

HB4'S AFFECT ON JURY CHARGES

E. LEE PARSLEY
E. LEE PARSLEY, P.C.
100 Congress Avenue, Suite 210
Austin, Texas 78701
512-481-8800
512-481-8806 fax
lee@eleeparsley.com

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CHAPTER 16

Biography for E. Lee Parsley

Lee Parsley is a Board Certified civil appellate lawyer practicing in Austin, Texas. He focuses his practice on class action defense and legislative support, particularly in the area of civil justice reform. Mr. Parsley is an Adjunct Professor at the University of Texas School of Law, where he teaches a seminar on Texas appellate practice. He is a co-author with William V. Dorsaneo, III, and Julie C. Parsley of Chapters 147-154 (on appellate practice and procedure) and Chapters 90 to 92 (on pretrial discovery) of the *Texas Litigation Guide*. Mr. Parsley is also a co-author, as part of Appellate Practice Group of Locke Liddell & Sapp, LLP, of *Recurring Issues in Consumer and Business Class Action Litigation in Texas*, 33 TEX. TECH L. REV. 971 (2002). He was the first Rules Staff Attorney for the Supreme Court of Texas, serving in that position from 1993 to 1997. Lee Parsley hails from Shallowater, Texas, obtained (despite his best efforts) an undergraduate degree and an MBA from Texas Tech University, and graduated *magna cum laude* from Texas Tech University School of Law.

HB4's Affect on Jury Charges

A. Class Action Attorney Fees

HB4 requires that in a class action the trial court must use the lodestar method to calculate the amount of attorney's fees to be awarded class counsel. Act of June 2, 2003, 78th Leg., R.S., Ch. 204, § 1.01, 2003 TEX. GEN LAWS 847 (hereafter "H.B.4") (codified as TEX. CIV. PRAC. & REM. CODE § 26.003). The statute requires the Supreme Court to promulgate rules for awarding attorney's fees in a class action and provides that the rules may give the trial court discretion to increase or decrease the lodestar amount by no more than four times based on specified factors. *Id.*

Under the lodestar method, the court determines the number of hours reasonably spent by counsel on the matter, then multiplies those hours by an hourly rate the court deems reasonable for similarly complex, non-contingent work. *County of Dallas v. Wiland*, 124 S.W.3d 390, 403 (Tex. App.—Dallas 2003, pet. filed); *Haggar Apparel Co. v. Leal*, 100 S.W.3d 303, 315 (Tex. App.—Corpus Christi 2002, pet. filed); *Dillard Dep't Stores, Inc. v. Gonzales*, 72 S.W.3d 398, 412 (Tex. App.—El Paso 2002, pet. denied). The resulting amount is called the lodestar figure. *Wiland*, 124 S.W.3d at 403; *Guity v. C.C.I. Enter.*, 54 S.W.3d 526, 528 (Tex. App.—Houston [1st Dist.] 2001, no pet.). The trial court may then adjust the lodestar figure upward or downward to account for the factors first listed in *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 717-19 (5th Cir. 1974). *Wiland*, 124 S.W.3d at 403. The *Johnson* factors include: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the level of skill required; (4) the effect on other employment by the attorney; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) the time limitations imposed by the client or the ability of the attorney; (8) the amount involved and the result obtained; (9) the experience, reputation, and ability of the attorney; (10) the undesirability of the case; (11) the nature and length of the attorney's relationship with the client; and (12) awards in similar cases. *Wiland*, 124 S.W.3d at 403; *Guity*, 54 S.W.3d at 529.

After HB4 was enacted, the Texas Supreme Court amended Texas Rule of Civil Procedure 42 to incorporate HB4's attorney's fee requirement. Rule 42 now provides that, in awarding attorney's fees in a class action, the court must determine a lodestar figure by multiplying the number of hours reasonably worked times a reasonable hourly rate. *See* TEX. R. CIV. P. 42(i)(1). The fee award must be in the range of 25% to 400% of the lodestar figure. *Id.* In making "these determinations" the court must consider the factors specified in Texas Disciplinary Rule of Professional Conduct 1.04(b). *See* TEX. R. CIV. P. 42(i)(1). Rule 1.04(b) provides factors that a factfinder should consider when determining the reasonableness of a fee:

- (1) the time and labor required, the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;
- (3) the fee customarily charged in the locality for similar legal services;
- (4) the amount involved and the results obtained;
- (5) the time limitations imposed by the client or by the circumstances;
- (6) the nature and length of the professional relationship with the client;
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services; and
- (8) whether the fee is fixed or contingent on results obtained or uncertainty of collection before the legal services have been rendered.

TEX. DISCIPLINARY R. PROF. CONDUCT (*reprinted in* Tex. Gov't Code, tit. 2, subtit. G app.; *see also* *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 818 (Tex. 1997).

The statute provides that the *trial court* (not the fact finder) is to use the lodestar method to calculate the amount of attorney's fees. Article V, § 10 of the Texas Constitution provides that "[i]n the trial of all causes in the District Courts, the plaintiff or defendant shall, upon application made in open court, have the right of trial by jury" TEX. CONST. Art. V, § 10. The question thus arises whether the Legislature intended to abrogate the right to a jury trial on the amount of attorney's fees in class actions. If so, does the Legislature have the power to abrogate the right to a jury trial? Some dicta suggests that the Legislature has that power. See *City of Garland v. Dallas Morning News*, 969 S.W.2d 548, 559-60 (Tex. App.—Dallas 1998) ("a review of other statutes shows that the legislature may have expressly indicated when the trial court, and not a jury, is to determine the amount of attorney's fees", citing TEX. FAM. CODE 231.211(a), TEX. REV. CIV. STAT. 6132b, § 7.01, and other statutes), *affirmed*, 22 S.W.3d 351 (Tex. 2000); *but see Bocquet v. Herring*, 972 S.W.2d 19, 21 (Tex. 1998) (under Declaratory Judgment Act, which provides that "the court may award costs and reasonable and necessary attorney's fees as are equitable and just," the trial court determines whether to award attorney's fees and the jury determines the amount of reasonable attorney's fees).

Assuming the Legislature did not intend, or does not have the ability, to give the trial court the power to determine the amount of attorney's fees in a class action, then it is not altogether clear how Disciplinary Rule 1.04 and Civil Procedure Rule 42 should work together. Disciplinary Rule 1.04 is addressed to the reasonableness of the attorney's fee as a whole while Rule 42 is addressed to the reasonableness of the hours worked and the hourly rate charged. Some parts of Disciplinary Rule 1.04 are inapplicable to determining the reasonableness of the hours worked and the rate charged. For example, paragraph (8)'s reference to a "fixed or contingent" contract cannot be squared with Rule 42's requirement that the fee be based on the hours actually worked. But an adjustment of the lodestar amount may be made based on whether there was a contingent fee arrangement. See *Borg-Warner Protective Serv. Corp. v. Flores*, 955 S.W.2d 861, 870 (Tex. App.—Corpus Christi 1997, no pet.).

Thus, in a class action in which the recovery of attorney's fees is possible under applicable substantive law, the jury should be asked a question like this:

What is a reasonable fee for the necessary services of counsel for the plaintiff class in this case, stated ?

In answering this question, you should multiply the number of hours you find to have been reasonably worked by counsel for the plaintiff class by the hourly rate you find to be reasonable for the work performed by counsel for the plaintiff class.

In determining the reasonableness of the hours worked or the hourly rate, you may consider:

- (1) the novelty and difficulty of the questions involved, and the skill required to perform the legal service properly;***
- (2) the likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer;***
- (3) the fee customarily charged in the locality for similar legal services;***
- (4) the amount involved and the results obtained;***
- (5) the time limitations imposed by the client or by the circumstances;***
- (6) the nature and length of the professional relationship with the client;***
and
- (7) the experience, reputation, and ability of the lawyer or lawyers performing the services.***

Answer : \$_____

See PJC 110.43. Alternatively, it may be appropriate to omit the list of factors, saving those for the trial judge to use in deciding whether to increase or decrease the lodestar amount. In that case, the question given the jury would be—

What is a reasonable fee for the necessary services of counsel for the plaintiff class in this case, stated ?

In answering this question, you should multiply the number of hours you find to have been reasonably worked by counsel for the plaintiff class by the hourly rate you find to be reasonable for the work performed by counsel for the plaintiff class.

Answer : \$_____

If the plaintiff has not presented evidence of (1) the number of hours actually worked, (2) the reasonableness of the hours worked, and (3) the reasonableness of the hourly rate requested, it may be appropriate to object to the submission of an attorney's fee question on the ground that it is not supported by the evidence. TEX. R. CIV. P. 278 (court shall submit questions raised by the pleadings and the evidence); *see also Elbaor v. Smith*, 845 S.W.2d 240, 243 (Tex. 1992) ("A trial court may refuse to submit an issue only if no evidence exists to warrant its submission."). The reasonableness of the hours worked and the hourly rate requires expert testimony. *See In re T.L.K.*, 90 S.W.3d 833, 842 (Tex. App.—San Antonio 2002, no pet); *Woollett v. Matyastik*, 23 S.W.3d 48, 52 (Tex. App.—Austin 2000, pet. denied).

B. Fee Shifting Under Offer-of-Settlement Statute

The Legislature enacted an offer-of-settlement statute as part of HB4. H.B.4, § 2.01 (codified as TEX. CIV. PRAC. & REM. CODE § 42.001-.005). Generally speaking, the offer-of-settlement statute allows a party to recover "litigation costs" from an opposing party who does not accept a settlement offer that turns out to be significantly better for that party than the ultimate judgment rendered in the case. *See* TEX. CIV. PRAC. & REM. CODE § 42.004(a). The statute defines "litigation costs" as money actually spend and obligations actually incurred that are directly related to the case, including court costs, reasonable fees for not more than two testifying expert witnesses, and reasonable attorney's fees. *Id.* § 42.001(5).

The Texas Supreme Court promulgated rules to implement Chapter 42 and, in doing so, clarified that "litigation costs" are expenditures actually made and the obligations actually incurred "directly in relation to the claims covered by a settlement offer under this rule" TEX. R. CIV. P. 167.4(c). Both the rule and the statute limit the applicability of the offer-of-settlement procedure to claims for monetary damages. TEX. CIV. PRAC. & REM. CODE § 42.001(1); TEX. R. CIV. P. 167.1(a). Thus, under Rule 167, the litigation costs that may be awarded are those related to the claims for monetary damages presented in the case, and not those litigation costs related to other claims in the case. Obviously, this means that an attorney representing a party seeking an award of litigation costs must segregation his or her time between that spent on claims for monetary relief and that spent on other claims, unless the claims are dependent on the same set of facts or circumstances and, therefore, are intertwined to the point of being inseparable. *See Stewart Title Guar. Co. v. Aiello*, 941 S.W.2d 68, 73 (Tex. 1997) (providing exception for intertwined claims); *Stewart Title Guar. Co. v. Sterling*, 822 S.W.2d 1, 11 (Tex. 1991) (requiring segregation of attorney's fees by claim).

Additionally, the statute provides that the litigation costs that may be recovered by the offering party are "limited to those litigation costs incurred by the offering party after the date the rejecting party rejected the settlement offer." *Id.* § 42.004(c); *see also* TEX. R. CIV. P. 167.4(a). And the statute provides: "If a claimant or defendant is entitled to recover fees and costs under another law, the court

must not include fees and costs incurred by that claimant or defendant after the date of rejection of the settlement offer when calculating the amount of the judgment to be rendered" TEX. CIV. PRAC. & REM. CODE § 42.004(f); *see also* TEX. R. CIV. P. 167.4(f). Billable hours, therefore, must be segregated based on the date a settlement offer is rejected; and segregation of the opposing party's attorney's fees may be required.

The statute is designed to prevent a party receiving a settlement offer from running up attorney's fees to avoid statutory fee shifting. For example, assume the plaintiff in a DTPA case alleges damages of \$50,000. The defendant makes a \$75,000 settlement offer under Chapter 42, stating that the offer covers the plaintiff's damages and attorney's fees. The plaintiff rejects that offer and continues to litigate. The defendant needs to obtain findings on the amount of attorney's fees incurred by the plaintiff *before* the settlement offer was rejected because § 42.004(f) provides that the court cannot include fees and costs incurred by the plaintiff after the date of rejection of the settlement offer when calculating the amount of the judgment to be rendered. The plaintiff, of course, needs to obtain a finding on the total amount of attorney's fees incurred by the plaintiff in the case. Assume the verdict finds: (1) \$30,000 in damages, (2) the plaintiff's reasonable and necessary attorney's fees incurred *before* rejecting the settlement offer were \$10,000, and (3) the plaintiff's reasonable and necessary attorney's fees incurred *after* rejecting the settlement offer were \$30,000. The fee shifting statute would apply because the offer the plaintiff rejected was significantly better than the damages and attorney's fees at the time of rejection (\$40,000 is less than 80% of \$75,000 offered). Thus, the plaintiff must pay the defendant's fees incurred after the date the settlement offer was rejected and cannot recover the additional \$30,000 incurred after the date the settlement offer was rejected. In other words, in this example, the defendant needs to segregate the plaintiff's attorney's fees between those incurred before and after rejection of the settlement offer.

Furthermore, the offer-of-settlement statute is party specific, not case specific. In other words, a settlement offer, and the possibility of fee shifting, may be made to or received from only one opposing party in a multi-party case. Billable time, therefore, must be segregated by party because each party may or may not be subject to fee shifting under the statute depending on whether the party received a settlement offer and, if so, whether the judgment is significantly less favorable to that party than was the settlement offer.

The requirement to segregate billable time by claim, date, and party could create the need for multiple attorney's fees jury questions in multi-party litigation. Some examples may clarify the problem:

Example 1:

Assume a two-party negligence case (*i.e.*, only monetary damages) in which the defendant makes a complying settlement offer that was rejected by the plaintiff on October 31, 2003. The attorney's fee jury question would be:

What is a reasonable fee for the necessary services for Defendant's attorney incurred in this case after October 31, 2003, stated in dollars and cents?

Answer: \$ _____

Example 2:

Assume a three-party negligence case (*i.e.*, only monetary damages) in which the defendant makes a complying settlement offers to both plaintiffs that were rejected by both plaintiffs on October 31, 2003. The attorney's fee jury question would be:

What is a reasonable fee for the necessary services for Defendant's attorney incurred in this case after October 31, 2003, with regard to the claims asserted by each party listed below, stated in dollars and cents?

Answer for Defendant's attorney's fees incurred with regard to the claims asserted by Plaintiff No. 1: \$_____

Answer for Defendant's attorney's fees incurred with regard to the claims asserted by Plaintiff No. 2: \$_____

Example 3:

Assume a three-party negligence case (*i.e.*, only monetary damages) in which the defendant makes complying settlement offers to both plaintiffs, and those offers were rejected by the plaintiffs on different dates – on October 31, 2003 by the first plaintiff and on November 30, 2003 by the second. The attorney's fee jury questions would be:

QUESTION NO. 1

What is a reasonable fee for the necessary services for Defendant's attorney incurred in this case after October 31, 2003, with regard to the claims asserted by Plaintiff No. 1, stated in dollars and cents?

Answer: \$_____

QUESTION NO. 2

What is a reasonable fee for the necessary services for Defendant's attorney incurred in this case after November 30, 2003, with regard to the claims asserted by Plaintiff No. 2, stated in dollars and cents?

Answer: \$_____

Example 4:

Assume a four-party negligence case (*i.e.*, only monetary damages) in which the both defendants make complying settlement offers to both plaintiffs, and those offers were rejected by the plaintiffs on four different dates. The attorney's fee jury questions would be:

QUESTION NO. 1

What is a reasonable fee for the necessary services for Defendant No. 1's attorney incurred in this case after October 31, 2003, with regard to the claims asserted by Plaintiff No. 1, stated in dollars and cents?

Answer: \$ _____

QUESTION NO. 2

What is a reasonable fee for the necessary services for Defendant No. 1's attorney incurred in this case after November 30, 2003, with regard to the claims asserted by Plaintiff No. 2, stated in dollars and cents?

Answer: \$ _____

QUESTION NO. 3

What is a reasonable fee for the necessary services for Defendant No. 2's attorney incurred in this case after November 15, 2003, with regard to the claims asserted by Plaintiff No. 1, stated in dollars and cents?

Answer: \$ _____

QUESTION NO. 4

What is a reasonable fee for the necessary services for Defendant No. 2's attorney incurred in this case after December 15, 2003, with regard to the claims asserted by Plaintiff No. 2, stated in dollars and cents?

Answer: \$ _____

Example 5:

Assume a two-party DTPA case described above in which the \$75,000 settlement offer was rejected by the plaintiff on October 31, 2003. The attorney's fee jury questions would be:

QUESTION NO. 1

What is a reasonable fee for the necessary services for Plaintiff's attorney incurred in this case for the periods given below, stated in dollars and cents?

For the period ending on October 30, 2003: \$ _____

For the period beginning on October 31, 2003: \$ _____

QUESTION NO. 2

What is a reasonable fee for the necessary services for Defendant's attorney incurred in this case after October 31, 2003, stated in dollars and cents?

Answer: \$ _____

C. Responsible Third-Parties

HB4 amended Civil Practice and Remedies Code Chapter 33 to provide for the designation (instead of joinder) of responsible third-parties. *See* H.B.4, § 4.02 (codified as TEX. CIV. PRAC. & REM. CODE § 33.003(a)). The amendment does not cause any significant change in submission of a case to the jury because both the old law and the new law require the submission to the jury of the name of any responsible third-party properly joined (old law) or designated (new law). Both the old and new law also provide that the statute does not require the submission to the jury of a question regarding conduct by a person unless there is evidence to support that submission. TEX. CIV. PRAC. & REM. CODE § 33.003(b). Thus, an objection to the charge is appropriate if no evidence is adduced a trial showing that a person designated as a responsible third-party "caused or contributed to causing in any way the harm for which recovery of damages is sought." *Id.* § 33.011(6) (defining responsible third-party).

D. Damages***1. Definitions Changes***

The definitions of the various kinds of damages have changed and, therefore, the following definitions should be used in jury charges in cases to which the amended statute is applicable:

"Compensatory damages" means economic and noneconomic damages. The term does not include exemplary damages.

"Economic damages" means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.

“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.

“Future damages” means damages that are incurred after the date of the judgment. Future damages do not include exemplary damages.

“Future loss of earnings” means a pecuniary loss incurred after the date of the judgment, including: (A) loss of income, wages, or earning capacity; and (B) loss of inheritance.

“Noneconomic damages” means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.

Additionally, the concept of gross negligence, which was previously subsumed under “malice,” is now separated from the definition of “malice.” Previously, “malice was defined as: “(A) a specific intent by the defendant to cause substantial injury or harm to the claimant or (B) an act or omission: (i) 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 (ii) 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. *See* TEX. CIV. PRAC. & REM. CODE § 41.001(7) (before 2003 amendment).

After the 2003 amendment, “malice” is defined simply as “a specific intent by the defendant to cause substantial injury or harm to the claimant” and “gross negligence” is defined as “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.” TEX. CIV. PRAC. & REM. CODE § 41.001(7), (11).

A corresponding change is made to § 41.003, which now provides that exemplary damages may be awarded “if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from: (1) fraud; (2) malice; or (3) gross negligence.” *Id.* § 41.003(a). Thus, the final result is that exemplary damages are available—as before—if the claimant proves malice or gross negligence.

The exemplary damages questions, therefore, must be adjusted to account for these changes in law.

QUESTION NO. ____

Do you find by clear and convincing evidence that the negligence of Don Davis 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: _____

QUESTION NO. ____

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

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

Answer “Yes” or “No: _____

QUESTION NO. ____

What sum of money, if any, should be assessed against Don Davis 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: \$ _____

See PJC 4.2, 8.6.

2. *Unanimity for Exemplary Damages*

Article V, § 13 of the Texas Constitution provides:

In trials of civil cases in the District Courts, nine members of the jury, concurring, may render a verdict, but when the verdict shall be rendered by less than the whole number, it shall be signed by every member of the jury concurring in it. When, pending the trial of any case, one or more jurors not exceeding three, may die, or be disabled from sitting, the remainder of the jury shall have the power to render the verdict; provided, that the Legislature may change or modify the rule authorizing less than the whole number of the jury to render a verdict.

Civil Procedure Rule 292 provides that 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” TEX. R. CIV. P. 292. The current court-approved admonitory instruction provides:

You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict.

TEX. R. CIV. P. 226a, Approved Instruction III, ¶ 6. Thus, 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. Stated differently, ten votes were required for either a “yes” or “no” answer. If ten votes could not be obtained, the jury was hung.

The Legislature amended § 41.003 to provide that exemplary damages “may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.” TEX. CIV. PRAC. & REM. CODE § 41.003(d). It further amended § 41.003 to provide that “[i]n all cases where the issue of exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court: ‘You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.’” *Id.* § 41.003(e).

In enacting § 41.003(d), did the Legislature change the number of votes required to refuse to award exemplary damages, or did it just change the number of votes required to award exemplary damages? In other words, can ten jurors agree to a “no” response to the exemplary damages liability question or must all jurors agree to a “no” response to that question?

The Supreme Court Advisory Committee (“SCAC”) has debated this issue and reached the conclusion that § 41.003(d) changed the number of votes required to answer “yes” to an exemplary damages liability question, but not the number of votes required to answer “no” to an exemplary damages liability question. Thus, the jury can answer “no” to a gross negligence or malice question upon the vote of ten, but must be unanimous in answering “yes” to such a question. If the jury fails to obtain ten votes for “no” or fails to obtain all votes for “yes”, it is hung.

Clearly, § 41.003(d) requires that the jury be unanimous on the *amount* of exemplary damages, whether that amount is \$0 or \$1,000,000. If the jury cannot reach a unanimous verdict as to the amount of exemplary damages to be awarded, the jury is hung.

In light of § 41.003, the currently used questions, definitions, and instructions are no longer appropriate. See ¶ D.5. *infra*.

3. *Unanimity for Liability*

In enacting § 41.003(d), did the Legislature implicitly decide that the jury must be unanimous in its answer to the underlying liability questions or can the jury find liability based on the vote of ten jurors and still award exemplary damages? 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?

This issue has been debated at length by the SCAC. The proponents of the position that the jury charge should not require unanimity on all underlying liability questions have expressed their position as follows:

Several members of the sub-committee felt that the statutory change brought by House Bill 4 does not require a unanimous finding on *all* underlying liability questions. Rather, there is an argument (a persuasive one we believe) that HB 4 only requires a unanimous finding on the liability question that gives rise to the award of exemplary damages (referred to by some as the “Trigger question”). As a threshold matter, the issue of whether HB 4 requires all liability questions to be unanimous or only those that are the “Trigger questions” is a matter of statutory construction which should be decided by Texas courts and not this committee.

Nevertheless, if one accepts that HB 4 does not require unanimity for all liability questions, requiring unanimity in all such questions would impose obligations on a plaintiff ... that [are] greater than what is mandated by statute. One justification for imposing these additional requirements is apparently to avoid a conflict in the jury’s findings. Proponents of the non-unanimous verdict form set forth below believe that requiring unanimity in order to avoid a conflict in the charge goes too far and is not necessary.

First, there are many instances where a jury could vote 10-2 on one liability question and 12-0 on another liability question and the Trigger 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. There are many other examples where, in all likelihood, a trial or appellate court would not find such jury findings to be in conflict with one another.

The most frequently cited example of a potential conflict in the charge involves negligence and gross negligence. A juror might be able to find, however, that the defendant was negligent, but that such negligence was not the proximate cause of the injury and thus answer the negligence questions “No.” In that scenario, the juror could still find that the conduct was grossly negligent. In other words, 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, 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.

Further, if unanimity is not required for all liability questions, it would not be necessary to have a separate Trigger question for each defendant in multi-defendant cases. Rather, there could be one Trigger question with a space provided for each

defendant and an instruction that the jury must be unanimous in order to answer “Yes” as to any defendant.

In short, the proponents of the charge and Rule 226a changes listed below believe that the ... potential for conflict in the jury charge is minimal and what little potential there is can be handled by the trial courts and reviewed by the appellate courts. The proponents believe that handling potential conflicts in this manner is better than the additional burdens created by requiring unanimity in all liability questions as a predicate to answering the Trigger question.

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

A majority of the SCAC supported the position that this issue should not be answered by rule, but should be answered by court interpretation of § 41.003. Thus, unless the Supreme Court decides otherwise when it reviews the SCAC’s work, objections to the questions and instructions given the jury will be required to preserve this issue for appeal.

4. Changes to Admonitory Instruction

The current admonitory instruction provides:

You may render your verdict upon the vote of ten or more members of the jury. The same ten or more of you must agree upon all of the answers made and to the entire verdict.

TEX. R. CIV. P. 226a, Approved Instruction III, ¶ 6. Obviously, this instruction is no longer accurate given that the jury cannot find liability for exemplary damages and cannot agree on the amount of exemplary damages on the vote of ten or more jurors. The following revised instruction has been proposed by the Supreme Court Advisory Committee.

Unless otherwise instructed, you may answer a question upon the vote of ten or more jurors. If you answer more than one question upon the vote of ten or more jurors, the same group of at least ten of you must agree upon the answers to each of those questions.

The phrase “unless otherwise instructed” is intended to account for the requirement of unanimity for awarding exemplary damages. The jury, therefore, must be “otherwise instructed” as part of the exemplary damages question itself.

5. Exemplary Damages Questions and Instructions

The SCAC 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.

Part 2

If you have answered "Yes" to Question No. 2 as to any person named below, 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* _____

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

_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____
_____	_____

To preserve error as to whether the jury's answers to the predicate liability question must be unanimous, you must object to the predicate instruction to the exemplary damages liability question and request that an instruction be submitted informing the jury that it should answer the exemplary damages

liability question only if it was unanimous in answering the underlying liability question. Using the above example, the predicate instruction to Question No. 4 might be like this:

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.

The instruction should be modified to reference every underlying liability question from which exemplary damages might arise.

E. Products Liability

HB4 made a number of significant substantive changes in regard to products liability law. See H.B.4, § 5.01-.02. It expanded an existing 15-year statute of repose to cover all products, while providing an exception for injury and death cases arising from a disease that did not manifest before the end of the 15-year period. H.B.4 § 5.01 (codified as TEX. CIV. PRAC. & REM. CODE § 16.012). It created an “innocent seller’s” defense, a “government standards” defense, and a defense for medicines that were approved by the FDA. H.B.4 § 5.02 (codified as TEX. CIV. PRAC. & REM. CODE §§ 82.003, .007, .008).

These changes in substantive law doubtless create a need for new jury questions in products liability cases, and a series of new questions are suggested below. As a caveat, the author of this paper typically does not practice in the area of products liability and the questions suggested below may be wholly unworkable or incorrect. They represent the author’s best effort to create jury questions that track the statute.

1. Innocent Seller’s Defense

HB4 provides that a seller that did not manufacture a product is not liable for harm caused by that product unless the plaintiff proves that the seller took certain specific acts in regard to the product. H.B.4 § 5.02 (codified as TEX. CIV. PRAC. & REM. CODE § 82.003). One or more of the following questions, therefore, may be appropriate in a particular case to establish a seller-defendant’s liability for harm caused by a product—

QUESTION NO. 1

Did Seller-Defendant participate in designing the product in question?

Answer “Yes” or “No”: _____

QUESTION NO. 2

Did Seller-Defendant alter or modify the product in question and, if so, was that alteration or modification of the product a producing cause of the [occurrence or injury] in question?

Answer “Yes” or “No”: _____

QUESTION NO. 3

Did Seller-Defendant install or have the product in question installed on another product and, if so, was the installation of the product a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

QUESTION NO. 4a

Did Seller-Defendant exercise substantial control over the content of the warning or instruction that accompanied the product in question and was the warning instruction inadequate?

Answer "Yes" or "No": _____

If you have answered "Yes" in response to Question No. 4a, then answer Question No. 4b. Otherwise, do not answer Question No. 4b.

QUESTION NO. 4b

Was the inadequate instruction a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

QUESTION NO. 5a

Did Seller-Defendant make an express factual representation about an aspect of the product that was incorrect and that was relied on by Plaintiff in [obtaining or using] the product in question?

Answer "Yes" or "No": _____

If you have answered "Yes" in response to Question No. 5a, then answer Question No. 5b. Otherwise, do not answer Question No. 5b.

QUESTION NO. 5b

Was the failure of that aspect of the product to be as it was represented a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

QUESTION NO. 6

Did Seller-Defendant actually know of a defect to the product at the time Seller-Defendant supplied the product to Plaintiff and was the defect a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

Answer "Yes" or "No": _____

2. Pharmaceutical Products Defense

HB4 provides that in a products liability action in which it is alleged that an injury was caused by the failure to provide adequate warnings or information regarding a pharmaceutical product, there is a rebuttable presumption that the defendant are not liable with regard to the alleged failure to warn if: (1) the warnings or information that accompanied the product were approved by the FDA; or (2) the warnings provided were those stated in monographs developed by the FDA. H.B.4 § 5.02 (codified as TEX. CIV. PRAC. & REM. CODE § 82.007). Presumably, a question of fact as to whether the warning was provided or whether the warning was one that had been approved by the FDA or were stated in monographs developed by the FSA will seldom arise. There, however, may be questions of fact in regard to rebutting the presumption. The following are possible questions—

QUESTION NO. 1a

Did Defendant, before or after pre-market approval or licensing of the product, withhold from or misrepresent to the FDA required information that was material and relevant to the product's performance?

Answer "Yes" or "No": _____

If you have answered "Yes" in response to Question No. 1a, then answer Question No. 1b. Otherwise, do not answer Question No. 1b.

QUESTION NO. 1b

Was the FDA's inability to consider the information that was withheld or misrepresented a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

QUESTION NO. 2

Did Defendant [sell or prescribe] the product after the effective date of an FDA order to [remove the product from the market or withdrawing approval of the product]?

Answer "Yes" or "No": _____

QUESTION NO. 3a

Did Defendant [recommend, promote, or advertise] the product for an indication not approved by the FDA and, if so, did Plaintiff use the product as recommended, promoted, or advertised by Defendant?

Answer "Yes" or "No": _____

If you have answered "Yes" in response to Question No. 3a, then answer Question No. 3b. Otherwise, do not answer Question No. 3b.

QUESTION NO. 3b

Was Plaintiff's use of the product as [recommended, promoted, or advertised] by Defendant a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

QUESTION NO. 4a

Did Defendant prescribe the product for an indication not approved by the FDA and, if so, did Plaintiff use the product as prescribed by Defendant?

Answer "Yes" or "No": _____

If you have answered "Yes" in response to Question No. 4a, then answer Question No. 4b. Otherwise, do not answer Question No. 4b.

QUESTION NO. 4b

Was Plaintiff's use of the product as prescribed a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

QUESTION NO. 5a

Did Defendant, before or after pre-market approval or licensing of the product, engaged in conduct that would constitute a violation of 18 U.S.C. Section 201 and, if so, did that conduct cause the warnings or instructions approved for the product by the FDA to be inadequate?

Answer "Yes" or "No": _____

If you have answered "Yes" in response to Question No. 5a, then answer Question No. 5b. Otherwise, do not answer Question No. 5b.

QUESTION NO. 5b

Was the inadequacy of the instructions a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

3. Government Standards Defense

HB4 also provides a rebuttable presumption of no liability in a product liability action alleging an injury caused by the formulation, labeling, or design of a product, if defendant establishes: (1) that the product's formula, labeling, or design complied with mandatory safety standards or regulations adopted and promulgated by the federal government, or an agency of the federal government, that were applicable to the product at the time of manufacture; or (2) that the product was subject to pre-market licensing or approval by the federal government, or an agency of the federal government, that the manufacturer complied with all of the government's or agency's procedures and requirements with respect to pre-market licensing or approval, and that after full consideration of the product's risks and benefits the product was approved or licensed for sale by the government or agency. H.B.4 § 5.02 (codified as TEX. CIV. PRAC. & REM. CODE § 82.008). The following are possible questions related to this statute (although Question Nos 1 and 3 may be questions of law rather than questions of fact)—

QUESTION NO. 1

Were the safety [standards or regulations] applicable to the product in question inadequate to protect the public from unreasonable risks of injury by or damage from that product?

Answer "Yes" or "No": _____

QUESTION NO. 2

Did the Manufacturer-Defendant, before or after marketing the product, [withhold or misrepresent] [information or material] relevant to the [government's or agency's] determination of the adequacy of the safety [standards or regulations] at issue?

Answer "Yes" or "No": _____

QUESTION NO. 3

Were the [standards or procedures] used in the pre-market approval or licensing process for the product in question inadequate to protect the public from unreasonable risks of injury or damage from that product?

Answer "Yes" or "No": _____

QUESTION NO. 4a

Did the Manufacturer-Defendant, before or after pre-market approval or licensing of the product, [withhold from or misrepresent to] the [government or agency] information that was material and relevant to the performance of the product?

Answer "Yes" or "No": _____

If you have answered "Yes" in response to Question No. 4a, then answer Question No. 4b. Otherwise, do not answer Question No. 4b.

QUESTION NO. 4b

Was the [government's or agency's] inability to consider the information that was withheld or misrepresented a producing cause of the [occurrence or injury] in question?

Answer "Yes" or "No": _____

F. Health Care Liability Cases**1. Informed Consent**

Article 10 of HB4 recodified and revised the law governing health care liability cases, including the law governing a cause of action for failure to obtain a patient's informed consent to medical treatment. See H.B.4 § 10.01 (codified as TEX. CIV. PRAC. & REM. CODE § 74.101-.107).

Section 74.102 creates the Texas Medical Disclosure Panel, which is to "determine which risks and hazards related to medical care and surgical procedures must be disclosed by health care providers or physicians to their patients ... and to establish the general form and substance of such disclosure." TEX. CIV. PRAC. & REM. CODE § 74.102(a). Lists of treatments and procedures requiring disclosure and written explanations of the degree and form of disclosure must be published by the panel. *Id.* § 71.103(a), (b).

Before a patient gives consent to any medical care or surgical procedure that appears on the disclosure panel's list, the physician or health care provider must disclose to the patient the risks and hazards involved in the care or procedure. *Id.* § 74.104. Section 74.106 provides:

(1) both disclosure made as provided in Section 74.104 and failure to disclose based on inclusion of any medical care or surgical procedure on the panel's list for which disclosure is not required shall be admissible in evidence and shall create a rebuttable presumption that the requirements of Sections 74.104 and 74.105 have been complied with ***and this presumption shall be included in the charge to the jury***; and

(2) failure to disclose the risks and hazards involved in any medical care or surgical procedure required to be disclosed under Sections 74.104 and 74.105 shall be admissible in evidence and shall create a rebuttable presumption of a negligent failure to conform to the duty of disclosure set forth in Sections 74.104 and 74.105, ***and this presumption shall be included in the charge to the jury***; but failure to disclose may be found not to be negligent if there was an emergency or if for some other reason it was not medically feasible to make a disclosure of the kind that would otherwise have been negligence.

Id. § 74.106(a)(1), (2). PJC 51.11-51.15 provide questions, definitions, and instructions for informed consent and may be modified, if necessary, to include these two presumptions.

Civil Practice and Remedies Code § 74.101 provides that “in a suit against a physician or health care provider involving a health care liability claim that is based on the failure of the physician or health care provider to disclose or adequately disclose the risks and hazards involved in the medical care or medical procedure rendered by the physician or health care provider, the only theory on which recovery may be obtained is that of negligence in failing to disclose the risks or hazards that could have influenced a reasonable person in making a decision to give or withhold consent.” TEX. CIV. PRAC. & REM. CODE § 74.101. Thus, there is no cause of action for battery related to obtain the patient’s informed consent and PJC 51.16 is probably no longer valid.

2. *Emergency Care*

Before the enactment of HB4, Civil Practice and Remedies Code Ch. 74, provided that a person who, in good faith, administered emergency care at the scene of an emergency, but not in a hospital or other health care facility, was not liable for damages for an act performed during the emergency unless the act was wilfully or wantonly negligent. TEX. CIV. PRAC. & REM. CODE § 74.001(a) (before 2003 amendment). Section 74.001 went on to provide that the section did not apply if the care was administered for or in expectation of remuneration and “a person who would ordinarily receive or be entitled to receive a salary, fee, or other remuneration for administering care was deemed to be acting for or in expectation of remuneration even if the person waived or elected to not charge or receive remuneration on the occasion in question.” *Id.* § 74.001(b)(1), (d). PJC 51.19A instructed the jury according to these sections.

HB4 amends § 74.001 (and recodifies it as § 74.151) to remove the limitation making the immunity unavailable for emergency care rendered at a hospital or other health care facility. And it repeals paragraph (d), regarding the expectation of remuneration, and amends paragraph (b)(1) to provide that the “section does not apply to care administered ... for or in expectation of remuneration, ***provided that being legally entitled to receive remuneration for the emergency care rendered shall not determine whether or not the care was administered for or in anticipation of remuneration.***” TEX. CIV. PRAC. & REM. CODE § 74.151(b)(1) (emphasis added). The instruction in PJC 51.19A regarding the expectation of remuneration is not longer proper.

Section 74.154 then provides specific directions regarding jury instructions to be used in cases involving emergency care. It provides:

(a) In an action for damages that involves a claim of negligence arising from the provision of emergency medical care in a hospital emergency department or obstetrical unit or in a surgical suite immediately following the evaluation or treatment of a patient in a hospital emergency department, ***the court shall instruct the jury to consider, together with all other relevant matters:***

- (1) whether the person providing care did or did not have the patient's medical history or was able or unable to obtain a full medical history, including the knowledge of preexisting medical conditions, allergies, and medications;
- (2) the presence or lack of a preexisting physician-patient relationship or health care provider-patient relationship;
- (3) the circumstances constituting the emergency; and

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

(b) The provisions of Subsection (a) do not apply to medical care or treatment:

(1) that occurs after the patient is stabilized and is capable of receiving medical treatment as a nonemergency patient;

(2) that is unrelated to the original medical emergency; or

(3) that is related to an emergency caused in whole or in part by the negligence of the defendant.

Id. § 74.154 (emphasis added).

3. *Instructions Regarding Damage Limits and Negligence*

HB4 limits the non-economic damages a party may recover in a health care liability case. H.B.4 § 10.01 (codified as TEX. CIV. PRAC. & REM. CODE § 74.301-.303). It also provides that, “[i]n any action on a health care liability claim that is tried by a jury in a court in this state, ***the following shall be included in the court’s written instructions to the jurors:***

(1) ‘Do not consider, discuss, nor speculate whether or not liability, if any, on the part of any party is or is not subject to any limit under applicable law.’

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

TEX. CIV. PRAC. & REM. CODE § 74.303(e) (emphasis added). The second of these instruction should be included, at least, with PJC 51.3 (the basic negligence question). The first of these instruction might be included with any damages question, but is probably better included as part of Rule 226a’s admonitory instructions.

G. **Instructions Regarding Tax Consequences**

HB4 adds new Section 18.091 to the Civil Practice and Remedies Code. Paragraph (a) provides that evidence to prove the loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance must be presented in the form of a net loss after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law. TEX. CIV. PRAC. & REM. CODE § 18.091(a). This is a substantive rule of evidence rule that does not require any change in the jury charge.

Section 18.091(b), on the other hand, does require a change in the jury charge. It provides that “the court shall instruct the jury as to whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes” if the “claimant seeks recovery for loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance”