

PJC 4.2

Standards for Recovery of Exemplary Damages

~~PJC 4.2A — Gross Negligence — Causes of Action Accruing before
September 1, 1995~~

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

~~QUESTION _____~~

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

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

~~Answer “Yes” or “No.”~~

~~Answer: _____~~

~~PJC 4.2B — Malice — Causes of Action Accruing on or after~~

~~September 1, 1995, and Filed before September 1, 2003~~

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

~~QUESTION _____~~

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

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

~~“Malice” means —~~

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

~~2. an act or omission by *Don Davis*,~~

~~a. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree~~

~~of risk, considering the probability and magnitude of the potential harm to others; and~~

~~b. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.~~

~~Answer “Yes” or “No.”~~

~~Answer: _____~~

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

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

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

QUESTION _____

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

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

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

1. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and

2. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No.”

Answer: _____

COMMENT

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

~~Also, if only one defendant is a party to the action, it may be unnecessary to include *any part of* in the conditioning instruction.~~

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

Actions filed before September 1, 2003. For actions filed before September 1, 2003, see the 2018 edition of the PJC this volume for an explanation of the earlier law.

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

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

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

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

~~The court also stated:~~

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

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

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

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

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

~~*{The following paragraphs apply only to PJC 4.2C.}*~~

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

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

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

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

DRAFT

PJC 7.8 Attorney's Fees—Question

QUESTION _____

What is a reasonable fee for the necessary legal services of [Paul Payne's/Don Davis's] attorney?

A reasonable fee is the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work.

Do not include fees that relate solely to any other claim.

Answer with an amount in dollars and cents for each of the following:

1. For representation in the trial court.

Answer: _____

2. For representation in the court of appeals.

Answer: _____

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

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

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

Answer: _____

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

~~Answer with an amount for each of the following:~~

~~1. For representation in the trial court.~~

~~Answer:~~ _____

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

~~Answer:~~ _____

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

~~Answer:~~ _____

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

~~Answer:~~ _____

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

Answer: _____

COMMENT

When to use. ~~Theft Liability Act claim.~~ Attorney’s fees are recoverable by the prevailing party. See Tex. Civ. Prac. & Rem. Code § Section 134.005(b) of the Texas Civil Practice & Remedies Code provides that “[e]ach person who prevails in a suit under [the Texas Theft Liability Act] shall be awarded court costs and reasonable and necessary attorney’s fees.” A prevailing person under the Texas Theft Liability Act may be the plaintiff or defendant. Consequently, the above question should be submitted for all parties to a Texas Theft Liability Act claim. See also *Agar Corp. v. Electro Circuits International*, 580 S.W.3d 136, 146–48 (Tex. 2019) (“The statute’s command that attorney’s fees be awarded to ‘each person who prevails’ unambiguously applies to all persons, be they a prevailing plaintiff or defendant.”). See also *Arrow Marble LLC v. Estate of Killion*, 441 S.W.3d 702, 706 (Tex. App.—Houston [1st Dist.] 2014, no pet.) (“Courts have held that the phrase ‘prevailing party’ in section 134.005(b) of the [Texas Theft Liability Act] includes both a plaintiff successfully prosecuting a theft suit and a defendant successfully defending against one.”).

Actual damages not required. While some fee-shifting statutes require the prevailing party to have recovered actual damages to obtain an award of attorney's fees, actual damages are not a necessary element for the recovery of attorney's fees under the Theft Liability Act. See *In re Corral-Lerma*, 451 S.W.3d 385, 386–87 (Tex. 2014) (Theft Liability Act provides for attorney's fees even without underlying damages recovery).

Some other guiding considerations. “When a claimant wishes to obtain attorney's fees from the opposing party, the claimant must prove that the requested fees are both reasonable and necessary.” *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 489 (Tex. 2019). Both of these “elements are questions of fact to be determined by the fact finder and act as limits on the amount of fees that a prevailing party can shift to the non-prevailing party.” *Rohrmoos Venture*, 578 S.W.3d at 489.

The lodestar analysis applies to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. The “fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts.” *Rohrmoos Venture*, 578 S.W.3d at 498. The process applies to both jury trials and bench trials. See *Rohrmoos Venture*, 578 S.W.3d at 494. This applies even

in cases where the fee agreement is one for an arrangement other than hourly billing, as well as in the sanctions context. *Rohrmoos Venture*, 578 S.W.3d at 499 n.10; *Nath v. Texas Children’s Hospital*, 576 S.W.3d 707, 710 (Tex. 2019) (per curiam).

Factors to consider. In an appropriate case, additional considerations may be taken into account in determining a reasonable and necessary attorney’s fee. See *Rohrmoos Venture*, 578 S.W.3d at 500–01.

In such a case, the following instruction should be used. However, the additional consideration cannot be a consideration already subsumed in the reasonable fee. *Rohrmoos Venture*, 578 S.W.3d at 500–02.

A reasonable fee is presumed to be the reasonable hours worked, and to be worked, multiplied by a reasonable hourly rate for that work. But other considerations may justify an enhancement or reduction to that amount. You must determine whether evidence of those considerations overcomes the presumption and necessitates an adjustment to a reasonable fee.

Zero fees. Unless evidence was admitted that no fee was needed to assert or defend a claim, a zero-fee award may be reversible error. See *Smith v. Patrick W.Y. Tam Trust*, 296 S.W.3d 545, 548 (Tex. 2009). The trial court can correct the error by directing jurors before they are discharged to return to the jury room and reform their answer. See Tex. R. Civ. P. 295; *Smith*, 296 S.W.3d at 548. In such cases, the following instruction may be used:

The evidence in this case indicates that some amount of attorney fees is reasonable, making the finding of zero inappropriate. It is up to the court to fashion a judgment from the answers to the jury questions. Therefore, I am instructing you to return to your deliberations to make a decision on the question(s) for attorney fees that is consistent with the evidence and other instructions given by the court to the jury.

Segregation of fees. If any attorney's fees relate solely to a claim for which such fees are unrecoverable, a claimant must segregate recoverable from unrecoverable fees. Intertwined facts do not make unrecoverable fees recoverable; it is only when discrete legal services advance both a recoverable and unrecoverable claim that they are so intertwined that they need not be segregated. *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 313–14 (Tex. 2006); see also *Kinsel v. Lindsey*, 526 S.W.3d 411, 427 (Tex. 2017). A party, however, may recover attorney's fees incurred in overcoming defenses or counterclaims to a claim for which attorney's fees are recoverable. *Varner v. Cardenas*, 218 S.W.3d 68, 69 (Tex. 2007). Segregation of fees may be required on a claim-by-claim basis. See *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848, 884

(Tex. 2017) (no evidence to support breach of contract claim, but evidence supported Texas Theft Liability Act claim so remand for testimony segregating on a claim-by-claim basis); *Chapa*, 212 S.W.3d at 313–14.

Any error in failing to segregate attorney’s fees is waived by a failure to object to the lack of apportionment. *Green International, Inc. v. Solis*, 951 S.W.2d 384, 389 (Tex. 1997). Accordingly, the question to be submitted may vary from the pattern above in cases involving multiple claims where fees are not recoverable under one or more of the claims or where there are multiple defendants who may not be charged with fee shifting.

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

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

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

~~QUESTION _____~~

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

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

~~“Malice” means—~~

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

~~2.—an act or omission by *Don Davis*,~~

~~a.—which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and~~

~~b.—of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.~~

~~Answer “Yes” or “No.”~~

~~Answer: _____~~

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

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

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

QUESTION _____


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

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

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

COMMENT

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

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

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

Actual damages generally required. In general, exemplary damages may be awarded only if damages other than nominal damages are awarded. ~~However, in actions filed before September 1, 2003, if the jury finds that the harm suffered by the plaintiff was caused by a specific intent by the defendant to cause substantial injury to the plaintiff (the definition of “malice” in the question above), then an award of nominal damages will support an award of exemplary damages. Former Tex. Civ. ♦Prac. & Rem. Code § 41.004. Actions filed on or after September 1, 2003, are governed by the 2003 amendments to the Civil Practice and Remedies Code that provide that a claimant may not recover exemplary damages if the jury awards only nominal damages. ♦Tex. Civ. ♦Prac. & Rem. Code § 41.004(a). For actions filed before September 1, 2003, see the Comment to PJC 7.11 in the 2018 edition of this volume.~~

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

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

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

DRAFT

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

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

QUESTION _____

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

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

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

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

COMMENT

When to use. PJC 10.12 submits the common-law doctrine of negligent entrustment to a reckless driver. In an appropriate case, the words *incompetent*, *reckless or incompetent*, or *unlicensed* should be substituted for *reckless*. Negligent entrustment requires (1) entrustment of a vehicle by the owner (2) to an unlicensed, incompetent, or reckless driver (3) that at the time of the entrustment the owner knew or

should have known to be unlicensed, incompetent, or reckless; and (4) the driver’s negligence on the occasion in question (5) proximately caused the accident. 4Front Engineered Solutions, Inc. v. Rosales, 505 S.W.3d 905, 909 (Tex. 2016); Goodyear Tire & Rubber Co. v. Mayes, 236 S.W.3d 754, 758 (Tex. 2007); Williams v. Steves Industries, Inc., 699 S.W.2d 570 (Tex. 1985), *superseded by statute on other grounds as stated in Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 20 n.11 (Tex. 1994); Mundy v. —1994. The doctrine of negligent entrustment may be applied to tangible property other than motor vehicles. 4Front Engineered Solutions, Inc., 505 S.W.3d at 909 n.5 (addressing entrustment of forklift and listing other examples of tangible personal property subject to entrustment including, e.g., firearms).

Pirie Slaughter Motor Co., 206 S.W.2d 587 (Tex. 1947); Hanson v. Green, 339 S.W.2d 381 (Tex. App.—Texarkana 1960, writ ref’d); *see also* Walter Dunham, Jr., *Doctrine of Negligent Entrustment to Reckless or Incompetent Driver*, 25 Tex. B.J. 123 (1962); Note, *The Doctrine of Negligent Entrustment in Texas*, 20 Sw. L.J. 202 (1966). Note that PJC 10.12 consists of two parts—an instruction, to be given immediately after the definition of “negligence,” and a broad-form question.

Statutory standard for unlicensed drivers. “A person may not authorize or knowingly permit a motor vehicle owned by or under the control of the person to be operated on a highway by any person in violation of this chapter.” Tex. Transp. Code § 521.458(b). “This chapter” prohibits, among other things, a person, unless expressly exempted under Chapter 521, from “operat[ing] a motor vehicle on a highway in this state unless that person holds a driver’s license issued under this chapter.” Tex. Transp. Code § 521.021. Where a statute requires a driver to be legally licensed to operate a vehicle, then permitting the driver to operate it without a license would constitute negligence per se. 4Front Engineered Solutions, Inc., 505 S.W.3d at 911 (citing Mundy v. Pirie-Slaughter Motor Co., 206 S.W.2d 587, 589–90 (Tex. 1947)). See PJC 5.1 comment, “Two types of negligence per se standards.”

Beware, however, that “[t]he reference to an unlicensed driver arises from cases alleging negligent entrustment of an automobile, and is based on the fact that Texas statutes require all drivers to be licensed and prohibit an owner from knowingly permitting an unlicensed driver to operate the owner’s vehicle.”

4Front Engineered Solutions, Inc., 505 S.W.3d at 909 n.6 (citing Mundy, 206 S.W.2d at 589–90)). If Texas law does not require a license to operate a particular piece of equipment (e.g., a forklift) or prohibit an owner from permitting an unlicensed person from operating a particular piece of equipment, the lack of a license would be inapplicable to the negligent entrustment issue. *See 4Front Engineered Solutions, Inc.*, 505 S.W.3d at 909 n.6 (citing *Mundy*, 206 S.W.2d at 589–90)).

Proximate cause of entrustor. “For entrustment to be a proximate cause, the defendant entrustor should be shown to be reasonably able to anticipate that an injury would result from a natural and probable consequence of the entrustment.” *Schneider v. Esperanza Transmission Co.*, 744 S.W.2d 595 (Tex. 1987) (not foreseeable that employee would become intoxicated and allow others to drive company vehicle, where employee’s only record was of speeding tickets); *see also Always Auto Group, Ltd. v. Walters*, 530 S.W.3d 147, 148 (Tex. 2017) (not foreseeable that driver, who was visibly intoxicated when he was provided loaner vehicle, would get drunk eighteen days later and cause a collision); *Hanson v Green*, 339 S.W.2d 381, 383 (Tex. App.—Texarkana 1960, writ ref’d). ~~The Committee believes that this standard is comprehended within the common law standard for negligent entrustment, and thus no instruction is necessary. See PJC comment, “Two types of negligence per se standards.”~~

~~) (finding negligence, if any, of father in entrusting car to unlicensed, minor daughter was not a proximate cause of plaintiff’s injuries and damages, where—unbeknownst to father—daughter entrusted car to unlicensed, minor friend).~~

~~Thus, negligent~~**Proximate cause of entrustor.** ~~Negligent~~ entrustment is considered a proximate cause of the collision if the risk that caused the entrustment to be negligent caused the accident at issue. *TXI Transportation Co. v. Hughes*, 306 S.W.3d 230, 240–41 (Tex. 2010) (neither driver’s status as illegal alien nor fact that he had used fake Social Security number to obtain his commercial driver’s license was proximate cause of accident); *see also Endeavor Energy Resources, L.P. v. Cuevas*, 593 S.W.3d 307, 311 (Tex. 2019). Concerning whether the presumption of proximate cause set out in the second sentence of this instruction should apply in a double-entrustment case, *see Schneider v. Esperanza Transmission*

~~Corr.~~ 744 S.W.2d 595 (Tex. 1987) (where risk that caused entrustment to be negligent did not cause collision, entrustment was not proximate cause of collision).

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

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

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

Employer required to investigate. ~~An employer is required~~**Duty to investigate.** Under the common law, an employer owes a duty to the general public to ascertain the qualifications and competence of the employees and independent contractors it hires, “especially when the employees are engaged in occupations that require skill or experience and that could be hazardous to the safety of others.” *Morris v. JTM Materials, Inc.*, 78 S.W.3d 28, 49 (Tex. App.—Fort Worth 2002, no pet.); see also *Martinez v. Hays Construction, Inc.*, 355 S.W.3d 170, 180 (Tex. App.—Houston [1st Dist.] 2011, pet. denied) (negligent hiring case), *disapproved of on other grounds by Gonzalez v. Ramirez*, 463 S.W.3d 499 (Tex. 2015) (to

the extent *Martinez* holds that employer was liable as a motor carrier under federal regulations). If employment requires driving a vehicle, the employer has an affirmative duty to investigate the employee or independent contractor’s competency to drive. *Martinez*, 355 S.W.3d at 180 (citing *Mireles v. Ashley*, 201 S.W.3d 779 782–83 (Tex. App.—Amarillo 2006, no pet.), and *Morris*, 78 S.W.3d at 49)).

An employer is also required by state statute to investigate a driver’s driving record with the Department of Public Safety and to verify that he has a valid license before entrusting a vehicle to him to transport persons or property. *Tex. Transp. Code* § 521.459(a); see *North Houston Pole Line Corp. v. McAllister*, 667 S.W.2d 829, 835 (Tex. App.—Houston [14th Dist.] 1983, no writ) (former article 6687b, section 37, imposed “duty to know”). In the context of a commercial motor vehicle, the Federal Motor Carrier Safety Regulations require an employer to, among many other things and subject to certain limited exemptions, investigate each employed driver’s motor vehicle record and Department of Transportation–regulated employment history during the preceding three years. See 49 C.F.R. pt. 391, subpt. C (“Background and Character”); 49 C.F.R. pt. 391, subpt. G (“Limited Exemptions”).

~~**If unlicensed entrustee entrusts to another unlicensed driver.** For circumstances in which an unlicensed driver to whom the owner entrusted his vehicle permitted another unlicensed driver to operate it, see *Hanson*, 339 S.W.2d 381. Use of “injury” or “occurrence.” See discussion at PJC 4.1 Comment.~~

PJC 10.14 Imputing Gross Negligence ~~or Malice~~ to a Corporation

~~PJC 10.14A — Imputing Gross Negligence to a Corporation —~~

~~Causes of Action Accruing before September 1, 1995~~

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

~~QUESTION _____~~

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

~~{Define “gross negligence” as set out in PJC .}~~

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

~~{Insert one or more of the following grounds as supported by the evidence.}~~

~~1. — ABC Corporation authorized the doing and the manner of the act,~~

~~or~~

~~2.—Don Davis was unfit and ABC Corporation was reckless in employing him, or~~

~~3.—Don Davis was employed [as a vice principal] [in a managerial capacity] and was acting in the scope of employment, or~~

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

~~Answer “Yes” or “No.”~~

~~Answer: _____~~

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

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

~~QUESTION _____~~

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

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

~~“Malice” means—~~

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

~~2. an act or omission by *Don Davis*,~~

~~a. which when viewed objectively from the standpoint of *Don Davis* at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and~~

~~b. of which *Don Davis* has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.~~

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

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

~~1. ABC Corporation authorized the doing and the manner of the act,~~

~~or~~

~~2. Don Davis was unfit and ABC Corporation was reckless in employing him, or~~

~~3. Don Davis was employed [as a vice principal] [in a managerial capacity] and was acting in the scope of employment, or~~

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

~~Answer “Yes” or “No.”~~

~~Answer: _____~~

~~**PJC 10.14C — Imputing Gross Negligence to a Corporation —**~~

~~**Actions Filed on or after September 1, 2003**~~

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

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

QUESTION _____

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

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

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

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

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

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

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

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

A person is a “vice-principal” if—

1. that person is a corporate officer; or

2. that person has authority to employ, direct, and discharge an employee of *ABC Corporation*; or

3. that person is engaged in the performance of nondelegable or absolute duties of *ABC Corporation*; or

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

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

1. that person has authority to employ, direct, and discharge an employee of *ABC Corporation*; or

2. *ABC Corporation* has confided to that person the management of the whole or a department or division of the business of *ABC Corporation*.

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 10.14 may be used if a plaintiff seeks to impute the gross negligence ~~or malice~~ of a defendant employee to his corporate employer. The grounds listed in this instruction are alternatives, and any of the listed grounds that are not ap-

plicable to or supported by sufficient evidence in the case should be omitted. Regarding broad-form submission, see Introduction 4(a). If imputation is not required, see PJC .

Source of instruction. The supreme court adopted the doctrine set out in *Restatement of Torts* § 909 (~~1979~~1939) in *King v. McGuff*, 234 S.W.2d 403 (Tex. 1950); see also *Fisher v. Carrousel Motor Hotel, Inc.*, 424 S.W.2d 627 (Tex. 1967). Section 909 sets out four distinct reasons to impute the gross negligence or malice of an employee to a corporate employer. As the court in *Fisher* set out:

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

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

Fisher, 424 S.W.2d at 630; see also *Bennett v. Reynolds*, 315 S.W.3d 867, 883–84 (Tex. 2010). In *Fort Worth Elevators Co.*, the court held that the gross negligence of a “vice-principal” could be imputed to a corporation and listed the elements of “vice-

principal” as set out in the definitions in PJC 10.14C. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 406 (Tex. 1934), *disapproved on other grounds by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). The court also discussed “absolute or nondelegable duties” for which “the corporation itself remains responsible for the manner of their performance.” *Fort Worth Elevators Co.*, 70 S.W.2d at 401.

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

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

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

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

- (1) the principal authorized the doing and the manner of the act;
- (2) the agent was unfit and the principal acted with malice in employing or retaining him;
- (3) the agent was employed in a managerial capacity and was acting in the scope of employment; or
- (4) the employer or a manager of the employer ratified or approved the act.

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

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

Source of definitions of “gross negligence,” and “malice.” See PJC [4.2](#) and Comment.

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

Actions filed before September 1, 2003. For actions filed before September 1, 2003, see the 2018 edition of this volume for an explanation of the earlier law.

PJC 28.2

**Personal Injury Damages—Instruction on Whether
Compensatory Damages Are Subject to Income Taxes—
~~Actions Filed on or after September 1, 2003~~**

You are instructed that any monetary recovery for *[list each element of economic or noneconomic damages that is subject to taxation]* is subject to *[federal or state]* income taxes. Any recovery for *[list each element of economic or noneconomic damages that is not subject to taxation]* is not subject to *[federal or state]* income taxes.

COMMENT

When to use. PJC 28.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. *See* Tex. Civ. Prac. & Rem. Code § 18.091(b).

PJC 28.7 Personal Injury Damages—Exemplary Damages

~~PJC 28.7A—Personal Injury Damages—Exemplary Damages—~~

~~Causes of Action Accruing before September 1, 1995~~

~~If you answered “Yes” to Question _____ [or other question authorizing potential recovery of punitive damages], then answer the following question. Otherwise, do not answer the following question.~~

~~QUESTION _____~~

~~What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____ [question authorizing potential recovery of punitive damages]?~~

~~“Exemplary damages” means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.~~

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

- ~~1.—The nature of the wrong.~~

- ~~2.—The character of the conduct involved.~~
- ~~3.—The degree of culpability of the wrongdoer.~~
- ~~4.—The situation and sensibilities of the parties concerned.~~
- ~~5.—The extent to which such conduct offends a public sense of justice and propriety.~~

~~Answer in dollars and cents, if any.~~

~~Answer: _____~~

~~PJC 28.7B — **Personal Injury Damages — Exemplary Damages** —~~

~~**Causes of Action Accruing on or after September 1, 1995,
and Filed before September 1, 2003**~~

~~If you answered “Yes” to Question _____~~

~~[or other question authorizing potential recovery of punitive damages],~~

~~then answer the following question. Otherwise, do not answer the following question.~~

QUESTION _____

~~What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____~~

~~[question authorizing potential recovery of punitive damages]?~~

~~“Exemplary damages” means any damages awarded as a penalty or by way of punishment. Exemplary damages includes punitive damages.~~

~~In determining the amount of exemplary damages you shall consider evidence, if any, relating to—~~

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

~~Answer in dollars and cents, if any.~~

~~Answer: _____~~

~~PJC 28.7C — Personal Injury Damages — Exemplary Damages —~~

~~Actions Filed on or after September 1, 2003~~

Answer the following question regarding *Don Davis* only if you unanimously answered “Yes” to Question _____ [*or other question authorizing potential recovery of punitive damages*] regarding *Don Davis*. Otherwise, do not answer the following question regarding *Don Davis*.

QUESTION _____

You are instructed that you must unanimously agree on the amount of any award of exemplary damages.

What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the conduct found in response to Question _____ [*question authorizing potential recovery of punitive damages*]?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

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

1. The nature of the wrong.

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

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 28.7A should be used to submit the question for exemplary damages for personal injury in causes of action filed on or after September 1, 2003~~accruing before September 1, 1995. PJC 28.7B should be used for causes of action accruing on or after September 1, 1995, and filed before September 1, 2003. For actions filed on or after September 1, 2003, PJC 28.7C should be used.~~

Actions filed before September 1, 2003. For actions filed before September 1, 2003, see the 2018 edition of this volume for an explanation of the earlier law.

Conditioned on finding of gross negligence or malice. PJC 28.7 must be conditioned on an affirmative finding to a question on gross negligence, malice, or other finding justifying exemplary damages. ~~See Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, amended by Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995;~~ Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d).

Bifurcation. No predicating instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. *See* Tex. Civ. Prac. & Rem. Code § 41.009. If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate phase two jury charge should be prepared. In such a phase two jury charge, PJC 28.7A, 28.7B, ~~or 28.7C (as appropriate)~~ should be submitted with both PJC 1.3 and 1.4 instructions.

Multiple defendants. There should be a separate question and answer blank for each defendant against whom exemplary damages are sought. Tex. Civ. Prac. & Rem. Code § 41.006.

Multiple plaintiffs. For multiple plaintiffs, a separate finding on the amount of exemplary damages awarded to each is appropriate. Tex. Civ. Prac. & Rem. Code § 71.010. For an example of submission of apportionment in a single question, see PJC 29.8.

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

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

Evidence that the defendant's conduct caused harm to persons who are not before the court may also be probative of the reprehensibility of the defendant's conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007). But when this type of evidence is admitted, the jury should be instructed that it may not punish a defendant for the harm the defendant's conduct allegedly caused to other persons who are not parties to the litigation. *Williams*, 549 U.S. at 357.

Neither *Campbell* nor *Williams* specifies whether the requirement of an instruction means a limiting instruction at the time the evidence is offered, an instruction in the jury charge, or both.

[The following paragraphs apply only to PJC 28.7A]

~~**Source of definition and instructions.** The definition of exemplary damages in PJC 28.7A is derived from *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex.~~

1980). The “factors to consider” instructions are derived from *Alamo National Bank v. Kraus*, 616 S.W.2d 908, 910 (Tex. 1981), and approved in a note in *Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29 n.26 (Tex. 1994), *superseded on other grounds by statute as stated in U Haul International, Inc. v. Waldrip*, 380 S.W.3d 118, 140 (Tex. 2012). Additional factors that have been considered by Texas courts in reviewing the propriety of an exemplary damages award include (1) compensation for inconvenience and attorney’s fees, *Hofer v. Lavender*, 679 S.W.2d 470, 474 (Tex. 1984); (2) the net worth of the wrongdoer, *Moriel*, 879 S.W.2d at 29–30; *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), *disapproved of by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992); (3) the frequency of the wrongs committed, *State Farm Mutual Automobile Insurance Co. v. Zubiate*, 808 S.W.2d 590, 604 (Tex. App.—El Paso 1991, writ denied), *disapproved on other grounds by Saenz v. Fidelity & Guaranty Insurance Underwriters*, 925 S.W.2d 607 (Tex. 1996); *see also Moriel*, 879 S.W.2d at 27 n.22; and (4) the size of the award needed to deter similar wrongs in the future, *Zubiate*, 808 S.W.2d at 604; *see also Moriel*, 879 S.W.2d at 27 n.22. If attorney’s fees are sought under another theory of recovery, they should not be included in the “factors to consider” instruction; otherwise, there exists the potential of a double recovery on this element.

These factors are included in response to Texas and U.S. Supreme Court decisions establishing that the discretion of the trier of fact to award punitive damages must be exercised within reasonable constraints. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1

~~(1991); see also Moriel, 879 S.W.2d at 27 n.22 (multifactor jury instruction meets constitutional requirements).~~

~~*{The following paragraphs apply only to PJC 28.7B and 28.7C.}*~~

Source of definitions and instructions. The definitions of exemplary damages ~~in PJC 28.7B and 28.7C are~~ derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(5), 41.011(a). The factors to consider are from Tex. Civ. Prac. & Rem. Code § 41.011(a). ~~PJC 28.7C is for use in all cases filed on or after September 1, 2003.~~

~~Tex. R. Civ. P. 226a.~~

Limitation on amount of recovery. For causes of action accruing on or after September 1, 1995, exemplary damages awarded against a defendant ordinarily may not exceed an amount equal to the greater of—

- (1)(A) two times the amount of economic damages; plus
 - (B) an amount equal to any noneconomic damages found by the jury, not to exceed \$750,000; or
- (2) \$200,000.

Tex. Civ. Prac. & Rem. Code § 41.008(b). These limitations will not apply in favor of a defendant found to have “knowingly” or “intentionally” committed conduct de-

scribed as a felony in specified sections of the Texas Penal Code. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c), (d).

DRAFT

~~PJC 28.8 — Personal Injury Damages — Exclusionary Instruction for
Other Condition~~

~~Do not include any amount for any condition that did not result from the
occurrence in question.~~

COMMENT

~~When to use after question, before elements of damages. PJC 28.8 should
be given if there is evidence that the plaintiff suffers from another physical infirmity
not caused or aggravated by the occurrence in question and if the injuries flowing
from the prior existing infirmity and those flowing from the defendant's negligence
are closely connected and intermingled to the extent that the jury might become con-
fused. See *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955); *Dallas
Railway & Terminal v. Ector*, 116 S.W.2d 683 (Tex. 1938). A tortfeasor is not liable
for damages not of such general character as might reasonably have been anticipated.
See *Hoke v. Poser*, 384 S.W.2d 335 (Tex. 1964); *Carey v. Pure Distributing Corp.*,
124 S.W.2d 847 (Tex. 1939). If applicable, this instruction should be given after the
question and before the elements of damages (PJC 28.3 28.5, 29.3 29.6, and 30.3).~~

~~When not to use if liability question uses "injury." If the liability question in
PJC is submitted with the term "injury," PJC 28.8 should not be submitted.~~

~~**Aggravation of preexisting condition.**—If there is evidence that the occurrence in question aggravated a preexisting condition, PJC 28.9 should be given in lieu of PJC 28.8.~~

~~**Substitution of *existing before*.**—The phrase *existing before* may be substituted for the phrase *that did not result from* if it would add clarity in the individual case.~~

~~**Addition of “arising after the occurrence in question.”**—If there is evidence that a condition arose after the original occurrence, the phrase “arising after the occurrence in question” may be added after the words “for any condition” for added clarity.~~

~~**Alternative exclusionary instruction for specific condition.**—If it would add clarity in the individual case, an instruction not to consider specific, named, preexisting bodily conditions would be proper, if requested, in lieu of the above instruction. *Tyler Mirror & Glass Co. v. Simpkins*, 407 S.W.2d 807 (Tex. Civ. App.—Tyler 1966, writ ref’d n.r.e.). Such an instruction should specify all preexisting conditions raised by the evidence.~~

PJC 28.8 Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition

PJC 28.8A Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—No Aggravation of

Preexisting Symptomatic Condition or Injury and No Eggshell Plaintiff

Do not include any amount for any injury or condition that did not result from the occurrence in question.

PJC 28.8B Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—Aggravation of Symptomatic Preexisting Injury or Condition

If the damages you found resulted in part from any preexisting injury or condition that was causing symptoms at the time of the occurrence in question, do not include any amount for any such preexisting injury or condition, except to the extent the preexisting injury or condition was aggravated by the occurrence in question.

PJC 28.8C Personal Injury Damages—Instruction in Cases Involving Preexisting Injury or Condition—Asymptomatic Preexisting Injury or Condition—Eggshell Plaintiff

If a preexisting injury or condition was not causing any symptoms at the time of the occurrence in question but made the plaintiff more susceptible to injury than a person without that injury or condition, include damages, if any, resulting from a combination of the preexisting injury or condition and the occurrence in question.

COMMENT

When to use—after question, before elements of damages. The instructions in PJC 28.8 address situations in which a plaintiff has a preexisting condition or injury that (1) is not aggravated by the occurrence in question and does not make the plaintiff more susceptible to injury by the occurrence in question (PJC 28.8A), (2) is symptomatic at the time of the occurrence in question and is aggravated by the occurrence in question (PJC 28.8B), and (3) is asymptomatic at the time of the occurrence in question and that makes the plaintiff more susceptible to injury—the “eggshell” or “thin skull” plaintiff scenario (PJC 28.8C). If one or more of the instructions in PJC 28.8 is applicable, as discussed below, it should be given after the question and before the elements of damages.

Cases involving no aggravation of preexisting symptomatic condition or injury and no eggshell plaintiff. PJC 28.8A 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 injury or condition 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 Co. v. Orr*, 215 S.W.2d 862, 864 (Tex. 1948) (citing *Dallas Railway & Terminal Co. v. Ector*, 116

S.W.2d 683, 685 (Tex. [Comm'n Op.] 1938)). A tortfeasor is liable only for damages 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).

Cases involving aggravation of preexisting symptomatic injury or condition. PJC 28.8B should be given if there is evidence that the plaintiff had a symptomatic preexisting injury or condition that was aggravated by the occurrence in question. The tortfeasor is liable with regard to the preexisting injury or condition only to the extent the preexisting injury or condition was aggravated by the occurrence in question. *Ector*, 116 S.W.2d at 686; see also *Hoke*, 384 S.W.2d at 339 .

Cases involving preexisting asymptomatic injury or condition—“eggshell plaintiff.” PJC 28.8C may be given if there is evidence that the plaintiff had a preexisting injury or condition that was asymptomatic at the time of the occurrence in question and which made the plaintiff more susceptible to an injury than a person without the injury or condition and that the occurrence in question may have aggravated—the “eggshell plaintiff” or “thin skull” scenario. See *Katy Springs & Manufacturing, Inc. v. Favalora*, 476 S.W.3d 579, 591–92 (Tex. App.—Houston [14th Dist.] 2015, pet. denied); *Singh v. Payan*, No. 04-17-00111-CV, 2018 WL 4096402, at *5–8 (Tex. App.—San Antonio Aug. 29, 2018, no pet.); *Transcontinental Business Systems., Inc. v. Scirratt*, 376 S.W.2d 56, 62–63 (Tex. App.—Tyler 1964, writ ref’d n.r.e.). A tortfeasor takes a plaintiff as he finds him. *Coates v. Whittington*, 758 S.W.2d 749, 752 (Tex. 1988) (orig. proceeding). Thus, the tortfeasor is held responsible for all injuries caused by the occurrence in question, even if the plaintiff suffered from a preexisting but asymptomatic injury or condition before the occurrence in question and therefore suffered a greater degree of injury than a person who did not have such a preexisting injury or condition would have suffered. *Coates*, 758 S.W.2d at 752; *Driess v. Frederich*, 11 S.W. 493, 493–94 (Tex. 1889); *Favalora*, 476 S.W.3d at 591–92; *Thompson v. Quarles*, 297 S.W.2d 321, 329–30 (Tex. App.—Galveston 1956, writ ref’d n.r.e.)).

Cases involving both aggravation of preexisting symptomatic injury or condition and preexisting asymptomatic injury or condition. If there is evidence of both an aggravated symptomatic preexisting injury or condition and of an asymptomatic

preexisting injury or condition that enhanced the plaintiff's susceptibility to injury,
both PJC 28.8B and 28.8C may be submitted.

DRAFT

~~PJC 28.9 — Personal Injury Damages — Exclusionary Instruction for
Preexisting Condition That Is Aggravated~~

~~Do not include any amount for any condition existing before the occurrence in question, except to the extent, if any, that such other condition was aggravated by any injuries that resulted from the occurrence in question.~~

COMMENT

~~When to use after question, before elements of damages. PJC 28.9 should be given if there is evidence that the plaintiff was suffering from a prior physical infirmity that was aggravated by the occurrence in question. See *Dallas Railway & Terminal v. Ector*, 116 S.W.2d 683 (Tex. 1938); *Armellini Express Lines of Florida v. Ansley*, 605 S.W.2d 297 (Tex. Civ. App. — Corpus Christi 1980, writ ref'd n.r.e.), disapproved on other grounds by *Pope v. Moore*, 711 S.W.2d 622 (Tex. 1986); see also *Yellow Cab & Baggage Co. v. Green*, 277 S.W.2d 92 (Tex. 1955). If applicable, this instruction should be given after the question and before the elements of damages (PJC 28.3–28.5, 29.3–29.6, and 30.3).~~

~~When not to use if liability question uses “injury.” If the liability question in PJC is submitted with the term “injury,” PJC 28.9 should not be submitted.~~

~~**Discussion of standards.**—For discussion of the standards governing submission of this instruction, see James B. Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. Tex. L.J. 217, 238–46 (1977).~~

DRAFT

PJC 28.~~109~~ **Personal Injury Damages—Exclusionary Instruction for Failure to Mitigate**

Do not include any amount for any condition resulting from the failure, if any, of *Paul Payne* to have acted as a person of ordinary prudence would have done under the same or similar circumstances in caring for and treating *his* injuries, if any, that resulted from the occurrence in question.

COMMENT

When to use—after question, before elements of damages. PJC 28.~~940~~ should be given if there is evidence that the plaintiff, through want of care, aggravated or failed to mitigate the effects of his injuries resulting from the occurrence in question. *Moulton v. Alamo Ambulance Service*, 414 S.W.2d 444 (Tex. 1967); *City of Fort Worth v. Satterwhite*, 329 S.W.2d 899 (Tex. ~~Civ.~~ App.—Fort Worth 1959, no writ); *cf. Armellini Express Lines of Florida v. Ansley*, 605 S.W.2d 297, 309 (Tex. ~~Civ.~~ App.—Corpus Christi—Edinburg 1980, writ ref'd n.r.e.) (evidence failed to show plaintiff was negligent in gaining weight after car accident and did not support submission of instruction for failure to mitigate), *disapproved on other grounds by Pope v. Moore*, 711 S.W.2d 622 (Tex. 1986).

PJC 28.910 may be used under circumstances such as those described in *Moulton*—

in which there is evidence of negligence on the part of the plaintiff in failing to consult a doctor, in failing to consult a doctor as soon as a reasonable prudent person would, in failing to follow a doctor’s advice, or simply in failing properly to care for and treat injuries which do not require the attention of a doctor.

Moulton, 414 S.W.2d at 450. If applicable, the instruction should be given after the question and before the elements of damages (PJC 28.3–28.5, 29.3–29.6, and 30.3).

If liability question uses “injury.” If the liability question in PJC is submitted with the term “injury,” PJC should be modified to instruct the jury not to include failure to mitigate in the percentage of the injury attributable to the plaintiff. See PJC .

Modify instruction not to reduce amounts because of plaintiff’s negligence. If PJC 28.910 is given, the instruction not to reduce amounts because of the negligence of the plaintiff, injured spouse, or decedent, which appears in PJC 28.3–28.5, 29.3–29.6, 30.3, and 31.3–31.4, should be modified to read—

Do not reduce the amounts in your answers because of the negligence, if any, that you have attributed to *Paul Payne* in Questions _____ [*the negligence question*] and _____ [*the percentage*

causa-
tion question].

Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Discussion of standards. For discussion of the standards governing submission of this instruction, see James B. Sales, *Limitations on Recovery of Damages in Personal Injury Actions*, 18 S. Tex. L.J. 217, 246–53 (1977).

DRAFT

PJC 28.~~1011~~ Personal Injury Damages—Child’s Loss of Consortium—Question about Parent’s Injury

If you answered “Yes” to Question[s] _____ [*question(s) establishing the liability of one or more defendants*], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

Was the physical injury to *Paul Payne* a serious, permanent, and disabling injury?

Answer “Yes” or “No.”

Answer: _____

COMMENT

When to use. PJC 28.~~1011~~ is to be used in conjunction with PJC 28.~~1112~~ to submit a cause of action for loss of parental consortium. *See Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1991). On rehearing, the court addressed the question whether there must be a separate finding on the nature of the injury or whether an instruction would suffice. It held that when the facts are disputed “there must be a threshold finding by the finder of fact that the injury to the parent was a serious, permanent, and

disabling injury before the finder of fact determines the consortium damage issue.”

Reagan, 804 S.W.2d at 468.

Use of “physical injury.” The term “physical injury” is used because “the plaintiff must show that the defendant physically injured the child’s parent in a manner that would subject the defendant to liability.” *Reagan*, 804 S.W.2d at 467. The Committee expresses no opinion on whether a nonphysical injury could be “serious, permanent, and disabling.”

PJC 28.~~11~~¹² **Personal Injury Damages—Child’s Loss of Consortium—Damages Question**

If you answered “Yes” to Question _____ [28.~~11~~¹⁰], then answer the following question. Otherwise, do not answer the following question.

QUESTION _____

What sum of money, if paid now in cash, would fairly and reasonably compensate *Polly Payne* for the loss, if any, of parental consortium that resulted from the physical injury to *Paul Payne*?

“Parental consortium” means the positive benefits flowing from the parent’s love, affection, protection, emotional support, services, companionship, care, and society.

In considering your answer to this question, you may consider only the following factors: the severity of the injury to the parent and its actual effect on the parent-child relationship, the child’s age, the nature of the child’s relationship with the parent, the child’s emotional and physical characteristics, and whether other consortium-giving relationships are available to the child.

Do not include interest on any amount of damages you find. Do not reduce the amounts, if any, in your answer because of the negligence, if any, of *Paul Payne*.

Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

Answer in dollars and cents for damages, if any, that—

were sustained in the past;

Answer: _____

in reasonable probability will be sustained in the future.

Answer: _____

COMMENT

When to use. PJC 28.~~1112~~ should be used in conjunction with PJC 28.~~1011~~ to submit a cause of action for loss of parental consortium. *See Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1991). The above question separately submits past and future damages. *See* Tex. Fin. Code § 304.1045.

Definition of “consortium”; factors to consider. The definition of “parental consortium” and the instruction on what factors the jury may consider are from

Reagan, 804 S.W.2d at 467. Although the Committee has suggested a limiting instruction, the court left open the possibility of other factors. Depending on the facts of the case, other factors may be added to those listed above, and some of those listed above may be deleted.

Derivative damages subject to reduction because of negligence of injured parent. Because a claim for loss of parental consortium, like that for loss of spousal consortium, is derivative, any percentage of contributory negligence attributable to the parent will reduce the amount of the child’s recovery. *Reagan*, 804 S.W.2d at 468.

Instruction not to reduce amounts because of negligence of injured parent. If the negligence of the injured parent is also in question, the exclusionary instruction given in this PJC before the answer blanks is proper. See Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the injured parent’s negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. See PJC 28.910.

Mental anguish damages not included. A claim for loss of consortium does not include a claim for negligent infliction of mental anguish. In *Reagan* the court specifically noted that recovery for mental anguish that is not based on the wrongful death statute requires proof that the plaintiff was “among other things, located at or near the scene of the accident, and that the mental anguish resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the

incident, as contrasted with learning of the accident from others after the occurrence.”

Reagan, 804 S.W.2d at 467. See PJC 28.3 comment, “Bystander injury.”

DRAFT

PJC 29.2

**Wrongful Death Damages—Instruction on Whether
Compensatory Damages Are Subject to Income Taxes—
~~Actions Filed on or after September 1, 2003~~**

You are instructed that any monetary recovery for *[list each element of economic or noneconomic damages that is subject to taxation]* is subject to *[federal or state]* income taxes. Any recovery for *[list each element of economic or noneconomic damages that is not subject to taxation]* is not subject to *[federal or state]* income taxes.

COMMENT

When to use. PJC 29.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. *See* Tex. Civ. Prac. & Rem. Code § 18.091(b).

PJC 29.7 Wrongful Death Damages—Exemplary Damages

~~PJC 29.7A Wrongful Death Damages—Exemplary Damages—~~

~~Causes of Action Accruing before September 1, 1995~~

If you answered “Yes” to Question _____

~~[- or other question authorizing potential recovery of punitive damages],~~

~~then answer the following question. Otherwise, do not answer the following question.~~

~~QUESTION _____~~

~~What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the death of *Mary Payne*?~~

~~“Exemplary damages” means an amount that you may in your discretion award as an example to others and as a penalty or by way of punishment, in addition to any amount that you may have found as actual damages.~~

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

- ~~1. The nature of the wrong.~~
- ~~2. The character of the conduct involved.~~

~~3.—The degree of culpability of the wrongdoer.~~

~~4.—The situation and sensibilities of the parties concerned.~~

~~5.—The extent to which such conduct offends a public sense of justice and propriety.~~

~~Answer in dollars and cents, if any.~~

~~Answer: _____~~

~~PJC 29.7B — **Wrongful Death Damages — Exemplary Damages —**
Causes of Action Accruing on or after September 1, 1995,
and Filed before September 1, 2003~~

~~If you answered “Yes” to Question _____ [or other question authorizing potential recovery of punitive damages], then answer the following question. Otherwise, do not answer the following question.~~

~~QUESTION _____~~

~~What sum of money, if any, should be assessed against *Don Davis* and awarded to *Paul Payne* as exemplary damages for the death of *Mary Payne*?~~

~~“Exemplary damages” means any damages awarded as a penalty or by way of punishment. Exemplary damages includes punitive damages.~~

~~In determining the amount of exemplary damages, you shall consider evidence, if any, relating to—~~

~~1.—The nature of the wrong.~~

~~2.—The character of the conduct involved.~~

~~3.—The degree of culpability of the wrongdoer.~~

~~4.—The situation and sensibilities of the parties concerned.~~

~~5.—The extent to which such conduct offends a public sense of justice and propriety.~~

~~6.—The net worth of *Don Davis*.~~

~~Answer in dollars and cents, if any.~~

~~Answer: _____~~

~~PJC 29.7C — Wrongful Death Damages — Exemplary Damages —
Actions Filed on or after September 1, 2003~~

Answer the following question regarding *Don Davis* only if you unanimously answered “Yes” to Question _____ [*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 _____ [*or other question authorizing potential recovery of punitive damages*]?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

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

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

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 29.7~~A~~ should be used to submit the question of exemplary damages for wrongful death for causes of action ~~accruing before September 1, 1995. PJC 29.7B submits the question for causes of action accruing on or after September 1, 1995, and filed before September 1, 2003. For actions~~ filed on or after September 1, 2003, ~~PJC 29.7C should be used.~~

Actions filed before September 1, 2003. For actions filed before September 1, 2003, see the 2018 edition of this volume for an explanation of the earlier law.

Conditioned on finding of gross negligence or malice. PJC 29.7 must be conditioned on an affirmative finding to a question on gross negligence, malice, or other finding justifying exemplary damages. ~~See Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, amended by Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995;~~ Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d).

Bifurcation. No predicated instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. *See Transportation Insurance Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994); Tex. Civ. Prac. &

Rem. Code § 41.009. If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate phase two jury charge should be prepared. In such a phase two jury charge, PJC 29.7A, 29.7B, or 29.7C (as appropriate) should be submitted with both PJC 1.3 and 1.4 instructions.

Exemplary damages for wrongful death under Texas Constitution. Exemplary damages in cases of “homicide, through wilful act, or omission, or gross neglect” are authorized by article XVI, section 26, of the Texas Constitution. Only the survivors enumerated in the constitutional provision (“surviving husband, widow, heirs of his or her body”) may recover. *General Chemical Corp. v. De La Lastra*, 852 S.W.2d 916, 923 (Tex. 1993) (parents of deceased child may not recover exemplary damages), *disapproved of on other grounds by Vogler v. Blackmore*, 352 F.3d 150 (5th Cir. 2003). A separate answer is recommended with respect to each constitutionally designated survivor. For the pattern question for apportionment of exemplary damages, see PJC 29.8.

Actual damages in suit against employer covered by Workers’ Compensation Act no longer required. Formerly, in a suit maintained by a survivor for exemplary damages against an employer covered by the Workers’ Compensation Act, Tex. Lab. Code § 408.001, an additional question on the amount of actual damages was advisable. To recover exemplary damages, the plaintiff had to show himself *entitled* to recover actual damages, which he would have recovered but for the Act. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 409 (Tex. 1934), *disapproved by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). An additional ra-

tionale was to permit an evaluation of the reasonableness of the ratio between the actual and exemplary damages. *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299, 308 (Tex. 2006); *see Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Under *Wright*, 725 S.W.2d 712, a plaintiff no longer needs to secure a finding on actual damages in this situation. *But see* Tex. Civ. Prac. & Rem. Code § 41.002 (after 1995 and 1997 amendments, death actions against workers' compensation subscribers no longer specifically excluded from application of chapter 41); *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005).

Exemplary damages under survival statute. Exemplary damages on behalf of a decedent are recoverable by the estate under the survival statute. Tex. Civ. Prac. & Rem. Code § 71.021; *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Castleberry v. Goolsby Building Corp.*, 617 S.W.2d 665 (Tex. 1981). *See* PJC 30.4.

Multiple defendants. There should be a separate question and answer blank for each defendant against whom exemplary damages are sought. *See* Tex. Civ. Prac. & Rem. Code § 41.006.

Multiple plaintiffs. For multiple plaintiffs, a separate finding on the amount of exemplary damages awarded to each is appropriate. *See* Tex. Civ. Prac. & Rem. Code § 71.010. For an example of submission of apportionment in a single question, *see* PJC 29.8.

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

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

Evidence that the defendant’s conduct caused harm to persons who are not before the court may also be probative of the reprehensibility of the defendant’s conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007). But when this type of evidence is admitted, the jury should be instructed that it may not punish a defendant for the harm the defendant’s conduct allegedly caused to other persons who are not parties to the litigation. *Williams*, 549 U.S. at 357.

Neither *Campbell* nor *Williams* specifies whether the requirement of an instruction means a limiting instruction at the time the evidence is offered, an instruction in the jury charge, or both.

[The following paragraphs apply only to PJC 29.7A.]

~~**Sources of definition and instructions.**—The definition of exemplary damages in PJC 29.7A is derived from *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex.~~

1980). The “factors to consider” instructions are derived from *Kraus*, 616 S.W.2d at 910, and approved in a note in *Moriel*, 879 S.W.2d at 29 n.26. Additional factors that have been considered by Texas courts in reviewing the propriety of an exemplary damages award include (1) compensation for inconvenience and attorney’s fees, *Hofer*, 679 S.W.2d at 474; (2) the net worth of the wrongdoer, *Moriel*, 879 S.W.2d at 29–30; *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), *disapproved of by Walker v. Packer*, 827 S.W.2d 833 (Tex. 1992); (3) the frequency of the wrongs committed, *State Farm Mutual Automobile Insurance Co. v. Zubiato*, 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, *Zubiato*, 808 S.W.2d at 604; *see also Moriel*, 879 S.W.2d at 27 n.22. If attorney’s fees are sought under another theory of recovery, they should not be included in the “factors to consider” instruction; otherwise, there exists the potential of a double recovery on this element.

These factors are included in response to Texas and U.S. Supreme Court decisions establishing that the discretion of the trier of fact to award punitive damages must be exercised within reasonable constraints. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993); *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991); *see also Moriel*, 879 S.W.2d at 27 n.22 (multifactor jury instruction meets constitutional requirements).

[The following paragraphs apply only to PJC 29.7B and 29.7C.]

Sources of definitions and instructions. The definitions of exemplary damages in PJC 29.7B and 29.7C are is derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(5), 41.011(a). The factors to consider are from Tex. Civ. Prac. & Rem. Code § 41.011(a). ~~PJC 29.7C is for use in all cases filed on or after September 1, 2003.~~

~~Tex. R. Civ. P. 226a.~~

Limitation on amount of recovery. For causes of action accruing on or after September 1, 1995, exemplary damages awarded against a defendant ordinarily may not exceed an amount equal to the greater of—

two times the amount of economic damages; plus

an amount equal to any noneconomic damages found by the jury, not to

exceed \$750,000; or

\$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 30.2

Survival Damages—Instruction on Whether

Compensatory Damages Are Subject to Income Taxes—

~~Actions Filed on or after September 1, 2003~~

You are instructed that any monetary recovery for [*list each element of economic or noneconomic damages that is subject to taxation*] is subject to [*federal or state*] income taxes. Any recovery for [*list each element of economic or noneconomic damages that is not subject to taxation*] is not subject to [*federal or state*] income taxes.

COMMENT

When to use. PJC 30.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. *See* Tex. Civ. Prac. & Rem. Code § 18.091(b).

PJC 30.4 Survival Damages—Exemplary Damages

~~**PJC 30.4A Survival Damages Exemplary Damages Causes of
Action Accruing before September 1, 1995**~~

If you answered “Yes” to Question _____
 ~~[or other question authorizing potential recovery of punitive damages],~~
then answer the following question. Otherwise, do not answer the following
question.

~~QUESTION _____~~

~~What sum of money, if any, should be assessed against *Don Davis* and
awarded to *Paul Payne* as exemplary damages for the death of *Mary Payne*?~~

~~“Exemplary damages” means an amount that you may in your discretion
award as an example to others and as a penalty or by way of punishment, in
addition to any amount that you may have found as actual damages.~~

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

- ~~1.—The nature of the wrong.~~
- ~~2.—The character of the conduct involved.~~

~~3.—The degree of culpability of the wrongdoer.~~

~~4.—The situation and sensibilities of the parties concerned.~~

~~5.—The extent to which such conduct offends a public sense of justice and propriety.~~

~~Answer in dollars and cents, if any.~~

~~Answer: _____~~

~~PJC 30.4B — Survival Damages — Exemplary Damages — Causes of
Action Accruing on or after September 1, 1995, and Filed
before September 1, 2003~~

~~If you answered “Yes” to Question _____ [or other question authorizing
potential recovery of punitive damages], then answer the following question.
Otherwise, do not answer the following question.~~

~~QUESTION _____~~

~~What sum of money, if any, should be assessed against *Don Davis* and
awarded to *Paul Payne* as exemplary damages for the death of *Mary Payne*?~~

~~“Exemplary damages” means any damages awarded as a penalty or by way
of punishment. Exemplary damages includes punitive damages.~~

~~In determining the amount of exemplary damages, you shall consider evidence, if any, relating to—~~

~~1.—The nature of the wrong.~~

~~2.—The character of the conduct involved.~~

~~3.—The degree of culpability of the wrongdoer.~~

~~4.—The situation and sensibilities of the parties concerned.~~

~~5.—The extent to which such conduct offends a public sense of justice and propriety.~~

~~6.—The net worth of *Don Davis*.~~

~~Answer in dollars and cents, if any.~~

~~Answer: _____~~

~~PJC 30.4C — Survival Damages — Exemplary Damages — Actions Filed
on or after September 1, 2003~~

Answer the following question regarding *Don Davis* only if you unanimously answered “Yes” to Question _____ [*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 _____ [*or other question authorizing potential recovery of punitive damages*]?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages includes punitive damages.

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

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

Answer in dollars and cents, if any.

Answer: _____

COMMENT

When to use. PJC 30.4 submits the question of exemplary damages in a survival action. Exemplary damages on behalf of a decedent are recoverable by the estate under the survival statute. Tex. Civ. Prac. & Rem. Code § 71.021; *Hofer v. Lavender*, 679 S.W.2d 470 (Tex. 1984); *Castleberry v. Goolsby Building Corp.*, 617 S.W.2d 665 (Tex. 1981). The above submission assumes that *Paul Payne* is acting as representative of the estate.

[Actions filed before September 1, 2003. For actions filed before September 1, 2003, see the 2018 edition of this volume for an explanation of the earlier law.](#)

Conditioned on finding of gross negligence or malice. PJC 30.4 must be conditioned on an affirmative finding to a question on gross negligence, malice, or other finding justifying exemplary damages. ~~See Acts 1987, 70th Leg., 1st C.S., ch. 2, § 2.12 (S.B. 5), eff. Sept. 2, 1987, amended by Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995;~~ Tex. Civ. Prac. & Rem. Code §§ 41.001(7), (11), 41.003(a), (d).

Bifurcation. No predicated instruction is necessary if the court has granted a timely motion to bifurcate trial of the amount of punitive damages. *See Transporta-*

tion Insurance Co. v. Moriel, 879 S.W.2d 10, 29–30 (Tex. 1994); Tex. Civ. Prac. & Rem. Code § 41.009. If in the first phase of the trial the jury finds facts establishing a predicate for an award of exemplary damages, then a separate phase two jury charge should be prepared. In such a phase two jury charge, PJC 30.4A, ~~30.4B, or 30.4C~~ (as appropriate) should be submitted with both PJC 1.3 and 1.4 instructions.

Actual damages in suit against employer covered by Workers' Compensation Act no longer required. Formerly, in a suit maintained by a survivor for exemplary damages against an employer covered by the Workers' Compensation Act, Tex. Lab. Code § 408.001, an additional question on the amount of actual damages was advisable. To recover exemplary damages, the plaintiff had to show himself *entitled* to recover actual damages, which he would have recovered but for the Act. *Fort Worth Elevators Co. v. Russell*, 70 S.W.2d 397, 409 (Tex. 1934), *disapproved by Wright v. Gifford-Hill & Co.*, 725 S.W.2d 712, 714 (Tex. 1987). An additional rationale was to permit an evaluation of the reasonableness of the ratio between the actual and exemplary damages. *Tony Gullo Motors v. Chapa*, 212 S.W.3d 299, 308 (Tex. 2006); *see Alamo National Bank v. Kraus*, 616 S.W.2d 908 (Tex. 1981). Under *Wright*, 725 S.W.2d 712, a plaintiff no longer needs to secure a finding on actual damages in this situation. *But see* Tex. Civ. Prac. & Rem. Code § 41.002 (after 1995 and 1997 amendments, death actions against workers' compensation subscribers no longer specifically excluded from application of chapter 41); *Hall v. Diamond Shamrock Refining Co.*, 82 S.W.3d 5 (Tex. App.—San Antonio 2001), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005).

Multiple defendants. There should be a separate question and answer blank for each defendant against whom exemplary damages are sought. Tex. Civ. Prac. & Rem. Code § 41.006.

Multiple plaintiffs. For multiple plaintiffs, a separate finding on the amount of exemplary damages awarded to each is appropriate. *See* Tex. Civ. Prac. & Rem. Code § 71.010. For an example of submission of apportionment in a single question, see PJC .

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

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

Evidence that the defendant's conduct caused harm to persons who are not before the court may also be probative of the reprehensibility of the defendant's conduct. *Philip Morris USA v. Williams*, 549 U.S. 346, 355–57 (2007). But when this type of evidence is admitted, the jury should be instructed that it may not punish a defendant for the harm the defendant's conduct allegedly caused to other persons who are not parties to the litigation. *Williams*, 549 U.S. at 357.

Neither *Campbell* nor *Williams* specifies whether the requirement of an instruction means a limiting instruction at the time the evidence is offered, an instruction in the jury charge, or both

~~*[The following paragraphs apply only to PJC 30.4A.]*~~

~~**Source of definition and instructions.**—The definition of exemplary damages in PJC 30.4A is derived from *Carnation Co. v. Borner*, 610 S.W.2d 450, 454 (Tex. 1980). The “factors to consider” instructions are derived from *Kraus*, 616 S.W.2d at 910, and approved in a note in *Moriel*, 879 S.W.2d at 29 n.26. Additional factors that have been considered by Texas courts in reviewing the propriety of an exemplary damages award include (1) compensation for inconvenience and attorney’s fees, *Hofer*, 679 S.W.2d at 474; (2) the net worth of the wrongdoer, *Moriel*, 879 S.W.2d at 29–30; *Lunsford v. Morris*, 746 S.W.2d 471 (Tex. 1988), *disapproved of by Walker v. Paeker*, 827 S.W.2d 833 (Tex. 1992); (3) the frequency of the wrongs committed, *State Farm Mutual Automobile Insurance Co. v. Zubiato*, 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, *Zubiato*, 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 in-~~

cluded 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 *Morie*, 879 S.W.2d at 27 n.22 (multifactor jury instruction meets constitutional requirements).

~~*[The following paragraphs apply only to PJC 30.4B and 30.4C.]*~~

Source of definitions and instructions. The definitions of exemplary damages in PJC 30.4B and 30.4C are is derived from Tex. Civ. Prac. & Rem. Code §§ 41.001(5), 41.011(a). The factors to consider are from Tex. Civ. Prac. & Rem. Code § 41.011(a). ~~PJC 30.4C is for use in all cases filed on or after September 1, 2003.~~

~~Tex. R. Civ. P. 226a.~~

Limitation on amount of recovery. For causes of action accruing on or after September 1, 1995, exemplary damages awarded against a defendant ordinarily may not exceed an amount equal to the greater of—

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

(B) an amount equal to any noneconomic damages found by the jury,

not to exceed \$750,000; or

(2) \$200,000.

Tex. Civ. Prac. & Rem. Code § 41.008(b). These limitations will not apply in favor of a defendant found to have “knowingly” or “intentionally” committed conduct described as a felony in specified sections of the Texas Penal Code. *See* Tex. Civ. Prac. & Rem. Code § 41.008(c), (d).

PJC 31.2 **Property Damages—Instruction on Whether
Compensatory Damages Are Subject to Income Taxes—
~~Actions Filed on or after September 1, 2003~~**

You are instructed that any monetary recovery for [*list each element of economic or noneconomic damages that is subject to taxation*] is subject to [*federal or state*] income taxes. Any recovery for [*list each element of economic or noneconomic damages that is not subject to taxation*] is not subject to [*federal or state*] income taxes.

COMMENT

When to use. PJC 31.2 should be submitted with the damages question in any action filed on or after September 1, 2003, in which a claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance. Whether an element of damages is taxable depends on the substantive tax law pertaining to each cause of action.

Source of instruction. *See* Tex. Civ. Prac. & Rem. Code § 18.091(b).