TEXAS PATTERN JURY CHARGES

2012

- MALPRACTICE
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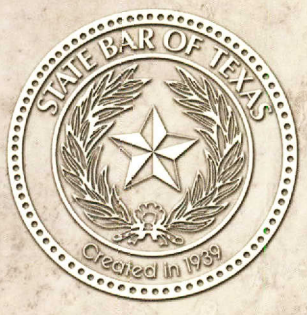

TEXAS
PATTERN JURY CHARGES

Malpractice • Premises • Products

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

Austin 2012

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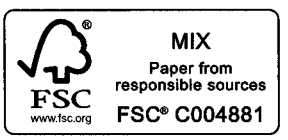
The use of the masculine gender throughout this publication is purely for literary convenience and should, of course, be understood to include the feminine gender as well.

International Standard Book Number: 978-1-892542-97-7

Printed in the United States of America

Texas Pattern Jury Charges—Malpractice, Premises & Products was formerly titled *Texas Pattern Jury Charges, Volume 3.*



To the memory of Gene Cavin,
director of the State Bar's continuing legal education and
professional development programs from 1963 to 1986,
who greatly encouraged and aided the work of the
Pattern Jury Charges from its inception.

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PREFACE

The Pattern Jury Charges (volume 3) Committee for this second edition has worked for over two years to revise this important volume in the State Bar of Texas's PJC series. A major objective has been to incorporate broad-form submissions wherever possible, with the aim of simplifying the charge for the jury as well as for the bench and bar.

The Committee wishes to express its gratitude to State Bar presidents Joe Nagy (1987–88), Jim Sales (1988–89), and Darrell Jordan (1989–90) for their support of its work. It also wishes to thank the staff of the Books and Systems Department of the State Bar, especially Sue Mills, director, and Vickie Tatum, project legal editor.

The Committee wishes also to thank Richard Griffith, a former member (1988–89), for his important service to the Committee.

J. Hadley Edgar, the chairman of the standing PJC Committee that oversees the publication of all PJC volumes, played an important role in supporting and advising the Committee in all phases of its work.

Russell H. McMains, the liaison from the standing PJC Committee, was a de facto member, attending the meetings and providing information, advice, and expertise that was invaluable.

Finally, the Committee thanks the first PJC 3 Committee (1981–82) for the dedication with which it labored to produce the original volume. Its members were—

Judge Peter S. Solito, chair
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—Peter S. Solito, *Chair*

PREFACE TO THE 2012 EDITION

The Committee for *Texas Pattern Jury Charges—Malpractice, Premises & Products* is pleased to submit this 2012 edition to the bench and bar of Texas. A notable change to this edition is the inclusion of a new chapter 72, which submits questions, instructions, and definitions relating to certain Texas Penal Code violations that may be used in establishing joint and several liability. The Committee has also made several significant revisions to the chapters on damages, including the addition of comments about the types of economic damages that may be recoverable in accounting malpractice cases, more precise definitions of the damages recoverable in negligent misrepresentation cases, and updated comments relating to medical care expenses. In addition, the definition of proximate cause has undergone a slight revision to eliminate potentially confusing references to "events." Finally, the admonitory chapter includes updated instructions to jurors, and the volume concludes with a new chapter 86 discussing the preservation of charge error.

The members of this Committee have given unselfishly of their time, displayed a continuing spirit of nonpartisanship, and provided practical solutions to often difficult problems. Our guiding principle is to "get it right." If we have fallen short of that goal in any way, we ask the bench and bar to let us know. The Committee takes these comments seriously; indeed, several revisions to this and previous editions were prompted by thoughtful questions or suggestions from practitioners and judges.

We thank Vickie Tatum, Lisa Chamberlain, and the staff of the TexasBarBooks Department of the State Bar of Texas for their invaluable guidance, tireless assistance, and unfailing good humor. Their steady hand kept us on task and on time. And we dedicate this volume to the founders and protectors of the American legal system, without whom we would not have juries to charge.

—Jeff Levinger, *Chair*

CHANGES IN THE 2012 EDITION

The 2012 edition of *Texas Pattern Jury Charges—Malpractice, Premises & Products* includes the following changes from the 2010 edition:

1. Admonitory instructions—
   a. Revised instructions to jury panel before voir dire examination and Comment (40.1)
   b. Revised instructions to jury after jury selection (40.2)
   c. Revised charge of the court and Comment (40.3)
   d. Revised additional instruction on bifurcated trial and Comment (40.4)
   e. Revised instructions to jury after verdict and Comment (40.5)
   f. Revised instructions to jury if permitted to separate and Comment (40.6)
   g. Revised instruction if jury disagrees about testimony (40.7)
   h. Revised instruction on privilege—no adverse inference (40.10)
   i. Deleted instruction on jurors' note-taking (previously 40.11; topic now covered in 40.2 and 40.3)
   j. Deleted instruction on jurors' use of electronic technology (40.13; topic now covered in 40.1–40.3)
   k. Renumbered PJC 40.12 to 40.11
2. Proximate cause—Replaced "event" with alternate language (50.1–50.4, 60.1, 60.2, 65.4, 65.5, 70.2, 71.7)
3. Hospital liability—Added new comments (50.2)
4. Sole proximate cause—Replaced "event" with alternate language (50.5, 60.3, 65.6)
5. Ostensible agency—Deleted caveat on corporate practice of medicine (52.4)
6. Nonmedical malpractice—Deleted comment on accountant's negligent misrepresentation to third party (60.1)
7. Substantial change in condition or subsequent alteration by affirmative conduct—Replaced "event" with alternate language (70.6)
8. Joint and several liability—Added new chapter on certain Penal Code violations as grounds for joint and several liability (ch. 72)

9. Medical care expenses—Deleted "incurred" in personal injury damages element and revised Comment (80.3, 80.5)

10. Economic damages for accounting malpractice—Added new PJC providing sample instructions (84.5)

11. Economic damages for negligent misrepresentation—Renumbered PJC 84.5 to 84.6

12. Gross negligence imputed to corporation—Revised Comment (85.2)

13. Preservation of charge error—Added new chapter (ch. 86)

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 professional malpractice, premises, and products cases. 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 professional malpractice, premises, or products 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 chapters 50 and 65 for such rebuttals as "new and independent cause" and "emergency" 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 names *Paul Payne* and *Mary Payne* have been used for plaintiffs, and *Don Davis* for the defendant. In wrongful death and survival cases, *Mary Payne* is also used for the decedent. *Dr. Davis*, *Don Donaldson*, *Donna Dunn*, *Darla Dean*, and *Dixon Hospital* have been used for medical malpractice defendants, and *Dora Dotson* and *Tom Taylor* for nonmedical professional defendants. *Connie Contributor* designates a contribution defendant (third-party defendant not sued by the plaintiff), *Responsible Ray* a responsible third party, and *Sam Settlor* a settling person. *ABC Company* is used for the seller of an alleged defective product, and *Panther Manufacturing Co.* for the manufacturer of an alleged noncrashworthy automobile. *Paul Payne, Jr.*, *Polly Payne*, and *Mary Minor* are minor plaintiffs, and *Fred Father* is a derivative claimant suing on behalf of an injured child. *Dixie Drugstore* and *Olivia Owner* are owners or occupiers of premises.

5. COMMENTS AND CITATIONS OF AUTHORITY

The comments to each PJC provide a ready reference to the law that serves as a foundation for the charge. The primary authority cited herein is Texas case law. In some instances, secondary authority—for example, *Restatement (Second) of Agency*—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. 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.

7. DOWNLOADING AND INSTALLING THE DIGITAL PRODUCT

The complimentary downloadable version of *Texas Pattern Jury Charges—Malpractice, Premises & Products* (2012 edition) contains the entire text of the printed book. To download the digital product—

1. go to **http://www.texasbarcle.com/pjc-malpractice-2012**,
2. log in to TexasBarCLE's Web site, and
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8. 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.

CHAPTER 40 ADMONITORY INSTRUCTIONS

PJC 40.1 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 40.2 may be included in the instruction.

PJC 40.2 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 40.3 Charge of the Court

PJC 40.3A 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 40.3B 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 40.4 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 40.4 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 40.3.

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 40.5 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 40.6 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 40.7 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 40.8 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 40.8 may be used when there is circumstantial evidence in the case. It would be placed in the charge of the court (PJC 40.3) 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 40.9 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 40.10 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 40.11 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.

[Chapters 41–49 are reserved for expansion.]

PJC 50.1 Physician's Degree of Care; Proximate Cause

"Negligence," when used with respect to the conduct of *Dr. Davis*, means failure to use ordinary care, that is, failing to do that which *a physician* of ordinary prudence would have done under the same or similar circumstances or doing that which *a physician* of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of *Dr. Davis*, means that degree of care that *a physician* of ordinary prudence would use under the same or similar circumstances.

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

COMMENT

When to use. These definitions should usually be included in the court's charge in a medical malpractice case involving one or more physicians. See, e.g., PJC 51.3. If the evidence raises "new and independent cause," the definitions in PJC 50.4 should be used in lieu of the definition of "proximate cause" above.

Source of definitions. The definitions include the standard and accepted elements of medical malpractice on the part of a physician. *See, e.g., Hood v. Phillips*, 554 S.W.2d 160, 164–66 (Tex. 1977); *Webb v. Jorns*, 488 S.W.2d 407, 411 (Tex. 1972); *Snow v. Bond*, 438 S.W.2d 549, 550–51 (Tex. 1969). The 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, 222–23 (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," when used with respect to the conduct of *Dr. Davis*, 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 *physician* 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 50.1. 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.

Lost chance of survival. An instruction for lost chance of survival should be submitted only if the plaintiff suffers from a particular medical condition, such as cancer, that places the proximate cause of the plaintiff's death or impending death into question. If evidence demonstrates that such a medical condition preexists the alleged negligence of the defendant, and, at the time of the alleged negligence, the medical condition resulted in the plaintiff's having a 50 percent or less chance of survival, the following additional instruction is proper:

> You are instructed that *Paul Payne* must have had a greater than fifty percent (50%) chance of survival if reasonable medical care had been provided on or around [*the time of the alleged negligence*] for the negligence of *Dr. Davis* to be a proximate cause of the [*injury to*] *Paul Payne*.

Columbia Rio Grande Healthcare v. Hawley, 284 S.W.3d 851, 860–61 (Tex. 2009). In an appropriate case, the words *death of* may be substituted for *injury to*.

Evidence of bad result. For earlier cases it may be appropriate, and for all actions filed on or after September 1, 2003, it will be necessary, to add an instruction about evidence of a bad result to the definition of "negligence." See PJC 50.7.

Substitute appropriate term for specialist. The term designating the particular medical specialist involved (e.g., *an orthopedic surgeon*) should be substituted for the words *a physician*.

Limit definition to areas in issue. The negligence of the physician should be limited to those areas of practice placed in issue by the pleadings and evidence. For example, if the physician's conduct during surgery is in issue, the definition of negligence should focus on that conduct.

Modify definition of "ordinary care." Because multiple specialists perform surgery or treat the same area of the body (e.g., a neurosurgeon and an orthopedic surgeon both perform lumbar laminectomies), it may be appropriate to use the following definition of "ordinary care":

> When used with respect to the conduct of *Dr. Davis*, "ordinary care" means that degree of care that a physician of ordinary prudence, possessing and exercising a reasonable degree of skill and learning in *back surgery*, would use under the same or similar circumstances.

For a general surgeon and a plastic surgeon who both perform breast surgery, the standard should be that of a breast surgeon. Similarly, for an orthopedic surgeon and a podiatrist who both perform foot surgery, the standard should be that of a foot surgeon. *See King v. Flamm*, 442 S.W.2d 679, 681 (Tex. 1969).

Evidence of customary practice and standard of care. In *Hood*, 554 S.W.2d 160, the supreme court rejected standards of care that would in any way embody the concept that negligence should be determined by what a given number of physicians do. Hence, the standards of "reasonable surgeons would disagree," "respectable minority," "considerable number," "any variance," and "consensus" were expressly rejected as legal standards for the medical profession. *Hood*, 554 S.W.2d at 165. An instruction or definition to the jury on any of these rejected standards would be improper. *Henderson v. Heyer-Schulte Corp.*, 600 S.W.2d 844 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.).

A proper analysis of the ultimate issue of the standard of care may involve a consideration of the role of custom. In typical negligence cases, custom is some evidence of the standard of care; however, it is never conclusive. *Leadon v. Kimbrough Bros. Lumber Co.*, 484 S.W.2d 567, 569 (Tex. 1972); *Gulf, Colorado & Santa Fe Railway v. Evansich*, 61 Tex. 3, 6 (1884). The ultimate inquiry for the jury is whether the defendant failed to act as a reasonably prudent person would have acted. The parties are not entitled to jury questions inquiring whether a defendant has complied with custom. *Brown v. Lundell*, 344 S.W.2d 863, 867 (Tex. 1961). Texas courts have held that medical custom or usual or routine practice is admissible as some evidence of the medical standard of care in a given case. *Kissinger v. Turner*, 727 S.W.2d 750, 755 (Tex. App.—Fort Worth 1987, writ ref'd n.r.e.); *Golden Villa Nursing Home v. Smith*, 674 S.W.2d 343, 348 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.); *see also* Tex. R. Evid. 406 (habit; routine practice).

Locality rule. The supreme court has held that the purpose of the locality rule is served if the definitions of "negligence" and "ordinary care" refer to conduct "under the same or similar circumstances." Thus, it is not necessary to include language such as "this or similar communities" in the charge to the jury. *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 366 (Tex. 1987); *Peterson v. Shields*, 652 S.W.2d 929 (Tex. 1983); *see also Hickson v. Martinez*, 707 S.W.2d 919, 925 (Tex. App.—Dallas 1985), *writ ref'd n.r.e. per curiam*, 716 S.W.2d 499 (Tex. 1986) (locality rule is predicate to admit expert testimony and is therefore question of law, not fact, and need not be submitted in charge). There are certain minimum standards universally regarded as ordinary medical standards. *See Webb*, 488 S.W.2d at 411.

Using "reasonable care" instead of "ordinary care." In *Hiroms v. Scheffey*, 76 S.W.3d 486, 488–89 (Tex. App.—Houston [14th Dist.] 2002, no pet.), the court noted that there was merit to the appellant's contention that the standard of care in medical malpractice cases should turn on whether the defendant exercised reasonable care rather than ordinary care. But the court ultimately did not resolve the issue because the appellant had failed to preserve error. The Committee raises the issue, however, because in some cases "reasonable" may be substituted for "ordinary," depending on the facts and circumstances. *See, e.g., Dennis v. Allison*, 698 S.W.2d 94, 95 (Tex. 1985) (describing actionable negligence as breach of duty of reasonable care); *Helms v. Day*, 215 S.W.2d 356, 358 (Tex. Civ. App.—Fort Worth 1948, writ dism'd) (absent special contract to either cure or not charge for services, a physician warrants only that he "possesses a reasonable degree of skill, such as ordinarily possessed by a profession generally, and to exercise that skill with reasonable care and diligence") (citing *Graham v. Gautier*, 21 Tex. 111 (1858)); *Magnolia Paper Co. v. Duffy*, 176 S.W. 89, 92 (Tex. Civ. App.—San Antonio 1915, no writ) ("The final test of negligence is not usage or custom, but the inflexible rule which fixes reasonable care as the standard by which the conduct of the master to the servant is measured.").

PJC 50.2 Hospital's Degree of Care; Proximate Cause

"Negligence," when used with respect to the conduct of *Dixon Hospital*, means failure to use ordinary care, that is, failing to do that which a *hospital* of ordinary prudence would have done under the same or similar circumstances or doing that which a *hospital* of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of *Dixon Hospital*, means that degree of care that a *hospital* of ordinary prudence would use under the same or similar circumstances.

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

COMMENT

Source of definitions. These definitions reflect the standards imposed on a hospital. *See Harris v. Harris County Hospital District*, 557 S.W.2d 353 (Tex. Civ. App.—Houston [1st Dist.] 1977, no writ). The 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, 222–23 (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," when used with respect to the conduct of *Dixon Hospital*, 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 *hospital* 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 50.2. 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. These definitions should usually be included in the court's charge in a negligence case involving a hospital. See, e.g., PJC 51.3. If the evidence raises "new and independent cause," the definitions in PJC 50.4 should be used in lieu of the definition of "proximate cause" above.

Hospital liability for conduct of agents and employees. An instruction defining how a hospital acts can be used when the claim is for the hospital's vicarious liability based on conduct of a hospital's agents or employees. In those circumstances, the following instruction is proper:

> A hospital acts through its agents, employees, officers, and representatives, and those acts are the acts of the hospital.

However, when this instruction is used and there is no claim that the hospital is liable for the acts of the independent contractor physician, *Columbia Rio Grande Healthcare v. Hawley*, 284 S.W.3d 851 (Tex. 2009), indicates that the following instruction also should be given, substituting the name of the independent contractor physician:

> In considering the negligence of *Dixon Hospital*, do not consider the acts or omissions of *the independent contractor physician*.

In addition, if the claim against the hospital is for vicarious liability based on the conduct of a hospital employee, such as a nurse, the definitions may be modified to substitute the particular employee in lieu of the hospital:

> "Negligence," when used with respect to the conduct of *Dixon Hospital*, means failure to use ordinary care, that is, failing to do that which a *nurse* of ordinary prudence would have done under the same

or similar circumstances or doing that which a *nurse* of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of *Dixon Hospital*, means that degree of care that a *nurse* of ordinary prudence would use under the same or similar circumstances.

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

Hospital liability relating to policies and procedures. An instruction defining how a hospital acts also can be used when a hospital's policies or procedures are called into question or when "business as usual" at a hospital is conducted outside of its written policies and procedures. Hospitals have a duty to use reasonable care in formulating the policies and procedures that govern their medical staff and nonphysician personnel and have a duty to ensure the medical staff and nonphysician personnel follow hospital policies and procedures when those policies and procedures reflect the standard of care to be provided to patients. *See, e.g., Denton Regional Medical Center v. LaCroix*, 947 S.W.2d 941, 950 (Tex. App.—Fort Worth 1997, writ dism'd by agr.) (citing *Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 576–81 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.)). In appropriate circumstances, the court may consider submitting the following instruction:

A hospital acts in the manner in which it [*formulates*] [*follows*] [*formulates and follows*] its policies, procedures, rules, bylaws, and other governing protocols, whether express or implied.

Lost chance of survival. An instruction for lost chance of survival should be submitted only if the plaintiff suffers from a particular medical condition, such as cancer, that places the proximate cause of the plaintiff's death or impending death into question. If evidence demonstrates that such a medical condition preexists the alleged negligence of the defendant, and, at the time of the alleged negligence, the medical condition resulted in the plaintiff's having a 50 percent or less chance of survival, the following additional instruction is proper:

> You are instructed that *Paul Payne* must have had a greater than fifty percent (50%) chance of survival if reasonable medical care had been provided on or around [*the time of the alleged negligence*] for the negligence of *Dixon Hospital* to be a proximate cause of the [*injury to*] *Paul Payne.*

Columbia Rio Grande Healthcare, 284 S.W.3d at 860–61. In an appropriate case, the words *death of* may be substituted for *injury to.*

Evidence of bad result. For earlier cases it may be appropriate, and for all actions filed on or after September 1, 2003, it will be necessary, to add an instruction about evidence of a bad result to the definition of "negligence." See PJC 50.7.

Limit definition to areas in issue. The negligence of the hospital should be limited to those areas of practice placed in issue by the pleadings and evidence. For example, if only the adequacy of the hospital's equipment is in issue, the definition of negligence should focus on the conduct of the hospital with regard to the equipment. *Medical & Surgical Memorial Hospital v. Cauthorn*, 229 S.W.2d 932 (Tex. Civ. App.—El Paso 1949, writ ref'd n.r.e.).

Substitute particular health care provider. The appropriate term to describe the particular health care facility should be substituted for the word *hospital.*

Locality rule. The supreme court has held that the purpose of the locality rule is served if the definitions of "negligence" and "ordinary care" refer to conduct "under the same or similar circumstances." Thus, it is not necessary to include language such as "this or similar communities" in the charge to the jury. *Birchfield v. Texarkana Memorial Hospital*, 747 S.W.2d 361, 366 (Tex. 1987); *Peterson v. Shields*, 652 S.W.2d 929 (Tex. 1983); *see also Hickson v. Martinez*, 707 S.W.2d 919, 925 (Tex. App.—Dallas 1985), *writ ref'd n.r.e. per curiam*, 716 S.W.2d 499 (Tex. 1986) (locality rule is predicate to admit expert testimony and is therefore question of law, not fact, and need not be submitted in charge). There are certain minimum standards universally regarded as ordinary medical standards. *See Webb v. Jorns*, 488 S.W.2d 407, 411 (Tex. 1972).

Caveat. If the evidence shows that the patient's known condition creates a known or possible danger to the patient, by the patient's own conduct, arising from a physical or mental incapacity, the following definition of "ordinary care" may be substituted for that above:

> "Ordinary care," with respect to the conduct of *Dixon Hospital*, means that degree of care that a *hospital* of ordinary prudence would use under the same or similar circumstances, as the patient's condition, as it is known to be, may require, including safeguarding and protecting the patient from any known or reasonably apparent danger

from himself that may arise from his known mental or physical incapacity.

See Harris, 557 S.W.2d 353; *Harris Hospital v. Pope*, 520 S.W.2d 813 (Tex. Civ. App.—Fort Worth 1975, writ ref'd n.r.e.).

Evidence of customary practice and standard of care. The standard of care as applied to a hospital should not be determined by resort to customary, usual, or ordinary practices. See PJC 50.1 comment, "Evidence of customary practice and standard of care." The role of custom in negligence cases has been stated to be merely "evidence to be considered along with other circumstances in determining what the ordinary reasonable man would do under the circumstances." *Stanley v. Southern Pacific Co.*, 466 S.W.2d 548, 551 (Tex. 1971). Thus, the ultimate inquiry for the jury is whether the hospital failed to act as a reasonably prudent hospital would have acted. The parties are not entitled to jury questions inquiring whether a hospital has complied with custom. *See Golden Villa Nursing Home v. Smith*, 674 S.W.2d 343, 348 (Tex. App.—Houston [14th Dist.] 1984, writ ref'd n.r.e.).

Malicious credentialing claim against a hospital. See PJC 51.19.

Using "reasonable care" instead of "ordinary care." In *Hiroms v. Scheffey*, 76 S.W.3d 486, 488–89 (Tex. App.—Houston [14th Dist.] 2002, no pet.), the court noted that there was merit to the appellant's contention that the standard of care in medical malpractice cases should turn on whether the defendant exercised reasonable care rather than ordinary care. But the court ultimately did not resolve the issue because the appellant had failed to preserve error. The Committee raises the issue, however, because in some cases "reasonable" may be substituted for "ordinary," depending on the facts and circumstances. *See, e.g., Dennis v. Allison*, 698 S.W.2d 94, 95 (Tex. 1985) (describing actionable negligence as breach of duty of reasonable care); *Helms v. Day*, 215 S.W.2d 356, 358 (Tex. Civ. App.—Fort Worth 1948, writ dism'd) (absent special contract to either cure or not charge for services, a physician warrants only that he "possesses a reasonable degree of skill, such as ordinarily possessed by a profession generally, and to exercise that skill with reasonable care and diligence") (citing *Graham v. Gautier*, 21 Tex. 111 (1858)); *Magnolia Paper Co. v. Duffy*, 176 S.W. 89, 92 (Tex. Civ. App.—San Antonio 1915, no writ) ("The final test of negligence is not usage or custom, but the inflexible rule which fixes reasonable care as the standard by which the conduct of the master to the servant is measured.").

PJC 50.3 Health Care Personnel's Degree of Care; Proximate Cause

"Negligence," when used with respect to the conduct of *Don Donaldson*, 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," when used with respect to the conduct of *Don Donaldson*, means that degree of care that *a person* of ordinary prudence would use under the same or similar circumstances.

"Proximate cause," when used with respect to the conduct of *Don Donaldson*, means a cause that was a substantial factor in bringing about an [*occurrence*] [*injury*] [*occurrence or injury*], and without which cause such [*occurrence*] [*injury*] [*occurrence or injury*] 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 [*occurrence*] [*injury*] [*occurrence or injury*], or some similar [*occurrence*] [*injury*] [*occurrence or injury*], might reasonably result therefrom. There may be more than one proximate cause of an [*occurrence*] [*injury*] [*occurrence or injury*].

COMMENT

Source of definition. 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, 222–23 (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," when used with respect to the conduct of *Don Donaldson*, 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 50.3. 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. These definitions should usually be included in the court's charge in a medical malpractice case involving health care personnel. See, e.g., PJC 51.3. If the evidence raises "new and independent cause," the definitions in PJC 50.4 should be used in lieu of the definition of "proximate cause" above.

Lost chance of survival. An instruction for lost chance of survival should be submitted only if the plaintiff suffers from a particular medical condition, such as cancer, that places the proximate cause of the plaintiff's death or impending death into question. If evidence demonstrates that such a medical condition preexists the alleged negligence of the defendant, and, at the time of the alleged negligence, the medical condition resulted in the plaintiff's having a 50 percent or less chance of survival, the following additional instruction is proper:

> You are instructed that *Paul Payne* must have had a greater than fifty percent (50%) chance of survival if reasonable medical care had been provided on or around [*the time of the alleged negligence*] for the negligence of *Don Donaldson* to be a proximate cause of the [*injury to*] *Paul Payne*.

Columbia Rio Grande Healthcare v. Hawley, 284 S.W.3d 851, 860–61 (Tex. 2009). In an appropriate case, the words *death of* may be substituted for *injury to*.

Evidence of bad result. For earlier cases it may be appropriate, and for all actions filed on or after September 1, 2003, it will be necessary, to add an instruction about evidence of a bad result to the definition of "negligence." See PJC 50.7.

Limit definition to areas in issue. The negligence of the health care personnel should be limited to those areas of practice placed in issue by the pleadings and evidence. For example, if the defendant's conduct during surgery is in issue, the definition of negligence should focus on that conduct.

Substitute appropriate term for particular personnel—actions filed before September 1, 2003. The appropriate term for the particular health care personnel should be substituted for the words *a person*. *See Forney v. Memorial Hospital*, 543 S.W.2d 705 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); *Mobil Pipe Line Co. v. Goodwin*, 492 S.W.2d 608, 613 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.). For a definition of "health care provider," see former Tex. Rev. Civ. Stat. art. 4590i, § 1.03(a)(3) (Acts 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(3) (H.B. 1048), eff. Aug. 29, 1977). *See, e.g., Finley v. Steenkamp*, 19 S.W.3d 533, 541–42 (Tex. App.—Fort Worth 2000, no pet.) (dialysis center not "health care provider"); *Terry v. Barrinuevo*, 961 S.W.2d 528, 530–31 (Tex. App.—Houston [1st Dist.] 1997, no pet.) (physical therapist not "health care provider"); *Townsend v. Catalina Ambulance Co.*, 857 S.W.2d 791, 796 (Tex. App.—Corpus Christi 1993, no writ) (emergency ambulance service not "health care provider"); *Lenhard v. Butler*, 745 S.W.2d 101, 106 (Tex. App.—Fort Worth 1988, writ denied) (psychologist not "health care provider"). *But see Ponce v. El Paso Healthcare System*, 55 S.W.3d 34, 37 (Tex. App.—El Paso 2001, pet. denied) (occupational therapist employed by health care provider is within ambit of article 4590i).

Substitute appropriate term for particular personnel—actions filed on or after September 1, 2003. See the definition of "health care provider" in Tex. Civ. Prac. & Rem. Code § 74.001(a)(12).

Using "reasonable care" instead of "ordinary care." In *Hiroms v. Scheffey*, 76 S.W.3d 486, 488–89 (Tex. App.—Houston [14th Dist.] 2002, no pet.), the court noted that there was merit to the appellant's contention that the standard of care in medical malpractice cases should turn on whether the defendant exercised reasonable care rather than ordinary care. But the court ultimately did not resolve the issue because the appellant had failed to preserve error. The Committee raises the issue, however, because in some cases "reasonable" may be substituted for "ordinary," depending on the facts and circumstances. *See, e.g., Dennis v. Allison*, 698 S.W.2d 94, 95 (Tex. 1985) (describing actionable negligence as breach of duty of reasonable care); *Helms v. Day*, 215 S.W.2d 356, 358 (Tex. Civ. App.—Fort Worth 1948, writ dism'd) (absent special contract to either cure or not charge for services, a physician warrants only that he "possesses a reasonable degree of skill, such as ordinarily possessed by a profession generally, and to exercise that skill with reasonable care and diligence") (citing *Graham v. Gautier*, 21 Tex. 111 (1858)); *Magnolia Paper Co. v. Duffy*, 176 S.W. 89, 92 (Tex. Civ. App.—San Antonio 1915, no writ) ("The final test of negligence is not usage or custom, but the inflexible rule which fixes reasonable care as the standard by which the conduct of the master to the servant is measured.").

PJC 50.4 New and Independent Cause—Medical

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

"New and independent cause" means the act or omission of a separate and independent agency, not reasonably foreseeable by *a physician* exercising ordinary care, 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 50.1–50.3. PJC 50.4 should be used in lieu of the usual definitions of "proximate cause" (see PJC 50.1–50.3) if there is evidence of 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).

Substitute *a person* or appropriate term for specialist. The term *a person* or an appropriate term describing the specialist or health care provider involved should be substituted for the words *a physician.*

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

PJC 50.5 Sole Proximate Cause—Medical

There may be more than one proximate cause of an [*occurrence*] [*injury*] [*occurrence or injury*], but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an [*occurrence*] [*injury*] [*occurrence or injury*], 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 proximate cause definition. PJC 50.5 should be used in lieu of the last sentence of the definition of "proximate cause" (see PJC 50.1–50.3) 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, 432 (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 50.6 Physician-Patient Relationship

QUESTION _____

At the time in question, was *Paul Payne* the patient of *Dr. Davis* with respect to *Paul Payne's stomach ulcer*?

A physician-patient relationship exists only if the physician has agreed, expressly or impliedly, to render medical services of a specified or general nature to the person claiming such relationship.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 50.6 may be given if the existence of a physician-patient relationship between the defendant-physician and the plaintiff is in dispute.

Relationship arises out of contract. Except for cases arising under the "Good Samaritan" law (see PJC 51.18), a physician is liable only if there is a physician-patient relationship arising out of a contract, express or implied, that the physician will treat the patient with proper professional skill and there is a negligent breach of that duty proximately causing damages. *St. John v. Pope*, 901 S.W.2d 420 (Tex. 1995); *see also Lection v. Dyll*, 65 S.W.3d 696 (Tex. App.—Dallas 2001, pet. denied).

Particular medical condition. The appropriate term for the plaintiff's particular medical condition should be substituted for the words *stomach ulcer*.

Caveat. There are certain circumstances under which the existence of a physician-patient relationship is not required to impose the duty of ordinary care on a physician. *See Gooden v. Tips*, 651 S.W.2d 364 (Tex. App.—Tyler 1983, no writ) (physician can owe duty to use reasonable care to protect public when physician's negligence in diagnosis or treatment of patient contributes to plaintiff's injuries); *Lunsford v. Board of Nurse Examiners*, 648 S.W.2d 391, 394–95 (Tex. App.—Austin 1983, no writ) (nurse had legal duty to care for patient). *But see Bird v. W.C.W.*, 868 S.W.2d 767, 768 (Tex. 1994) (limiting *Gooden* and holding that as a matter of law no professional duty runs from psychologist to third party to not negligently misdiagnose condition of patient).

Physician employed by third party to examine another. A physician who is employed by a third party to make a physical examination of another person (e.g., an employee or an applicant) and to report the results to the third party cannot be held liable for failure to diagnose an existing condition but may be held liable under certain

circumstances. *Wilson v. Winsett*, 828 S.W.2d 231, 233 (Tex. App.—Amarillo 1992, writ denied); *Johnston v. Sibley*, 558 S.W.2d 135, 137–38 (Tex. Civ. App.—Tyler 1977, writ ref'd n.r.e.); *Lotspeich v. Chance Vought Aircraft*, 369 S.W.2d 705, 710 (Tex. Civ. App.—Dallas 1963, writ ref'd n.r.e.).

Consultants retained by attending physician. The third-party employment situation should be distinguished from the retention of the defendant-physician by the patient's attending physician. The attending physician may be empowered by the patient to act as his agent in the formation of the physician-patient relationship. *See Weiser v. Hampton*, 445 S.W.2d 224, 230–31 (Tex. Civ. App.—Houston [1st Dist.] 1969, writ ref'd n.r.e.).

Termination. If there is evidence of termination of a physician-patient relationship, the following instruction may be added to PJC 50.6:

> A physician-patient relationship does not exist when either the physician or the patient has terminated the relationship. A patient may terminate the relationship at any time. The physician may terminate the relationship at any time if reasonable provision for adequate medical care is made or if the patient is not in need of continuing medical care.

If the need for continuing medical care is an issue in the case and a claim of abandonment is made, see PJC 51.7.

PJC 50.7 Evidence of Bad Result

A finding of negligence may not be based solely on evidence of a bad result to the claimant in question, but a bad result may be considered by you, along with other evidence, in determining the issue of negligence. You are the sole judges of the weight, if any, to be given to this kind of evidence.

COMMENT

When to use.

Actions filed on or after September 1, 2003. The above instruction should be added to the definition of "negligence" for any action on a health care liability claim filed on or after September 1, 2003. Tex. Civ. Prac. & Rem. Code § 74.303(e)(2).

Actions filed before September 1, 2003. For causes of action accruing on or after September 1, 1989, and filed before September 1, 2003, it may be appropriate to add the following instruction to the definition of "negligence":

> A finding of negligence may not be based solely on evidence of a bad result to the patient in question, but such a bad result may be considered by you, along with other evidence, in determining the issue of negligence; you shall be the sole judges of the weight, if any, to be given to any such evidence.

Former Tex. Rev. Civ. Stat. art. 4590i, § 7.02(a) (Acts 1989, 71st Leg., R.S., ch. 1027, § 28 (H.B. 18), eff. Sept. 1, 1989).

PJC 51.1 Use of "Occurrence," "Injury," or "Occurrence or Injury" (Comment)

Pleadings and proof determine choice. The pleadings and proof in each case will determine the choice of the terms "occurrence," "injury," or "occurrence or injury" in the questions in this chapter. The choice 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 the liability and proportionate responsibility questions if "occurrence" is used, while it should consider the negligence if "injury" is used. Also, in an appropriate case, the word "death" may replace "injury."

Proportionate responsibility statute. The passage of the comparative (now named "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. Tex. Civ. Prac. & Rem. Code § 33.003. "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.

Distinctions affect how to submit conduct. 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 proportionate responsibility 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.

Interplay between use of "occurrence" or "injury" and use of exclusionary instruction in submitting damages questions. Submitting "occurrence" in conjunction with the appropriate exclusionary instruction in PJC 80.7 or 80.9 may resolve

any uncertainty about using "injury" or "occurrence" in a given case. But note that if the liability question is submitted with the term "injury," an exclusionary instruction should not be submitted.

PJC 51.2 Submission of Settling Persons, Contribution Defendants, and Responsible Third Parties (Comment)

Settling persons. The proportionate responsibility statute requires the responsibility of a settling person (*Sam Settlor*) to be determined by the trier of fact. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. Thus, if the case includes a settling person, that person's name must be included in the basic liability question as well as in the proportionate responsibility question.

Contribution defendants. 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 contribution defendant should *not* be included in the question comparing the responsibility of the plaintiff with that of the other defendants. A separate comparative question is necessary. See PJC 51.5.

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 51.4.

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).

PJC 51.3 Negligence of Physician, Hospital, or Other Health Care Provider

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. *Dr. Davis* _____
2. *Dixon Hospital* _____
3. *Paul Payne* _____
4. *Sam Settlor* _____
5. *Responsible Ray* _____
6. *Connie Contributor* _____

COMMENT

When to use. PJC 51.3 is a broad-form question that should be appropriate in most medical malpractice 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 respon-

sibility, 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.

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." Tex. R. Civ. P. 277. 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. PJC 51.3 is designed to be accompanied by the appropriate definitions of "negligence," "ordinary care," and "proximate cause" in PJC 50.1–50.3. If the evidence raises "new and independent cause," the definitions in PJC 50.4 should be used in lieu of the definition of "proximate cause" in PJC 50.1–50.3.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

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 51.3. Tex. Civ. Prac. & Rem. Code §§ 33.001–.017. See PJC 51.4 and 51.6.

Professional associations. In most cases, the jury should be asked only whether a physician or health care provider was negligent, and the consequences to the professional association follow as a matter of law. For a discussion of when it might be appropriate to submit the negligence of both a physician and a physician's professional association, see *Battaglia v. Alexander*, 177 S.W.3d 893 (Tex. 2005).

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 this volume.

Settling person, contribution defendant, or responsible third party. See PJC 51.2.

PJC 51.4 Proportionate Responsibility—Medical

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 of those named below that you found caused or contributed to cause the [*occurrence*] [*injury*] [*occurrence or injury*], find the percentage of responsibility attributable to each:

1.	*Dr. Davis*	_____%
2.	*Dixon Hospital*	_____%
3.	*Paul Payne*	_____%
4.	*Sam Settlor*	_____%
5.	*Responsible Ray*	_____%
Total		100 %

COMMENT

When to use. Rule 277 requires a percentage question "[i]n any cause in which the jury is required to apportion the loss among the parties." Tex. R. Civ. P. 277. Thus, PJC 51.4 should be given if the issue of the responsibility of more than one party is submitted to the jury under Tex. Civ. Prac. & Rem. Code ch. 33. For cases in which there is a derivative claimant, see PJC 51.6.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1. The term used in PJC 51.4 should match that used in PJC 51.3.

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.

Compare claimants separately. A separate comparative question should be submitted for each claimant. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011(1); *see also Haney Electric Co. v. Hurst*, 624 S.W.2d 602 (Tex. Civ. App.—Dallas 1981, writ dism'd by agr.). For claimants seeking derivative damages, see PJC 51.6.

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 of those named below that you found caused or contributed to cause the [*occurrence*] [*injury*] [*occurrence or injury*], find the percentage of negligence attributable to each.

Settling person, contribution defendant, or responsible third party. See PJC 51.2.

PJC 51.5 Proportionate Responsibility If Contribution Defendant Is Joined—Medical

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.	*Dr. Davis*	_____%
2.	*Connie Contributor*	_____%
Total		100 %

COMMENT

When to use. PJC 51.5 is an additional comparative question designed to follow the comparative question in PJC 51.4 or 51.6. 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 responsibility of more than one defendant is submitted, separate percentage answers should not be sought for each defendant in PJC 51.5; 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 51.4 or 51.6, in which a separate answer is obtained for each defendant; seeking a second set of separate answers in PJC 51.5 might result in jury confusion or conflicting answers. The contribution responsibility of each defendant is determined by allo-

cating the percentage attributed to all defendants in answer to PJC 51.5 in proportion to the relative percentages found for each defendant in answer to PJC 51.4 or 51.6.

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

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1. The term used in PJC 51.5 should match that used in PJC 51.3.

PJC 51.6 Proportionate Responsibility—Medical—Derivative Claimant

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.	*Mary Minor*	_____%
3.	*Fred Father*	_____%
4.	*Sam Settlor*	_____%
5.	*Responsible Ray*	_____%
Total		100 %

COMMENT

When to use. Rule 277 requires a percentage question "[i]n any cause in which the jury is required to apportion the loss among the parties." Tex. R. Civ. P. 277. PJC 51.6 is designed to apportion loss in cases in which there is a derivative claimant—that is, a claimant suing for damages caused by injuries to another. In the example above, *Fred Father* is the derivative claimant and *Mary Minor* is the injured child. For PJC 51.6 to apply, the child must *not* be suing the parent. A separate comparative submission is required for the derivative claim. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011(1); *see also Haney Electric Co. v. Hurst*, 624 S.W.2d 602, 611 (Tex. Civ. App.—Dallas 1981, writ dism'd by agr.) (holding that "each plaintiff's claim must be

considered as if it were a separate suit"). PJC 51.6 applies to the derivative claim. For submission of the underlying claim against the defendant, see PJC 51.4.

Separate questions (such as PJC 51.6 and 51.4) are submitted because the responsibility of a derivative claimant (*Fred Father*) will not bar or diminish the recovery of the primary claimant (*Mary Minor*). On the other hand, the responsibility of *Mary Minor* will bar or diminish the recovery of both *Mary Minor* and *Fred Father*. For this reason, the percentage of responsibility of both *Mary Minor* and *Fred Father* must be considered in determining whether the recovery of *Fred Father* is barred or diminished.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1. The term used in PJC 51.6 should match that used in PJC 51.3.

Liability question must also include name of derivative claimant. In cases involving a derivative claimant, the basic liability question must also include the name of the derivative claimant along with that of the primary claimant.

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.

Settling person, contribution defendant, or responsible third party. See PJC 51.2.

PJC 51.7 Abandonment of Patient by Physician

QUESTION _____

Was the abandonment, if any, by *Dr. Davis* of *Paul Payne* a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*]?

"Abandonment" means the termination of the physician-patient relationship without reasonable notice of the physician's intent to sever such relationship at a time when there is a necessity for continuing medical care. "Reasonable notice" means such notice as would normally give the patient reasonable time to secure other medical attention if desired. There can be no abandonment of a patient by a physician if the patient has voluntarily chosen not to return to the physician or has discharged or dismissed the physician.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.7 may be used if there is evidence that the plaintiff was abandoned by the defendant-physician. A physician has a duty not to abandon a patient. *See Williams v. Bennett*, 582 S.W.2d 577, 579 (Tex. Civ. App.—Beaumont 1979), *rev'd on other grounds*, 610 S.W.2d 144 (Tex. 1980); *Lee v. Dewbre*, 362 S.W.2d 900, 902–03 (Tex. Civ. App.—Amarillo 1962, no writ); *Urrutia v. Patino*, 297 S.W. 512, 516 (Tex. Civ. App.—San Antonio 1927, no writ); Jim M. Perdue, *The Law of Texas Medical Malpractice*, 22 Hous. L. Rev. 1, 17 (2d ed. 1985).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Modify for justified abandonment. If a legal justification for the abandonment is raised (*see Urrutia*, 297 S.W. at 516), PJC 51.7 should be modified accordingly.

Caveat. The Committee has omitted from the definition of abandonment the language "or the failure to make reasonable provision for adequate medical attention in the event of the physician's absence at a time when there is a necessity for continuing medical care." The Committee believes that the failure to make adequate provision for

care in the physician's absence is a negligence theory embodied in the broad-form submission at PJC 51.3.

PJC 51.8 Res Ipsa Loquitur—Medical (Comment)

Res ipsa loquitur under Medical Liability Act.

Actions filed before September 1, 2003. The Medical Liability and Insurance Improvement Act provides as follows: "The common-law doctrine of res ipsa loquitur shall only apply to health care liability claims against health care providers or physicians in those cases to which it has been applied by the appellate courts of this state as of the effective date of this subchapter." Former Tex. Rev. Civ. Stat. art. 4590i, § 7.01 (Acts 1977, 65th Leg., R.S., ch. 817, § 7.01 (H.B. 1048), eff. Aug. 29, 1977). As noted in *Haddock v. Arnspiger*, 793 S.W.2d 948 (Tex. 1990), "[A]ppellate courts before August 29, 1977 overwhelmingly recognized that *res ipsa loquitur* was inapplicable in medical malpractice cases subject to certain exceptions." *Haddock*, 793 S.W.2d at 951.

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.201, which restates the above article 4590i application.

Exceptions to general inapplicability. "[A]n exception is recognized when the nature of the alleged malpractice and injuries are plainly within the common knowledge of laymen, requiring no expert testimony. Examples of this exception include negligence in the use of mechanical instruments, operating on the wrong portion of the body, or leaving surgical instruments or sponges within the body." *Haddock*, 793 S.W.2d at 951.

Expert testimony may not establish predicate. In *Haddock* the plaintiff sought to establish by expert testimony that an injury involving a mechanical instrument could not have occurred without negligence. The court held that this predicate of res ipsa loquitur could not be established by expert testimony and that, in the case of mechanical instruments, the doctrine may not be applied when the use of the instrument is not a matter within the common knowledge of laymen. *Haddock*, 793 S.W.2d at 954.

Rule of evidence only—negligence and proximate cause still required. "*Res ipsa loquitur* is simply a rule of evidence by which negligence may be inferred by the jury; it is not a separate cause of action from negligence." *Haddock*, 793 S.W.2d at 950. Although medical testimony of negligence is not required when the doctrine is properly invoked, negligence and proximate cause still must be proved. For example, in *Martin v. Petta*, 694 S.W.2d 233, 240 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.), the trial court was held not to have erred in rendering summary judgment for the physician, because the evidence was uncontroverted that he exercised no control over the instrumentality alleged to have caused the injury.

Sample instruction. For cases in which the doctrine is held to apply, the following instruction is suggested as a model:

In answering this question, you may infer negligence by a party but are not compelled to do so if you find that (1) the character of the occurrence is such that it would ordinarily not happen in the absence of negligence and (2) the instrumentality causing the occurrence was under the management and control of the party at the time that the negligence, if any, probably occurred.

See Haddock, 793 S.W.2d at 954.

PJC 51.9 Informed Consent (Common Law)

QUESTION _____

Did *Darla Dean* fail to obtain informed consent from *Paul Payne* for *treatment by physical therapy*?

"Informed consent" means consent given by a patient to whom such risks incident to *treatment by physical therapy* have been disclosed as would be disclosed to the patient by a physician of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

If those risks had been so disclosed, would a person of ordinary prudence have refused such treatment under the same or similar circumstances?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Paul Payne* injured by the occurrence of the risk or hazard of which *he* was not informed?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.9 submits the doctrine of informed consent under the common law. It should be used only in cases in which the provider of medical-related ser-

vices does not fall within the definition of "health care provider" in the Medical Liability Act.

Actions filed before September 1, 2003. *See* former Tex. Rev. Civ. Stat. art. 4590i (Acts 1977, 65th Leg., R.S., ch. 817 (H.B. 1048), eff. Aug. 29, 1977).

Actions filed on or after September 1, 2003. *See* Tex. Civ. Prac. & Rem. Code § 74.001(a)(12).

For a discussion of "health care provider," see PJC 50.3.

Caveat. PJC 51.9 as written should apply only in rare instances. See PJC 51.10–51.14 for submission of informed consent under the Medical Liability and Insurance Improvement Act, which will apply in most cases filed before September 1, 2003, and the Medical Liability Act (Tex. Civ. Prac. & Rem. Code ch. 74), which will apply to most actions filed on or after September 1, 2003.

Particular treatment and provider. Terms describing the medical treatment in question and the particular provider should be substituted for the italicized words in the charge.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne*.

Accompanying definitions and instructions. PJC 51.9 is designed to be accompanied by the appropriate definitions of "ordinary care" and "proximate cause" in PJC 50.1–50.3. If the evidence raises "new and independent cause," the definitions in PJC 50.4, rather than the definition of "proximate cause" in PJC 50.1–50.3, should be submitted. As part of proximate cause, the patient must establish that he was injured by the occurrence of the risk of which he was not informed. *Greene v. Thiet*, 846 S.W.2d 26, 31 (Tex. App.—San Antonio 1992, writ denied).

PJC 51.10 Informed Consent (Statutory)—Procedure Not on List A or B—No Emergency or Other Medically Feasible Reason for Nondisclosure—Disclosure in Issue

QUESTION _____

Did *Dr. Davis* fail to disclose to *Paul Payne* such risks and hazards inherent in *the treatment by radiation therapy* that could have influenced a reasonable person in making a decision to give or withhold consent to such treatment?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would a reasonable person have refused such treatment if those risks and hazards had been disclosed?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Paul Payne* injured by the occurrence of the risk or hazard of which *he* was not informed?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.10 may be used to submit a claim of breach of the duty of informed consent in a case in which the procedure is not on list A or B, there is no emergency or other medically feasible reason for nondisclosure, and there is a dispute over whether adequate disclosure (oral or written) was made. For submission of statutory informed consent under other states of the evidence, see PJC 51.11–51.14.

Actions filed before September 1, 2003. *See* former Tex. Rev. Civ. Stat. art. 4590i, § 6.07(b) (Acts 1977, 65th Leg., R.S., ch. 817, § 6.07(b) (H.B. 1048), eff. Aug. 29, 1977); *McKinley v. Stripling*, 763 S.W.2d 407 (Tex. 1989); *Barclay v. Campbell*, 704 S.W.2d 8 (Tex. 1986); *Peterson v. Shields*, 652 S.W.2d 929 (Tex. 1983).

Actions filed on or after September 1, 2003. *See* Tex. Civ. Prac. & Rem. Code § 74.106(b).

Particular treatment or procedure. An appropriate term for the medical treatment or surgical procedure in question should be substituted for the phrase *the treatment by radiation therapy*.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne*.

Proximate cause. The objective form of causation (reasonable-person standard) should be used to submit proximate cause. *McKinley*, 763 S.W.2d at 410; see also *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied), in which the court allowed the submission of proximate cause in a form different from that set out in PJC 51.10. As part of proximate cause, the patient must establish that he was injured by the occurrence of the risk of which he was not informed. *Greene v. Thiet*, 846 S.W.2d 26, 31 (Tex. App.—San Antonio 1992, writ denied).

Medical Liability Act. The Medical Liability Act applies to causes of action based on "health care liability claims." For cases filed before September 1, 2003, see former Tex. Rev. Civ. Stat. art. 4590i, § 1.03(a)(4) (Acts 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4) (H.B. 1048), eff. Aug. 29, 1977). For actions filed on or after September 1, 2003, see Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

Under the Act, the Texas Medical Disclosure Panel has the duty to prepare lists of medical treatments and surgical procedures that do and do not require disclosure of risks and hazards to the patient. See former Tex. Rev. Civ. Stat. art. 4590i, § 6.03, and Tex. Civ. Prac. & Rem. Code § 74.103. These lists and the degree and form of disclosure required are found at 25 Tex. Admin. Code §§ 601.1–.9.

If the medical care or surgical procedure is on list A, the health care provider is required to disclose such risks and hazards. Former Tex. Rev. Civ. Stat. art. 4590i, § 6.05, and Tex. Civ. Prac. & Rem. Code § 74.104. If disclosure is made as provided in former section 6.06 or section 74.105, the provider shall be considered to have complied with former section 6.05 or section 74.104.

Duty of disclosure. The duty of disclosure for procedures not on list A or B is to disclose all risks and hazards that could influence a reasonable person in making a decision to consent to the procedure. *Peterson*, 652 S.W.2d at 931; *see also Hartfiel v. Owen*, 618 S.W.2d 902, 905 (Tex. App.—El Paso 1981, writ ref'd n.r.e.) (plaintiff must prove injury resulted from undisclosed risk). The medical condition complained

of must be shown by expert testimony to be a risk inherent in the medical procedure performed. *Peterson*, 652 S.W.2d at 931.

No-disclosure list. If the evidence shows that the care or procedure involved is on the list for which no disclosure is required under section 6.04 or 74.103, the Committee believes that no question on informed consent should be submitted.

No panel determination on procedure. For treatments or procedures on which the panel has made no determination regarding a duty of disclosure, section 6.07(b) or 74.106(b) expressly retains the same duty otherwise imposed by law. Former Tex. Rev. Civ. Stat. art. 4590i, § 6.07(b), and Tex. Civ. Prac. & Rem. Code § 74.106(b).

Locality rule in informed consent cases. The Medical Liability Act has replaced the common-law locality rule with a "reasonable person" rule. Former Tex. Rev. Civ. Stat. art. 4590i, § 6.02, and Tex. Civ. Prac. & Rem. Code § 74.101; *Barclay*, 704 S.W.2d at 9 (Act changed locality rule "concerning physician's duty of disclosure"); *Peterson*, 652 S.W.2d at 931. For a discussion of the locality rule, see PJC 50.1.

Implied informed consent. Informed consent is implied as a matter of law if a patient is unconscious or otherwise unable to give express consent and immediate surgery or other medical care or procedure is necessary to preserve the patient's life or health. If there is a dispute concerning implied informed consent, a question should be submitted. See PJC 51.12. *See Gravis v. Physicians & Surgeons Hospital*, 427 S.W.2d 310, 311 (Tex. 1968).

PJC 51.11 Informed Consent (Statutory)—Procedure on List A—No Emergency or Other Medically Feasible Reason for Nondisclosure—No Disclosure

QUESTION _____

The law requires *Dr. Davis* to disclose to *Paul Payne* the risks and hazards of *retinal surgery*.

The risks and hazards of *retinal surgery* required to be disclosed are—

1. *complications requiring additional treatment and/or surgery, and*
2. *recurrence or spread of disease, and*
3. *partial or total loss of vision.*

Would a reasonable person have refused such treatment if the above risks and hazards had been disclosed?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Paul Payne* injured by the occurrence of the risk or hazard of which *he* was not informed?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.11 submits statutory informed consent if the evidence shows that the procedure was on the list requiring disclosure (list A) but there is neither evidence reflecting disclosure nor evidence of emergency or other reason it was not medically feasible to make a disclosure. For submission of statutory informed consent under other states of the evidence, see PJC 51.10 and 51.12–51.14.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne.*

Proximate cause. The objective form of causation (reasonable-person standard) should be used to submit proximate cause. *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989); see also *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied), in which the court allowed the submission of proximate cause in a form different from that set out in PJC 51.11. As part of proximate cause, the patient must establish that he was injured by the occurrence of the risk of which he was not informed. *Greene v. Thiet*, 846 S.W.2d 26, 31 (Tex. App.—San Antonio 1992, writ denied).

Particular risks and treatment. The particular risks required to be disclosed are found on list A and should be substituted for those above. Tex. Civ. Prac. & Rem. Code § 74.103. An appropriate term for the medical treatment or surgical procedure in question should be substituted for the words *retinal surgery*. For a compilation of the medical procedures for which the medical disclosure panel has enumerated risks required to be disclosed, see 25 Tex. Admin. Code §§ 601.1–.3.

Existence of presumption. Failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed creates a rebuttable presumption of a negligent failure to conform to the duty of disclosure. This presumption must be included in the charge to the jury.

Actions filed before September 1, 2003. See former Tex. Rev. Civ. Stat. art. 4590i, § 6.07(a)(2) (Acts 1977, 65th Leg., R.S., ch. 817, § 6.07(a)(2) (H.B. 1048), eff. Aug. 29, 1977).

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.106(a)(2).

Implied informed consent. Informed consent is implied as a matter of law if a patient is unconscious or otherwise unable to give express consent and immediate surgery or other medical care or procedure is necessary to preserve the patient's life or health. If there is a dispute concerning implied informed consent, a question should be submitted. See PJC 51.12. *See Gravis v. Physicians & Surgeons Hospital*, 427 S.W.2d 310, 311 (Tex. 1968).

PJC 51.12 Informed Consent (Statutory)—Procedure on List A—No Emergency or Other Medically Feasible Reason for Nondisclosure—Disclosure Not in Statutory Form

QUESTION _____

The law requires *Dr. Davis* to disclose to *Paul Payne* the following risks and hazards of *retinal surgery*:

1. *complications requiring additional treatment and/or surgery, and*
2. *recurrence or spread of disease, and*
3. *partial or total loss of vision.*

The failure of a physician to disclose those risks and hazards on a written form, signed by the patient or a person authorized to consent for the patient and a competent witness, is presumed to constitute a negligent failure to disclose such risks. This presumption may be overcome if the physician adequately disclosed such risks and hazards in some other manner.

Did *Dr. Davis* fail to adequately disclose such risks and hazards in some other manner to *Paul Payne*?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would a reasonable person have refused such treatment if those risks and hazards had been disclosed?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Paul Payne* injured by the occurrence of the risk or hazard of which *he* was not informed?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.12 submits statutory informed consent if the evidence shows that the medical procedure was on the list requiring disclosure (list A) and disclosure is not made in statutory form but there is evidence of disclosure, such as evidence of oral disclosure. For submission of informed consent under other states of the evidence, see PJC 51.10–51.11 and 51.13–51.14.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne.*

Proximate cause. The objective form of causation (reasonable-person standard) should be used to submit proximate cause. *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989); see also *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied), in which the court allowed the submission of proximate cause in a form different from that set out in PJC 51.12. As part of proximate cause, the patient must establish that he was injured by the occurrence of the risk of which he was not informed. *Greene v. Thiet*, 846 S.W.2d 26, 31 (Tex. App.—San Antonio 1992, writ denied).

Particular risks and treatment. The particular risks required to be disclosed are found on list A and should be substituted for those above. Tex. Civ. Prac. & Rem. Code § 74.103. An appropriate term for the medical treatment or surgical procedure in question should be substituted for the words *retinal surgery.* For a compilation of the medical procedures for which the medical disclosure panel has enumerated risks required to be disclosed, see 25 Tex. Admin. Code §§ 601.1–.3.

Existence of presumption. Failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed creates a rebuttable presumption of a negligent failure to conform to the duty of disclosure. This presumption must be included in the charge to the jury.

Actions filed before September 1, 2003. See former Tex. Rev. Civ. Stat. art. 4590i, § 6.07(a)(2) (Acts 1977, 65th Leg., R.S., ch. 817, § 6.07(a)(2) (H.B. 1048), eff. Aug. 29, 1977).

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.106(a)(2).

Implied informed consent. Informed consent is implied as a matter of law if a patient is unconscious or otherwise unable to give express consent and immediate surgery or other medical care or procedure is necessary to preserve the patient's life or

health. *See Gravis v. Physicians & Surgeons Hospital*, 427 S.W.2d 310, 311 (Tex. 1968).

PJC 51.13 Informed Consent (Statutory)—Procedure on List A—No Disclosure—Emergency or Other Medically Feasible Reason for Nondisclosure in Issue

QUESTION _____

The law requires *Dr. Davis* to disclose to *Paul Payne* the following risks and hazards of *a transfusion*:

1. *fever; and*

2. *transfusion reaction, which may include kidney failure or anemia; and*

3. *heart failure; and*

4. *hepatitis; and*

5. *AIDS (acquired immunodeficiency syndrome); and*

6. *other infections.*

The failure of a physician to disclose those risks and hazards on a written form, signed by the patient or a person authorized to consent for the patient and by a competent witness, creates a presumption of a negligent failure to conform to the duty of disclosure. This presumption is overcome if there was an emergency or some other reason disclosure was not medically feasible.

Was *Dr. Davis*'s failure to disclose the risks and hazards of *a transfusion* negligence?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Would a reasonable person have refused such treatment if those risks had been disclosed?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Paul Payne* injured by the occurrence of the risk or hazard of which *he* was not informed?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.13 submits statutory informed consent if the evidence shows that the medical procedure was on the list requiring disclosure (list A) and disclosure was not made but there is evidence that would excuse the failure to disclose, such as an emergency or other medically feasible reason.

Actions filed before September 1, 2003. See former Tex. Rev. Civ. Stat. art. 4590i, § 6.07(a)(2) (Acts 1977, 65th Leg., R.S., ch. 817, § 6.07(a)(2) (H.B. 1048), eff. Aug. 29, 1977); *see also Gravis v. Physicians & Surgeons Hospital*, 427 S.W.2d 310, 311 (Tex. 1968).

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.106(a)(2).

For submission of statutory informed consent under other states of the evidence, see PJC 51.10–51.12 and 51.14.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne*.

Proximate cause. The objective form of causation (reasonable-person standard) should be used to submit proximate cause. *McKinley v. Stripling*, 763 S.W.2d 407, 410 (Tex. 1989); see also *Melissinos v. Phamanivong*, 823 S.W.2d 339 (Tex. App.—Texarkana 1991, writ denied), in which the court allowed the submission of proximate cause in a form different from that set out in PJC 51.13. As part of proximate cause, the patient must establish that he was injured by the occurrence of the risk of which he was not informed. *Greene v. Thiet*, 846 S.W.2d 26, 31 (Tex. App.—San Antonio 1992, writ denied).

Particular risks and treatment. The particular risks required to be disclosed are found on list A and should be substituted for those above. Tex. Civ. Prac. & Rem. Code § 74.103. An appropriate term for the medical treatment or surgical procedure in question should be substituted for the words *a transfusion*. For a compilation of the

medical procedures for which the medical disclosure panel has enumerated risks required to be disclosed, see 25 Tex. Admin. Code §§ 601.1–.3.

PJC 51.14 Informed Consent (Statutory)—Procedure on List A—Validity of Disclosure Instrument in Issue

QUESTION _____

At the time *Paul Payne* signed the consent form, was *he without mental capacity*?

It is presumed that *Paul Payne* had the required mental capacity, which presumption may be overcome if *he* was without mental capacity.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.14 submits the validity of the disclosure instrument if the evidence shows that the surgical procedure was on the list requiring disclosure (list A) and an instrument exists reflecting the required disclosure but there is also evidence that the instrument is invalid.

Actions filed before September 1, 2003. See former Tex. Rev. Civ. Stat. art. 4590i, §§ 6.05–.07 (Acts. 1977, 65th Leg., R.S., ch. 817, §§ 6.05–.07 (H.B. 1048), eff. Aug. 29, 1977).

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code §§ 74.104–.106.

If the physician has obtained the patient's signature on a consent form conforming with the panel's requirements and containing the risks enumerated on list A, the only means by which the patient may recover for failure to obtain informed consent is to prove the invalidity of the form and that the risks had not otherwise been disclosed to him.

Person authorized to consent for patient. If appropriate, the phrase *a person authorized to consent for Paul Payne* may be substituted for *Paul Payne*.

Particular circumstances. Appropriate words describing the particular circumstances alleged to invalidate the disclosure instrument should be substituted for the words *without mental capacity* if there is evidence that the instrument reflecting such disclosure may be invalid because of forgery or the incompetence or illiteracy of the person apparently consenting or of the subscribing witness.

Effect of answer. If the jury answers the question "No," the invalidity of the form has not been proved and the cause of action for failure to obtain informed consent fails. If the jury answers "Yes," the plaintiff must then prove that the physician other-

wise failed to disclose the risks and hazards required to be disclosed and must prove proximate cause. Such issues should be conditionally submitted under PJC 51.10–51.12, as appropriate under the evidence.

PJC 51.15 Battery—Medical

QUESTION _____

Did *Dr. Davis*, without *Paul Payne*'s consent, perform an *intestinal bypass* on *Paul Payne*?

Consent is implied by law if the patient is unconscious or otherwise unable to give express consent and an immediate surgical procedure is necessary to preserve his life or health.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.15 may be used to submit a claim of battery. Earlier Texas cases recognized the tort of battery when a physician, with no justification or excuse, performed an operation without the express or implied consent of the patient or someone authorized to consent for the patient. *Gravis v. Physicians & Surgeons Hospital*, 427 S.W.2d 310, 311 (Tex. 1968); *see also Moss v. Rishworth*, 222 S.W. 225, 226 (Tex. Comm'n App. 1920, judgm't adopted); *Thaxton v. Reed*, 339 S.W.2d 241, 246 (Tex. Civ. App.—Dallas 1960, writ ref'd n.r.e.).

When not to use.

Actions filed before September 1, 2003. A cause of action for battery is no longer available if the basis of the patient's claim is that the physician failed to disclose adequately the risks involved in the surgery and thus failed to obtain *informed* consent, as distinguished from *any* consent. *See* former Tex. Rev. Civ. Stat. art. 4590i, § 6.02 (Acts 1977, 65th Leg., R.S., ch. 817, § 6.02 (H.B. 1048), eff. Aug. 29, 1977), which provides as follows:

> In a suit against a . . . health care provider involving a health care liability claim that is based on the failure of the . . . provider to disclose or adequately to disclose the risks and hazards involved in the medical care or surgical procedure rendered by the . . . provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.101, which contains the same language as that in former article 4590i.

The status or viability of the cause of action for battery after the enactment of the statutory provision has not been expressly determined.

Particular treatment or procedure. An appropriate term for the medical treatment or surgical procedure in question should be substituted for the words *intestinal bypass.*

Person legally authorized to consent for patient. If there is an issue whether consent was obtained from a person legally authorized to give consent for the patient, that person's name should be substituted for (or stated disjunctively with) the patient's name in the first line of the question. The trial court must be satisfied that, as a matter of law, the person giving consent has authority to do so. *Gravis*, 427 S.W.2d 310 (husband had no authority to consent for wife without prior authorization).

PJC 51.16 Express Warranty—Medical

QUESTION _____

Did *Dr. Davis* promise *Paul Payne* in writing *to cure Paul Payne's arthritis*?

Answer "Yes" or "No."

Answer: _____

If you answered the above question "Yes," then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was *Dr. Davis*'s failure, if any, *to cure Paul Payne's arthritis* a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1.

When to use. PJC 51.16 may be used to submit a cause of action for breach of an express warranty.

Actions filed before September 1, 2003. See former Tex. Rev. Civ. Stat. art. 4590i, § 1.03(a)(4) (Acts 1977, 65th Leg., R.S., ch. 817, § 1.03(a)(4) (H.B. 1048), eff. Aug. 29, 1977).

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

Both the above statutory provisions apply to causes of action based on "health care liability claim[s]," whether sounding "in tort or *contract*" (emphasis added); *see also* Tex. Bus. & Com. Code § 26.01(b)(8) (agreements not enforceable unless in writing include agreements relating to medical care).

Omit first question if no dispute. If there is no dispute about whether there was a promise in writing, the first question should not be submitted.

Particular warranty. Appropriate words describing the particular promise or warranty claimed to be breached should be substituted for the phrase *to cure Paul Payne's arthritis*.

Caveat. The Texas Business and Commerce Code requires a finding of "proximate cause" rather than "producing cause" for consequential damages (injury to person or property) arising from any breach of warranty. Tex. Bus. & Com. Code § 2.715(b)(2); *see Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320, 329 (Tex. 1978). The same result is obtained for breach of express warranty under Tex. UCC § 2.313. *General Supply & Equipment Co. v. Phillips*, 490 S.W.2d 913, 917 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.). Both these cases, however, dealt with *goods* rather than services. If the sale of services is not governed by the Business and Commerce Code, "producing cause" may have to be substituted for "proximate cause" in the second question. No Texas cases on this point have been found. *But see Southwestern Bell Telephone Co. v. FDP Corp.*, 811 S.W.2d 572 (Tex. 1991).

PJC 51.17 Implied Warranty—Medical (Comment)

The Supreme Court of Texas first recognized an implied warranty of good and workmanlike performance of services in *Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968). *See also Centex Homes v. Buecher*, 95 S.W.3d 266 (Tex. 2002) (explaining warranty created in *Humber*). The court has also recognized an implied warranty of good and workmanlike performance of services rendered in connection with the repair or modification of existing tangible goods. *Melody Home Manufacturing Co. v. Barnes*, 741 S.W.2d 349 (Tex. 1987); *see also Buecher*, 95 S.W.3d at 270; *Archibald v. Act III Arabians*, 755 S.W.2d 84 (Tex. 1988). In *Dennis v. Allison*, 698 S.W.2d 94 (Tex. 1985), however, the court held that there is no implied warranty that a psychiatrist will follow the canons of ethics of his profession. These decisions leave a number of questions regarding implied warranties for service providers unanswered.

An implied warranty for professional health care services has not been recognized by the supreme court. Unless *Dennis v. Allison* is expressly overruled or distinguished by the court, the submission of questions pertaining to implied warranties of professional-service providers is not recommended.

When to use.

Actions filed before September 1, 2003. *See* former Tex. Rev. Civ. Stat. art. 4590i, § 12.01 (Acts 1977, 65th Leg., R.S., ch. 817, § 12.01 (H.B. 1048), eff. Aug. 29, 1977) (inapplicability of Deceptive Trade Practices–Consumer Protection Act to claims grounded in negligence); Tex. Bus. & Com. Code § 26.01 (statute of frauds).

Actions filed on or after September 1, 2003. *See* Tex. Civ. Prac. & Rem. Code § 74.004 (inapplicability of Deceptive Trade Practices–Consumer Protection Act to claims grounded in negligence); Tex. Bus. & Com. Code § 26.01 (statute of frauds).

PJC 51.18 Emergency Care (Statutory)

PJC 51.18A Emergency Care (Statutory)—Emergency Scene Outside a Hospital, Health Care Facility, or Medical Transport

QUESTION 1

Did *Dr. Davis perform the tracheotomy* on *Paul Payne* without remuneration or the expectation of remuneration?

[For actions filed before September 1, 2003, use the following instruction.]

A person who would ordinarily receive or be entitled to receive a salary, fee, or other remuneration for administering emergency care to the patient in question shall be deemed to be acting for or in expectation of remuneration even if the person waives or elects not to charge or receive remuneration on the occasion in question.

[For actions filed on or after September 1, 2003, use the following instruction.]

Being legally entitled to receive remuneration for the emergency care rendered shall not determine whether or not the care was administered for or in anticipation of remuneration.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Was such emergency care rendered by *Dr. Davis* with willful or wanton negligence?

"Willful or wanton 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 complained of was the result of actual conscious indifference to the rights, safety, or welfare of the persons affected by it.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 2, then answer Question 3. Otherwise, do not answer Question 3.

QUESTION 3

Was such negligence a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use.

Actions filed before September 1, 2003. PJC 51.18A should be used if the evidence shows the scene of the emergency is outside a hospital, health care facility, or means of medical transport. The "Good Samaritan" statute provides that there is no liability for civil damages for administering the care in good faith "unless the act is wilfully or wantonly negligent." *See* former Tex. Civ. Prac. & Rem. Code ch. 74 (Acts 1985, 69th Leg., R.S., ch. 959, § 1 (S.B. 797), eff. Sept. 1, 1985, *amended by* Acts 1993, 73d Leg., R.S., ch. 960, § 1 (S.B. 386), eff. Aug. 30, 1993).

Actions filed on or after September 1, 2003. PJC 51.18A should be used regardless of where the emergency in question occurred if such care was not provided for or in expectation of remuneration. Tex. Civ. Prac. & Rem. Code § 74.151(b)(1).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Remuneration. In *McIntyre v. Ramirez*, 109 S.W.3d 741 (Tex. 2003), the supreme court rejected the argument that a person will be immune only if the person can prove that he is not "legally" entitled to receive payment.

If emergency is in issue. If performance of the emergency care at the scene of an emergency is in issue, a preliminary question would need to be submitted, such as—

Did *Dr. Davis* perform *the tracheotomy* on *Paul Payne* during an emergency?

Words describing the particular care rendered should be substituted for the phrase *perform the tracheotomy*.

When to omit Question 3. In the usual case, Question 2 will be pleaded and argued as an affirmative defense. Thus, the plaintiff will have requested and the court will have submitted questions on and definitions of ordinary negligence and proximate cause. In such a case, Question 3 should be omitted.

Source of definition. The definition of "willful or wanton negligence" is based on that of "gross negligence" in former Tex. Civ. Prac. & Rem. Code § 41.001(5) (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). The Committee expresses no opinion on the question of whether the repeal of the source statute changed the definition or whether the concept of gross negligence should be modified to include the professional standard of care as set out in PJC 50.1.

PJC 51.18B Emergency Care (Statutory)—Emergency Scene Inside a Hospital, Health Care Facility, or Medical Transport

QUESTION 1

Was such emergency care rendered by *Dr. Davis* with willful or wanton negligence?

"Willful or wanton 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 complained of was the result of actual conscious indifference to the rights, safety, or welfare of the persons affected by it.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Was such negligence a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use.

Actions filed before September 1, 2003. PJC 51.18B should be used if the evidence shows the scene of the emergency is inside a hospital, health care facility, or means of medical transport. The "Good Samaritan" statute provides that there is no liability for civil damages for administering the care in good faith "unless the act is wilfully or wantonly negligent." *See* former Tex. Civ. Prac. & Rem. Code ch. 74 (Acts 1985, 69th Leg., R.S., ch. 959, § 1 (S.B. 797), eff. Sept. 1, 1985, *amended by* Acts 1993, 73d Leg., R.S., ch. 960, § 1 (S.B. 386), eff. Aug. 30, 1993).

Actions filed on or after September 1, 2003. PJC 51.18B should be used regardless of where the emergency in question occurred if such care was not provided for or in expectation of remuneration. Tex. Civ. Prac. & Rem. Code § 74.151(b)(1).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

If emergency is in issue. If performance of the emergency care at the scene of an emergency is in issue, a preliminary question would need to be submitted, such as—

> Did *Dr. Davis* perform *the tracheotomy* on *Paul Payne* during an emergency?

Words describing the particular care rendered should be substituted for the phrase *perform the tracheotomy*.

When to omit Question 2. In the usual case, Question 1 will be pleaded and argued as an affirmative defense. Thus, the plaintiff will have requested and the court will have submitted questions on and definitions of ordinary negligence and proximate cause. In such a case, Question 2 should be omitted.

Source of definition. The definition of "willful or wanton negligence" is based on that of "gross negligence" in former Tex. Civ. Prac. & Rem. Code § 41.001(5) (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). The Committee expresses no opinion on the question of whether the repeal of the source statute changed the definition or whether the concept of gross negligence should be modified to include the professional standard of care as set out in PJC 50.1.

PJC 51.18C Emergency Care (Statutory)—Care Administered in a Hospital Emergency Department, an Obstetrical Unit, or a Surgical Suite Immediately Following Evaluation or Treatment in a Hospital Emergency Department

QUESTION 1

Was such emergency care rendered by *Dr. Davis* with willful or wanton negligence?

"Willful or wanton 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 complained of was the result of actual conscious indifference to the rights, safety, or welfare of the persons affected by it.

In answering this question, you shall consider, together with all relevant factors—

1. whether the person providing care did or did not have the patient's medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;

2. the presence or lack of a preexisting physician-patient relationship or health care provider–patient relationship;

3. the circumstances constituting the emergency; and

4. the circumstances surrounding the delivery of the emergency medical care.

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

Was such negligence a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*]?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.18C should be used in actions filed on or after September 1, 2003, if the evidence shows that the injury or death complained of arose out of the provision of emergency medical care in a hospital emergency department, an obstetrical unit, or a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department. Tex. Civ. Prac. & Rem. Code §§ 74.153–.154.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

If emergency is in issue. If performance of the emergency care in an emergency department, obstetrical unit, or surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department is in issue, including whether the medical care or treatment occurred after the patient was stabilized and capable of receiving medical treatment as a nonemergency patient, a preliminary question would need to be submitted, such as—

> Was the care provided by *Dr. Davis* emergency medical care administered in the emergency department or obstetrical unit, or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department?
>
> "Emergency medical care" means bona fide emergency services provided after the sudden onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity, including severe pain, such that the absence of immediate medical attention could reasonably be expected to result in placing the patient's health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term does not include medical care or treatment that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient or that is unrelated to the original medical emergency.

See Tex. Civ. Prac. & Rem. Code § 74.001(a)(7).

When to omit jury instructions. Jury instructions 1–4 should not be used if the medical care or treatment (1) occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency, (2) is unrelated to the original medi-

cal emergency, or (3) is related to an emergency caused in whole or in part by the negligence of the defendant. Tex. Civ. Prac. & Rem. Code § 74.154(b)(1)–(3).

PJC 51.19 Malicious Credentialing Claim against a Hospital

PJC 51.19A Malicious Credentialing Claim against a Hospital—Causes of Action Filed before September 1, 2003

QUESTION _____

Do you find that *Dixon Hospital* acted with malice in the granting or retaining of *Dr. Davis*'s active surgical credentials and that such conduct was a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

"Malice" means—

1. a specific intent by *Dixon Hospital* to cause substantial injury to *Paul Payne*; or

2. an act or omission by *Dixon Hospital*,

   a. which when viewed objectively from the standpoint of *Dixon Hospital* 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 *Dixon Hospital* 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 51.19B Malicious Credentialing Claim against a Hospital—Causes of Action Filed on or after September 1, 2003

QUESTION _____

Do you find that *Dixon Hospital* acted with malice in the granting or retaining of *Dr. Davis*'s active surgical credentials and that such conduct was a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

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

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 51.19 should be used if the plaintiff seeks recovery for injuries resulting from the malicious credentialing of a physician. A hospital's alleged malicious credentialing can be the proximate cause of the plaintiff's injuries only if the jury finds that the physician was negligent and the negligence injured the plaintiff. *See Garland Community Hospital v. Rose*, 156 S.W.3d 541, 546 (Tex. 2004).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Source of definitions.

Actions filed before September 1, 2003. See former Tex Civ. Prac. & Rem. Code § 41.001(7)(B) (Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995). In actions filed before September 1, 2003, malice in the credentialing process need not be directed toward a specific patient. *St. Luke's Episcopal Hospital v. Agbor*, 952 S.W.2d 503, 506 (Tex. 1997). The definition of malice under former section 41.001(7)(B) consists of two components—one objective and one subjective. *KPH Consolidation, Inc. v. Romero*, 102 S.W.3d 135, 143 (Tex. App.—Houston [14th Dist.] 2003), *aff'd*, 166 S.W.3d 212 (Tex. 2005). Both prongs of malice can be proved by circumstantial evidence. *KPH Consolidation, Inc.*, 102 S.W.3d at 145.

Actions filed on or after September 1, 2003. See Tex. Civ. Prac. & Rem. Code § 41.001(7).

Proximate cause. PJC 51.19 is designed to be used with the definition of "proximate cause" in PJC 50.2. If the evidence raises "new and independent cause," the definitions in PJC 50.4 should be used in lieu of the definition of "proximate cause" in PJC 50.2.

Exemplary damages. Malice must be proved by clear and convincing evidence to recover exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003(a)–(c); *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 220 (Tex. 2005). However, there is no requirement that malice be proved by more than a preponderance of the evidence to recover actual damages. *Romero*, 166 S.W.3d at 220.

PJC 52.1 Borrowed Employee—Medical—Liability of Borrowing Employer

QUESTION _____

On the occasion in question, was *Don Donaldson* acting as a borrowed employee of *Dixon Hospital*?

If *Don Donaldson* was generally employed by *Dr. Davis*, *he* was a "borrowed employee" of *Dixon Hospital* if *Dixon Hospital* or its agents had the right to direct and control the details of the particular work inquired about.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 52.1 submits the "borrowed employee" (sometimes called "borrowed servant," "loaned employee," or "special employee") theory if vicarious liability is sought against the borrowing employer (such as the hospital) only. The right of control over the details of the work is the determinative test of whether responsibility for the injury rests with the general employer or the borrowing employer. *See St. Joseph Hospital v. Wolff*, 94 S.W.3d 513, 537 (Tex. 2002); *J.A. Robinson Sons v. Wigart*, 431 S.W.2d 327, 330–34 (Tex. 1968), *overruled on other grounds by Sanchez v. Schindler*, 651 S.W.2d 249, 251 (Tex. 1983); *Shell Oil Co. v. Reinhart*, 375 S.W.2d 717, 718–19 (Tex. 1964); *Producers Chemical Co. v. McKay*, 366 S.W.2d 220, 225–26 (Tex. 1963). An additional factor to be considered is any contract language between the two parties addressing the right of control. *Exxon Corp. v. Perez*, 842 S.W.2d 629, 630 (Tex. 1992). The "captain of the ship" doctrine has been disapproved in Texas. *Sparger v. Worley Hospital, Inc.*, 547 S.W.2d 582, 583–85 (Tex. 1977); *Ramon v. Mani*, 550 S.W.2d 270, 271 (Tex. 1977).

When not to use.

Imposing liability versus avoiding liability. PJC 52.1 should be used only to *impose* vicarious liability on the alleged borrowing employer (such as the hospital). If, instead, the general employer (such as the physician) asserts the "borrowed employee" doctrine to *avoid* liability, it should be submitted as in PJC 52.2. *See* Tex. R. Civ. P. 277; *Select Insurance Co. v. Boucher*, 561 S.W.2d 474 (Tex. 1978).

Not appropriate for independent contractor or joint control. PJC 52.1 is not appropriate to submit the concept of independent contractor. Nor should it be used if the issue of joint control by the hospital and physician is raised by the facts.

PJC 52.2 Borrowed Employee—Medical—Lending Employer's Rebuttal Instruction

QUESTION _____

On the occasion in question, was *Don Donaldson* acting as an employee of *Dixon Hospital*?

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. PJC 52.2 may be used if a general employer (such as the physician) claimed to be vicariously liable seeks to rebut the employment relationship with evidence that the employee was the borrowed employee of another (such as the hospital) on the occasion in question. This contention is an inferential rebuttal and is to be submitted as an instruction rather than disjunctively. *See* Tex. R. Civ. P. 277; *Select Insurance Co. v. Boucher*, 561 S.W.2d 474 (Tex. 1978).

When not to use. PJC 52.2 is not appropriate to submit the concept of independent contractor. Nor should it be used if the issue of joint control by the hospital and physician is raised by the facts.

There may be situations in which a physician's status as a borrowed employee is established as a matter of law. *See St. Joseph Hospital v. Wolff*, 94 S.W.3d 513 (Tex. 2002) (plurality opinion).

Disjunctive submission. For a disjunctive submission, see PJC 52.3. If the doctrine of borrowed employee is the proper subject of a question seeking to impose liability on the borrowing employer only, see PJC 52.1.

PJC 52.3 Borrowed Employee—Medical—Disjunctive Submission of Lending or Borrowing Employer

QUESTION _____

On the occasion in question, was *Don Donaldson* acting as an employee of *Dixon Hospital* or of *Dr. Davis*?

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.

For purposes of this question, the term "employee" includes "borrowed employee." On the occasion in question, *Don Donaldson* could not have been the employee of both *Dixon Hospital* and *Dr. Davis*.

Answer "*Dixon Hospital*" or "*Dr. Davis*."

Answer: _____

COMMENT

When to use. The disjunctive submission above properly submits "borrowed employee" *only* if the plaintiff alleges and it is apparent from the evidence that the alleged tortfeasor is necessarily the employee of either the hospital or the physician. *See* Tex. R. Civ. P. 277; *Archuleta v. International Insurance Co.*, 667 S.W.2d 120 (Tex. 1984) (proper to ask about total and partial incapacity as alternate theories; inquiry about partial incapacity is improper inferential rebuttal if only total incapacity is claimed); *see also Burns v. Union Standard Insurance Co.*, 593 S.W.2d 309 (Tex. 1980).

When not to use. PJC 52.3 should not be used to submit "borrowed employee" as an inferential rebuttal. *Select Insurance Co. v. Boucher*, 561 S.W.2d 474 (Tex. 1978). In such a case, see PJC 52.2. Nor would the above charge be appropriate if the concept of joint control by the hospital and the physician or that of the independent contractor were raised by the evidence.

PJC 52.4 Ostensible Agency—Question and Instruction

QUESTION _____

Was there an ostensible agency relationship between *Dr. Davis* and *Dixon Hospital* with respect to *Dr. Davis*'s treatment of *Paul Payne* at *Dixon Hospital*?

An ostensible agency relationship existed if (1) *Paul Payne* had a reasonable belief that *Dr. Davis* was the agent or employee of *Dixon Hospital*; (2) such belief was generated by *Dixon Hospital*'s affirmatively holding out *Dr. Davis* as its agent or employee, or by *Dixon Hospital*'s knowingly permitting *Dr. Davis* to hold *himself* out as its agent or employee; and (3) *Paul Payne* justifiably relied on the representation of authority.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 52.4 submits the "ostensible agency" theory for imposing vicarious liability on a hospital for the conduct of an independent contractor physician. There is no practical distinction among the theories of ostensible agency, apparent agency, apparent authority, and agency by estoppel, and this question should be used for all such theories. *See Baptist Memorial Hospital System v. Sampson*, 969 S.W.2d 945 (Tex. 1998). Ostensible agency is a form of estoppel, *Sampson*, 969 S.W.2d at 948, and must be pleaded in accordance with Tex. R. Civ. P. 94. *Nicholson v. Memorial Hospital System*, 722 S.W.2d 746, 749 (Tex. App.—Houston [14th Dist.] 1986, writ ref'd n.r.e.). In cases in which the patient was at the time not capable of making, and therefore did not make, his or her own medical treatment decision and the decision of whether, where, and from whom treatment would be obtained was made by someone lawfully authorized to act on the patient's behalf, the Committee recommends that the phrase *or someone lawfully acting on his behalf* be inserted after the patient's name in the definition.

Source of definition and elements. The doctrine was first adopted by the Supreme Court of Texas for use in medical malpractice cases in *Sampson*, 969 S.W.2d 945.

Defensive theories may be found in the following PJCs:

[Chapters 54–59 are reserved for expansion.]

Note

Certain professions consist of members who hold themselves out as having superior knowledge, training, and skill. Such persons are held to a standard embodying this concept, a violation of which is called professional negligence or malpractice, which is expressed in terms of a similar professional acting or failing to act under the same or similar circumstances. Other types of professionals are held to the standard of reasonably prudent persons. Whether a particular profession falls within one standard or the other is a question of substantive law. When this book was prepared, the professions treated in chapters 60 and 61—law, accounting, and architecture—had been judicially recognized to be within the higher professional standard.

PJC 60.1 Nonmedical Professional's Degree of Care; Proximate Cause

"Negligence," when used with respect to the conduct of *Dora Dotson*, means failure to use ordinary care, that is, failing to do that which *an accountant* of ordinary prudence would have done under the same or similar circumstances or doing that which *an accountant* of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care," when used with respect to the conduct of *Dora Dotson*, means that degree of care that *an accountant of ordinary prudence* would use under the same or similar circumstances.

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

COMMENT

Source of definitions. The definitions include the standard and accepted elements of nonmedical professional malpractice. *See Fireman's Fund American Insurance Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.) (attorney); *Atkins v. Crosland*, 406 S.W.2d 263 (Tex. Civ. App.—Fort Worth 1966), *rev'd on other grounds*, 417 S.W.2d 150 (Tex. 1967) (accountant); *Ryan v. Morgan Spear Associates, Inc.*, 546 S.W.2d 678 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (architect). The 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, 222–23 (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," when used with respect to the conduct of *Dora Dotson*, 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 *an accountant* 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 60.1. 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. These definitions should usually be included in the court's charge in a nonmedical professional malpractice case. If the evidence raises "new and independent cause," the definitions in PJC 60.2 should be used in lieu of the definition of "proximate cause" above.

Substitute particular professional. A term describing the professional involved (e.g., *attorney*, *architect*) should be substituted as appropriate for the word *accountant.*

Attorneys.

Implied representation of necessary skills. An attorney engaging in the practice of law and contracting to represent a client as an attorney impliedly represents that he possesses the requisite degree of skill, learning, and ability that is necessary to practice the profession and that others similarly situated ordinarily possess; will exert his best judgment in the legal matter thus entrusted; and will exercise reasonable and ordinary care and diligence in applying the skill and knowledge at hand. *See Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ), *disapproved on other grounds*, *Cosgrove v. Grimes*, 774 S.W.2d 662, 664–65 (Tex. 1989); *Patterson & Wallace v. Frazer*, 79 S.W. 1077 (Tex. Civ. App. 1904, no writ). Note that the so-called good-faith doctrine, held by some courts of appeals to excuse attorneys' negligence in malpractice suits (*e.g., Cook*, 409 S.W.2d at 477), has been disapproved. *Cosgrove*, 774 S.W.2d at 665.

Substitute "could" for "would." In the above definitions of "ordinary care" and "negligence," the word "could" should be substituted for the word "would" in the case of an attorney. *Cosgrove*, 774 S.W.2d at 665.

Loss of right of appeal—proximate cause for the court. In legal malpractice claims involving the loss of a right of appeal, the supreme court has determined that the question of proximate cause of a claimant's damages is a matter of law for the court. *Millhouse v. Wiesenthal*, 775 S.W.2d 626 (Tex. 1989). Thus the jury should not be instructed on proximate cause issues involving the loss of a right of appeal.

Caveat—legal specialists. Whether a legal specialist is to be held to a higher standard than that of an ordinary attorney, as set forth above, has not been decided. If a higher standard is applicable, the appropriate term to describe a specialist in the particular specialty (e.g., *a legal specialist in Estate Planning and Probate*) should be substituted for the term *an accountant* in the definitions of "negligence" and "proximate cause"; in the definition of "ordinary care," the words *an accountant of ordinary prudence* should be replaced with the phrase *a legal specialist of ordinary prudence in Estate Planning and Probate*.

Areas of specialization. The Supreme Court of Texas, by order, has recognized certain areas of legal specialization. To be certified as a specialist in these areas, the attorney must satisfy a number of requirements, including satisfactorily completing a course in the area and passing a written examination. The areas of specialization now certified are Administrative; Business Bankruptcy; Civil Appellate; Civil Trial; Consumer and Commercial; Consumer Bankruptcy; Criminal; Criminal Appellate; Estate Planning and Probate; Family; Health; Immigration and Nationality; Juvenile; Labor and Employment; Oil, Gas, and Mineral; Personal Injury Trial; Real Estate—Commercial; Real Estate—Residential; Real Estate—Farm and Ranch; Tax; and Workers' Compensation. Also recognized as specialists are patent lawyers licensed to practice before the U.S. Patent and Trademark Office; this license is based on educational credentials in a technical field and an examination administered by the Patent Office. The concept of legal specialization may also be associated with an attorney's holding himself out as specially qualified in a particular area.

Accountants.

Accountant's standard of care. As members of a skilled professional class, accountants are subject generally to the same rules of liability for negligence in practicing their profession as are members of other skilled professions and are liable to their clients for professional negligence. The standard of care of auditors and public accountants is the same as that applied to lawyers, physicians, and members of other skilled professions who furnish their professional services for compensation. *See Greenstein, Logan & Co. v. Burgess Marketing, Inc.*, 744 S.W.2d 170, 185 (Tex. App.—Waco 1987, writ denied); *Atkins v. Crosland*, 406 S.W.2d 263 (Tex. Civ. App.—Fort Worth 1966), *rev'd on other grounds*, 417 S.W.2d 150 (Tex. 1967).

Public Accountancy Act. Accountants are subject to Tex. Occ. Code ch. 901, the Public Accountancy Act, which is administered by the Texas State Board of Public Accountancy. The board is authorized to promulgate rules of professional conduct, the violation of which may form the basis for a cause of action against an accountant. *See Shatterproof Glass Corp. v. James*, 466 S.W.2d 873 (Tex. Civ. App.—Fort Worth 1971, writ ref'd n.r.e.).

Registration statements subject to federal securities statute. An accountant participating in the preparation of a registration statement is governed by the federal securities statute and is liable to anyone acquiring a security whose registration statement contains an untrue statement of fact or omits a required one. 15 U.S.C. § 77k(a)(4).

Implied possession, use of skill. The architect's undertaking implies only that he possesses the skill and ability sufficient to draw and prepare the plans and specifications in an ordinary, reasonable manner and will exercise and apply that skill and ability with ordinary care. *See Ryan v. Morgan Spear Associates, Inc.*, 546 S.W.2d 678 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.); *Capitol Hotel Co. v. Rittenberry*, 41 S.W.2d 697 (Tex. Civ. App.—Amarillo 1931, writ dism'd); *American Surety Co. v. San Antonio Loan & Trust Co.*, 98 S.W. 387 (Tex. Civ. App. 1906), *rev'd in part on other grounds sub. nom. Lonergan v. San Antonio Loan & Trust Co.*, 104 S.W. 1061 (Tex. 1907).

Architects.

Board of Architectural Examiners. The practice of architecture is regulated by the Texas Board of Architectural Examiners, which is responsible for both examination and licensing. Tex. Occ. Code ch. 1051.

Basis of liability. The liability of an architect may be based on breach of contract, fraud, misrepresentation, or negligence. *See Cobb v. Thomas*, 565 S.W.2d 281 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.). Such cases may also involve the interpretation of written contracts and are consequently beyond the scope of pattern jury charges for miscellaneous unintended torts.

Using "reasonable care" instead of "ordinary care." In *Hiroms v. Scheffey*, 76 S.W.3d 486, 488–89 (Tex. App.—Houston [14th Dist.] 2002, no pet.), the court noted that there was merit to the appellant's contention that the standard of care in medical malpractice cases should turn on whether the defendant exercised reasonable care rather than ordinary care. But the court ultimately did not resolve the issue because the appellant had failed to preserve error. The Committee raises the issue, however, because in some cases "reasonable" may be substituted for "ordinary," depending on the facts and circumstances. *See, e.g., Dennis v. Allison*, 698 S.W.2d 94, 95 (Tex. 1985) (describing actionable negligence as breach of duty of reasonable care); *Helms v. Day*, 215 S.W.2d 356, 358 (Tex. Civ. App.—Fort Worth 1948, writ dism'd) (absent special contract to either cure or not charge for services, a physician warrants only that he "possesses a reasonable degree of skill, such as ordinarily possessed by a profession

generally, and to exercise that skill with reasonable care and diligence") (citing *Graham v. Gautier*, 21 Tex. 111 (1858)); *Magnolia Paper Co. v. Duffy*, 176 S.W. 89, 92 (Tex. Civ. App.—San Antonio 1915, no writ) ("The final test of negligence is not usage or custom, but the inflexible rule which fixes reasonable care as the standard by which the conduct of the master to the servant is measured.").

PJC 60.2 New and Independent Cause—Nonmedical Professional

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

"New and independent cause" means the act or omission of a separate and independent agency, not reasonably foreseeable by an *accountant* exercising ordinary care, 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 60.1. PJC 60.2 should be used in lieu of the usual definition of "proximate cause" (see PJC 60.1) if there is evidence of 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).

Substitute particular professional. A term describing the professional involved (e.g., *attorney*, *architect*) should be substituted as appropriate for the term *accountant*.

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 60.3 Sole Proximate Cause—Nonmedical Professional

There may be more than one proximate cause of an [*occurrence*] [*injury*] [*occurrence or injury*], but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an [*occurrence*] [*injury*] [*occurrence or injury*], 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 proximate cause definition. PJC 60.3 should be used in lieu of the last sentence of the definition of "proximate cause" (see PJC 60.1) 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, 432 (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 61.1 Use of "Occurrence," "Injury," or "Occurrence or Injury" (Comment)

Pleadings and proof determine choice. The pleadings and proof in each case will determine the choice of the terms "occurrence," "injury," or "occurrence or injury" in the questions in this chapter. The choice 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 the liability and proportionate responsibility questions if "occurrence" is used, while it should consider the negligence if "injury" is used. Also, in an appropriate case, the word "death" may replace "injury."

Proportionate responsibility statute. The passage of the comparative (now named "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. Tex. Civ. Prac. & Rem. Code § 33.003. "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.

Distinctions affect how to submit conduct. 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 proportionate responsibility 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.

Interplay between use of "occurrence" or "injury" and use of exclusionary instruction in submitting damages questions. Submitting "occurrence" in conjunction with the appropriate exclusionary instruction in PJC 80.7 or 80.9 may resolve

any uncertainty about using "injury" or "occurrence" in a given case. But note that if the liability question is submitted with the term "injury," an exclusionary instruction should not be submitted.

PJC 61.2 Submission of Settling Persons, Contribution Defendants, and Responsible Third Parties (Comment)

Settling persons. The proportionate responsibility statute requires the responsibility of a settling person (*Sam Settlor*) to be determined by the trier of fact. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. Thus, if the case includes a settling person, that person's name must be included in the basic liability question as well as in the proportionate responsibility question.

Contribution defendants. 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 contribution defendant should *not* be included in the question comparing the responsibility of the plaintiff with that of the other defendants. A separate comparative question is necessary. See PJC 61.7.

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 61.6.

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).

PJC 61.3 Nonmedical Professional Relationship—Existence in Dispute

QUESTION _____

At the time in question, was *Paul Payne* a client of *Dora Dotson*'s with respect to the matter in dispute?

An *accountant*-client relationship exists only if the *accountant* has agreed, expressly or impliedly, to render *accounting* services of a specified or general nature to the person claiming such relationship.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 61.3 may be used if the existence of a professional relationship between the plaintiff and the defendant-professional is in dispute.

Substitute terms as appropriate. Appropriate terms to describe the particular professional (e.g., *attorney*, *architect*) and services (e.g., *legal*, *architectural*) should be substituted for the terms *accountant* and *accounting*.

Relationship arises out of contract. A professional is liable to the client only if there is a professional relationship arising out of a contract, express or implied, that the professional will represent the client with proper professional skill and there is a negligent breach of that duty proximately causing damages. *See Dickey v. Jansen*, 731 S.W.2d 581 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.) (attorney-client relationship); *Bell v. Manning*, 613 S.W.2d 335 (Tex. Civ. App.—Tyler 1981, writ ref'd n.r.e.). *Cf. Parker v. Carnahan*, 772 S.W.2d 151 (Tex. App.—Texarkana 1989, writ denied), in which the court held that while the evidence showed the nonexistence of an attorney-client relationship, an attorney might still be negligent for failing to advise a party of the fact that he was not representing such party, if the circumstances led the party to believe that the attorney was representing her. See also PJC 61.4 on negligent misrepresentation.

Termination. If there is evidence of termination of the relationship, the following instruction may be added to PJC 61.3:

> An *accountant*-client relationship does not exist if either the client or the accountant has terminated the relationship. The client may terminate the relationship at any time by communicating the termination to the accountant. The accountant may terminate the relation-

ship after taking reasonable steps to avoid foreseeable prejudice to his client.

Note that an attorney's withdrawal from employment is governed by Tex. Disciplinary Rules Prof'l Conduct R. 1.15, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (West 2005 & Supp. 2012) (Tex. State Bar R. art. X, § 9), and the above instruction should be modified to comport with its requirements.

Abandonment. The concept of abandonment as reflected in PJC 51.7 may apply to an attorney-client relationship. For relative protection of the parties in a termination case, see *Mandell & Wright v. Thomas*, 441 S.W.2d 841 (Tex. 1969).

PJC 61.4 Question and Instruction on Negligent Misrepresentation

QUESTION _____

Did *Dora Dotson* make a negligent misrepresentation on which *Paul Payne* justifiably relied?

Negligent misrepresentation occurs when—

1. a party makes a representation in the course of his business, profession, or employment, or in a transaction in which he has a pecuniary interest; and

2. the representation supplies false information for the guidance of others in their business; and

3. the party making the representation does not exercise reasonable care or competence in obtaining or communicating the information.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 61.4 is a broad-form question that should be appropriate in most cases involving a claim of negligent misrepresentation if the court, as a matter of law, or the jury, as a matter of fact, has found that the plaintiff is within the class of persons allowed to bring this cause of action. *See Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991) (adopting *Restatement (Second) of Torts* § 552 (1977), tort of negligent misrepresentation); *see also McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 791 (Tex. 1999). A defendant is liable only for pecuniary loss caused to the plaintiff by the plaintiff's justifiable reliance on the representation. *Sloane*, 825 S.W.2d at 442.

Source of question and instruction. The question and instruction are from the supreme court's opinion in *Sloane*, 825 S.W.2d at 442.

Damages. Economic damages for negligent misrepresentation are limited to those necessary to compensate the party for the pecuniary loss caused by the misrepresentation. Benefit-of-the-bargain and lost-profit damages are not available. *Sloane*, 825 S.W.2d at 442–43 (adopting *Restatement (Second) of Torts* § 552B (1977)); *see also D.S.A., Inc. v. Hillsboro Independent School District*, 973 S.W.2d 662, 663–64 (Tex. 1998). In *D.S.A., Inc.*, the court also recognized that under *Restatement (Second) of Torts* § 311 (1965), "[a] party may recover for negligent misrepresentation involving a risk of physical harm only if actual physical harm results." *D.S.A, Inc.*, 973

S.W.2d at 664; *accord Sloane*, 825 S.W.2d at 443 n.4. For submission of negligent misrepresentation damages, see PJC 84.6.

PJC 61.5 Negligence of Nonmedical Professional

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. *Dora Dotson* _____
2. *Paul Payne* _____
3. *Sam Settlor* _____
4. *Responsible Ray* _____
5. *Connie Contributor* _____

COMMENT

When to use. PJC 61.5 is a broad-form question that should be appropriate in most nonmedical professional malpractice 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.

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." Tex. R. Civ. P. 277. 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. PJC 61.5 is designed to be accompanied by the appropriate definitions of "negligence," "ordinary care," and "proximate cause" in PJC 60.1. If the evidence raises "new and independent cause," the definitions in PJC 60.2 should be used in lieu of the definition of "proximate cause" in PJC 60.1.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 61.1.

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 61.5. Tex. Civ. Prac. & Rem. Code §§ 33.001–.017. See PJC 61.6 and 61.8.

Plaintiff must prove defendant's negligence caused loss. In a claim of legal malpractice, the plaintiff must prove that the defendant's negligence caused the loss. *Cosgrove v. Grimes*, 774 S.W.2d 662 (Tex. 1989); *Fireman's Fund American Insurance Co. v. Patterson & Lamberty, Inc.*, 528 S.W.2d 67 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.). Therefore, a client suing an attorney on the ground that the latter caused the former to lose a cause of action has the burden of proving that the original action would have been successful and the amount that would have been collected if a favorable judgment had been rendered. *Jackson v. Urban, Coolidge, Pennington & Scott*, 516 S.W.2d 948 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.); *see also Schlosser v. Tropoli*, 609 S.W.2d 255 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.); *Patterson & Wallace v. Frazer*, 79 S.W. 1077 (Tex. Civ. App. 1904, no writ). Thus, the plaintiff, in effect, is required to try two suits in one—a "suit within a suit." Because the plaintiff has not yet proved the essential elements of the underlying cause of action, no additional burden is imposed by this requirement. In similar instances, a plaintiff is required to plead and prove the underlying basis of the claim. *See Baker v. Goldsmith*, 582 S.W.2d 404, 409 (Tex. 1979) (burden of persuasion on original plaintiff to prove underlying cause of action in bill-of-review hearing aris-

ing from default judgment). For the appropriate damages question and accompanying instruction, see PJC 84.3 and 84.4.

Attorney impliedly represents he possesses necessary skills. An attorney engaging in the practice of law and contracting to represent a client as an attorney impliedly represents that he or she possesses the requisite degree of skill, learning, and ability that is necessary to practice the profession and that others similarly situated ordinarily possess; will exert his or her best judgment in the legal matter thus entrusted; and will exercise reasonable and ordinary care and diligence in applying the skill and knowledge at hand. *See Cook v. Irion*, 409 S.W.2d 475, 477 (Tex. Civ. App.—San Antonio 1966, no writ), *disapproved on other grounds*, *Cosgrove v. Grimes*, 774 S.W.2d 662, 664–65 (Tex. 1989); *Patterson & Wallace*, 79 S.W. at 1080–81. Note that the so-called good-faith doctrine, held by some courts of appeals to excuse attorneys' negligence in malpractice suits (*e.g., Cook*, 409 S.W.2d at 477), has been disapproved. *Cosgrove*, 774 S.W.2d at 665.

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 this volume.

Settling person, contribution defendant, or responsible third party. See PJC 61.2.

PJC 61.6 Proportionate Responsibility—Nonmedical Professional

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.	*Dora Dotson*	_____%
2.	*Paul Payne*	_____%
3.	*Sam Settlor*	_____%
4.	*Responsible Ray*	_____%
Total		100 %

COMMENT

When to use. Rule 277 requires a percentage question "[i]n any cause in which the jury is required to apportion the loss among the parties." Tex. R. Civ. P. 277. Thus, PJC 61.6 should be used if the issue of the responsibility of more than one party is submitted to the jury under Tex. Civ. Prac. & Rem. Code ch. 33. For cases in which there is a derivative claimant, see PJC 61.8.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 61.1. The term used in PJC 61.6 should match that used in PJC 61.5.

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.

Compare claimants separately. A separate comparative question should be submitted for each claimant. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011(1); *see also Haney Electric Co. v. Hurst*, 624 S.W.2d 602 (Tex. Civ. App.—Dallas 1981, writ dism'd by agr.). For claimants seeking derivative damages, see PJC 61.8.

Negligent misrepresentation. Section 552A of the *Restatement (Second) of Torts* (1977) recognizes contributory negligence as a defense in an action based on negligent misrepresentation to the recipient. While the *Restatement* recognizes it as a complete bar to recovery, the existing statutory scheme requires that contributory negligence be submitted on a comparative basis in actions founded on negligence. *See* Tex. Civ. Prac. & Rem. Code ch. 33.

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:

Settling person, contribution defendant, or responsible third party. See PJC 61.2.

PJC 61.7 Proportionate Responsibility If Contribution Defendant Is Joined—Nonmedical Professional

If you answered "Yes" to Question[*s*] _____ [*applicable liability question(s)*] for more than one of the persons 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.	*Dora Dotson*	_____%
2.	*Connie Contributor*	_____%
Total		100 %

COMMENT

When to use. PJC 61.7 is an additional comparative question designed to follow the comparative question in PJC 61.6 or 61.8. 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 responsibility of more than one defendant is submitted, separate percentage answers should not be sought for each defendant in PJC 61.7; 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 61.6 or 61.8, in which a separate answer is obtained for each defendant; seeking a second set of separate answers in PJC 61.7 might result in jury confusion or conflicting answers. The contribution responsibility of each defendant is determined by allo-

cating the percentage attributed to all defendants in answer to PJC 61.7 in proportion to the relative percentages found for each defendant in answer to PJC 61.6 or 61.8.

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

Use of "occurrence," "injury," or "occurrence or injury." See PJC 61.1. The term used in PJC 61.7 should match that used in PJC 61.5.

PJC 61.8 Proportionate Responsibility—Nonmedical Professional—Derivative Claimant

If you answered "Yes" to Question[*s*] _____ [*applicable liability question(s)*] for more than one of the persons 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.	*Dora Dotson*	_____%
2.	*Mary Minor*	_____%
3.	*Fred Father*	_____%
4.	*Sam Settlor*	_____%
5.	*Responsible Ray*	_____%
Total		100 %

COMMENT

When to use. Rule 277 requires a percentage question "[i]n any cause in which the jury is required to apportion the loss among the parties." Tex. R. Civ. P. 277. PJC 61.8 is designed to apportion loss in cases in which there is a derivative claimant—that is, a claimant suing for damages caused by injuries to another. In the example above, *Fred Father* is the derivative claimant and *Mary Minor* is the injured child. For PJC 61.8 to apply, the child must *not* be suing the parent. A separate comparative submission is required for the derivative claim. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011(1); *see also Haney Electric Co. v. Hurst*, 624 S.W.2d 602, 611 (Tex. Civ. App.—Dallas 1981, writ dism'd by agr.) (holding that "each plaintiff's claim must be

considered as if it were a separate suit"). PJC 61.8 applies to the derivative claim. For submission of the underlying claim against the defendant, see PJC 61.6.

Separate questions (such as PJC 61.8 and 61.6) are submitted because the responsibility of a derivative claimant (*Fred Father*) will not bar or diminish the recovery of the primary claimant (*Mary Minor*). On the other hand, the responsibility of *Mary Minor* will bar or diminish the recovery of both *Mary Minor* and *Fred Father*. For this reason, the percentage of responsibility of both *Mary Minor* and *Fred Father* must be considered in determining whether the recovery of *Fred Father* is barred or diminished.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 61.1. The term used in PJC 61.8 should match that used in PJC 61.5.

Liability question must also include name of derivative claimant. In cases involving a derivative claimant, the basic liability question must also include the name of the derivative claimant as well as that of the primary claimant.

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.

Settling person, contribution defendant, or responsible third party. See PJC 61.2.

PJC 61.9 Liability of Attorneys under Deceptive Trade Practices Act (Comment)

Attorneys may incur liability under the Texas Deceptive Trade Practices–Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–.63 ("DTPA"). *See Johnson v. DeLay*, 809 S.W.2d 552 (Tex. App.—Corpus Christi 1991, writ denied); *DeBakey v. Staggs*, 605 S.W.2d 631 (Tex. Civ. App.—Houston [1st Dist.] 1980), *writ ref'd n.r.e. per curiam*, 612 S.W.2d 924 (Tex. 1981).

The 1995 amendments to the DTPA exempted certain professional services ("the essence of which is the providing of advice, judgment, opinion, or similar professional skill") from DTPA coverage. The exemption does not shield attorneys from liability for acts that cannot be characterized as advice, judgment, or opinion and are (1) express misrepresentations of material facts, (2) failures to disclose information known at the time of the transaction if the failure to disclose was intended to induce the consumer into a transaction the consumer otherwise would not have entered, (3) unconscionable actions or courses of action, or (4) breaches of an express warranty. Tex. Bus. & Com. Code § 17.49(c). The "professional services" exemption applies to causes of action accruing after September 1, 1995, or causes of action accruing before that date but on which suit is not filed until on or after September 1, 1996.

See the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* for questions, instructions, and comments to be used in a case applying the DTPA.

[Chapters 62–64 are reserved for expansion.]

CHAPTER 65 PREMISES LIABILITY—DEFINITIONS AND INSTRUCTIONS

PJC 65.1 Application—Distinction between Premises Defect and Negligent Activity (Comment)

There are two types of premises liability cases: (1) those arising from a premises defect and (2) those arising from a negligent activity on the premises. *See Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523, 527 (Tex. 1997). The first type, premises defect, involves a defective condition on the premises. *Olivo*, 952 S.W.2d 523 (where plaintiff fell and landed on one of several drill pipe thread protectors that had been left on the ground, case involved a premises defect rather than a negligent activity). The second type, negligent activity, requires a claimant to have been injured by, or as a contemporaneous result of, the activity itself—not by a condition the activity created. *See Keetch v. Kroger Co.*, 845 S.W.2d 262, 264 (Tex. 1992) (plaintiff who slipped on floor may have been injured by a condition created by spraying but was not injured by the activity of spraying itself).

In *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 776 (Tex. 2010), the court stated, "We have recognized that negligent activity encompasses a malfeasance theory based on affirmative, contemporaneous conduct by the owner that caused the injury, while premises liability encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe." *See also Del Lago Partners, Inc.*, 307 S.W.3d at 789–90 (Wainwright, J., dissenting) (listing cases of each type).

Because the elements of these two premises liability theories are different, it is important to submit the questions, instructions, and definitions that are applicable to the particular theory. *See Saenz v. David & David Construction Co.*, 52 S.W.3d 807, 812 (Tex. App.—San Antonio 2001, pet. denied) (because plaintiff's claim involved a negligent activity, trial court did not err in denying plaintiff's request to submit a premises-defect question). Therefore:

- In negligent-activity cases, the questions, instructions, and definitions in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—General Negligence & Intentional Personal Torts* should be used. If right-to-control issues are present in the case, PJC 66.3 in this volume should precede such questions.
- In premises-defect cases, the questions, instructions, and definitions in chapters 65 and 66 in this volume should be used.
- In both negligent-activity and premises-defect cases governed by Texas Civil Practice and Remedies Code chapter 95, PJC 66.14 in this volume should be used.

PJC 65.2 Negligence and Ordinary Care of Plaintiffs or of Defendants Other Than Owners or Occupiers of Premises

"Negligence," when used with respect to the conduct of [*Paul Payne*] [*Don Davis*], 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," when used with respect to the conduct of [*Paul Payne*] [*Don Davis*], 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. The standard of care of a defendant who is an owner or occupier of a premises is included in the liability question. See, e.g., PJC 66.4. PJC 65.2 should be used to submit the conduct of other parties, such as a contributorily negligent plaintiff or a third-party defendant who is not an owner or occupier of a premises. *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). See also PJC 65.3 for a child's standard of care. The Committee recommends that if more than one standard of care is submitted, the different standards should identify the appropriate party by name.

PJC 65.3 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); *see also Rudes v. Gottschalk*, 324 S.W.2d 201, 204 (Tex. 1959). 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 456; *City of Austin v. Hoffman*, 379 S.W.2d 103, 107 (Tex. Civ. App.—Austin 1964, no writ).

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 65.4 or 65.5. *See Rudes*, 324 S.W.2d at 207; *MacConnell v. Hill*, 569 S.W.2d 524, 528 (Tex. Civ. App.—Corpus Christi 1978, no writ).

Additional instruction in comparative question 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.

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 65.4 Proximate Cause—Premises

"Proximate cause" means a cause that was a substantial factor in bringing about an [*occurrence*] [*injury*] [*occurrence or injury*], and without which cause such [*occurrence*] [*injury*] [*occurrence or injury*] 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 [*occurrence*] [*injury*] [*occurrence or injury*], or some similar [*occurrence*] [*injury*] [*occurrence or injury*], might reasonably result therefrom. There may be more than one proximate cause of an [*occurrence*] [*injury*] [*occurrence or injury*].

COMMENT

Source of definition. 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, 222–23 (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 65.4. 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. PJC 65.4 should be used in every premises case in which the cause of action requires that the negligence be a proximate cause of the occurrence or injury. For discussion of the element of "foreseeability," see *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 478 (Tex. 1995), and *Carey v. Pure Distributing Corp.*, 124 S.W.2d 847, 849 (Tex. 1939). If there is evidence of a "new and independent cause," the definitions in PJC 65.5 should be used in lieu of the definition above. If "sole proximate cause" is raised by the evidence, see PJC 65.6.

Modify if "ordinary care" not applicable to all. In a case involving more than one standard of care (see PJC 65.2 and 65.3), the phrase *the degree of care required of him* should replace the phrase *ordinary care. See Rudes*, 324 S.W.2d at 206–07.

PJC 65.5 New and Independent Cause—Premises

"Proximate cause" means a cause, unbroken by any new and independent cause, that was a substantial factor in bringing about an [*occurrence*] [*injury*] [*occurrence or injury*], and without which cause such [*occurrence*] [*injury*] [*occurrence or injury*] 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 [*occurrence*] [*injury*] [*occurrence or injury*], or some similar [*occurrence*] [*injury*] [*occurrence or injury*], might reasonably result therefrom. There may be more than one proximate cause of an [*occurrence*] [*injury*] [*occurrence or injury*].

"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 65.4. PJC 65.5 should be used in lieu of PJC 65.4 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. In a case involving more than one standard of care (see PJC 65.2 and 65.3), 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 65.6 Sole Proximate Cause—Premises

There may be more than one proximate cause of an [*occurrence*] [*injury*] [*occurrence or injury*], but if an act or omission of any person not a party to the suit was the "sole proximate cause" of an [*occurrence*] [*injury*] [*occurrence or injury*], 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 proximate cause definition. PJC 65.6 should be used in lieu of the last sentence of the definition of "proximate cause" (see PJC 65.4) 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, 432 (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 65.7 Unavoidable Accident

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

COMMENT

When to use—given immediately after definition of "proximate cause." PJC 65.7 should be given immediately after the definition of "proximate cause" in PJC 65.4 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 65.8 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 65.8 should be given immediately after the definition of "proximate cause" in PJC 65.4 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 65.7 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 65.8 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, 432 (Tex. 2005).

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

PJC 65.9 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 65.9 should be given immediately after the definition of "negligence" 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 (Tex. 1978); *Yarborough v. Berner*, 467 S.W.2d 188 (Tex. 1971). *See generally Thomas v. Oldham*, 895 S.W.2d 352, 360 (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 66.1 Use of "Occurrence," "Injury," or "Occurrence or Injury" (Comment)

Pleadings and proof determine choice. The pleadings and proof in each case will determine the choice of the terms "occurrence," "injury," or "occurrence or injury" in the questions in this chapter. The choice 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 the liability and proportionate responsibility questions if "occurrence" is used, while it should consider the negligence if "injury" is used. Also, in an appropriate case, the word "death" may replace "injury."

Proportionate responsibility statute. The passage of the comparative (now named "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. Tex. Civ. Prac. & Rem. Code § 33.003. "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.

Distinctions affect how to submit conduct. 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 proportionate responsibility 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.

Interplay between use of "occurrence" or "injury" and use of exclusionary instruction in submitting damages questions. Submitting "occurrence" in conjunction with the appropriate exclusionary instruction in PJC 80.7 or 80.9 may resolve

any uncertainty about using "injury" or "occurrence" in a given case. But note that if the liability question is submitted with the term "injury," an exclusionary instruction should not be submitted.

PJC 66.2 Submission of Settling Persons, Contribution Defendants, and Responsible Third Parties (Comment)

Settling persons. The proportionate responsibility statute requires the responsibility of a settling person (*Sam Settlor*) to be determined by the trier of fact. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. Thus, if the case includes a settling person, that person's name must be included in the basic liability question as well as in the proportionate responsibility question.

Contribution defendants. 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 contribution defendant should *not* be included in the question comparing the responsibility of the plaintiff with that of the other defendants. A separate comparative question is necessary. See PJC 66.12.

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 66.11.

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).

PJC 66.3 Premises Liability Based on Negligent Activity or Premises Defect—Right to Control

QUESTION _____

Did [*the general contractor*] [*the property owner*] exercise or retain some control over the manner in which [*the injury-causing activity*] [*the defect-producing work*] was performed, other than the right to order the work to start or stop or to inspect progress or receive reports?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 66.3 is a predicate to the appropriate liability question in common-law cases brought against a general contractor or property owner for (1) the negligent activity of an independent contractor or (2) a premises defect created by an independent contractor's work. *See Dow Chemical Co. v. Bright*, 89 S.W.3d 602 (Tex. 2002); *Lee Lewis Construction, Inc. v. Harrison*, 70 S.W.3d 778 (Tex. 2001); *Clayton W. Williams, Jr., Inc. v. Olivo*, 952 S.W.2d 523 (Tex. 1997). In such cases, the injured plaintiff must establish *both* the general contractor or property owner's right of control over the injury-causing activity or defect-producing work that gives rise to a duty to ensure that the independent contractor performs its work safely, *and* a breach of that duty. In cases involving property owners that qualify for the protections available under chapter 95 of the Texas Civil Practice and Remedies Code, PJC 66.14 should be used. In premises defect cases not governed by chapter 95, the above question should immediately precede PJC 66.4.

Substitute name of general contractor or property owner. The name of the general contractor or property owner should be substituted for the italicized phrase in the charge.

Substitute particular activity or work. Terms describing the particular activity alleged to have caused the injury or work alleged to have produced the defect should be substituted for the italicized phrase in the charge.

Caveat. "A general contractor can retain the right to control an aspect of an independent contractor's work or project so as to give rise to a duty of care to that independent contractor's employees in two ways: by contract or by actual exercise of control." *Lee Lewis Construction, Inc.*, 70 S.W.3d at 783. The court acknowledged that it had used the phrases "right of control" or "retained control" interchangeably. "The distinction remains important, however, because determining what a contract says is gener-

ally a question of law for the court, while determining whether someone exercised actual control is generally a question of fact for the jury." *Lee Lewis Construction, Inc.*, 70 S.W.3d at 783; *see also Shell Oil Co. v. Khan*, 138 S.W.3d 288, 292 (Tex. 2004). Therefore, if the case does not involve a contractual retention of the right of control or if the trial court rules as a matter of law that the general contractor or premises owner did not retain a contractual right to control, the parties should omit the phrase "or retain" from the question and submit to the jury only the issue of actual exercise of control. If the trial court rules as a matter of law that the general contractor or owner did retain a contractual right of control, this question may not need to be submitted unless a fact issue exists with respect to actual exercise of control. *See, e.g., Elliott-Williams Co. v. Diaz*, 9 S.W.3d 801, 804 (Tex. 1999) (if right of control has contractual basis, circumstance of no actual exercise of control will not absolve contractor of liability).

Source of question. PJC 66.3 is based on section 95.003 of the Civil Practice and Remedies Code ("Liability for Acts of Independent Contractors").

PJC 66.4 Premises Liability—Plaintiff Is Invitee

QUESTION _____

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

With respect to the condition of the premises, *Don Davis* was negligent if—

1. *the condition* posed an unreasonable risk of harm, and

2. *Don Davis* knew or reasonably should have known of the danger, and

3. *Don Davis* failed to exercise ordinary care to protect *Paul Payne* from the danger, by both failing to adequately warn *Paul Payne* of *the condition* and failing to make that condition reasonably safe.

"Ordinary care," when used with respect to the conduct of *Don Davis* as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

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 66.4 is a broad-form question that should be appropriate in most premises liability cases in which it is undisputed that the plaintiff was an invitee. *See Dallas Market Center Development Co. v. Liedeker*, 958 S.W.2d 382, 385 (Tex. 1997), *overruled in part on other grounds by Torrington Co. v. Stutzman*, 46 S.W.3d 829, 840 (Tex. 2000); *State v. Williams*, 940 S.W.2d 583, 584–85 (Tex. 1997).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospi-*

tal, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Accompanying question. In cases against a general contractor for premises defects created by an independent contractor's work activity, PJC 66.3 should immediately precede this question if there is a dispute about the general contractor's right to control the manner in which the work was performed. *See Saenz v. David & David Construction Co.*, 52 S.W.3d 807, 813 (Tex. App.—San Antonio 2001, pet. denied).

Accompanying definitions and instructions. PJC 66.4 is designed to be accompanied by the appropriate definitions of the standard of care and "proximate cause" set out in PJC 65.2–65.4. PJC 65.2 should be used when the conduct of a contributorily negligent plaintiff or a defendant who is not an owner or occupier of a premises is also to be considered by the jury. PJC 65.3 should be used for a child's standard of care. If the evidence raises "new and independent cause," the definitions in PJC 65.5 should be used in lieu of the definition of "proximate cause" in PJC 65.4.

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 66.4. Tex. Civ. Prac. & Rem. Code §§ 33.001–.017. See PJC 66.11 and 66.13.

Plaintiff's status as to easement holder defendant. The plaintiff's status as to an easement holder defendant depends on whether the easement is exclusive or nonexclusive. An exclusive easement gives the holder the right to exclusive possession; conversely, a nonexclusive easement does not convey the right to exclude others from the easement. If a plaintiff sues a nonexclusive easement holder, his status as to the landowner is determinative—that is, if the plaintiff is an invitee as to the landowner, then he will be an invitee as to the easement holder. If a plaintiff sues an exclusive easement holder, then his status depends on his relationship to the easement holder, not to the landowner. *Hernandez v. Heldenfels*, 374 S.W.2d 196 (Tex. 1963); *Roberts v. Friendswood Development Co.*, 886 S.W.2d 363 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Phillips Pipe Line Co. v. Razo*, 409 S.W.2d 565 (Tex. Civ. App.—Tyler 1966), *rev'd on other grounds*, 420 S.W.2d 691 (Tex. 1967); *Denton County Electric Co-operative v. Burkholder*, 354 S.W.2d 639 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

Derivative claimant. In cases involving a derivative claimant (see PJC 66.13), the above question must also include the name of the derivative claimant along with that of the primary claimant.

Condition must create unreasonable risk resulting in physical harm. Only a condition creating an unreasonable risk that results in physical harm will impose liability on the possessor of a premises. Some conditions have been held, as a matter of

law, not to create unreasonable risks. *See, e.g., Scott & White Memorial Hospital v. Fair*, 310 S.W.3d 411, 419 (Tex. 2010) (accumulation of mud or ice); *Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161 (Tex. 2007) (ramp at auto dealership); *H.E. Butt Grocery Co. v. Resendez*, 988 S.W.2d 218 (Tex. 1999) (per curiam) (customer sampling display); *Seideneck v. Cal Bayreuther Associates*, 451 S.W.2d 752 (Tex. 1970) (throw rug).

Substitute particular condition. If it is agreed that the case involves only one condition, the Committee recommends that the particular condition (e.g., *a grape on the floor*) be substituted for the phrase *the condition*.

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 this volume.

Settling person, contribution defendant, or responsible third party. See PJC 66.2.

PJC 66.5 Premises Liability—Plaintiff Is Licensee

QUESTION _____

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

With respect to the condition of the premises, *Don Davis* was negligent if—

1. *the condition* posed an unreasonable risk of harm, and
2. *Don Davis* had actual knowledge of the danger, and
3. *Paul Payne* did not have actual knowledge of the danger, and
4. *Don Davis* failed to exercise ordinary care to protect *Paul Payne* from the danger, by both failing to adequately warn *Paul Payne* of *the condition* and failing to make that condition reasonably safe.

"Ordinary care," when used with respect to the conduct of *Don Davis* as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

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 66.5 is a broad-form question that should be appropriate in most premises liability cases in which it is undisputed that the plaintiff was a licensee. *See State v. Williams*, 940 S.W.2d 583, 584–85 (Tex. 1997).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for

wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Accompanying definitions and instructions. The standard of care of a defendant owner or occupier of a premises is set out in the above instruction. *Williams*, 940 S.W.2d at 584. PJC 65.2 should be used when the conduct of a contributorily negligent plaintiff or a defendant who is not an owner or occupier of a premises is also to be considered by the jury. PJC 65.3 should be used for a child's standard of care. The definition of "proximate cause" is set out in PJC 65.4. If the evidence raises "new and independent cause," the definitions in PJC 65.5 should be used in lieu of the definition of "proximate cause" in PJC 65.4.

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 66.5. Tex. Civ. Prac. & Rem. Code §§ 33.001–.017. See PJC 66.11 and 66.13.

Plaintiff's status as to easement holder defendant. The plaintiff's status as to an easement holder defendant depends on whether the easement is exclusive or nonexclusive. An exclusive easement gives the holder the right to exclusive possession; conversely, a nonexclusive easement does not convey the right to exclude others from the easement. If a plaintiff sues a nonexclusive easement holder, his status as to the landowner is determinative—that is, if the plaintiff is an invitee as to the landowner, then he will be an invitee as to the easement holder. If a plaintiff sues an exclusive easement holder, then his status depends on his relationship to the easement holder, not to the landowner. *Hernandez v. Heldenfels*, 374 S.W.2d 196 (Tex. 1963); *Roberts v. Friendswood Development Co.*, 886 S.W.2d 363 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Phillips Pipe Line Co. v. Razo*, 409 S.W.2d 565 (Tex. Civ. App.—Tyler 1966), *rev'd on other grounds*, 420 S.W.2d 691 (Tex. 1967); *Denton County Electric Co-operative v. Burkholder*, 354 S.W.2d 639 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

Derivative claimant. In cases involving a derivative claimant (see PJC 66.13), the above question must also include the name of the derivative claimant along with that of the primary claimant.

Condition must create unreasonable risk resulting in physical harm. Only a condition creating an unreasonable risk that results in physical harm will impose liability on the possessor of a premises. Some conditions have been held, as a matter of law, not to create unreasonable risks. *See, e.g., Scott & White Memorial Hospital v. Fair*, 310 S.W.3d 411, 419 (Tex. 2010) (accumulation of mud or ice); *Brinson Ford, Inc. v. Alger*, 228 S.W.3d 161 (Tex. 2007) (ramp at auto dealership); *H.E. Butt Grocery Co. v. Resendez*, 988 S.W.2d 218 (Tex. 1999) (per curiam) (customer sampling dis-

play); *Seideneck v. Cal Bayreuther Associates*, 451 S.W.2d 752 (Tex. 1970) (throw rug).

Substitute particular condition. If it is agreed that the case involves only one condition, the Committee recommends that the particular condition (e.g., *a grape on the floor*) be substituted for the phrase *the condition.*

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 this volume.

Settling person, contribution defendant, or responsible third party. See PJC 66.2.

PJC 66.6 Premises Liability—Plaintiff's Status in Dispute

QUESTION _____

On the occasion in question, was *Paul Payne an invitee* on that part of *Don Davis*'s premises under consideration?

An "invitee" is a person who is on the premises at the express or implied invitation of the possessor of the premises and who has entered thereon either as a member of the public for a purpose for which the premises are held open to the public or for a purpose connected with the business of the possessor that does or may result in their mutual economic benefit.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. If there is no dispute about the plaintiff's status, PJC 66.6 is unnecessary. See PJC 66.4 or 66.5. However, if the plaintiff claims only invitee status but the defendant argues that the plaintiff was not an invitee, PJC 66.6 should be submitted followed by PJC 66.4, conditioned on the answer to PJC 66.6.

Plaintiff's status as to easement holder defendant. The plaintiff's status as to an easement holder defendant depends on whether the easement is exclusive or nonexclusive. An exclusive easement gives the holder the right to exclusive possession; conversely, a nonexclusive easement does not convey the right to exclude others from the easement. If a plaintiff sues a nonexclusive easement holder, his status as to the landowner is determinative—that is, if the plaintiff is an invitee as to the landowner, then he will be an invitee as to the easement holder. If a plaintiff sues an exclusive easement holder, then his status depends on his relationship to the easement holder, not to the landowner. *Hernandez v. Heldenfels*, 374 S.W.2d 196 (Tex. 1963); *Roberts v. Friendswood Development Co.*, 886 S.W.2d 363 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Phillips Pipe Line Co. v. Razo*, 409 S.W.2d 565 (Tex. Civ. App.—Tyler 1966), *rev'd on other grounds*, 420 S.W.2d 691 (Tex. 1967); *Denton County Electric Co-operative v. Burkholder*, 354 S.W.2d 639 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

Modify if claimed licensee status in dispute. If the plaintiff claims only that he was a licensee but the defendant argues that the plaintiff was a trespasser, PJC 66.6 may be modified by substituting the phrase *a licensee* for *an invitee* in the question and the following definition for that given above:

> A "licensee" is a person on the premises with the permission of the possessor but without an express or implied invitation. Such person is on the premises only because the possessor has allowed him to enter and not because of any business or contractual relations with, or enticement, allurement, or inducement to enter by, the possessor.

Invitee on one part of premises; licensee on another. A person may be an invitee on one part of the premises and a licensee on another or a licensee on one part and a trespasser on another. *Burton Construction & Shipbuilding Co. v. Broussard*, 273 S.W.2d 598, 602–03 (Tex. 1954). If the plaintiff's status on a particular part of the premises is not in dispute, the phrases "that part of" and "under consideration" in the above question should be deleted.

PJC 66.7 Premises Liability—Disjunctive Submission of Invitee-Licensee for Alternate Theories of Recovery

QUESTION _____

On the occasion in question, was *Paul Payne an invitee* or a *licensee* on that part of *Don Davis*'s premises under consideration?

An "invitee" is a person who is on the premises at the express or implied invitation of the possessor of the premises and who has entered thereon either as a member of the public for a purpose for which the premises are held open to the public or for a purpose connected with the business of the possessor that does or may result in their mutual economic benefit. One who is an invitee cannot be a licensee at the same time.

A "licensee" is a person on the premises with the permission of the possessor but without an express or implied invitation. Such person is on the premises only because the possessor has allowed him to enter and not because of any business or contractual relations with, or enticement, allurement, or inducement to enter by, the possessor.

Answer "*invitee*" or "*licensee.*"

Answer: _____

COMMENT

When to use. PJC 66.7 is appropriate if the plaintiff seeks to recover on alternate theories of liability—that is, that he was either an invitee or a licensee. In such event, licensee status is *not* in the nature of an inferential rebuttal, and disjunctive submission is proper under Tex. R. Civ. P. 277 if the evidence shows that the plaintiff must be either an invitee or a licensee. *Cf. Archuleta v. International Insurance Co.*, 667 S.W.2d 120 (Tex. 1984) (in worker's compensation suit, proper to ask about total and partial incapacity as alternate theories; inquiry about partial incapacity improper inferential rebuttal if only total incapacity claimed).

Modify if claimed licensee status in dispute. If the plaintiff claims he was a licensee but the defendant argues that the plaintiff was a trespasser, PJC 66.7 may be modified by substituting the words *a licensee* for *an invitee* and *trespasser* for *licensee* in the question, *licensee* for *invitee* and *trespasser* for *licensee* in the answer-instruction, and the following definitions for those given above:

> A "licensee" is a person on the premises with the express or implied permission of the possessor. One who is a licensee cannot be a trespasser at the same time.
>
> A "trespasser" is a person on the property of another without any right, lawful authority, or express or implied invitation, permission, or license, not in the performance of any duty to the owner or person in charge or on any business of such person, but merely for his own purposes, pleasure, or convenience or out of curiosity and without enticement, allurement, inducement, or express or implied assurance of safety from the owner or person in charge.

The above definitions are based on those in *Texas-Louisiana Power Co. v. Webster*, 91 S.W.2d 302, 306 (Tex. 1936); *see also Wilen v. Falkenstein*, 191 S.W.3d 791, 803–04 (Tex. App.—Fort Worth 2006, pet. denied).

Invitee on one part of premises; licensee on another. A person may be an invitee on one part of the premises and a licensee on another or a licensee on one part and a trespasser on another. *Burton Construction & Shipbuilding Co. v. Broussard*, 273 S.W.2d 598, 602–03 (Tex. 1954). If the plaintiff's status on a particular part of the premises is not in dispute, the phrases "that part of" and "under consideration" in the above question should be deleted.

Answer determines which liability question follows. PJC 66.7 is designed to function as a predicate to the appropriate liability question. Therefore, after answering the above question, the jury should be directed to answer either PJC 66.4 (plaintiff is invitee) or PJC 66.5 (plaintiff is licensee), whichever is appropriate.

PJC 66.8 Premises Liability—Plaintiff-Licensee Injured by Gross Negligence

QUESTION _____

Was *Don Davis*'s gross negligence, if any, a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

Don Davis was grossly negligent with respect to the condition of the premises if—

1. *the condition* posed an unreasonable risk of harm, and

2. *Don Davis* both failed to adequately warn *Paul Payne* of the danger and failed to make that condition reasonably safe, and

3. *Don Davis*'s conduct was more than momentary thoughtlessness, inadvertence, or error of judgment. In other words, *Don Davis* must have either known or been substantially certain that the result or a similar result would occur, or *he* must have displayed 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 persons affected by it.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 66.8 presents a ground of recovery independent of that found in PJC 66.4 or 66.5. It may be used as a basis for recovery of actual damages in a case in which the plaintiff-licensee claims to have been injured as a result of the defendant's gross negligence. The possessor of premises owes to the licensee the duty not to injure him by willful or wanton conduct or gross negligence. *State v. Tennison*, 509 S.W.2d 560, 562 (Tex. 1974); *Carlisle v. J. Weingarten, Inc.*, 152 S.W.2d 1073, 1074 (Tex. 1941); *see also Jannette v. Deprez*, 701 S.W.2d 56, 59 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (in premises case, defendant's gross negligence may be compared with plaintiff's ordinary negligence). This position differs from that found in *Restatement (Second) of Torts* §§ 341, 342 (1965).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospi-*

tal, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Substitute particular condition. If it is agreed that the case involves only one condition, the Committee recommends that the particular condition (e.g., *a grape on the floor*) be substituted for the phrase *the condition*.

Source of instruction. That portion of the above instruction relating to gross negligence (see element 3) is taken 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. The Committee has not employed the language of Tex. Civ. Prac. & Rem. Code § 41.001, which defines "malice" as a basis for recovering punitive damages. An affirmative answer by the jury to the above question provides a basis for recovering only actual damages. If a plaintiff desires to seek both actual and punitive damages in a case arising after September 1, 1995, then both the above submission and the submission in PJC 85.3B or 85.3C would be required, with the latter submission being conditioned on an affirmative response to the former.

PJC 66.9 Premises Liability—Plaintiff Is Trespasser

QUESTION _____

Was *Don Davis*'s gross negligence, if any, a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

Don Davis was grossly negligent with respect to the condition of the premises if—

1. *the condition* posed an unreasonable risk of harm, and

2. *Don Davis* both failed to adequately warn *Paul Payne* of the danger and failed to make that condition reasonably safe, and

3. *Don Davis*'s conduct was more than momentary thoughtlessness, inadvertence, or error of judgment. In other words, *Don Davis* must have either known or been substantially certain that the result or a similar result would occur, or *he* must have displayed 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 persons affected by it.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 66.9 may be used in a suit in which the plaintiff-trespasser sues a premises defendant for gross negligence. *See Jannette v. Deprez*, 701 S.W.2d 56, 59 (Tex. App.—Dallas 1985, writ ref'd n.r.e.) (in premises case, defendant's gross negligence may be compared with plaintiff's ordinary negligence).

PJC 66.9 also may be adapted for use in suits under the Texas recreational use statute, Tex. Civ. Prac. & Rem. Code ch. 75, which elevates the plaintiff's status to that of a trespasser. *See* Tex. Civ. Prac. & Rem. Code § 75.002. For a discussion of the standard of care owed to recreational users of property asserting premises liability claims under chapter 75, see *State v. Shumake*, 199 S.W.3d 279 (Tex. 2006) (holding that Tex. Civ. Prac. & Rem. Code ch. 41 gross negligence standard, rather than common-law trespasser standard, applies under ch. 75). Predicate questions submitting other conditions necessary to incur liability under the recreational use statute may also be required.

Plaintiff's status as to easement holder defendant. The plaintiff's status as to an easement holder defendant depends on whether the easement is exclusive or nonex-

clusive. An exclusive easement gives the holder the right to exclusive possession; conversely, a nonexclusive easement does not convey the right to exclude others from the easement. If a plaintiff sues a nonexclusive easement holder, his status as to the landowner is determinative—that is, if the plaintiff is an invitee as to the landowner, then he will be an invitee as to the easement holder. If a plaintiff sues an exclusive easement holder, then his status depends on his relationship to the easement holder, not to the landowner. *Hernandez v. Heldenfels*, 374 S.W.2d 196 (Tex. 1963); *Roberts v. Friendswood Development Co.*, 886 S.W.2d 363 (Tex. App.—Houston [1st Dist.] 1994, no writ); *Phillips Pipe Line Co. v. Razo*, 409 S.W.2d 565 (Tex. Civ. App.—Tyler 1966), *rev'd on other grounds*, 420 S.W.2d 691 (Tex. 1967); *Denton County Electric Cooperative v. Burkholder*, 354 S.W.2d 639 (Tex. Civ. App.—Fort Worth 1962, writ ref'd n.r.e.).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Substitute particular condition. If it is agreed that the case involves only one condition, the Committee recommends that the particular condition (e.g., *a grape on the floor*) be substituted for the phrase *the condition*.

Accompanying definitions and instructions. The standard of care of a defendant owner or occupier of a premises is set out in the above instruction. PJC 65.2 should be used when the conduct of a contributorily negligent plaintiff or a defendant who is not an owner or occupier of a premises is also to be considered by the jury. PJC 65.3 should be used for a child's standard of care. The definition of "proximate cause" is set out in PJC 65.4. If the evidence raises "new and independent cause," the definitions in PJC 65.5 should be used in lieu of the definition of "proximate cause" in PJC 65.4.

Source of instruction. That portion of the above instruction relating to gross negligence (see element 3) is taken 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. The Committee has not employed the language of Tex. Civ. Prac. & Rem. Code § 41.001, which defines "malice" as a basis for recovering punitive damages. An affirmative answer by the jury to the above question provides a basis for recovering only actual damages. If a plaintiff desires to seek both actual and punitive damages in a case arising after September 1, 1995, then both the above submission and the submission in PJC 85.3B or 85.3C would be required, with the latter submission being conditioned on an affirmative response to the former.

PJC 66.10 Premises Liability—Attractive Nuisance

QUESTION 1

On the occasion in question, did *Don Davis* know or should *he* have known that children were likely to be present on or about *the oil derrick*?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to Question 1, then answer Question 2. Otherwise, do not answer Question 2.

QUESTION 2

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

With respect to the condition of the premises, *Don Davis* was negligent if—

1. *the condition* posed an unreasonable risk of harm, and

2. *Don Davis* knew or reasonably should have known of the danger, and

3. *Don Davis* failed to exercise ordinary care to protect *Paul Payne, Jr.* from the danger, by both failing to adequately warn *Paul Payne, Jr.* of *the condition* and failing to make that condition reasonably safe.

"Ordinary care," when used with respect to the conduct of *Don Davis* as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No" for each of the following:

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

COMMENT

When to use. PJC 66.10 may be used if the plaintiff seeks to impose liability on the owner or occupier for harm caused to trespassing children by structures or other artificial conditions on the premises. It is immaterial whether the child was attracted to the premises by the structure or artificial condition as long as the presence of the child should have been reasonably anticipated. *Eaton v. R.B. George Investments, Inc.*, 260 S.W.2d 587, 590 (Tex. 1953); *Banker v. McLaughlin*, 208 S.W.2d 843, 847 (Tex. 1948).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1.

Substitute particular attractive nuisance. The alleged attractive nuisance should be substituted for the phrase *the oil derrick* in Question 1.

Accompanying definitions and instructions. PJC 66.10 is designed to be accompanied by the appropriate definitions of the standard of care and "proximate cause" set out in PJC 65.2–65.4. PJC 65.2 should be used when the conduct of a contributorily negligent plaintiff or a defendant who is not an owner or occupier of a premises is also to be considered by the jury. PJC 65.3 should be used for a child's standard of care. If the evidence raises "new and independent cause," the definitions in PJC 65.5 should be used in lieu of the definition of "proximate cause" in PJC 65.4.

Derivative claimant. In cases involving a derivative claimant (see PJC 66.13), the above question must also include the name of the derivative claimant along with that of the primary claimant.

Age of child. Whether the child is within the age bracket to be protected by the doctrine is a law question. Children under fourteen or fifteen years of age, depending on the type of dangerous condition, normally are included. *Massie v. Copeland*, 233 S.W.2d 449 (Tex. 1950); *McCoy v. Texas Power & Light Co.*, 239 S.W. 1105 (Tex. Comm'n App. 1922, judgm't adopted); *Johns v. Fort Worth Power & Light Co.*, 30 S.W.2d 549 (Tex. Civ. App.—Fort Worth 1930, writ ref'd). *But see Texas Utilities Electric Co. v. Timmons*, 947 S.W.2d 191, 193–96 (Tex. 1997) (doctrine did not apply to fourteen-year-old electrocuted on electrical tower).

Whether the contributory negligence of a child should be submitted to the jury depends on the age of the child. As a matter of law, a child four years and ten months of age is not contributorily negligent. *Yarborough v. Berner*, 467 S.W.2d 188 (Tex. 1971). If the child is five years old, a jury issue is presented. *Gulf Production Co. v. Quisenberry*, 97 S.W.2d 166 (Tex. 1936). If the contributory negligence of a child of "tender years" is submitted, the definitions of "ordinary care" and "negligence" used with regard to the child should conform to PJC 65.3.

Condition or location in dispute. The foregoing questions assume that there is no dispute that the condition giving rise to the event was in fact located on premises

for which the defendant is legally responsible. If this matter is controverted, an appropriate question may be submitted.

Caveat. In *Eaton*, 260 S.W.2d 587, the court relied heavily on *Restatement of Torts* § 339 subpara. (c) (1934) (carried forward in *Restatement (Second) of Torts* (1965)), which requires for liability that "the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it." *Eaton*, 260 S.W.2d at 589–90; *see also Texas Utilities Electric Co.*, 947 S.W.2d 191.

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 this volume.

Settling person, contribution defendant, or responsible third party. See PJC 66.2.

PJC 66.11 Premises Liability—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 "[i]n any cause in which the jury is required to apportion the loss among the parties." Tex. R. Civ. P. 277. Thus, PJC 66.11 should be used in a premises case if the issue of the responsibility of more than one party is submitted to the jury under Tex. Civ. Prac. & Rem. Code ch. 33. For cases in which there is a derivative claimant, see PJC 66.13.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1. The term used in PJC 66.11 should match that used in the liability question.

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.

Compare claimants separately. A separate comparative question should be submitted for each claimant. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011(1); *see also Haney Electric Co. v. Hurst*, 624 S.W.2d 602, 611 (Tex. Civ. App.—Dallas 1981, writ dism'd by agr.). For claimants seeking derivative damages, see PJC 66.13.

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:

Settling person, contribution defendant, or responsible third party. See PJC 66.2.

PJC 66.12 Premises Liability—Proportionate Responsibility If Contribution Defendant Is Joined

If you answered "Yes" to Question[*s*] _____ [*applicable liability question(s)*] for more than one of the persons 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 66.12 is an additional comparative question designed to follow the comparative question in PJC 66.11 or 66.13. 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 responsibility of more than one defendant is submitted, separate percentage answers should not be sought for each defendant in PJC 66.12. 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 66.11 or 66.13, in which a separate answer is obtained for each defendant; seeking a second set of separate answers in PJC 66.12 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 66.12 in proportion to the relative percentages found for each defendant in answer to PJC 66.11 or 66.13.

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

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1. The term used in PJC 66.12 should match that used in the liability question.

PJC 66.13 Premises Liability—Proportionate Responsibility—Derivative Claimant

If you answered "Yes" to Question[*s*] _____ [*applicable liability question(s)*] for more than one of the persons 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.	*Mary Minor*	_____%
3.	*Fred Father*	_____%
4.	*Sam Settlor*	_____%
5.	*Responsible Ray*	_____%
Total		100 %

COMMENT

When to use. Rule 277 requires a percentage question "[i]n any cause in which the jury is required to apportion the loss among the parties." Tex. R. Civ. P. 277. PJC 66.13 is designed to apportion loss in cases in which there is a derivative claimant—that is, a claimant suing for damages caused by injuries to another. In the example above, *Fred Father* is the derivative claimant and *Mary Minor* is the injured child. For PJC 66.13 to apply, the child must *not* be suing the parent. A separate comparative submission is required for the derivative claim. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011(1); *see also Haney Electric Co. v. Hurst*, 624 S.W.2d 602, 611 (Tex. Civ. App.—Dallas 1981, writ dism'd by agr.) (holding that "each plaintiff's claim

must be considered as if it were a separate suit"). PJC 66.13 applies to the derivative claim. For submission of the underlying claim against the defendant, see PJC 66.11.

Separate questions (such as PJC 66.11 and 66.13) are submitted because the responsibility of a derivative claimant (*Fred Father*) will not bar or diminish the recovery of the primary claimant (*Mary Minor*). On the other hand, the responsibility of *Mary Minor* will bar or diminish the recovery of both *Mary Minor* and *Fred Father*. For this reason, the percentage of responsibility of both *Mary Minor* and *Fred Father* must be considered in determining whether the recovery of *Fred Father* is barred or diminished.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1. The term used in PJC 66.13 should match that used in the liability question.

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.

Liability questions must also include derivative claimant. In cases involving a derivative claimant, the basic liability questions must also include the name of the derivative claimant along with that of the primary claimant.

Settling person, contribution defendant, or responsible third party. See PJC 66.2.

PJC 66.14 Property Owner's Liability to Contractors, Subcontractors, or Their Employees (Tex. Civ. Prac. & Rem. Code ch. 95)

QUESTION _____

Did *Olivia Owner* exercise or retain some control over the manner in which [*the injury-causing*] [*the defect-producing*] work was performed, other than the right to order the work to start or stop or to inspect progress or receive reports?

Answer "Yes" or "No."

Answer: _____

If you answered "Yes" to the above question, then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Did the negligence, if any, of *Olivia Owner* proximately cause the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

With respect to the condition of the premises, *Olivia Owner* was negligent if—

1. *the condition* posed an unreasonable risk of harm, and
2. *Olivia Owner* had actual knowledge of the danger, and
3. *Olivia Owner* failed to exercise ordinary care to protect *Paul Payne* from the danger, by both failing to adequately warn *Paul Payne* of *the condition* and failing to make that condition reasonably safe.

"Ordinary care," when used with respect to the conduct of *Olivia Owner* as an owner of a premises, means that degree of care that would be used by an owner of ordinary prudence under the same or similar circumstances.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 66.14 should be used in cases governed by chapter 95 of the Texas Civil Practice and Remedies Code, which applies when a property owner is claimed to be liable for personal injury, death, or property damage to a contractor, a

subcontractor, or an employee of a contractor or subcontractor arising from the condition or use of an improvement to real property where the contractor or subcontractor constructs, repairs, renovates, or modifies the improvement. Under the statute, the property owner is not liable unless he controlled the manner in which the work was performed and knew of the harm and failed to adequately warn of it. Tex. Civ. Prac. & Rem. Code § 95.003.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 66.1.

Accompanying question. Predicate questions submitting other conditions necessary to incur liability under the statute may also be required. For example, fact questions may exist about whether the real property was used primarily for commercial or business purposes or whether the occurrence or injury arose from an improvement to the property that was constructed, repaired, renovated, or modified by the contractor.

Substitute particular work. Terms describing the particular work alleged to have caused the injury or produced the defect should be substituted for the italicized phrase in the charge.

Substitute particular condition. If it is agreed that the case involves only one condition, the Committee recommends that the particular condition (e.g., *a hole in the roof*) be substituted for the phrase *the condition*.

[Chapters 67–69 are reserved for expansion.]

PJC 70.1 Producing Cause

"Producing cause" means a cause that was a substantial factor in bringing about the [*occurrence*] [*injury*] [*occurrence or injury*], and without which the [*occurrence*] [*injury*] [*occurrence or injury*] would not have occurred. There may be more than one producing cause.

COMMENT

When to use. PJC 70.1 provides a definition of "producing cause," which is generally the proper causation standard for a strict liability submission. *See Rourke v. Garza*, 530 S.W.2d 794, 801 (Tex. 1975).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Source of definition. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).

Deletion of "contributing" and "in a natural sequence." Both "contributing" and "in a natural sequence" are omitted from the definition of "producing cause" above. The supreme court did not retain those words in its analysis. *See Ledesma*, 242 S.W.3d at 46. However, the court did not criticize either of those concepts, and it may be appropriate to retain one or both of those concepts in an appropriate case.

Caveat—"unavoidably unsafe" products. The Committee expresses no opinion on the applicability of the producing-cause standard to "unavoidably unsafe" products involving a foreseeability element. Courts have recognized that certain products, though manufactured as designed and intended, are "unavoidably unsafe." Manufacturers of such products—e.g., prescription drugs—are generally not liable for resulting harm absent proof that the manufacturer knew or reasonably should have known of the risk of harm at the time of marketing. *Restatement (Second) of Torts* § 402A cmts. j, k; *Restatement (Third) of Torts* ch. 1 topic 2—Liability Rules Applicable to Special Products, § 6 ("reasonable instructions or warnings regarding foreseeable risks of harm"); *cf. Crocker v. Winthrop Laboratories*, 514 S.W.2d 429, 433 (Tex. 1974) (drug manufacturer is liable for misrepresentation, regardless of state of medical knowledge, when it "positively and specifically represents its product to be free and safe from all dangers . . . and when the treating physician relies upon that representation"); *see also Alm v. Aluminum Co. of America*, 717 S.W.2d 588, 596 (Tex. 1986) (adequate warning to physician relieves manufacturer of duty to warn consumer-patient of hazards associated with product).

PJC 70.2 Proximate Cause—Products Liability

"Proximate cause" means a cause that was a substantial factor in bringing about an [*occurrence*] [*injury*] [*occurrence or injury*], and without which cause such [*occurrence*] [*injury*] [*occurrence or injury*] 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 [*occurrence*] [*injury*] [*occurrence or injury*], or some similar [*occurrence*] [*injury*] [*occurrence or injury*], might reasonably result therefrom. There may be more than one proximate cause of an [*occurrence*] [*injury*] [*occurrence or injury*].

COMMENT

Source of definition. 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, 222–23 (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 70.2. 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. PJC 70.2 should be used in submitting claims for breach of express or implied warranty (see PJC 71.9–71.12).

"New and independent cause" or "sole proximate cause." In an appropriate case, the definition of "new and independent cause" or "sole proximate cause" may be submitted instead of or in addition to PJC 70.2. For definitions of "new and independent cause" and "sole proximate cause," see PJC 70.3 and 50.5, which may be modified as necessary.

PJC 70.3 New and Independent Cause—Products Liability

"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. PJC 70.3 should be used in addition to PJC 70.2 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). If there is evidence of a new and independent cause, a refusal to submit this instruction may be reversible error. *Bell-Ton Electric Service, Inc. v. Pickle*, 915 S.W.2d 480, 481 (Tex. 1996). Conversely, if there is no such evidence, this submission is improper and may be reversible error. *Galvan v. Fedder*, 678 S.W.2d 596, 598 (Tex. App.—Houston [14th Dist.] 1984, no writ).

The Committee expresses no opinion on whether "new and independent cause" applies in a strict tort liability submission involving a producing-cause standard. *Compare V. Mueller & Co. v. Corley*, 570 S.W.2d 140, 144–45 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.), *with Dover Corp. v. Perez*, 587 S.W.2d 761, 765 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

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).

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

PJC 70.4 Sole Cause—Products Liability

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

COMMENT

When to use. If "sole cause" is raised by the evidence, PJC 70.4 should be used in lieu of the last sentence of the definition in PJC 70.1. *See Dresser Industries v. Lee*, 880 S.W.2d 750 (Tex. 1993).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

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

PJC 70.5 Seller of a Product

QUESTION _____

Was *ABC Company* engaged in the business of selling *table saws*?

The "business of selling" means involvement, as a part of its business, in selling, leasing, or otherwise placing in the course of commerce products similar to the product in question by transactions that are essentially commercial in character.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 70.5 provides a preliminary question to establish whether the defendant is one to whom strict liability may apply. Strict tort liability applies to designers, manufacturers, and some sellers of products. *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787 (Tex. 1967); *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779 (Tex. 1967); *Restatement (Second) of Torts* § 402A (1965). The doctrine also applies to the constructors and some sellers of mass-produced homes and used products. *See Humber v. Morton*, 426 S.W.2d 554 (Tex. 1968); *Hovenden v. Tenbush*, 529 S.W.2d 302 (Tex. Civ. App.—San Antonio 1975, no writ). It is not necessary, however, that the seller be engaged solely in the business of selling such products. *Restatement (Second) of Torts* § 402A cmt. f.

Liability of nonmanufacturing product sellers. Section 82.003 of the Texas Civil Practice and Remedies Code provides that a nonmanufacturing seller of a product is not liable for harm caused by the product unless the claimant proves one or more of the elements set forth in the statute. When a disputed fact question arises about the existence of one or more of these elements, the Committee recommends that the question be submitted to the jury. For example—

Did *Sidney Seller* participate in the design of [the product]?

Note that this section does not apply to claims arising under chapter 2301 (Sale or Lease of Motor Vehicles) of the Texas Occupations Code. Tex. Civ. Prac. & Rem. Code § 82.003.

PJC 70.6 Substantial Change in Condition or Subsequent Alteration by Affirmative Conduct—Instruction

A product is not in a defective condition, thus not unreasonably dangerous when sold, if the unreasonably dangerous condition is solely caused by a substantial change or alteration of the product after it is sold, and but for which unreasonably dangerous condition the [*occurrence*] [*injury*] [*occurrence or injury*] would not have occurred. "Substantial change or alteration" means that the configuration or operational characteristics of the product are changed or altered by affirmative conduct of some person in a manner that the defendant could not have reasonably foreseen would occur in the intended or foreseeable use of the product. Substantial change or alteration does not include reasonably foreseeable wear and tear or deterioration.

COMMENT

When to use. If the elements of substantial change or alteration are raised by the evidence, PJC 70.6 should be included in the charge immediately following the definition of "unreasonably dangerous" (see PJC 71.3 and 71.5). *See Federal Pacific Electric Co. v. Woodend*, 735 S.W.2d 887, 892 (Tex. App.—Fort Worth 1987, no writ). See *Woods v. Crane Carrier Co.*, 693 S.W.2d 377, 380 (Tex. 1985), for a case in which the above instruction was allowed.

Source of instruction. Liability applies only when the product is expected to and does reach the user or consumer without substantial change in the condition in which it was sold. *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374 (Tex. 1978). An unforeseeable change or alteration in the original condition of the product that makes an otherwise safe product unreasonably dangerous relieves the supplier of liability. *Restatement (Third) of Torts: Products Liability* § 15 cmt. b (1998); *see Ford Motor Co. v. Russell & Smith Ford Co.*, 474 S.W.2d 549 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ). Substantial change or alteration does not include reasonably foreseeable wear and tear or deterioration. *See Miller v. Bock Laundry Machine Co.*, 568 S.W.2d 648 (Tex. 1977).

PJC 70.7 Statute of Repose (Comment)

The Texas Civil Practice and Remedies Code establishes a fifteen-year statute of repose for products liability claims, exempting personal injury and wrongful death claims in which the claimant could not have reasonably discovered the injury within the fifteen-year period. Tex. Civ. Prac. & Rem. Code § 16.012. If there is a dispute about the date of sale of the product by the defendant, the Committee recommends that the dispute be submitted to the jury.

PJC 71.1 Use of "Occurrence," "Injury," or "Occurrence or Injury" (Comment)

Pleadings and proof determine choice. The pleadings and proof in each case will determine the choice of the terms "occurrence," "injury," or "occurrence or injury" in the questions in this chapter. The choice 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 the liability and proportionate responsibility questions if "occurrence" is used, while it should consider the negligence if "injury" is used. Also, in an appropriate case, the word "death" may replace "injury."

Proportionate responsibility statute. The passage of the comparative (now named "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. Tex. Civ. Prac. & Rem. Code § 33.003. "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.

Distinctions affect how to submit conduct. 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 proportionate responsibility 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.

Interplay between use of "occurrence" or "injury" and use of exclusionary instruction in submitting damages questions. Submitting "occurrence" in conjunction with the appropriate exclusionary instruction in PJC 80.7 or 80.9 may resolve

any uncertainty about using "injury" or "occurrence" in a given case. But note that if the liability question is submitted with the term "injury," an exclusionary instruction should not be submitted.

PJC 71.2 Submission of Settling Persons, Contribution Defendants, and Responsible Third Parties (Comment)

Settling persons. The proportionate responsibility statute requires the responsibility of a settling person (*Sam Settlor*) to be determined by the trier of fact. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011. Thus, if the case includes a settling person, that person's name must be included in the basic liability question as well as in the proportionate responsibility question.

Contribution defendants. 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 contribution defendant should *not* be included in the question comparing the responsibility of the plaintiff with that of the other defendants. A separate comparative question is necessary. See PJC 71.14.

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 71.13.

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).

PJC 71.3 Manufacturing Defect

QUESTION _____

Was there a manufacturing defect in the *automobile* at the time it left the possession of *ABC Company* that was a producing cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

A "manufacturing defect" means that the product deviated in its construction or quality from its specifications or planned output in a manner that renders it unreasonably dangerous. An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product, with the ordinary knowledge common to the community as to the product's characteristics.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 71.3 is designed to submit a claim that a defective condition in a product rendered it unreasonably dangerous at the time it left the seller's possession. *See Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007); *Lucas v. Texas Industries*, 696 S.W.2d 372 (Tex. 1984); *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374 (Tex. 1978); *Restatement (Second) of Torts* § 402A (1965).

Liability of nonmanufacturing product sellers for actions filed on or after July 1, 2003. For a discussion of the liability of a nonmanufacturing product seller in actions filed on or after July 1, 2003, see PJC 70.5.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Definition of "producing cause." The appropriate definition of "producing cause" (see PJC 70.1) should accompany PJC 71.3.

Proof of defect. The plaintiff must establish that the product was in a defective condition at the time it left the hands of the particular seller. *Armstrong Rubber*, 570 S.W.2d 374; *Otis Elevator Co. v. Bedre*, 758 S.W.2d 953, 956 (Tex. App.—Beaumont

1988), *rev'd on other grounds*, 776 S.W.2d 152 (Tex. 1989); *Restatement (Second) of Torts* § 402A cmt. g. This requirement applies to each person or legal entity in the distributive chain. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984). A manufacturing defect requires proof that the product deviated in its construction or quality from the specifications or planned output in a manner that renders it unreasonably dangerous. *See Ledesma*, 242 S.W.3d at 41–42.

PJC 71.4 Design Defect

PJC 71.4A Design Defect—Causes of Action Accruing before September 1, 1993

QUESTION _____

Was there a design defect in the *automobile* at the time it left the possession of *ABC Company* that was a producing cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Answer "Yes" or "No."

Answer: _____

PJC 71.4B Design Defect—Causes of Action Accruing on or after September 1, 1993

QUESTION _____

Was there a design defect in the *automobile* at the time it left the possession of *ABC Company* that was a producing cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use. For a design defect to exist there must have been a safer alternative design.

"Safer alternative design" means a product design other than the one actually used that in reasonable probability—

1. would have prevented or significantly reduced the risk of the [*occurrence*] [*injury*] [*occurrence or injury*] in question without substantially impairing the product's utility and

2. was economically and technologically feasible at the time the product left the control of *ABC Company* by the application of existing or reasonably achievable scientific knowledge.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use PJC 71.4A. PJC 71.4A may be used in a case accruing before September 1, 1993, in which recovery for a design defect is sought. In *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979), the court formulated a question and instruction on which PJC 71.4A is based, expressly repudiating in design cases the bifurcated test defining "unreasonably dangerous" earlier approved in *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977), and *Henderson v. Ford Motor Co.*, 519 S.W.2d 87 (Tex. 1974).

When to use PJC 71.4B. PJC 71.4B may be used in a case accruing after September 1, 1993, in which recovery for a design defect is sought. *See Hernandez v. Tokai Corp.*, 2 S.W.3d 251, 256 n.8 (Tex. 1999). In 1993 the legislature amended the Civil Practice and Remedies Code by adding chapter 82, "Products Liability." PJC 71.4B is based on Tex. Civ. Prac. & Rem. Code § 82.005.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Definition of "producing cause." The appropriate definition of "producing cause" (see PJC 70.1) should accompany PJC 71.4.

Proof of defect. The plaintiff must establish that the product was in a defective condition at the time it left the hands of the particular defendant. *Armstrong Rubber Co. v. Urquidez*, 570 S.W.2d 374 (Tex. 1978); *Otis Elevator Co. v. Bedre*, 758 S.W.2d 953, 956 (Tex. App.—Beaumont 1988), *rev'd on other grounds*, 776 S.W.2d 152 (Tex. 1989); *Restatement (Third) of Torts: Products Liability* § 2 cmt. c (1998). This requirement applies to each person or legal entity in the distributive chain. *Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 432 (Tex. 1984).

Liability of nonmanufacturing product sellers for actions filed on or after July 1, 2003. For a discussion of the liability of a nonmanufacturing product seller in actions filed on or after July 1, 2003, see PJC 70.5.

Safer alternative design. The duty of a manufacturer respecting safer alternative design was discussed in *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328 (Tex. 1998).

Note on submitting strict liability, negligence, and implied warranty theories in same case. When the controlling issues regarding the existence of defect for strict liability, negligence, or implied warranty are functionally identical, "a trial court is not required to, and should not, confuse the jury by submitting differently worded questions that call for the same factual finding." *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 665–66 (Tex. 1999) (affirming refusal in crashworthiness case to submit question on breach of implied warranty in addition to strict products liability question). Because of the overlapping elements of proof, there is a risk of conflicting answers that will necessitate a new trial. *See Ford Motor Co. v. Miles*, 141 S.W.3d 309, 315–19 (Tex. App.—Dallas 2004, pet. denied); *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 690 (Tex. App.—Dallas 2000, no pet.); *see also Hanus v. Texas Utilities Co.*, 71 S.W.3d 874, 881 (Tex. App.—Fort Worth 2002, no pet.) ("Commentators and other courts have also recognized that the duty-to-warn analyses of marketing defect and negligence claims are so similar as to be duplicative.").

Caveat—government contractors. The U.S. Supreme Court has held that states may not impose liability for design defects in military equipment if (1) the United States has approved "reasonably precise specifications," (2) the equipment conformed to those specifications, and (3) the government contractor supplying the equipment warned the United States about dangers in the use of the equipment that were known to the supplier but not to the United States. *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1987).

Rebuttable presumptions for products complying with government standards and products receiving premarket licensing or approval—actions filed on or after July 1, 2003. The Code provides, in certain circumstances, rebuttable presumptions of nonliability for manufacturers and sellers of products complying with government standards and products receiving premarket licensing or approval. Tex. Civ. Prac. & Rem. Code § 82.008. Note that the statutes sets forth what the plaintiff must establish to rebut the presumption. Tex. Civ. Prac. & Rem. Code § 82.008(b). For a discussion of rebuttable presumptions generally, see *Combined American Insurance Co. v. Blanton*, 353 S.W.2d 847, 849 (Tex. 1962); *see also Wright v. Ford Motor Co.*, 508 F.3d 263, 270–74 (5th Cir. 2007); *Texas A&M University v. Chambers*, 31 S.W.3d 780, 783–85 (Tex. App.—Austin 2000, pet. denied).

PJC 71.5 Marketing Defect—No Warning or Instruction or Inadequate Warnings or Instructions for Use Given with Product

QUESTION _____

Was there a defect in the marketing of the *automobile* at the time it left the possession of *ABC Company* that was a producing cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

A "marketing defect" with respect to the product means the failure to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known or failure to give adequate instructions to avoid such dangers, which failure rendered the product unreasonably dangerous as marketed.

"Adequate" warnings and instructions mean warnings and instructions given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; and the content of the warnings and instructions must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 71.5 should be used if the plaintiff seeks to recover on the theory of marketing defect for the defendant's failure to warn or failure to adequately warn or instruct for safe use of the product. The duty to warn and instruct for safe use in connection with marketing a product is determined by the dangers inherent in the product or associated with its foreseeable use. *Bristol-Myers Co. v. Gonzales*, 561 S.W.2d 801, 804 (Tex. 1978); *Technical Chemical Co. v. Jacobs*, 480 S.W.2d 602, 605 (Tex. 1972). This duty extends beyond the purchaser to the ultimate user. *See Lopez v. Aro Corp.*, 584 S.W.2d 333 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.). The duty is limited to dangers that are either known or by the application of reasonably

developed human skill and foresight should have been known by the defendant when the product was marketed and to uses that are either intended or reasonably foreseeable. *See Bristol-Myers*, 561 S.W.2d at 804; *Simms v. Southwest Texas Methodist Hospital*, 535 S.W.2d 192, 198 (Tex. Civ. App.—San Antonio 1976, writ ref'd n.r.e.); *Ethicon, Inc. v. Parten*, 520 S.W.2d 527, 533 (Tex. Civ. App.—Houston [14th Dist.] 1975, no writ).

Liability of a nonmanufacturing product seller for actions filed on or after July 1, 2003. For a discussion of the liability of a nonmanufacturing product seller in actions filed on or after July 1, 2003, see PJC 70.5.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Definition of "adequate." A definition of the term "adequate" as applied to warnings or instructions for safe use is appropriate. Regarding that term, see *Shop Rite Foods, Inc. v. Upjohn Co.*, 619 S.W.2d 574 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.), and *Bituminous Casualty Corp. v. Black & Decker Manufacturing Corp.*, 518 S.W.2d 868 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.). Implicit in the duty to warn and to instruct for proper and safe use is the obligation to keep abreast of scientific knowledge and advances and to provide an adequate warning of dangers that were known or should have been known, based on the latest knowledge and available information. *See Bristol-Myers*, 561 S.W.2d at 804. If the risks and dangers are commonly known, warning generally is not required. *Sauder Custom Fabrication, Inc. v. Boyd*, 967 S.W.2d 349 (Tex. 1998); *Caterpillar, Inc. v. Shears*, 911 S.W.2d 379 (Tex. 1995).

Definition of "producing cause." The appropriate definition of "producing cause" (see PJC 70.1) should accompany PJC 71.5.

Rebuttable presumption. When a defendant fails to give adequate warnings or instructions, a rebuttable presumption arises that the user would have read and heeded such warnings or instructions. *Magro v. Ragsdale Bros.*, 721 S.W.2d 832, 834 (Tex. 1986). See *Dresser Industries v. Lee*, 880 S.W.2d 750 (Tex. 1993), for the type of evidence that can overcome the presumption where no warning is given. In *General Motors Corp. v. Saenz*, 873 S.W.2d 353 (Tex. 1993), the court held that the presumption operates differently in an inadequate-warning case than it does in a failure-to-warn case. In *Saenz*, the court held that when such warnings or instructions are sufficiently conspicuous, no such presumption arises in the absence of evidence that the plaintiff read the warnings or instructions, even though such warnings or instructions may have been legally inadequate.

Rebuttable presumptions for pharmaceutical products, products complying with government standards, and products receiving premarket licensing or approval—actions filed on or after July 1, 2003. The Code provides, in certain circumstances, a rebuttable presumption of nonliability for manufacturers and sellers of pharmaceutical products, products complying with government standards, and products receiving premarket licensing or approval. Tex. Civ. Prac. & Rem. Code §§ 82.002–.008. Note that the statutes set forth what the plaintiff must establish to rebut the presumption. Tex. Civ. Prac. & Rem. Code §§ 82.007(b), 82.008(b). For a discussion of rebuttable presumptions generally, see *Combined American Insurance Co. v. Blanton*, 353 S.W.2d 847, 849 (Tex. 1962); *see also Wright v. Ford Motor Co.*, 508 F.3d 263, 270–74 (5th Cir. 2007); *Texas A&M University v. Chambers*, 31 S.W.3d 780, 783–85 (Tex. App.—Austin 2000, pet. denied).

Learned intermediary. Prescription drugs and certain prescribed medical appliances constitute an exception to the duty to warn the ultimate user. *See Air Shields, Inc. v. Spears*, 590 S.W.2d 574, 582 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.). Generally, a defendant satisfies the duty to adequately warn of dangers and instruct for safe use by furnishing the warnings and instructions to the prescribing physician. The physician, as a learned intermediary, is the person best qualified to make an informed choice after evaluating the benefits of a particular drug against the risk of harm from its use. *Gravis v. Parke-Davis & Co.*, 502 S.W.2d 863, 870 (Tex. Civ. App.—Corpus Christi 1973, writ ref'd n.r.e.). However, if the defendant anticipates that a prescription drug will be dispensed without a physician's intermediate evaluation of the utility of the drug against its potential risk of harm, the warnings or instructions must be calculated to reach the ultimate user or consumer.

PJC 71.6 Misrepresentation (§ 402B)

QUESTION _____

Was there a misrepresentation by *ABC Company* that was a producing cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

There was a misrepresentation if—

1. *ABC Company* represented to the public that *the Panther automobile possessed the most stable suspension system on the market*; and

2. the *automobile* in question failed to *possess the most stable suspension system on the market*; and

3. the representation about *the stability of the suspension system* involved a material fact concerning the character or quality of the *automobile* in question; and

4. *Paul Payne* relied on the representation made by *ABC Company* in purchasing the *automobile* in question.

A "material fact" is a fact that is important to a normal purchaser by which the purchaser may justifiably be expected to be influenced in making the decision to buy the product.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 71.6 should be used if the plaintiff seeks recovery for personal injuries resulting from misrepresentations made by the seller. *See Crocker v. Winthrop Laboratories*, 514 S.W.2d 429 (Tex. 1974); *Jack Roach-Bissonnet, Inc. v. Puskar*, 417 S.W.2d 262, 278 (Tex. 1967); *Bristol-Myers Co. v. Gonzales*, 548 S.W.2d 416 (Tex. Civ. App.—Corpus Christi 1976), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978); *Ford Motor Co. v. Russell & Smith Ford Co.*, 474 S.W.2d 549 (Tex. Civ. App.—Houston [14th Dist.] 1971, no writ); *Restatement (Third) of Torts: Products Liability* § 9 (1998).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospi-*

tal, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

If plaintiff is not purchaser. If the plaintiff is not the purchaser, instruction 4 above should be modified to establish whether the purchaser relied on the representation. A finding that either the purchaser relied on the representation in purchasing the product or the plaintiff-user relied on the representation in using the product would support recovery.

Reasonable implication of express representation. If the reasonable implication of an express representation is in issue, instruction 1 should be modified as follows:

> 1. *ABC Company*'s representation that *the Panther automobile had the most stable suspension system on the market* reasonably implied to the ordinary user that *the automobile could safely turn a corner at 35 miles per hour*; and

Learned intermediary. If the product falls within the learned intermediary doctrine, so that the defendant's duty is only to represent the product correctly to the physician, or if the materiality of the representation has been established as a matter of law, instruction 1 should be modified as follows:

> 1. *ABC Company* represented to the medical profession that *the drug "Good for All Seasons" would not cause physical dependence*; and

Instruction 4 should also be modified:

> 4. *Dr. Jones* relied on such representation in prescribing *"Good for All Seasons"* for use by *Paul Payne.*

PJC 71.7 Negligence in Products Cases

QUESTION _____

Was *ABC Company* negligent in [*manufacturing*] [*designing*] [*marketing*] the *automobile* at the time it left *ABC Company*, and was that negligence, if any, a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

For *ABC Company* to have been negligent, there must have been a defect in the [*manufacturing*] [*designing*] [*marketing*] of the product.

"Negligence," when used with respect to the conduct of *ABC Company*, means failure to use ordinary care, that is, failing to do that which a company of ordinary prudence would have done under the same or similar circumstances or doing that which a company of ordinary prudence would not have done under the same or similar circumstances.

"Ordinary care" means that degree of care that a company of ordinary prudence would use under the same or similar circumstances.

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

[Insert appropriate defect theory—manufacturing, design, or marketing.]

A "manufacturing defect" means that the product deviated in its construction or quality from its specifications or planned output in a manner that renders it unreasonably dangerous. An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product, with the ordinary knowledge common to the community as to the product's characteristics.

[or]

A "design defect" is a condition of the product that renders it unreasonably dangerous as designed, taking into consideration the utility of the product and

the risk involved in its use. For a design defect to exist there must have been a safer alternative design.

"Safer alternative design" means a product design other than the one actually used that in reasonable probability—

1. would have prevented or significantly reduced the risk of the [*occurrence*] [*injury*] [*occurrence or injury*] in question without substantially impairing the product's utility and

2. was economically and technologically feasible at the time the product left the control of *ABC Company* by the application of existing or reasonably achievable scientific knowledge.

[or]

A "marketing defect" with respect to the product means the failure to give adequate warnings of the product's dangers that were known or by the application of reasonably developed human skill and foresight should have been known or failure to give adequate instructions to avoid such dangers, which failure rendered the product unreasonably dangerous as marketed.

"Adequate" warnings and instructions mean warnings and instructions given in a form that could reasonably be expected to catch the attention of a reasonably prudent person in the circumstances of the product's use; and the content of the warnings and instructions must be comprehensible to the average user and must convey a fair indication of the nature and extent of the danger and how to avoid it to the mind of a reasonably prudent person.

An "unreasonably dangerous" product is one that is dangerous to an extent beyond that which would be contemplated by the ordinary user of the product with the ordinary knowledge common to the community as to the product's characteristics.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 71.7 may be used to submit a negligence theory to the jury in a products liability case. A negligence theory may be premised on negligent manufacturing, negligent design, or negligent marketing. *See, e.g., Humble Sand & Gravel, Inc. v. Gomez*, 146 S.W.3d 170, 181 (Tex. 2004) (negligent marketing); *American*

Tobacco Co., Inc. v. Grinnell, 951 S.W.2d 420, 437 (Tex. 1997) (negligent manufacture); *Gonzales v. Caterpillar Tractor Co.*, 571 S.W.2d 867, 871 (Tex. 1978) (negligent design). Although the care taken by the manufacturer of a product is not a consideration in strict liability, it is "the ultimate question in a negligence action." *Gonzales*, 571 S.W.2d at 871. Both strict liability and negligence require proof that the injury resulted from a defect in the product. *See Toshiba International Corp. v. Henry*, 152 S.W.3d 774, 785 (Tex. App.—Texarkana 2004, no pet.) (before negligence theory can be used in products case, there must be proof of defect in product); *Ford Motor Co. v. Miles*, 141 S.W.3d 309, 315 (Tex. App.—Dallas 2004, pet. denied) (whether plaintiff seeks recovery because of negligence or strict liability, he must prove injury resulted from product defect); *Simms v. Southwest Texas Methodist Hospital*, 535 S.W.2d 192, 197 (Tex. App.—San Antonio 1976, writ ref'd n.r.e.) (whether plaintiff sought recovery because of negligence, breach of warranty, or strict liability, she had to prove injury resulted from defect in product). The definitions of manufacturing, design, and marketing defect in PJC 71.3, 71.4, and 71.5 should be incorporated in the submission depending on the defect theory. In a negligent design case, the instruction and definition of "safer alternative design" should also be submitted as shown in PJC 71.4. *See* Tex. Civ. Prac. & Rem. Code §§ 82.001, 82.005.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Note on submitting strict liability, negligence, and implied warranty theories in same case. When the controlling issues regarding the existence of defect for strict liability, negligence, or implied warranty are functionally identical, "a trial court is not required to, and should not, confuse the jury by submitting differently worded questions that call for the same factual finding." *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 665–66 (Tex. 1999) (affirming refusal in crashworthiness case to submit question on breach of implied warranty in addition to strict products liability question). Because of the overlapping elements of proof, there is a risk of conflicting answers that will necessitate a new trial. *See Miles*, 141 S.W.3d at 315–19; *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 690 (Tex. App.—Dallas 2000, no pet.); *see also Hanus v. Texas Utilities Co.*, 71 S.W.3d 874, 881 (Tex. App.—Fort Worth 2002, no pet.) ("Commentators and other courts have also recognized that the duty-to-warn analyses of marketing defect and negligence claims are so similar as to be duplicative.").

PJC 71.8 Negligent Undertaking

QUESTION _____

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

Don Davis was negligent if—

1. *Don Davis* undertook to perform services that *he* knew or should have known were necessary for *Paul Payne*'s protection, and

2. *Don Davis* failed to exercise reasonable care in performing those services, and

3. either [*Paul Payne*] relied on *Don Davis*'s performance or *Don Davis*'s performance increased *Paul Payne*'s risk of harm.

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 71.8 should be used if the plaintiff seeks recovery for damages resulting from a negligent undertaking. *See Torrington Co. v. Stutzman*, 46 S.W.3d 829, 838 (Tex. 2000); *Restatement (Second) of Torts* §§ 323, 324A (1965). The Committee expresses no opinion about how the elements above should be modified if the negligent undertaking does not involve safety-related services.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Caveat to element 3. There are two types of negligent undertaking, which will dictate whether to use the name of the plaintiff or of someone else in element 3. The first type is the rendition of services to the plaintiff, in which event an element of the tort is reliance by (or alternatively increased risk to) the plaintiff to whom services are rendered, as set forth in *Restatement (Second) of Torts* § 323. *See Colonial Savings Ass'n v. Taylor*, 544 S.W.2d 116, 120 (Tex. 1976) (lienholder not liable in its undertaking unless plaintiff learned of and relied on the undertaking); *Entex v. Gonzalez*, 94 S.W.3d 1, 9 (Tex. App.—Houston [14th Dist.] 2002, pet. denied) (requiring proof of actual reliance in § 323 case). The second type is the rendition of services to another, which the defendant should recognize as necessary for the protection of a third person, as in *Restatement (Second) of Torts* § 324A. *See Johnson v. Abbe Engineering Co.*, 749 F.2d 1131, 1133 (5th Cir. 1984) (applying Texas law and holding that both subsidiary to whom undertaking duty owed and its employees who would benefit by the safety checks relied on the undertaking). This is the situation in *Torrington*, 46 S.W.3d 829. Torrington agreed to render the services to Bell. The third party to be protected included the U.S. Navy as a whole and any passengers in the helicopters, such as the plaintiffs:

> Thus, the jury should have been instructed that Torrington was negligent only if (1) Torrington undertook to perform services that it knew or should have known were necessary for the plaintiffs' protection, (2) Torrington failed to exercise reasonable care in performing those services, and either (3) the Navy relied upon Torrington's performance, or (4) Torrington's performance increased the plaintiffs' risk of harm.

Torrington, 46 S.W.3d at 838. As made clear by § 324A, an element of that tort is reliance by either the party to whom services were rendered or the third party to be protected. Depending on the undertaking, element 3 of the above instruction should either refer to the plaintiff, *Paul Payne* (§ 323 undertaking), or to the third party (§ 324A undertaking).

PJC 71.9 Breach of Implied Warranty of Merchantability (Tex. UCC § 2.314(b)(3)) (Design Defect)

QUESTION _____

Was the [*good or product*] supplied by *ABC Company* unfit for the ordinary purposes for which such [*goods or products*] are used because of a defect, and, if so, was such unfit condition a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

A "defect" means a condition of the [*good or product*] that renders it unfit for the ordinary purposes for which such [*goods or products*] are used because of a lack of something necessary for adequacy.

For a defect in the design of the [*good or product*] to exist, there must have been a safer alternative design.

"Safer alternative design" means a design other than the one actually used that in reasonable probability—

1. would have prevented or significantly reduced the risk of the [*occurrence*] [*injury*] [*occurrence or injury*] in question without substantially impairing the utility of the [*good or product*] and

2. was economically and technologically feasible at the time the [*good or product*] left the control of *ABC Company* by the application of existing or reasonably achievable scientific knowledge.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 71.9 may be used to submit a claim of a breach of implied warranty of merchantability in a products liability case under Tex. Bus. & Com. Code § 2.314(b)(3) when the defect alleged is a design defect. Tex. Civ. Prac. & Rem. Code §§ 82.001, 82.005; *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 n.14 (Tex. 1999). Except for the additional instruction on and definition of safer alternative design (*see* Tex. Civ. Prac. & Rem. Code § 82.005), this question is based on the approved question in *Plas-Tex, Inc. v. U.S. Steel Corp.*, 772 S.W.2d 442, 444 n.4 (Tex. 1989) (proof of defect required in action for breach of warranty of merchantability under section 2.314(b)(3)).

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Caveat. Note that PJC 71.9 is applicable *only* to cases brought under Tex. UCC § 2.314(b)(3). *See Plas-Tex, Inc.*, 772 S.W.2d at 445 n.4. For cases involving other types of breach of implied warranty, including other types of breach of warranty of merchantability (*see* Tex. UCC § 2.314(b)(1), (2), (4), (6)), see PJC 71.10 and 71.11. The Committee expresses no opinion on the applicability of the above definition in a case in which the goods are claimed to be unfit, not because of a *lack* of something, but because they contain *more* than is desired—for example, a one-ounce weight that actually is two ounces.

Personal injury claims may be brought under Texas UCC. Claims for personal injury are recoverable under the Texas UCC. *Garcia v. Texas Instruments*, 610 S.W.2d 456, 462–63 (Tex. 1980). Personal injury cases may also be brought under the Deceptive Trade Practices–Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–.63. For sample questions in a DTPA case, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment.*

Proximate cause standard. Unlike a cause of action based on strict tort liability, an action based on breach of implied warranty under the Texas UCC requires a finding of "proximate" rather than "producing" cause. *See* Tex. UCC § 2.715 (consequential damages include "injury to person or property *proximately* resulting from any breach of warranty") (emphasis added); *Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320, 328 (Tex. 1978). For a definition of "proximate cause," see PJC 70.2.

Limitations. A cause of action for personal injury based on a breach of implied warranty has been held to be governed by Tex. UCC § 2.725. *Weeks v. J.I. Case Co.*, 694 S.W.2d 634 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.); *Fitzgerald v. Caterpillar Tractor Co.*, 683 S.W.2d 162 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). Section 2.725 sets out a four-year statute of limitations and states that "a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Tex. UCC § 2.725(b); *see also Garcia*, 610 S.W.2d 456 (cause of action for breach of warranty accrues on date of tender of delivery of product).

Other defenses. Other defenses may also apply in breach-of-warranty cases. *See* Tex. UCC § 2.605 (waiver of buyer's objections by failure to particularize), § 2.607 (effect of acceptance, notice of breach), § 2.719 (contractual modification or limitation of remedy). The seller must also be a "merchant" as defined in Tex. UCC § 2.104(a). *See Nelson v. Union Equity Co-operative Exchange*, 536 S.W.2d 635, 641 (Tex. Civ.

App.—Fort Worth 1976), *aff'd on other grounds*, 548 S.W.2d 352 (Tex. 1977) (whether seller is "merchant" is jury question).

Implied warranties may be disclaimed. Both the implied warranty of merchantability, Tex. UCC § 2.314, and the implied warranty of fitness for a particular purpose, Tex. UCC § 2.315, may be excluded or modified under certain conditions. *See* Tex. UCC § 2.316; *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 82 (Tex. 1977).

Note on submitting strict liability, negligence, and implied warranty theories in same case. When the controlling issues regarding the existence of defect for strict liability, negligence, or implied warranty are functionally identical, "a trial court is not required to, and should not, confuse the jury by submitting differently worded questions that call for the same factual finding." *Hyundai*, 995 S.W.2d at 665–66 (affirming refusal in crashworthiness case to submit question on breach of implied warranty in addition to strict products liability question). Because of the overlapping elements of proof, there is a risk of conflicting answers that will necessitate a new trial. *See Ford Motor Co. v. Miles*, 141 S.W.3d 309, 315–19 (Tex. App.—Dallas 2004, pet. denied); *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 690 (Tex. App.—Dallas 2000, no pet.); *see also Hanus v. Texas Utilities Co.*, 71 S.W.3d 874, 881 (Tex. App.—Fort Worth 2002, no pet.) ("Commentators and other courts have also recognized that the duty-to-warn analyses of marketing defect and negligence claims are so similar as to be duplicative.").

PJC 71.10 Breach of Implied Warranty of Merchantability (Tex. UCC § 2.314(b)(1), (2), (4), (6))

QUESTION _____

Was there a breach of the implied warranty of merchantability, and, if so, was such breach a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

A warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

There is a breach of an implied warranty of merchantability if the goods in question fail to at least—

1. pass without objection in the trade under the contract description; and

2. in the case of fungible goods, be of a fair average quality within the description; and

3. run, within the variations permitted by agreement, of even kind, quality, and quantity within each unit and among all units involved; and

4. conform to the promises or affirmations of fact made on the container or label, if any.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 71.10 should be used to submit a claim for breach of implied warranty of merchantability under Tex. Bus. & Com. Code § 2.314(b)(1), (2), (4), (6). For cases involving a breach of warranty of merchantability under Tex. UCC § 2.314(b)(3), see PJC 71.9.

Design defect cases. When the breach-of-implied-warranty claim involves the contention that there was a defect in the design of the product, the instruction on and definition of "safer alternative design" in PJC 71.4 should be given. Tex. Civ. Prac. & Rem. Code § 82.005; *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 n.14 (Tex. 1999)

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Proximate cause standard. Unlike a cause of action based on strict tort liability, an action based on breach of implied warranty under the Texas UCC requires a finding of "proximate" rather than "producing" cause. *See* Tex. UCC § 2.715 (consequential damages include "injury to person or property *proximately* resulting from any breach of warranty") (emphasis added); *Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320, 328 (Tex. 1978). For a definition of "proximate cause," see PJC 70.2.

Limitations. A cause of action for personal injury based on a breach of implied warranty has been held to be governed by Tex. UCC § 2.725. *Weeks v. J.I. Case Co.*, 694 S.W.2d 634 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.); *Fitzgerald v. Caterpillar Tractor Co.*, 683 S.W.2d 162 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). Section 2.725 sets out a four-year statute of limitations and states that "a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Tex. UCC § 2.725(b); *see also Garcia v. Texas Instruments*, 610 S.W.2d 456 (Tex. 1980) (cause of action for breach of warranty accrues on date of tender of delivery of product).

Other defenses. Other defenses may also apply in breach-of-warranty cases. *See* Tex. UCC § 2.605 (waiver of buyer's objections by failure to particularize), § 2.607 (effect of acceptance, notice of breach), § 2.719 (contractual modification or limitation of remedy). The seller must also be a "merchant" as defined in Tex. UCC § 2.104(a). *See Nelson v. Union Equity Co-operative Exchange*, 536 S.W.2d 635, 641 (Tex. Civ. App.—Fort Worth 1976), *aff'd on other grounds*, 548 S.W.2d 352 (Tex. 1977) (whether seller is "merchant" is jury question).

Implied warranties may be disclaimed. Both the implied warranty of merchantability, Tex. UCC § 2.314, and the implied warranty of fitness for a particular purpose, Tex. UCC § 2.315, may be excluded or modified under certain conditions. *See* Tex. UCC § 2.316; *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 82 (Tex. 1977).

Note on submitting strict liability, negligence, and implied warranty theories in same case. When the controlling issues regarding the existence of defect for strict liability, negligence, or implied warranty are functionally identical, "a trial court is not required to, and should not, confuse the jury by submitting differently worded questions that call for the same factual finding." *Hyundai*, 995 S.W.2d at 665–66 (affirming refusal in crashworthiness case to submit question on breach of implied warranty in addition to strict products liability question). Because of the overlapping elements of proof, there is a risk of conflicting answers that will necessitate a new trial. *See Ford*

Motor Co. v. Miles, 141 S.W.3d 309, 315–19 (Tex. App.—Dallas 2004, pet. denied); *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 690 (Tex. App.—Dallas 2000, no pet.); *see also Hanus v. Texas Utilities Co.*, 71 S.W.3d 874, 881 (Tex. App.—Fort Worth 2002, no pet.) ("Commentators and other courts have also recognized that the duty-to-warn analyses of marketing defect and negligence claims are so similar as to be duplicative.").

PJC 71.11 Breach of Implied Warranty of Fitness for a Particular Purpose (Tex. UCC § 2.315)

QUESTION _____

Was there a breach of an implied warranty of fitness for a particular purpose, and, if so, was such breach a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

A warranty that the goods are fit for a particular purpose is implied if at the time of contracting—

1. the seller had reason to know the particular purpose for which the goods are required; and

2. the seller had reason to know that the buyer was relying on the seller's skill and judgment to select or furnish suitable goods.

There is a breach of an implied warranty of fitness for a particular purpose if at the time of sale the goods supplied by the seller are unfit for the particular purpose for which the goods were purchased.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 71.11 should be used to submit a claim for breach of implied warranty of fitness for a particular purpose under Tex. Bus. & Com. Code § 2.315. Claims for personal injury are recoverable under the Texas Business and Commerce Code. *Garcia v. Texas Instruments*, 610 S.W.2d 456 (Tex. 1980). Personal injury cases may also be brought under the Deceptive Trade Practices–Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–.63. For sample questions in a DTPA case, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment*.

Design defect cases. When the breach-of-implied-warranty claim involves the contention that there was a defect in the design of the product, the instruction on and definition of "safer alternative design" in PJC 71.4 should be given. Tex. Civ. Prac. & Rem. Code § 82.005; *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 n.14 (Tex. 1999)

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

"Of fitness for a particular purpose." If desired, the phrase "of fitness for a particular purpose" may be deleted.

Proximate cause standard. Unlike a cause of action based on strict tort liability, an action based on breach of implied warranty under the Texas UCC requires a finding of "proximate" rather than "producing" cause. *See* Tex. UCC § 2.715 (consequential damages include "injury to person or property *proximately* resulting from any breach of warranty") (emphasis added); *Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320, 328 (Tex. 1978). For a definition of "proximate cause," see PJC 70.2.

Limitations. A cause of action for personal injury based on a breach of implied warranty has been held to be governed by Tex. UCC § 2.725. *Weeks v. J.I. Case Co.*, 694 S.W.2d 634 (Tex. App.—Texarkana 1985, writ ref'd n.r.e.); *Fitzgerald v. Caterpillar Tractor Co.*, 683 S.W.2d 162 (Tex. App.—Fort Worth 1985, writ ref'd n.r.e.). Section 2.725 sets out a four-year statute of limitations and states that "a cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach." Tex. UCC § 2.725(b); *see also Garcia*, 610 S.W.2d 456 (cause of action for breach of warranty accrues on date of tender of delivery of product).

Other defenses. Other defenses may also apply in breach-of-warranty cases. *See* Tex. UCC § 2.605 (waiver of buyer's objections by failure to particularize), § 2.607 (effect of acceptance, notice of breach), § 2.719 (contractual modification or limitation of remedy). The seller must also be a "merchant" as defined in Tex. UCC § 2.604(a). *See Nelson v. Union Equity Co-operative Exchange*, 536 S.W.2d 635, 641 (Tex. Civ. App.—Fort Worth 1976), *aff'd on other grounds*, 548 S.W.2d 352 (Tex. 1977) (whether seller is "merchant" is jury question).

Implied warranties may be disclaimed. Both the implied warranty of merchantability, Tex. UCC § 2.314, and the implied warranty of fitness for a particular purpose, Tex. UCC § 2.315, may be excluded or modified under certain conditions. *See* Tex. UCC § 2.316; *Nobility Homes of Texas, Inc. v. Shivers*, 557 S.W.2d 77, 82 (Tex. 1977).

Note on submitting strict liability, negligence, and implied warranty theories in same case. When the controlling issues regarding the existence of defect for strict liability, negligence, or implied warranty are functionally identical, "a trial court is not required to, and should not, confuse the jury by submitting differently worded questions that call for the same factual finding." *Hyundai*, 995 S.W.2d at 665–66 (affirming refusal in crashworthiness case to submit question on breach of implied warranty in addition to strict products liability question). Because of the overlapping elements of

proof, there is a risk of conflicting answers that will necessitate a new trial. *See Ford Motor Co. v. Miles*, 141 S.W.3d 309, 315–19 (Tex. App.—Dallas 2004, pet. denied); *Otis Spunkmeyer, Inc. v. Blakely*, 30 S.W.3d 678, 690 (Tex. App.—Dallas 2000, no pet.); *see also Hanus v. Texas Utilities Co.*, 71 S.W.3d 874, 881 (Tex. App.—Fort Worth 2002, no pet.) ("Commentators and other courts have also recognized that the duty-to-warn analyses of marketing defect and negligence claims are so similar as to be duplicative.").

PJC 71.12 Breach of Express Warranty (Tex. UCC § 2.313)

QUESTION _____

Did *the power brakes fail to function normally with the engine not running*, and, if so, was such failure a proximate cause of the [*occurrence*] [*injury*] [*occurrence or injury*] in question?

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 71.12 may be used to submit a claim for breach of express warranty based on the provisions of Tex. Bus. & Com. Code § 2.313. Claims for personal injury are recoverable under the Texas Business and Commerce Code. *Garcia v. Texas Instruments*, 610 S.W.2d 456 (Tex. 1980). Personal injury cases may also be brought under the Deceptive Trade Practices–Consumer Protection Act, Tex. Bus. & Com. Code §§ 17.41–.63. For sample questions in a DTPA case, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment.*

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1.

Substitution of "death." Under the Texas wrongful death statute, a defendant's liability may be predicated only on "an injury that causes an individual's death." Tex. Civ. Prac. & Rem. Code § 71.002(b); *see also Kramer v. Lewisville Memorial Hospital*, 858 S.W.2d 397, 404 (Tex. 1993). Therefore, in a case involving a claim for wrongful death, the word "death" may be substituted for the word "injury" in the negligence question.

Modify if dispute about scope or status. PJC 71.12 assumes there is no fact dispute about the existence and scope of the warranty or its status as a part of the basis of the bargain. If there is such a dispute, one or both of the following questions should be submitted first, and the above question would then follow as Question 2 or 3.

QUESTION _____

Did *Panther Manufacturing Company* represent to *Paul Payne* that *the power brakes of the Panther automobile would function normally with the engine not running*?

QUESTION _____

Did the representation that *the power brakes of the Panther automobile would function normally with the engine not running* become part of the basis of the bargain between *Panther Manufacturing Company and Paul Payne* for the sale of the *automobile*?

Requirements to create express warranty. Creation of an express warranty requires that a seller make an affirmation of fact or promise that relates to the goods and becomes a part of the basis of the bargain. Tex. UCC § 2.313(a)(1). The "basis of the bargain" question may be a fact issue constituting an essential element of the express warranty. *Indust-Ri-Chem Laboratory v. Par-Pak Co.*, 602 S.W.2d 282, 289 (Tex. Civ. App.—Dallas 1980, no writ); *General Supply & Equipment Co. v. Phillips*, 490 S.W.2d 913, 917 (Tex. Civ. App.—Tyler 1972, writ ref'd n.r.e.).

An affirmation merely of the value of the goods or a statement purporting to be merely the seller's opinion or commendation of the goods does not create an express warranty. Tex. UCC § 2.313(b).

Caveat. If the express warranty arises from a sale by sample under Tex. UCC § 2.313(a)(3) and the seller has introduced proof of the buyer's lack of reliance on the sample, the seller may be entitled to an instruction that the warranty was not a part of the basis of the bargain if the buyer did not rely on it. *See Indust-Ri-Chem Laboratory*, 602 S.W.2d at 289 (lack of reliance may inferentially rebut "basis of bargain" element of plaintiff's recovery).

Proximate cause standard. Unlike a cause of action based on strict tort liability, an action based on breach of express warranty under the Texas UCC requires a finding of "proximate" rather than "producing" cause. *See* Tex. UCC § 2.715 (consequential damages include "injury to person or property *proximately* resulting from any breach of warranty") (emphasis added); *Signal Oil & Gas Co. v. Universal Oil Products*, 572 S.W.2d 320, 328 (Tex. 1978). For a definition of "proximate cause," see PJC 70.2.

PJC 71.13 Products Liability—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 a person or product is not necessarily measured by the number of acts, omissions, or product defects 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 or product 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.	*The Panther automobile* [and *Panther Manufacturing Co.*]	_____%
3.	*Paul Payne*	_____%
4.	*Sam Settlor*	_____%
5.	*Responsible Ray*	_____%
Total		100 %

COMMENT

When to use. Rule 277 requires a percentage question "[i]n any cause in which the jury is required to apportion the loss among the parties." Tex. R. Civ. P. 277. Thus, PJC 71.13 should be used if the responsibility of more than one person (or product) is submitted to the jury under Tex. Civ. Prac. & Rem. Code ch. 33.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1. The term used in PJC 71.13 should match that used in the liability questions.

Product and product defendant submitted jointly. The Committee suggests that the names of both the product and the product defendant be submitted jointly in

the comparative question if the charge also submits a question about the product defendant's responsibility, unless the circumstances of the case warrant separate submission. *See, e.g., Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 427 n.8 (Tex. 1984) (separate submission is warranted under prior law regarding cases involving both products liability and negligence).

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.

Compare claimants separately. A separate comparative question should be submitted for each claimant. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011(1); *see also Haney Electric Co. v. Hurst*, 624 S.W.2d 602 (Tex. Civ. App.—Dallas 1981, writ dism'd by agr.). For claimants seeking derivative damages, see PJC 71.15.

Liability of downstream parties. PJC 71.13 does not include questions concerning persons downstream from the product defendant in the distribution of the product, because they are normally treated as one. If the evidence raises independent liability facts against downstream parties, an independent submission concerning each of them is appropriate, accompanied by instructions to limit the percentage finding to such independent liability.

Settling person, contribution defendant, or responsible third party. See PJC 71.2.

Instruction about contribution defendant. If there is a contribution defendant, 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*] _____ [*the liability question(s)*], you will be asked to attribute the percentage of responsibility as to *Connie Contributor* in Question _____ [*the proportionate responsibility question*].

If there is a dispute about plaintiff's conduct. If the evidence raises questions about the plaintiff's conduct, including some conduct that constituted the mere failure to discover or guard against a product defect, the Committee suggests the addition of the following instruction, if requested, before the paragraph beginning "Assign percentages . . .":

> With respect to *Paul Payne*, do not consider any act or omission of *Paul Payne* that constitutes a mere failure to discover or guard against a product defect.

In such a case, the above instruction should also be added to the general negligence question. *See General Motors Corp. v. Sanchez*, 997 S.W.2d 584 (Tex. 1999). *See also*

Dresser Industries v. Lee, 880 S.W.2d 750, 755 (Tex. 1993) (failure to request instruction waives error on appeal).

PJC 71.14 Products Liability—Proportionate Responsibility If Contribution Defendant Is Joined

If you answered "Yes" to Question[*s*] _____ [*applicable liability question(s)*] for more than one of the persons 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 a party or product is not necessarily measured by the number of acts, omissions, or product defects 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 71.14 is an additional comparative question designed to follow the comparative question in PJC 71.13 or 71.15. 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 responsibility of more than one defendant is submitted, separate percentage answers should not be sought for each defendant in PJC 71.14. 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 71.13 or 71.15, in which a separate answer is obtained for each defendant; seeking a second set of separate answers in PJC 71.14 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 71.14 in proportion to the relative percentages found for each defendant in answer to PJC 71.13 or 71.15.

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

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1. The term used in PJC 71.14 should match that used in the liability questions.

PJC 71.15 Products Liability—Proportionate Responsibility—Derivative Claimant

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 a party or product is not necessarily measured by the number of acts, omissions, or product defects found. The percentage attributable to any one need not be the same percentage attributed to that one in answering another question.

QUESTION _____

For each party or product found by you in your answer[*s*] to Question[*s*] _____ [*applicable liability question(s)*] to have caused the [*occurrence*] [*injury*] [*occurrence or injury*], find the percentage caused by—

1.	*Don Davis*	_____%
2.	*The Panther automobile* [and *Panther Manufacturing Co.*]	_____%
3.	*Mary Minor*	_____%
4.	*Fred Father*	_____%
5.	*Sam Settlor*	_____%
6.	*Responsible Ray*	_____%
Total		100 %

COMMENT

When to use. Rule 277 requires a percentage question "[i]n any cause in which the jury is required to apportion the loss among the parties." Tex. R. Civ. P. 277. PJC 71.15 is designed to apportion loss in cases in which there is a derivative claimant—that is, a claimant suing for damages caused by injuries to another. In the example above, *Fred Father* is the derivative claimant and *Mary Minor* is the injured child. For PJC 71.15 to apply, the child must *not* be suing the parent. A separate comparative

submission is required for the derivative claim. Tex. Civ. Prac. & Rem. Code §§ 33.003, 33.011(1); *see also Haney Electric Co. v. Hurst*, 624 S.W.2d 602, 611 (Tex. Civ. App.—Dallas 1981, writ dism'd by agr.) (holding that "each plaintiff's claim must be considered as if it were a separate suit"). PJC 71.15 applies to the derivative claim. For submission of the underlying claim against the defendant, see PJC 71.13.

Separate questions (such as PJC 71.15 and 71.13) are submitted because the responsibility of a derivative claimant (*Fred Father*) will not bar or diminish the recovery of the primary claimant (*Mary Minor*). On the other hand, the responsibility of *Mary Minor* will bar or diminish the recovery of both *Mary Minor* and *Fred Father*. For this reason, the percentage of responsibility of both *Mary Minor* and *Fred Father* must be considered in determining whether the recovery of *Fred Father* is barred or diminished.

Use of "occurrence," "injury," or "occurrence or injury." See PJC 71.1. The term used in PJC 71.15 should match that used in the liability questions.

Liability questions must also include name of derivative claimant. In cases involving a derivative claimant, the basic liability questions must also include the name of the derivative claimant along with that of the primary claimant.

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.

Product and product defendant submitted jointly. The Committee suggests that the names of both the product and the product defendant be submitted jointly in the comparative question if the charge also submits a question about the product defendant's responsibility, unless the circumstances of the case warrant separate submission. *See, e.g., Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 427 n.8 (Tex. 1984) (separate submission is warranted under prior law regarding cases involving both products liability and negligence).

Liability of downstream parties. PJC 71.15 does not include questions concerning persons downstream from the product defendant in the distribution of the product, because they are normally treated as one. If the evidence raises independent liability facts against downstream parties, an independent submission concerning each of them is appropriate, accompanied by instructions to limit the percentage finding to such independent liability.

Settling person, contribution defendant, or responsible third party. See PJC 71.2.

PJC 72.1 Application—Joint and Several Liability as a Consequence of Certain Penal Code Violations (Comment)

The Texas Civil Practice and Remedies Code provides that if "the defendant, with the specific intent to do harm to others, acted in concert with another person to engage in the conduct described in the following provisions of the Penal Code and in doing so proximately caused the damages legally recoverable by the claimant," that defendant is jointly and severally liable. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2).

Because there are several different sections of the Penal Code listed in section 33.013(b), it is important to submit questions, instructions, and definitions that are applicable to the particular Penal Code section on which the claimant relies to establish joint and several liability.

Questions under this chapter should come after the proportionate liability question. Moreover, as "proximate cause" is used in all questions under this chapter, that term should be defined in the charge.

PJC 72.2 Question and Instructions—Murder as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(A))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit murder that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Murder" means that a person—

1. intentionally or knowingly causes the death of an individual; or

2. intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

3. commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.2 tracks a provision of the Texas Penal Code (Tex. Penal Code § 19.02), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(A).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit capital murder that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Murder" means that a person—

1. intentionally or knowingly causes the death of an individual; or

2. intends to cause serious bodily injury and commits an act clearly dangerous to human life that causes the death of an individual; or

3. commits or attempts to commit a felony, other than manslaughter, and in the course of and in furtherance of the commission or attempt, or in immediate flight from the commission or attempt, he commits or attempts to commit an act clearly dangerous to human life that causes the death of an individual.

"Capital murder" means—

1. the person murders a peace officer or firefighter who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or firefighter; or

2. the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, arson, obstruction or retaliation, or terroristic threat; or

3. the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration; or

4. the person commits the murder while escaping or attempting to escape from a penal institution; or

5. the person, while incarcerated in a penal institution, murders another—

a. who is employed in the operation of the penal institution; or

b. with the intent to establish, maintain, or participate in a combination or in the profits of a combination; or

6. the person—

a. while incarcerated for an offense under this section or for murder, murders another; or

b. while serving a sentence of life imprisonment or a term of ninety-nine years for aggravated kidnapping, aggravated sexual assault, or aggravated robbery, murders another; or

7. the person murders more than one person—

a. during the same criminal transaction; or

b. during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct; or

8. the person murders an individual under ten years of age; or

9. the person murders another person in retaliation for or on account of the service or status of the other person as a judge or justice of the supreme court, the court of criminal appeals, a court of appeals, a district court, a criminal district court, a constitutional county court, a statutory county court, a justice court, or a municipal court.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.3 tracks a provision of the Texas Penal Code (Tex. Penal Code § 19.03), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(B).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit aggravated kidnapping that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Aggravated kidnapping" means—

1. a person intentionally or knowingly abducts another person with the intent to—

   a. hold him for ransom or reward; or

   b. use him as a shield or hostage; or

   c. facilitate the commission of a felony or the flight after the attempt or commission of a felony; or

   d. inflict bodily injury on him or violate or abuse him sexually; or

   e. terrorize him or a third person; or

   f. interfere with the performance of any governmental or political function; or

2. a person intentionally or knowingly abducts another person and uses or exhibits a deadly weapon during the commission of the offense.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.4 tracks a provision of the Texas Penal Code (Tex. Penal Code § 20.04), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(C).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit aggravated assault that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Aggravated assault" means a person commits assault and the person—

1. causes serious bodily injury to another, including the person's spouse; or

2. uses or exhibits a deadly weapon during the commission of the assault.

"Assault" means that a person—

1. intentionally, knowingly, or recklessly causes bodily injury to another, including the person's spouse; or

2. intentionally or knowingly threatens another with imminent bodily injury, including the person's spouse; or

3. intentionally or knowingly causes physical contact with another when the person 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 72.5 tracks provisions of the Texas Penal Code (Tex. Penal Code §§ 22.01, 22.02), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(D).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit sexual assault that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Sexual assault" means that a person—

1. intentionally or knowingly—
    a. causes the penetration of the anus or sexual organ of another person by any means, without that person's consent; or
    b. causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
    c. causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
2. intentionally or knowingly—
    a. causes the penetration of the anus or sexual organ of a child by any means; or
    b. causes the penetration of the mouth of a child by the sexual organ of the actor; or
    c. causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
    d. causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

e. causes the mouth of a child to contact the anus or sexual organ of another person, including the actor.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.6 tracks a provision of the Texas Penal Code (Tex. Penal Code § 22.011), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(E).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit aggravated sexual assault that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Aggravated sexual assault" means that a person—

1. intentionally or knowingly—
    a. causes the penetration of the anus or sexual organ of another person by any means, without that person's consent; or
    b. causes the penetration of the mouth of another person by the sexual organ of the actor, without that person's consent; or
    c. causes the sexual organ of another person, without that person's consent, to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
2. intentionally or knowingly—
    a. causes the penetration of the anus or sexual organ of a child by any means; or
    b. causes the penetration of the mouth of a child by the sexual organ of the actor; or
    c. causes the sexual organ of a child to contact or penetrate the mouth, anus, or sexual organ of another person, including the actor; or
    d. causes the anus of a child to contact the mouth, anus, or sexual organ of another person, including the actor; or

e. causes the mouth of a child to contact the anus or sexual organ of another person, including the actor; and

if—

3. the person—

a. causes serious bodily injury or attempts to cause the death of the victim or another person in the course of the same criminal episode; or

b. by acts or words places the victim in fear that any person will become the victim of an offense [*under Texas Penal Code section 20A.02(a)(3), (4), (7), or (8)*] or that death, serious bodily injury, or kidnapping will be imminently inflicted on any person; or

c. by acts or words occurring in the presence of the victim threatens to cause any person to become the victim of an offense [*under Texas Penal Code section 20A.02(a)(3), (4), (7), or (8)*] or to cause the death, serious bodily injury, or kidnapping of any person; or

d. uses or exhibits a deadly weapon in the course of the same criminal episode; or

e. acts in concert with another who engages in conduct described by paragraph 1 directed toward the same victim and occurring during the course of the same criminal episode; or

f. administers or provides flunitrazepam, otherwise known as rohypnol, gamma hydroxybutyrate, or ketamine to the victim of the offense with the intent of facilitating the commission of the offense; or

4. the victim is younger than fourteen years of age; or

5. the victim is an elderly individual or a disabled individual.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.7 tracks a provision of the Texas Penal Code (Tex. Penal Code § 22.021), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(F).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07. The phrase "[*under Texas Penal Code section 20A.02(a)(3), (4), (7), or (8)*]" should be replaced with the appropriate statutory language. *See* Tex. Penal Code § 20A.02(a)(3), (4), (7), (8).

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

PJC 72.8 Injury to Child, Elderly Individual, or Disabled Individual as a Ground for Joint and Several Liability

PJC 72.8A Question and Instructions—Injury to a Child as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(G))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit injury to a child that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Injury to a child" means that—

1. a person intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a child—

    a. serious bodily injury; or

    b. serious mental deficiency, impairment, or injury; or

    c. bodily injury; or

2. a person is an owner, operator, or employee of a group home, nursing facility, assisted living facility, intermediate care facility for persons with mental retardation, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to a child who is a resident of that group home or facility—

    a. serious bodily injury; or

    b. serious mental deficiency, impairment, or injury; or

    c. bodily injury.

"Child" means a person fourteen years of age or younger.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.8A tracks a provision of the Texas Penal Code (Tex. Penal Code § 22.04), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(G).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

PJC 72.8B Question and Instructions—Injury to an Elderly Individual as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(G))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit injury to an elderly individual that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Injury to an elderly individual" means that—

1. a person intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to an elderly individual—

    a. serious bodily injury; or

    b. serious mental deficiency, impairment, or injury; or

    c. bodily injury; or

2. a person is an owner, operator, or employee of a group home, nursing facility, assisted living facility, intermediate care facility for persons with mental retardation, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to an elderly individual who is a resident of that group home or facility—

    a. serious bodily injury; or

    b. serious mental deficiency, impairment, or injury; or

    c. bodily injury.

"Elderly individual" means a person sixty-five years of age or older.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.8B tracks a provision of the Texas Penal Code (Tex. Penal Code § 22.04), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(G).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

PJC 72.8C Question and Instructions—Injury to a Disabled Individual as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(G))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit injury to a disabled individual that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Injury to a disabled individual" means that—

1. a person intentionally, knowingly, recklessly, or with criminal negligence, by act or intentionally, knowingly, or recklessly by omission, causes to a disabled individual—

    a. serious bodily injury; or

    b. serious mental deficiency, impairment, or injury; or

    c. bodily injury; or

2. a person is an owner, operator, or employee of a group home, nursing facility, assisted living facility, intermediate care facility for persons with mental retardation, or other institutional care facility and the person intentionally, knowingly, recklessly, or with criminal negligence by omission causes to a disabled individual who is a resident of that group home or facility—

    a. serious bodily injury; or

    b. serious mental deficiency, impairment, or injury; or

    c. bodily injury.

"Disabled individual" means a person older than fourteen years of age who by reason of age or physical or mental disease, defect, or injury is substantially unable to protect himself from harm or to provide food, shelter, or medical care for himself.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.8C tracks a provision of the Texas Penal Code (Tex. Penal Code § 22.04), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(G).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit forgery that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

"Forge" means—

1. to alter, make, complete, execute, or authenticate any writing so that it purports—
    a. to be the act of another who did not authorize that act; or
    b. to have been executed at a time or place or in a numbered sequence other than was in fact the case; or
    c. to be a copy of an original when no such original existed; or
2. to issue, transfer, register the transfer of, pass, publish, or otherwise utter a writing that is forged within the meaning of paragraph 1; or
3. to possess a writing that is forged within the meaning of paragraph 1 with intent to utter it in a manner specified in paragraph 2.

"Writing" includes—

1. printing or any other method of recording information; and
2. money, coins, tokens, stamps, seals, credit cards, badges, and trademarks; and
3. symbols of value, right, privilege, or identification.

A person commits an offense if he forges a writing with intent to defraud or harm another.

A person is presumed to intend to defraud or harm another if the person acts with respect to two or more writings of the same type and if each writing is a government record.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.9 tracks a provision of the Texas Penal Code (Tex. Penal Code § 32.21), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(H).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07. For the definition of "government record," see Tex. Penal Code § 37.01(2).

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit commercial bribery that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

A person who is a fiduciary commits commercial bribery if, without the consent of his beneficiary, he intentionally or knowingly solicits, accepts, or agrees to accept any benefit from another person on agreement or understanding that the benefit will influence the conduct of the fiduciary in relation to the affairs of his beneficiary; or

A person commits commercial bribery if he offers, confers, or agrees to confer any benefit the acceptance of which is an offense under the previous paragraph.

"Beneficiary" means a person for whom a fiduciary is acting.

"Fiduciary" means—

1. an agent or employee; or

2. a trustee, guardian, custodian, administrator, executor, conservator, receiver, or similar fiduciary; or

3. a lawyer, physician, accountant, appraiser, or other professional advisor; or

4. an officer, director, partner, manager, or other participant in the direction of the affairs of a corporation or association.

"Benefit" means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.10 tracks a provision of the Texas Penal Code (Tex. Penal Code § 32.43), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(I).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07. The definition of "benefit" is also found in Penal Code section 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit misapplication of fiduciary property or property of a financial institution that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

A person commits a misapplication of fiduciary property or property of a financial institution if he intentionally, knowingly, or recklessly misapplies property he holds as a fiduciary or property of a financial institution in a manner that involves substantial risk of loss to the owner of the property or to a person for whose benefit the property is held.

"Fiduciary" includes—

1. a trustee, guardian, administrator, executor, conservator, and receiver; or

2. an attorney in fact or agent appointed under a durable power of attorney as provided by [*insert language from Texas Probate Code chapter XII*]; or

3. any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier, as those terms are defined by [*insert language from Texas Tax Code section 162.001*]; or

4. an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary.

"Misapply" means deal with property contrary to—

1. an agreement under which the fiduciary holds the property; or
2. a law prescribing the custody or disposition of the property.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.11 tracks a provision of the Texas Penal Code (Tex. Penal Code § 32.45), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(J).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07. The phrases "[*insert language from Texas Probate Code chapter XII*]" and "[*insert language from Texas Tax Code section 162.001*]" should be replaced with the appropriate statutory language.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to secure execution of a document by deception that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

A person commits the offense of securing execution of a document by deception if, with intent to defraud or harm any person, he, by deception—

1. causes another to sign or execute any document affecting property or service or the pecuniary interest of any person; or

2. causes or induces a public servant to file or record any purported judgment or other document purporting to memorialize or evidence an act, an order, a directive, or process of—

   a. a purported court that is not expressly created or established under the constitution or the laws of this state or of the United States; or

   b. a purported judicial entity that is not expressly created or established under the constitution or laws of this state or of the United States; or

   c. a purported judicial officer of a purported court or purported judicial entity described by paragraph a or b.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.12 tracks a provision of the Texas Penal Code (Tex. Penal Code § 32.46), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(K).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

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))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit fraudulent destruction, removal, alteration, or concealment of writing that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

A person commits the offense of fraudulent destruction, removal, alteration, or concealment of writing if, with intent to defraud or harm another, he destroys, removes, conceals, alters, substitutes, or otherwise impairs the verity, legibility, or availability of a writing, other than a governmental record.

"Writing" includes—

1. printing or any other method of recording information; and

2. money, coins, tokens, stamps, seals, credit cards, badges, and trademarks; and

3. symbols of value, right, privilege, or identification; and

4. universal product codes, labels, price tags, or markings on goods.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.13 tracks a provision of the Texas Penal Code (Tex. Penal Code § 32.47), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(L).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

PJC 72.14 Question and Instructions—Theft as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(M))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit theft that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

A person commits theft if he unlawfully appropriates property with intent to deprive the owner of property.

Appropriation of property is unlawful if—

1. it is without the owner's effective consent; or

2. the property is stolen and the actor appropriates the property knowing it was stolen by another; or

3. property in the custody of any law enforcement agency was explicitly represented by any law enforcement agent to the actor as being stolen and the actor appropriates the property believing it was stolen by another.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.14 tracks a provision of the Texas Penal Code (Tex. Penal Code § 31.03), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(M).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3, 60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

PJC 72.15 Question and Instructions—Continuous Sexual Abuse of a Young Child or Children as a Ground for Joint and Several Liability (Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(N))

QUESTION _____

Did *Don Davis*, with the specific intent to do harm to others, act in concert with [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*] to commit continuous sexual abuse of a young child or children that was a proximate cause of the damages, if any, to *Paul Payne*?

Don Davis acts with specific intent to do harm with respect to the nature of *Don Davis*'s conduct and the result of [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conduct when it is [*name(s) of person(s) or entity(ies) with whom or with which Don Davis acted in concert*]'s conscious effort or desire to engage in the conduct for the purpose of doing substantial harm to others.

A person commits continuous sexual abuse of a young child or children if—

1. during a period that is thirty or more days in duration, the person commits two or more acts of sexual abuse, regardless of whether the acts of sexual abuse are committed against one or more victims; and

2. at the time of the commission of each of the acts of sexual abuse, the actor is seventeen years of age or older and the victim is a child younger than fourteen years of age.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 72.15 tracks a provision of the Texas Penal Code (Tex. Penal Code § 21.02), as provided for in the Texas Civil Practice and Remedies Code. Tex. Civ. Prac. & Rem. Code § 33.013(b)(2)(N).

Name of person or entity. Because the statute requires that *Don Davis* act in concert with another, the name of each person or entity with whom or with which *Don Davis* acted in concert must be inserted as set forth in the bracketed portions above.

Accompanying definitions and instructions. Proximate cause should be defined in the charge, as it is incorporated into all questions in this chapter. See PJC 50.1–50.3,

60.1, 65.4, and 70.2. "Person" means an individual, corporation, or association. Tex. Penal Code § 1.07.

In an appropriate case, submit only the specific definitions for the offense that are supported by the evidence.

[Chapters 73–79 are reserved for expansion.]

CHAPTER 80 PERSONAL INJURY DAMAGES

PJC 80.1 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 80.1 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 80.2 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 80.2 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 80.3 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* 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 80.3 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 the damages 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 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. 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 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 80.7 (for other condition), 80.8 (for preexisting condition), and 80.9 (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 80.9.

PJC 80.4 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 80.4 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 80.3 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 80.9.

PJC 80.5 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* 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 80.5 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 80.5 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 80.5 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 80.6 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 submissions 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 80.3 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 80.9.

Scope of comments to PJC 80.5. The comments to PJC 80.5 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 80.3.

PJC 80.6 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 80.6 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 80.5 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 80.7 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 80.7 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.

When not to use—if liability question uses "injury." If the liability question is submitted with the term "injury," PJC 80.7 should not be submitted.

Aggravation of preexisting condition. If there is evidence that the occurrence in question aggravated a preexisting condition, PJC 80.8 should be given in lieu of PJC 80.7.

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 80.8 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 80.8 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.

When not to use—if liability question uses "injury." If the liability question is submitted with the term "injury," PJC 80.8 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 80.9 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 80.9 should be used 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 80.9 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.

When not to use—if liability question uses "injury." If the liability question is submitted with the term "injury," PJC 80.9 should not be submitted.

Modify instruction not to reduce amounts because of plaintiff's negligence. If PJC 80.9 is given, the instruction not to reduce amounts because of the negligence of the plaintiff, injured spouse, or decedent, which appears in PJC 80.3–80.5, 80.12, 81.3–81.6, 82.3, 83.3, 83.4, and 84.3, 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 80.10 Personal Injury Damages—Cautionary Instruction Concerning Damages Limit in Health Care Suit

Do not consider, discuss, or speculate whether any party is or is not subject to any damages limit under applicable law.

COMMENT

When to use. The above instruction is derived from the Texas Civil Practice and Remedies Code, which requires the following instruction to be given in any action on a health care liability claim: "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law." Tex. Civ. Prac. & Rem. Code § 74.303(e). If applicable, this instruction should be given after the question and before the elements of damages. Although PJC 80.10 varies from the statutory language, the Committee believes the former more fully effectuates the intent of the legislation. Moreover, the parties can agree to waive its submission. Tex. R. Civ. P. 279.

Definition of "health care liability claim." As defined in the Code—

> "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety or professional or administrative services directly related to health care, which proximately resulted in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

PJC 80.11 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 80.11 is to be used in conjunction with PJC 80.12 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 80.12 Personal Injury Damages—Child's Loss of Consortium—Damages Question

If you answered "Yes" to Question _____ [*80.11*], 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 80.12 should be used in conjunction with PJC 80.11 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 80.9.

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 80.3 comment, "Bystander injury."

PJC 81.1 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 81.1 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 81.2 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 81.2 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 81.3 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 81.3 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 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, Inc.*, 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 the 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 80.9.

PJC 81.4 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 81.4 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 81.3 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 the damages 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 81.3 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 80.9.

PJC 81.5 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 81.5 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 81.3 and 81.4 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 81.3 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 80.9.

PJC 81.6 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 81.6 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 81.3 and 81.4 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 81.3 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 80.9.

PJC 81.7 Wrongful Death Damages—Cautionary Instruction Concerning Damages Limit in Health Care Suit

Do not consider, discuss, or speculate whether any party is or is not subject to any damages limit under applicable law.

COMMENT

When to use. The above instruction is derived from the Texas Civil Practice and Remedies Code, which requires the following instruction to be given in any action on a health care liability claim: "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law." Tex. Civ. Prac. & Rem. Code § 74.303(e). If applicable, this instruction should be given after the question and before the elements of damages. Although PJC 81.7 varies from the statutory language, the Committee believes the former more fully effectuates the intent of the legislation. Moreover, the parties can agree to waive its submission. Tex. R. Civ. P. 279.

Definition of "health care liability claim." As defined in the Code—

> "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

PJC 82.1 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 82.1 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 82.2 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 82.2 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 82.3 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 82.3 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 82.3 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 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 care—specific terms. 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 the 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 evi-

dence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

Exemplary damages. For actions accruing on or after September 1, 1995, and filed before September 1, 2003, if exemplary damages are sought in addition to compensatory damages, it is necessary to obtain separate answers for economic and non-economic damages. "Economic damages" means "compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." *See* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995.

Broad-form submission of elements. When separate answers are not required, the following broad-form 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 80.9.

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

PJC 82.4 Survival Damages—Cautionary Instruction Concerning Damages Limit in Health Care Suit

Do not consider, discuss, or speculate whether any party is or is not subject to any damages limit under applicable law.

COMMENT

When to use. The above instruction is derived from the Texas Civil Practice and Remedies Code, which requires the following instruction to be given in any action on a health care liability claim: "Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law." Tex. Civ. Prac. & Rem. Code § 74.303(e). If applicable, this instruction should be given after the question and before the elements of damages. Although PJC 82.4 varies from the statutory language, the Committee believes the former more fully effectuates the intent of the legislation. Moreover, the parties can agree to waive its submission. Tex. R. Civ. P. 279.

Definition of "health care liability claim." As defined in the Code—

> "Health care liability claim" means a cause of action against a health care provider or physician for treatment, lack of treatment, or other claimed departure from accepted standards of medical care or health care or safety or professional or administrative services directly related to health care, which proximately results in injury to or death of a claimant, whether the claimant's claim or cause of action sounds in tort or contract.

Tex. Civ. Prac. & Rem. Code § 74.001(a)(13).

CHAPTER 83 PROPERTY DAMAGES

PJC 83.1 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 83.1 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 83.2 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 83.2 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 83.3 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 83.3 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 83.4. 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 83.4.

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 83.4 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 amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

1. Cost of repairs.

Consider the reasonable cost in *Clay* County, Texas, to restore the 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 83.4 is an alternative to PJC 83.3. 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 83.4 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 as above.

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

CHAPTER 84 ECONOMIC DAMAGES

PJC 84.1 Economic 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 84.1 may be used to condition answers to economic 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 84.2 Economic 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 84.2 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 84.3 Economic Damages—Nonmedical Professional Malpractice

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *his* loss, if any, 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.

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.

[Insert appropriate elements of damages below.]

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

Answer: _____

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

Answer: _____

COMMENT

When to use. PJC 84.3 may be used, along with appropriate instructions, to submit economic damages in a negligence action against an attorney, accountant, or architect. Substantive law, including the statutes, will determine the proper elements of damages in the particular professional malpractice action. The trial court must inform the jury of the proper elements and limit the jury's consideration to those elements. Compliance with this requirement may be accomplished either by adding an explanatory instruction or by listing the proper elements as is done in a personal injury action.

Instruction required. PJC 84.3 should not be submitted without an instruction on the appropriate measures of damages. See PJC 84.4 for sample instructions in a

legal malpractice case and PJC 84.5 for sample instructions in an accounting malpractice case.

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. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. See PJC 80.9.

PJC 84.4 Sample Instructions for Economic Damages—Legal Malpractice

Explanatory note: Damages instructions in legal malpractice cases are often necessarily fact-specific. The following instructions are illustrative only, using a hypothetical situation to give a few examples of how instructions may be worded to submit various legal measures of damages.

Sample A—Value of the original suit

The amount, if any, that *Paul Payne* would have recovered and collected if *his* original suit against *Tom Taylor* had been properly prosecuted by *Don Davis*.

Sample B—Loss to the value of the original suit

The difference, if any, between the amount that *Paul Payne* [recovered] [settled for] and collected in *his* original suit against *Tom Taylor* and the amount *he* would have [recovered] [settled for] and collected if the original suit had been properly prosecuted by *Don Davis*.

Sample C—The increase in damages assessed against Paul Payne in the original suit

The increase, if any, in damages assessed against *Paul Payne* in the original suit brought by *Tom Taylor* caused by the failure of *Don Davis* to properly defend the lawsuit.

Sample D—Additional attorney's fees incurred

Reasonable and necessary attorney's fees incurred by *Paul Payne* for legal services proximately caused by the negligence of *Don Davis*. Do not include any attorney's fees incurred for the prosecution of this claim against *Don Davis*.

COMMENT

When to use. See explanatory note above. Because damages instructions in legal malpractice cases are necessarily fact-specific, no true "pattern" instructions are given—only samples of some measures of general damages available in such cases. This list is not exhaustive. The samples are illustrative only, adapted to a hypothetical fact situation, and must be rewritten to fit the particular damages raised by the plead-

ings and proof and recoverable under a legally accepted theory. The instructions should be drafted in an attempt to make the plaintiff whole but not to put him in a better position than he would have been in had the defendant not been negligent. Substantive law will determine the proper elements of damages for legal malpractice. This question does not address any damages for breach of fiduciary duty. See the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 115.18 for that issue.

Measures generally alternative. The measures outlined above are generally alternative, although some may be in addition to one of the other measures.

Value of the original suit. This measure may be appropriate for the failure to file or properly prosecute a lawsuit. The client must show that he would have made a recovery that would have been collectible on or after the date a judgment in the underlying case was or would have been rendered. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 299 S.W.3d 106, 113–14 (Tex. 2009). It is unnecessary to submit a separate question on whether the recovery would have been collectible. *See Schlosser v. Tropoli*, 609 S.W.2d 255, 258–59 (Tex. Civ. App.—Houston [14th Dist.] 1980, writ ref'd n.r.e.). One Texas appellate court has held that damages measured by the value of the original suit need not be reduced by the amount of the contingent fee that the client would have owed to the attorney if the underlying suit had been successfully prosecuted. *See Akin, Gump, Strauss, Hauer & Feld, L.L.P. v. National Development & Research Corp.*, 232 S.W.3d 883, 897–99 (Tex. App.—Dallas 2007), *rev'd on other grounds*, 299 S.W.3d 106 (Tex. 2009).

Loss to the value of the original suit. This measure may be appropriate for negligent handling of a lawsuit, leading to a poor result either by verdict, settlement, or appeal. Again, the jury must be instructed on the element of collectibility. *See Ballesteros v. Jones*, 985 S.W.2d 485, 500 (Tex. App.—San Antonio 1998, pet. denied); *Smith v. Heard*, 980 S.W.2d 693, 693–96 (Tex. App.—San Antonio 1998, pet denied).

The increase in damages assessed against *Paul Payne* in the original suit. This measure may be appropriate for the negligent defense of a case. Similarly, if a defense attorney's malpractice inflated the settlement value of a case, the client may be able to recover as damages the difference between the settlement amount and the actual value of the case if handled properly, less any expenses avoided or saved as a result of the settlement. *See Keck, Mahin & Cate v. National Union Fire Insurance Co. of Pittsburgh*, 20 S.W.3d 692, 703 (Tex. 2000); *Heath v. Herron*, 732 S.W.2d 748, 753 (Tex. App.—Houston [14th Dist.] 1987, writ denied). A lawyer is not responsible for a loss to a client who would have lost the case without the negligence of the lawyer. For example, even if a lawyer failed to answer for a client, the client must still establish that he had a defense to the case or that the negligence of the lawyer made his loss greater. *See Haynes & Boone v. Bowser Bouldin, Ltd.*, 864 S.W.2d 662, 672 (Tex. App.—San Antonio 1993), *rev'd in part on other grounds*, 896 S.W.2d 179 (Tex. 1995).

Special rules for clients convicted of a crime. In the case of the defense of a criminal case, the client must get his conviction reversed before he can sue his criminal defense lawyer for malpractice; otherwise, there is no causation as a matter of law. *Peeler v. Hughes & Luce*, 909 S.W.2d 494 (Tex. 1995).

Additional attorney's fees incurred. This measure may be appropriate when a client had to hire an additional attorney to correct the negligence of the first attorney in the underlying case or when the negligence of an attorney in drafting a document caused the client to incur additional attorney's fees. *See Akin*, 299 S.W.3d at 122; *Estate of Arlitt v. Paterson*, 995 S.W.2d 713 (Tex. App.—San Antonio 1999, pet. denied). The measure does not include any fees incurred for the prosecution of the malpractice action itself.

PJC 84.5 Sample Instructions for Economic Damages—Accounting Malpractice

Explanatory note: Damages instructions in accounting malpractice cases are often necessarily fact-specific. The following instructions are illustrative only, using a hypothetical situation to give a few examples of how instructions may be worded to submit various legal measures of damages.

Sample A—IRS penalties

The amount, if any, of penalties [assessed by] [paid to] the IRS proximately caused by the negligence of *Dora Dotson.*

Sample B—Taxes

The excess tax paid by *Paul Payne*, proximately caused by the negligence of *Dora Dotson*, that cannot be recovered through an amended tax return.

Sample C—The undiscovered malfeasance/fraud/risky investment

The amount of loss from the [malfeasance] [fraud] [risky investment] in question from the time that it should have been discovered by *Dora Dotson* to the time it was discovered.

Sample D—Additional accounting fees incurred

Reasonable and necessary accounting fees incurred by *Paul Payne* for additional accountant services proximately caused by the negligence of *Dora Dotson.*

Sample E—Value of the services

The difference, if any, between the amount paid for the accountant services of *Dora Dotson* and the [value of] [benefit conferred by] the services rendered by *Dora Dotson.*

Sample F—Damage to the business

The [lost profits] [unwarranted expenses], if any, to the business proximately caused by the negligence of *Dora Dotson.*

COMMENT

When to use. See explanatory note above. Because damages instructions in accounting malpractice cases are necessarily fact-specific, no true "pattern" instructions are given—only samples of some measures of general damages available in such cases. This list is not exhaustive. The samples are illustrative only, adapted to a hypothetical fact situation, and must be rewritten to fit the particular damages raised by the pleadings and proof and recoverable under a legally accepted theory. The instructions should be drafted in an attempt to make the plaintiff whole but not to put him in a better position than he would have been in had the defendant not been negligent. Substantive law will determine the proper elements of damages for accounting malpractice. This question does not address any damages for breach of fiduciary duty. See the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 115.18 for that issue.

Measures generally alternative. The measures outlined above are generally alternative, although some may be in addition to one of the other measures.

PJC 84.6 Economic Damages—Question and Instruction on Monetary Loss Caused by Negligent Misrepresentation

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

QUESTION _____

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

[Insert definition of proximate cause, PJC 60.1.]

Consider the following elements of damages, if any, and none other. Do not add any amount for interest on past damages, if any.

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

The difference, if any, between the value of what *Paul Payne* has received in the transaction and the purchase price or value given.

Answer: _____

The economic loss, if any, otherwise suffered in the past as a consequence of *Paul Payne*'s reliance on the misrepresentation.

Answer: _____

The economic loss, if any, that in reasonable probability will be sustained in the future as a consequence of *Paul Payne*'s reliance on the misrepresentation.

Answer: _____

COMMENT

When to use. PJC 84.6 should be predicated on a "Yes" answer to PJC 61.4. If only one measure of damages is supported by the pleadings and proof, the measure may be incorporated into the question.

Instruction required. PJC 84.6 *may not* be submitted without an instruction on the appropriate measure of damages. *See Jackson v. Fontaine's Clinics*, 499 S.W.2d 87, 90 (Tex. 1973).

Source of instructions. The measures of damages set forth in the instructions are prescribed by *Restatement (Second) of Torts* § 552B (1977) and have been adopted by the Supreme Court of Texas. *Federal Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442–43 (Tex. 1991); *see also D.S.A., Inc. v. Hillsboro Independent School District*, 973 S.W.2d 662, 663–64 (Tex. 1998). In *D.S.A, Inc.*, the court also recognized that under *Restatement (Second) of Torts* § 311 (1965) a party could recover damages for risk of physical harm if actual physical harm had resulted from negligent misrepresentation. *D.S.A., Inc.*, 973 S.W.2d at 664; *but see Sloane*, 825 S.W.2d at 443 n.4.

Separating elements of damages. 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).

In addition, 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). *See also Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212, 215 (Tex. 2005) (harmful error in submitting broad-form question incorporating both valid and invalid theories of liability).

Elements considered separately. *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003), provides an alternative instruction that may be appropriate in certain cases involving undefined or potentially overlapping categories of damages. The following language should be substituted for the instruction to consider each element separately:

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

Parallel theories. If the negligent misrepresentation cause of action is only one of several theories of recovery submitted in the charge and any theory has a different legal measure of damages to be applied to a factually similar claim for damages, a separate damages question for each theory may be submitted and the following additional instruction may be included earlier in the charge:

> 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.

Prejudgment interest. Instructing the jury not to add interest is suggested because prejudgment interest, if recoverable, will be calculated by the court at the time of judgment. If interest paid on an obligation is claimed as an element of damages, it may be necessary to modify the instruction on interest. "Prejudgment interest may not be assessed or recovered on an award of future damages." Tex. Fin. Code § 304.1045 (wrongful death, personal injury, or property damage cases); *see also Perry Roofing Co. v. Olcott*, 744 S.W.2d 929, 931 (Tex. 1988) (contract cases); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 555–56 (Tex. 1985) (other types of cases). Therefore, separation of past and future damages is required.

PJC 85.1 Standards for Recovery of Exemplary Damages

PJC 85.1A Standard for Recovery of Exemplary Damages—Gross Negligence—Causes of Action Accruing before September 1, 1995

If, in answer to Question _____ [*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 85.1B Standard for Recovery of Exemplary Damages—Malice—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?

"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 85.1C Standard for Recovery of Exemplary Damages—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 _____ [*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 85.1A 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 85.1B should be used. For actions filed on or after September 1, 2003, PJC 85.1C should be used. See the comments below for the sources of these definitions and instructions. For submission of the question for exemplary damages, see PJC 85.3.

Fraud. In addition to gross negligence, gross neglect, and malice, fraud is a ground for recovery of exemplary damages. Tex. Civ. Prac. & Rem. Code § 41.003. Fraud is defined as "fraud other than constructive fraud." Tex. Civ. Prac. & Rem. Code § 41.001(6). Constructive fraud is defined as "the breach of some legal or equitable duty which, irrespective of moral guilt, the law declares fraudulent because of its tendency to deceive others, to violate confidence, or to injure public interests." *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964). The Committee expresses no opinion on the elements that may be required to establish fraud in the context of a case involving a claim for exemplary damages against a nonmedical professional. The burden of proof for causes of action accruing on or after September 1, 1995, is clear and convincing evidence. All other cases must be proved by a preponderance of the evidence. For questions, instructions, and definitions for fraud as a predicate for actual damages, see the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC105.1–105.11.

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). See PJC 85.5–85.11 for questions and instructions on these exceptions.

[The following paragraphs apply only to PJC 85.1A.]

Use of "occurrence," "injury," or "occurrence or injury." See PJC 51.1, 61.1, 66.1, and 71.1. The term used in PJC 85.1A should match that used in PJC 51.3, 61.5, 66.4, and 71.13.

Source of definition. The definition in PJC 85.1A 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 85.1B.]

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 85.1B 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 85.1C.]

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 85.2 Imputing Gross Negligence or Malice to a Corporation

PJC 85.2A 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 85.1A.]

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 85.2B 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 85.2C 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 85.2 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 85.2 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).

Definitions of "gross negligence" and "malice." See PJC 85.1.

Unanimity instructions. The unanimity instructions in PJC 85.2C 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—General Negligence & Intentional Personal Torts* PJC 10.14 and *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment* PJC 115.39 for comparative questions and comments in general negligence and business submissions.

PJC 85.3 Determining Amount of Exemplary Damages

PJC 85.3A Determining Amount of Exemplary Damages—Causes of Action Accruing before September 1, 1995

If you answered "Yes" to Question _____ [*85.1 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*] [*or, in a wrongful death or survival action, 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 85.3B Determining Amount of Exemplary Damages—Causes of Action Accruing on or after September 1, 1995, and Filed before September 1, 2003

If you answered "Yes" to Question _____ [*85.1 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*] [*or, in a wrongful death or survival action, 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 85.3C Determining Amount of 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 _____ [*85.1 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 puni-*

tive damages] [*or, in a wrongful death or survival action, for the death of Mary Payne*]?

"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 85.3A should be used to submit the question of exemplary damages for causes of action accruing before September 1, 1995. PJC 85.3B 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 85.3C should be used.

Conditioned on finding of gross negligence or malice. PJC 85.3 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 85.3A, 85.3B, or 85.3C (as appropriate) should be submitted with both PJC 40.3 and 40.4 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 85.4.

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 82.3.

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 85.4.

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 85.3A.]

Source of definition and instructions. The definition of exemplary damages in PJC 85.3A 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 85.3B and 85.3C.]

Source of definitions and instructions. The definitions of exemplary damages in PJC 85.3B and 85.3C 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 85.3C 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 85.4 Apportioning Exemplary Damages

If, in your answer to Question _____ [*85.3*], you entered any amount of exemplary damages, then answer the following question. Otherwise, do not answer the following question.

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 85.4 is a submission of apportionment in a single question.

PJC 85.5 Question and Instructions—Forgery as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(8))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*85.1*]. Otherwise, do not answer the following question.

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 _____

Did *Don Davis* commit forgery with the intent to defraud or harm another?

"Forgery" means that a person *alters, makes, completes, executes, or authenticates* a writing so that it purports to *be the act of another who did not authorize that act.*

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 85.5 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a felony in Tex. Penal Code § 32.21, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(8). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.21, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c)(8). See comment below, "Felonious conduct," for a discussion of the requirements needed to establish that the conduct in question was felonious.

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.5 should be answered in the first phase of the trial.

Alternative language for issuance or possession of a forged writing. Tex. Penal Code § 32.21(a)(1)(B) defines "forgery" alternatively as occurring when a person issues, transfers, registers the transfer of, passes, publishes, or otherwise utters a forged writing as defined in Tex. Penal Code § 32.21(a)(1)(A). Also, Tex. Penal Code § 32.21(a)(1)(C) gives another alternative definition of "forgery" as occurring when a person possesses a forged writing (as defined in Tex. Penal Code § 32.21(a)(1)(A)) with the intent to utter it (as defined in Tex. Penal Code § 32.21(a)(1)(B)). In an appropriate case, an alternative definition of "forgery" may be substituted.

Definition of "writing." In an appropriate case, use an applicable definition of "writing" as found in Tex. Penal Code § 32.21(a)(2).

Alternative language for "be the act of another who did not authorize that act." In an appropriate case, the language *have been executed at a time (at a place) (in a numbered sequence) other than was in fact the case*, or *be a copy of an original when no such original existed* may be substituted for the original language of the charge. Tex. Penal Code § 32.21(a)(1)(A).

Felonious conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) provides that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.21. The criminal conduct described in Tex. Penal Code § 32.21 rises to felonious conduct only when the writing—

1. is or purports to be a will, codicil, deed, deed of trust, mortgage, security instrument, security agreement, credit card, check, authorization to debit an account at a financial institution, or similar sight order for payment of money, contract, release, or other commercial instrument;

2. is part of an issue of money, securities, postage, or revenue stamps;

3. is a license, certificate, permit, seal, title, letter of patent, or similar document issued by a government; or

4. is another instrument issued by a state or national government or by a subdivision of either, or part of an issue of stock, bonds, or other instruments representing interests in or claims against another person.

Tex. Penal Code § 32.21(d), (e).

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 32.21(a), (b); Tex. Civ. Prac. & Rem. Code § 41.008.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.6–85.11.

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

> If you answered "Yes" to Question _____ [*85.1*], then answer the following question. Otherwise, do not answer the following question.

PJC 85.6 Question and Instruction—Commercial (Fiduciary) Bribery as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(9))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*85.1*]. Otherwise, do not answer the following question.

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 _____

Did *Don Davis*, without *Paul Payne*'s consent, intentionally solicit, accept, or agree to accept any benefit from another person on the agreement or understanding that the benefit would influence *his* conduct in relation to the affairs of *Paul Payne*?

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 85.6 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described in Tex. Penal Code § 32.43, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(9). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.43, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c).

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.6 should be answered in the first phase of the trial.

Consent. If a definition of "consent" is required, use the following:

> "Consent" means assent in fact, whether express or apparent.

Tex. Penal Code § 1.07(a)(11).

Benefit. If a definition of "benefit" is required, use the following:

> "Benefit" means anything reasonably regarded as economic gain or advantage, including benefit to any other person in whose welfare the beneficiary is interested.

Tex. Penal Code § 1.07(a)(7).

Knowing standard of conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) authorizes elimination of the limitation on exemplary damages awards if the conduct described in the applicable Penal Code section was committed either knowingly or intentionally. If knowing instead of intentional conduct is alleged, use the following definition:

> A person acts knowingly with respect to the nature of *his* conduct or to circumstances surrounding *his* conduct when *he* is aware of the nature of *his* conduct or that the circumstances exist. A person acts knowingly with respect to a result of *his* conduct when *he* is aware that *his* conduct is reasonably certain to cause the result.

Tex. Penal Code § 6.03(b).

Offering bribe also criminal conduct. A person who, for an improper purpose, intentionally offers, confers, or agrees to confer a benefit to a fiduciary also commits commercial bribery. Tex. Penal Code § 32.43(c). In an appropriate case, the question should read:

> Did *Don Davis* intentionally offer, confer, or agree to confer a benefit on *Fred Fiduciary* on the agreement that the benefit would influence *Fred Fiduciary*'s conduct in relation to the affairs of *Paul Payne*?

Fiduciary. The defendant must be a fiduciary for the conduct described in Tex. Penal Code § 32.43 to apply. "Fiduciary" is defined there as (1) an agent or employee; (2) a trustee, guardian, custodian, administrator, executor, conservator, receiver, or similar fiduciary; (3) a lawyer, physician, accountant, appraiser, or other professional advisor; or (4) an officer, director, partner, manager, or other participant in the direction of the affairs of a corporation or association. Tex. Penal Code § 32.43(a)(2). If the existence of such a fiduciary relationship is disputed, a preliminary question should be submitted, and PJC 85.6 should be made conditional on a "Yes" answer to that question. *See Schiller v. Elick*, 240 S.W.2d 997, 999 (Tex. 1951) (dispute whether defendant was plaintiff's agent).

Beneficiary. For purposes of the commercial bribery statute, a "beneficiary" is the person for whom a fiduciary acts. Tex. Penal Code § 32.43(a)(1). PJC 85.6 assumes that the plaintiff is the beneficiary.

Source of instruction and definition. Tex. Penal Code § 32.43; Tex. Civ. Prac. & Rem. Code § 41.008.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.5, 85.7–85.11.

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

> If you answered "Yes" to Question _____ [*85.1*], then answer the following question. Otherwise, do not answer the following question.

PJC 85.7 Question and Instructions—Misapplication of Fiduciary Property as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(10))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*85.1*]. Otherwise, do not answer the following question.

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 _____

Did *Don Davis* intentionally misapply [*identify property defendant held as a fiduciary*] in a manner that involved substantial risk of loss to *Paul Payne* [*and was the value of the property $1,500 or greater*]?

"Misapply" means a person deals with property [*or money*] contrary to *an agreement under which the person holds the property* [*or money*].

"Substantial risk of loss" means it is more likely than not that loss will occur.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 85.7 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described in Tex. Penal Code § 32.45, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(10). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.45, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c).

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.7 should be answered in the first phase of the trial.

Knowing standard of conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) authorizes elimination of the limitation on exemplary damages awards if the conduct described in the applicable Penal Code section was committed either knowingly or intentionally. If knowing instead of intentional conduct is alleged, use the following definition:

> A person acts knowingly with respect to the nature of *his* conduct or to circumstances surrounding *his* conduct when *he* is aware of the nature of *his* conduct or that the circumstances exist. A person acts knowingly with respect to a result of *his* conduct when *he* is aware that *his* conduct is reasonably certain to cause the result.

Tex. Penal Code § 6.03(b).

Agreement. If a definition of "agreement" is required, use the following:

> "Agreement" means the act of agreement or coming to an agreement; a harmonious understanding; or an arrangement as to a course of action.

Bynum v. State, 711 S.W.2d 321, 323 (Tex. App.—Amarillo 1986), *aff'd*, 767 S.W.2d 769 (Tex. Crim. App. 1989) (applying ordinary, dictionary definition of "agreement").

Property. Tex. Penal Code § 32.01(2) defines "property" broadly to include tangible or intangible property as well as money. Because the jury may not understand money to be "property," the word "money" should be used if money is involved in the case.

Acting contrary to a law governing disposition of property. In an appropriate case, the phrase *a law prescribing the custody or disposition of the property* may be substituted for, or added to, the phrase *an agreement under which the person holds the property*. *See* Tex. Penal Code § 32.45(a)(2).

Fiduciary. The defendant must be a fiduciary for the conduct described in Tex. Penal Code § 32.45 to apply. "Fiduciary" is defined there as including (1) "a trustee, guardian, administrator, executor, conservator, and receiver"; (2) "an attorney in fact or agent appointed under a durable power of attorney" as provided by chapter 12 of the Texas Probate Code; (3) "any other person acting in a fiduciary capacity, but not a commercial bailee unless the commercial bailee is a party in a motor fuel sales agreement with a distributor or supplier," as those terms are defined in Tex. Tax Code § 162.001; and (4) "an officer, manager, employee, or agent carrying on fiduciary functions on behalf of a fiduciary." Tex. Penal Code § 32.45(a)(1). "[A]ny other person acting in a fiduciary capacity" embraces all fiduciaries, not just the categories of

fiduciaries enumerated in Tex. Penal Code § 32.45(a)(1). *Coplin v. State*, 585 S.W.2d 734, 735 (Tex. Crim. App. 1979); *Showery v. State*, 678 S.W.2d 103, 107–08 (Tex. App.—El Paso 1984, pet. ref'd).

If the existence of such a fiduciary relationship is disputed, a preliminary question should be submitted, and PJC 85.7 should be made conditional on a "Yes" answer to that question. *See Schiller v. Elick*, 240 S.W.2d 997, 999 (Tex. 1951) (dispute whether defendant was plaintiff's agent).

Substantial risk of loss. The definition of "substantial risk of loss" is derived from *Bynum v. State*, 767 S.W.2d 769, 774–75 (Tex. Crim. App. 1989); and *Casillas v. State*, 733 S.W.2d 158, 163–64 (Tex. Crim. App. 1986), *appeal dismissed*, 484 U.S. 918 (1987).

Misapplication of property of financial institution. If the defendant is alleged to have misapplied property of a financial institution instead of fiduciary property, the question should be amended to read as follows:

> QUESTION _____
>
> Did *Don Davis* intentionally misapply property of *ABC Bank* in a manner that involved substantial risk of loss to *ABC Bank* [*and was the value of the misapplied property $1,500 or greater*]?
>
> "Misapply" means to deal with property contrary to a law prescribing the custody or disposition of the property.
>
> "Substantial risk of loss" means it is more likely than not that loss will occur.
>
> A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

"Value" and requirement that conduct be described as a felony. Tex. Civ. Prac. & Rem. Code § 41.008(c) provides that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.45. The criminal conduct described in Tex. Penal Code § 32.45 rises to felonious conduct only when the value of the property misapplied is $1,500 or higher. Tex. Penal Code § 32.45(c). The optional language in the basic question in PJC 85.7 establishes whether the defendant's conduct rises to the status of a felony, if there is a dispute about the value of the misapplied property.

Source of instruction and definition. Tex. Penal Code §§ 31.08, 32.45; Tex. Civ. Prac. & Rem. Code § 41.008.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for

and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.5, 85.6, 85.8–85.11.

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

> If you answered "Yes" to Question _____ [*85.1*], then answer the following question. Otherwise, do not answer the following question.

PJC 85.8 Question and Instructions—Securing Execution of Document by Deception as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(11))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*85.1*]. Otherwise, do not answer the following question.

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 _____

Did *Don Davis* secure the execution of a document by deception [*and was the value of the property affected $1,500 or more*]?

"Securing the execution of a document by deception" occurs when a person causes another person to *sign* any document affecting *property*, and does so by deception, with the intent to defraud or harm any person.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

"Deception" means creating or confirming by words or conduct a false impression of law or fact that is likely to affect the judgment of another in the transaction, and that the actor does not believe to be true.

"Property" means: (a) real property; (b) tangible or intangible personal property, including anything severed from land; or (c) a document, including money, that represents or embodies anything of value.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 85.8 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff resulted from conduct described as a felony in Tex. Penal Code § 32.46, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ.

Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(11). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.46, and the conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c).

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.8 should be answered in the first phase of the trial.

Alternative language for "sign." In an appropriate case, the word *execute* may be substituted for the word *sign. See* Tex. Penal Code § 32.46(a).

Alternative language for "property." In an appropriate case, the term *service* or *the pecuniary interest of any person* may be substituted for the word *property. See* Tex. Penal Code § 32.46(a)(1). If *service* is substituted for *property*, the following definition should be substituted:

> "Service" includes: (a) labor and professional service; (b) telecommunication, public utility, and transportation service; (c) lodging, restaurant service, and entertainment; and (d) the supply of a motor vehicle or other property for use.

Tex. Penal Code § 32.01(3).

"Deception." The definition of "deception" in PJC 85.8 is taken from Tex. Penal Code § 31.01(1) and *Goldstein v. State*, 803 S.W.2d 777, 790 (Tex. App.—Dallas 1991, pet. ref'd). See Tex. Penal Code § 31.01(1) for alternative definitions of "deception."

"Value" and requirement that conduct be described as a felony. Tex. Civ. Prac. & Rem. Code § 41.008(c) requires that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.46. The criterion for felony status is that the property or service have a value of $1,500 or higher. Tex. Penal Code § 32.46(b)(4). The optional language in the basic question in PJC 85.8 establishes whether the defendant's conduct rises to the status of a felony, if there is a dispute about the value of the property in question.

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 31.01(1), 31.08, 32.01(2), (3), 32.46; Tex. Civ. Prac. & Rem. Code § 41.008.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme

court's January 27, 2005, order under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.5–85.7, 85.9–85.11.

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

> If you answered "Yes" to Question _____ [*85.1*], then answer the following question. Otherwise, do not answer the following question.

PJC 85.9 Question and Instruction—Fraudulent Destruction, Removal, Alteration, or Concealment of Writing as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(12))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*85.1*]. Otherwise, do not answer the following question.

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 _____

Did *Don Davis alter* [*describe the writing in question*] with intent to defraud or harm another?

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 85.9 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff resulted from conduct described as a felony in Tex. Penal Code § 32.47, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(12). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code § 32.47, and that conduct rises to the level of a felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c). See comment below, "Felonious conduct," for a discussion of the requirements needed to establish that the conduct in question was felonious.

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.9 should be answered in the first phase of the trial.

Alternative language for "alter." In an appropriate case, the terms *remove*, *conceal*, *destroy*, *substitute*, or *impair the verity (legibility) (availability) of* may be substituted for the word *alter*. *See* Tex. Penal Code § 32.47(a).

Not applicable to governmental records. Because Tex. Penal Code § 32.47 does not apply to writings that are "governmental records," PJC 85.9 is not applicable in a case in which the writing in question is such a record. *See* Tex. Penal Code § 32.47(a). See Tex. Penal Code § 37.01(2) for a definition of "governmental record."

Definition of "writing." In an appropriate case, use a definition of "writing" as provided in Tex. Penal Code § 32.47(b).

Felonious conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) provides that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in Tex. Penal Code § 32.47. The criminal conduct described in Tex. Penal Code § 32.47 rises to felonious conduct only in the following situations:

1. the writing is a will or codicil of another, whether or not the maker is alive or dead and whether or not it has been admitted to probate; or

2. the writing is a deed, mortgage, deed of trust, security instrument, security agreement, or other writing for which the law provides public recording or filing, whether or not the writing has been acknowledged.

Tex. Penal Code § 32.47(d).

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 6.03(a), 32.47; Tex. Civ. Prac. & Rem. Code § 41.008.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.5–85.8, 85.10, 85.11.

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

If you answered "Yes" to Question _____ [*85.1*], then answer the following question. Otherwise, do not answer the following question.

PJC 85.10 Question and Instructions—Theft as a Ground for Removing Limitation on Exemplary Damages (Tex. Civ. Prac. & Rem. Code § 41.008(c)(13))

Answer the following question only if you unanimously answered "Yes" to Question _____ [*85.1*]. Otherwise, do not answer the following question.

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 _____

Did *Don Davis* commit theft [*and was the value of the stolen property $20,000 or greater*]?

"Theft" means that a person unlawfully appropriates *property* with the intent to deprive the owner of property. Appropriating *property* is unlawful if it is without the owner's effective consent.

A person acts with intent with respect to the nature of *his* conduct or to a result of *his* conduct when it is the conscious objective or desire to engage in the conduct or cause the result.

"Deprive" means *to withhold property from the owner permanently or for so extended a period of time that a major portion of the value or enjoyment of the property is lost to the owner.*

"Owner" means a person who has title to the property, possession of the property, whether lawful or not, or a greater right to possession of the property than *Don Davis*.

"Property" means: (a) real property; (b) tangible or intangible personal property, including anything severed from land; or (c) a document, including money, that represents or embodies anything of value.

"Consent" means assent in fact, whether express or implied.

"Effective consent" includes *consent by a person legally authorized to act for the owner. Consent is not effective if induced by deception or coercion.*

Answer "Yes" or "No."

Answer: _____

COMMENT

When to use. PJC 85.10 should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from conduct described as a third-degree felony in Tex. Penal Code § 31.03, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c)(13). This statute applies to causes of action accruing on or after September 1, 1995. If the jury finds conduct that violates Tex. Penal Code ch. 31, and that conduct rises to the level of a third-degree felony, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c). See comment below, "'Value' and requirement that conduct be described as a third-degree felony," for a discussion of the requirements needed to establish that the conduct in question was felonious.

Bifurcation. If a defendant has requested a bifurcated trial pursuant to Tex. Civ. Prac. & Rem. Code § 41.009, PJC 85.10 should be answered in the first phase of the trial.

Alternative definition for "unlawful appropriation of property." "Unlawful appropriation of property" also occurs when the property is stolen and the actor appropriates the property knowing it was stolen by another. Tex. Penal Code § 31.03(b)(2). In an appropriate case, this definition should be substituted for the one shown above, and the Penal Code's definition of "knowing conduct," found at Tex. Penal Code § 6.03(b), should be given as well.

Alternative definitions for "deprive." In an appropriate case, one or more of the following definitions of "deprive" may be substituted for the one shown above.

> to restore property only upon payment of reward or other compensation.

or—

> to dispose of property in a manner that makes recovery of the property by the owner unlikely.

Tex. Penal Code § 31.01(2)(B), (C).

Effective consent. In an appropriate case, the language *Consent is not effective if induced by deception or coercion* may be replaced with any of the following alternatives:

> [Consent is not effective if]
>
> 1. given by a person *Don Davis* knows is not legally authorized to act for the owner;

2. given by a person who by reason of youth, mental disease or defect, or intoxication is known by *Don Davis* to be unable to make reasonable property dispositions; or

3. given solely to detect the commission of an offense.

See Tex. Penal Code § 31.01(3)(B), (C), (D). If the defendant's knowledge of a fact is in issue (as in option 1 above), the definition of "knowing conduct" found at Tex. Penal Code § 6.03(b) should be given.

Theft of services and trade secrets. Tex. Penal Code § 31.04 should be consulted if the alleged theft was of services rather than of property, and Tex. Penal Code § 31.05 should be consulted if the alleged theft was of a trade secret.

"Value" and requirement that conduct be described as a third-degree felony. Tex. Civ. Prac. & Rem. Code § 41.008(c)(13) requires that the theft be at a level of a third-degree felony or higher in order to lift the limitation or cap on exemplary damages awards. The general criterion for a third-degree felony is that the property or service have a value of $20,000 or higher but less than $100,000. Tex. Penal Code § 31.03(e)(5). The optional language in the basic question in PJC 85.10 makes this inquiry, if there is a dispute about the value of what was stolen. Tex. Penal Code § 31.08 contains additional criteria for ascertaining value to determine the level of the offense, and Tex. Penal Code § 31.03 contains additional, nonmonetary criteria for ascertaining the level of punishment.

Source of instruction and definition. The question and instructions are derived from Tex. Penal Code §§ 1.07(a)(11), (35), 6.03, 31.01(2), (3), (4), (5), 31.03, 31.08; Tex. Civ. Prac. & Rem. Code § 41.008.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.5–85.9, 85.11.

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

If you answered "Yes" to Question _____ [*85.1*], then answer the following question. Otherwise, do not answer the following question.

PJC 85.11 Other Conduct of Defendant Authorizing Removal of Limitation on Exemplary Damages Award (Comment)

In addition to the actions described in PJC 85.5–85.10, nine other instances of the defendant's conduct, listed in Tex. Civ. Prac. & Rem. Code § 41.008(c), will support a removal of the limitation on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b). They are:

- murder (Tex. Penal Code § 19.02);
- capital murder (Tex. Penal Code § 19.03);
- aggravated kidnapping (Tex. Penal Code § 20.04);
- aggravated assault (Tex. Penal Code § 22.02);
- sexual assault (Tex. Penal Code § 22.011);
- aggravated sexual assault (Tex. Penal Code § 22.021);
- injury to a child, elderly individual, or disabled individual (Tex. Penal Code § 22.04), but for actions filed on or after September 1, 2003, "not if the conduct occurred while providing health care as defined by [Texas Civil Practice and Remedies Code] Section 74.001" (Tex. Civ. Prac. & Rem. Code § 41.008(c)(7));
- intoxication assault (Tex. Penal Code § 49.07); and
- intoxication manslaughter (Tex. Penal Code § 49.08).

When to use. A question asking whether the defendant engaged in the conduct described in the Penal Code provisions set out above should be used in a case in which (1) exemplary damages are sought, (2) the harm to the plaintiff is alleged to have resulted from the felonious conduct described in the Penal Code provision, and (3) the jury has previously found that the defendant committed conduct authorizing recovery of exemplary damages as set out in Tex. Civ. Prac. & Rem. Code § 41.003. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c). This statute applies to causes of action accruing on or after September 1, 1995. If the jury answers "Yes" to such a question, the limitations on exemplary damages awards set out in Tex. Civ. Prac. & Rem. Code § 41.008(b) do not apply. Tex. Civ. Prac. & Rem. Code § 41.008(c).

Drafting of question. A jury question regarding one or more of the acts set out in the Penal Code sections listed above should follow the pattern set out in PJC 85.5–85.10. See also the current edition of State Bar of Texas, *Texas Criminal Pattern Jury Charges—Crimes against Persons*.

Standard of conduct—"knowingly" or "intentionally." Tex. Civ. Prac. & Rem. Code § 41.008(c) authorizes elimination of the limitation on exemplary damages awards if the conduct described in the applicable Penal Code section was committed either knowingly or intentionally. "Knowingly" is defined as follows:

> A person acts knowingly, or with knowledge, with respect to the nature of his conduct or to circumstances surrounding his conduct when he is aware of the nature of his conduct or that the circumstances exist. A person acts knowingly, or with knowledge, with respect to a result of his conduct when he is aware that his conduct is reasonably certain to cause the result.

Tex. Penal Code § 6.03(b).

"Intentionally" is defined as follows:

> A person acts intentionally, or with intent, with respect to the nature of his conduct or to a result of his conduct when it is his conscious objective or desire to engage in the conduct or cause the result.

Tex. Penal Code § 6.03(a).

Felonious conduct. Tex. Civ. Prac. & Rem. Code § 41.008(c) provides that the limitation or cap on exemplary damages may be lifted only if the plaintiff's damages are based on conduct "described as a felony" in the applicable Penal Code section, unless the conduct is intoxication assault or intoxication manslaughter.

Unanimity. For actions filed on or after September 1, 2003, "[e]xemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages." Tex. Civ. Prac. & Rem. Code § 41.003(d). The jury must be instructed that its answer regarding the amount of exemplary damages must be unanimous. Tex. Civ. Prac. & Rem. Code § 41.003(e). By the supreme court's January 27, 2005, order under Tex. R. Civ. P. 226a, the supreme court requires unanimity on the applicable liability question as well as the exemplary damages question in cases governed by Tex. Civ. Prac. & Rem. Code § 41.003(d). Section 41.008 of the Civil Practice and Remedies Code limits the amount of exemplary damages and then lists exceptions that remove these limitations or caps. Tex. Civ. Prac. & Rem. Code § 41.008. The Committee considers these exceptions to be findings that establish "liability for and the amount of exemplary damages"; therefore, these questions are conditioned on, and require, unanimous findings. See PJC 85.5–85.10.

PJC 86.1 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.

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[Chapters 246–249 are reserved for expansion.]

STATUTES AND RULES CITED

[Decimal references are to PJC numbers.]

Texas Revised Civil Statutes

Texas Business & Commerce Code

Texas Civil Practice & Remedies Code

Texas Family Code

Texas Finance Code

Texas Labor Code

Texas Occupations Code

Texas Penal Code

Texas Tax Code

Texas Administrative Code

Texas Rules of Civil Procedure

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United States Code

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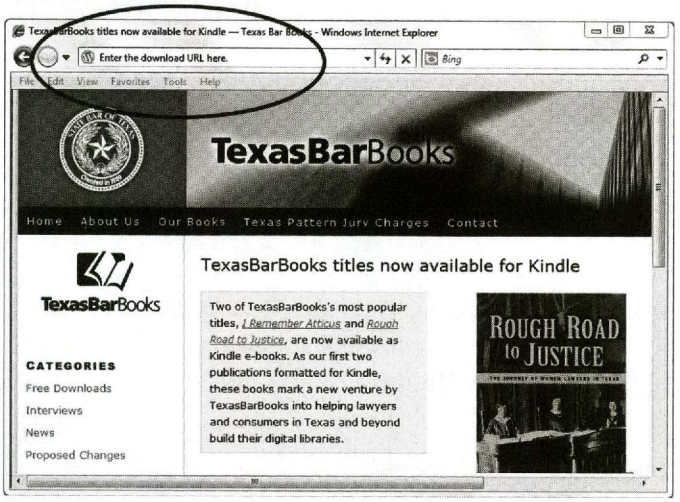

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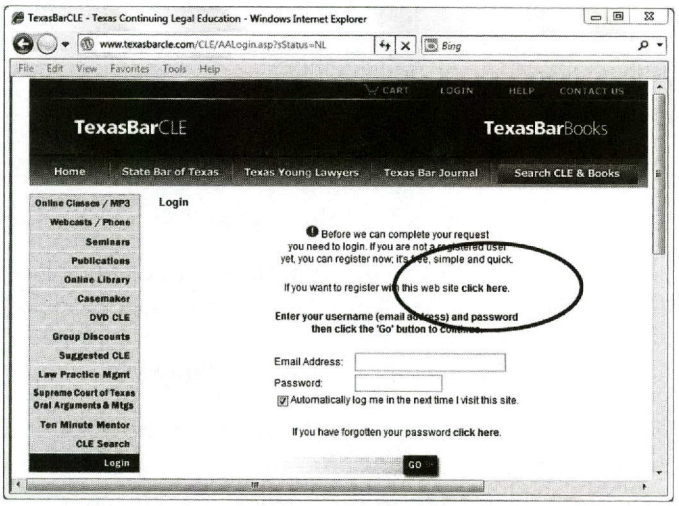

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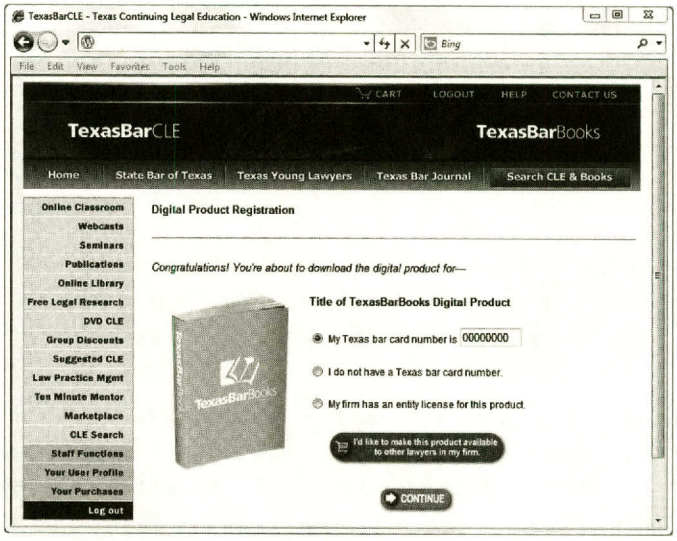

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