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BROAD-FORM SUBMISSION OF JURY QUESTIONS AND THE STANDARD OF REVIEW

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I. INTRODUCTION

A. PURPOSE AND SCOPE OF THE ARTICLE

THE purpose of this article is to provide an analysis of the developing law regarding the jury charge under Texas law, with particular emphasis upon the relationship of the feasibility of submitting liability issues in one broad-form question to appellate standards of review. Since September 1, 1973, when broad-form jury questions became appropriate in negligence cases, Texas has been moving away from a very complex method for submitting cases to juries in civil cases. Part of that process has involved the reduction in the number of jury questions, a corresponding expansion in the breadth of the questions submitted, and an increasing role for accompanying instructions and definitions in enabling the jury to understand the questions submitted and to render a verdict. By January 1, 1988, when the submission of broad-form questions in jury cases was made mandatory, rather than discretionary, problems that, prior to the 1988 amendments to Rule 277,[1] had been lurking below the surface, because of the discretionary nature of broad-form submission, percolated to the surface, requiring Texas courts to decide the proper method of broad-form submission in cases involving multiple theories.

Although no Texas court decision has recognized it, the continuing development of broad-form submission of jury cases is largely dependent upon how appellate standards of review are applied to broad-form charges that embrace multiple claims or defenses when one or more of the claims or defenses are flawed as a matter of law or under the evidence. Recent cases have intimated that some type of corrective action will be necessary if there is a problem with one or more of the theories subsumed by one general question. Logically then, a blind adherence to the broad-form submission may make it difficult to attain the goals that the broad-form submission was intended to achieve, namely to reduce appeals and retrials. A determination of the proper breadth of a controlling question cannot be based upon some type of Platonic adherence to the proper forms of things as determined in the texture of the universe. It must be evaluated by reference to the concerns that a sophisticated legal system has for the respective roles of the court and jury.

B. STRUCTURE OF CURRENT CHARGE RULES

The essential elements of a proper charge are found in Rules 271 through 279 of the Texas Rules of Civil Procedure.[2] These nine rules set out the road map of today's practice. The standard of review and definition of reversible error are found in part in Rule 81(b)(1) of the Appellate Rules.[3] Rule 52 of

1. TEX. R. CIV. P. 277. *See infra* text accompanying notes 6-52 for discussion of the history of the jury charge prior to 1988.
2. TEX. R. CIV. P. 271-79.
3. TEX. R. APP. P. 81(b)(1).

the Rules of Appellate Procedure,[4] in conjunction with Rules 274 and 278 of the Rules of Civil Procedure,[5] describe the steps necessary to preserve a complaint for appellate review.

II. BROAD-FORM SUBMISSION OF JURY QUESTIONS

A. EVOLUTION OF TEXAS CHARGE PRACTICE

1. Early Texas Practice

The earliest Texas practice[6] recognized the use of a special verdict in the form of narrative findings by the jury similar to the findings of fact made in bench trials.[7] From 1846 to 1913, both the general charge and special charges and verdicts were authorized. In the general charge, the judge stated the applicable law and it was "the province and duty of the jury to apply the facts, permitted to go before them under the rulings of the court, to the law as given them in the charge . . . , and directly and concretely decide by their verdict who shall prevail in the suit."[8] Due to its inherent technicalities, the general charge was viewed as the source of numerous reversals.[9] If any theory in a general charge was insupportable factually, legally, or procedurally, the entire case was reversed, even though the evidence would support one or more of the non-defective theories.

In *Lancaster v. Fitch*,[10] three theories of negligence were submitted in a general charge. Although the court of appeals found that one of the theories was flawed as a matter of law, it upheld the jury's verdict in favor of the injured party on the grounds that the verdict and judgment were sustainable under the other theories.[11] The Texas Supreme Court rejected this ap-

4. TEX. R. APP. P. 52.

5. TEX. R. CIV. P. 274, 278.

6. For further discussion of the Texas jury charge practice prior to the 1973 amendments, see GUS M. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS (1959); Richard L. Collier, *Submission of Special Issues in Slip and Fall Cases*, 5 BAYLOR L. REV. 161 (1953); J.B. Dooley, *Special Issues Under the New Rules*, 20 TEX. L. REV. 32 (1941); Coleman Gay, *"Blindfolding" the Jury: Another View*, 34 TEX. L. REV. 368 (1956); J.A. Gooch, *Submission to the Jury*, 18 TEX. B.J. 155 (1955); Leon Green, *Blindfolding the Jury*, 33 TEX. L. REV. 273 (1955); Leon Green, *Special Issues*, 14 TEX. B.J. 521 (1951); Albert P. Jones, *Special Issue Submission*, 15 TEX. B.J. 285 (1953); Albert P. Jones, *Special Issue Submission*, 16 TEX. B.J. 323 (1952); W. Page Keeton, *Personal Injuries Resulting from Open and Obvious Conditions—Special Issue Submission in Texas*, 33 TEX. L. REV. 1 (1954); William D. Masterson, Jr., *Preparation and Submission of Special Issues in Texas*, 6 SW. L.J. 163 (1952); William O. Neal & William A. Poddick, *Submission of Issues in Uncontrolled-Intersection Collision Cases in Texas*, 44 TEX. L. REV. 1 (1965); A.R. Stout, *Our Special Issue System*, 36 TEX. L. REV. 44 (1957); Hon. Tom Suggs, *Jury Submission Under the New Rules*, 6 DALLAS B. SPEAKS 229 (1941).

7. *See* Claiborne v. Tanner, 18 Tex. 68, 73-76 (1856).

8. McFaddin v. Hebert, 15 S.W.2d 213, 216 (Tex. Comm'n App. 1929), *rev'd*, 44 S.W.2d 938 (Tex. Comm'n App. 1932).

9. *See* 3 ROY MCDONALD, TEXAS CIVIL PRACTICE § 12.39 (1970).

10. 246 S.W. 1015 (Tex. 1923); *see also* Tisdale v. Panhandle & S.F. Ry. Co., 228 S.W. 133, 137 (Tex. Comm'n App. 1921, judgm't adopted).

11. Lancaster v. Fitch, 239 S.W. 265, 271 (Tex. Civ. App.—Texarkana 1922), *aff'd on other grounds*, 246 S.W. 1015, 1016 (Tex. 1923). The court of appeals explained the justification for its method of analysis in this way:

> If the evidence conclusively showed that the angle cock and its condition did not

proach, reasoning that it was impossible to determine that the jury did not find for the claimant upon the flawed theory alone.[12] The court explained why the judgment could not be affirmed if one theory was invalid, even though two were sustainable as follows:

> This issue of negligence was specifically submitted to the jury by the court as being of itself alone sufficient ground of recovery. We think it is impossible to say that the jury did not find for . . . [the plaintiff] upon this issue alone . . . . [The jury] may have found for . . . [the plaintiff] only on the issue that was improperly submitted. In order for courts to be able to administer the law in such cases with reasonable certainty and to lay down and maintain just and practical rules for determining the rights of parties, it is necessary that the issues made and submitted to juries, and upon which they are required to pass, be authorized and supported by the law governing the case . . . . The charge authorizing the jury to find for . . . [the plaintiff] . . . upon the defective condition of the angle cock alone would make it impossible to say that they found for him upon the other two issues.[13]

By the end of the nineteenth century, due to legislative enactments and court interpretation, submission of cases by special issues became mandatory on the request of a party.[14] One of the principal early obstacles to the use of special issues was the rule that a verdict had to encompass all of the elements of the claim.[15] Even undisputed facts had to be found by the jury because the trial court was statutorily precluded from rendering judgment if all facts raised by the pleadings were not found, even if none of the evidence presented raised a fact issue. In 1897, the Texas Supreme Court criticized this dangerous aspect of special verdict practice. In *Silliman v. Gano*,[16] Chief Justice Gaines noted that the requirement that the special verdict include *all* findings necessary to support a judgment was too stringent.[17] In answer to this criticism, the Texas Legislature passed legislation mandating that "an issue not submitted and not requested by a party . . . shall be deemed as found by the court in such manner as to support the judgment."[18]

In 1913, the Texas Legislature enacted the Special Issues Act,[19] the predecessor of what is presently Rule 277 of the Texas Rules of Civil Procedure.

> of and by itself alone cause appellee the injury to the leg, then clearly a jury of ordinarily sensible men would not find to the contrary, and the court could not reasonably say that they did so find and found their verdict thereon. And we think that the error complained of did not cause injury or the rendition of an improper judgment.

Id. at 271.

12. 246 S.W. at 1016.

13. *Id.* at 1016-17.

14. *See* Galveston, H. & S. A. Ry. Co. v. Jackson, 50 S.W. 1012, 1013 (Tex. 1899).

15. *See, e.g.*, Paschal v. Cushman, 26 Tex. 74, 75 (1861) ("This verdict is not sufficient to sustain the decree, inasmuch as the fact is omitted that appellants had recovered a judgment, etc., as alleged in the petition.").

16. 39 S.W. 559 (Tex. 1897).

17. *Id.* at 561-62.

18. Act approved June 18, 1897, 25th Leg., C.S., ch. 7, § 1, 1897 Tex. Gen. Laws 15, 15, *reprinted in* 10 H. GAMMEL, LAWS OF TEXAS 1441, 1455 (1898).

19. Act of March 27, 1913, 33d Leg., R.S., ch. 59, § 1, 1913 Tex. Gen. Laws 113, *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201.

It is commonly accepted that the legislation was enacted to provide an escape from a general charge practice that had become unmanageable because of "a gradual accumulation of instructions considered helpful to juries."[20] The new procedures mandated by the Special Issues Act required the use of special issues. The statute included language requiring that "special issues shall be submitted distinctly and separately, and without being intermingled with each other, so that each issue may be answered by the jury separately."[21] This "distinctly and separately" requirement introduced a "system of fractionalization of special issues far beyond that employed in any other jurisdiction in the common-law world."[22]

2. *1913 to 1973: The "Distinctly and Separately" Approach*

In *Fox v. Dallas Hotel Co.*[23] the Texas Supreme Court mandated the submission of each issue "distinctly and separately, avoiding all intermingling" in negligence cases.[24] Alexander Fox died as a result of injuries he sustained while trying to operate a defective elevator. Although many specific acts of negligence had been alleged, the court submitted the following single question concerning the decedent's contributory negligence:

> Do you find from a preponderance of the evidence that Alexander Fox was guilty of contributory negligence in his conduct in, around, or at the elevator, or the shaft thereof, prior to or about the time he was injured?[25]

The Texas Supreme Court rejected the trial court's submission of contributory negligence in broad-form, construing Article 1984a as requiring that each separate factual theory be the subject of a separate question having a separate answer.[26]

After *Fox*, the courts strictly enforced the requirement that issues be submitted "separately and distinctly" in negligence cases. In non-negligence cases, however, broad-form submission was permitted.[27] In *Roosth & Genecov Production Co. v. White*[28] in which more than twenty specific acts or omissions of negligence were alleged, the trial court submitted a broad issue, over objection, that inquired whether the oil derrick, as it stood, was defective at the time it was furnished by the defendant.[29] The Texas Supreme Court, concluding that the "distinctly and separately" requirement

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20. Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

21. Act of March 27, 1913, 33d Leg., R.S., ch. 59, § 1, 1913 Tex. Gen. Laws 113, *repealed by* Act of May 12, 1939, 46th Leg., R.S., ch. 25, § 1, 1939 Tex. Gen. Laws 201.

22. Jack Pope & William G. Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577, 579 (1973).

23. 240 S.W. 517 (1922), *overruled by* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 925 (Tex. 1981); *see infra* notes 46-49 and accompanying text for discussion of *Burk Royalty*.

24. *Fox*, 240 S.W. at 522.

25. *Id.*

26. *Id.* at 521-22.

27. *See* City of Houston v. Lurie, 224 S.W.2d 871, 876 (Tex. 1949) (condemnation action); Howell v. Howell, 210 S.W.2d 978, 980 (Tex. 1948) (divorce action).

28. 262 S.W.2d 99 (Tex. 1953), *overruled by* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 925 (Tex. 1981).

29. *Id.* at 100.

had been violated, restricted the application of the specificity requirement to negligence cases only, thus authorizing a dual system of issue submission between negligence and non-negligence cases.[30] The *Roosth* court distinguished *City of Houston v. Lurie*[31] and *Howell v. Howell*[32] on the basis that they were not negligence cases.[33] Texas thus developed a unique, technical, and very complicated practice for negligence cases. Criticism of the Texas charge practice prompted a major revision of the rules in 1973.

Before discussing the 1973 amendments, it is worth noting, for historical purposes, that there was dissatisfaction with the requirement of separate and distinct submission of factual theories at the time the Texas Rules of Civil Procedure were adopted in 1940. During the years 1939 and 1940, while the original Texas Rules of Civil Procedure were being developed, Rules 277, 278 and 279 were drafted, revised in part, and repealed in part. As originally promulgated in 1940, Rule 277 contained the following language authorizing disjunctive submission:

> [T]he court may submit several issues disjunctively in the same question where an affirmative finding on either of such issues would be sufficient as an element for a basis of recovery or of defense. For example, the court may inquire in one question whether the defendant has committed any one of several alleged acts of negligence. Alleged acts of contributory negligence may likewise be grouped.[34]

This language was deleted by the 1941 amendment before the original rules went into effect.[35] Had this language survived, the 1941 version of Rule 277 certainly would have created interpretive problems and opportunities like the ones that Texas courts have encountered since 1973.[36] However, because this language was deleted, the broad-form question did not become the favored submission until 1973. Consequently, the "distinctly and separately" requirement mandated by the Special Issues Act and the Texas Supreme Court in *Fox* remained as the prominent method of submission until September 1, 1973.

3. *Alternative Methods of Submission: 1973 Amendments to Rule 277*

Effective September 1, 1973, Rule 277 was amended.[37] After sixty years,

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30. *Id.* at 104.
31. 224 S.W.2d 871 (Tex. 1949) (condemnation of buildings).
32. 210 S.W.2d 978 (Tex. 1948) (divorce).
33. *Roosth*, 262 S.W.2d at 103.
34. *Rules of Practice and Procedure In Civil Actions, Rule 277 (Special Issues)*, 3 TEX. B.J. 525, 566 (1940).
35. *Id.*
36. It should also be noted that TEX. R. CIV. P. 278, "Failure to Submit Separately," was also repealed before it became effective. It provided that "[t]he fact that an issue is multifarious or duplicitous shall not constitute ground for reversal except where it affirmatively appears from the record that the complaining party was prejudiced thereby."
37. TEX. R. CIV. P. 277 historical note (Vernon 1976). For further discussion of the Texas jury charge practice after the 1973 amendments, see Price Ainsworth & Mike C. Miller, *Removing the Blindfold: General Verdicts and Letting the Jury Know the Effects of Its Answers*, 29 S. TEX. L.J. 233 (1987); Tom H. Davis & John R.W. Cracken, *Texas Rules of Civil Procedure Important Changes in 1988*, 51 TEX. B.J. 668 (1988); J. Hadley Edgar, *The Court's Charge, in* TEXAS ADVANCED PERSONAL INJURY LAW COURSE, pt. Q, at 1 (State Bar of

it became apparent that the Texas charge practice was overloaded with granulated issues.[38] The requirement that issues be submitted in separate and distinct form was eliminated, but the method of special issue submission was not completely abolished. Trial courts were given the discretion to submit issues broadly with combined elements or to submit separate questions with respect to each element. As a result of the 1973 amendments, the use of a "*Muckelroy*" or "*Stovall*" charge that inquired simply "whose negligence, if any, . . . proximately caused the collision . . .?" was acceptable, but discretionary.[39] The decision to submit broad-form questions remained within the discretion of the trial judge until the 1988 amendments to Rule 277.[40] The 1973 amendments to Rule 277 also eliminated the submission of "inferential rebuttal" matters in issue or question form and authorized the submission of "proper" explanatory instructions, rather than "necessary" ones.[41]

4. *The Supreme Court's Preference for Broad-Form Questions*

Following the 1973 amendments, the Texas Supreme Court interpreted the meaning of "broad-form question" in a number of opinions, insisting that Rule 277 means what it says and that it was designed to abolish the "distinctly and separately" requirement. The court also made it clear that it preferred the use of broad-form submissions. In *Mobil Chemical Co. v. Bell*[42] the court stated that Rule 277 means that

> . . . in an ordinary negligence case, where several specific acts of negligence are alleged and evidence as to each is introduced, the submission of a broad issue inquiring generally whether the defendant was negli-

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Texas 1987); Earnest E. Figari, Jr. et al., *Texas Civil Procedure Annual Survey of Texas Law*, 44 SW. L.J. 541, 573-75 (1990), 43 SW. L.J. 485, 508 (1989), 42 SW. L.J. 523, 551 (1988); William W. Kilgarlin et al., *Practicing Law in the "New Age": The 1988 Amendments to the Texas Rules of Civil Procedure*, 19 TEX. TECH L. REV. 881, 912-16 (1988); Jack Pope & William G. Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577 (1973); Jack Pope & William G. Lowerre, *The State of the Special Verdict—1979*, 11 ST. MARY'S L.J. 1 (1979); Kevin W. Saunders, *A Logical Look at Special Issue Conflicts*, 19 TEX. TECH L. REV. 37 (1988); Regan W. Simpson, *Jury Practice in Texas Civil Cases*, 17 TEX. TECH L. REV. 225 (1986); Garey B. Spradley, *The Global Issue: Outlaw of the Special Issue Practice*, 18 HOUS. L. REV. 1 (1980); B. Lee Ware, *The Jury Charge*, *in* ADVANCED CIVIL TRIAL SHORT COURSE—1988, pt. m, at 1 (SMU School of Law 1988); R. Mike Borland, Comment, *Disjunctive Submission of Inferential Rebuttal Issues*, 33 BAYLOR L. REV. 147 (1981); Christopher Guisel, Note, *Alternative and Inconsistent Theories of Recovery or Defense May Be Submitted in a Single Broad Issue Without Mentioning All the Theories in the Jury Charge:* Island Recreational Development Corp. v. Republic of Texas Savings Association, *710 S.W.2d 551 (Tex. 1986)*, 18 TEX. TECH L. REV. 1017 (1987); Stewart Jay, *Juror Agreement on the Basis of Negligence*, 8 REV. LITIG. 119 (1989); John J. Sampson, TDHS v. E.B., *The* Coup de Grace *for Special Issues*, 23 ST. MARY'S L.J. 221 (1991).

38. *See* Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984).

39. *See* Members Mut. Ins. Co. v. Muckelroy, 523 S.W.2d 77, 82 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (upholding the original "*Muckelroy*" charge of "whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of this suit?").

40. TEX. R. CIV. P. 277. *See infra* text accompanying notes 53-82 for discussion of 1988 amendments and interpretive problems arising from the change to mandatory broad-form submissions.

41. TEX. R. CIV. P. 277. *See infra* text accompanying notes 296-362 for a discussion of when an instruction is proper to enable the jury to render a verdict.

42. 517 S.W.2d 245 (Tex. 1974).

> gent is not error and is not subject to the objection that the single issue inquires about several elements or issues.[43]

Similarly, in *Scott v. Atchison, Topeka & Santa Fe Railway Co.*[44] the court stressed that "Rule 277 was amended . . . for the specific purpose of permitting simpler and broader submissions of controlling issues as a means of halting the complex and artificial proliferation of narrow special issues."[45]

The court reinforced its position in *Burk Royalty Co. v. Walls*[46] in which the court expressly overruled all of the cases decided before the 1973 amendments.[47] In *Burk Royalty* the jury was asked whether the defendant "failed to follow approved safety practices for pulling wet tubing."[48] In approving the submission, the court explained that "[t]here was no need to ask separate questions about each reason that defendant may have failed to do so. This court has repeatedly written that Rule 277 will be applied as written."[49] Likewise, in *Lemos v. Montez*[50] Justice Pope stated that since the 1973 amendment to Rule 277, "*broad issues have been repeatedly approved by this court as the correct method for jury submission.*"[51] In a later opinion the court instructed that "trial courts are permitted, and even urged, to submit the controlling issues of a case in broad terms so as to simplify the jury's chore."[52]

5. *Broad-Form Submission Made Mandatory: The 1988 Amendments*

Rule 277 was amended, effective January 1, 1988, to provide that "broad-form questions" "shall" be used "whenever feasible."[53] The Texas Supreme Court also eliminated the language from Rule 277 permitting separate questions with respect to each element of a case at the discretion of the trial court.[54] Since the 1988 amendments, the Texas Supreme Court has reiterated its preference for broad-form submission by holding that, unless extraordinary circumstances exist, a court must submit issues broadly with appropriate instructions and definitions as requested.[55] In subsequent opinions, however, the court seems to be reevaluating a strict interpretation of the "broad-form" standard, indicating that at least in certain situations, a less broad formulation of the charge may still be permissible.[56] Whether the

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43. *Id.* at 255.
44. 572 S.W.2d 273 (Tex. 1978).
45. *Id.* at 278.
46. 616 S.W.2d 911 (Tex. 1981).
47. *Id.* at 925.
48. *Id.* at 924.
49. *Id.*
50. 680 S.W.2d 798 (Tex. 1984).
51. *Id.* at 801 (emphasis added).
52. Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n, 710 S.W.2d 551, 555 (Tex. 1986).
53. TEX. R. CIV. P. 277.
54. *Id.*
55. Texas Dep't of Human Serv. v. E.B., 802 S.W.2d 647, 649 (Tex. 1990).
56. *See* H.E. Butt Grocery Co. v. Warner, 845 S.W.2d 258 (Tex. 1992); Westgate Ltd. v. State, 843 S.W.2d 448 (Tex. 1992); *see also* State Dep't of Highways & Pub. Transp. v. Payne, 838 S.W.2d 235 (Tex. 1992).

door has been opened widely for a different formulation of the charge, or whether it is merely ajar under extraordinary and limited circumstances, is still unclear. Consequently, it is safe to state only that the broad-form submission is currently in a state of transition.

B. INTERPRETIVE PROBLEMS CONCERNING MANDATORY BROAD-FORM SUBMISSION

The 1988 amendments to Rule 277 mandating broad-form questions and subsequent Texas Supreme Court decisions have presented the bench and bar with a number of interpretive problems:

- May broad-form submissions submit mixed questions of law and fact?
- Does Rule 277 require one "broad-form" liability question or may broad-form submissions be made up of more than one liability question?
- Is it reversible error to submit more than one liability question?
- Should *or* when should multiple legal theories be included in one broad-form liability question?
- What is the appropriate standard of review in multiple theory cases?

1. May Broad-Form Submissions Submit Mixed Questions of Law and Fact?

It is well known to modern lawyers that questions of law are to be determined by the court and that the jury decides questions of fact. In fact, it is hornbook law that questions of law are to be decided by the court and that they should not be submitted to the jury.[57] The submission of a question of law is harmless, however, unless there is a showing of extrinsic prejudice.[58] In Texas, based on essentially the same policy of restricting the triers of fact to factual questions, the same treatment has been traditionally accorded to so-called "mixed questions" of law and fact.[59] It is now clear, however, that

57. *See* C & C Partners v. Sun Exploration & Prod. Co., 783 S.W.2d 707, 715 (Tex. App.—Dallas 1989, writ denied).

58. Alamo Carriage Serv. Inc. v. City of San Antonio, 768 S.W.2d 937, 942 (Tex. App.—San Antonio 1989, no writ). As stated by Professor McDonald, "Absent some showing of extraneous prejudice, the submission of a question of law is harmless: if it is answered as the court should have decided, it can hardly damage; if it is answered to the contrary, the finding would be immaterial and hence should be ignored." 3 ROY MCDONALD, TEXAS CIVIL PRACTICE IN DISTRICT AND COUNTY COURTS, § 12.37.2 (rev. 1983).

59. *See, e.g.*, Ryan Mortgage Investors v. Fleming-Wood, 650 S.W.2d 928, 932-33 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (although mixed question of law and fact requiring jurors to interpret instruments and determine legal effect of contract should not be asked, question that asked "Do you find from a preponderance of the evidence that Ryan and GAMI failed to perform their obligations in accordance with the Fleming-Wood Contract" was not improper); Texas Imports v. Allday, 649 S.W.2d 730, 739 (Tex. App.—Tyler 1983, writ ref'd n.r.e.) (answers to questions that submit questions of law or mixed questions of law and fact without appropriate explanatory instructions can form no basis for judgment for either party); U.S. Life Title Co. v. Andreen, 644 S.W.2d 185, 193 (Tex. App.—San Antonio 1982, writ ref'd n.r.e.) (in action to enforce repurchase agreement, submission of question to jury concerning constructive notice was improper because question contained question of law or mixed law and

the division of labor between the court and the jury has been changed by the adoption of broad-form jury questions.

In *Brown v. American Transfer & Storage Co.*,[60] for instance, the Texas Supreme Court approved the trial court's submission of broad-form jury questions in a deceptive trade practices case. In the course of its opinion, the high court expressly disapproved of the opinion of the Dallas Court of Appeals which had held "that the issues submitted by the trial court which followed closely the wording of the statute, asked legal questions rather than . . . factual inquiries."[61] The Texas Supreme Court's opinion makes no attempt to explain why the court disagreed with the court of appeals reasoning.[62] Although the court clearly approved a series of broad-form questions submitted in a manner that closely resembled the statutory subsections of the Deceptive Trade Practices Act which the plaintiff claimed the defendant violated,[63] the opinion does not provide any guidance on whether a broader form of submission - such as "Did the defendant commit a deceptive trade practice?" or "Did the defendant violate the deceptive trade practices act?" - would be proper. *Brown* teaches that strictly factual inquiries are not necessary and that mixed questions of law and fact were entirely permissible under the 1973 amendments to Rule 277.

Similarly in *Castleberry v. Branscum*,[64] the trial court submitted the following question:

> Do you find from a preponderance of the evidence that Texan Transfer, Inc. was the alter ego of the defendant?[65]

The question was accompanied by the following instruction:

> You are instructed that a corporation may become an "alter ego" or mere extension of the individual if the individual controls the corporation and conducts its business affairs without due regard for the separate corporate nature of the business; or that such separate corporate nature ceased to exist; or if the corporate assets are dealt with by the individual as if owned by the individual; or if corporate formalities are not adhered to by the corporation; or if the individual is using the corporate entity as a sham to perpetrate fraud or to avoid personal liability.[66]

The Dallas Court of Appeals held that the question was too broad, reasoning

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fact, but the error was harmless). *See also* GUS M. HODGES & T. RAY GUY, THE JURY CHARGE IN TEXAS CIVIL LITIGATION § 2 (2d ed. 1968).

60. 601 S.W.2d 931 (Tex. 1980), *cert. denied*, 449 U.S. 1015 (1980).

61. *Id.* at 937.

62. As Chief Justice Guitard's opinion indicates, the Dallas Court believed that asking jury questions in the language of the statute was improper because "[i]t is the function of the court, rather than the jury, to apply the law to the facts and determine whether the representation found falls within any of the subdivisions at section 17.46(b)." American Transfer & Storage Co. v. Brown, 584 S.W.2d 284, 295 (Tex. Civ. App.—Dallas 1979), *rev'd*, 601 S.W.2d 931 (Tex. 1980).

63. *See infra* text accompanying note 247 for the specific questions that were submitted by the trial court.

64. 721 S.W.2d 270 (Tex. 1986).

65. *Id.* at 275.

66. *Id.* at 275-76 (quoted only in part).

that "the ultimate issue of whether a corporation is the alter ego of an individual or individuals is a question of law and, therefore, should not be submitted to the jury."[67] The Texas Supreme Court disagreed, holding that the alter ego question is a factual one that is submitted properly in broad-form.[68]

Controversies about the distinction between questions of law and questions of fact have been particularly common in commercial litigation. Consider the following submission:

> Do you find from a preponderance of the evidence that *under the contract between the parties* at the time of the exchange of properties, that Norman Orr was not to pay a difference of $18,000 to Kenneth A. Wirtz?[69]

In *Wirtz*, this question was held to be improper on the basis that it asked the jury a *question of law about the legal effect of the contract*, rather than a factual question about the intent of the parties.[70] *Wirtz* follows a pre-1983 line of cases condemning the inclusion of the phrase "under the contract" in a jury question.[71] But it now seems to be relatively clear that this method of analysis has been rejected by a majority of the courts of appeals that have considered the question.[72]

Undoubtedly, the most provocative decision on the question of law/question of fact problem at the present time is the Texas Supreme Court's decision in *Texas Department of Human Services v. E.B.*[73] In *E.B.*, the Texas Department of Human Services filed for termination of the parent-child relationship between the parents and their two children. Under Section 15.02 of the Family Code, the State was required to establish that at least one of the following occurred:

(1) the parent had knowingly placed or knowingly allowed the child to

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67. Branscum v. Castleberry, 695 S.W.2d 643, 646 (Tex. App.—Dallas 1985), *rev'd*, 721 S.W.2d 270, 277 (Tex. 1986).

68. Castleberry v. Branscum, 721 S.W.2d 270, 277 (Tex. 1986).

69. Wirtz v. Orr, 533 S.W.2d 468, 471 (Tex. Civ. App.—Eastland 1976, writ ref'd n.r.e.) (emphasis added).

70. *Id.* (emphasis added).

71. *See*, e.g., Kemper v. Police & Firemen's Ins. Ass'n, 48 S.W.2d 254 (Tex. Comm'n App.1932, holding approved), which held: "The phrase, 'as required by the terms of the contract,' permitted the jury to construe the contract. The construction of a contract is a question of law for the court, and not a question of fact for a jury." *Id.* at 255.

72. *See* National Fire Ins. v. Valero Energy, 777 S.W.2d 501, 506-07 (Tex. App.—Corpus Christi 1989, no writ) (relying on Island Recreation Dev. Corp. v. Republic of Texas Sav. Ass'n, 710 S.W.2d 551 (Tex. 1986), in rejecting argument that a question asking whether some conduct or circumstances fall "under the terms of the contract" has the effect of asking an improper law question); *but see* Garza v. Southland Corp., 836 S.W.2d 214, 219 (Tex.App.—Houston [14th Dist.] 1992, no writ) ("The issue of whether a party 'breached a contract' is a question of law rather than fact, and should not be submitted to the jury."); *see also* Rodgers v. RAB Investments, Ltd., 816 S.W.2d 543, 551-52 (Tex. App.—Dallas 1991, no writ) ("The ultimate issue of whether a contract has been breached is a question of law for the court. Riehn, 796 S.W.2d at 253 n.3. Questions of law should not be submitted to the jury. *C & C Partners*, 783 S.W.2d at 715. In order to avoid submitting questions of law to the jury, the trial court must examine the contract to determine what the contract requires of the parties. The court should submit to the jury any disputed *factual* issues regarding failure of a party to conform to the contract. Riehn, 796 S.W.2d at 253 n.3. When the jury determines the conduct, it is not making a decision of law . . . .")

73. 802 S.W.2d 647 (Tex. 1990).

> remain in conditions or surroundings which endangered the physical or emotional well-being of the child; or
> (2) the parent had engaged in conduct or knowingly placed the child with persons who engaged in conduct which endangered the physical or emotional well-being of the child.[74]

In addition, the State was required to prove that termination of the parent-child relationship would be in the best interest of the child.[75] As a matter of statutory law, termination of parental rights is a two-step process, with the first step involving some relatively specific acts of misconduct defined by statute.[76]

> The trial court submitted one broad-form question to the jury:
> Should the parent-child relationship between [the parent] and the child [E.B.] be terminated?[77]

The jury answered "yes" and the trial court rendered judgment terminating the parent-child relationship.[78] The Austin Court of Appeals reversed and remanded, finding that the question required the jury, rather than the court, to determine the ultimate legal issue of whether the parent-child relationship should be terminated, and that allowing the jury to invade the proper role of the trial court is a result not intended by Rule 277.[79] Based on this reasoning process, the Austin court concluded that multiple jury questions, each of which permitted the jury to determine the controlling fact issue, and upon which the court would render judgment, should have been submitted.[80]

The Texas Supreme Court reversed, stating that the charge in parental rights cases should be the same as in other civil cases. The court upheld the question submitted by the trial court, which was taken from the Texas Pattern Jury Charges, and the accompanying instructions, which were substantially similar to those in the Texas Pattern Jury Charges.[81] The court explained:

> In the 1988 amendments to Rule 277 this court said broad-form submission "shall" be used "whenever feasible" and eliminated trial court discretion to submit separate questions with respect to each element of a case. Rule 277 mandates broad form submissions "whenever feasible,"

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74. TEX. FAM. CODE ANN. § 15.02 (Vernon 1986).
75. *Id.*
76. *See id.*
77. *E.B.*, 802 S.W.2d at 648.
78. *Id.*
79. E.B. v. Texas Dep't of Human Services, 766 S.W.2d 387, 390 (Tex. App.—Austin 1989), *rev'd*, 802 S.W.2d 647 (Tex. 1990).
80. *Id.* The court of appeals noted that a submission similar to that given in Howell v. Howell, 210 S.W.2d 978 (Tex. 1948), would have been appropriate. *E.B.*, 766 S.W.2d at 390. In *Howell*, the Texas Supreme Court approved the following submission:

> Do you find from a preponderance of the evidence that the acts or conduct of the defendant toward the Plaintiff, if any, constituted such excesses, cruel treatment or outrages of such a nature as to render their further living together as husband and wife insupportable, as that term is hereinafter defined in this charge?

Howell, 210 S.W.2d at 979.
81. *E.B.*, 802 S.W.2d at 648-49; *see* 5 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, PJC 218.01B (1992).

> that is, in any or every instance in which it is capable of being accomplished. . . . The rule unequivocally requires broad form submission whenever feasible. Unless extraordinary circumstances exist, a court must submit such broad form questions.[82]

Based on the foregoing decisions, it is clear that broad-form jury questions drafted in compliance with current Rule 277 should not be strictly factual inquiries asking about specific conduct. Under current practice a broad-form question should be crafted as a mixed question that requires the jury to apply the law to the facts. In other words, prior case law disapproving the submission of mixed questions of law and fact is contrary to the requirement that a broad-form question must be used whenever feasible. At some point, a question that calls for the application of law to fact begins to look more like a strictly legal inquiry to the factfinder. For example, a question that asks the jury "Is the defendant liable?" could be considered a strictly legal inquiry because it downplays the factual component of the analysis. But is that question really very different from the broad-form question asked in *E.B.*? I think not. The characterization of a question as a question of law rather than as a question of fact does not really depend upon the breadth of the question in some abstract sense. It is merely a convenient way to talk about whether the question should be answered by the court or the jury for policy reasons. It is a way to describe the outcome of the overall analysis concerning the limits of broad-form submission, rather than a particularly useful analytical tool in its own right.

2. *Does Rule 277 Require One "Broad-form" Liability Question or May Broad-form Submissions Be Made Up of More Than One Liability Question*?

In several cases, decided both before and after the 1988 amendments, it is suggested that one liability question is required because this method of submission is "feasible". In *Lemos v. Montez*[83] the Texas Supreme Court approved a form of submission that combined both the plaintiff's negligence claims and the defendant's contributory negligence defenses in "one" broad-form question containing two answer blanks as follows:

> Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision of December 27, 1979 made the basis of this suit?
>
> | | Yes | No |
> |---|---|---|
> | (a) Alfred R. Montez | _____ | _____ |
> | (b) Ignaciao Nat Arellano | _____ | _____.[84] |

Similarly, in *National Fire Insurance Company of Pittsburgh v. Valero Energy Corp.*,[85] the court of appeals approved the trial court's submission of the following question:

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82. *E.B.*, 802 S.W.2d at 649.

83. 680 S.W.2d 798 (Tex. 1984).

84. *Id.* at 799; *see also* Southern Pac.. Co. v. Castro, 493 S.W.2d 491 (Tex. 1973) (combining contributing negligence per se and excuse).

85. 777 S.W.2d 501 (Tex. App.—Corpus Christi 1989, writ denied).

Did a loss occur which was covered and payable under the policy?[86]

When comparative apportionment is not part of the jury's job, it also may be "feasible" to combine liability and damages in one broad-form question. For example, in a contested false imprisonment case tried in Hidalgo County,[87] the trial court asked one question:

> What amount of money, if any, if paid now in cash, do you find from a preponderance of the evidence would reasonably compensate Olivia Hernandez for damages directly resulting from the false imprisonment, *if any*, on the occasion in question.[88]

These cases demonstrate that it is technically possible to draft an intelligible broad-form question to cover an entire case. The applicability of principles of comparative apportionment to a case would complicate the question or accompanying instructions. However, even in this circumstance a one question submission can be developed in virtually every case. Accordingly, broad-form submission in one question is always feasible (i.e., possible). This does not necessarily mean that there are no other problems.

The first modern Texas Supreme Court decision to identify serious problems raised by broad-form submission is *Island Recreational Development Corp. v. Republic of Texas Savings Ass'n*.[89] In that action, the plaintiff, a developer, sued because of the defendant bank's failure to fund a loan commitment. The plaintiff specifically contended that a condition in the written commitment had been waived and that it had performed everything it had been asked to perform in accordance with the contract. The defendant argued, among other things, that the condition precedent to the performance of the commitment had not been satisfied or waived. At trial, both parties requested the court to submit a separate question that explicitly included the plaintiff's waiver theory. Instead, one broad-form question was submitted:

> Do you find from a preponderance of the evidence that [Island] performed their obligations under the Commitment Letter in question?[90]

No accompanying instructions were submitted with the question, and no objections were made to the charge on this ground. In its first opinion, the Texas Supreme Court, in a sharply divided (5-4) decision, reversed the case because the plaintiff failed to secure a specific jury finding on waiver.[91] On rehearing, the court withdrew its prior opinion and approved the broad-form question,[92] holding that, although the word "waiver" did not appear in the charge, the issue was subsumed in the one broad-form question.[93] The court, after giving the history and the difficulties in gaining recognition for the broad-form submission, stated:

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86. *Id.* at 506.

87. Hernandez v. Montgomery Ward & Co., 652 S.W.2d 923 (Tex. 1983), *overruled on other grounds by* Acord v. General Motors Corp., 669 S.W.2d 111, 114 (Tex. 1984).

88. *Id.* at 924 (emphasis added).

89. 710 S.W.2d 551 (Tex. 1986).

90. *Id.* at 554.

91. Island Recreational Dev. Corp. v. Republic of Texas Sav. Ass'n, 28 Tex. Sup. Ct. 534 (July 3, 1985), *withdrawn*, 710 S.W.2d 551 (Tex. 1986).

92. 710 S.W.2d at 555.

93. *Id.*

> In the instant case the controlling issue, the only issue which would authorize a recovery by Island, was whether Island had performed all of the things required by Republic as conditions precedent so as to entitle Island to enforce the commitment. This was precisely the single issue the trial court chose to submit to the jury. We hold that in the instant case the trial judge was following the policy this court has enunciated concerning broad issue submissions.[94]

The dissent in *Island Recreational* suggested the following submission to resolve the waiver issue as an independent ground of defense:

> Do you find from a preponderance of the evidence that [plaintiff] performed all of the obligations under the commitment letter which [defendant] did not waive? You are instructed that waiver is defined as intentionally giving up a known right. You are instructed that performed means carrying out obligations as required by the contract.[95]

The primary thrust of the dissent's reasoning was that the "waiver" theory was not subsumed within the submitted jury question or in an appropriate accompanying instruction.[96] While this point is debatable, the dissent's concern that the jury know clearly from reading the charge "what grounds of recovery it may consider in reaching its verdict"[97] should be an important factor regardless of the form of submission. Of equal significance is the dissent's concern that "the trial court and the appellate court will know clearly from reading the charge what grounds of recovery the jury considered, and review the case accordingly, without speculation."[98]

Thereafter, in *Texas Department of Human Services v. E.B.*,[99] an opinion that has been treated by one well-respected Texas legal scholar as the requiem for the prior practice,[100] the Texas Supreme Court announced the position that a broad-form question should be used unless "extraordinary circumstances" exist.[101] As the majority explains "[b]road-form questions reduce conflicting jury answers, thus reducing appeals and avoiding retrials. Rule 277 expedites trials by simplifying the charge conference and making questions easier for the jury to comprehend and answer."[102]

In *E.B.*, the court of appeals reasoned that the submission of the grounds for termination of the parent-child relationship in one broad question conflicted with Rule 292, which requires a vote of the same ten jurors on each submitted question.[103] The State therefore could obtain an affirmative answer to the broad-form question without discharging the burden imposed by

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94. *Id.*
95. *Id.* at 557 n.1 (Spears, J., dissenting).
96. *Id.* at 557-58.
97. *Id.* at 559.
98. *Id.*
99. 802 S.W.2d 647 (Tex. 1990). *See supra* notes 73-82 and accompanying text.
100. *See* John J. Sampson, TDHS v. E.B., *The* Coup de Grace *for Special Issues*, 23 ST. MARY'S L.J. 221 (1991).
101. *E.B.*, 802 S.W.2d at 649.
102. *Id.*
103. E.B. v. Texas Dep't of Human Servs., 766 S.W.2d 387 (Tex. App.—Austin 1989), *rev'd*, 802 S.W.2d 647 (Tex. 1990); *but see* TEX. R. CIV. P. 292 (requiring concurrence only as to each "answer").

the Texas Family Code that at least ten jurors conclude that the parent violated one or more of the grounds for termination set out in Section 15.02 and that the same ten jurors find that termination is in the best interest of the child.[104] The broad-form question, as submitted, allowed the court to terminate the mother's parental rights on the basis of five (and only five) jurors concluding that she "placed the [child] in a dangerous situation" and five (and only five) jurors concluding that she "engaged in dangerous conduct."[105]

After reading the Texas Supreme Court's opinion in the *E.B.* case, there is no doubt about the court's preference for broad-form submission. There is also no doubt that the court is not troubled by the court of appeals' concern with the "ten jurors" problem.[106] In this connection, it may be important to recognize that the court noted in *E.B.* that no complaint had been made about the legal or factual sufficiency of the evidence to support the jury's termination findings.[107] Accordingly, *E.B.* does not clarify whether broad-form submission would still be considered feasible in retrospect if a reviewing court determined that one or more of the alternate endangerment theories subsumed in a broad question was legally flawed or had no evidentiary support.

3. *Is the Submission of More Than One Liability Question Reversible Error?*

Despite the *E.B.* decision's strong suggestion to the contrary, it is now clear that submission of more than one liability question does not ordinarily constitute reversible error. The first appellate opinion to consider the problem is *Sanchez v. Excelo Bldg. Maintenance*.[108] In that decision, the San Antonio Court of Appeals addressed the discretion of the trial court to submit controlling fact issues in broad form in a slip and fall case. Justice Peeples' opinion explains that it would have been possible and feasible to submit one broad liability question, provided that the charge included proper instructions and correct definitions, but found no reversible error in the trial court's submission of the following two questions:

Question 1

Do you find that there was a condition in the ladies bathroom, created

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104. *See* TEX. FAM. CODE ANN § 15.02 (Vernon 1986).

105. *E.B.*, 766 S.W.2d at 389.

106. *E.B.* appears to stand for the proposition that broad-form submission of a ground of liability is permissible if ten jurors agree on the controlling question, e.g., whether the defendant was negligent, even if the charge does not require that the same ten jurors agree on the specific underlying factual theory. *See E.B.*, 802 S.W.2d at 649 (since ten jurors agreed as to the controlling question, *i.e.*, that the mother's parental rights should be terminated because the mother had endangered the child, it is immaterial that ten jurors may not have agreed on a specific statutory basis of endangerment); *see also* TEX. R. DIV. P. 226a (Rule 226a requires instruction to jury that ten or more jurors must agree upon all answers made and to entire verdict); James P. Wallace, *Jury Issue Submission: Broad Issues Are Here To Stay* A-15-16, *in* STATE BAR OF TEXAS JURY ISSUE SUBMISSION INSTITUTE (1985).

107. *E.B.*, 802 S.W.2d at 648.

108. 780 S.W.2d 851 (Tex. App.—San Antonio 1989, no writ).

by Excelo Building Maintenance, which created the unreasonable risk of harm to Martha Sanchez?

Question 2
Whose negligence, if any, of the persons or corporations named below proximately caused the occurrence in question?

a. Excelo Building Maintenance
b. Martha Sanchez[109]

The court held that Rule 277 did not require the trial court, on the pain of reversal, to submit the liability elements in one question instead of two and stated:

> [T]he two-question liability submission did not frustrate any of the purposes of broad-form questions. We hold that the trial courts have at least some discretion to determine the feasibility of broader submission, and that the court did not err in submitting two reasonably broad liability questions instead of one.[110]

Several years later, in a similar case in which the Texas Supreme Court held that it is feasible to submit premises liability cases in one liability question, the court considered, but did not resolve the question of whether a granulated submission in violation of Rule 277 would constitute reversible error. In *Keetch v. Kroger Co.*[111] the plaintiff claimed that Kroger was negligent in creating a dangerous condition on its premises or in failing to discover the condition if it was created by someone else, for whose conduct Kroger was not legally accountable. The trial court submitted the case in a series of four separate jury questions. The plaintiff complained about the multiple question form of submission of its premises condition theory. The court rejected the plaintiff's argument. Although the court concluded that a premises liability case can be submitted in one liability question accompanied by appropriate instructions in a case involving an invitee,[112] the court did not decide whether failure to submit the case in one liability question was reversible error because the plaintiff "did not provide the trial judge with any indication that her complaint was with the trial court's failure to submit in broad form."[113]

Thereafter in *H.E. Butt Grocery Co. v. Warner*,[114] the Texas Supreme Court directly addressed the question and decided that noncompliance with

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109. *Id.* at 852 n.1.
110. *Id.* at 854.
111. 845 S.W.2d 262 (Tex. 1992).
112. The court approved PJC 66.04 Premises Liability — Plaintiff as Invitee, 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 66.04 (1990), which provides:

> Did the negligence, if any, of those named below proximately cause the [occurrence] [injury] [occurrence or injury] in question?
> Answer "yes" or "no"
> for each of the
> following:
> Don Davis: _____
> Paul Payne: _____.

Id. at 266.
113. *Id.* at 267.
114. 845 S.W.2d 258 (Tex. 1992).

Rule 277's mandate for broad-form submission did not constitute harmful error. In that case, the plaintiff slipped in a puddle of water, chicken blood, and other fluids that had accumulated on the floor of an H.E.B. store. At trial, the plaintiff alleged that the store was negligent in failing to adequately maintain its floors in a safe condition, or in failing to pre-bag the chicken in a manner that would have reduced the amount of chicken blood that dripped on the store's floor. The trial court submitted the negligence claim in five questions which included only the plaintiff's first theory of liability. The plaintiff complained about the omission of its second theory, and about the multiple question form of submission of its premises liability theory. The court rejected the plaintiff's argument concerning the applicability of the second negligence theory of liability, holding that the plaintiff's "only potential cause of action is limited to a premises liability theory, which was submitted by the trial court."[115] The court then noted that the trial court should have submitted the premises liability question in broad-form because the plaintiff tendered a proper broad-form question with appropriate instructions.[116] Nevertheless, the court concluded that failure to submit the premises liability theory in broad-form did not constitute reversible error.[117] The court explained:

> Although submitted in granulated form, the jury questions contained the proper elements of a premises liability action. Because the charge fairly submitted to the jury the disputed issues of fact and because the charge incorporated a correct legal standard for the jury to apply, we hold that the trial court's refusal to submit Warner's tendered question and instructions did not amount to harmful error."[118]

In a subsequent opinion, the Texas Supreme Court indicated that granulated submissions may be harmful under limited circumstances. In *Westgate Ltd. v. State*[119] the government commenced condemnation proceedings against a landowner who owned a tract of land needed in part for a proposed highway expansion. After determining that the landowner could only recover damages on its statutory condemnation claim,[120] the court addressed the proper method of submission for the determination of statutory condemnation damages.[121] The trial court submitted two separate questions in order to establish the damages on the statutory condemnation claim.[122] One asked the value of the landowner's entire tract of land without considering the highway project and the other asked the value of the landowner's remaining land not taken by the government. The Texas Supreme Court held

115. *Id.* at 259.

116. *Id.*

117. *Id.*

118. *Id.*

119. 843 S.W.2d 448 (Tex. 1992).

120. The landowner sought to recover damages for inverse condemnation under the takings clause of the Texas Constitution. *See infra* notes 154-59 and accompanying text for discussion of the court's holding on this issue.

121. *Westgate*, 833 S.W.2d at 457.

122. *Id.*

that although the trial court submitted the proper measure of damages,[123] the damages "should have been submitted broadly as one question asking the difference in the pre- and post-taking value, rather than two separate questions."[124] Moreover, the trial court's failure to submit in broad-form constituted harmful error because the granulated submission "produced a demonstrably different result than if a broad-form question had been used."[125] The court explained:

> The difference in the before and after values found by the jury was $2,524,000. This difference was within the permissible range of damages supported by the evidence, and would have stood as the damages if a broad-form question had been given. However, the trial court, examining the jury's before-taking and after-taking answers separately, determined that the before-taking value was $210,000 lower than the evidence would support, and accordingly increased the damages to $2,734,000. The trial court's failure to submit in broad form thus increased the damages on the statutory condemnation claim by $210,000, and constituted harmful error.[126]

Although holding that the trial court committed harmful error in this case, the court noted that "[i]n many cases, the failure to submit questions in broad-form will not be reversible error."[127] After *Warner* and *Westgate*, it is clear that the court is retreating from an absolute broad-form submission requirement by reference to principles of harmless error. As discussed below, a further retreat from mandatory broad-form submission of liability may be preferable in many cases involving multiple legal theories to avoid other problems that could constitute reversible error.[128]

4. *Should or When Should Multiple Legal Theories Be Included in One Broad-Form Question?*

Problems of broad-form submission are particularly acute in cases that are tried on multiple legal theories. Must multiple theories of recovery be included in one broad-form question? Can a more refined submission be used to separate each legal theory into its own question?

The Texas Supreme Court has suggested recently that Rule 277 may not necessarily require the submission of only one broad-form "liability" question, but rather a multiple question submission may be allowed to avoid the risk of reversal in multiple theory cases. In *State Department of Highways and Public Transportation v. Payne*,[129] the plaintiff was injured when he fell into a drainage ditch while stepping off a culvert that ran perpendicular to and beneath a highway. The plaintiff filed suit against the State alleging that the culvert was both a special defect and a premise defect and that the State

123. *Id.*
124. *Id.*
125. *Id.* at 457.
126. *Id.* at 457-58.
127. *Id.* at 458.
128. *See infra* notes 129-223 and accompanying text.
129. 838 S.W.2d 235 (Tex. 1992).

had knowledge of the alleged defect and he did not. The State answered that the culvert was not a defect of any kind. Alternatively, the State asserted that the culvert was not a special defect and that under the provisions of the Tort Claims Act,[130] even if a premise defect existed, the State owed Payne the limited duty that a private landowner owes a licensee, i.e., the duty to use "ordinary care either to warn a licensee of, or to make reasonably safe, a dangerous condition of which the owner is aware and the licensee is not."[131]

The trial court submitted two questions to the jury about liability. The first asked:

> Did the negligence, if any, of the below named parties proximately cause the occurrence in question?[132]

The second question inquired about the comparative negligence of the parties. The questions submitted were accompanied by extensive definitions including a legal description of the duty owed by the State where a special defect exists.[133] The court of appeals held that the trial court's refusal to submit a jury question regarding the existence of a dangerous condition was proper because the instructions required the jury to find that a dangerous condition existed in order to find negligence.[134] The trial court also refused to submit the following question: "Do you find . . . that [Mr.Payne] had actual knowledge that the culvert was at the location in question . . . ?"[135] The court of appeals held that because this was a "special defect" case, the plaintiff's knowledge was relevant only to the issue of his contributory negligence, and because a contributory negligence question was submitted, the trial court did not err in refusing to submit the question.[136]

The Texas Supreme Court reversed, holding that the culvert was not a special defect, as determined by the lower courts, but rather a premise de-

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130. TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (Vernon 1986).

131. *Payne*, 838 S.W.2d at 237.

132. State Dept. of Highways & Pub. Transp. v. Payne, 781 S.W.2d 318, 320 (Tex. App.—Houston [1st Dist.] 1989), *rev'd*, 838 S.W.2d 235 (Tex. 1992).

133. The trial court gave the jury the following instructions:

> "GOVERNMENTAL LIABILITY": A governmental unit in the state is liable for personal injury and death so caused by a condition or use of tangible personal or real property if the governmental unit would, were it a private person, be liable to the claimant according to Texas law.
>
> "DUTY OWED: SPECIAL DEFECT": Where there is a special defect such as an excavation or obstruction on or adjacent to a highway, road, or street or where there is the absence or malfunction of a traffic sign, signal or warning device that is required by law, the governmental unit owes to the plaintiff a duty to warn of such special defect.
>
> The duty owed is a duty to use ordinary care to either warn of a dangerous condition or to make such dangerous condition reasonably safe, provided the governmental unit had knowledge of the dangerous condition, or through the exercise of ordinary care, should have had knowledge of the dangerous condition.
>
> "DANGEROUS CONDITION" means a condition other than normally connected with the use of the roadway, excavation or obstruction, and a person using ordinary care could not encounter such condition with safety.

Payne, 781 S.W.2d at 320.

134. *Id.* at 321.

135. *Id.*

136. *Id.* at 321-22.

fect.[137] The majority then concluded that the plaintiff failed to meet his burden to prevail on a premise defect theory, because he failed to obtain a finding that he lacked knowledge of the culvert.[138] The majority explained its decision in the following terms:

> The trial court's refusal to ask the question requested by the State constituted a clear refusal to submit a premise defect theory to the jury. We do not suggest . . . that the trial court should have submitted the case to the jury on specific questions rather than broad-form questions, as required by Rule 277, TEX. R. CIV. P. The issue is not whether the trial court should have asked the jury the specific question requested by the State; rather, the issue is whether the State's request called the trial court's attention to the State's complaint that no premise liability theory was submitted to the jury sufficiently to preserve the complaint for appeal . . . . The request not only objects to the omission of the theory, it suggests the missing language necessary to correct the omission. *The trial court should have included the missing element in its broad-form submission in an appropriate manner* . . . . Payne was not entitled to recover on his special defect theory as a matter of law. To prevail on his premise defect theory, Payne was required to obtain a finding that he lacked knowledge of the culvert. This element of his claim was not included in the broad-form charge which the trial court submitted to the jury . . . . Thus, the verdict does not support a judgment in Payne's favor. [139]

In a dissenting opinion, Justice Mauzy accused the majority of ignoring the policy concerns underlying the requirement of broad-form submission by stating that "under settled law, the trial court would have erred in *submitting*" the specific question requested by the state.[140] Based on Justice Cook's opinion in *E.B*, Justice Mauzy explained that broad-form submission reduces conflicting jury answers, thus reducing appeals and avoiding retrials. Under this method of reasoning, if an instruction is defective, the proper remedy is to correct the instruction, not to submit additional jury questions that will "muddle the charge and foster conflicting jury answers, increasing the likelihood of appeal and retrial."[141] Although Justice Mauzy's accusation begs the question somewhat because the majority did *not* suggest that the specific question be included as a separate submission, rather than as an instruction, the dissent does attempt to grapple with the problem of submitting multiple legal theories in a broad-form charge. It may be important to recognize that in these types of cases, broad-form submission may be inappropriate simply because one of the theories embraced in the charge is invalid. In *Payne* because the special defect theory was not available under controlling legal principles, the failure of the trial judge to modify the charge required reversal. Would the result differ if both the special defect and premise theories were covered in one broad-form submission? I doubt it.

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137. 838 S.W.2d at 238-39.
138. *Id.* at 241.
139. *Id.* at 239-41 (footnotes omitted; emphasis added).
140. *Id.* at 241-43 (Mauzy, J., dissenting).
141. *Id.* at 243.

Another premises liability case, *Keetch v. Kroger Co.*,[142] also presents the problem of how feasible it is to submit such an action in broad form. In that case, the plaintiff claimed that Kroger was negligent in creating a dangerous condition on its premises or in failing to discover the condition if it was created by someone else, for whose conduct Kroger was not legally accountable. The trial court submitted the case in a series of four separate jury questions that embraced only one of the plaintiff's liability theories. The plaintiff complained about the omission of its "negligent activity" theory and about the multiple question form of submission of its premises condition theory. The court rejected the plaintiff's argument about the applicability of the negligent activity theory[143] and concluded that a premises liability case can be submitted in one liability question accompanied by appropriate instructions in a case involving an invitee.[144] Nonetheless, the court did not decide whether failure to submit the case in one liability question was reversible error because the plaintiff "did not provide the trial judge with any indication that her complaint was with the trial court's failure to submit in broad-form."[145]

Payne, Keetch and *Warner* do not provide clear guidance on whether multiple legal theories should be submitted in one broad-form liability question, or on the proper standard of review when a broad-form question encompasses more than one theory of recovery but there is a problem with one of the theories under the law or the evidence. However, each of the cases suggests that if there is a problem with one or more of the legal theories subsumed in the general question, some type of corrective action will be necessary.[146]

Two other recent Texas Supreme Court decisions do demonstrate that when a broad-form submission allows a jury to decide the case on the basis of a theory that is legally flawed or that has no support in the probative evidence, reversal is required if the complaint is properly preserved. In *Religious of the Sacred Heart v. City of Houston*,[147] the court was presented with the substantive issue of whether the substitute facilities doctrine entitled an owner of a private school to compensation in a condemnation case measured

142. 845 S.W.2d 262 (Tex. 1992).

143. *Id.* at 264.

144. *Id.* at 267. The Court approved PJC 66.04 Premises Liability — Plaintiff Is Invitee, 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 66.04 (1990), which provides:

> Did the negligence, if any, of those named below proximately cause the [occurrence] [injury] [occurrence or injury] in question?
> Answer "yes" or "no"
> for each of the
> following:
> Don Davis: _____.
> Paul Payne: _____.

Id.

145. *Keetch*, 845 S.W.2d at 267.

146. Although it is arguable that premises liability cases are in an exceptional category, it is more sensible to recognize that not only has the broad-form submission controversy not been concluded, but that the Texas Supreme Court is currently developing the proper application of Rule 277 to complex cases in the context of premises liability litigation.

147. 836 S.W.2d 606 (Tex. 1992).

by the cost of purchasing substitute facilities. The trial court submitted the case to the jury on a single question:

> What do you find from a preponderance of the evidence was the reasonable cost on February 18, 1988, of land, if any, reasonably necessary to restore the remaining land and improvements at Duchesne Academy to substantially the same function and use that existed at Duchesne Academy before the City's taking of 1.479 acres of land and improvements thereon for construction and use of Chimney Rock Road?[148]

The condemnor objected to the charge on the basis that the substitute facilities doctrine was included in the broad-form submission.[149] Based on the court's substantive holding that the doctrine did not apply to a private landowner, the court held that the condemnor's objection to the submission of a jury question that embraced the invalid theory should have been sustained.[150] As a result, the court of appeals' reversal of the trial court's judgment was affirmed.[151] Although the Texas Supreme Court's opinion does not expressly articulate the principles of appellate review espoused in this article, it is clear that the court applied them. The inclusion of a theory in the charge that was legally invalid caused the reversal of the trial court's judgment.

In dissent, Justice Gonzalez argued that the court should have upheld the jury verdict as a proper broad-form submission on the topic of just compensation.[152] He reasoned that "because the court's broad form submission did not prescribe what basis—whether substitute facilities, cost to cure, or market value—the jury should use to reach its result . . . , the court of appeals erred in reversing the trial court's judgment based on the invalidity of the substitute facilities doctrine."[153] It is implicit in Justice Gonzalez's opinion that the inclusion of an invalid legal theory in a broad-form submission of multiple theories should not be a basis for reversal of the trial court's judgment. By the same token, it is implicit in the majority opinion that it should be reversible error when it cannot be determined whether the trier of fact based its verdict on the improper ground.

The second case is another condemnation case that also addresses the problem of the submission of a multiple theory case in one broad-form question. In *Westgate Ltd. v. State,*[154] the court determined that a landowner

148. *Id.* at 614.

149. *Id.* at 618.

150. *Id.* at 607.

151. *Id.* The court concluded that the condemnor did not have the burden to request the submission of a correct alternative measure of compensation because the question as submitted was defective in that it included the substitute facilities doctrine. *Id.* at 612-13.

152. *Id.* at 630 (Gonzalez, J., dissenting).

153. *Id.* Justice Gonzalez's reasoning process, which seems odd on its face, is actually more complex than it first appears. As his dissent also explains, the parties apparently tried the case on the basis of a "collective goal of restoring the school to its original pre-taking utility." *Id.* But the parties differed on what was necessary to accomplish this objective under the evidence. Under this method of analysis, the jury submission could be considered as a broad-form question that asked the jury "what amount would justly make [the private school] whole?" *Id.*

154. 843 S.W.2d 448 (Tex. 1992).

could not recover damages in an inverse condemnation case under the takings clause[155] where the government has not physically appropriated, denied access to, or otherwise directly restricted the use of the landowner's property.[156] In that action, the landowner may have pleaded two alternative legal theories in support of its claim for damages. First, the landowner could have pleaded that the government acted in an unreasonable manner in failing to warn it of the highway construction project and in delaying the commencement of condemnation proceedings. Alternatively, it may have pleaded that the government acted in bad faith to cause economic damage to the landowner.[157] Although the majority opinion and the dissent disagree on this point, the majority determined that the bad faith claim was not included in the jury charge because Westgate did not request its submission.[158] Provocatively, the court noted the following with respect to the inclusion of both theories in one broad-form jury submission.

> Westgate could have requested jury instructions on bad faith and negligence. Although we adhere to the principles of broad-form submission, *see* Texas Department of Human Services v. E.B., 802 S.W.2d 647, 649 (Tex. 1990), TEX. R. CIV. P. 277 is not absolute; it mandates broad-form submission "whenever feasible." Submitting alternative liability standards when the governing law is unsettled might very well be a situation where broad-form submission is not feasible.[159]

Although the settled or unsettled character of the law that is included in the jury charge probably should make very little difference to a reviewing court if the law becomes settled in such a way that all of the alternative theories are validated under the law and the evidence on appeal, the inclusion of an invalid theory in one broad-form submission may make a large difference.[160]

If *E.B.* is interpreted as a multiple legal theory case and if its dicta is taken literally, it would appear that a broad-form question is required to embrace multiple theories.[161] Under this analysis, in a case involving three liability theories the jury might be asked, "Do you find by a preponderance of the evidence that the defendant's conduct was negligent or fraudulent or a breach of the duty of good faith and fair dealing?" But subsequent decisions

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155. TEX. CONST. art. I, § 17.

156. *Westgate*, 843 S.W.2d at 452.

157. Westgate claimed in its answer and counterclaim that:

> The Condemnees told the City and State on numerous occasions that the threatened condemnation was destroying their ability to lease their shopping center to prospective tenants. In spite of this knowledge, the Condemnors continued to fail and refuse to condemn the premises, to compensate the Condemnees, or to otherwise act to mitigate Condemned's losses . . . . This [conduct] was undertaken by the Condemnors deliberately and with full knowledge of the injuries being inflicted on these Cross-Plaintiffs and in conscious and contemptuous disregard for the rights and interests of these litigants.

Id. at 455 n.5.

158. *Id.*

159. *Id.* at 456 n.6.

160. Of course, because of the "ten jurors" problem, that *E.B.* did not credit, it may still be argued that it is not feasible to submit well-established multiple, legal theories in broad-form.

161. *See supra* notes 73-82 and accompanying text for discussion of Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647 (Tex. 1990).

suggest that a more refined formulation is at least permissible, such that the different legal theories could be submitted with each theory having its own "broad-form" question.[162] Although the "ten jurors" problem did not trouble the court in *E.B.*, would the court take the same position if five jurors believed the defendant was negligent, but not otherwise culpable, and five jurors believed there was fraud, but no negligence or other misconduct?

The "ten jurors" problem takes on an entirely different dimension when the case involves multiple legal theories as distinguished from multiple factual theories that are subsumed within one cause of action. Imposing liability for negligence when five jurors believe that the defendant was negligent in his speed, but not otherwise negligent, and five other jurors believe that the defendant was negligent in failing to keep a proper lookout but not otherwise, is vastly different from imposing liability in tort because ten jurors in the aggregate believe that some type of tort occurred. The problem is even more striking when a single broad-form question covers both tort and contract theories of recovery.

Finally, even if the "ten jurors" problem is not considered a significant impediment in multiple theory cases, should Texas courts be troubled by a broad-form question embracing multiple theories, if one of the theories was improper under the law or the evidence? On the basis of the Texas Supreme Court decisions after *E.B.*, it appears that when the incorporation of multiple theories of liability in a general form of submission produces a verdict that cannot be analyzed and reviewed on appeal without presuming that a problem under the applicable law or the evidence did not contribute to the result, reversal should be required when that presumption is not reasonable because of the nature of the problem.

5. *What Is the Appropriate Standard of Review in Multiple Theory Cases?*

In determining how to deal with multi-theory cases, the impact of the review process and the added ease or difficulty of finding reversible error due to broad-form submission should be an important consideration. Specifically, before the broad-form controversy can be put to rest, the court must decide what effect does (or should) the review process have on the decision to submit a multiple theory case in one jury question? The threshold issue should be whether the case must be reversed when a broad-form question, encompassing multiple theories of liability, is given to the jury such that it is not possible to determine whether the jury may have decided the case on a ground of recovery or defense that is insupportable under the law or the evidence. Should the problem be ignored on appeal by assuming that the jury was not affected by it or should an appellate court refuse to assume that the charge problem was inconsequential? Although some Texas cases have

162. *See supra* notes 129-45 and accompanying text for discussion of State Dep't of Highways and Pub. Transp. v. Payne, 838 S.W.2d 235 (Tex. 1992) and Keetch v. Kroger Co., 845 S.W.2d 262 (Tex. 1992); *see also supra* notes 114-118 and accompanying text for discussion of H.E. Butt Grocery Co. v. Warner, 845 S.W.2d 258 (Tex. 1992).

recognized this problem, the issue has not been confronted squarely in the context of evaluating broad-form submission of multiple legal theories.

a. Texas Cases Addressing the Standard for Reviewing Broad-Form Liability Submissions

The Texas Supreme Court's opinion in *E.B.* provides some relatively opaque guidance on the subject of the appropriate standard of review of appellate complaints about the jury charge. After stating that broad-form submission must be used except in "extraordinary circumstances," the court announces that an "abuse of discretion" standard of review is applicable to these complaints.[163]

Of course, aside from the fact that there is a certain fundamental inconsistency between these two positions, the court's particular treatment of the standard of review leaves much to be desired because it is devoid of any discernable legal content. Nonetheless, prior to the court's subsequent opinions in *Payne* and *Westgate*, at a time when the court's focus was upon the question of combining multiple factual theories into one broad-form question, the Texas Supreme Court indirectly addressed the multiple theory problem in *Scott v. Atchison, Topeka & Santa Fe Railway*.[164] In *Scott*, the plaintiff alleged multiple factual theories of recovery, most of which were not supported by the evidence. The broad jury question (inquiring whether the defendant was negligent) was submitted based upon a petition alleging four specific acts of negligence, three of which were not supported by the evidence. In addition, the plaintiff proved seven acts of negligence that were not pleaded. The court reversed a judgment for the plaintiff because of the "wide variance between the pleadings and unpled facts and circumstances from which the jury could have inferred that the [Defendant] was negligent."[165]

The court indicated that one broad-form question could have been used if the trial court had properly drafted the question. The court gave the following guidance:

> Where multiple acts or omissions are alleged to be negligent, . . . the trial court should inquire only about those which are raised by both the pleadings and the evidence. Judicial compliance with this requirement does not necessarily mean the submission of separate questions with respect to each of such acts or omissions. On the contrary, compliance under the two alternative broader methods of submission authorized in Rule 277 can be accomplished very simply by listing the relevant acts or omissions . . . in a broad ultimate fact issue . . . or in a checklist form. Or, if the listing of the relevant acts or omissions in the broad ultimate fact issue should be cumbersome, complicating, or otherwise undesir-

163. *E.B.*, 802 S.W.2d at 649. The court provides: "The standard of review of the charge is abuse of discretion, and abuse of discretion occurs only when the trial court acts without reference to any guiding principle." *Id.*

164. 572 S.W.2d 273 (Tex. 1978).

165. *Id.* at 277.

able, the requirement may be met by a complementary instruction along the following lines:

> In your determination of the above question you shall consider only whether the railroad company was negligent in failing to have necessary culverts *or* sluices at or near [the bridge] *or* [here listing any other acts or omissions raised by the pleadings and the evidence upon the new trial].[166]

In a later opinion, the Texas Supreme Court significantly limited *Scott*'s reach, downplaying the problem related to a variance between pleadings, proof, and general form submissions.[167] In *Brown* the court stated that "[v]ariance between pleadings and proof has rarely been the source of harmful error. To be reversible the variance must be substantial, misleading, constitute surprise, and be a prejudicial departure from the pleadings."[168] The court added that the wide variance between the pleadings and proof in the *Scott* case would rarely occur declaring that "[a] case could hardly be conceived in which a variance could be wider than that found in *Scott*."[169]

The *Brown* court indicated that a lack of evidence will not necessarily be cause for reversal.[170] The court stated specifically that "we are not to be understood as holding that a broad submission of an issue will be reversed simply because one or more acts which contributed to the injury was not particularly pleaded or proved."[171] Although this language could be interpreted broadly to encompass a problem concerning one of the legal theories contained within the literal terms of a broad-form question, it is obvious from the multiple broad-form questions actually submitted by the trial court in *Brown* that the court did not have a multiple legal theory submission in one question in mind when the opinion was written. Perhaps the most sensible way to reconcile the court's statements in *Brown* with its subsequent opinions in *Payne* and *Westgate* would be to embrace an approach that treats multiple factual theories differently from multiple legal theories. It can be argued with reason that jurors are perfectly capable of rejecting factual theories of liability that have no support in the evidence even when a broad-form liability question authorizes an affirmative finding on the basis of a factual theory with the flawed evidentiary foundation.[172] Moreover, it is not as offensive to impose liability for a breach of a particular legal duty on the basis of the "ten jurors" problem in this situation.

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166. *Id.* at 277-78 (emphasis added).

167. Brown v. American Transfer & Storage Co., 601 S.W.2d 931 (Tex.), *cert. denied*, 449 U.S. 1015 (1980).

168. *Id.* at 937.

169. *Id.*

170. *Id.*

171. *Id.* at 938.

172. *See generally*, Lancaster v. Fitch, 239 S.W. 265, 271 (Tex. Civ. App.—Texarkana 1922), *aff'd on other grounds*, 246 S.W. 1015, 1016 (Tex. 1923); Griffin v. United States, 112 S. Ct. 466, 474 (1991) ("Jurors are not generally equipped to determine whether a particular theory of conviction submitted to them is contrary to law . . . . Quite the opposite is true, however, when they have been left the option of relying upon a factually inadequate theory, since jurors *are* well equipped to analyze the evidence . . . ."). *See supra* notes 10-13 and accompanying text for discussion of *Lancaster*.

But when a single jury question encompasses multiple legal theories, the analysis becomes more complex and the procedural choices are more difficult. Although it can also be argued that the jury is capable of rejecting a legal theory that has no support in the evidence, it cannot sensibly be contended that jurors are capable of distinguishing between valid legal theories and invalid theories when both have support in the evidence. Accordingly, when a jury question authorizes a jury to give an affirmative answer on the basis of a theory that has no legal foundation, such as the "special defect" theory in *Payne*, the "negligent activity" theory in *Keetch* or the flawed theories in *Sacred Heart* and *Westgate*, it should be presumed that the jury did take the theory into account. This may be particularly true where the "flawed" theory is in the forefront of a developing body of legal principles or when it is otherwise of a beguiling character from the general public's untutored legal perspective.

b. Texas Cases Addressing the Standard for Reviewing Broad-Form Damage Submissions

Despite the fact that the Texas courts have not directly addressed the flawed theory problem in the context of broad-form liability submissions, several cases have discussed the appropriate standard of review in the context of broad-form submissions on damages. In *National Fire Ins. Co. v. Valero Energy Corp.*,[173] the court submitted a broad-form damage question in the following terms:

[w]hat was the amount of such loss, if any, payable under the policy?[174]

The court of appeals held that the question was an example of proper broad-form submission.[175] However, despite the court's express holding that the defendant's failure to request an explanatory instruction in substantially correct wording waived its complaint about the failure of the trial judge to charge the jury on the proper measure of damages, because the generality of the damage inquiry permitted the jury to award damages for business interruption loss, the trial court's judgment was reversed.[176] The court of appeals explained its reasoning in the following way:

> Because the actual damage award of $10,000,000 (which was not submitted in separate items of damages) cannot be supported without an inclusion of damages for business interruption loss, and since we have found no evidence of business interruption loss in conformity with the contract formula for calculating business loss, we reverse the judgment of the trial court and remand the entire case for a new trial.[177]

In other words, the court of appeals concluded that the inclusion of a theory of damages that had no support in the evidence in the general damages question required reversal. However, because it appears that the ten

173. 777 S.W.2d 501 (Tex. App.—Corpus Christi 1989, writ denied).
174. *Id.* at 506.
175. *Id.* at 508.
176. *Id.* at 513.
177. *Id.*

million dollar figure could not be sustained on the basis of evidence of other compensable losses, there is no good reason to assume that the court of appeals would have considered the no evidence problem to be harmful under other circumstances. For example, if the jury could have reasonably found that the plaintiff suffered ten million dollars in damages based on evidence of other compensable losses, notwithstanding the business interruption loss component, the award probably would have been upheld. In this situation, it is ordinarily reasonable to presume that the jury reached its decision by considering the damage elements having support in the evidence, rather than on the basis of the unproven business interruption loss component. In other words, even if there is no evidence or insufficient evidence of some element or elements of damages pleaded, there is a principled and sensible basis for concluding that there is no reversible error if the overall damage award is not excessive.[178]

As discussed in the preceding section of this article, however, this is not the case if the general damage submission rests upon a flawed theory of liability that is the potential basis for at least a part of the factfinder's omnibus damage award. In *Wingate v. Hajdik*[179] the sole shareholder of a corporation sued a former shareholder for fraud, breach of fiduciary duty, and misappropriation of assets. The trial court found for the plaintiff on all three theories, but made a single award of damages predicated on multiple liability findings. The Texas Supreme Court held that the misappropriation of assets claim belonged to the corporation rather than the shareholder.[180] Consequently, the claim was legally flawed because the shareholder was not entitled to recover personally under the misappropriation theory. The court held that since the trial court failed to segregate the damages resulting from the misappropriation, the entire judgment must be reversed.[181] The court noted that "[h]ad the trial court segregated the damages resulting from [the defendant's] misappropriation of corporate assets from the damages recoverable on [the plaintiff's] personal causes of action, it would not be necessary to reverse the entire judgment."[182] In this situation, as the court's opinion suggests, it is more sensible to presume that the flawed legal theory did have an impact upon the damages awarded, regardless of whether the factfinder is

178. *See* Curry v. Girard, 502 S.W.2d 933, 934 (Tex. Civ. App.—Fort Worth 1973, no writ); *see also* Worsham Steel Co. v. Arias, 831 S.W.2d 81, 85 n.1 (Tex. App.—El Paso 1992, no writ) ("Insofar as the trial court failed to apportion actual damages among the four elements [of damages contained in the trial court's charge], a finding that the evidence is insufficient to support [one of these elements] serves to invalidate the jury's entire award for actual damages . . . because, at best, the record" does not support the overall damage award.); Baylor Medical Plaza Servs. Corp. v. Kidd, 834 S.W.2d 69, 79 (Tex. App.—Texarkana 1992, writ denied) (holding that although the jury issue did not specify the amount of damages awarded for each separate claim, there was legally and factually sufficient evidence as to one of the damage elements and the jury could conceivably have awarded the entire amount on this basis); Victory v. State, 158 S.W.2d 760, 765 (Tex. 1940) (presumption that judge as trier of fact based judgment on other evidence in the record).

179. 795 S.W.2d 717 (Tex. 1990).

180. *Id.* at 719.

181. *Id.*

182. *Id.* at 720.

a judge or a jury.[183]

A general damage submission is also problematic if it is unclear from the submission whether exemplary damages are supported by actual tort damages. In *Lovelace v. Sabine Consolidated, Inc.*,[184] the plaintiff submitted three theories of liability against the defendant joint venturer: breach of contract, fraud and breach of fiduciary duty. The plaintiff submitted separate liability questions on each of the three theories. However, the plaintiff requested only one actual damages question predicated on a "yes" answer to any liability question.[185] Further, the related instruction provided that exemplary or punitive damages could be awarded if the jury found "actual damages under one or more of the foregoing theories, and should further find that [the defendant] acted willfully in causing actual injury or damages to [the plaintiff]."[186] The jury found liability on all three theories, actual damages and punitive damages.

The court first noted that the plaintiff was required to prove tort damages, not contractual damages, to sustain the punitive damages award. Under this charge, there was no way to determine whether any actual damages were assessed on the tort claims. The court opined that since one of the underlying theories was not a tort theory and could not be a basis for an award of exemplary damages, the exemplary damages award must be reversed.[187] The court explained its holding in the following terms:

> From a reading of the issues and instruction above it is clear that the jury was not instructed to make the award of punitive damages contingent upon a finding of wrongful conduct under *all* the theories . . . it was only conditioned upon a finding of "one or more of the foregoing theories." The damages might very well have been awarded solely for the breach of the joint venture agreements. Furthermore, since we cannot determine from these special issues the dollar amount, if any, that was awarded for the torts of fraud and breach of fiduciary duty, we cannot determine whether the punitive damages are reasonable in relation to the actual damages in tort.[188]

The court of appeals also rejected the plaintiff's argument that the defendant

183. It should be noted, however, that if separate liability findings were made and if each liability theory had the same measure of actual damages, it would not be sensible to presume that the damages awarded were somehow tainted by the inclusion of a flawed theory. If "all roads lead to Rome" and it is clear that at least one of the proper routes was taken, the problem has become entirely theoretical. But if an award of exemplary damages is predicated on separate multiple liability findings, the problem may not be considered to be theoretical because of the nature of these damages. In this situation, it is more sensible to presume that the exemplary damages were increased because of the defendant's added culpability in the eyes of the factfinder.

184. 733 S.W.2d 648 (Tex. App.—Houston [14th Dist.] 1987, writ denied).

185. The plaintiff requested the following actual damage question:

> What sum of money, if any, if now paid in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate [the plaintiff], for the monetary losses, if any, which were proximately caused by the conduct of [the defendant] you have found above, if any?

Id. at 654.

186. *Id.*

187. *Id.* at 654-55.

188. *Id.* at 655.

could not complain about the exemplary damages award because it failed to object to the form of the damages issues by reasoning that "[a]n appellant cannot be held accountable for the failure of an appellee to secure separate jury findings upon which an accurate judgment could be based."[189]

The Texas Supreme Court faced a similar problem in *Wilgus v. Bond*,[190] in which the court upheld a general damage verdict predicated on multiple theories of liability even though it was not clear which damages related to each theory, but the court did so because the defendant made no objection to the damages question.[191] In *Wilgus*, the plaintiff recovered a jury verdict on four theories: breach of fiduciary duty, breach of the tort duties of good faith and fair dealing, conversion and fraud. The trial court then submitted the following questions on damages:

> What sum of money if paid now in cash would reasonably compensate the Plaintiff, Wilgus & Bond, Inc., for its damages, if any? What sum of money if paid now in cash would reasonably compensate Plaintiffs, Dick and Peggy Wilgus, individually for their damages, if any?[192]

Based on the jury's answers to these questions, the court rendered judgment for the plaintiffs for both actual and exemplary damages. In an unpublished opinion, the court of appeals reversed, holding that the trial court had erred by rendering judgment based on answers to damage questions that failed to relate the elements of damage to specific liability theories of recovery.[193]

Reversing the court of appeals, the Texas Supreme Court opined that the defendant's failure to object to the unsegregated damage issues constituted a waiver.[194] The court stated that under those circumstances the trial court did not commit "reversible error by submitting damage issues which did not specifically relate the various elements of damages to the underlying theories of recovery."[195]

The Texas Supreme Court has also held that a general damage submission was problematic but that the defendant had waived any complaint about the form of submission in *American National Petroleum Co. v. Transcontinental Gas Pipe Line Corp.*[196] In that case, the plaintiffs sued a pipeline company claiming breach of a claimed tort duty of good faith in the performance of a contract together with a claim of tortious interference with a related contract with a third party. The jury found for the plaintiffs on each of the claims which were submitted in separate liability questions and awarded actual damages in response to a general damages question on the claimant's

189. *Id.* Although writ was denied in *Lovelace*, ultimately the Texas Supreme Court concluded that a failure to object before the submission of the case to the jury about the court's failure to segregate damages between the underlying theories of recovery would have waived the complaint. *See* Birchfield v. Texarkana Memorial Hosp., 747 S.W.2d 361, 368 (Tex. 1987) (by failing to object, defendant waived argument that damages question did not specifically relate to particular grounds of recovery).

190. 730 S.W.2d 670 (Tex. 1987).

191. *Id.* at 672.

192. *Id.* at 671.

193. *Id.* at 672.

194. *Id.*

195. *Id.*

196. 798 S.W.2d 274, 278 (Tex. 1990).

actual damages, plus sixteen million dollars in exemplary damages for the pipeline company's "malicious" conduct.

The Texarkana Court of Appeals held that the pipeline company had a contractual obligation but did not have a tort duty of good faith and fair dealing in the performance of the contract.[197] Thus, the plaintiffs were limited to their tortious interference claim to sustain the punitive damages award. The plaintiffs, however, failed to obtain an independent finding of actual damages referable to that cause of action. In other words, the actual damages found by the jury were not all referable to a tort theory that would support an exemplary damages award. For this reason, the court of appeals concluded that the failure to obtain a discrete finding of actual tort damages, which is a prerequisite to the recovery of exemplary damages, required reversal of the trial court's judgment for exemplary damages.[198]

The plaintiffs attempted to argue that during the charge conference the defendant waived the need for submission of an actual damages question relating to the tortious interference claim. The court of appeals disagreed with the plaintiffs' waiver argument and held that it was the plaintiffs' duty "to allege, prove and secure jury findings not only on the *existence* but also on the *specific amount* of actual damages sufficient to support the award of exemplary damages."[199]

The Texas Supreme Court reversed the court of appeals and held that defense counsel waived any error concerning the nonsubmission of a separate tort damages question for the tortious interference claim.[200] The court reasoned that the "failure to object to the omission of a tort damages question as part of that cluster alone waived the requirement of submitting the correct damages issue to the jury."[201] It seems clear, however, that the court would have viewed the matter differently if the defendant had not admitted that the same damages were sustained under both the tortious interference and good faith and fair dealing theories. The clear implication of the court's opinion is that, absent waiver, the legal problem of treating the good faith and fair dealing claim as a tort claim, rather than as a contract claim, could not be ignored because the jury could have awarded some and perhaps all of the compensatory damages, as contract rather than tort damages, thereby making it difficult, if not impossible, for a reviewing court to determine whether a reasonable relationship existed between the two awards.

These damage cases are perfectly compatible with the viewpoint expressed above that jurors may be presumed capable of dealing with and discarding theories that have no evidentiary support, but not more seriously flawed broad-form submissions that embrace invalid grounds of recovery or defense.

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197. Transcontinental Gas Pipeline Corp. v. American Nat'l Petroleum, 763 S.W.2d 809, 820 (Tex. App.—Texarkana 1988), *rev'd*, 798 S.W.2d 274 (Tex. 1990).

198. *Id.*

199. *Id.* at 821.

200. 798 S.W.2d at 278.

201. *Id.*

C. SHOULD THE FLAWED THEORY PROBLEM BE TREATED AS HARMLESS?

Regardless of whether the multiple theory problem is considered in the context of multiple liability theories or in the context of the relationship of particular liability theories to damage awards, the foregoing Texas cases demonstrate that the problem of being unable to tell what role a flawed legal theory played in the factfinder's analysis and award may require reversal. The federal courts in this region and elsewhere have handled this question by requiring a reversal if "the giving of an instruction has made it possible that the jury *may* have found against a party on a ground for which there was no evidence."[202] In one case, a police officer sued several city officers for civil rights violations. The plaintiff alleged that he was dismissed due to his involvement in constitutionally protected activities. The district court instructed the jury that it was to answer "yes" if it found "*any one* [of the three listed activities] was a substantial motivating factor" in the decision to fire the plaintiff.[203]

One of the three activities listed was not supported by the evidence. On appeal, the Fifth Circuit held that the verdict must be reversed because it was not possible to determine whether the jury's verdict rested on the two supported grounds or the one unsubstantiated claim.[204] The court cited the rule established by the United States Supreme Court in *Zant v. Stephens*[205] as follows:

> [A] general verdict *must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those grounds is insufficient, because the verdict may have rested exclusively on the insufficient ground.* The cases in which this rule has been applied all involved general verdicts based on a record that *left the reviewing court uncertain as to the actual ground on which the jury's decision rested.*[206]

In *Dougherty v. Continental Oil Co.*[207] the court observed that an interrogatory dependent on multiple theories is really no better than a general verdict:

> Such an interrogatory presents the same dilemma as a general verdict

202. Neubauer v. City of McAllen, Tex., 766 F.2d 1567, 1575 (5th Cir. 1985).
203. *Id.* at 1572 n.3.
204. *Id.* at 1576-77.
205. 462 U.S. 862 (1983).
206. *Neubauer*, 766 F.2d at 1576 (citation omitted) (emphasis added). *See also* Sunkist Growers v. Winkler & Smith Citrus Prod. Co., 320 U.S. 19, 29-30 (1962) (where one theory upon which the general verdict may have rested was erroneous, the entire verdict must be reversed because if "upon any one issue error was committed, either in admission of the evidence or charge of the court, the verdict cannot be upheld"). Several cases have been reversed on this basis. *See e.g.*, Kicklighter v. Nails by Jannee, Inc., 616 F.2d 734, 742 (5th Cir. 1980) ("[a]lthough plaintiff asserted several theories of recovery, and although the *res ipsa loquitur* charge would relate to only one, the jury returned a general verdict in favor of the plaintiff . . . [W]e, therefore, do not know on what basis the jury reached its verdict"); Vandercook & Son, Inc. v. Thorpe, 344 F.2d 930 (5th Cir. 1965) (where case was submitted on both negligence and implied warranty theories, but there was no evidence of negligence, reversal of judgment on general verdict for plaintiff was required even if the jury could have properly found for plaintiff on the warranty theory alone).
207. 579 F.2d 954 (5th Cir. 1978).

> submitted to the jury on two theories of law, one of which is incorrect. Since we are unable to say whether the jury based its answer on a possibly correct theory of law . . . or an incorrect theory . . . we would have no alternative but reversal.[208]

Not surprisingly, the Eleventh Circuit Court of Appeals has taken the same position. In *Royal Typewriter Co. v. Xerographic Supplies*,[209] claims were made against Royal seeking to recover damages for alleged breaches of warranties, fraud and tortious interference with business relations. The trial judge submitted all of the theories to the jury in a general charge.[210] Although the court of appeals was urged to apply the "two-issue" rule adopted in Florida[211] and elsewhere,[212] it explained that it is well settled in the circuit that if "the judge accepts a general verdict in a case containing multiple issues, the verdict is immune to attack only as long as the evidence under each count is sufficient to authorize the result."[213] Accordingly, because the trial court erroneously submitted several of the multiple claims, the case was reversed and remanded for retrial.[214]

Federal procedural law does not, however, require an automatic reversal when a verdict could have been based on a flawed theory. If the court of appeals ". . . is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it," reversal is not required.[215] For example, if the record as a whole shows that it would be unreasonable to presume that the flawed theory affected the verdict, the case is not subject to

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208. *Id.* at 960 n.2. *See also* Woods v. Sammisa Co., 873 F.2d 842, 849 (5th Cir.), *cert. denied*, 110 S. Ct. 853 (1989) ("when two claims have been submitted to the jury, either on a general verdict or . . . in a single interrogatory, a new trial may be required if one of the claims was submitted erroneously unless the appellate court is reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it").

209. 719 F.2d 1092 (11th Cir. 1983).

210. *Id.* at 1098.

211. Under this rule, if a claimant does not request the separate submission of multiple theories, an appellate court will not grant a new trial where the jury has rendered a general verdict and the appellate court finds no error as to one of the theories on which the jury was instructed. *See* Colonial Stores, Inc. v. Scarbrough, 355 So.2d 1181, 1185-86 (Fla. 1977) explaining that the "two-issue" rule is a ". . . rule of policy, designed to limit the scope of proceedings on review." The Florida Supreme Court also explains that

> . . . the remedy is always in the hands of counsel. Counsel may simply request a special verdict as to each count in the case . . . Had petitioners in the instant case requested special verdicts and objected to submission of a general verdict form to the jury, it would have been necessary for the [court of appeals] to determine the sufficiency of the evidence to sustain the false imprisonment count as well as the malicious prosecution count. If there was error as to either count, the district court should then remand the case for a new trial as to both counts.

Hence, it is clear that the "two-issue" rule is very similar to the approach taken to damages submissions under current Texas law as explained in the preceding section of this article.

212. The "two-issue" rule appears to have been adopted in a number of jurisdictions. *See, e.g.*, Berger v. Southern Pac. Co., 300 P.2d 170 (Cal. [1st App.] 1956); Harper v. Henry, 169 N.E.2d 20 (Ohio App. 1959); Larriva v. Widmer, 415 P.2d 424 (Ariz. 1966).

213. 719 F.2d at 1098.

214. *Id.* at 1107.

215. E.I. Du Pont de Nemours v. Berkley & Co., 620 F.2d 1247, 1258 n.8 (8th Cir. 1980); *see also* Braun v. Flynt, 731 F.2d 1205, 1206 (5th Cir. 1984); Collum v. Butler, 421 F.2d 1257, 1260 (7th Cir. 1970) ("To permit . . . issues which occupied positions of . . . relative insignificance in the trial court to be treated now as so important as to make their submission to the jury prejudicial would not serve the interest of justice.").

reversal.[216]

In the punitive damage context, uncertainty is tolerated hardly at all, as seen, for example, in *Robertson Oil Co. v. Phillips Petroleum Co.*[217] The Eighth Circuit determined that, under applicable law, three or four causes of action underlying a single exemplary damage award were insufficient support for the award.[218]

Recognizing that punitive damages are closely intertwined with assessment of a defendant's conduct (since the determination includes consideration of the nature, extent, and enormity of the wrong-doing, as well as the motive actuating, and the degree of calculation involved, in the defendant's conduct), the Eighth Circuit reasoned that the punitive damage award could not stand without resolution in the charge of the precise conduct the jury intended to punish and deter. Accordingly, the court held:

> Because the punitive damage issue was submitted in the form of a general verdict . . . we cannot ascertain what conduct of [defendant] was determined by the jury to merit punitive damages. Some or all of the punitive damage award may have rested upon theories improperly submitted to the jury. Thus . . . we have no alternative but to reverse the punitive damage award and remand the issue to the district court.[219]

Of course, these problems do not exist if all of the claims in the general charge are legally viable and sufficiently supported by the evidence. For example, in *Olney Savings & Loan Ass'n v. Trinity Banc Savings Ass'n*,[220] the trial court posed a general question asking whether the defendant had engaged in fraud or negligent misrepresentation. The court of appeals upheld the question as proper because each claim was properly supported by the evidence.[221]

The development of a proper approach to the broad-form question issue warrants a reconsideration of the potential problems associated with the *E.B.* decision. The inclusion of multiple theories of liability in one broad-form question presents significant problems in the administration of civil justice when one or more of the multiple theories is legally flawed or has no support in the evidence. As explained above, the inclusion of invalid legal theories has a strong potential for misleading the trier of fact and should give rise to a presumption of harm, especially when the flawed theory has support in the evidence. Under these circumstances and perhaps in other instances when a reviewing court cannot be "reasonably certain" that the verdict was not tainted by the inclusion of the flawed theory in the charge on the basis of the entire record, reversal should be considered. The method of analysis embraced by the Supreme Court of Texas in *Island Recreational Develop-*

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216. Braun v. Flynt, 731 F.2d 1205, 1206 (5th Cir. 1984) (when there was no evidence of invasion of privacy by "appropriation" and the "entire focus of Mrs. Braun's case was . . . that the publication of her picture created a false impression of her and damaged her reputation," inclusion of appropriation theory in broad-form submission did not constitute reversible error).

217. 871 F.2d 1368 (8th Cir. 1988).

218. *Id.* at 1376.

219. *Id.*

220. 885 F.2d 266 (5th Cir. 1989).

221. *Id.* at 271.

ment Corp. v. Republic of Texas Savings.[222] should be applied to determine whether the inclusion of the flawed theory in the broad-form submission is reversible. As the Court explains:

> To determine whether an alleged error in the jury charge is reversible, the reviewing court must consider the pleadings of the parties, the evidence presented at trial, and the charge in its entirety. Alleged error will be deemed reversible only if, when viewed in the totality of these circumstances, it amounted to such a denial of the rights of the complaining party as was reasonably calculated and probably did cause the rendition of an improper judgment.[223]

Under this analysis, *E.B.*'s policy rationale for the required use of broad-form questions, i.e., the avoidance of unnecessary appeals and retrials, will be promoted, but not at the expense of persons who may have been held liable on the basis of a flawed legal theory.

D. Particular Types of "Complex" Cases

The next section of this article surveys the reported case law concerning broad-form submission of jury questions in a number of substantive areas with a view toward demonstrating that broad-form submission is ordinarily feasible even when the underlying law is complex and multifaceted. Of course, the fact that a broad-form submission can be devised in complex cases does not mean that it should be presumed that the inclusion of a flawed theory probably did not cause the rendition of an improper judgment.

1. Premises Liability Cases

The principal reason why the broad-form submission in premises liability cases grounded in negligence has been so controversial is that the law is somewhat more complex in these cases than in other negligence actions. Texas recognizes three categories of plaintiffs in premises liability cases. If the basic liability elements of a slip and fall case are submitted in one broad question, it must be made clear to the jury that the law in a slip and fall case is more complicated than the law in a car wreck case. The essential elements of an invitee's slip and fall case are:

1. Actual or constructive knowledge of some condition on the premises by the possessor of land;
2. That the condition posed an unreasonable risk of harm;
3. That the possessor of the land did not exercise reasonable care to reduce or eliminate the risk; and
4. That the failure to use such care proximately caused the plaintiff's injuries.[224]

A lesser degree of care is owed to trespassers and licensees.[225] As a matter of substantive law, these plaintiffs are required to prove that they did not know

222. 710 S.W.2d 551 (Tex. 1986).
223. *Id.* at 555.
224. Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 296 (Tex. 1983).
225. *See* State v. Tennison, 509 S.W.2d 560, 562 (Tex. 1974).

about the dangerous condition and the premises owner had actual knowledge.[226]

Submissions in slip and fall cases have presented problems since broad-form submission was adopted in negligence actions. In *Hernandez v. Kroger, Co.*[227] the Texas Supreme Court, in a per curiam opinion, appeared to approve a type of granulated submission, as follows:

Question No. 1

Did The Kroger Co. know, or in using ordinary care should it have known, that moisture would be tracked into the foyer of its stores causing an unreasonable risk of harm to its customers?

Question No. 2

On the occasion in question did The Kroger Co. fail to use ordinary care to reduce or eliminate such risk by the use of absorbing floor rugs in its foyer?

Question No. 3

Was such failure a proximate cause of injury to Lera Hernandez?

Question No. 4

On the occasion in question did The Kroger Co. fail to give such warning of such risk as would have been given by a person using ordinary care?

Question No. 5

Was such failure a proximate cause of injury to Lera Hernandez?

The court held that the requested issues were in substantially the same form as the essential elements of a slip and fall case as outlined in *Corbin v. Safeway Stories, Inc.*[228]

The Corpus Christi Court of Appeals followed the *Hernandez* holding in *Physicians & Surgeons General Hospital v. Koblizek Co.*[229] Specifically, the court of appeals held that the trial court erred in submitting the case to the jury based upon general negligence principles, rather than the method of submission set forth in *Hernandez.*[230] The trial judge was required to ask a specific, specialized question about whether the premises owner knew or should have known about the dangerous condition because that was an essential element of the plaintiffs' case.[231] Similarly, in *Skaggs Alpha Beta, Inc. v. Nabhan,*[232] the plaintiff sued a department store because of a blow to the head delivered from a sign hanging over the meat counter. A broad-form question, "[w]as the manner in which the defendant hung the sign negligence as herein defined?," and an inquiry as to proximate cause, together with the usual definitions of negligence, ordinary care and proximate cause were submitted.[233] The El Paso court, citing *Koblizek*, stated that "[i]t is

226. *Id.*
227. 711 S.W.2d 3 (Tex. 1986).
228. *Id.* at 4 (citing Corbin v. Safeway Stores, Inc., 648 S.W.2d 292 (Tex. 1983)).
229. 752 S.W.2d 657 (Tex. App.—Corpus Christi 1988, writ denied).
230. *Id.* at 659-60.
231. *Id.* at 660.
232. 808 S.W.2d 198 (Tex. App.—El Paso 1991, no writ).
233. *Id.* at 200.

clear that cases involving liability for on premises activities are properly charged as typical negligence cases."[234] In *Nabhan*, the defendant actually created the hazard as opposed to *Koblizek*, where a third party created the hazard.

It is "feasible" (possible) to submit a slip and fall case to the jury as follows:

Question

Whose negligence, if any, do you find from a preponderance of the evidence was a proximate cause of the occurrence made the basis of this suit?

(a) Joe Foster Management Company

(b) Bill Henson

For example, in *Prudential Insurance Co. of America v. Henson*,[235] the court expressly approved the above one question submission of a slip and fall case, accompanied by an instruction that stated the gist of the *Corbin* elements.[236] This question is similar to the question recommended in Pattern Jury Charge ("PJC") section 66.04.[237] The recent decision in *State Department of Highways & Public Transportation v. Payne* indicates that broad-form submission of premises liability cases is feasible, despite the complexity of the substantive law.[238] In *Payne*, the Texas Supreme Court held that it was reversible error to impose liability on a premise defect theory when a required element of the claim was not included in the broad-form charge that the trial court submitted to the jury.[239] Furthermore, according to the PJC, the following broad-form question would be proper in a premises liability case in which the plaintiff was a licensee:

With respect to the condition of the premises, [Defendant] was negligent if —

a. the condition posed an unreasonable risk of harm, and

b. [Defendant] had actual knowledge of the danger, and

c. [Plaintiff] did not have actual knowledge of the danger, and

d. [Defendant] failed to adequately warn [Plaintiff] of the condition or make that condition reasonably safe.

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

[Defendant]

[Plaintiff][240]

The customized submission for a licensee case would be combined with the standard definitions of negligence, ordinary care, and proximate cause.[241]

This method of addressing the legal complexity of a claim in the accompanying definitions and instructions, rather than by the use of multiple ques-

234. *Id.* at 201.

235. 753 S.W.2d 415, 416 (Tex. App.—Eastland 1988, no writ).

236. *Id.* at 417.

237. 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 66.04 (2d ed. 1990).

238. 838 S.W. 2d 235, 239 (Tex. 1992). See *supra* notes 128-40 and accompanying text for additional discussion of *Payne*.

239. *Id.* at 241.

240. 3 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 66.05 (2d ed. 1990).

241. *Id.* 66.05 cmt.

tions is also illustrated by the Dallas court's opinion in *Barham v. Turner Construction Co. of Texas*.[242] In *Barham*, the plaintiff sued a general contractor for the action of its subcontractor for a dangerous condition arising out of the performance of certain work by the subcontractor. The trial court defined negligence of the general contractor to mean "the failure to use ordinary care in the exercise of its control, if any, over the details of the work performed by [the subcontractor/plaintiff's employer]."[243]

The trial court refused the plaintiff's tendered definition of negligence found in the PJC and refused to submit the plaintiff's tendered issues inquiring 1) whether the general contractor had a right to control the details of the subcontractor's work and 2) whether the general contractor actually exercised control. The plaintiff also complained that the definition of negligence was an improper comment on the weight of the evidence because it excluded consideration of the negligence of the general contractor in failing to furnish safe materials, a safe work place and adequate inspection. On appeal, the court upheld the submission, stating that the definition of negligence placed the relevant issue before the jury.[244]

2. *Submission of DTPA Claims*

Broad-form submission has been used for years in DTPA actions. The "laundry list" of section 17.46(b) of the DTPA contains twenty-three subsections designed to prohibit specific types of unfair trade practices.[245] If the jury finds that one of the listed acts or practices occurred, it is an unlawful deceptive trade practice as a matter of law. In *Brown v. American Transfer and Storage Co.*[246] the Texas Supreme Court approved the following submitted questions:

> *Question No. 1*
>
> Do you find from a preponderance of the evidence that defendant, American Transfer and Storage Company, represented to Plaintiff, Raymond Brown, that the moving services of American Transfer & Storage Company would include benefits and characteristics which they did not include?
>
> *Question No. 2*
>
> Do you find from a preponderance of the evidence that the representation or representations inquired about in Special Issue No. 1 was a producing cause of any damage to Raymond Brown?
>
> *Question No. 3*
>
> Do you find from a preponderance of the evidence that defendant, American Transfer & Storage Company, represented to Plaintiff, Raymond Brown, that the moving services of American Transfer & Storage

242. 803 S.W.2d 731 (Tex. App.—Dallas 1990, writ denied).

243. *Id.* at 734.

244. *Id.* at 737 (citing Freedom Homes of Texas, Inc. v. Dickinson, 598 S.W.2d 714, 719 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (trial court did not err in refusing requested issues and instructions where issues were improper or were already included)).

245. TEX. BUS. & COM. CODE ANN. § 17.46(b) (Vernon 1987).

246. 601 S.W.2d 931 (Tex. 1980), *cert. denied*, 449 U.S. 1015 (1980).

Company were of a particular standard, quality or grade, when in fact they were not?

Question No. 4

Do you find from a preponderance of the evidence that the representation or representations inquired about in Special Issue No. 3 was a producing cause of any damage to Raymond Brown?[247]

The court emphasized that broad-form submissions were appropriate in DTPA litigation, stating that while issues in DTPA cases for violations of section 17.46(b) should be submitted "in terms as close as possible to those actually used in the statute[,] [t]he language of the statute may be altered somewhat to conform the issue to the evidence of the case."[248] The broad-form submission in *Brown* was proper because the submitted issues followed closely the wording of the statute with alterations or deletions to conform the issues to the pleadings and evidence.

Consistent with the mandate of Rule 277 and Texas Supreme Court decisions, it is possible to combine all statutory violations and causation into a single broad question.[249] For example, in a suit involving allegations and proof that an insurer misrepresented the nature of the coverage provided by a policy purchased by its insured, the following question could be used:

Was any conduct of Insurer a producing cause of damages to Plaintiff? Consider the following conduct, if any, and none other:

Representing that its services had characteristics, benefits, or qualities that it did not have. Representing that its services were of a particular quality or grade if they were of another.

Representing that the insurance policy involved rights, remedies or obligations that it did not have or involve.

Failing to disclose information about services that was known at the time of the transaction with the intention to induce another into a transaction.[250]

In *Holland Mortgage & Investment Corp. v. Bone*,[251] a case that involved misrepresentations about the propensity of a house to flood, the court of appeals approved the following combined liability submission of DTPA sections 17.46(b)(5) and 17.46(b)(7):

Do you find from a preponderance of the evidence that Defendant Holland Mortgage Company represented that the Bone residence:
(a) had characteristics which it did not have, or
(b) was of a particular quality when it was not.[252]

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247. American Transfer & Storage Co. v. Brown, 584 S.W.2d 284, 294 (Tex. Civ. App.—Dallas 1979), *rev'd*, 601 S.W.2d 931 (Tex. 1980).

248. *Brown*, 601 S.W.2d at 937.

249. *See generally* David F. Bragg, *The Court's Charge in DTPA Cases*, 18 TEX. TECH L. REV. 113, 130-31 (1987); *DTPA Pattern Jury Charges*, Vol. 4, at L-5.

250. *See* 4 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 102.01-.05 (1990).

251. 751 S.W.2d 515 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

252. *Id.* at 518; *see* TEX. BUS. & COM. CODE §§ 17.46(b)(5), (7) (Vernon 1987).

3. *Submission of Insurance Bad Faith Cases*

a. Two Roads to Recovery

Bad faith claims can be grounded both in the common law duty of good faith and fair dealing and as a DTPA claim based on violation of article 21.21 of the Texas Insurance Code.[253] The damages will vary depending on which theory is used. Under the DTPA, a plaintiff can get both attorneys' fees and treble damages.[254] In cases where the actual damages are high, a DTPA claim may result in the largest amount of overall damages. On the other hand, a successful plaintiff can get exemplary damages under a claim based on the common law duty of good faith and fair dealing which may exceed treble damages if actual damages are relatively low.

b. DTPA Grounded Claims

Bad faith claims may fall under the DTPA *if they violate* article 21.21 of the Texas Insurance Code.[255] The Texas Supreme Court has held that a finding that the insured failed to exercise good faith in processing the plaintiff's claims supported recovery under article 21.21, section 16 of the Texas Insurance Code and stated a cause of action for unfair claims settlement practices under the DTPA.[256]

The submission of such claims could be accomplished as with other DTPA claims.[257] Thus, it is possible to combine a laundry list of possible violations into a single broad-form liability question. This question may include several listed practices in addition to the bad faith claim. For example, in a suit involving allegations and proof that an insurer violated article 21.21 of the Texas Insurance Code, the following question could be used:

> Did the [Insurer] engage in any unfair or deceptive act or practice?
> Consider the following conduct, if any, and none other:
> Engaging in any false, misleading, or deceptive acts or practices.
> Making, or directly or indirectly causing to be made, any assertion, representation, or statement with respect to insurance that was untrue, deceptive, or misleading.
> Not attempting in good faith to effectuate a prompt, fair, and equitable settlement of a claim when liability has become reasonably clear.[258]

c. Common Law Duty of Good Faith and Fair Dealing

In the spirit of the *E.B.* holding,[259] it is plausible that the following broad-

253. *See* Vail v. Texas Farm Bureau Mut. Ins. Co., 754 S.W.2d 129 (Tex. 1988) (bad faith claims may fall under the DTPA); TEX. INS. CODE ANN. art. 21.21 (Vernon 1981).

254. TEX. BUS. & COM. CODE § 17.50 (Vernon 1987).

255. *Vail*, 754 S.W.2d at 134.

256. *Id.* at 135-36; *see* TEX. INS. CODE ANN. art. 21.21, § 16 (Vernon Supp. 1992).

257. *See supra* text accompanying notes 244-51 for discussion of DTPA claim submissions.

258. *See* 4 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 102.15, 102.17, 102.20 (1990).

259. Texas Dep't of Human Servs. v. E.B., 802 S.W.2d 647 (Tex. 1990); *see supra* notes 73-82 and accompanying text for discussion of *E.B.*.

form submission would be proper for a claim based on violation of the common law duty of good faith and fair dealing:

> Do you find from a preponderance of the evidence that the insurer breached its duty of good faith and fair dealing to the insured by denying or delaying payment of the claim?

In one opinion, the First District Court of Appeals upheld a similar submission in a case involving worker's compensation claims.[260] The trial court submitted the following question:

> Do you find from a preponderance of the evidence that [Texas Employers Insurance Association] failed to deal fairly and in good faith when it denied payment of weekly worker's compensation benefits to Howell Puckett?[261]

The court of appeals upheld the submission, noting that the question and related instructions tracked the Texas Supreme Court's language setting forth the elements of a bad faith claim in *Arnold v. National County Mutual Fire Insurance Co.*[262]. The *Puckett* court noted the similarity between the trial court's submission and the Pattern Jury Charge for good faith and fair dealing claims in worker's compensation cases.[263] PJC 29.03 provides the following three liability questions (in addition to questions on proximate cause and damage submissions) for such cases:

Question No. 1

> Did Ace Insurance Company delay the payment of or refuse to pay compensation benefits to Paul Payne?

Question No. 2

> Was there an absence of a reasonable basis for Ace Insurance Company to deny or delay the payment of compensation benefits to Paul Payne?

Question No. 3

> Did Ace Insurance Company know or should it have known that there was not a reasonable basis for denying the claim or delaying the payment of compensation benefits?[264]

The three PJC questions set out the elements of a good faith and fair dealing claim delineated by the Texas Supreme Court in *Aranda v. Insurance Co. of North America*.[265] The *Puckett* court likewise set out these elements in the instructions.[266] The PJC also provides one question that would combine the three questions with a causation question as follows:

> Did Ace Insurance company, when it knew or should have known there was no reasonable basis to do so, deny or delay the payment of workers' compensation benefits to Paul Payne, which denial or delay proximately

260. Texas Employers Ins. Ass'n v. Puckett, 822 S.W.2d 133 (Tex. App.—Houston [1st Dist.] 1991, writ denied).

261. *Id.* at 139.

262. *Id.* at 140; *see* Arnold v. National County Mut. Fire Ins. Co., 725 S.W.2d 165 (Tex. 1987). *See infra* text accompanying notes 345-62 for discussion of instructions and elements in bad faith cases.

263. *Puckett*, 822 S.W.2d at 139-40.

264. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 29.03 (2d ed. 1992).

265. 748 S.W.2d 210 (Tex. 1988).

266. *Puckett*, 822 S.W.2d at 139-40.

caused damages separate from and independent of the effects of the damages from the original job-related injury?[267]

d. The "Stowers Doctrine"

An insurer also has heightened responsibilities to its insured when handling third party claims against the insured. This duty, created in *G.A. Stowers Furniture Co. v. American Indemnity Co.*,[268] and commonly referred to as the Stowers Doctrine, requires the insurer to act with "that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business."[269]

In *Ranger County Mutual Insurance Co. v. Guin*,[270] two of Ranger's insureds were sued in connection with a car accident. Ranger failed to settle a third party claim on behalf of the two insureds. A later lawsuit resulted in damages from the accident that exceeded the amount of the policy by a significant amount. The plaintiffs subsequently sued Ranger under the Stowers Doctrine claiming that Ranger should have settled the claim within the policy limits.

The trial court submitted the case to the jury based upon the following special issue:

> Do you find from a preponderance of the evidence that the Defendant was negligent in the manner in which it handled the claim and lawsuit asserted against its insureds?[271]

Based on this question and related instructions, the majority upheld the jury's finding that the defendant was negligent in its handling of the third party claim against the plaintiffs.[272]

In a dissenting opinion, Justice Gonzalez argued that the submission exceeded the bounds of the Stowers Doctrine which applies only to "negligence on the part of the [insurer] in failing and refusing to make settlement."[273] Justice Gonzalez contended that the special issue was erroneous because it inquired about acts by the defendant other than negligent failure to settle a lawsuit, including the actual handling of the lawsuit after the failed settlement, which did not fall under the Stowers Doctrine.[274]

III. INSTRUCTIONS AND DEFINITIONS

A. HISTORICAL DEVELOPMENT

The Special Issues Act, enacted in 1913, permitted "such explanations and definitions of legal terms as shall be necessary to enable the jury to properly

267. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 29.03 cmt. (2d ed. 1992).
268. 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).
269. *Id.* at 547.
270. 723 S.W.2d 656 (Tex. 1987).
271. *Id.* at 658.
272. *Id.* at 660.
273. *Id.* at 661 (Gonzalez, J., dissenting).
274. *Id.* at 661-62.

pass upon and render a verdict on such issues."[275] This principle of necessity was applied rigorously in an apparent effort to avoid complex jury charges.[276] Accordingly, since the adoption of the Special Issues Act,[277] hostility to the general charge historically has meant a limited role for definitions and instructions. Indeed, before the adoption of the Texas Rules of Civil Procedure in 1941, the use of instructions, as distinguished from definitions of legal terms, was prohibited. The most that could be done was to define legal and technical terms used in the charge.[278]

As originally promulgated, Rule 277 was intended to liberalize the use of instructions by permitting "such explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict on such issues."[279] At that time, language was also added to provide that an explanatory instruction or definition did not constitute a general charge.[280] As explained in the following excerpt from an unpublished memorandum prepared by Justice James McClendon, these changes were intended to allow trial judges more discretion in the use of instructions.

> I am sure every member of the Committee recognized the inherent right of every litigant to have his theory of the case (where properly in issue factually) *fairly* presented to the jury in some *proper* and *adequate* manner. In the respect in question this was amply taken care of by the provision in Rule 277 . . . requiring the judge to give "explanatory instructions.". . .
>
> This change from "explanations" in Art. 2189 to "explanatory instructions" was intended to reach this objective. "Explanatory instructions" is also carried into Rules 273, 274, and 276.
>
> Still another objective is attained by this requirement of "Explanatory instructions." It combines the special issue and general charge methods so as to preserve the advantages of both. On the one hand it obviates subdividing the ultimate, controlling elements of grounds of recovery or defense into numerous component issues, thereby: 1) simplifying the questions required to be submitted; 2) avoiding confusion; and 3) obviating conflicting findings and double negatives. On the other hand, it enables the court to charge the jury understandingly in regard to the findings they are called upon to make; and at the same time the

275. Act of Mar. 27, 1913, 33d Leg., R.S., ch. 59, § 1, 1913 Tex. Gen. Laws 113, *repealed by* Act of May 12, 1939, 46th Leg., R.S., Ch. 25, § 1, 1939 Tex. Gen. Laws 201.

276. *See* Texas & N.O. Ry. Co. v. Martin, 32 S.W.2d 363, 366-67 (Tex. Civ. App.—Beaumont 1930, writ ref'd); *see also* J. M. Radford Grocery Co. v. Andrews, 15 S.W.2d 218, 219 (Tex. Comm'n App. 1929, holding approved) (in automobile collision case, instruction as to duties of drivers approaching and passing other vehicles on public streets was a general charge and not an explanation and definition of the legal term negligence).

277. Act approved June 18, 1897, 25th Leg., C.S., ch.7, § 1, 1897 Tex. Gen. Laws 15, 15, 10 H. GAMMEL, LAWS OF TEXAS 1441, 1445 (1898).

278. *See* Texas & N.O.Ry. Co. v. Martin, 32 S.W.2d 363, 366-67 (Tex. Civ. App.—Beaumont 1930, writ ref'd). "This assignment does not in the least complain of the court's refusing or failing to define any term used in [the] charge." *Id.* at 367.

279. TEX. R. CIV. P. 277 as originally promulgated in October, 1940, 3 TEX. B.J. 522 (1940).

280. 3 TEX. B.J. at 567.

> value of the special issue method in requiring specific findings upon the ultimate, controlling, controverted factual issues in the case is preserved. The special issue method, when properly administered, is generally conceded to be the best adapted to obtaining actual fact findings by the jury, and to confining the jury to its real proper function — that of a fact finding instrumentality only. The rule protested combined with the requirement for "explanatory instructions" will, it is submitted, greatly improve the administration of the special issue method in this State, preserving, at the same time, every right of the litigant to a fair submission of his theory of the case.

Nonetheless, continuing hostility to the "general charge" remained a formidable obstacle to the achievement of these goals.[281] Although Justice McClendon viewed the change from "explanations" to "explanatory instructions" as a way to avoid the confusing complexity then existing in the fragmented Texas "special issue" system by combining a broader form of special issue as authorized in the original versions of Rules 277 and 278, with useful explanatory instructions, this view was not shared by all of his contemporaries.[282] Ultimately, the change had no significant impact on the practice. Despite the substitution of the words "explanatory instructions" for "explanations," the 1941 version of Rule 277 permitted them only when they were "necessary to enable the jury to render a verdict."[283]

Restrictions on the use of explanatory instructions again were modified in 1973 when Rule 277 was amended by changing the word "necessary" to "proper."[284] Former Chief Justice Jack Pope, clearly the most influential figure in the modern development of Texas charge practice in the last twenty-five years, minimized the significance of this change in a subsequent law journal article by stating that, "[a]lthough the submission of instructions has been expanded to give the trial judge more discretion in his use of instructions, this discretion is not unfettered. Instructions are limited to those that should enable the jury to render its verdict."[285]

Under the current rule, the court is required to submit "such instructions and definitions as shall be proper to enable the jury to render a verdict."[286] In addition, the last paragraph of Rule 277 gives the following ambiguous warning:

> The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers when it is properly a part of an instruction or

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281. *See* Boaz v. White's Auto Stores, 172 S.W.2d 481, 484 (Tex. 1943).

282. *See* J.B. Dooley, *The Use of Special Issues Under the New State and Federal Rules*, 20 TEX. L. REV. 32, 36-37 (1941).

283. TEX. R. CIV. P. 277 as originally promulgated in October, 1940, 3 TEX. B.J. 522, 566-67 (1940).

284. TEX. R. CIV. P. 277 as amended May 5, 1973, eff. Sept. 1, 1973, 36 TEX. B.J. 495, 495-96 (1973).

285. Jack Pope & William G. Lowerre, *The State of the Special Verdict - 1979*, 11 ST. MARY'S L.J. 1, 39 (1979).

286. TEX. R. CIV. P. 277.

definition.[287]

While this paragraph recognizes the tendency of instructions that go beyond the provision of abstract legal definitions to suggest how jury questions should be answered, as well as the vice of advising the jury of the effects of their answers, it does not otherwise resolve the proper role of instructions.

Rule 277's mandate that cases be submitted to the jury by broad-form questions clearly increases the importance of instructions and definitions to explain the law, but to an uncertain extent. Chief Justice Pope in his last published opinion on the subject also predicted the potential problems with an increased role for instructions and definitions in *Lemos v. Montez*:[288]

> This court has treated addenda to the charge as impermissible comments that tilt or nudge the jury one way or the other . . . .
>
> Prior to 1913 there was such a gradual accumulation of instructions considered helpful to juries, that an errorless charge became almost impossible. In 1913, to escape from the unsuccessful general charge, the Texas Legislature enacted article 1984a. Submission of Special Issues Act, ch. 59, § 1, 1913 Tex. Gen. Laws 113. The new procedure required the use of special issues that would be submitted separately and distinctly.
>
> In 1973, after sixty years, it became apparent that Texas courts, while escaping from the voluminous instructions to jurors, had substituted in the place of instructions, a jury system that was overloaded with granulated issues to the point that jury trials were again ineffective. The Supreme Court in 1973 amended Rule 277, Tex. R. Civ. P., by abolishing the requirement that issues be submitted distinctly and separately. Since that time, broad issues have been repeatedly approved by this Court as the proper method of submission. This court's approval and adoption of the broad issue submission was not a signal to devise new or different instructions and definitions. We have learned from history that the growth and proliferation of both instructions and issues come one sentence at a time. For every thrust by the plaintiff for an instruction or an issue, there comes a parry by the defendant. Once begun, the instructive aids and balancing issues multiply. Judicial history teaches that broad issues and accepted definitions suffice and that a workable jury system demands strict adherence to simplicity in jury charges.[289]

The proper relationship of instructions and definitions in the charge to broad-form jury questions is examined in light of the concerns of both Justice McClendon and Chief Justice Pope.

B. The Need for Appropriate Accompanying Instructions

When all civil cases are submitted in one broad-form question, the complexity of the legal inquiry is masked unless adequate instructions and definitions are given. If, for example, the question submitted to the jury is "Did X defraud Y," the scienter component of fraud is hidden. The question masks

287. *Id.*
288. 680 S.W.2d 798 (Tex. 1984).
289. *Id.* at 801.

the fact that fraudulent concealment is different from affirmative fraud by misrepresentation, and from the various forms of constructive fraud. Similarly, in the submission of a number of other types of cases in broad-form, most of the pertinent information will be in the accompanying definitions and instructions. It is clearly feasible to construct one broad-form question in most cases, as long as informative instructions and definitions are included in the charge.[290]

C. STANDARDS FOR EXPLANATORY INSTRUCTIONS AND DEFINITIONS

What then is the proper role of explanations and definitions in the context of mandatory broad-form submission of jury questions? As expressed by the Texas Supreme Court in *Island Recreational*:[291]

> [w]hen requested, the trial court should submit appropriate accompanying instructions. However, we decline to say that the failure to do so is reversible error per se. To determine whether an alleged error in the jury charge is reversible, the reviewing court must consider the pleadings and the evidence presented at trial, and the charge in its entirety.[292]

A number of appellate decisions discuss this subject in more detailed terms by stating that the trial court is required to define or explain words or phrases that are given a distinct legal meaning[293] as distinguished from words having no special legal or technical meaning apart from their ordinary usage,[294] and by stating that otherwise, explanatory instructions "should be submitted when, in the sole discretion of the trial courts, they will help the jury to understand the meaning and effect of the applicable law and presumptions."[295] As the following paragraphs show, these guidelines are continuing to evolve.

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290. *See, e.g.*, Southwestern Bell Tel. Co. v. John Carlo Texas, Inc., 843 S.W.2d 470 (Tex. 1992) (Trial court's failure to provide the jury with a proper legal definition of an essential component of the plaintiff's cause of action, i.e. the "intentional" nature of the defendant's conduct in a tortious interference case, constitutes reversible error).

291. Island Recreational Dev. Corp. v. Republic of Texas Sav., 710 S.W.2d 551 (Tex. 1986).

292. *Id.* at 555.

293. *See, e.g.*, Security Sav. Ass'n v. Clifton, 755 S.W.2d 925, 933-34 (Tex. App.—Dallas 1988, no writ) ("At a minimum, however, the trial court must define those words and other technical phrases that have a distinct legal meaning."); *see also* First State Bank v. Ake, 606 S.W.2d 696, 701 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.) (quoting First State Bank & Trust Co. v. George, 519 S.W.2d 198, 207 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.) ("The only requirement to be observed is that the trial court must give definitions of legal and other technical terms.")).

294. *See, e.g.*, Green Tree Acceptance, Inc. v. Combs, 745 S.W.2d 87, 89 (Tex. App.—San Antonio 1988, no writ) (words "gross and willful misconduct" as set out in employment contracts held to be words of ordinary meaning needing no definition); *see also* Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 814 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988) (holding that term "agreement" in tortious interference with contract case needed no definition).

295. Security Sav. Ass'n v. Clifton, 755 S.W.2d 925, 933-34 (Tex. App.—Dallas 1988, no writ) ("Absent a showing of a denial of a party's rights which was reasonably calculated to cause and probably did cause rendition of an improper verdict, there is no abuse of discretion."); *cf.* Ahlschlager v. Remington Arms Co., 750 S.W.2d 832, 835 (Tex. App.—Houston [14th Dist.] 1988, writ denied) ("[I]t is well settled that each party is entitled to an affirmative submission of all of his theories which have support in the evidence.").

1. *Instruction Must Be Proper*

Rule 277 requires the court to submit such instructions as shall be "proper."[296] At the threshold, it must be noted that a definition or an instruction is not "proper" unless it is legally accurate.[297] Beyond this simple beginning point, Texas courts have repeatedly stated that an instruction is "proper" if it finds support in the evidence and the inferences to be drawn therefrom; if it might be of some aid or assistance to the jury in answering the issues submitted;[298] and if it does not improperly comment on the evidence or advise the jury of the effects of their answers.[299]

The trial court should exclude anything, no matter how relevant, that does not aid the jury in answering the questions.[300] Instructions that do not aid the jury in answering jury questions, no matter how interesting or relevant to the case in a general sense, should be excluded precisely because these instructions have a tendency to mislead the jury.[301]

2. *General Instruction About Law Is Improper*

An instruction must not merely instruct the jury about the general state of the law regarding who is and who is not liable.[302] An instruction that simply informs the jury of an abstract principle of law without the jury's knowledge of what bearing it has on the case is not proper.[303] In *Welch*, the compensation insurance carrier requested an instruction to the effect that evidence of prior compensation payments is not an admission of liability. The appellate court, in holding that the instruction was properly refused, pointed out that no question was submitted in the case inquiring as to whether Texas General was liable.[304] The requested instruction therefore could not aid the jury in answering any of the jury questions.[305]

3. *Instruction Cannot Be a Comment on the Evidence*

An instruction must not be a direct comment on the weight of the evidence.[306] In *American Bankers Insurance Co. v. Caruth*[307] the Dallas Court

296. TEX. R. CIV. P. 277.
297. Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449, 453 (Tex. 1978).
298. *See, e.g.*, National Fire Ins. v. Valero Energy Corp., 777 S.W.2d 501, 507 (Tex. App.—Corpus Christi 1989, writ denied); Texaco, Inc. v. Pennzoil Co., 729 S.W.2d 768, 822 (Tex. App—Houston [1st Dist.] 1987, writ ref'd n.r.e.), *cert. dismissed*, 485 U.S. 994 (1988) (proper instruction must be legally accurate and assist jury).
299. TEX. R. CIV. P. 277. *See infra* text accompanying notes 306-35.
300. *See* Union Oil Co. of Cal. v. Richard, 536 S.W.2d 955, 958 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.); Pope & Lowerre, *supra* note 285, at 41.
301. *See, e.g.*, First Int'l Bank v. Roper Co., 686 S.W.2d 602, 605 (Tex. 1985); Acord v. General Motors Corp., 669 S.W.2d 111, 116 (Tex. 1984); Fleishman v. Guadiano, 651 S.W.2d 730, 731 (Tex. 1983).
302. *See* Pope & Lowerre, *supra* note 285, at 41.
303. Texas Gen. Indem. Co. v. Welch, 595 S.W.2d 205, 207-08 (Tex. Civ. App.—Eastland 1980, writ ref'd n.r.e.).
304. *Id.* at 208.
305. *Id.*
306. TEX. R. CIV. P. 277.
307. 786 S.W.2d 427 (Tex. App.—Dallas 1990, no writ).

of Appeals determined that the trial court committed reversible error by commenting on the weight of the evidence and remanded the case for a new trial.[308] The plaintiff sued to collect under an insurance policy covering the life of a quarterhorse. After a lengthy discovery dispute, the trial court granted a default judgment against the insurance company as to liability alone because of discovery abuse, so that the only question for the jury was the amount of damages.[309] The trial court incorporated extensive findings of fact into the jury charge and the jury returned a verdict for the plaintiff of $414,000 under their DTPA cause of action and $5,000,000 in exemplary damages.[310] The Dallas Court of Appeals reversed, holding that the findings of fact were an improper comment on the evidence:

> An impermissible comment on the weight of the evidence occurs, when after examining the entire charge, it is determined that the judge assumed the truth of a material controverted fact, or exaggerates, minimizes, or withdraws some pertinent evidence from the jury's consideration. *Lively Exploration Co. v. Valero Transmission Co.*, 751 S.W.2d 649, 653 (Tex. App.—San Antonio 1988, writ denied). The comment must also be one that probably caused the rendition of an improper judgment. . . . We conclude that the trial court, in this instance, did comment on the weight of the evidence. While . . . it is not error for the trial court, in charging the jury, to assume an uncontroverted fact, the trial court, in this case, went beyond simply charging the jury as to uncontroverted facts. The trial judge made more than mere incidental comments. We hold that the findings of fact were unnecessary and impermissible comments on the weight of the evidence which were calculated to prejudice the rights of American Bankers in the eyes of the jury. The findings of fact were not designed to be helpful to the jury in answering any of the questions in the court's charge, and as evidenced by the trial court's failure to label them as "instructions," the findings of fact were not instructive to the jury in answering any of the questions in the charge. Consequently, we conclude that the trial court's comments tended to imply to the jury that the trial judge thought the law and the facts were in favor of Caruth and MJC and that they should be compensated commensurately.[311]

Although federal law permits the court to sum up the allegations of the parties and give the judge's view on how the case should be decided under the evidence, Texas practice does not permit trial judges to suggest to the jury how the factual disputes in the litigation should be resolved.[312] For the same reason, Texas procedural law precludes a trial judge from marshalling or summarizing the evidence.[313]

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308. *Id.* at 435.

309. *Id.* at 430.

310. *Id.* at 434.

311. *Id.* at 434-35 (citation omitted).

312. *See* Linden-Alimak, Inc. v. McDonald, 745 S.W.2d 82, 85 (Tex. App.—Fort Worth 1988, writ denied).

313. The Texas Supreme Court specifically disapproved the practice of marshalling in Gulf Coast State Bank v. Emenhiser, 562 S.W.2d 449, 453 (Tex. 1978), on grounds that the charge was a comment on the evidence and advised the jurors of the effect of their answers.

4. Questions and Instructions that "Nudge" or "Tilt" the Jury

Instructions that attempt to impermissibly tilt or nudge the jury toward a particular result are also improper.[314] In *Mitchell v. Missouri-Kansas-Texas Railroad Co.*[315] an FELA case, the plaintiff successfully argued that the following instruction was an improper comment on foreseeability:

> In answering this issue, you are instructed that before negligence, if any, can be established against the Defendant-Railroad, it must be shown that the Defendant-Railroad, through its officers, agents and/or employees, knew, or, in the exercise of ordinary care, should have known of an unsafe condition, if any.[316]

The Texas Supreme Court reasoned that the instruction was improper because it "confused the issue of foreseeability relating to duty with the concept of causation" effectively forcing the plaintiff to "prove foreseeability in order to establish causation, in clear violation of the substantive requirements of the FELA." [317] Accordingly, the Court remanded for a new trial, recommending the use of the Pattern Jury Instructions for FELA cases adopted by the Judicial Counsel of the Fifth Circuit.[318]

A similar problem may be created by the use of inferential rebuttal instructions in the charge. For example, in *Wisenbarger v. Gonzales Warm Springs Rehabilitation Hospital Inc.*,[319] the court of appeals considered whether an instruction on unavoidable accident could have confused the jury in a medical malpractice case.[320] The court applied the standard of review in *Acord v. General Motors Corp.*[321] and *Levermann v. Cartall*[322] to determine whether the unavoidable accident instruction was an impermissible comment on the case as a whole that diverted the jury from the real issues in the litigation. In both of these cases, the additional instructions were determined to be comments on the entire case, even though the instructions were legally accurate statements, and harmful error precisely because they had a tendency to focus the jury on a limitation on the defendants' duty of care in a misleading manner and because an examination of the entire record indicated that the instructions were reasonably calculated to have misled the jury.[323] In *Wisenbarger*, although the court of appeals concluded that there was no need for the instruction, the court refused to find that it was an improper comment or harmful to the plaintiff.[324]

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314. *See* Acord v. General Motors Corp., 669 S.W.2d 111, 116 (Tex. 1984); Lemos v. Montez, 680 S.W.2d 798, 801 (Tex. 1984); Stevens v. Travelers Ins. Co., 563 S.W.2d 223, 226-29 (Tex. 1978).

315. 786 S.W.2d 659 (Tex.), *cert. denied*, 498 U.S. 896 (1990).

316. *Id.* at 660.

317. *Id.* at 663.

318. *Id.* at 662.

319. 789 S.W.2d 688 (Tex. App.—Corpus Christi 1990, writ denied).

320. *Id.* at 693-94.

321. 669 S.W.2d 111, 116 (Tex. 1984) (instruction stated that the defendant was neither the insurer nor a guarantor of a perfect or accident-proof product).

322. 393 S.W.2d 931, 937 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.) (instruction stated that generally a medical doctor is not an insurer or guarantor of his work).

323. *Acord*, 669 S.W.2d at 116; *Levermann*, 393 S.W.2d at 935.

324. *Wisenbarger*, 789 S.W.2d at 694.

On the other hand, in *First International Bank v. Roper*,[325] a design defect case grounded in strict tort liability, a legally correct instruction concerning sole cause that was included within the definition of producing cause and was neutral in form, was held to be a comment on the weight of the evidence because it improperly highlighted the manufacturer's defense of parental negligence.[326] As the Court explained the matter, the sole cause instruction placed an "undue emphasis on the [parents'] negligence when the jury was considering the existence of a defect and its relationship to the injurious event."[327] But, thereafter in *Ahlschlager v. Remington Arms Co.*,[328] the court of appeals was confronted with the question of whether a sole cause instruction was excess baggage as in *Roper*, or was an appropriate accompanying instruction.[329] The defendant manufacturer defended the case by claiming that the conduct of a third-party was the sole cause of the accident. After the court concluded that it was difficult to imagine a stronger case for giving an instruction on sole cause,[330] the court distinguished *Roper* because it was tried before the Texas Supreme Court's landmark decision in *Duncan v. Cessna Aircraft Co.*[331] Although this distinction is less than completely convincing, the fact remains that the sole cause defense did not have a tendency to divert the jury from the real issues of the case in *Ahlschlager*.

Jury questions should be worded so as to avoid assuming the truth of material controverted facts.[332] In *Mooney Aircraft Corp. v. Altman*,[333] the Dallas Court of Appeals held that the following questions submitted to the jury constituted direct comments on the weight of the evidence because they allowed the jury to assume the existence of material contested facts by improper use of the word "if":

Question 2

If you find the vacuum pump on the aircraft was defective at the time it left the possession of Mooney Aircraft Corporation, was such defect a producing cause of the occurrence in question?

Question 3

If you find that the Mooney Aircraft Corporation made false representations to the public that the aircraft was airworthy, did the representation about the airworthiness of the aircraft involve a material fact concerning the character or quality of the aircraft in question which was relied on by Lawrence Stuart Altman?[334]

The court stated:

We conclude that there is a reasonable probability that the jury did

325. 686 S.W.2d 602 (Tex. 1985).
326. *Id.* at 605.
327. *Id.* at 604-605.
328. 750 S.W.2d 832 (Tex. App.—Houston [14th Dist.] 1988, writ denied).
329. *Id.*; *see* TEX. R. CIV. P. 277.
330. *Ahschlager*, 750 S.W.2d at 835.
331. 665 S.W.2d 414 (Tex. 1984). *Duncan* enacted a comparative negligence scheme in Texas for tort actions and arguably abolished the sole cause defense in such cases.
332. Alvarez v. Missouri-Kansas-Texas R.R. Co., 683 S.W.2d 375, 377 (Tex. 1984).
333. 772 S.W.2d 540 (Tex. App.—Dallas 1989, writ denied).
334. *Id.* at 541.

> think that it was required to assume or suppose the existence of the disputed facts contained in the questions' introductory "if" clauses. The questions were phrased so as to lead the jury to believe that it was assumed that the vacuum pump was defective and that Mooney made false representations. The jury was not properly asked to find all essential elements of the Altmans' case.[335]

Regardless of whether a comment is "direct" or "incidental," when the court's charge diverts the jury's attention from the real issues and misleads them in a way that was reasonably calculated to lead to the rendition of an improper verdict, reversal should be required. The touchstone of the analysis should be whether the jury was misled by the court's charge, rather than by slavish adherence to a host of technical rules.

D. THE PROPER ROLE OF INSTRUCTIONS IN "COMPLEX" CASES

1. Instructions in Statutory Negligence Cases

Assume that you represent the plaintiff in a car wreck case premised on theories of common law negligence and negligence per se. Assuming broad-form submission of one liability question in addition to the standard definitions of negligence, ordinary care, and proximate cause, are you entitled to an instruction that advises the jury that the violation of a traffic law is negligence, together with information concerning the requirements of the pertinent statute? In *Smith v. Central Freight Lines, Inc.*,[336] a rear-end collision case, the court held that a requested "assured clear distance" instruction was properly refused because it merely restated the standard of ordinary care and did not alter the common-law duty.[337] When the statutory standard is subsumed under the normal negligence charge, a claimant is not entitled to an instruction because the statute's standard of care is the same or substantially the same as ordinary care.[338] Under these circumstances, a more "detailed" charge would be more misleading to the jury than helpful. The corollary is that if the statute creates some special duty that goes beyond or differs from the common law duty, the claimant would be entitled to an additional instruction. For example, in *Caskey v. Bradley*[339] a blind pedestrian who was accompanied by his seeing eye dog was struck by a car, resulting in injury to the pedestrian. The dog was killed. Instructions based on section 121.00(b) of the Texas Human Resources Code[340] and section 79 of article 6701d[341] were included in the charge to the jury. Accordingly, the Fort Worth Court of Appeals determined that both statutes created a duty of care different from the ordinary care standard and held that the instructions were properly submitted.[342]

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335. *Id.* at 542.
336. 774 S.W.2d 411 (Tex. App.—Houston [14th Dist.] 1989, writ denied).
337. *Id.* at 415.
338. *Id.*
339. 773 S.W.2d 735 (Tex. App.—Fort Worth 1989, no writ).
340. TEX. HUM. RES. CODE ANN. § 121.00(b) (Vernon 1990).
341. TEX. REV. CIV. STAT. ANN. art. 670ld § 79 (Vernon 1977).
342. *Caskey*, 773 S.W.2d at 738.

2. Instructions in Insurance Bad Faith Cases

a. Definition of the Duty of Good Faith and Fair Dealing

Recent cases have addressed the proper instructions for good faith and fair dealing claims, despite the fact that the proper definition of the insurer's duty to the insured in two-party cases is controversial. In *Automobile Insurance Co. v. Davila*[343] the Corpus Christi Court of Appeals approved the following jury instruction:

> [T]here is a duty on the part of an insurance company to deal fairly and in good faith with those persons whom it insures. You are further instructed that, in order for the conduct of an insurance company in denying or delaying payment of a claim to constitute a failure to exercise good faith, it must be shown that the insurer had no reasonable basis for denying the claim or delaying payment or the insurer failed to determine whether there was any reasonable basis for the delay.[344]

The court reasoned that the instruction was proper because it tracked the language used by the Texas Supreme Court to define the tort duties of good faith and fair dealing in *Arnold v. National County Mutual Fire Insurance Co.*[345] However, it is clear from the majority opinion that the court would have preferred an instruction that tracked the more detailed description of these duties that is contained in the Texas Supreme Court's opinion in *Aranda v. Insurance Co. of North America*.[346]

A dissenting justice argued that the failure to include all of the *Aranda* elements was grounds for reversal because its definition of the applicable law was calculated to mislead or to confuse the jury.[347] Based on *Aranda*, the dissent set forth a more detailed exposition of the elements of the proof requirements for a cause of action for breach of the tort duties of good faith and fair dealing. The claimant has the burden to establish:

> (1) the absence of a reasonable basis for the denial of a claim or the delay in payment of the benefits of the policy, *and*
> (2) that the carrier: (a) actually knew there was not a reasonable basis for denial or delay, or (b) should have known, based upon its duty to investigate, that there was not a reasonable basis for the denial or delay.
> Regarding 2(a) and 2(b), whether there is a reasonable basis for denial is judged by the facts before the insurer at the time the claim is denied.[348]

Based on this elemental analysis, the dissenting justice reasoned that the instruction that was given by the trial judge did not instruct the jury that the defendant's conduct must be evaluated by considering "the facts before the insurer at the time of the denial."[349] According to the dissent, omission of this component was grounds for reversal "because the evidence at trial showed a substantial difference between the information available at the time

343. 805 S.W.2d 897 (Tex. App.—Corpus Christi 1991, writ denied).
344. *Id.* at 903.
345. 725 S.W.2d 165 (Tex. 1987); *Davila*, 805 S.W.2d at 904.
346. 748 S.W.2d 210 (Tex. 1988); *Davila*, 805 S.W.2d at 904.
347. *Davila*, 805 S.W.2d at 911-13 (Benavides, J. dissenting).
348. *Id.* at 911-12.
349. *Id.* at 912.

of the denial and the information available at the time of trial."[350] The dissent's analysis properly focused on the probable impact of the more abbreviated definition on the jury's verdict in the light of the case as a whole. Although the majority disagreed about the probable impact of the instruction, the method of reasoning used by the dissenting justice is the proper one. The choice of one "legally correct" definition over another one can influence the trier of fact. When this influence misleads the jury, reversal is the appropriate course of action.

Similarly, in *Texas Employers Insurance Ass'n v. Puckett*[351] the trial court also instructed the jury by tracking the language used in *Arnold*.[352] In that case, the trial court provided the following instructions concerning the duty of a workers' compensation carrier to act in good faith:

> You are instructed that a workers' compensation carrier has a duty to deal fairly and in good faith in its decision to pay or deny worker's compensation weekly benefits. In order to find that TEIA [Texas Employers Insurance Association] failed to deal fairly and in good faith in the payment of workers' compensation benefits, you must find that:
> (1) There was not a reasonable basis for a reasonable worker's compensation carrier under the same or similar circumstances to deny weekly benefits, and
> (2) TEIA denied the payment of weekly benefits when
> (a) TEIA knew that it had no reasonable basis for denying the claim or
> (b) TEIA failed to determine whether there was any reasonable basis for such denial.
> In this connection, you are instructed that a workers' compensation carrier has a duty to conduct a reasonable investigation in connection with its decision to pay or deny worker's compensation weekly benefits.[353]

In its opinion the court of appeals explained that the instruction was both a correct statement of the law according to the *Arnold* decision and was substantially similar to the Texas Pattern Jury Charge 29.03 on the same issue.[354]

Nonetheless, TEIA argued that additional language used in the *Aranda* opinion should have been included in the jury charge concerning the insurer's ability to deny "questionable claims:"

> TEIA may deny invalid or questionable claims without breaching its duty of good faith and fair dealing, even if such denial is erroneous. A workers' compensation carrier has the right to deny or dispute questionable claims. In order to find that there was not a reasonable basis for a denial of workers' compensation weekly benefits where the denial is based upon the interpretation of medical evidence which requires the carrier to determine the nature, extent, duration or existence of injury,

350. *Id.*
351. 822 S.W.2d 133 (Tex. App.—Houston [1st Dist.] 1991, writ denied).
352. 725 S.W.2d 165; *Puckett*, 822 S.W.2d at 140.
353. *Id.* at 139-40.
354. 2 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 29.03 (1990).

> disease or disability, the character and quality of the medical evidence must be such that reasonable minds could not disagree as to its meaning.[355]

As in *Davila*, the appellate court rejected the carrier's argument that without the additional instruction, the jury would not know that a carrier is entitled to some latitude in its decision making process and upheld the trial court's refusal to submit the instruction on the basis of the trial court's broad discretion with regard to the selection of instructions.[356] But would it have been erroneous for the trial judge to have included the additional instruction? Would the error, if any, have been a basis for reversal of the trial court's judgment based on a defense verdict? The answers to these questions should depend upon whether the record demonstrates that the inclusion or exclusion of a requested charge was misleading to the trier of fact, not on rigid adherence to standard forms.

b. The "Stowers Doctrine"

An insurer also has heightened responsibilities to its insured when handling third party claims against the insured. This duty, created in *G.A. Stowers Furniture Co. v. American Indemnity Co.*,[357] and commonly referred to as the "Stowers Doctrine," requires the insurer to act with "that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business."[358]

In *Ranger County Mutual Insurance Co. v. Guin*[359] the Texas Supreme Court upheld the following question and related instructions in a "Stowers Doctrine" case:

> Do you find from a preponderance of the evidence that the Defendant . . . was negligent in the manner in which it handled the claim and lawsuit asserted against its insureds?[360]

The trial court provided the following definition of negligence:

> "Negligence" as used in this special issue means the failure to exercise that degree of care and diligence which an ordinarily prudent person would exercise in the management of his own business. If an ordinarily prudent person in the exercise of ordinary care, as viewed from the standpoint of the insured, would have settled the case, but the defendant failed or refused to do so, then the defendant is negligent. The duty to settle implies the duty to negotiate. You are instructed that the Defendant . . . by the nature of its insurance contract with its insureds . . . assumed the responsibility to act as the exclusive and absolute agent of the insured in all matters pertaining to the questions in litigation and, as such agent, the Defendant is held to that degree of care and diligence which an ordinary prudent person would exercise in the management of his own business. . . . You are further instructed that under the law of

355. *Puckett*, 822 S.W.2d at 140.
356. *Id.*
357. 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved).
358. *Id.* at 547.
359. 723 S.W.2d 656 (Tex. 1987).
360. *Id.* at 660.

> Texas, an insurance carrier is required to exercise ordinary care in considering whether an offer of settlement should be accepted and whether it should offer the liability limits of its insurance policy but it is not necessarily a failure to exercise ordinary care merely because its decision proves to be wrong by reason of a jury verdict; in other words, the duty to exercise ordinary care leaves room for an error in judgment, without negligence necessarily resulting therefrom.[361]

Based on these submissions, the majority upheld the jury's finding that the defendant was negligent in its handling of the third party claim against the plaintiffs.[362]

IV. CONCLUSION

A comparison of the methods of charging the jury used by Texas courts in this century indicates clearly that the early preference for the use of a general charge comprised of instructions and definitions was abandoned in favor of a charge consisting of separate questions that downplayed the role of instructions and definitions. It seems clear that this policy choice was made to simplify charge practice and to avoid needless reversals of cases that would be decided essentially the same way when retried. Although there is a present-day recognition that complex or slanted instructions and definitions can and do create serious problems in the administration of justice, there is no doubt that the historic pattern has been reversed.

Policy decisions made before the conclusion of World War I concerning the best way to charge juries and the jury's proper role in the adjudicative process are very nearly opposite from modern Texas Supreme Court decisions on the subject. This reversal in the method of submitting cases has resulted in problems that must be resolved. One unsettled question of major consequence to the future development of broad-form submission jury cases is the appropriate standard of appellate review. Broad-form jury charges that have a tendency to mislead juries, either because a flawed legal theory is incorporated into the literal terms of a broad submission or for some deficiency in accompanying definitions and instructions, create real problems in the administration of justice that cannot sensibly be papered over by adherence to an opaque "abuse of discretion" standard. It is hoped that the analysis of these serious problems identified in this article will serve as a catalyst for the evolution of Texas charge practice as we approach the twenty-first century.

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361. *Id.* at 658.
362. *Id.* at 660.