

**THE SUPREME COURT AND
THE BROAD FORM JURY CHARGE**

CHARLES R. “SKIP” WATSON, JR.

Mullin Hoard & Brown, L.L.P.

P. O. Box 31656

Amarillo, Texas 79120-1656

(806) 372-5050

swatson@mhba.com

State Bar Of Texas
PRACTICE BEFORE THE TEXAS SUPREME COURT
April 16, 2004
Austin

CHAPTER 7

Charles R. "Skip" Watson, Jr.

MULLIN HOARD & BROWN, L.L.P.

P. O. Box 31656

Amarillo, Texas 79120-1656

(806) 372-5050

swatson@mhba.com

BOARD CERTIFIED:

Civil Appellate Law and

Civil Trial Law,

Texas Board of Legal Specialization, 1987

PROFESSIONAL ACTIVITIES:

Supreme Court of Texas Advisory Committee, 1999-2004

Chair, Appellate Section, State Bar of Texas, 2002-03

Chair, Committee on Professionalism, 1995-2002

Responsible for drafting "Standards for Appellate Conduct"

Course Director, State Bar Advanced Appellate Practice Course, 1994

Pattern Jury Charge Committee, Business, Consumer, Employment Law, 1991-2001

Texas Center for Legal Ethics, Board of Trustees, 2002-04; Advisory Council, 1998-2001

Grievance Committee, District 13, 1990-1994, Chair, 1993-1994

U.S. District Court Advisory Group, Northern District of Texas, 1992-1997

Author, Report on Cost and Delay in U.S. District Courts for Western Divisions

Course Director, State Bar Advanced DTPA - Consumer Law Course, 1989

Chair, Consumer Law Section, State Bar of Texas, 1987-1988

AUTHOR:

Appellate Professionalism,

Advanced Appellate Course, State Bar of Texas, 1996, 2001

Perfecting Appeal: Post Verdict Motions,

Advanced Civil Trial Course, State Bar of Texas, 1994

Advanced Appellate Course, State Bar of Texas, 1993

The Court's Charge to the Jury,

Advanced Civil Trial Course, State Bar of Texas, 2002, 2003

University of Texas School of Law, Appellate Course, 2000

Advanced Appellate Course, State Bar of Texas, 1991, 1992, 1994, 1998

Summary Judgments and Special Exceptions,

Advanced Civil Trial Course, State Bar of Texas, 1990

Rescuing the Record on Appeal,

Advanced Appellate Course, State Bar of Texas, 1990

Defending Deceptive Trade Practices Claims,

18 Texas Tech Law Review 77 (1987)

The McFadden Act and Remote Electronic Banking,

8 Texas Tech Law Review 771 (1977)

LAW SCHOOL:

Texas Tech School of Law, J.D., 1977

Award: Best Law Review Comment published in Texas,

by State Bar of Texas, Business Law Section, 1977

Law Review, Associate Editor, 1976-77

Moot Court Competition Winner, 1975

TABLE OF CONTENTS

I. *E.B.* – FROM ONE EXTREME..... 1

II. CONCERNS ON APPEAL 2

III. *CASTEEL* – THE PENDULUM STARTS BACK..... 2

IV. AFTER *CASTEEL* BUT PRIOR TO *SMITH*..... 3

V. *SMITH* – THE SWING-BACK IS REAL..... 3

VI. FUTURE HARMFUL BROAD FORM CHARGE ERROR..... 4

VII. A PROPOSED SOLUTION 5

THE SUPREME COURT AND THE BROAD FORM JURY CHARGE

by Charles R. "Skip" Watson, Jr.

The status and future of broad form jury charges is in flux. Recent decisions by the Supreme Court of Texas have led to speculation that broad form pendulum is swinging back to more specific findings. The court says it remains committed to broad form.

While broad form charge practice is undeniably changing, change occurs in starts and stops, and appears to be without overall design.

The court is addressing parties' loss of ability to demonstrate that a specific unsupported or erroneous submission resulted in an improper verdict because the invalid claim, defense, or damage element was submitted in an instruction with other properly submitted and proven elements. The court has fashioned a simple, if unsatisfactory, solution. It calls for potentially erroneous submissions to be submitted separately. Specific findings are required – but only when the submissions itself may be "invalid." Harmful error occurs when an improper submission is hidden in a broad form instruction and not submitted separately. The error is harmful because the court cannot determine whether charge error is harmful.

As a result, much attention has been paid to the specific types of potential error that have, and have not, been recognized as requiring a separately answered question. The court's heightened focus on the liability and damage elements of causes of action has resulted in closer scrutiny of the definitions used to describe these elements. Its emphasis on the quantity and quality of evidence needed to warrant submission of an element, and therefore the cause of action, has resulted in objections whenever liability and damage issues are not submitted by separate questions that permit findings on each disputed element.

Yet, incremental expansion of the exceptions to broad form should not be the sole focus of charge analysis in the supreme court. What is important is the reason for the court's vacillation. Successful supreme court practitioners seem to have the ability to help the court find lasting solutions to fundamental problems. Here, that problem is inherent in requiring litigants to demonstrate that charge error resulted in an improper verdict, rather than presuming error is harmful unless the record demonstrates it was not.

Many other topics vex the jury charge in Texas. This topic is purposefully narrow. It focuses the supreme court practitioner on recent changes in broad form jury charge practice required by the supreme court. By understanding how problems developed and how the court has responded, it is hoped that more than

potential harmful error will be revealed. Perhaps a solution can be suggested.

I. *E.B.* – FROM ONE EXTREME

In 1988 the court amended Rule 277 Tex. R. Civ. P. to require:

In all jury cases the court shall, whenever feasible, submit the cause upon broad-form questions.

Broad form submissions reached their zenith two years later, when the supreme court decided *Texas Dept. of Human Services v. E.B.*, 802 S.W.2d 647 (Tex. 1990). There the court held that Rule 277 Tex. R. Civ. P. "means exactly what it says." *Id.* at 648. It held the rule meant that "[u]nless *extraordinary circumstances* exist, a court *must* submit such broad form questions." *Id.* at 649, (emphasis added).

The point was driven home by *E.B.*'s subject matter -- termination of parental rights. The jury was asked the "controlling questions in the case," whether a mother's parent-child relationship with each of her two children should be terminated. *Id.* at 649.

The court of appeals opinion reveals that instructions accompanying each of the two questions disjunctively set forth two statutory grounds for termination. *E.B. v. Texas Dept. of Human Services* 766 S.W.2d 387, 388 (Tex. App. Austin 1989) *reverse*, 802 S.W.2d 647 (Tex. 1990). The court of appeals reversed the termination, upholding an objection that the broad form submission and disjunctive elements permitted the state to obtain a finding that the mother's rights should be terminated without the same ten jurors concluding that she violated one or both statutory grounds under Rule 392. *Id.* at 389. It also held that asking the jury to decide the ultimate legal question, whether the mother's rights should be terminated, invaded the role of the court. *Id.* at 390.

The supreme court was unconcerned that it could not be determined from the broad form submission, which, if either, of the grounds resulted in the jury's verdict. "All ten jurors agreed that the mother had endangered [each] child by doing one or the other of the things listed in § 15.02." *Id.* at 649. It correctly reasoned that the controlling issue was not which specific statutory ground the jury relied upon in deciding the controlling question. It did not address the jury's invasion on the courts' role as the sole judge of the legal consequence of the mother's actions.

It made its holding universal by declaring that parental rights cases should be decided "the same as in other civil cases." *Id.* Thus, submission of ultimate legal issues by question while submitting all dispositive factual grounds, and their elements, by

instruction, became the law of the state in all civil cases.

What the *E.B.* court did not consider was the impact of its holding if one of the grounds was not properly before the jury because it was not a recognized ground for recovery, was not raised by the evidence, or was erroneously defined.

II. CONCERNS ON APPEAL

Concerns for the ability to preserve and demonstrate error in jury instructions grew in the early 1990's. See e.g. Dorsaneo, *Broad-Form Submission of Jury Questions and the Standard of Review* 46 S.M.U. L. Rev. 601, n. 634-36 (1992).

That *E.B.* represented the maximum reach of broad form soon became evident. In 1992 the court held it was *not* reversible error to submit issues separately, rather than by broad form. *H.E. Butt Grocery Co. v. Warner* 845 S.W.2d 256, 259 (Tex. 1992). It simultaneously dropped a footnote in *Westgate, Ltd. v. State of Texas*, 843 S.W.2d 448, 455 n. 6 (Tex. 1992) stating that new or unsettled causes of action could appropriately be submitted separately. Thus, a correct charge containing individual special issues was not going to cause a reversal. The reason was obvious: it was not harmful. And, contrary to *E.B.s* only in "extraordinary circumstances" mandate, there were even circumstances in which individual special issues were even desirable. The court waited another eight years before applying *Westgate*.

III. CASTEEL – THE PENDULUM STARTS BACK

In *Crown Life Ins. Co. v. Casteel*, 22 S.W.3rd 378, 390 (Tex. 2000), the supreme court confronted commingling valid and invalid theories of recovery in instruction to a single liability question. Over objection, the court submitted eight Art. 21.21 Insurance Code violations with five DTPA violations even though the plaintiff lacked consumer status in four of the DTPA claims.

The court considered whether harmful error could be shown based on inclusion of an invalid theory of recovery in an instruction containing valid theories that could support the jury's answer. It concluded the broad form submission was harmful error, not because of what the jury's finding was based on, but because an appellate court could not determine whether the jury's answer was based on an invalid instruction.

The court held that when a trial court submits a single broad form liability question incorporating multiple theories of liability:

[T]he 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. The holding was obviously not based on the long-standing harmless error rule, Tex. R. App. P. 44.1(a) and 61.1(a). *Id.* Instead it was based on the harmful error safety net provided by Rules 44.1(b) and 61.1(b), providing reversal when error "probably prevented the petitioner from properly presenting his case to the appellate courts." *Id.*

The court's reversal, based on its inability to determine if error produced an improper verdict, required it to disapprove a line of cases which had held that submission of an invalid or unproven theory in a single question submission of multiple theories was harmless error. *Id.* at 389. See e.g., *Provident Am. Ins. Co. v. Casteneda*, 914 S.W.2d 273, 277-78 (Tex.App.—El Paso 1996), *rev'd on other grounds*, 988 S.W.2d 189 (Tex. 1998); *Hart v. Berko, Inc.*, 881 S.W.2d 502, 510-11 (Tex.App.—El Paso 1994, writ denied); *Bernstein v. Portland Sav. & Loan Ass'n*, 850 S.W.2d 694, 702 (Tex.App.—Corpus Christi 1993, writ denied); *Ford Motor Co. v. Pool*, 688 S.W.2d 879, 882 (Tex.App.—Texarkana 1985), *aff'd in part and rev'd in part on other grounds*, 715 S.W.2d 629 (Tex. 1986).

To understand *Casteel's* reach, one must understand the basis for its holding that it was error to characterize the liability instructions as harmless based on the inability to say they resulted in an improper verdict. It identified the right to be protected:

It is fundamental to our system of justice that parties have the right to be judged by a jury properly instructed in the law.

Id. at 388. The court then addressed the problem:

Yet, when a jury bases a finding of liability on a single broad-form question that commingles invalid theories of liability with valid theories, the appellate court is often unable to determine the effect of the error. The best the court can do is determine that some evidence *could* have supported the jury's conclusion on a legally valid theory. To hold this error harmless would allow a defendant to be held liable, without a judicial determination that a fact finder actually found that the defendant *should* be held liable on proper, legal grounds.

Id. (emphasis in original).

The court's reasoning closely tracked the analysis in one of the law review articles cited by the opinion, Muldrow and Underwood, *Application of the Harmless Error Standard to Errors in the Charge*, Baylor L. Rev. 815, 816 and 838-40 (1996). Muldrow and Underwood's article reviewed the continuing role of the "presumed error" doctrine in insuring this state's "harmless error" rule does not deprive a litigant of a trial on properly instructed jury questions. Presumed error retains vitality on a case by case basis even though it has repeatedly been replaced by harmless error in statute and multiple versions of the Rules of Civil Procedure. See *Standard Fire Ins. Co. v. Reese*, 584 S.S.2d 835, 839 n. 2. (Tex. 1979).

After *Casteel* it remained to be seen if the principle of harmful error in not being able to determine if charge error was harmful would be applied to instructions other than to liability questions, or to instructions containing error other than an "invalid theory." It eventually became apparent that those arguing the case was restricted to its facts missed the point. Even construed narrowly, the fundamental right to be judged by a jury "*properly instructed in the law*" covers a multitude of sins.

IV. AFTER CASTEEL BUT PRIOR TO SMITH

Following *Casteel*, the supreme court declined opportunities to extend its holding to broad form submissions of theories of liability not supported by the evidence or to incorrectly worded instructions. In *City of Ft. Worth v. Zimlich*, 29 S.W.2d 62 (Tex. 2000), the court concluded that the extension of *Casteel* to theories not supported by the evidence was not before it. *Id.* at 69 n.1. It could not ascertain whether the jury's finding of employment discrimination by means that were supported by the evidence or means that were not. It declined to address the issue because the city had not argued it was entitled to a new trial if the evidence of one of the theories was legally insufficient.

Traditional harmless error language was employed in *Quantum Chem. Corp. v. Toennies*, 47 S.W.3d 473 (Tex. 2001) to hold that submission of an incorrect causation instruction was harmful error. In determining that it probably caused an improper judgment, the court noted that the facts on that issue were vigorously disputed. *Id.* at 480.

The dissent in *Rocor Int'l, Inc. v. National Union Fire Ins. Co.*, 77 S.W.3d 253, 273 (Tex. 2002) (Baker, J., dissenting) noted that the defendant failed to object to inclusions of an incorrect legal theory, but had objected to the sufficiency of the evidence to support the theory. It then applied traditional harmless error analysis to conclude the error, if any, probably caused rendition of an improper verdict.

In *Union Pac. R.R. Co. v. Williams*, 85 S.W.3 162, (Tex. 2002), the court used *Casteel*-like rationale, but to find conventional harmful error under Rule 61.1(a) it concluded that a refused instruction on what the railroad knew or should have known about the dangerous condition created by a derailment being repaired at the time of injury prevented the jury from properly determining whether a duty to use reasonable care had arisen. "We cannot assume the jury considered evidence about the railroad's knowledge [in finding liability] without instruction." *Id.* at 170. The court held the absence of the instruction probably caused rendition of an improper judgment.

V. SMITH – THE SWING-BACK IS REAL

The supreme court extended *Casteel* to damages in *Harris County v. Smith*, 96 S.W.3rd 230 (Tex. 2002). There was no evidence of one of the elements of damages submitted by instruction in two damage questions which requested lump-sum answers for all of the elements covered by the instructions. The court of appeals held that the objection to the inclusion of the unproven elements in the broad form damage instruction should have been granted. But following established precedent, the court of appeals held the error was harmless because evidence supporting the proven elements was sufficient to support the aggregate awards, without considering the unproven elements. *Id.* at 232. It interpreted *Casteel* as applying only to "key issues" such as submission of invalid theories of liability. *Id.* at 233.

The supreme court disagreed, holding that the "error was harmful because the erroneous submission, over timely objection, affirmatively prevented the appellant from isolating the error and presenting the case on appeal." *Id.* Quoting *Casteel*, the court reiterated that

[A] litigant today has a right to a fair trial before a jury properly instructed on the issues "authorized and supported by the law governing the case."

Id. at 234. Here, the error of including a unproven element of damage in the instructions "because it prevented the appellate court from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage." *Id.*, quoting *Casteel* at 388, and citing to Tex. R. Civ. P. 61.1(b).

Before addressing the two aspects of the harmful error in Rules 44.1 and 61.1 (probably causing an improper judgment, and probably preventing presentation of the case on appeal), the supreme court addressed the long-standing potential for injustice inherent in the harmless error rule:

[T]he harmless error standard “was not intended to deprive a party to a suit of a substantial right,” namely, “the right to have damages assessed against it by the jury under proper instructions submitting only the elements of damage as raised by the pleadings, and supported by evidence.”

Id. at 324, quoting *Eastern Tex. Elec. Co. v. Baker*, 254 S.W. 933, 934-35 (Tex. 1923) (which applied the presumed error rule because it could not say the jury did not consider an erroneous charge in awarding damages).

In clear and straight forward language, Chief Justice Phillips wrote:

A litigant should not be powerless to require a trial court to fulfill its duty of submitting only those questions and instructions having support in the pleadings and the evidence.

Id., at 236. This, the court said, preserves the role of appellate courts as safeguards against arbitrary conduct by trial courts. *Id.*

VI. FUTURE HARMFUL BROAD FORM CHARGE ERROR

The supreme court characterized the history of its harmless error jurisprudence as “vacillating” in *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d at 839 n.2. Nothing has changed. The move from the general charge to special issues coincided with the move from presumed error to harmless error at the start of the twentieth century.

The presumed harm rule can be traced to *Bailey v. Mills* 27 Tex. 434, 438 (1864). The doctrine of presumed error arose from the inability to know whether a jury’s decision under a general charge was based on faulty instructions or the evidence under proper instructions, and the desire not to invade the jury’s thought process to determine if the error caused harm. Calvert, *The Development of the Doctrine of Harmless Error in Texas*, 31 Tex. L. Rev. 1, 3 (1952). Because the doctrine was perceived as resulting in too many new trials based on non-prejudicial error, the supreme court created the harmless error doctrine in 1912 when it adopted Rule 62a governing procedure in the courts of civil appeals. *Id.* at 4. Rule 62a contained the now infamous phrase “reasonably calculated to cause, and probably did cause, rendition of an improper judgment.” *Id.*

Not coincidentally, the adoption of the Special Issues Act by the 1913 Texas Legislature made it easier to identify which questions resulted in the jury’s verdict incorporated into the judgment. In short, submissions of individual special issues or even factual

dispute made it easy to identify whether any submission error was prejudicial. By 1922, the supreme court mandated distinct and separate submissions in *Fox v. Dallas Hotel Co.*, 240 S.W. 517 (Tex. 1922).

In 1941, the supreme court promulgated Texas Rules of Civil Procedure 434 and 503. Using identical language to former Rule 62a, they appeared to place the burden on the appellant to demonstrate more than harm.

The pendulum began to swing back in 1973. The avalanche of granulated special issues after 60 years of special issue practice caused the supreme court to amend Rule 277 Tex. R. Civ. P. to encourage use of more general, broad form submissions. The requirement of separate and distinct issue was eliminated, but not prohibited. Trial courts were given the option to submit multiple elements in one question. The supreme court encouraged the use of broad form questions in *Mobile Chemical Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974) and *Scott v. Atchison, Topeka & Santa Fe Railway Co.*, 572 S.W.2d 273, 278 (Tex. 1978). Finally, in *Burk Royalty v. Walls*, 616 S.W.2d 911, 925 (Tex. 1981), it overruled charge cases decided before the 1973 amendment to Rule 277. *See also*, *Lemos v. Montez*, 680 S.W.2d 798, 801 (Tex. 1984).

A system that permitted both broad form and special practice existed for 15 years. It was not unlike the dual system that existed from 1913’s Special Interest Act until *Fox Hotel* mandated exclusive use of special issues in 1922.

In 1988 Rule 277 was amended again to require broad form submissions “whenever feasible.” Language permitting separate submissions was dropped, paving the way for the supreme court’s eventual decision in *Texas Dept. of Human Services v. E.B.*, 801 S.W.2d 647 (Tex. 1990), holding that in parental rights terminations, like all civil cases, the ultimate issue should be in the question, with all grounds in the instruction. *Id.* at 648.

Yet, there was no move to re-adopt a presumed harm rule as the ability to demonstrate charge error caused an improper judgment disappeared with special issues.

Instead, the Rules of Appellate Procedure transferred former Rules 434 and 503 to TRAP’s 81(b) and 184(b). *See* Muldrow & Underwood, *Application of the Harmless Error Standard to Errors in the Charge*, 48 Baylor L. Rev. 815, 824-30 (1996). In 1997, Texas Rules of Appellate Procedure 44.1 and 61.1 replaced the “calculated to cause and probably did cause” language of the prior rules with “probably caused the rendition of an improper judgment” in subdivision (a). Subdivision (b) added that error “probably prevents the [complainant] from properly presenting the case in the appellate courts” as an

alternative ground for reversal. Thus, the burden remained the same, but error would be harmful if the form of submission prevented showing conventional harmful error.

The resulting harmful error system attempts to keep the necessity for showing error probably caused an improper judgment while insuring the right to an effective appeal under broad form. Special issues are required only where instructions may contain error or are otherwise invalid.

VII. A PROPOSED SOLUTION

The doctrine of presumed harm offers a straight-forward solution to the band-aid approach of finding harm in the inability to determine whether harm occurred.

It is the underpinning of the simple standard employed by the Fifth Circuit in determining charge error:

First, the charge as a whole must leave substantial doubt that the jury was properly guided in its deliberations; and

Second, the entire record must demonstrate that the error could not have affected the outcome of the case, or it will be reversed and remanded.

Federal Deposit Ins. Corp. v. Mijalis, 15 F.3d 1314, 1318 (5th Cir. 1993). Simply put, in federal court, erroneous instructions that could have affected the outcome should be reversed. *Ratliff v. City of Gainesville*, 256 F.3d 355, 359 (5th Cir. 2000), *reh'g en banc denied*, 232 F.3d 212, *cert. denied*, 532 U.S. 937 (2001).

The simple expedient of requiring the appellee/respondent to establish that, under the record, the charge error could not have affected the outcome eliminates the concerns addressed by the court in *Casteel* and *Smith*. It places the burden on the party seeking to uphold the verdict to be certain the case is fairly and correctly submitted. The temptation to stretch a definition or submit an unrecognized or unproven theory is eliminated by the necessity of establishing it did not influence the outcome.

The step is not a big one. As Justice Calvert, and professors Muldrow and Underwood have thoroughly documented, presumed harm has continuously been used by the supreme court to prevent injustices in spite of the harmless error rule. *See* Calvert, 31 Tex. L. Rev. at 4-14; Muldrow and Underwood, 48 Baylor L. Rev. at 825-33. Indeed, Muldrow and Underwood note that original Rule 62a could have stated that:

[A] judgment would be reversed based on any error of law, unless the error was shown to be harmless.

Id. at 825 n.32. The opinions in both *Casteel* and *Smith* rely upon presumed harm principles, and *Smith* relies on a presumed error case, *Eastern Tex. Elec. Co. v. Baker*, 254 S.W. at 934-35, to justify finding harm in the inability to determine if harm has occurred.

Rather than encourage litigants to request separate special issue submission of every suspect claim, defense, or damage instruction, perhaps placing the burden on the eventual winner to make sure the charge is correct will encourage all parties to take that obligation more seriously. It certainly simplifies appellate review of broad form charge error while insuring parties' rights to have their disputes decided "by a jury properly instructed on the law."