

**The Top Five Things You Need to Know
About The Jury Charge**

PRESENTED BY

Nina Cortell
HAYNES AND BOONE, LLP
901 Main St., Suite 3100
Dallas, Texas 75201

PAPER BY

Nina Cortell
Heather D. Bailey
HAYNES AND BOONE, LLP
901 Main St., Suite 3100
Dallas, Texas 75201

Karen S. Precella
HAYNES AND BOONE, LLP
201 Main St., Suite 2200
Fort Worth, Texas 76102

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THE TOP FIVE THINGS YOU NEED TO KNOW ABOUT THE JURY CHARGE

INTRODUCTION

This paper addresses what we believe are the top five things you should know about the jury charge based on recent developments: (1) broad form submission can lead to error; (2) the broad form debate has expanded to inferential rebuttal instructions; (3) the submission of liability, damages, and exemplary damages questions has changed after House Bill 4; (4) an argument can be made for submitting separate questions for claims and parties added after the effective date of House Bill 4; and (5) segregation of past and future damages is advised in order to preserve a claim for prejudgment interest. As this list indicates, the landscape for drafting a charge and the strategies that come into play have dramatically changed.

I. NUMBER 1: BROAD FORM SUBMISSION CAN LEAD TO ERROR

A. History lesson and overview of broad form submission in Texas

To understand today's charge one must understand the historical context within which we now practice. This paper briefly examines the history behind the transition from granulated charges to broad-form charges and the Texas Supreme Court's recent retreat, indicating a possible trend back towards granulated charges.

1. 1913 – 2000: Transition to broad form

From 1913 to 1973, Texas Rule of Civil Procedure 277 required that issues be submitted "distinctly and separately." TEX. R. CIV. P. 277 (superceded). In the 1922 case of *Fox v. Dallas Hotel Co.*, 240 S.W. 517, 522 (Tex. 1922), trial courts were instructed to "submit each issue distinctly and separately, avoiding all intermingling." In *Fox*, the court held that each of the defendant's contributory negligence allegations had to be submitted separately. *Id.* at 521-22.

In 1973, Rule 277 was amended to provide trial courts with discretion in submitting jury charges:

It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or

to submit the issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues.

Tex. R. Civ. P. 277 (superceded). In *Mobil Chemical v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974), the court held that the new rule meant that the jury could simply be asked whether a party was negligent. And in 1980, the Texas Supreme Court stated that the 1973 amendment to Rule 277 was designed to abolish the "distinctly and separately requirement." *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 937 (Tex. 1980).

During the 1980s, simplicity was the goal in charge practice. The Supreme Court indicated its intent to move toward broad-form submissions in *Burk Royalty Co. v. Walls*, 616 S.W.2d 911 (Tex. 1981) and *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984), when it stated that "a workable jury system demands strict adherence to simplicity in jury charges" and overruled all cases construing Rule 277 prior to the 1973 revisions.

The transition from distinct and separate issues to broad-form questions was furthered with the 1988 amendment to Rule 277. As the rule reads today, "broad-form questions" shall be submitted "whenever feasible." TEX. R. CIV. P. 277; see also *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 790 (Tex. 1995). "Whenever feasible" means "in any or every instance in which it is capable of being accomplished." *Tex. Dept. of Human Res. v. E.B.*, 802 S.W.2d 647, 649 (Tex. 1990); *Hyundai Motor Co. v. Chandler*, 882 S.W.2d 606, 616-17 (Tex. App.—Corpus Christi 1994, writ denied); *Missouri Pac. R.R. Co. v. Lemon*, 861 S.W.2d 501, 508 (Tex. App.—Houston [14th Dist.] 1993, writ dismissed by agr.).

But even after the broad-form mandate in 1988, courts continued to give great deference to a trial court's decision to submit a granulated charge. Thus, even with adequate preservation as to error in the failure to submit a broad-form charge, courts frequently found no error or harmless error. See *H.E. Butt Gro. Co. v. Warner*, 845 S.W.2d 258, 259-60 (Tex. 1992) (granulated submission not harmful); *Rosell v. Central West Motor States, Inc.*, 89 S.W.3d 643, 653-55 (Tex. App.—Dallas 2002, pet. denied) (granulated submission of negligent hiring, negligent training and negligent entrustment within court's

discretion to ensure needed answers without confusing jury); *Isern v. Watson*, 942 S.W.2d 186, 191 (Tex. App.—Beaumont 1997, writ denied) (citing *Warner* and holding that trial court had discretion to submit granulated factual bases in negligence theory); *Miller v. Wal-Mart Stores, Inc.*, 918 S.W.2d 658, 663-64 (Tex. App.—Amarillo 1996, writ denied) (trial court had discretion to submit separate question to resolve predicate factual dispute and condition liability question on affirmative finding to predicate issue); *Sanchez v. Excelco Bldg. Maintenance*, 780 S.W.2d 851, 853-54 (Tex. App.—San Antonio 1989, no writ) (court had discretion to submit four elements in two questions when charge was not overly complex or granulated); *see also Diamond Offshore Mgmt. Co. v. Guidry*, 84 S.W.3d 256, 263-64 (Tex. App.—Beaumont 2002, pet. filed) (refusal to use granulated submission of “course and scope” and “in the service of the vessel” not improper particularly when issues represent inferential rebuttal issues).

However, in *Exxon Pipeline Co. v. Zwahr*, 35 S.W.3d 705, 713 (Tex. App.—Houston [1st Dist.] 2000), *rev'd on other grounds*, 88 S.W.3d 623 (Tex. 2002), the court of appeals found that the failure to submit the charge in broad form was harmful error; *i.e.*, an otherwise error-free submission of separate and distinct special issues was reversed solely because of the failure to comply with Rule 277's mandate to use broad-form questions. *Id.* (holding that the trial court failed to comply with Rule 277's broad-form mandate by submitting two separate damage questions on fair market value).

2. 2000 – Present: Retreat from pure broad form

a. *Crown Life Ins. Co. v. Casteel*

In the now-famous 2000 *Casteel* decision, the Texas Supreme Court held that when both valid and invalid theories of liability were included in a single broad-form question, thus making it impossible to determine which the jury based its finding on, the error was harmful. *See id.* at 387-90. Moreover, the court held that broad-form submission may not be feasible when there are alternative liability standards and the governing law is unsettled or when the trial court is unsure whether it should submit a particular theory of liability. *Casteel*, 22 S.W.3d at 390; *Excel Corp. v. Apodaca*, 51 S.W.3d 686 (Tex. App.—Amarillo

2001), *rev'd on other grounds*, 81 S.W.3d 817 (Tex. 2002). Thus, a mere possibility that the jury got it right despite the error is no longer a viable appellate analytical standard applicable to charge error involving improper theories of liability. *Wal-Mart Stores, Inc. v. Redding*, 56 S.W.3d 141, 152-53 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).¹

The charge in *Casteel* included a single liability question that could have been based on any of thirteen independent grounds—the first five of which were taken from the DTPA's section 17.46(b) “laundry list.” *See id.* at 387; *see* question in Appendix. The plaintiff, Crown Life, did not have the requisite consumer status for four of those “laundry list” grounds. *See id.* at 389. The liability question called for a single answer, which the jury answered affirmatively. *See id.* The Court ruled that, as a result, the jury could have based its affirmative answer solely on one or

¹ A distinct body of case law has developed in the context of parental rights termination cases regarding whether, after *Casteel*, the Supreme Court's previous approval of broad-form submission in termination cases remains good law. *Texas Dept. of Human Servs. v. E.B.*, 802 S.W.2d 647 (Tex. 1990) (approving broad-form submission in termination cases). In a number of cases, courts of appeals (with Waco leading the way) have held that a broad-form disjunctive submission of the grounds for termination allows for the possibility of termination based on a statutory ground not found by the required ten jurors and violates *Casteel* (although the supreme court reversed a number of those cases because error was not preserved). *In re J.M.M.*, 80 S.W.3d 232, 246 (Tex. App.—Fort Worth, Jun. 13, 2002, pet. denied); *In re A.F.*, 91 S.W.3d 410, 412 (Tex. App.—Waco 2002), *rev'd*, 113 S.W.3d 363 (Tex. 2003); *In re A.V.*, 57 S.W.3d 51 (Tex. App.—Waco 2001), *rev'd*, 113 S.W.3d 355 (Tex. 2003); *In re M.C.M.*, 57 S.W.3d 27, 31 (Tex. App.—Houston [1st Dist.] 2001, pet. denied); *In re B.L.D.*, 56 S.W.3d 203 (Tex. App.—Waco 2001), *rev'd*, 113 S.W.3d 340 (Tex. 2003); *In re J.F.C.*, 57 S.W.3d 66 (Tex. App.—Waco 2001), *rev'd*, 96 S.W.3d 256 (Tex. 2002). Other courts of appeals have reached the opposite conclusion. *Thornton v. Texas Dept. of Protective and Regulatory Servs.*, No. 03-01-00317-CV, 2002 WL 246408, *3 (Tex. App.—Austin Feb. 22, 2002, pet. denied) (n.d.p.) (refusing to follow the Waco court of appeals and holding that *Casteel* did not overturn *E.B.*); *In re K.S.*, 76 S.W.3d 36, 42, 48-49 (Tex. App.—Amarillo 2002, no pet.) (holding that *Casteel* was not implicated because no ground submitted for termination was improper; broad-form submission was permitted by *E.B.*).

more the erroneously submitted theories. *Id.* at 387-88. The Court concluded that “when a trial court submits a single broad-form liability question incorporating multiple theories of liability, the error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.” *Id.* at 388.²

Most courts of appeals apply *Casteel* only when the error leaves the court unsure whether the jury based its finding on a valid legal theory. *See, e.g., Colonial County Mut. Ins. Co. v. Valdez*, 30 S.W.3d 514, 518-19 (Tex. App.—Corpus Christi 2000, no pet.); *In re Stevenson*, 27 S.W.3d 195, 202-03 (Tex. App.—San Antonio 2000, pet. denied) (although not citing *Casteel*, holding that instructing jury that it could terminate parental rights under either of two grounds, one of which was improperly submitted, caused harmful error when court could not determine whether jury relied on proper theory); *Kansas City Southern Ry. Co. v. Stokes*, 20 S.W.3d 45, 51 (Tex. App.—Texarkana 2000, no pet.). However, in recent cases, the courts of appeal have begun exploring the limits of *Casteel*.

b. *Harris County v. Smith*

Prior to *Casteel*, courts regularly upheld damage questions with a lump-sum answer, if the evidence supported that amount for any sub-part (or element) of the damages.³ Citing to its

² If, on the other hand, other findings can support the jury’s verdict or the court’s judgment, the error may be harmless.

³ *See Thomas v. Oldham*, 895 S.W.2d 352, 359-60 (Tex. 1995); *Provident Am. Ins. Co. v. Castaneda*, 914 S.W.2d 273, 282 (Tex. App.—El Paso 1996) (“so long as the aggregate evidence for all elements of damage supports the entire award, [court] must uphold the verdict”), *rev’d on other grounds*, 988 S.W.2d 189 (Tex. 1998); *Dodge v. Watts*, 876 S.W.2d 542, 545 (Tex. App.—Amarillo 1994, no writ) (evidence of pain, mental anguish, and other elements supported aggregate award); *Baylor Medical Plaza Servs. Corp. v. Kidd*, 834 S.W.2d 69, 79 (Tex. App.—Texarkana 1992, writ denied) (mental anguish could support finding by jury even in absence of evidence of other elements); *see also Wal-Mart Stores, Inc. v. Garcia*, 974 S.W.2d 83, 87-88 (Tex. App.—San Antonio 1998, no pet.) (without attack of sufficiency of evidence as to entire amount, no point raised for review). Prior to *Harris County*, only a few courts held that *Casteel* applied to lump-sum damages questions. *See Iron Mountain Bison Ranch, Inc. v.*

rationale in Casteel, however, the Supreme Court clarified in 2002 that a broad-form (or lump-sum or non-segregated) damage finding may cause reversible error when there is no evidence supporting one or more of those elements. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002).

In *Harris County*, the trial court submitted two broad-form damages questions, each of which instructed the jury to consider several elements and award a single lump-sum amount. *See* question in Appendix. *Harris County* objected to the questions and asked the trial court to submit each element separately. *Id.* at 231. After the court denied the request for separate submissions, *Harris County* objected on the ground that one listed element in each question was supported by no evidence. *Id.* at 231-32. The trial court overruled the objections.

On appeal, the court of appeals concluded there was no evidence of the challenged elements, but the submission error was harmless.⁴ The

Easley Trailer Mfg., Inc., 42 S.W.3d 149, 156-57 (Tex. App.—Amarillo 2000, no pet.) (finding *Casteel* applicable to a damage question that submitted two measures of damage, one of which had no support in the evidence); *City of Garland v. Dallas Morning News*, 2002 WL 31662724 at *3 (Tex. App.—Dallas 2002, no pet.) (n.d.p.) (although prior to *Harris County*, reversing when trial court submitted non-segregated fee finding over objection when a portion of fees were not recoverable and could be segregated).

⁴ The court of appeals had refused to extend the rule in *Casteel* to the broad-form damages question, instead applying traditional harm analysis, for three reasons. *See Harris County v. Smith*, 66 S.W.3d 326 (Tex. App.—Houston [1st Dist.] 2001), *rev’d*, 96 S.W.3d 230 (Tex. 2002). *First*, the court reasoned that *Casteel* is primarily concerned with the “key issue” of liability, and was intended to “preclude[] even the possibility that a party might be found liable on a completely invalid theory.” A damage question, however, could not present such, possibly constitutional, issues because the “key, primary, and ultimate issue of liability” was already answered. *Second*, the court reasoned that challenging the validity of only one of the elements of damage would be the equivalent of challenging the sufficiency of the evidence for only one element of damage—when, under *Thomas v. Oldham*, 895 S.W.2d 352, 354, 359 (Tex. 1995), the evidence must be considered as a whole. The court held that a party “should not be permitted to accomplish, by challenging the jury charge, what it cannot accomplish by challenging the legal sufficiency of the evidence.” The court added that “[i]n neither case should we presume

Texas Supreme Court reversed, holding that: “*Casteel*’s reasoning applies equally to broad-form damage questions” *id* at 236 and that “the trial court erred in overruling [the defendant’s] timely and specific objection to the charge, which mixed valid and invalid elements of damages in a single broad-form submission, and that such error was harmful because it prevented the appellate court from determining ‘whether the jury based its verdict on an improperly submitted invalid’ element of damage.” *Id.* at 234.⁵

Significantly, the Court stated that its decisions in *Casteel* and *Harris County* did not represent a sea-change in its preference for broad-form submissions. “Neither our decision today nor *Casteel* is a retrenchment from our fundamental commitment to broad-form submission.” *Id.* at 235. The court continued: “When properly utilized, broad-form submission can simplify charge conferences and provide more comprehensible questions for the jury. See *Hyundai Motor Co. v. Rodriguez*, 995 S.W.2d 661, 664 (Tex. 1999). But we recognize that it is not always practicable to submit every issue in a case broadly. As Professors Muldrow and Underwood observe, “broader is not always better.”” *Id.* (quoting Muldrow & Underwood, *Application of the Harmless Error Standard to*

error based on the possibility of error.” *Third*, the court adopted the reasoning of Professor Dorsaneo, who was also relied upon, in part, by the Texas Supreme Court in *Casteel*, that “‘there is a principled and sensible basis for concluding there is no reversible error’ when it is reasonable to presume that the jury awarded damages for elements that had support in the evidence, rather than those that lacked evidentiary support” (citing William V. Dorsaneo, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 630 (1992)). The court reasoned that this approach represented the “well-settled” rule of harmless error.

⁵ In addition to the failure of evidence, refusal to segregate damages over objection could cause error in the context of legal theories as well. See TEX. CIV. PRAC. & REM. CODE § 41.008 (calculating cap with economic and noneconomic damages); TEX. FIN. CODE § 304.1045 (applies to final judgments signed or subject to appeal on or after Sept. 1, 2003, and precludes prejudgment interest on future damages); *Roberts v. Williamson*, 111 S.W.3d 113 (Tex. 2003) (holding Texas does not recognize action for parent’s loss of consortium for non-fatal injury to child).

Errors in the Charge, 48 BAYLOR L. REV. 815, 853 (1996)).

c. *Golden Eagle Archery, Inc. v. Jackson*

While the no-evidence problem of *Harris County* argues for separate damages blanks, the factual sufficiency standard of review announced in *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757 (Tex. 2003), seems to argue for broad-form submission of damages elements. *Golden Eagle* is a products liability case in which the jury found liability and awarded damages in five separate categories, including (1) medical care, (2) physical pain and mental anguish, (3) physical impairment or loss of vision, (4) disfigurement, and (5) loss of earnings in the past. *Id.* at 760. In answer to a sixth category—physical impairment other than the loss of vision—the jury awarded \$0 damages. *Id.* The trial court did not define physical impairment. And, instead of defining the six damage categories such that they did not overlap, the court, following PJC 8.2, instructed the jury to “[c]onsider the elements of damages listed below and none other. Consider each element separately. Do not include damages for one element in any other element.” *Id.* at 770.⁶

The court of appeals agreed with plaintiff’s argument on appeal that the \$0 finding on physical impairment other than the loss of vision was against the great weight of the evidence. The Supreme Court reversed and announced a new standard for conducting a factual sufficiency review when some of the categories of damages are not defined and are not cleanly and clearly segregated. *Id.* at 770-73.

The court ruled that when only one category of damages is challenged on the basis that the

⁶ The Court suggested that the limiting instruction of PJC 8.2 (and the similar instruction in PJC 110.27) may need to be refined to comport with the “clearer” instruction from *French v. Grigsby*:

In answering this special issue you shall not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss, that is, do not compensate twice for the same loss, if any.

Id. (citing *French v. Grigsby*, 567 S.W.2d 604, 608 (Tex. Civ. App.—Beaumont, writ ref’d n.r.e., approved, 571 S.W.2d 867 (Tex. 1978)).

award in that category was zero or was too low, a court should consider only whether the evidence unique to that category is so against the great weight and preponderance of the evidence as to be manifestly unjust, shock the conscience, or clearly demonstrate bias. When the jury's failure to find greater damages in more than one overlapping category is challenged, the court of appeals should first determine if the evidence unique to each category is factually sufficient. If it is not, the court of appeals should then consider all the overlapping evidence, together with the evidence unique to each category, to determine if the total amount awarded in the overlapping categories is factually sufficient. *Id.* at 773.

The Supreme Court rejected Golden Eagle's argument that the splitting of physical impairment into two separate elements ("physical impairment of loss of vision" and "physical impairment other than loss of vision") violated the broad-form mandate of Rule 277. The court stated that "[a]lthough the trial court granulated physical impairment into two separate categories, Golden Eagle did not explain how it was harmed by this submission, particularly in light of the jury's award of '\$0' for physical impairment other than loss of vision." *Id.* at 776.

B. Strategy decisions based on open questions left by *Casteel* and *Harris County*

1. Drafting your proposed charge

In light of the developing law on when broad form submissions are feasible, practical considerations, or matters of strategy, will dictate your requested form of submission. The variations for a multi-theory case are too numerous to outline. Indeed, the combinations will vary depending upon, among other things: (1) how many plaintiffs and defendants the charge will submit,⁷ (2) how many theories of liability and/or defense the charge will submit, (3) the strengths and weaknesses of a case—on evidentiary, legal and jury appeal grounds, (4) what relief or combinations of relief a party will seek in formation of the judgment,⁸ and (5) the risk of

reversal that a party can tolerate to achieve a "winning" verdict. These various influences will affect the ultimate submission choices.

For example, a plaintiff might prefer that the trial court not submit multiple defenses in separate questions because (1) the jury receives more than one opportunity to thwart the plaintiff's recovery, (2) the opportunity for multiple defensive answers might create an overall perception against liability, (3) the possibility of conflicts increases with the number of questions submitted, and (4) a defendant can more easily challenge the evidentiary support of the jury's findings. On the other hand, if the jury answers a multi-theory question adverse to the plaintiff, the plaintiff will face a difficult task in attacking the jury's finding.

But you cannot wait to see what the jury answers before deciding to object to the form of the question or the underlying reasons it will fail. Instead, assuming you decide after consideration of strategic points to raise *Casteel*, the "broad form" error must have been preserved prior to submission to the jury. *Molina v. Moore*, 33 S.W.3d 323, 328 (Tex. App.—Amarillo 2000, no pet.) (even if *Casteel* extended to require separate answers to elements of damage, party waived error by failing to object to the form). *But cf. Iron Mountain Bison Ranch, Inc. v. Easley Traillee Mfg., Inc.*, 42 S.W.3d 149, 156-57 (Tex. App.—Amarillo 2000, no pet.) (despite lack of objection on broad form format, court found objection as to lack of evidentiary support sufficient to preserve *Casteel* error).⁹

As a further example, in the context of segregated damages, submission of multiple damage blanks may make a defendant queasy—are separate blanks the best choice? Instead, as a

(1) whether claims have different measures of damages, (2) whether a party seeks tort based damages for recovery of punitive damages, (3) whether a party can seek both punitive and trebled damages, (4) whether attorneys' fees are at issue on a particular claim, and (5) the type of relief sought for various claims or conduct (*e.g.*, forfeiture of different property, etc.).

⁹ Moreover, as *Casteel* recognized, the existence of one broad form error does not necessarily result in reversal. For example, other findings may support the judgment. *See Valdez*, 30 S.W.3d at 518-19 (although DTPA question defectively included improper theories and created harm under *Casteel*, Insurance Code question tied to same damage question supported judgment and rendered DTPA error harmless).

⁷ Joint and several liability (or several liability only) for actual or punitive damages also presents an array of issues in submission of a multi-party charge. Those issues are beyond the scope of this paper.

⁸ Some damage-related issues to consider in how broadly a court can combine theories include

defendant, do you want to allow a non-segregated damage finding without objection? What challenge do you face to gain review and reversal on the sufficiency of the evidence of any one or more damage element? Is that one of the main issues in the case or a lesser issue? The answers to those questions will help balance the need to win at trial with the risks of reversal on appeal.

2. To object or not to object

Whether the form of the broad form question creates a risk of reversal depends upon how many theories of liability and defense a single question combines, how the jury answered the question, and what part of the question fails on what grounds on appeal. For example, except perhaps for omission of a theory of liability, the risk of reversal (or harmful error) generally arises with a question that submits multiple liability or defensive theories in a single question only when the jury returns an *affirmative* finding to any question that contains multiple liability or defensive theories. When one of the multiple theories in a single question fails, a reviewing court cannot determine on what part of the question the jury relied to return an affirmative finding allowing recovery (liability) or on what part the jury relied to disallow recovery (defenses). On the other hand, a *negative* finding to those same questions would not have the same effect. In that situation, the jury relied upon none of the theories. The form of the question itself caused no error; no question exists as to which part of multi-theory question the jury relied upon to reach its finding. Thus, no risk exists of an improper recovery based on an invalid liability theory or a denial of recovery based on an invalid defensive theory.

However, if the broad-form question submitted both liability and defensive theories, and when one of those theories fails, even with a negative finding, the reviewing court cannot determine whether the jury answered “no” on liability or “yes” on a proper or improper defensive theory. Without knowing on what basis the jury answered in the negative, it may be difficult to hold that the question can stand after the failure of a defensive issue.

Assuming the combination presents potential error, how serious the risk of reversal is should be assessed. Is there some evidence of every theory subsumed in the questions and instructions? How

clear and strong is the law for or against the submission you seek? As the volume of evidence and strength of the law increases, the risk of reversal may decrease.

Thus, strategic options will play an important role in deciding how to proceed. If faced with an objection to a submission that is clearly erroneous, modifications to the charge may represent the best strategic choice. But, if faced with objections on potential or unknown errors, the choices become more difficult. An accurate assessment of the record, the law, and the jury’s possible answers becomes critical to making the strategic choices raised in that context.

II. NUMBER 2: THE BROAD FORM DEBATE HAS EXPANDED TO INFERENTIAL REBUTTAL INSTRUCTIONS

An inferential rebuttal defense operates to rebut an essential element of the plaintiff’s case by proof of other facts. *Dillard v. Tex. Elec. Coop*, 157 S.W.3d 429, 430 (Tex. 2005). Inferential rebuttal questions are not to be submitted in the charge and should instead be submitted in the form of instructions. TEX. R. CIV. P. 277.

For example, the PJC contains five instructions presenting inferential rebuttal defenses when the defendants blame an occurrence on someone or something other than themselves: (1) sole proximate cause (the occurrence is caused by a person not party to the suit), (2) unavoidable accident (the negligence is not caused by the negligence of any party to it), (3) new and independent cause (the occurrence is caused by someone else later), (4) sudden emergency (the occurrence is caused by something other than the defendant’s negligence and arises suddenly, and (5) act of God (the occurrence is caused by the violence of nature). *Id.*; Texas Pattern Jury Charges--General Negligence & Intentional Personal Torts PJC 3.1-3.5 (2003).

In two recent Texas Supreme Court cases, the high court has taken opposing views on whether a more granulated charge should have been submitted and whether the issue presented was an inferential rebuttal defense in the first place. *See Dillard v. Tex. Elec. Coop*, 157 S.W.3d 429 (Tex. 2005); *Diamond Offshore Mgmt. Co. v. Guidry*, 2005 WL 784265 (Tex. Apr. 8, 2005).

A. *Dillard v. Tex. Elec. Coop.*

In *Dillard v. Tex. Elec. Coop.*, 157 S.W.3d 429 (Tex. 2005), the Texas Supreme Court disapproved of the PJC's granulated instruction for inferential rebuttals. At issue was the cause of a fatal car accident that occurred when a truck driver employed by the defendant hit a cow and a subsequent motorist lost control of his car when he struck the dead cow in the roadway and collided with another car, killing the passenger of the second car.

The plaintiff requested two separate inferential rebuttal instructions because the accident could have been caused by a condition beyond the truck driver's control—the cattle on the roadway—or by someone not a party to the litigation—either the unknown cattle owner or the motorist who struck the cow and the plaintiff's car. The trial court's charge included only one—the unavoidable accident instruction—and not the sole proximate cause instruction.

The court of appeals concluded that both should have been submitted, but the supreme court reversed, holding that the trial court's charge adequately informed the jury about the defendant's inferential rebuttal defenses, and the court of appeals erred in holding that the case be retried under a more elaborate and granulated charge.

The supreme court was concerned that giving both instructions might improperly nudge the jury. It explained that many of the instructions overlap to create redundancies that are contrary to the spirit of broad-form submission. *Id.* at 433-34. "Under broad-form submission rules, jurors need not agree on every detail of what occurred so long as they agree on the legally relevant result." *Id.* at 434. The supreme court then concluded:

[T]he jurors here could have unanimously found [the defendant truck driver] negligent, even if half believed the negligent act was overloading his truck and half believed it was failing to warn oncoming traffic--acts that preceded two different collisions.

With respect to inferential rebuttal issues, jurors need not agree on what person or thing caused an occurrence, so long as they agree it was not the defendant. If some jurors here blamed the cattle (unavoidable accident or

sudden emergency) and the rest blamed the unknown cow owner (sole proximate cause), their differences would be irrelevant--they would properly return a unanimous defense verdict. Just as jurors may find against a defendant without agreeing on which precise acts were negligent, they should be able to find the opposite without agreeing on the precise reason.

Id. at 434.

B. *Diamond Offshore Mgmt. Co. v. Guidry*

On the other hand, in *Diamond Offshore Mgmt. Co. v. Guidry*, 2005 WL 784265 (Tex. Apr. 8, 2005), the Texas Supreme Court favored a more granulated charge that would have specifically asked the jury, in a Jones Act wrongful death action, whether a seaman, who was killed ashore in a one-vehicle accident, and whether second seaman, who had been driving the pickup, had been ashore in course of employment. The trial court's charge instructed the jury on course of employment, but the question submitted to jury asked only about negligence and causation.

The supreme court held that "[t]he basic characteristic of an improper inferential rebuttal question to a jury is that it presents a contrary or inconsistent theory from the claim relied upon for recovery." The defendant's course and scope questions "did not present a theory inconsistent with the plaintiff's claim; they asked about elements of the plaintiff's claim." *Id.* at *3.

The supreme court rejected plaintiff's argument that submitting separate questions on the course of employment would have been inconsistent with the broad-form mandate of Rule 277. It explained: "Broad-form submission does not entail omitting elements of proof from the charge. While the trial court could certainly have inquired about the separate issues of negligence, causation, and course of employment in a single question with proper instructions, Diamond was not obligated to request such a question. It was required only to object to the absence of any inquiry, which the trial court acknowledged Diamond had done with its requested questions." *Id.* at *3.

III. NUMBER 3: THE SUBMISSION OF LIABILITY, DAMAGES, AND EXEMPLARY DAMAGES

QUESTIONS HAS CHANGED AFTER HOUSE BILL 4

In January, the Texas Supreme Court amended Rule 226a to implement the requirement for juror unanimity for exemplary damages in compliance with House Bill 4, the omnibus tort-reform legislation enacted in 2003. Acts 2003, 78th Leg., ch. 204, § 13.04, eff. Sept. 1, 2003. House Bill 4 amended Texas Civil Practice and Remedies Code § 41.003 to require unanimous jury findings on “liability for and the amount of exemplary damages” and a jury instruction that “the amount of such damages must be unanimous,” making it harder for a claimant to recover punitive damages. TEX. CIV. PRAC. & REM. CODE § 41.003(d), (e).

Before the amendments to Chapter 41, at least ten jurors (in district court) could agree to the jury’s answer to a question, whether that answer was affirmative or negative. TEX. R. CIV. P. 292. (a verdict may be rendered “by the concurrence, as to each and all answers made, of the same ten members of an original jury of twelve.”) Stated differently, ten votes were required for either a “yes” or “no” answer. If ten votes could not be obtained, the jury was hung.

Under the House Bill 4 amendments, it is clear that the jury must be instructed that its finding on the amount of punitive damages must be unanimous. But, until the supreme court changed Rule 226a, it was arguably unclear whether the jury should be instructed that its answers to the underlying liability question (*e.g.* negligence or breach of fiduciary duty) and for the exemplary predicate question (*i.e.*, malice, gross negligence or fraud) must also be unanimous to avoid conflicts in the jury’s findings. Stated differently, is it inconsistent for a juror to take the position, for example, that the defendant was not negligent but then, when answering the exemplary damages question, take the position that the defendant was grossly negligent? If it is inconsistent for an individual juror to take those two positions, does that mean that the jury must be unanimous on all underlying liability questions in order to award exemplary damages?¹⁰

¹⁰ The issue had been debated at length by the Supreme Court Advisory Committee. Some members took the position that the charge should not require unanimity on all underlying liability questions and that such a requirement would impose obligations on a plaintiff that are greater than what is mandated by statute.

The Texas Supreme Court answered that question affirmatively when it interpreted the statute to implicitly require unanimity for the exemplary damages question as well as the underlying tort liability and predicate questions and amended Texas Rule of Civil Procedure 226a accordingly. The amendment to Rule 226a took effect February 1, 2005 in cases filed on or after September 1, 2003. Under the rule, unanimity is required for the following jury questions:

- tort liability question: unanimous
- tort damages question: NOT unanimous
- exemplary predicate question: unanimous and expressly conditioned on a unanimous tort liability finding
- exemplary damages question: unanimous

IV. NUMBER 4: AN ARGUMENT CAN BE MADE FOR SUBMITTING SEPARATE QUESTIONS FOR CLAIMS AND PARTIES ADDED

Those members argued that there are many instances where a jury could vote 10-2 on one tort liability question and 12-0 on another tort liability question and the exemplary predicate question, in which case the verdict would not be in conflict. For example, a jury could vote 10-2 finding negligence and vote 12-0 finding breach of fiduciary duty, and 12-0 on a malice question. Another possible scenario might arise in which a juror finds that the defendant was negligent, but that such negligence was not the proximate cause of the injury and thus answer the negligence question “No.” In that scenario, the juror could still find that the conduct was grossly negligent. In other words, they argued, it is possible that a juror could vote “No” on negligence and “Yes” on gross negligence without creating a conflict in the jury findings. Moreover, they argued, if a juror votes “No” on negligence because he or she does not believe that the defendant’s conduct rises to the level of negligence, it is a virtual certainty that the juror will vote “No” on the question of gross negligence—meaning there is no need for additional conditioning.

http://www.supreme.courts.state.tx.us/advisory/Overview_226a.pdf.

AFTER THE EFFECTIVE DATE OF HOUSE BILL 4.

The effective date of House Bill 4 was September 1, 2003. House Bill 4's effective-date provision states: "Except as otherwise provided in this section or by a specific provision in an article, this Act applies only to an action filed on or after the effective date of this Act. . ." Act of June 11, 2003, 78th Leg., R.S., ch. 205, § 23.02(d), 2003 Tex. Gen. Laws 847, 899; *see also Dillard Dept. Stores, Inc. v. Silva*, 148 S.W.3d 370, 373 (Tex. 2004) (applying the pre-2003 definition of malice to an action that occurred in 1997). If you are getting ready for trial in a case that was filed before September 1, 2003, your case will be governed by the law in effect immediately before House Bill 4 became effective, so exemplary damages can be based on a 10-2 jury vote.

One issue arises when new parties or claims have been added to an ongoing action after September 1, 2003. In that scenario, the Act provides that "[a]n action filed before the effective date of this Act, including an action filed before that date in which a party is joined or designated after that date, is governed by the law in effect immediately before the change in law made by this Act, and that law is continued in effect for that purpose." Act of June 11, 2003, 78th Leg., R.S., ch. 205, § 23.02(d), 2003 Tex. Gen. Laws 847, 899 (emphasis added).

An argument can be made that this provision is ambiguous as to whether later-added parties or claims should be governed by the previous law. While it is clear that the "action" will be governed by previous law, it is not entirely clear whether it would be appropriate to separately submit questions against the original parties under the previous law while submitting separate questions calling for House Bill 4 unanimity against the later-added parties.

V. NUMBER FIVE: PREJUDGMENT INTEREST: SEGREGATION IS BACK!

House Bill 4 added Section 304.1045 to the Finance Code which provides that prejudgment interest may not be assessed or recovered on an award of future damages. *See id.* § 304.1045. This has important implications for the court's charge. As under *Cavnar* (see below), a plaintiff may have the burden to request a damage question that segregates between past and

future damages. If the plaintiff does not segregate past losses from future losses, he may not be entitled to recover prejudgment interest on those non-segregated elements of damages. *Cavnar*, 696 S.W.2d 549 (Tex. 1985); *Domingues v. City of San Antonio*, 985 S.W.2d 505, 511 (Tex. App.—San Antonio 1998, pet. denied); *Cresthaven Nursing Residence v. Freeman*, 134 S.W.3d 214, 223 (Tex. App. — 2003, no pet.)

Cavnar, which was a pre-statute common law case, did not allow interest on future damages, holding that, unless statutorily or contractually provided, prejudgment interest was only available on actual damages that have accrued by the time of judgment. *See Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549, 555–56 (Tex. 1985). Thus, to recover prejudgment interest on accrued damages under *Cavnar*, the plaintiff had to segregate accrued damages from future damages. *Id.* at 556; *see also Benavidez v. Isles Constr. Co.*, 726 S.W.2d 23, 24–25 (Tex. 1987) (although jury awarded lump sum combining past and future damages, stipulation on past medical expenses and separate finding on property damage sufficiently segregated past and future damages to allow prejudgment interest on past damages); *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 636 (Tex. 1986) (plaintiffs were not entitled to prejudgment interest on wrongful death claims because they failed to segregate past damages from future, unaccrued damages such as loss of inheritance); *Loyd Elec. Co., Inc. v. Millett*, 767 S.W.2d 476, 484 (Tex. App.—San Antonio 1989, no writ) (court correctly calculated prejudgment interest on damages accruing before trial).

Article 5069-1.05, (the predecessor to sections 304.101–108 of the Texas Finance Code), enacted in 1987, modified *Cavnar* in "wrongful death, personal injury, and property damage" cases. In *C&H Nationwide, Inc. v. Thompson*, the Texas Supreme Court held that this statute allowed recovery of prejudgment interest in such cases not only on past damages, but also on future damages included in the judgment. *C & H Nationwide, Inc. v. Thompson*, 903 S.W.2d 315, 324–25 (Tex. 1994). *But see Columbia Hosp. Corp. v. Moore*, 92 S.W.3d 470, 474–75 (Tex. 2002) (prohibiting the award of prejudgment interest on future damages in health care liability claims). The court reasoned that the phrase "amount of the judgment" in article 5069-1.05, section 6(a) made no distinction between past and

future damages and thus entitled the plaintiffs to prejudgment interest on the entire judgment. *C&D Robotics, Inc., v. Mann*, 47 S.W.3d 194, 202 (Tex. App.—Texarkana 2001, no pet.); *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 347 (Tex. App.—Austin 2000, pet. denied); *Weidner v. Sanchez*, 14 S.W.3d 353, 372 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Jamar v. Patterson*, 910 S.W.2d 118, 124 (Tex. App.—Houston [14th Dist.] 1995, writ denied). *C & H Nationwide*, 903 S.W.2d at 325. Based on *C&H Nationwide*, several appellate courts upheld awards of prejudgment interest on future damages. *C&D Robotics, Inc., v. Mann*, 47 S.W.3d 194, 202 (Tex. App.—Texarkana 2001, no pet.); *Reliable Consultants, Inc. v. Jaquez*, 25 S.W.3d 336, 347 (Tex. App.—Austin 2000, pet. denied); *Weidner v. Sanchez*, 14 S.W.3d 353, 372 (Tex. App.—Houston [14th Dist.] 2000, no pet.); *Jamar v. Patterson*, 910 S.W.2d 118, 124 (Tex. App.—Houston [14th Dist.] 1995, writ denied). In this context, where prejudgment interest was allowed on both past and future damages, no segregation of damages was necessary. However, those authorities are now superceded by the House Bill 4 amendments.

VI. BONUS POINT: THE CURRENT PREJUDGMENT AND POSTJUDGMENT INTEREST RATE HAS RISEN ABOVE 5%.

Although judgment interest issues occur during the judgment formation stage of a lawsuit rather than the immediately preceding jury charge phase, you should know that pre- and post-judgment interest rates are currently in flux, and have steadily been increasing from 5% in December 2004 to 6% in June 2005.

For a number of years, most Texas judgments earned pre- and post-judgment interest at 10%. See former TEX. FIN. CODE § 3004.003(c) (“The judgment interest rate is . . . the auction rate quoted on a discount basis for 52-week treasury

bills issued by the United States government as most recently published by the Federal Reserve Board before the date or computation [or] 10 percent if the auction rate . . . is less than 10 percent.”). Because the Federal Reserve’s auction rate consistently remained below 10 percent, it was common practice to assume that the rate would not change. This is no longer the case.

In 2003, House Bill 2415 changed the basis for calculation of postjudgment interest under Section 304.003(c) of the Texas Finance Code. See TEX. FIN. CODE § 3004.003(c). Because prejudgment and postjudgment interest rates are the same, the bill also changed the prejudgment interest rate. House Bill 2415 applies to all judgments signed after June 20, 2003.

Section 304.003(c) now provides that the postjudgment interest rate will be computed by using the prime rate as published by the Federal Reserve Bank of New York and then subjecting that rate to floor and ceiling limit tests. If the prime rate is less than 5%, then the postjudgment rate will be 5%. If the prime rate is more than 15%, then the postjudgment rate will be 15%. See TEX. FIN. CODE § 3004.003(c).

In mid-December 2004, prime rate exceeded 5% for the first time in over four years. This means that in order to determine the prejudgment and/or postjudgment interest rate on a judgment, you must go to the website of the Office of the Consumer Credit Commissioner at <http://www.occc.state.tx.us/>. From the home page, choose “interest rates” at the left hand menu bar, and you will be directed to the Interest Rates main page or to the *Texas Credit Letter*, where current rates are published. The consumer credit commissioner determines the postjudgment interest rate on the 15th day of each month and that rate is applied to a money judgment rendered by a Texas court during the succeeding calendar month. The effective rate for June 2005 is 6%. <http://www.occc.state.tx.us/pages/publications/ccl/2005/2005.html>.

APPENDIX - SAMPLE QUESTIONS

CASTEEL-LIKE LIABILITY QUESTION

QUESTION No. __

Did CROWN engage in any false, misleading, or deceptive act or practice that CASTEEL relied on to his detriment and that was a producing cause of damages to CASTEEL?

“False, misleading, or deceptive act or practice” means any of the following:

- (1) Representing that goods or services had or would have characteristics that they did not have, [17.46(b)(5)]
- (2) Representing that goods or services are or will be of a particular quality if they were of another, [17.46(b)(7)]
- (3) Advertising goods or services with intent not to sell them as advertised, [17.46(b)(9)]
- (4) **Representing that an agreement confers or involves rights that it did not have or involve, [17.46(b)(12)]** or
- (5) Failing to disclose information about goods or services that was known at the time of the transaction with the intention to induce CASTEEL into a transaction it otherwise would not have entered into if the information had been disclosed. [17.46(b)(23)]

ANSWER ‘YES’ OR ‘NO’: _____

HARRIS COUNTY DAMAGE QUESTION

Consider the elements of damages listed below and none other:

- a. Physical pain and mental and mental anguish;
- b. **Loss of earning capacity;**
- c. **Physical impairment;** and
- d. Medical care.

ANSWER: \$90,000

GLOBAL DAMAGE QUESTION

QUESTION NO. 3

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate CASTEEL for his damages, if any, that were proximately caused by such conduct?

Consider the elements of damages listed below and none other:

- (1) the market value of the property,
- (2) out-of-pocket expenditures incurred by CASTEEL,
- (3) the profits CASTEEL lost in the past that were a natural, probable and foreseeable consequence of such conduct, and
- (4) the profits CASTEEL will lose, in reasonable probability, in the future as a natural, probable and foreseeable consequence of such conduct.

ANSWER in Dollars and Cents, if any:

DAMAGE ELEMENTS SUBMITTED SEPARATELY

ALTERNATIVE QUESTION NO. 3

What sum of money, if any, if paid now in cash, would fairly and reasonably compensate CASTEEL for his damages, if any, that were proximately caused by such conduct?

- a. Consider the elements of damages listed below and none other.
- b. Do not include in your answer any amount that you find CASTEEL could have avoided by the exercise of reasonable care.
- c. Do not include interest on any amount of damages you find.

ANSWER separately in the blank following each element, in Dollars and Cents, for damages if any:

- (1) the market value of the property \$ _____
- (2) out-of-pocket expenditures incurred by CASTEEL \$ _____
- (3) the profits CASTEEL lost in the past that were a natural, probable and foreseeable consequence of such conduct \$ _____
- (4) the profits CASTEEL will lose, in reasonable probability, in the future as a natural, probable and foreseeable consequence of such conduct \$ _____

ACTUAL AND EXEMPLARY DAMAGES
QUESTIONS AND INSTRUCTIONS AFTER HB4

The Supreme Court Advisory Committee has determined that the charge is more understandable (user-friendly) if broken into two parts, with the first part asking basic liability and damages questions and the second part asking exemplary damages questions. The two parts then have separate certificates.

Part 1

QUESTION NO. 1

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

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

- a. Paul Payne _____
- b. Don Davis _____
- c. David Davis _____

Answer Question No. 2 if you have answered “Yes” as to two or more of the persons named in Question No. 1. Otherwise, do not answer Question No. 2.

QUESTION NO. 2

With respect to causing or contributing to cause in any way the injury to Paul Payne, find the percentage of negligence, if any, attributable as between or among those listed below.

The percentages you find must total 100 percent. The percentages must be expressed in whole numbers. The negligence attributable to any one named below is not necessarily measured by the number of acts or omissions found.

- a. Paul Payne _____
- b. Don Davis _____
- c. David Davis _____
- TOTAL _____ 100%

Answer Question No. 3 if you answered “Yes” as to either Don Davis or David Davis in response to Question No. 1 and: (1) you answered “No” for Paul Payne in response to Question No. 1, or (2) you answered 50% or less for Paul Payne in response to Question No. 2. Otherwise, do not answer Question No. 3.

QUESTION NO. 3

What sum of money, if paid now in cash, would fairly and reasonably compensate Paul

Payne for his injuries, if any, that resulted from the occurrence in question?

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of Paul Payne.

Answer for damages, if any, that—

were sustained in the past: \$ _____

in reasonable probability will
be sustained in the future \$ _____

Certificate for Part 1

If you are unanimous as to every answer, the presiding juror must certify the verdict on behalf of the jury by signing in the space provided below.

I, the Presiding Juror of the Jury, certify that the jury has answered the above and foregoing questions as instructed, the jury is unanimous as to every answer, and the jury returns the above answers into court as its verdict.

SIGNATURE OF PRESIDING JUROR

PRINTED NAME OF PRESIDING JUROR

If you are not unanimous as to every answer, the jurors who have agreed to each answer must certify the verdict by signing in the spaces provided below.

We, members of the jury, certify that we have answered the above and foregoing questions as instructed, the undersigned group of us has agreed as to every answer, and we return the above answers into court as our verdict.

SIGNATURE OF JUROR

PRINTED NAME

Part 2

If you have answered “Yes” to Question No. 2 as to any person named below and your answer was unanimous, then answer Question No. 4 as to that person. Otherwise, do not answer Question No. 4.

You are instructed that in order to answer “Yes” to Question No. 4 as to any person named below, you must be unanimous. You may answer “No” to Question No. 4 as to any person named below upon a vote of ten or more jurors.

QUESTION NO. 4

Do you find by clear and convincing evidence that the negligence of the persons named below was “gross negligence”?

“Gross negligence” means an act or omission: (A) which when viewed objectively from the standpoint of the actor 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 the actor 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” as to each of the following:

- a. Don Davis _____
- b. David Davis _____

ALTERNATIVE QUESTION NO. 4

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

“Malice” means a specific intent by the persons named below to cause substantial injury or harm to Paul Payne.

Answer “Yes” or “No as to each of the following:

- a. Don Davis _____
- b. David Davis _____

Answer Question No. 5 only if you have answered “Yes” as to one or more person in response to Question No. 4. Otherwise, do not answer Question No. 5.

You are instructed that in order to find exemplary damages, your answer to Question No. 5 must be unanimous.

QUESTION NO. 5

What sum of money, if any, should be assessed against the persons listed below and

awarded to Paul Payne as exemplary damages for the conduct you have found in response to Question No. 4?

“Exemplary damages” means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. “Exemplary damages” includes punitive damages.

In determining the amount of exemplary damages, you should consider evidence, if any, relating to:

- The nature of the wrong.
- The character of the conduct involved.
- The degree of culpability of the wrongdoer.
- The situation and sensibilities of the parties concerned.
- The extent to which such conduct offends the public sense of justice and propriety.
- The net worth of the defendant.

Answer in dollars and cents, if any, for each of the following:

- a. Don Davis \$ _____
- b. David Davis \$ _____

Certificate for Part 2

If you are unanimous as to every answer in Part 2, the presiding juror must certify the verdict in Part 2 on behalf of the jury by signing in the space provided below.

I, the Presiding Juror of the Jury, certify that the jury has answered the above and foregoing questions in Part 2 as instructed, the jury is unanimous as to every answer in Part 2, and the jury returns the above answers into court as its verdict on Part 2.

SIGNATURE OF PRESIDING JUROR

PRINTED NAME OF PRESIDING JUROR

If you are not unanimous as to every answer in Part 2, the jurors who have agreed to each answer in Part 2 must certify the verdict as to Part 2 by signing in the spaces provided below.

We, members of the jury, certify that we have answered the above and foregoing questions in Part 2 as instructed, the undersigned group of us has agreed as to every answer in Part 2, and we return the above answers into court as our verdict on Part 2.

SIGNATURE OF JUROR

PRINTED NAME
