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Judges, Juries, and Reviewing Courts

William V. Dorsaneo III
Southern Methodist University, Dedman School of Law, wdorsane@mail.smu.edu

JUDGES, JURIES, AND REVIEWING COURTS

*William V. Dorsaneo, III**

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* Chief Justice John and Lena Hickman Distinguished Faculty Fellow and Professor of Law, Southern Methodist University School of Law, Dallas, Texas. Helpful comments and suggestions were provided by David W. Robertson, Harvey Brown, Ellen Pryor, Beth Thornburg, Thomas C. Wright, Russell H. McMains, and several of my other colleagues who reviewed prior drafts of this article.

> There is nothing to prevent . . . invasion of the jury's province except the self-restraint of the judges themselves. It is simply an institutional risk. Where impulses are so strong to do ultimate justice, and where the jury and what its members heard, observed and considered are so far removed from the chambers of the court, the brakes of self-restraint are severely taxed. The supreme power in a court system as in any other hierarchy inevitably increases with its exercise.[1]

> [S]omehow everything in life conspires against courage.[2]

I. INTRODUCTION

THE purposes of this paper are to evaluate the standard and scope of appellate evidentiary review of fact findings made by juries and trial judges under Texas law, and to describe and to criticize the recent treatment of the duty and causation issues in tort litigation by the Texas Supreme Court. The court has not acknowledged that the standards of evidentiary review applied to jury findings have been changed and one prominent scholar has concluded otherwise,[3] but an examination of the court's recent jurisprudence reveals that significant changes have been made in the application of the no-evidence standard of review traditionally applied by Texas courts in assessing the probative value of evidence to support jury findings. During roughly the same ten-year period, the Texas Supreme Court has otherwise modified the respective roles of judges, juries, and reviewing courts in Texas by revising its treatment of the duty and causation issues in tort cases. These companion developments have shifted the locus of the decision-making process away from juries and ultimately toward the appellate courts.

Both the methods for deciding the duty and causation issues in civil litigation and the standards of review applied by reviewing courts to jury verdicts are of fundamental importance to the operation of the litigation process because these subjects control the division of adjudicative power among trial judges, juries, and reviewing courts. This paper explores and explains these important matters.

II. JUDGES AND JURIES

An accurate, but oversimplified, characterization of the judge-jury relationship in the litigation process is that trial and appellate judges decide

1. Leon Green, *Jury Trial and Proximate Cause*, 35 TEXAS L. REV. 357, 358 (1957).
2. Leon Green, *Must the Legal Profession Undergo a Spiritual Rebirth?*, 16 IND. L.J. 15, 28 (1940).
3. In a provocative article, Dean William Powers, Jr. takes the position that the Texas Supreme Court's recent jurisprudence has not changed the traditional Texas standard and scope of no-evidence review, only the court's substantive assessment of duties owed to injured claimants. Dean Powers' article is discussed below in Part IX of this article. *See* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1699, 1719 (1997).

law questions and that juries only decide fact questions.[4] But this is merely a way to talk about whether the question should be answered by the court or jury for policy reasons.[5] A more helpful assessment of the relationship between the trial judge and the jury, on the one hand, and among the trial judge, the jury, and the appellate courts, on the other hand, requires more than the simple statement that duty is a question of law for the court and that breach of duty and causation are questions of fact[6] for the jury to determine under the evidence pursuant to the court's instructions.

The primary function of the trial judge in jury cases is to declare the law in the court's charge.[7] The law declaration function is performed by framing the questions that the jury will be required to answer in order to decide what happened and, in tort cases, to apply the law to the facts to

4. *See* Ellis v. Waldrop, 627 S.W.2d 791, 796 (Tex. App.—Fort Worth 1982), *aff'd in part and rev'd in part on other grounds*, 656 S.W.2d 902 (Tex. 1983).

5. A number of articles have been written about the jury's role in the litigation process. *See* Daniel W. Shuman & Anthony Champagne, *Removing the People from the Legal Process: The Rhetoric and Research on Judicial Selection and Juries*, 3 PSYCHOL., PUB. POL'Y, & L. 242 (1997) (explaining how empirical studies among judges, jurors, attorneys, and experts in Baltimore, Dallas, Seattle, and Tucson demonstrated jurors' ability to fulfill their courtroom obligations competently and their reactions to the use of expert witnesses); *see also* Marc Galanter, *The Civil Jury as Regulator of the Litigation Process*, 1990 U. CHI. LEGAL F. 201 (discussing newly focused attacks on juries and proposals to limit their power); Stephan Landsman, *The Civil Jury in America: Scenes from an Unappreciated History*, 44 HASTINGS L.J. 579 (1993) (tracing the practices of opponents to the civil jury who have used procedural changes to marginalize juries and decrease their power); Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial Under the Federal Rules of Civil Procedure*, 50 U. PITT. L. REV. 725 (1989) (discussing the effects of other procedural changes on the jury); David Millon, *Juries, Judges, and Democracy*, 18 LAW & SOC. INQUIRY 135 (1993) (reviewing SHANNON C. STIMSON, THE AMERICAN REVOLUTION IN THE LAW: ANGLO-AMERICAN JURISPRUDENCE BEFORE JOHN MARSHALL (1990) (describing the nineteenth-century procedural changes used to gradually diminish jury authority)); Stephen C. Yeazell, *The New Jury and the Ancient Jury Conflict*, 1990 U. CHI. LEGAL F. 87 (describing the eighteenth-century changes that altered the relationships of power among judges, counsel, and jury).

6. For a discussion of this subject see William V. Dorsaneo, III, *Broad-Form Submission of Jury Questions and the Standard of Review*, 46 SMU L. REV. 601, 610-14 (1992); *see also* Martin B. Louis, *Allocating Adjudicative Decision Making Authority Between the Trial and Appellate Levels: A Unified View of the Scope of Review, the Judge/Jury Question, and Procedural Discretion*, 64 N.C. L. REV. 993 (1986).

7. Professors Hart and Sacks, in their landmark text, divide the functions of judge and jury in a threefold manner under which the judge has the job of "law declaration" and the jury performs the functions of "fact identification" and "law application," unless a special verdict system is used to restrict the jury's role to deciding "what happened" in which case the judge would perform the "law application" function. *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 352-54 (1994). The normal approach to tort cases in Texas and elsewhere involves the use of broad-form jury questions under which the jury performs the functions of "fact identification" and "law application." *See* Dorsaneo, *supra* note 6 at 609-26. The trial judge has other functions, including the determination of the evidence that will be presented and the rendition of judgment as a matter of law at various stages of the proceeding. However, rendition of judgment as a matter of law has not been the primary function of the trial judge in cases tried to juries. *See* James M. Treece, *Leon Green and the Judicial Process: Government of the People, by the People, and for the People*, 56 TEXAS L. REV. 447, 461-66 (1978). Judgment as a matter of law is only appropriate under the standards of evidentiary review discussed in Parts IV-VI and VIII of this article.

decide whether the conduct of the parties violated the applicable standard of care or conduct and caused harm under the court's instructions, which define the applicable breach of duty and causation concepts. To make the questions understandable, the trial judge must give instructions about the standard of care, the pertinent causation standard, and, if needed, about compensable injuries and damages. By performing this function, the trial judge sets out the duty or duties that are pertinent to the case and prepares the fact finder to decide whether the duties were breached and caused compensable harm. This is the main meaning of the phrase "duty is a question of law for the court."

The primary function of the jury as the fact finder is to answer the question or questions prepared by the trial judge pursuant to the court's instructions based on the evidence presented at trial through the application of the juror's normal reasoning processes during the collective deliberative process. In tort litigation, as a general rule the jury is asked to apply the law to the facts—mixed questions of law and fact—not merely to decide whether a particular person did or did not engage in specific conduct. In other words, the jury is asked to set the specific or particularized standard for the case within the general standard supplied by the controlling legal principle when it decides whether the general standard was violated in the case sub judice. The jury is also asked whether the violation caused compensable harm under standards that vary from jurisdiction to jurisdiction and that may vary from one theory of recovery or defense to another in the same jurisdiction.[8] Nonetheless, because these are the functions that are assigned to juries for policy reasons,[9] questions of negligence, product defect, and causation are termed "fact questions." Thus, the main meaning of calling something a fact question is that the jury is required to answer the question in reaching a verdict, regardless of whether the verdict form is general or special.

One primary function of a reviewing court is to determine whether the trial judge properly performed his or her functions during the adjudicative process. Among a great many other matters, not all directly pertinent to this article, this includes that the reviewing court may review how the judge declared the law. In this regard, a reviewing court assesses the trial judge's performance under a standard of review that involves limited deference to the manner in which the jury was charged on the law.[10] Another primary function of a reviewing court is to assess whether the fact

8. *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 777-85 (Tex. 1995) (Cornyn, J. concurring).

9. *See* Laura Gaston Dooley, *Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury*, 80 CORNELL L. REV. 325, 328 (1995); *see also* Treece, *supra* note 7, at 455-57.

10. Complaints concerning the court's charge are reviewed under an abuse of discretion standard of review, but the trial judge has no discretion to misstate the law or to deny submission of a claim or defense raised by the pleadings and the evidence. *See* Texas Dep't of Human Servs. v. E. B., 802 S.W.2d 647, 649 (Tex. 1990); *see also* Walker v. Packer, 827 S.W.2d 833, 839-40 (Tex. 1992).

finder's findings are supported by the evidence.[11]

The point of this simplified description of the respective roles of the trial judge, the jury, and the appellate courts is to dispel the general view that somehow what constitutes a question of law or a question of fact can be divorced from the functions to be performed during the trial and appellate process. What is really important to decide is how these functions are performed and how much deference is given to trial judges and juries by reviewing courts.

III. THE ROLE AND IMPORTANCE OF EVIDENTIARY REVIEW STANDARDS

Although the subject of evidentiary review of jury findings by appellate courts has received scant attention in academic literature, there is probably no single legal subject that is more important to the administration of justice than the standards of judicial review of verdicts, judgments, and other orders based on the sufficiency of the evidence presented at a hearing or at trial. This subject is important because it imposes principled constraints on all of the institutional actors who perform the work of deciding cases in the litigation process.

Despite the importance of the approach taken concerning the degree of deference that should be given to the fact finder, there is no consensus on the proper approach among the states or within the federal system. Recently, it has been suggested that the Texas Supreme Court may have fundamentally altered no-evidence review.[12] Indeed, a critical article argues that the Texas Supreme Court may prefer its own views about the outcomes of cases over the views of Texas juries.[13] As shown in the following parts of this article, although the basic rules of evidentiary review have not been abandoned, subtle changes have been made in the application of the no-evidence standard of review.

IV. THE TEXAS NO-EVIDENCE STANDARD OF REVIEW

The bases for asserting a legal sufficiency challenge to a verdict or a particular fact finding as commonly stated by Texas courts are: (i) a complete absence of evidence of a vital fact, i.e., a component element of a claim or defense; (ii) the court is barred by rules of law, such as the parol evidence rule or rules of evidence, from giving weight to the only evidence offered to prove a vital fact; (iii) the evidence offered to prove a vital fact is no more than a scintilla; and (iv) the evidence conclusively

11. *See* discussion *infra* Parts IV-VIII.

12. *See* W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 478-79 (1998); *see also* Provident Am. Ins. Co. v. Castaneda, 988 S.W.2d 189, 205-07 (Tex. 1998) (Gonzalez, J., dissenting).

13. Phillip D. Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1 (1998) ("For almost a decade, the Phillips/Hecht Court has ignored, trivialized, or written around jury verdicts.").

establishes the opposite of the vital fact.[14]

Because most cases do not involve the first two bases for challenging the evidence in support of a finding on an ultimate fact,[15] perhaps the most critical question that must be answered by a reviewing court in conducting a no-evidence review of a fact finding is whether the fact finder had a reasonable basis to make the finding.[16] Moreover, because most cases do not involve a complete absence of evidence of a vital matter, another critical question is whether the fact finder could have disregarded any evidence supporting the proposition or theory that the fact finder rejected, either because the evidence has no probative value or, more importantly, because the fact finder found the probative direct and circumstantial evidence supporting the rejected proposition to be unconvincing.[17] These are critical questions because, as long as the fact finder fulfills its responsibilities, a reviewing court is not permitted to prefer its own conclusions regarding what happened over the conclusions reached by the fact finder.[18]

V. ASSESSING THE SCOPE OF THE TEXAS NO-EVIDENCE REVIEW STANDARD

The traditional statement of the scope of no-evidence review requires the trial court and any appellate court that is reviewing the findings in question to consider only the evidence favoring the finding, disregarding all direct and circumstantial evidence to the contrary.[19]

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14. *See* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361, 362-63 (1960); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997).

15. Although the Texas Supreme Court has occasionally used scintilla-rule language in discussing the probative value of expert testimony, it seems more reasonable to consider testimony that comes from an unqualified witness or that does not satisfy current standards of relevance and reliability as evidence that is entitled to no weight under rules of law or evidence. *See Havner*, 953 S.W.2d at 711. "More than a scintilla of evidence exists where the evidence supporting the finding, as a whole, 'rises to a level that would enable reasonable and fair-minded people to differ in their conclusions.'" Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499 (Tex. 1995) (quoting Transportation Ins. Co. v. Moriel, 879 S.W.2d 10, 25 (Tex. 1994)).

16. *See* Browning-Ferris, Inc. v. Reyna, 865 S.W.2d 925, 927-28 (Tex. 1993); Kindred v. Con/Chem, Inc., 650 S.W.2d 61, 63 (Tex. 1983).

17. *See* Rivas v. Garibay, 974 S.W.2d 93, 96 (Tex. App.—San Antonio 1998, pet. denied) ("A jury may disbelieve any witness, including a physician, even though that witness's testimony is not contradicted."). *But see* Schwartz v. Pinnacle Communications, 944 S.W.2d 427, 434 (Tex. App.—Houston [14th Dist.] 1997, no writ) ("[w]hile the fact finder is charged with the duty of deciding issues raised by conflicting evidence, when the evidence is not conflicting, the fact finder may not disregard uncontradicted testimony in order to decide an issue in accordance with its own wishes.").

18. *See* Benoit v. Wilson, 239 S.W.2d 792, 796 (Tex. 1951).

19. *See* Continental Coffee Prods. v. Cazarez, 937 S.W.2d 444, 450 (Tex. 1996); Cartwright v. Canode, 171 S.W. 696, 698 (Tex. 1914). To accommodate the traditional approach, which is designed to review findings by considering the evidence "in its most favorable light in support of the verdict," if the party with the burden of proof challenges a negative finding, the record must be examined under a two-step process. First, the record is examined for evidence that supports the negative finding. "If there is no evidence to support the fact finder's answer, then secondly, the entire record must be examined to see

The scope of review is an important prophylactic against the intentional or inadvertent invasion of the jury's province as the fact finder.[20] The tendency to weigh the evidence is difficult to resist if the scope of review is not limited to the favorable evidence, including reasonable inferences favoring the finding or the findings. If the direct evidence and reasonable inferences[21] that support the verdict must be viewed through the prism of the entire record of the evidence, including some strong evidence supporting the party who challenges the verdict, the evidence supporting the verdict may be more easily discounted.

The federal courts of appeals have stated differing formulations of the standard and scope of review for a legal insufficiency challenge, and, until recently, the Supreme Court appears to have had no interest in resolving the conflict among the circuits.[22] As explained in Justice White's dissent from the denial of certiorari in *Schwimmer v. Sony Corporation of America*, for a number of years the federal courts of appeals followed three different approaches to determining whether evidence is sufficient to create a jury issue. As Justice White explains:

> [I]t is the Second Circuit's practice to examine all of the evidence in a manner most favorable to the nonmoving party. This is also the position of at least the Fifth and Seventh Circuits. In the Eighth Circuit, however, it appears that only evidence which supports the verdict winner is to be considered. The First and Third Circuits follow a middle ground: the reviewing court may consider uncontradicted, unimpeached evidence from disinterested witnesses.[23]

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if the contrary proposition is established as a matter of law." Holley v. Watts, 629 S.W.2d 694, 696 (Tex. 1982). The Texas Supreme Court has also held that although an affirmative finding must be based on some probative evidence, a negative finding is "nothing more than [a finding] . . . that the [party with the burden of proof] failed to carry its burden of proving the fact." C. & R. Transp., Inc. v. Campbell, 406 S.W.2d 191, 194 (Tex. 1966). This method of reasoning is helpful when the party without the burden of proof wants to embrace the verdict because the party with the burden of persuasion has failed to obtain a finding on a vital element of a claim or a defense. *See id.*; Grenwelge v. Shamrock Reconstructors, Inc., 705 S.W.2d 693, 694 (Tex. 1986).

20. *See, e.g., Benoit*, 239 S.W.2d at 796-97.

21. The reasonableness of inferences that may be drawn from the evidence must be evaluated in light of all facts and circumstances that the fact finder is required to consider. *See* Texas & N.O.R. Co. v. Burden, 203 S.W.2d 522, 530 (1947); *see also* Simmons & Simmons Constr. Co. v. Rea, 286 S.W.2d 415, 419 (1955).

22. *See* Schwimmer v. Sony Corp. of Am., 459 U.S. 1007, 1009 (1982).

23. *Id.* (citing Boeing Co. v. Shipman, 411 F.2d 365, 374-75 (5th Cir. 1969)); Panter v. Marshall Field & Co., 646 F.2d 271, 281-82 (7th Cir. 1981); Simpson v. Skelly Oil Co., 371 F.2d 563 (8th Cir. 1967); Layne v. Vinzant, 657 F.2d 468, 472 (1st Cir. 1981); Inventive Music Ltd. v. Cohen, 617 F.2d 29, 33 (3d Cir. 1980)). Justice White explains in his dissent in *Schwimmer* that because the issue "will often be influential, if not dispositive, of a motion for judgment n.o.v., this disagreement among the federal courts of appeals is of far more than academic interest." *Schwimmer*, 459 U.S. at 1009. Despite the importance of the subject, a brief review of the academic literature on this subject and the case law makes it plain that very few commentators have been interested in it. *See* Steven Alan Childress, *Judicial Review and Diversity Jurisdiction: Solving an Irrepressible Erie Mystery?*, 47 SMU L. REV. 271 (1994); Patrick Higginbotham, *Continuing the Dialogue: Civil Juries and the Allocation of Judicial Power*, 56 TEXAS L. REV. 47 (1977); Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237 (1989); *see*

The Eighth Circuit has expressed the accurate view that a consideration by a reviewing court of only the evidence that supports the finding "will result in fewer grants of motions for directed verdict than would result if judges were free to take cases from the jury because of what they view as very strong evidence supporting the moving party."[24] Of course, this does not mean that the limited review standard is too deferential. It does, however, recognize that a consideration of only the favorable evidence and reasonable inferences is a more deferential way of viewing the evidence in its most favorable light in support of the finding than a consideration of both the favorable and the unfavorable evidence and inferences.

The Fifth Circuit's embrace of whole record review in *Boeing Company v. Shipman*[25] requires a reviewing court to consider all of the evidence, "but in the light and with all reasonable inferences most favorable to the party" in whose favor the finding was made.[26] The *Shipman* opinion does not, however, make it clear how this analytical process works. Beyond stating that a motion for judgment as a matter of law "should not be decided by which side has the better [case], . . . [or] only when there is a complete absence of probative facts to support a jury verdict . . . [and that] [t]here must be a conflict in substantial evidence to create a jury question,"[27] the court of appeals does not explain how the reasonableness of an inference is to be evaluated or what constitutes a conflict in substantial evidence. It is, however, possible to read the opinion to mean that the nonmovant's evidence will be viewed in the context of the movant's strong evidence and that a trial judge may grant judgment as a matter of law if very strong evidence supports the movant's position. Justice Rives, however, in partial dissent in *Shipman*, not only regards the question of the sufficiency of the evidence to require submission of a case to a jury as a constitutional issue.[28] He reasons that the court of appeals' en banc opinion "downgrades the Seventh Amendment" and "commits an error of constitutional proportions which will continue to plague this Court and the district courts of this Circuit until the Supreme Court grants certiorai in . . . some future case."[29]

Thirty years after Justice White's dissent in *Schwimmer*, the Supreme Court granted certiorai in *Reeves v. Sanderson Plumbing Products, Inc.*,[30] an age discrimination case in which the Fifth Circuit reversed a district court judgment based on a jury's verdict of willful discrimination on the ground that the verdict was not supported by probative evidence.[31] The

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also 9A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 2529, at 297-300 (2d ed. 1994).

24. Dace v. ACF Indus., Inc., 722 F.2d 374, 376 (8th Cir. 1983).
25. 411 F.2d 365 (5th Cir. 1969).
26. *Id.* at 374.
27. *Id.* at 375.
28. *See id.* at 377-78.
29. *Id.*
30. ___ U.S. ___, 120 S. Ct. 2097 (2000).
31. *See* Reeves v. Sanderson Plumbing Prods., Inc., 197 F.3d 688, 694 (5th Cir. 1999).

Supreme Court reversed. The Court specifically held that in an age discrimination case, a prima facie case of discrimination[32] and sufficient evidence for the fact finder to reject the employer's explanation as a pretext and unworthy of belief, may preclude rendition of judgment against the claimant as a matter of law, even though no independent and additional evidence of willful discrimination is introduced.[33] Because the court of appeals ignored the evidence supporting the petitioner's prima facie case and the evidence challenging the employer's explanation for its decision to discharge the petitioner, the Court reversed.

Of much more general significance, the Court addressed in *Reeves* , and for the most part resolved, the differences between the courts of appeals on the issue of the scope and standard of appellate review of fact findings.[34] The Court explained that some decisions have stated that review is limited to the evidence favorable to the nonmoving party[35] while most hold that review extends to the entire record.[36] But the Court regarded this distinction as "more semantic than real" and explained that while review of all of the evidence is required to determine a motion for judgment as a matter of law, the trial judge is required to give credence to the evidence and reasonable inferences which tend to support the finding and to disregard all contrary evidence that the jury was not required to believe.[37] This means that the reasonableness of inferences involves a consideration of the evidence as a whole, but not that a reviewing court may make credibility determinations or weigh the evidence.

> [T]he court must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence .... "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Thus, although the court should review the record as a whole, it must disregard all evidence favorable to the moving party that the jury is not required to believe .... That is, the court should give credence to the evidence favoring the nonmovant as well as that "evidence supporting the moving party that is uncontradicted and unimpeached, at least to the extent

32. As defined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a prima facie case is established if the claimant shows: (i) that he or she belongs to a racial minority; (ii) that he or she applied and was qualified for a job; (iii) that despite his or her qualifications, the claimant was rejected; and (iv) that the position remained open and the employer continued to seek applicants from persons of the claimant's qualifications. *See id.* at 802. In an ADEA discharge case, a prima facie case of discrimination is established if the plaintiff shows that he or she was: (i) discharged; (ii) qualified; (iii) within the protected class at the time of discharge; and (iv) either replaced by someone outside the class or someone younger, or otherwise discharged because of age. *See* Bodenheimer v. PPG Indus., Inc., 5 F.3d 955, 957 (5th Cir. 1993).

33. *See Reeves*, 120 S. Ct. at 2109.

34. *See id.* at 2109-10.

35. *See* Aparicio v. Norfolk & Western Ry. Co., 84 F.3d 803, 807 (6th Cir. 1996); Simpson v. Skelly Oil Co., 371 F.2d 563, 566 (8th Cir. 1967).

36. *See, e.g.*, Boeing Co. v. Shipman, 411 F.2d 365, 374 (5th Cir. 1969); Tate v. Government Employees Ins. Co., 997 F.2d 1433, 1436 (11th Cir. 1993).

37. *See Reeves*, 120 S. Ct. at 2110.

that [it] comes from disinterested witnesses."[38]

One of Texas' leading legal citizens, Chief Justice Robert W. Calvert, as part of his career objective to clarify Texas procedural principles, must be given primary credit for crystallizing the traditional standard and the permissible scope of no-evidence review based on his frequently cited law review article.[39] Some commentators have mistakenly, I think, considered that an opinion written by Justice Calvert defines the scope of review more broadly to include all of the direct evidence and reasonable inferences concerning the finding, both favorable and unfavorable.[40] But in that opinion Justice Calvert seems to have adopted the sensible view that the only way to consider the evidence in the most favorable light when assessing the validity of the verdict is to determine whether any direct or circumstantial evidence, including reasonable inferences drawn from the totality of the circumstantial evidence, supports the fact findings, without regard to the existence of other direct evidence or competing reasonable inferences that do not do so.[41] Although some recent cases that cite the opinion[42] could be interpreted to embrace a different standard, they really do not do so and should not be so interpreted. In fact, the so-called "particularized application of our traditional standard of review,"[43] under which an insurer's basis for denying claims could not be disregarded, has itself been discarded.[44]

38. *Id.* at 2110 (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986)).

39. *See* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361, 364 (citing Cartwright v. Canode, 171 S.W. 696, 696-97 (1914)).

40. *See* Harbin v. Seale, 461 S.W.2d 591, 592 (Tex. 1970) ("All evidence must be considered in a light most favorable to the party in whose favor the verdict has been rendered, and every reasonable inference deducible from the evidence is to be indulged in such party's favor."); W. Wendell Hall, *Standards of Review in Texas*, 29 ST. MARY'S L.J. 351, 478-79 (1998).

41. *See Harbin*, 461 S.W.2d at 592 ("Thus, the question before this court is whether there is evidence of probative force in the record which supports the jury's finding of gross negligence.").

42. *See* Formosa Plastics Corp. USA v. Presidio Eng'rs and Contractors, Inc., 960 S.W.2d 41, 48 (Tex. 1998); Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 711 (Tex. 1997); *see also* Associated Indem. Corp. v. CAT Contracting, Inc., 964 S.W.2d 276, 286 (Tex. 1998).

43. Lyons v. Millers Cas. Ins. Co. of Tex., 866 S.W.2d 597, 600 (Tex. 1993). In *Lyons*, the court devised "a particularized application of our traditional no evidence [scope of] review" under which a review of "the legal sufficiency of the evidence supporting a bad faith finding [must] focus . . . on the relationship of the evidence arguably supporting the bad faith finding." *Id.* In other words, the evidence of the insurer's basis for denial of the claim cannot be disregarded and, if probative and uncontroverted, can be conclusive.

44. *See* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 55 (Tex. 1997); Standard Fire Ins. Co. v. Stephenson, 955 S.W.2d 665, 668 (Tex. App.—Beaumont 1997, no pet.) (withdrawn from publication).

VI. CHANGES IN THE STANDARD OF REVIEW: MODERN TEXAS CASES DO GIVE REVIEWING COURTS MORE POWER TO CONCLUDE THAT NO PROBATIVE EVIDENCE SUPPORTS THE VERDICT

Although the scope of review probably has not yet been changed by the Texas Supreme Court, three significant procedural developments appear to have changed no-evidence review. First, an unfortunate and misguided rearticulation of the scintilla rule has made it easier for reviewing courts to disregard favorable inferences that support a verdict.[45] Second, the Texas Supreme Court has embraced and extended the principle that undisputed evidence cannot be disregarded.[46] Third, the probative value of expert testimony—its relevance and reliability—has become a question for the court, not the fact finder.[47] The importance of these developments cannot be overemphasized because they alter the fundamental principle that the court is never permitted to substitute its findings and conclusions for that of the jury.

A. Reasonable Inferences and the Scintilla Rule

A longstanding rule has treated weak circumstantial evidence that does no more than create a mere surmise or suspicion of the existence of a vital fact as no evidence. In *Kindred v. Con/Chem, Inc.*,[48] the court explained that:

> [t]he test for the application of this no evidence/scintilla rule is that if reasonable minds cannot differ from the conclusion that the evidence offered to support the existence of a vital fact lacks probative force, it will be held to be the legal equivalent of no evidence. However, there is some evidence, more than a scintilla, if the evidence furnishes some reasonable basis for differing conclusions by reasonable minds as to the existence of the vital fact.[49]

The scintilla rule has been recast in a number of cases as a rule that treats so-called "equal inferences" as improper and nonprobative.[50] The

45. *See, e.g.*, Wal-Mart Stores, Inc. v. Gonzalez, 968 S.W.2d 934 (Tex. 1998).
46. *See, e.g.*, Provident Am. Ins. Co. v. Castaneda, 988 S.W.2d 189, 190 (Tex. 1998).
47. *See generally Havner*, 953 S.W.2d at 711-12.
48. 650 S.W.2d 61 (Tex. 1983).
49. *Id.* at 63. The reasonableness of the inferences that the fact finder may draw from the evidence as a whole must be evaluated in light of all facts and circumstances. *See generally* Texas & N.O.R. Co. v. Burden, 203 S.W.2d 522, 530 (1947); Seymour v. American Engine Co. & Grinding, 956 S.W.2d 49 (Tex. App.—Houston [14th Dist.] 1996, writ denied) ("In our review of the evidence, the reasonableness of an inference that may be drawn from evidence must be evaluated in light of all facts and circumstances, including those circumstances in derogation of that inference."); *see also* Simmons & Simmons Constr. Co. v. Rea, 286 S.W.2d 415, 419 (1955).
50. *See* Litton Indus. Prods., Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984); $56,700 in U.S. Currency v. State, 730 S.W.2d 659, 662 (Tex. 1987). Although this method of analysis is not entirely unprecedented, as Justice Calvert himself notes there is no need for it, although he apparently regards it as harmless. *See* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence,"* 38 Texas L. Rev. 361, 365 (1960) ("Opinions in some of the decided cases indicate that an inference contrary to a finding of a vital fact is considered when the existence of the vital fact is essential to a recovery and the facts proved give

equal-inference version of the scintilla rule can be used as a blunt instrument to challenge the fact finder's inference whenever the opposing party has a competing factual theory that is reasonable.[51] This is a clear usurpation of the fact finder's traditional role. Unfortunately, a bare majority of the current court has arguably embraced this methodology.[52]

Even before the court's political composition changed, however, this questionable approach to no-evidence review had been used to set aside a jury's verdict. In *$56,700 in U.S. Currency v. State*,[53] a civil forfeiture case involving $56,700 found by the police during the seizure of cocaine at Harry Farah's condominium, the Texas Supreme Court sustained a no-evidence point of error directed at the trial judge's finding that Farah derived the funds from the sale or distribution of illegal drugs. The evidence showed signs of drug use, possible drug sales, and an alternative explanation for the source of the 567 one hundred dollar bills found on the premises. Based on *Litton Industrial Products, Inc. v. Gammage*,[54] a case that involved no basis for drawing reasonable, but conflicting, inferences from the circumstantial evidence, a majority of the Texas Supreme Court explained that the circumstantial evidence gave rise to two equally plausible inferences—Farah was a drug user who obtained the funds in a legitimate manner, or Farah obtained the one hundred dollar bills from drug sales—nothing showed that one factual theory was more probable than the other. The majority opinion clearly bases its poorly reasoned conclusion on a mistaken view of the distinction between a true presumption, which disappears when contrary evidence is produced, and a reasonable inference, which does not.[55]

Because any ultimate fact may be proved by circumstantial evidence,[56] Justice Campbell dissented and took the majority to task for invading the province of the fact finder:

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rise to opposing inferences which are equally reasonable and plausible. In that situation it is said that a finding that the vital fact exists is purely speculative and a no evidence point is sustained. It appears that the opposing inference is considered for the purpose of determining whether the necessary supporting inference may be drawn *with reasonable certainty*. There would appear to be no necessity for the variation. The opposing inference is present and it does no harm to note its presence, but the basic reason for sustaining the 'no evidence' point is that the inference supporting the finding of the vital fact is not reasonably to be drawn from the meager facts proved.") Unfortunately, Judge Calvert was mistaken in his view that the variation does no harm because it can be used to argue that opposing reasonable inferences have no probative value, i.e., that only the most convincing reasonable inference has probative value.

51. *See, e.g.*, Continued Care, Inc. v. Fournet, 979 S.W.2d 419, 421-22 (Tex. App.—Beaumont 1998, no pet.)

52. *See* Wal-Mart Stores, Inc. v. Gonzalez, 968 S.W.2d 934 (Tex. 1998).

53. 730 S.W.2d 659 (Tex. 1987).

54. 668 S.W.2d 319, 324 (Tex. 1984).

55. *See $56,700 in U.S. Currency*, 730 S.W.2d at 662 ("Any presumption which may have arisen that the currency was derived from the sale or distribution of illicit drugs was rebutted [by the testimony]."); *see also* Scott v. Millers Mut. Fire Ins. Co. of Tex., 524 S.W.2d 285, 288 (Tex. 1975); Southland Life Ins. Co. v. Greenwade, 159 S.W.2d 854, 857 (1942).

56. *See* Farley v. M M Cattle Co., 529 S.W.2d 751, 755 (Tex. 1975).

> The majority has misapplied the rules relating to inferences and has invaded the province of the fact finder. It is well established that more than one inference may be drawn from a single fact situation. Although inferences drawn from circumstantial evidence may be rebutted, this question is determined by the fact finder unless only one reasonable deduction can be drawn therefrom. The proponent of such evidence need not disprove all other possible conclusions which could be drawn from the circumstances.[57]

Justice Campbell concluded:

> [t]he circumstantial evidence relied upon by the trial court has the probative force sufficient to constitute a basis for legal inference that the currency was derived from the sale of cocaine. Therefore, it is the duty and responsibility of this Court to uphold the findings and judgment of the trial court and not to substitute its judgment for that of the trial court.[58]

Another example of the substitution of the equal-inference version of the scintilla rule for the more traditional "reasonable minds" approach appears in *Wal-Mart Stores, Inc. v. Gonzalez*,[59] a case that cites *$56,700 in U.S. Currency v. State* approvingly. *Gonzalez* was a slip and fall case in which the plaintiff slipped on a pile of macaroni. The circumstantial evidence was that the "macaroni had mayonnaise in it, was 'fresh,' 'wet,' 'still humid,' and contaminated with 'a lot of dirt.'"[60] The court characterized this evidence as follows:

> Dirt in macaroni salad lying on a heavily-traveled aisle is no evidence of the length of time the macaroni had been on the floor. That evidence can no more support the inference that it accumulated dirt over a long period of time than it can support the opposite inference that the macaroni had just been dropped on the floor and was quickly contaminated by customers and carts traversing the aisle.
>
> . . .
>
> The presence of footprints or cart tracks in the macaroni salad equally supports the inference that the tracks were of recent origin as it supports the opposite inference, that the tracks had been there a long time.
>
> . . .
>
> We hold that the evidence that the macaroni salad had "a lot of dirt" and tracks through it . . . is no evidence that the macaroni had been on the floor long enough to charge Wal-Mart with constructive notice of this condition. Gonzalez had to demonstrate that it was *more likely than not* that the macaroni salad had been there for a long time; Gonzalez proved only that the macaroni salad *could possibly*

57. *$56,700 in U.S. Currency*, 730 S.W.2d at 663 (citing Walters v. American States Ins. Co., 654 S.W.2d 423, 426 (Tex. 1983); Farley v. M M Cattle Co., 529 S.W.2d 751, 757 (Tex. 1975); Ross v. Green, 139 S.W.2d 565, 572 (1940)).

58. *Id.*

59. 968 S.W.2d 934 (Tex. 1998). Although no dissenting opinion has been delivered, Chief Justice Phillips and Justices Abbott, Hankinson, and Spector noted their dissent from the majority opinion delivered by Justice Gonzalez and joined by Justices Hecht, Enoch, Owen and Baker.

60. *Id.* at 936.

have been there long enough to make Wal-Mart responsible for noticing it.[61]

Based on these authorities, among others, it can be argued that the court has recognized a new scintilla rule under which equally plausible inferences always negate each other. This can be a clear departure from the view that it is the jury's role to select "from the conflicting evidence and conflicting inferences that which it considered most reasonable."[62]

Under a no-evidence analysis based on an assessment of circumstantial evidence, a reviewing court must decide whether reasonable minds could differ with respect to the matter in controversy. The principle applied by the majority opinion in the *Wal-Mart* case concerning "equally plausible but opposite inferences" is not a necessary part of this reasoning process.[63] In fact, it allows for a perversion of the review process in most cases, which do not involve a paucity of circumstantial evidence. In many cases involving an ordinary amount of circumstantial evidence, that is, the facts and circumstances surrounding an event or occurrence from which inferences may be drawn concerning what happened, whether an applicable standard of care was violated or what caused harm to the claimant, more than one inference is commonly permissible.[64]

Under well-established principles, it is impermissible for a trial judge or a reviewing court to set aside a jury verdict "because the record contains evidence of and gives equal support to inconsistent inferences"[65] as long as the inference drawn by the jury is not based merely on speculation or conjecture. Thus, a true equal-inference case is one involving "meager circumstantial evidence"[66] from which no reasonable inference can be drawn. In *Litton Industrial Products*,[67] for example, the record contained very little information concerning the matter in controversy, i.e., whether the product in question was sold after the effective date of the Deceptive Trade Practices Act. The evidence showed that ratchet adaptors of the same type had been sold before the enactment of the Act as well as thereafter. Under these circumstances, the meager circumstantial evidence did give rise to equal inferences, not because the evidence pointed in two different directions, but because the circumstantial evidence provided no reasonable basis for inferring that the product in question was purchased before, rather than after, the effective date of the Act. This is an entirely different type of situation from the one that confronted

61. *Id.* at 937-38.

62. Benoit v. Wilson, 239 S.W.2d 792, 797 (1951).

63. Wal-Mart Stores, Inc. v. Gonzalez, 968 S.W.2d 934, 936 (Tex. 1998).

64. *See, e.g.*, Farley v. M M Cattle Co., 529 S.W.2d 751, 756-57 (Tex. 1975) (involving a single fact pattern supporting competing reasonable inferences about causation).

65. *Benoit*, 239 S.W.2d at 797 ("This court should never set aside a jury verdict merely because the jury could have drawn different inferences or conclusions.").

66. *See, e.g.*, Litton Indus. Prods. Inc. v. Gammage, 668 S.W.2d 319, 324 (Tex. 1984) (holding evidence that defendant sold same tool before and after effective date of DTPA did not permit inference that defendant did any act or practice in violation of DTPA).

67. 668 S.W.2d 319 (Tex. 1984).

the court in *$56,700 in U.S. Currency*,[68] a case in which the conflicting evidence would support alternative and reasonable inferences about the source of the disputed funds. Moreover, although the question is a much closer one in *Wal-Mart Stores, Inc. v. Gonzalez*, the Court's focus should have been more directly on whether reasonable minds could conclude that the macaroni had been on the floor long enough to charge Wal-Mart with knowledge, not on some type of weighing or balancing test.

Use of the equal-inference approach to the no-evidence review standard can create analytical problems and, for two reasons, can be used to invade the province of the jury. First, it assumes that not more than one reasonable inference can be drawn from the totality of the circumstantial evidence. Second, it requires that the claimant's suggested inference must be the most convincing inference among the reasonable inferences that can be drawn from the circumstantial evidence, thereby miscasting the standard of evidentiary review.[69] This is a clear departure from the view that it is the jury's role "[to select] from the conflicting evidence and conflicting inferences that which it considered most reasonable."[70]

The equal-inference articulation of the scintilla rule allows counsel to argue, and a reviewing court to find, that because each party's factual claim is reasonably plausible, no probative evidence has been presented. Similarly, it allows a reviewing court to select from the conflicting inferences, the inference that the court prefers, i.e., considers most reasonable, thereby supplanting the jury and the jury's choice among conflicting reasonable inferences.[71]

B. Undisputed Evidence

Until recently, it was not clear whether undisputed evidence would be exempted from the traditional evaluation process. Many cases unequivocally state that the jury is the exclusive judge of the facts and the credibility of the witnesses. Nonetheless, some older cases made the point that neither the fact finder nor the reviewing court could disregard the uncon-

68. *See* $56,700 in U.S. Currency v. State, 730 S.W.2d 659 (Tex. 1987).

69. *See, e.g.*, Lozano v. Lozano, 983 S.W.2d 787, 790 (Tex. App.—Houston [14th Dist.] 1998, pet. granted) ("In order to overrule appellants' no-evidence point of error, we must find that the inference of appellants' knowledge drawn from the circumstantial evidence is more reasonable than the lack of knowledge inference proposed by appellants.").

70. *See* Benoit v. Wilson, 239 S.W.2d 792, 797 (Tex. 1951).

71. Another "purported rule," as described by Judge Calvert, is that a no-evidence point must be sustained if a finding of fact can be supported only by piling inference upon inference. Chief Justice Robert W. Calvert explains that "[a]ctually, that is not a separate rule of decision; it is also [like the so-called equal-inference rule] but another way of saying that the vital fact may not reasonably be inferred from the meager facts proved in the particular case." Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 Texas L. Rev. 361, 365 (1962) (citing Phoenix Ref. Co. v. Powell, 251 S.W.2d 892 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.)) (quoting Dean Wigmore's scathing criticism of the inference piling rule). As the Calvert article suggests, Texas courts would be much better off to abandon the inference piling approach to no-evidence review because it is hard to apply, easy to manipulate, and simply not a reliable tool for assessing the reasonableness of an inference.

tradicted testimony of a disinterested witness.[72] Recently, this same concept has been applied to uncontroverted direct evidence from interested witnesses.[73] Under current thinking, if the interested witness' testimony is clear, direct, and positive, free from contradictions, inaccuracies, and circumstances tending to cast suspicion on the evidence, and if it is corroborated or could have been readily controverted by an opponent, but was not controverted,[74] it may conclusively establish the matter in controversy. Although the wisdom of giving conclusive effect to the uncorroborated testimony of an interested witness may be questioned, because of the limits imposed on this approach, no serious problems in the administration of justice are normally presented by this principle of undisputed evidence.

The biggest and arguably most problematic, if not pernicious, development concerns the treatment of so-called "undisputed circumstantial evidence." Circumstantial evidence may be defined as the facts and circumstances surrounding an event or occurrence from which inferences may be reasonably drawn concerning what happened, whether the applicable standard of care was violated, what the actors concerned in the event intended or believed, or what caused harm to a claimant. Under this analysis, the circumstantial evidence is distinct from the inferences that may reasonably be drawn from the circumstances. Accordingly, even in cases in which the circumstantial evidence or some part of it is undisputed, it is quite possible that the inferences to be drawn from the evidence are hotly contested and at the center of the controversy that must be resolved by the fact finder.[75] In other words, merely because some or all of the circumstantial evidence is undisputed, it will not necessarily or even normally follow that an inference drawn from the evidence will also qualify as undisputed evidence. Nonetheless, in an important recent case, the Texas Supreme Court opined in a footnote that reviewing courts need not "disregard undisputed evidence that allows of only one logical inference."[76] As reflected in the cases relied upon in the footnote,[77] this means that if the facts are undisputed, and they admit or al-

72. *See, e.g.*, Texas & N.O.R. Co. v. Burden, 203 S.W.2d 522, 530 (1947).

73. *See, e.g.*, Schwartz v. Pinnacle Communications, 944 S.W.2d 427, 431-33 (Tex. App.—Houston [14th Dist.] 1997, no writ).

74. *See* Collora v. Navarro, 574 S.W.2d 65, 68-70 (Tex. 1978); *see also* Lofton v. Texas Brine Corp., 777 S.W.2d 384, 386 (Tex. 1989).

75. An important threshold principle for the analysis of circumstantial evidence recognizes that the reasonableness of inferences that could be drawn from the circumstantial evidence must be evaluated in light of all facts and circumstances that the fact finder is required to credit, i.e., undisputed facts and circumstances. *See Texas & N.O.R. Co.*, 203 S.W.2d at 530; Simmons & Simmons Constr. Co. v. Rea, 286 S.W.2d 415, 419 (1955).

76. Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 51 n.1 (Tex. 1997); *see also* GXG, Inc. v. Texacal Oil & Gas, 977 S.W.2d 403, 423 (Tex. App.—Corpus Christi 1998, pet. denied).

77. Wininger v. Ft. Worth & D.C. Ry. Co., 143 S.W. 1150, 1152 (1912); Texas & N.O.R. Co. v. Rooks, 293 S.W. 554, 556-57 (Tex. Comm'n App. 1927, motion for rehearing overruled).

low only one logical inference, circumstantial evidence can establish an ultimate fact, such as negligence, as a matter of law.

The footnote does not mean that undisputed facts normally give rise to only one reasonable inference, that the fact finder is required to select the most reasonable inference[78] or to choose the same inference that a reviewing court might have selected. Under a proper analysis, a reviewing court is not permitted to treat evidence as undisputed merely because it is not directly contradicted, if the evidence conflicts with other evidence because a reasonable inference in support of the verdict can be drawn from the other evidence in support of the verdict, any more than it is permitted to ignore any other evidence that supports the verdict.[79]

On a more subtle level of analysis, a reviewing court is not permitted to treat evidence as undisputed if the evidence, by itself or in combination with other evidence, gives rise to more than one reasonable inference. Certainly, it is not proper for a reviewing court to draw an adverse inference from undisputed circumstantial evidence and to conclude that the adverse inference is undisputed and conclusive because in the court's view it is the most reasonable one. Nonetheless, this is arguably what happened in *Richey v. Brookshire Grocery Company*[80]

Richey was a malicious prosecution case in which the central issue was whether the grocery company lacked probable cause to initiate criminal proceedings against Kelly Richey. The jury found that the company lacked probable cause to file a criminal prosecution and awarded damages to the plaintiff. A bare majority of the Texas Supreme Court[81] concluded that the grocery company had probable cause as a matter of law because Richey was observed by the company's employees concealing a pack of cigarettes, retaining the merchandise in his possession, and passing through the check-out line without paying for the merchandise. Despite the fact that the court defined probable cause as "the existence of such facts and circumstances as would excite belief in a reasonable mind, acting on the facts within the knowledge of the prosecutor [complainant], that the person charged was guilty of the crime for which he was prosecuted,"[82] the court focused on only some of the circumstances, which were not disputed, and based on these circumstances drew the logical, but not an inescapable or the only logical or reasonable, inference that the

78. There is some muddled historical support for the view that more reasonable inferences vitiate or supersede less reasonable ones, but even these cases are limited to situations in which the more reasonable inference "is conclusive, or so clear, positive and disinterested that it would be unreasonable not to give effect to it as conclusive." Southland Life Ins. Co. v. Greenwade, 159 S.W.2d 854, 858 (1942); *see also* Ross v. Green, 139 S.W.2d 565, 572-73 (1940).

79. As former Justice Raul Gonzalez has accurately opined in a dissent in the *Castaneda* case, although certain "evidence" may not be directly disputed or contradicted, it may still conflict with other evidence in the record. *See* Provident Am. Ins. Co. v. Castaneda, 988 S.W.2d 189, 205 (Tex. 1998).

80. 952 S.W.2d 515 (Tex. 1997).

81. The majority includes Justice Spector, who delivered the opinion, Chief Justice Phillips, and Justices Hecht, Enoch and Owen. *See id.* at 516.

82. *Richey*, 952 S.W.2d at 517 (quoting Akin v. Dahl, 661 S.W.2d 917, 921 (Tex. 1983)).

grocery company did not lack probable cause and concluded that the malicious prosecution claim should not have been submitted to the jury.[83] Four justices dissented.[84] As explained by Justice Cornyn's dissent, based on the definition of probable cause and record evidence showing that Richey had paid $51.75 for groceries for his family, re-entered the store to purchase items for charity, paid an additional $8.89 in cash for those items, had cash available to pay $1.49 for the cigarettes, and offered to pay for them when he was reminded about them, the jury could have concluded that a reasonable person would not have believed that a crime had been committed.[85]

Seasoned appellate lawyers know that appellate judges try to determine in their own minds what really happened. But this is a preliminary step in the appellate process, and not a proper basis for deciding cases in the face of jury findings grounded on probative evidence. Although Justice Hardberger's explanation concerning the court's motives or ideology is too harsh,[86] it is arguable that the court's rejection of some verdicts has been based on one or both of these misapplications of the principle that undisputed evidence cannot be disregarded by the fact finder.[87]

C. Opinion Testimony

Opinion testimony, and particularly expert opinion testimony, has played an ever increasing role in modern litigation. Hence, the distinct body of principles used by courts to assess the admissibility and probative value of opinion testimony is particularly important to the modern litigator. Probably for this reason, and because the rules of evidence allow opinion testimony on the ultimate issues to be resolved by the trier of facts,[88] special rules have been devised for evidentiary review of opinion testimony.

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83. *See id.* at 518 ("Probable cause in this case, in which the facts and events leading up to Richey's arrest are undisputed, is *therefore* a question of law for the court and not the trier of fact. Because Richey concealed merchandise, retained the merchandise in his possession, and passed through the check-out line without paying for the merchandise, the only probable-cause issue is the reasonableness of Brookshire's belief as to Richey's state of mind at the time of the appropriation.") Unless the majority opinion was attempting to state that in malicious prosecution cases, for public policy reasons, the probable cause question is a question of law for the court, see *Lonon v. Fiesta Mart, Inc.*, 999 S.W. 2d 458, 460 (Tex. App.—Houston [14th Dist.] 1999, no pet.), and that the jury is restricted to deciding only what happened on the basis of conflicting evidence rather than the larger issue of the reasonableness of Brookshire's belief as to Richey's state of mind, the opinion cannot be reconciled with conventional evidentiary review standards. Even then, the majority's analysis of the "reasonableness" issue is questionable. Viewed most charitably in this light, the majority opinion stands for the proposition that if all the objective elements of a criminal offense have been committed, there is probable cause, regardless of the overall reasonableness of the prosecutor's belief.

84. *See Richey*, 952 S.W.2d at 520. Justice Cornyn penned the dissent and is joined by Justices Gonzalez (Raul), Baker, and Abbott.

85. *See id.* at 521.

86. *See* Hardberger, *supra* note 13.

87. *See, e.g.*, Provident Am. Ins. Co. v. Castaneda, 988 S.W.2d 189, 189 (Tex. 1998).

88. *See* Tex. R. Evid. 704; Louder v. De Leon, 754 S.W.2d 148, 148-49 (Tex. 1988); Birchfield v. Texarkana Mem'l Hosp., 747 S.W.2d 361, 365 (Tex. 1987).

The general rule is that opinion testimony does not bind the trier of fact, even if it is not controverted, unless the subject matter is one for experts alone.[89] Because the rule that expert testimony is generally not conclusive is based on the fact that the testimony is opinion testimony, and not because of its source, uncontroverted opinion testimony is also not conclusive when provided by a lay witness.[90] Of course, lay opinion testimony may have no probative value whatsoever if the subject requires expertise,[91] or for other reasons.

In order for expert opinion testimony to have probative value the witness must be qualified as an expert by knowledge, skill, experience, training, or education to testify on scientific, technical, or other specialized subjects for the testimony to assist the fact finder in understanding the evidence or determining a fact issue.[92] More significantly from the standpoint of no-evidence review of jury findings grounded on expert opinion testimony, in *Gammill v. Jack Williams Chevrolet, Inc.*,[93] the Texas Supreme Court clearly held that "[a]ll expert testimony must be shown to be reliable . . . regardless of whether the scientific evidence presented is novel or conventional."[94] This means that the expert's opinion testimony must be based on reliable data,[95] a proper methodology or reasoning process,[96] and there must not be "too great an analytical gap between the data and the opinion proferred."[97] In other words, if the trial court or the reviewing court concludes that the bases for the expert's opinions are not reasonable or logical, the opinion has no probative value. Moreover, it appears that to pass the reliability threshold, the expert must address and refute other plausible theories.[98] Whether these theories involve causation ("if there are other plausible causes of the injury or condition that could be negated, the plaintiff must offer evidence excluding those causes

89. *See* McGalliard v. Kuhlmann, 722 S.W.2d 694, 697 (Tex. 1986); *see also*, Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 338 (Tex. 1998); Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 665 (Tex. App.—Houston [1st Dist.] 1998, pet. filed).

90. *See Martinez*, 977 S.W.2d at 339.

91. *See* Hood v. Phillips, 554 S.W.2d 160, 165-66 (Tex. 1977).

92. *See* TEX. R. EVID. 702; Broders v. Heise, 924 S.W.2d 148, 152-53 (Tex. 1996) (stating that expert witness must "possess special knowledge as to the very matter on which he proposes to give an opinion") (quoting 2 RAY, TEXAS LAW OF EVIDENCE: CIVIL AND CRIMINAL § 1401, at 32 (Tex. Practice 3d ed. 1980)).

93. 972 S.W.2d 713 (Tex. 1998).

94. *Id.* at 722-26.

95. *See* Burroughs Wellcome Co. v. Crye, 907 S.W.2d 497, 499-500 (Tex. 1995).

96. *See* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 714 (Tex. 1997); *see also Burroughs*, 907 S.W.2d at 499-500.

97. *Gammill*, 972 S.W.2d at 727 (quoting General Elec. Co. v. Joiner, 522 U.S. 136, 146 (1997).

98. *See Havner*, 953 S.W.2d 714; *see also* E.I. du Pont de Nemours & Co. v. Robinson, 923 S.W.2d 549, 557 (Tex. 1995).

with reasonable certainty")[99] or some other relevant matter,[100] these formidable requirements make it possible for a reviewing court to discount expert opinion testimony needed to sustain a fact finding.

A similar approach has been taken to lay opinion testimony. In the *Wal-Mart Stores, Inc. v. Gonzalez*[101] case, a lay witness testified based on her observation of the macaroni salad that, because it had footprints and cart track marks in it, it "seemed like it had been there a while."[102] Yet this otherwise proper shorthand rendition of the facts was discounted because the witness had not seen the macaroni salad prior to the fall and had no personal knowledge of the length of time it had been there. Hence, in the court's view the testimony constituted "mere speculative, subjective opinion of no evidentiary value."[103]

VII. SUMMARY JUDGMENT PRACTICE AND THE NO-EVIDENCE REVIEW STANDARD

Approximately nine years after the first Advisory Committee to the Texas Supreme Court decided not to recommend the adoption of a summary judgment rule, a summary judgment rule modeled on Federal Rule 56 was adopted.[104] Although the procedure was heralded as a means to reduce costs and to improve judicial economy by piercing unmerited claims and untenable defenses,[105] during most of the time that has elapsed since its adoption, trial and appellate courts have viewed summary judgment practice with hostility. In 1962, the Texas Supreme Court expressed the view that summary judgment is harsh, drastic, extreme, and demands strict application and every indulgence for the nonmovant.[106]

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99. *Havner*, 953 S.W.2d at 720. Refutation of the alternative factual theories has not been required in other contexts. *See, e.g.*, Offshore Pipelines, Inc. v. Schooley, 984 S.W.2d 654, 664 (Tex. App.—Houston [1st Dist.] 1998, pet. filed); *Robinson*, 923 S.W.2d at 559. Venerable precedent provides that the plaintiff is not required to exclude every other possible cause of an injury producing event. *See, e.g.*, Burlington-Rock Island R. Co. v. Ellison, 167 S.W.2d 723, 726 (1943) ("These plaintiffs were not required to exclude the probability that the accident might have occurred in some other way. To so hold would impose upon them the burden of establishing their case beyond a reasonable doubt.") One case has concluded otherwise in reliance on the *Merrell Dow* opinion. *See* Williams v. NGF, Inc., 994 S.W.2d 255, 256 (Tex. App.—Texarkana 1999, no pet.).

100. *See* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706, 720 (Tex. 1997); *see also* Weiss v. Mechanical Associated Servs., Inc., 989 S.W.2d 120, 125-26 (Tex. App.—San Antonio 1999, pet. denied).

101. 968 S.W.2d 934 (Tex. 1998).

102. *Id.* at 936.

103. *Id.* at 937-38.

104. TEX. R. CIV. P. 166a (adopted as a new rule, effective March 1, 1950).

105. *See* Roy W. McDonald, *Summary Judgments*, 30 TEXAS L. REV. 285, 286 (1952); Gulbenkian v. Penn, 252 S.W.2d 929, 931 (1952).

106. *See* Gaines v. Hamman, 358 S.W.2d 557, 561-63 (1962). Somewhat interestingly, earlier appellate decisions had treated the procedure more favorably after its adoption in 1950. *See* Rolfe v. Swearingen, 241 S.W.2d 236, 239-40 (Tex. Civ. App.—San Antonio 1951, writ ref'd n.r.e.) (opinion by Pope, J.) (holding that a nonmovant could not raise a disputed issue of fact by remaining silent and announcing ready for trial). Justice Jack Pope's opinion contains the following interesting language: "While appellees were shouting their facts, appellants elected to remain mute." *Id.* at 239. To hold otherwise, ". . . will sound the requiem to a rule that has hardly been christened." *Id.* at 240; *see also* Fowler v.

Thereafter, in a series of opinions, the high court reversed summary judgments routinely by giving a restrictive interpretation of the basic summary judgment test[107] and by taking a strict view of the sufficiency of the movant's summary judgment evidence.[108] Not surprisingly, trial judges developed a reluctance to grant summary judgments.[109] Consequently, Civil Procedure Rule 166a was largely ineffective for the next three decades until the rule was rewritten in 1978. The principal amendments concerned both the basic test and the sufficiency of the movant's summary judgment evidence.

By virtue of the 1978 amendments, issues not expressly presented to the trial court by written motion, answer, or other response may not be considered on appeal as grounds for reversal.[110] In addition, the amendments authorized summary judgment on the basis of the uncontradicted testimonial evidence of an interested witness or of an expert, if the evidence is probative and could have been readily controverted, but was not.[111] By 1979, as reflected in the Texas Supreme Court's opinion in *City of Houston v. Clear Creek Basin Authority*,[112] summary judgment was recognized as a helpful tool, rather than as an invasion of the trial process or some type of snap judgment.

Until 1997, a defendant-movant was required to conclusively negate one or more elements of a plaintiff's cause of action or to conclusively establish each element of an affirmative defense to show an entitlement to a summary judgment.[113] Although a series of United States Supreme Court decisions[114] had reinterpreted the federal rule to require nonmovant plaintiffs to come forward with evidence showing that a genuine issue for trial exists to avoid a summary judgment, until 1997 the Texas Supreme Court rejected this approach.

Texas Employers' Ins. Ass'n, 237 S.W.2d 373, 375 (Tex. Civ. App.—Fort Worth 1951, writ ref'd) (relying on following general rule from *Cochran v. Wool Growers Cent. Storage Co.*, 166 S.W.2d 904, 908 (1942): "Where the testimony of an interested witness is not contradicted by any other witness, or attendant circumstances, and the same is clear, direct and positive, and free from contradiction, inaccuracies, and circumstances tending to cast suspicion thereon, it is taken as true, as a matter of law.").

107. *See* Gibbs v. General Motors Corp., 450 S.W.2d 827 (Tex. 1970).

108. *See* Texas Nat'l Corp. v. United Sys. Int'l, Inc., 493 S.W.2d 738 (Tex. 1973).

109. A study revealed that during a six-year period, only 2% of civil cases in Texas were handled successfully by summary judgment. *See* Robert L. Pittsford & James W. Russell, III, *Summary Judgment in Texas: A Selective Survey*, 14 HOUS. L. REV. 854, 854 (1977). Another study revealed that 70% of the summary judgment cases decided by the Texas Supreme Court from 1968 to 1976 resulted in reversals. *See* Patrick K. Sheehan, *Summary Judgment: Let the Movant Beware*, 8 ST. MARY'S L.J. 253, 254 (1976).

110. *See* TEX. R. CIV. P. 166a(c).

111. *See* TEX. R. CIV. P. 166a(c), (d).

112. 589 S.W.2d 671 (Tex. 1979).

113. *See* Casso v. Brand, 776 S.W.2d 551, 555-56 (Tex. 1989); *see also* Jennings v. Burgess, 917 S.W.2d 790, 793 (Tex. 1996); Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 471 (Tex. 1991).

114. In *Celotex*, Chief Justice Rehnquist wrote that "the plain language of [Federal] Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

The Texas Supreme Court amended the summary judgment rule, effective September 1, 1997, to embrace the modified federal approach to motions that are based on challenges to a ground of recovery or defense on which the nonmovant would have the burden of proof at trial. As a result of the amendment, a defendant may obtain a summary judgment without conclusively negating an element of the plaintiff's cause of action.[115]

The most important aspect of the new provision is the incorporation of the familiar no-evidence standard, applied in instructed verdict cases, involving objections to submission of vital fact issues and in connection with motions under Civil Procedure Rule 301 for judgment notwithstanding the verdict or in disregard of particular jury findings,[116] into summary judgment practice. Regardless of the context, as explained in the preceding sections of this article, Texas courts have followed the approach that, in applying the no-evidence standard of review, the evidence is to be considered in its most favorable light in support of the nonmovant's position.[117] Under this approach to the scope of review, a no-evidence challenge fails if some probative testimonial or documentary evidence is identified, regardless of the number of witnesses or quantity of contrary evidence. This is a particularly good approach in the context of the summary judgment practice.

The application of a broad, whole record scope of review to summary judgment practice and the review of summary judgments on appeal presents a more serious question than the use of such a standard in directed verdict or judgment n.o.v. practice in the context of conventional trials. In the absence of a conventional trial record, a consideration of the nonmovant's evidence, through the prism of the movant's contrary evidence, would certainly affect how the nonmovant's evidence is evaluated.[118]

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115. Subdivision (i) of amended Civil Procedure Rule 166a provides:

> (i) No-Evidence Motion. After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial. The motion must state the elements as to which there is no evidence. The court must grant the motion unless the respondent produces summary judgment evidence raising a genuine issue of material fact.

TEX. R. CIV. P. 166a(i).

116. *See* TEX. R. CIV. P. 301; *see also* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361 (1960); William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEXAS L. REV. 515 (1991). It is abundantly clear, however, that the new Texas no-evidence summary judgment practice is controlled by the same limited scope of review no-evidence standard as applied to legal insufficiency challenges made in conventional trials. *See* Weiss v. Mechanical Associated Servs., Inc., 989 S.W.2d 120, 124 (Tex. App.—San Antonio 1999, pet. denied); Moore v. K Mart Corp., 981 S.W.2d 266, 268-69 (Tex. App.—San Antonio 1998, pet. denied).

117. *See, e.g.*, Havner v. E-Z Mart Stores, Inc., 825 S.W.2d 456, 458 (Tex. 1992); *see also* W. Wendell Hall, *Revisiting Standards of Review on Civil Appeals*, 24 ST. MARY'S L.J. 1045, 1133 (1993).

118. The federal courts apply the same standard for granting summary judgments as they apply in deciding to grant a directed verdict. *See* Anderson v. Liberty Lobby, Inc., 477

A proper application of the scintilla rule and principles of undisputed evidence take on an even larger importance in the context of summary judgment practice because it is easier for trial judges and reviewing courts to lose sight of how the no-evidence standard would and should be applied in the litigation process in the absence of a conventional trial. In summary judgment cases, the so-called "equal-inference" rule can have a beguiling surface appeal and arguments that the evidence is undisputed are more difficult to refute when the actual dispute concerns the existence of conflicting inferences.[119]

VIII. THE ROLE AND IMPORTANCE OF THE TEXAS FACTUAL INSUFFICIENCY STANDARD

In contrast to the no-evidence standard of review, the factual sufficiency standard requires the trial judge to view and weigh all of the evidence supporting the finding and to set aside the finding only if the supporting evidence is so weak that the finding is manifestly wrong and unjust.[120] Although it is widely recognized that this standard is imprecise, it is an obvious safeguard against judgments that are supported by some evidence, but that should not be permitted to stand, in the interest of justice.[121] In the Texas procedural system, insufficient evidence rulings are assigned to trial judges and the courts of appeals, but not to the Texas Supreme Court.[122] Certainly, this system design removed the Texas Supreme Court from factual sufficiency review on at least two prudential grounds. First, the high court should be concerned with significant legal questions, not with conducting a particularized review of individual cases to correct errors. Error correction is the principal function of the fourteen courts of appeals, not the function of the Texas Supreme Court. Second, the high court should respect and defer to the lower courts, which are better suited to deal with fairness issues that may arise in individual cases when the evidence is too weak to withstand scrutiny, but will withstand a proper no-evidence analysis.

U.S. 242, 250 (1986). As explained by the Supreme Court in the *Reeves* case, this requires the trial judge and any reviewing court to review all of the evidence in the record, but to give credence only to the evidence and reasonable inferences that favor the nonmovant. *See* Reeves v. Sanderson Plumbing Prods., Inc., ___ U.S. ___, ___, 120 S. Ct. 2097, 2110 (2000).

119. *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995). Both the majority and the concurrence seem to forget that the fact finder should decide the proximate causation issue, regardless of whether the issue is couched in terms of an assessment of whether the conduct or product in question was a "substantial factor" or in terms of the "foreseeability of harm," if reasonable minds could differ about these matters under the evidence.

120. *See* Cain v. Bain, 709 S.W.2d 175, 176 (Tex. 1986). The courts of appeals may not reverse merely because the appellate judges conclude that the evidence preponderates toward an affirmative answer. *See* Herbert v. Herbert, 754 S.W.2d 141, 144 (Tex. 1988).

121. *See* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEXAS L. REV. 361, 368 (1960); *see also* W. St. John Garwood, *The Question of Insufficient Evidence on Appeal*, 30 TEXAS L. REV. 803, 813-14 (1952).

122. *See* TEX. GOV'T CODE ANN. §§ 22.001, 22.225 (West 1988 & Supp. 2000); Pool v. Ford Motor Co., 715 S.W.2d 629 (Tex. 1986).

Despite the finality of judgments in the courts of appeals on fact questions, a number of cases make it plain that the Texas Supreme Court can review such a determination by a court of appeals to decide if the correct standard of insufficiency review has been applied by a court of appeals.[123] Unfortunately, in recent years, the Texas Supreme Court has developed an unhealthy skepticism about how the courts of appeals have been doing factual sufficiency reviews. Commencing with *Pool v. Ford Motor Company*,[124] to allow the high court to determine if the correct standard of factual sufficiency review has been applied, courts of appeals were required to detail the evidence relevant to the issue and clearly state why the finding is so against the weight of the evidence that the finding is clearly wrong and manifestly unjust.[125] This approach was adopted by the predecessor court, which no doubt regarded the exercise of the power of at least some intermediate appellate courts to review verdicts with considerable skepticism.

In the 1990s, this same idea was applied to factual sufficiency review of punitive damage awards, whether they were reversed or affirmed by a court of appeals.[126] Of course, strict scrutiny review of orders and judgments affirming punitive damages verdicts has nothing to do with preserving respect for the fact finding process or the fact finder. It arguably demonstrates instead that the high court has more confidence in its own ability to decide individual cases than juries, trial judges, and the courts of appeals. As a practical matter, however, a particularized review of individual cases by the court is neither wise nor possible for the court to conduct. It is also not within the court's job description.[127]

IX. THE LEGACY OF LEON GREEN: A REPLY TO DEAN POWERS

The central thesis of an important article written by Dean William Powers of the University of Texas School of Law is that the Texas Supreme Court's recent tort jurisprudence has not changed the traditional Texas standard and scope of no-evidence review. The only change is the court's substantive assessment of duties owed to injured claimants through the development of a "particularized duty" approach that shifts "more of the normative work in tort litigation away from juries and toward judges."[128] Dean Powers regards this development as a good thing

123. *See Pool*, 715 S.W.2d, at 634-35 (citing cases).

124. 715 S.W.2d 629 (Tex. 1986).

125. *See id.* at 635.

126. *See* Mobil Oil Corp. v. Ellender, 968 S.W.2d 917, 925 (Tex. 1998); Ellis County State Bank v. Keever, 888 S.W.2d 790, 794 (Tex. 1994); .

127. *See* TEX. GOV'T CODE ANN. § 22.001 (a)(6) (West 1988).

128. William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1699, 1719 (1997) ("the Texas Supreme Court is increasingly willing to overturn jury verdicts in tort cases . . . by attending more carefully to the question of duty. Specifically, the court is moving away from broad definitions of duty and toward particularized definitions of duty. Defining legal duties has always been a proper role for the courts.").

because, "in some places," such as design defect litigation,[129] the jury should not be given broad policy-making authority.[130] Dean Powers also suggests that this development has its roots in the philosophy of Dean Leon Green.[131]

I disagree with Dean Powers' assessment that what is happening in Texas is restricted to an appropriate exercise of the Texas Supreme Court's law-question jurisdiction. I also believe that Dean Green would not have approved of what Dean Powers calls the court's increasing tendency to overturn jury verdicts or to otherwise minimize the jury's role in the tort litigation process.

Dean Leon Green's legal career and his body of written work spans several decades.[132] Dean Green's work is particularly interesting and important because he was concerned with the dynamic operation of the personal injury reparations system, not merely with substantive tort law concepts. Dean Green's concern with the litigation process differentiates him from other torts men[133] of his era and thereafter. As its title demonstrates, *Judge and Jury*,[134] a compendium of law review articles assembled in book form, Dean Green's most important work and the work that is most frequently identified with his views, is about the litigation process in tort law and the respective roles of judges and juries.

Because Dean Green's written work spans nearly fifty years, and his attitudes were developed and refined during his lengthy academic career, it is difficult to definitively assess how he would evaluate developments in

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129. *Id.* at 1719 ("It is one thing to let juries determine whether a particular driver was driving reasonably. That issue is relatively narrow and local. When we ask juries to determine how an automobile ought to be designed, however, we give juries broad policymaking authority . . . . The move to particularized duty rules in some cases, however, shifts at least some of that normative power back to courts, arguably where it belongs.").

130. The Texas Supreme Court's recent opinion in *Hernandez v. Tokai Corp.*, 2 S.W.3d 251 (Tex. 1999), does not wholeheartedly embrace this view. *See id.* at 260-61.

131. *See* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1699, 1701 n.5 (1997) (noting the works of Leon Green); *see also id.* at 1703 ("Duty is usually an issue for the court; breach and proximate cause are usually issues for the jury. The crucial difference is that Green's approach assigns more power to the court . . . ."). Powers also notes that: "[i]t is important to understand where the shift is taking place—on the duty issue—and where it is not—on the no evidence standard of review. Dean Green . . . would have placed more of that power in the hands of the courts—albeit trial courts, not appellate courts." *Id.* at 1719.

132. Dean Leon A. Green (1888-1979), A.B. Ouachita College 1908, L.L.B. University of Texas School of Law 1915; Visiting Professor of Law, Yale Law School, 1926-1929; Dean and Professor of Law, Northwestern University School of Law, 1929-1947; Distinguished Professor of Law, University of Texas School of Law, 1947-1977.

133. *See* David W. Robertson, *The Legal Philosophy of Leon Green*, 56 TEXAS L. REV. 393, 393 (1978) ("The eminence of Leon Green as a torts man is a matter of longstanding and considerable record.").

134. LEON GREEN, JUDGE AND JURY (1930). Dean Green's other publications include: RATIONALE OF PROXIMATE CAUSE (1927); *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014 (1928); *The Duty Problem in Negligence Cases: II*, 29 COLUM. L. REV. 255 (1929); THE JUDICIAL PROCESS IN TORT CASES (1939); INJURIES TO RELATIONS (1949); *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482 (1956); *Duties, Risks, Causation Doctrines*, 41 TEXAS L. REV. 42 (1962); *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543 (1962); and THE LITIGATION PROCESS IN TORT LAW (Bobbs-Merrill ed. 1965).

the current legal environment. It is unlikely, however, that Dean Green would have approved of an appellate court's use of a particularized duty analysis in tort cases as a doctrinal device to shift power from the jury and the trial judge to the appellate courts.[135]

Like Dean W. Page Keeton,[136] Dean Green conceptually defines the term "cause of action" in the conventional common law manner as consisting of four elements: duty, breach, causation, and damages (if they are a part of the cause of action).[137] Dean Green's approach does involve an elemental duty analysis to be made by the trial judge, as a law question, based on a set of factors[138] that bears some resemblance to the current Texas approach to duty questions,[139] with one very significant exception. Dean Green did not regard foreseeability of harm as a central part of the trial judge's duty determination.

As early as 1928, Dean Green reasoned that the foreseeability or anticipation of harm standard by which juries determine the negligence issue, i.e., the violation of duty, should not be used as a formula for the trial judge's judgment in defining duties.[140] Dean Green explains:

> [i]nasmuch as the foreseeability of danger is an essential requisite of the negligence issue, this issue is sometimes confused with the function of the judge to determine whether the risk of injury suffered by the victim was within the scope of the defendant's duty. The two

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135. Dean Green was highly critical of this phenomenon in several of his writings. *See* Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482 (1956); Leon Green, *Jury Trial and Promixate Cause*, 35 TEXAS L. REV. 357 (1957).

136. Dean Keeton also considered duty to be an elemental component of cause of action analysis, although he shared Dean Prosser's view that the duty issue normally is a simple one. *See* W. Page Keeton, *Action, Cause of Action, and Theory of the Action in Texas*, 11 TEXAS L. REV. 145, 146-49, 157-58 (1933); *see also* W. Page Keeton, *Negligence, Duty and Causation in Texas*, 16 TEXAS L. REV. 1 (1937); W. PAGE KEETON ET. AL., PROSSER AND KEETON ON TORTS 164-65 (5th ed. 1984).

137. *See* Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1022 (1928) ("In the class of cases known as 'negligence cases' a working analysis has been rather widely adopted . . . [s]uch a case has four elements: (1) the right-duty element; (2) the negligence element; (3) the damage element; and (4) the causal relation element.").

138. *See id.* at 1034.

> The following are believed to be the factors of most significance in influencing the determination of duties and through them the limits of the protection afforded by law. There are doubtless others:
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> 1. The administrative factor.
> 2. The ethical or moral factor.
> 3. The economic factor.
> 4. The prophylactic factor.
> 5. The justice factor.

139. *Id.*; El Chico Corp. v. Poole, 732 S.W.2d 306, 311 (Tex. 1987) ("Duty is the function of several interrelated factors, the foremost and dominant consideration being foreseeability of the risk."); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 309 (Tex. 1983) ("Though the decisional law of this State has yet to address the precise issues presented by this case, factors which should be considered in determining whether the law should impose a duty are the risk, foreseeability, and likelihood of injury weighed against the social utility of the actor's conduct, the magnitude of the burden of guarding against the injury and consequences of placing that burden on the employer.").

140. *See* LEON GREEN, JUDGE AND JURY 30-31, 68-74 (1930) (first published as *Analysis of Tort Cases*, 35 W.VA. L.Q. 323 (1929)); Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1026-35 (1928).

> issues are distinct; one is based on underlying policies that call for protection against risks of danger, the other on foreseeability of the risk of danger in the particular case.[141]

Under Dean Green's theory of risks, in resolving the duty question, the trial judge may take into consideration the economic and moral environments, the difficulties of administration, former court decisions and statutes, and all other factors brought to the court's attention, to determine what risks are comprehended by the defendant's duty.[142] Dean Green recognizes, however, that in most cases the trial judge's duty determination will follow a familiar pattern[143] and that "[i]n most cases the law has already been determined by former decisions or by statute under which a doctrine or rule governing defendant's conduct is firmly established."[144]

In describing the trial judge's role, Dean Green makes it clear that the trial judge must determine the existence of a "duty and its coverage, that is, whether it may extend to the particular risk or risks . . . suffered by the victim."[145] Dean Green explains that the trial judge's duty determination in an individual case resembles the decision of the jury in that:

> no rule of law can be stated which is automatically valid beyond the factual data of the case decided; that the lawmaking function of the court is necessarily founded on policy—the interests of the rest of us as well as those of the parties—and that this lawmaking function of determining duties and their scope must always be left free for the next case.[146]

In the same vein, Dean Green also explains "[a]side from those few cases where duties have been stated in terms of conduct, the duty a defendant was under, or the protection a plaintiff was entitled to have, is unknowable until the case has been adjudged."[147] Under this view, trial judges conduct a particularized duty analysis to aid in the resolution of specific cases in accordance with general principles that have been developed and declared by appellate courts.

Dean Green also believed that the causation element should be restricted to a cause-in-fact question and should not be expressed in terms of wrongfulness or responsibility.[148] Dean Green believed that responsi-

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141. Leon Green, *The Negligence Action*, 369 ARIZ. ST. L.J. 369, 379 (1974); *see also* Leon Green, *Identification of Issues in Negligence Cases*, 26 SW. L.J. 811, 828 (1972).

142. *See* Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 567-68 (1962).

143. LEON GREEN, JUDGE AND JURY 60 (1930) (first published as *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1025-26 (1928)). "How can a judge say there was a duty in this case and not in that one? This is the first problem in any case. In the 'mine run' of cases it may not be so very difficult because other more or less similar cases have blazed trails." *Id.*

144. Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 543, 562-63 (1962).

145. Leon Green, *Joseph Walter Bingham*, 17 STAN. L. REV. 1009, 1014 (1965).

146. *Id.*

147. LEON GREEN, JUDGE AND JURY 60 (1930).

148. *See* Leon Green, *The Submission of Issues in Negligence Cases*, 18 U. MIAMI L. REV. 30, 30-35 (1963) ("It will be noted that the use of such terms as proximate, remote, sole, intervening, superseding and other 'cause' terminology has been studiously avoided

bility issues should be allocated to the elements of duty and breach, i.e., negligence. Thus, Dean Green's definition of proximate cause would be a very different one from the current Texas definition of proximate cause, which includes an articulated foreseeability component.[149] In other words, Dean Green's philosophy to this extent seems to align him with Judge Cardozo, rather than Judge Andrews, in the celebrated *Palsgraf* case.[150]

Although Dean Green clearly admired Justice Cardozo,[151] he was not in agreement with the particularized duty analysis set forth in the Cardozo opinion in *Palsgraf* because Dean Green regarded forseeability of harm as a part of the negligence element rather than a definitive component of the trial judge's duty determination.[152] Dean Green disagreed with Justice Cardozo's duty formula for two reasons. First, the trial judge's duty determination depends upon a number of factors, finds its source in the law, and cannot sensibly be reduced to a formula.[153] Second, in Dean Green's view, foreseeability of harm is a question of fact to be decided by the jury.[154]

. . . . There may be and usually are many 'causes' of an injury, but the only inquiry before the court is whether the defendant's conduct contributed substantially to the injury.").

149. *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 775 (Tex. 1995).

150. *See* Palsgraf v. Long Island R.R., 162 N.E. 99 (1928). Justice Cardozo's majority opinion assumes that foreseeability questions should not be part of "[t]he law of causation remote or proximate," *id.* at 101, and states: "[t]he risk reasonably to be perceived defines the duty to be obeyed, and risk imports relation; it is risk to another or to others within the range of apprehension." *Id.* at 100. Although Cardozo's opinion is usually read to mean that the duty element assigns most of the heavy lifting to the court, the opinion also states: "[t]he range of reasonable apprehension is at times a question for the court, and at times, if varying inferences [of negligence] are possible, a question for the jury." *Id.* at 101. In contrast, Justice Andrews' opinion is usually cited for the view that these matters are the province of proximate causation, which is a jury question. *See id.* at 103-04 (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point. This is not logic. It is practical politics.").

151. *See* Leon Green, *Benjamin Nathan Cardozo*, 33 ILL. L. REV. 123 (1938).

152. *See* Leon Green, *The Causal Relation Issue in Negligence Law*, 60 MICH. L. REV. 565-68 (1962).

153. *See* Leon Green, *The Palsgraf Case*, 30 COLUM L. REV. 789, 797 (1932) ("The trouble arises in attempting to use the formula of 'foreseeability' as a *sole* detriment of duty . . . . Foreseeability is based upon experience; experience is, of course, a factor in determining the scope of duty, but by no means the sole factor. It frequently happens that duty coincides with experience, but not always so, and it is a mistake to think that judges are so narrowly bound, or that they need a formula for their purposes."). Green's interpretation of what he referred to as the "suggested determinants of duty" is contained in *Judge and Jury* at 74-96 (1930). *See* Leon Green, *The Duty Problem in Negligence Cases*, 28 COLUM. L. REV. 1014, 1031-32 (1928).

154. The following footnote in Leon Green, *The Causal Relation Issue in Negligence Law*, 60 Mich. L. Rev. 543, 566 n.72 (1962) discussing H.L.A. HART & A.M. HONORE, CAUSATION IN THE LAW 103 (1959) ("the authors") describes the analytical problems with Justice Cardozo's opinion in *Palsgraf*:

> The trouble with *Palsgraf* is that the issue to which Judge Cardozo is talking is not clearly formulated. Causal relation in the case is clear. Either the insufficiency of evidence to raise an issue of negligence with respect to the plaintiff, or the absence of negligence itself with respect to her and the injury she suffered, seems clear enough to support his judgment. The interpretation given by the authors, and perhaps Professor Seavey, is that of no duty to her.

Once the trial judge decides to pass the case to the jury under the court's instructions, the jury decides the issues of negligence and causation, both of which are submitted in simple terms "by some formula which would indicate as unrestrictively as possible upon what phase of the case the judgment of the jury should be desired."[155] Significantly, "the jury's judgment is restricted to the single case and it has no validity beyond this."[156]

Dean Green preferred the use of a type of broad-form jury submission of the negligence and causation questions under which the jury draws the ultimate conclusions of liability or defense.[157] Green disliked both the general charge[158] and the type of granulated special issue submission that preceded the 1973 amendments to the Texas Rules of Civil Procedure,[159] because both methods unduly complicate the case before the jury and permit an invasive form of appellate review.[160] Dean Green's particular dislike of the proximate-cause doctrine rests largely upon his view that it creates confusion and blurs the functions of court and jury.[161]

As far as the appellate courts are concerned, Dean Green recognizes that their primary function is to declare rights and duties by "indicating the boundaries of legal rules, or the harms against which government will undertake to give protection,"[162] but disapproves strongly of the development of "many subtle doctrines for effectually controlling jury judgment

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> That there was a duty to Mrs. Palsgraf as a waiting passenger is clear, but whether defendant's duty included the risk that befell her is seemingly what the authors think is involved, and that on this basis Judge Cardozo decided that the risk was determined on the basis of "foreseeability."

Despite some of the language in his opinion, that interpretation is not consistent with his opinions in *H. R. Moch Co. v. Rensselaer Water Co.*, 159 N.E. 896 (1928), decided the same year, *Wagner v. International Ry.*, 133 N.E. 437 (1921), and *Ultramares Corp. v. Touche, Niven & Co.*, 174 N.E. 441 (1931), nor in fact, with *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (1916), and *Hynes v. New York Cent. R.R.*, 131 N.E. 898 (1921). In the last mentioned cases, Judge Cardozo clearly finds the source of duty in the law. In *Palsgraf* the important fact is that the *highest appellate court*, after all the evidentiary data and arguments were in, and after consideration of all the factors involved, simply decided that the injury suffered by Mrs. Palsgraf *was not a risk within the scope of any duty owed her* as a passenger. If this is an acceptable interpretation, many more factors were involved than mere "foreseeability." On the other hand, if the court decided that *there was no sufficient evidence to raise an issue of negligence*, then "foreseeability" was a highly pertinent consideration.

155. LEON GREEN, JUDGE AND JURY 30 (1930).

156. *Id.*

157. *See* Leon Green, *Identification of Issues in Negligence Cases*, 26 SW. L.J. 811, 827-28 (1972); Leon Green, *The Submission of Issues in Negligence Cases*, 18 U. MIAMI L. REV. 30, 33-41 (1963); Leon Green, *Proximate Cause in Texas Negligence Law*, 28 TEXAS L. REV. 471, 778-82 (1950).

158. *See* Leon Green, *A New Development in Jury Trial*, 13 A.B.A. J. 715, 715 (1927) ("As a scientific method of settling disputes the general verdict rates little higher than the ordeal, compurgation or trial by battle.").

159. *See* Leon Green, *Special Issues*, 14 TEX. B.J. 552, 555-56 (1951).

160. *See* Leon Green, *Proximate Cause in Negligence Law*, 471, 761-64 (1950).

161. *See* Leon Green, *Jury Trial and Proximate Cause*, 35 TEXAS L. REV. 357, 358-59 (1957).

162. LEON GREEN, JUDGE AND JURY 386 (1930).

and reaching results which the appellate courts themselves approve."[163] Dean Green believed that the development of particularized rules of law for future cases to be generally unwise, if not impossible. Accordingly, trial judges and juries are best suited to resolve specific controversies in accordance with general principles.[164] Certainly, Dean Green, who regarded appellate review and the expansion of the power of appellate courts with suspicion and occasional distaste,[165] never intended reviewing courts to second-guess the trial judge or the fact finder on the particularized application of general principles in the context of an individual case.[166]

Under Dean Green's analysis, tort cases can only be understood through the procedural process to which they are subjected by the court.[167] The important lesson to be learned from Dean Green's considerable work product is that the litigation process is a dynamic process in which the principles of tort law are developed, applied, and refined by judges and juries.[168] Who decides what happened, whether the conduct of the actors involved violated applicable standards of care, and the institutional deference accorded those determinations in the litigation process are the important questions.

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163. *Id.*; *see also* Leon Green, *Identification of Issues in Negligence Cases*, 26 Sw. L.J. 811, 811 (1972) ("Appellate courts, however, too frequently misconceive the issue of the defendant's duty, and seek to affirm or reverse a judgment with a labored opinion based on false issues supported by questionable doctrinal refinements.").

164. LEON GREEN, JUDGE AND JURY 57-58 (1930). "The most a legal science can do with the classes of cases here involved is to employ broad formulas both for judge and jury and rely upon their respective judgment-passing capacity to dispose of cases as they arise." *Id.*

165. *See* David W. Robertson, *The Legal Philosophy of Leon Green*, 56 TEXAS L. REV. 393 (1978). Professor Robertson cites Dean Green's writings for the following pertinent propositions:

> Probably the strangest chapter in American legal history is how in the short period of the last fifty or seventy-five years, the same period during which trial courts were losing most of their power, the appellate courts have drawn unto themselves practically all the power of the judicial system.
>
> . . .
>
> The appellate courts have now secured control of all the essentials of jury trial . . . . Unless the judge handling the case is a dullard (and this is so rare that it need not be taken into account), some device of appellate control is always at hand to further the ends of justice as they may appear, however perfect the record may seem on its face. Where impulses are so strong to do ultimate justice and where the jury and what its members heard, observed, and considered are so far removed from the chambers of the court, the brakes of self-restraint are severely taxed. The supreme power in a court system as in any other hierarchy inevitably increases with its exercise.

Id. (citing *Jury Trial and Proximate Cause*, 35 TEXAS L. REV. 357, 358 (1957)).

166. *See* Leon Green, *Jury Trial and Mr. Justice Black*, 65 YALE L.J. 482, 487-88 (1956) ("Whatever its ultimate explanation, the shift of power from the trial court and jury to the appellate court—from the local community to a centralized court system—may well deaden the administration of the law, just as these other concentrations of power have produced conformity in other facets of our lives."); *see also* Leon Green, *Identification of Issues in Negligence Cases*, 26 Sw. L.J. 811 (1972).

167. *See* LEON GREEN, JUDGE & JURY 32 (1930).

168. *See* William L. Prosser, *Palsgraf Revisited*, 52 MICH. L. REV. 1, 32 (1953).

X. THE REDEFINITION OF BASIC CAUSATION PRINCIPLES

As Dean Green was fond of arguing and lamenting,[169] the causation issue can present a golden opportunity for a reviewing court to substitute its judgment for the judgment of the jury. Unfortunately, in *Union Pump Company v. Allbritton*,[170] the Texas Supreme Court has taken full advantage of this opportunity by modifying both the causation standards used in tort cases and the analytical process through which the fact finder's causation finding is reviewed.[171]

For a number of years, Texas has used the test of proximate cause in negligence and other cases,[172] and producing cause in strict tort liability cases[173] and in actions brought for violation of the Deceptive Trade Practices Act.[174] Proximate cause consists of three components, which are included in the proximate cause definition incorporated in Texas jury charges[175] in the following order: a chain of causation component, a but for causation element, and a foreseeability component.

The Texas Supreme Court incorporated the element of foreseeability into the definition of proximate cause during the early 1900s for two important reasons. By ruling that the basic test of proximate cause in negligence cases is whether the defendant could have reasonably foreseen that as a consequence of the defendant's negligence the injury or some similar injury would probably result,[176] and thereby adding an express foresee-

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169. *See* Green, *supra* notes 160-61 and accompanying text.

170. 898 S.W.2d 773 (Tex. 1995).

171. Although Justice Owen delivered the opinion of the Court, Chief Justice Phillips and Justices Gonzalez, Hightower, Hecht, Gammage, and Enoch joined in the court's majority opinion. Justice Cornyn concurred in the result. Only Justice Spector dissented from both the majority's analysis and result.

172. *See* Missouri Pac. R.R. v. American Statesman, 552 S.W.2d 99, 103 (Tex. 1977) (applying to common law negligence); *see also* Nixon v. Mr. Property Management Co., 690 S.W.2d 546, 549 (Tex. 1985) (negligence per se); Hyundai Motor Co. v. Rodriguez, 995 S.W.2d 661, 667 (Tex. 1999) (implied warranty).

173. *See* C. A. Hoover & Son v. O.M. Franklin Serum Co., 444 S.W.2d 596, 598 (Tex. 1969) (holding that foreseeability is normally part of the causation standard in strict product liability cases); *see also* General Motors Corp. v. Saenz, 873 S.W.2d 353, 357 (Tex. 1993) (strict tort liability).

174. *See* TEX. BUS. & COM. CODE ANN. § 17.50 (West 2000); *see also* Haynes & Boone v. Bowser Bouldin, Ltd., 896 S.W.2d 179, 182 (Tex. 1995).

175. The standard definition of proximate cause used in the *Texas Pattern Jury Charge* for a number of years provides:

> "Proximate cause" means that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the event, or some similar event, might reasonably result therefrom. There may be more than one proximate cause of an event.

See STATE BOARD OF TEXAS, TEXAS PATTERN JURY CHARGES: GENERAL NEGLIGENCE, INTENTIONAL PERSONAL TORTS PJC 2.4 (1998). This definition is based largely on *Rudes v. Gottschalk*, 324 S.W.2d 201, 207 (Tex. 1959).

176. *See* Seale v. Gulf, Colo. & Santa Fe Ry. Co., 65 Tex. 274 (1886); Texas & Pac. Ry. Co. v. Bigham, 38 S.W. 162 (1896); Gulf, Colo. & Santa Fe Ry. Co. v. Bennett, 219 S.W.1 97, 198-99 (Tex. 1920); *see also* Carey v. Pure Distrib. Corp., 124 S.W.2d 847, 849 (Tex. 1939) ("It is not required that the particular accident complained of should have been foreseen.").

ability component to the chain of causation and but for causation components, the form of negligence submission to the jury was designed:

> to avoid as far as possible the metaphysical and philosophical niceties in the age-old discussion of causation, and to lay down a rule of general application which will, as nearly as may be done by a general rule, apply a practical test, the test of common experience, to human conduct when determining legal rights and legal liability.[177]

Because foreseeability then had no place under the principles of strict products liability embraced by the Texas Supreme Court in the 1960s,[178] Texas courts developed a different causation standard called "producing cause."[179] Proximate and producing cause differ in one significant respect: the foreseeability component of proximate cause is not a part of the definition of producing cause.[180] Otherwise, the technical differences in the wording of the two causation standards are of no legal significance.[181] Accordingly, the definition of producing cause and the first part of the definition of proximate cause define what Texas courts describe as the Texas version of cause-in-fact.[182]

In *Union Pump*, however, another element was added to the formula. Based on earlier cases that used the term substantial factor as part of the analytical process, first as a synonym for the but for element,[183] and sec-

177. City of Dallas v. Maxwell, 248 S.W. 667, 670 (Tex. Comm'n App. 1923, holding approved); *see also* Rudes v. Gottschalk, 324 S.W.2d 201, 206 (Tex. 1959).

178. *See* McKisson v. Sales Affiliates, Inc. 416 S.W.2d 787, 788-89 (Tex. 1967) (adopting *Restatement (Second) of Torts* § 402A as law of Texas). This is no longer true. The Texas Supreme Court has adopted the modern view embodied in the *Restatement (Third) of Torts: Products Liability* § 2(b) (1998), which makes "[f]oreseeability of risk of harm . . . a requirement for liability for a defectively designed product." Hernandez v. Tokai Corp., 2 S.W.3d 251, 257 (Tex. 1999).

179. Rourke v. Garza, 530 S.W.2d 794, 801 (Tex. 1975). The conventional definition of producing cause is as follows: "an efficient, exciting, or contributing cause that, in a natural sequence, produces the [*occurrence*] [*injury*] [*occurrence or injury*]. There may be more than one producing cause." STATE BAR OF TEXAS PATTERN JURY CHARGES: MALPRACTICE, PREMISES, PRODUCTS PJC 70.1 (1998).

180. *See* Hyundai Motor Co. v. Rodriguez, 995 S.W.2d 661, 667 (Tex. 1999); General Motors Corp. v. Saenz, 873 S.W.2d 353, 357 (Tex. 1993). Another aspect of the elimination of foreseeability from the causation standard in strict tort liability cases concerns the applicability of "new and independent cause" to the causation standard in strict tort liability cases. *See* V. Mueller & Co. v. Corley, 570 S.W.2d 140, 144 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.) (holding "new and independent cause" is not applicable to strict liability); *cf.* Dover Corp. v. Perez, 587 S.W.2d 761, 765 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd. n.r.e.) (holding new and independent cause applies).

181. In fact, some versions of the producing cause definition have contained an express but for causation component. *See, e.g.*, General Motors Corp. v. Hopkins, 548 S.W.2d 344, 351 (Tex. 1977), *overruled by* Turner v. General Motors Corp., 584 S.W.2d 844 (Tex. 1979); *see also* Jones v. Traders & Gen. Ins. Co., 169 S.W.2d 160, 162 (Tex. 1943).

182. The Texas Supreme Court has explained that "[c]ause in fact is ordinarily defined as 'that cause which, in a natural and continuous sequence, produces an event, and without which cause such event would not have occurred.'" Browning-Ferris Indus., Inc. v. Lieck, 881 S.W.2d 288, 292 (Tex. 1994) (quoting 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES PJC 2.04 (1987)). Despite the inclusion of a "natural and continuous sequence" chain of causation component, foreseeability is not considered a part of the cause in fact definition. *See id.*

183. *See* Texas & Pac. Ry. Co. v. McCleery, 418 S.W.2d 494, 497 (Tex. 1967); *see also* Missouri Pac. R.R. v. American Statesman, 552 S.W.2d 99, 103 (Tex. 1977).

ond, as a way of describing proximate or legal cause,[184] the *Union Pump* majority radically changed causation analysis by adding a vague substantial factor/responsibility component to the cause in fact component of general causation analysis.[185] After noting Justice Andrew's dissenting opinion in the *Palsgraf* case,[186] and discussing the court's earlier opinion in *Lear Siegler, Inc. v. Perez*,[187] the majority quotes and embraces the following comment from section 431 of the *Restatement (Second) of Torts*:

> In order to be a legal cause of another's harm, it is not enough that the harm would not have occurred had the actor not been negligent . . . . The negligence must also be a substantial factor in bringing about the plaintiff's harm. The word "substantial" is used to denote the fact that the defendant's conduct has such an effect in producing the harm as to lead reasonable men to regard it as a cause, using that word in the popular sense, in which there always lurks the idea of responsibility, rather than in the so-called "philosophic sense," which includes every one of the great number of events without which any happening would not have occurred.[188]

By embracing the Restatement comment, the court's opinion both raised the causation standard applicable in negligence and strict liability cases and rendered the causation standard considerably less intelligible. Prior to *Union Pump* and *Lear Siegler, Inc. v. Perez*, cause in fact analysis under Texas law was an objectively factual one designed to be performed by juries in a step-by-step process without reference to any separate notions of responsibility. First, the chain of causation component asked the jury to decide whether the harm suffered by the plaintiff could be traced back to the defendant's conduct or to a defective product sold by the

184. *See* Lear Siegler, Inc. v. Perez, 819 S.W.2d 470, 472 (Tex. 1991). As Professor David Robertson clearly explains in *The Common Sense of Cause in Fact*, 75 TEXAS L. REV. 1765, 1776 (1997), this phenomenon is partially attributable to the Second Restatement of Torts use of the term "substantial factor" as a synonym for the but for test (RESTATEMENT (SECOND) OF TORTS § 432 (1) (1965)), as an alternative in combined force (two fires) cases (RESTATEMENT (SECOND) OF TORTS § 432 (1)-(2) (1965)) and as part of legal or proximate cause analysis (RESTATEMENT (SECOND) OF TORTS §§ 431, 433 (1965)). As Professor Robertson explains, the use of "substantial factor" as a synonym for but-for causation and its use as a part of an approach to legal cause "should both be discouraged." David Robertson, *The Common Sense of Cause in Fact*, 75 TEXAS L. REV. 1765, 1777 (1997).

185. Justice John Cornyn's concurring opinion accurately describes the evolution of "substantial factor" analysis. *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 777-84 (Tex. 1995).

186. Palsgraf v. Long Island Ry. Co., 162 N.E. 99, 101-05 (1928).

187. 819 S.W.2d 470 (Tex. 1991) (per Gammage, J.)

188. RESTATEMENT (SECOND) OF TORTS § 431 cmt. a (1965). Although the causation provisions of the Second Restatement are an enigmatic hodgepodge, section 433 does provide considerably more guidance about the contours of substantial factor analysis than comment (a) to section 431. Section 433's black letter provides for a consideration of the following factors: the number of other factors which contribute to the harm; "whether the actor's conduct has created a force or series of forces which are in continuous and active operation up until the time of the harm;" and the lapse of time. RESTATEMENT (SECOND) OF TORTS § 433 (1965); *see also id.* § 435(2) ("The actor's conduct may be held not to be a legal cause of harm to another where after the event and looking back from the harm to the actor's negligent conduct, it appears to the court highly extraordinary that it should have brought about the harm.").

defendant. Second, the but for component required the jury to determine whether the harm would have occurred even if the defendant had been acting properly or if the product had not been defective.[189] Furthermore, because the method of reasoning to be applied has objective characteristics, juries can perform these functions sensibly and their determinations can be subjected to a principled process of evidentiary review. In other words, the inclusion of a substantial factor/responsibility element to the causation standard does not help juries perform their function because it is vague and opaque, although it does unfortunately enable a reviewing court to discount a jury's causation finding on the basis of the court's conclusion that the connection between the wrong and the harm is somehow too attenuated or remote to hold the defendant responsible.

The majority's analysis in *Union Pump* makes the matter plain. The case involved injury to an employee who claimed that a pump manufactured by Union Pump was the proximate or producing cause of her injuries. The pump had malfunctioned and caused a fire. The employee assisted in abating the fire but, after the fire was extinguished, a nitrogen purge valve appeared to present an emergency. The employee and her supervisor climbed over a pipe rack to reach the valve since it was the shortest route. Upon reaching the valve, the employee and her supervisor were told that it was not necessary to block off the valve. Both the supervisor and the plaintiff returned by the same route, even though this was unsafe because the pipe rack was wet and the employees were still wearing firefighting gear, when the plaintiff hopped or slipped off the rack.[190]

The trial court granted summary judgment for Union Pump. The court of appeals reversed because material issues of fact existed concerning producing cause and proximate cause.[191] The Texas Supreme Court reversed the court of appeals. The majority's reasoning process substitutes a new causation standard that applies with "equal force to proximate and producing cause"[192] and allows a reviewing court to reject a causation finding on the basis of the court's decision that the defendant should not be held responsible.[193] Although the addition of *Union Pump*'s substan-

189. The mental process is a bit more complicated because it consists of several steps. As explained by one commentator, the five steps are: (i) identify the injuries in suit; (ii) identify the wrongful conduct; (iii) mentally correct the wrongful conduct to the extent necessary to make it lawful, leaving everything else the same; (iv) ask whether the injuries would still have occurred had the defendant been acting correctly in that sense; and (v) answer the question. *See* David W. Robertson, *The Common Sense of Cause in Fact*, 75 TEXAS L. REV. 1765, 1770-71 (1997).

190. *See* Union Pump Co. v. Allbritton, 898 S.W.2d 773, 774 (Tex. 1995).

191. *See* Allbritton v. Union Pump Co., 888 S.W.2d 833, 839 (Tex. App.—Beaumont 1994), *rev'd*, Union Pump Co. v. Allbritton, 898 S.W.2d 773 (Tex. 1995).

192. Union Pump Co. v. Allbritton, 898 S.W.2d 773, 776 (Tex. 1995).

193. The majority sums up its cryptic reasoning in one paragraph:

> Even if the pump fire were in some sense a "philosophic" or "but for" cause of Allbritton's injuries, the forces generated by the fire had come to rest when she fell off the pipe rack. The fire had been extinguished and Allbritton was walking away from the scene. . . [T]he pump fire did no more than create the condition that made Allbritton's injuries possible. We conclude

tial factor component has a more obvious effect on producing cause, which otherwise has no separate responsibility component, the addition of a recondite, subjective responsibility component to the proximate causation issue has the same effect because it can be used to pretermit the pertinence of the foreseeability component. A reviewing court can conclude that the causal connection is too weak if the court does not want the defendant to be held responsible, even if the harm was reasonably foreseeable. Ironically, the effective substitution of an undefined substantial factor component for the foreseeability component of the Texas proximate cause standard actually returns the subject of causation to "the metaphysical and philosophical niceties in the age-old discussion of causation."[194] As a result, the arcane quality of the new approach makes it much easier for a reviewing court to substitute its judgment for the jury's decision, and much more difficult for anyone else to demonstrate why the reviewing court has exceeded the scope of its judicial power.

XI. THE DUTY DEBATE IN THE TEXAS SUPREME COURT

The Texas Supreme Court's recent jurisprudence has also been concerned with the issues of duty, breach of duty, and the role of foreseeability in the adjudicative process.[195] In *Mellon Mortgage Company v. Holder*, a case against the owner of a parking garage, which involved a sexual assault on a woman who was told by a police officer to drive into the parking garage where the officer assaulted her in his squad car, a plurality of the Texas Supreme Court consisting of Justice Abbott, who delivered the plurality opinion, Justice Hecht and Justice Owen joined two other justices who wrote concurring opinions in rendering a take nothing judgment.

Based on reasoning that it was not foreseeable to the garage owner that the claimant would be accosted several blocks from the garage where she would be sexually assaulted, the plurality opinion holds that the garage owner owed no duty to the claimant. This holding is grounded on a particularized foreseeability analysis of the type applied by Justice Cardozo in the *Palsgraf* case based on the apparent belief that section 281 of the *Restatement (Second) of Torts* embraces "the gist of Chief Judge Cardozo's duty analysis."[196] A concurring opinion by Justice Baker rightly criticizes the plurality opinion by asserting that it changes the duty analy-

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> that the circumstances surrounding her injuries are too remotely connected with Union Pump's conduct or pump to constitute a legal cause of her injuries.

Id.

194. *See supra* note 177. Now that foreseeability of harm must be proven by claimants in products liability cases, with the largely theoretical exception of manufacturing defect cases, a much better way to resolve the court's real concern in *Union Pump*, that the producing cause standard is too strict because it reaches too far, would be to add a foreseeability component, that is, to use the traditional "proximate cause" standard instead. *See supra* note 193.

195. *See* Mellon Mortgage Co. v. Holder, 5 S.W.3d 654 (Tex. 1999).

196. *Id.* at 656.

sis to include the traditional proximate cause foreseeability test used by Texas courts, and thus allocates too much power to judges, including appellate judges, but then curiously comes to essentially the same conclusion that the garage owner owed no duty to the plaintiff because the garage owner could not have foreseen that a sexual assault would occur in the garage.[197] The three dissenting justices, Justice Harriet O'Neill, who delivered the dissenting opinion, Justice Hankinson, and Chief Justice Phillips disagree with the plurality opinion and with Justice Baker's conclusion that the plaintiff or the crime, or both, were not foreseeable. Because the dissenting justices share Justice Baker's view that the plurality's so-called *Palsgraf* two-prong duty analysis does not reflect Texas law and represents a poor policy choice concerning the proper role of judge and jury,[198] it appears that the assignment of a particularized duty analysis to trial judges and reviewing courts has not been embraced by the Texas Supreme Court.[199]

There are important differences between Justice Baker's concurring opinion and the dissenting opinion of Justice O'Neill, Chief Justice Phillips, and Justice Hankinson. Justice Baker's concurrence rests upon his belief that a proper foreseeability analysis grounded on the *Timberwalk*[200] factors of frequency, recency, publicity, and similarity of previous criminal activity requires the conclusion that it was not foreseeable to the garage owner that a sexual assault would occur in the garage,[201] even when the evidence is viewed in the light most favorable to the nonmovant plaintiff, Ms. Holder.[202] Justice Baker's concurrence concludes, in essence, that the heightened proof requirements of the particularized *Timberwalk* standard were not satisfied by the summary judgment evidence presented on Ms. Holder's behalf because there was no evidence of personal crimes occurring in the garage. In contrast, the dissenting justices concluded that "it was not unforeseeable as a matter of law that a rape might occur in the parking garage"[203] based on summary judgment evidence that crimes involving personal violence had occurred in the vicinity of the parking garage, although not in the facility itself.

Justice Baker and the dissenters do not view the *Timberwalk* factors as exclusive; however, Justice Baker's concurrence clearly reflects his view that the *Timberwalk* duty standard requires more than evidence of violent crimes in the vicinity of the garage, as distinguished from evidence of

197. *See id.* at 662-63 (Baker, J. concurring).

198. *See id.* at 665 (O'Neill, J., dissenting, joined by Chief Justice Phillips and Justice Hankinson).

199. Justice Gonzales did not participate in the decision. In addition, Justice Enoch's concurring opinion states that he "can join neither the plurality opinion nor Justice Baker's writing . . . ." *Id.* at 660.

200. Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749, 759 (Tex. 1998).

201. *See Mellon*, 5 S.W.3d at 662 (Baker J., concurring).

202. As explained in the next section of this paper, the Texas Supreme Court has developed particularized duty standards in a number of specialized contexts.

203. *Mellon*, 5 S.W.3d at 669 (Justice O'Neill, Chief Justice Phillips, and Justice Hankinson, dissenting).

personal crimes on the landowner's property itself. Justice Baker's application of the duty analysis articulated previously by the Texas Supreme Court for use in a particular and arguably special class of cases involving the liability of one person for the alleged foreseeable criminal conduct of another is more palatable than the even more particularized *Palsgraf* approach embraced by Justice Abbott's plurality opinion.[204] But Justice Baker's conclusion about the insufficiency of the evidence to support submission of the case to the jury is highly questionable. Even though it is not an easy task to decide whether Justice Baker or Justices O'Neill, Phillips, and Hankinson have reached the right conclusion concerning the summary judgment evidence under the *Timberwalk* standard, the dissent's view is considerably more persuasive.

The plurality opinion, authored by Justice Abbott, seems puzzled by the concerns expressed in Justice Baker's concurrence and by the dissenters. In paraphrased form, the plurality opinion asks why the same particularized foreseeability analysis used by juries in deciding whether the defendant's negligence constituted a proximate cause of the occurrence is not used by judges and reviewing courts in deciding the threshold duty issue. The simple answer to this fundamental question is that it is normally not the function of the trial court in negligence cases tried to juries to decide whether the defendant's conduct lacks reasonable care or whether it is the legal cause of the occurrence: it is the jury's job to perform these roles in the litigation process.

A failure to keep this fundamental principle in mind will allow trial judges and reviewing courts to substitute judicial assessments about whether the pertinent standard of care was violated for the assessment of juries, and to disregard jury findings on so-called legal grounds regardless of the sufficiency of the evidence or the principles used to evaluate the verdict under the evidence. In other words, the principles of evidentiary review that are designed to constrain judges from usurping the role of the fact finder will become largely irrelevant in the decision-making process if the trial or reviewing courts can bypass the fact finder by conducting a detailed foreseeability assessment of the risk of harm and concluding that no duty exists under the particular facts of the case being decided.[205]

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204. The key differences are that, first, Justice Abbott's plurality opinion strongly suggests that a particularized duty analysis should be conducted in every case rather than in unusual or special cases for which a particularized duty standard has been developed on prudential grounds. Second, the particularized duty analysis grounded on the *Timberwalk* factors of frequency, recency, publicity, and similarity of previous criminal activity is considerably less case specific and more serviceable as a principle of general application in the special class of cases to which it is applicable than the specialized foreseeability assessment contained in Justice Cardozo's opinion in *Palsgraf*.

205. In Palsgraf *Revisited*, Dean Prosser speculates about how far Helen Palsgraf was from the conductor when the package fell. Under Cardozo's particularized assessment of the evidence this appears to be the key fact question, or at least one of them. Another one might be whether the conductor was aware of her presence, wherever she was. The point is that a refined foreseeability assessment, particularly one conducted by a reviewing court, is likely to ignore, reject, or misperceive the picture presented to the fact finder because the focus of the reviewing court is on the cases' outcome, rather than on the evidence and its

XII. *PALSGRAF* AND THE SECOND RESTATEMENT

Because the avoidance of harm is a central concern of tort law, foreseeability of harm is an extremely important factor in negligence law. The negligence standard of care is based on an assessment of foreseeability of some harm. Foreseeability constitutes a component of the duty, breach, and causation elements of a negligence cause of action because the process of developing and refining or applying standards of care and deciding whether they have been violated in specific cases involves the foreseeability of harm. But how particularized the trial judge's foreseeability assessment should be in deciding whether to submit the case to the jury, or in the submission process itself, is the important question. Despite Justice Abbott's mistaken view that Justice Cardozo's particularized duty analysis in *Palsgraf* has been widely accepted,[206] by far the most common view of modern scholars, as reflected in the *Restatement (Second) of Torts*, is that the particularized application should be conducted by the fact finder, not by the trial judge.[207] As explained by Professor George C. Christie and his co-authors, although section 281 of the original *Restatement of Torts* did embrace Cardozo's analytical framework by providing that "[t]he actor is liable for an invasion of an interest of another if: (a) the interest is protected against unintentional invasion, and (b) the conduct of the actor is negligent with respect to such interest or any other similar interest of the other which is protected against unintentional invasion,"[208] the *Restatement (Second) of Torts* alters this position. Although the Second Restatement uses a stylized version of the *Palsgraf* case as an illustration to section 281, it does not indicate whether the defendant's nonliability rests on a no-duty rule or on some other flaw in the elemental

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relationship to the jury's verdict. *See* William L. Prosser, Palsgraf *Revisited*, 52 MICH. L. REV. 1, 32 (1953).

206. *See Mellon*, 5 S.W.3d at 655-56.

207. *See* DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 186 (2d ed. 1998); *see also* RESTATEMENT (SECOND) OF TORTS § 281 (1965). Professor Gary Schwartz in his Reporter's note to section 6 of the *Restatement (Third) of Torts: General Principles* explains the Second Restatement in the following manner:

> The Restatement Second of Torts tended to regard duty as a nonissue, except for problems of affirmative duty. Its definition, in § 281, of "The Elements of a Cause of Action for Negligence" does not include any explicit duty element. In the Scope Note to Topic 4, the Restatement Second indicates there is a duty owed by the actor to the other not to be negligent. Yet the Scope Note goes on to solve the duty problem by affirming that "normally, when there is an affirmative act [by the defendant], there is a duty not to be negligent." The Scope Note then refers to the special issue of mere failures to act. To be sure, § 281(b) identifies, as one "element" of a "cause of action," the requirement that "the conduct of the actor is negligent with respect to the [plaintiff]." Whether this requirement of a "foreseeable plaintiff" is an aspect of the doctrine of duty, or instead of the doctrine of proximate cause, is a point that the comment to § 281(b) does not make clear. Modern scholars tend to classify the issue of the foreseeable plaintiff under the general heading of proximate causation.

See, e.g., DAVID W. ROBERTSON ET AL., CASES AND MATERIALS ON TORTS 186 (2d ed. 1998).

208. *See* GEORGE C. CHRISTIE ET AL., CASES AND MATERIALS ON THE LAW OF TORTS, 278-79 (3d ed. 1997).

analysis. More significantly, the Second Restatement includes specific sections on the respective roles of judges and juries[209] and assigns the jury the function of determining "what the general standard of conduct would require in the particular case, and so to set a particular standard of its own within the general one."[210] Similarly, the Second Restatement also provides that "it is the function of the jury to determine, in any case in which it may reasonably differ on the issue . . . whether the defendant's conduct has been a substantial factor in causing the harm to the plaintiff."[211]

The view that the particularized application of the general standard should be conducted by the fact finder, not by the trial judge, is held so strongly that it is conventional for torts scholars to assert that the duty element is easily resolved since all persons have a general obligation to exercise ordinary care to avoid the infliction of harm on others. Although the duty element is technically separate from the key questions of negligence and causation, which, of course, are normally jury questions, in most cases, duty is a non-issue.[212] Under this approach, in the garden-variety negligence case, the jury is meant to conduct the particularized foreseeability analysis. Of course, under Texas negligence law, this particularized analysis involves both the issues of negligence and causation.[213] The jury's determination of liability and damage issues is, of course, subject to review at both the trial and appellate level for factual and legal sufficiency of the evidence in accordance with standards of review that credit and respect the jury's role in the litigation process.

XIII. THE DEVELOPMENT OF MEANINGFUL SUBSTANTIVE STANDARDS

As Dean Powers accurately points out,[214] the Texas Supreme Court has been very active in considering the policy question of what duties one member of society owes to another. The court has devised no-duty rules that preclude the imposition of liability on prudential grounds[215] and has refined the concept of duty in particular types of cases.[216] Importantly,

209. *See* RESTATEMENT (SECOND) OF TORTS §§ 328B, 328C (1965).

210. RESTATEMENT (SECOND) OF TORTS § 328C cmt. b (1965). The Third Restatement Discussion Draft largely agrees with and draws on the Second Restatement. *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 5(b) (1999) ("When, in light of all the facts relating to the actor's conduct, reasonable minds can differ as to whether the conduct lacks reasonable care, it is the function of the jury to make that determination.").

211. RESTATEMENT (SECOND) OF TORTS § 434(2).

212. *See* Clark v. Waggoner, 452 S.W.2d 437, 440 (Tex. 1970).

213. *See supra* Part X.

214. "What is really happening is that the court is reinvigorating the concept of duty, and the court is doing this for intellectually sound reasons. Recognizing that fact has important ramifications for Texas lawyers." William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1699, 1704 (1997).

215. *See* Murphy v. Campbell, 964 S.W.2d 265, 269 (Tex. 1997) (holding "there is no cause of action for breach of an implied warranty of accounting services").

216. *See* Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 382 (Tex. 1995) (holding "the law of products liability does not require a manufacturer or distributor to warn of obvious risks").

however, the court has also recognized and affirmed the existence of duties and developed meaningful substantive standards.[217] I agree that this is a traditional function of the court in recognizing, developing, and defining common law standards of care and conduct. Indeed, aside from the difficulty of predicting how particularized standards will work in subsequent cases due to the vagaries of human conduct, there is nothing to stop the Texas Supreme Court from making policy based judgments about rights and duties owed by one member of society to another. The court does its best and most important work when it conscientiously assesses what Texas law should require of manufacturers of commercial products[218] and consumer goods,[219] as well as accountants[220] and lawyers,[221] among others. The court does this important work very well when it develops meaningful substantive standards that can be used by trial judges and juries to decide specific cases, subject to review under appropriate standards of review. The development of particularized rules, however, that narrow or eliminate the general duties of care ex-

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In *Caterpillar*, a products liability case against a manufacturer and a retailer alleging negligence and strict liability, the court extrapolates this principle from a prior finding that there is no duty to warn when then a products' risks are matters "'within the ordinary knowledge common to the community.'" *Id.* (quoting Joseph E. Seagram & Sons, Inc. v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991)). Determining "the proper inquiry is whether an average person would recognize that operating an industrial vehicle with open sides and top presents a degree of risk or serious harm to the operator," the court ruled that the defendants "did not have the duty to warn of the dangers of operating the loader as an open cab without a ROPS [rollover protective structure]." *Caterpillar* 911 S.W.2d at 383-84 (holding "Texas law does not require a manufacturer to destroy the utility of his product in order to make it safe").

217. *See* Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 336 (Tex. 1998) (stating that liability for design defect may attach even if the defect is apparent); *see also* Universe Life Ins. Co. v. Giles, 950 S.W.2d 48, 55-56, 61-63 (Tex. 1997) (finding insurance bad faith liability based on common law principles recognized and affirmed).

218. *See* Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 383-84 (Tex. 1995) (holding "Texas law does not require a manufacturer to destroy the utility of his product in order to make it safe"). Dean Powers correctly views the *Caterpillar* decision as an example of the court announcing "a particularized duty rule—that a manufacturer has no duty to design a multipurpose machine in a way that makes it impossible to use in one of its intended settings." William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEXAS L. REV. 1699, 1706 (1997).

219. *See* Hernandez v. Tokai Corp., 2 S.W.3d 251, 260 (Tex. 1999) (holding "a manufacturer's intention that its product be used only by adults does not insulate it from liability for harm caused by a child who gains access to the product, but liability standards must be applied in the context of the intended users."). In *Hernandez*, the court was asked to decide whether a manufacturer may be found liable for a defective-design products liability claim if a minor child is injured through the misuse of the manufacturer's lighter by another minor child if the product was intended to be used by adults only, but the misuse by minors was clearly foreseeable and a safer alternative design was available.

220. *See* Murphy v. Campbell, 964 S.W.2d 265 (Tex. 1997); *see also* Arthur Andersen & Co. v. Perry Equip. Corp., 945 S.W.2d 812 (Tex. 1997).

221. *See* Burrow v. Arce, 997 S.W.2d 229, 238 (Tex. 1999) ("To limit forfeiture of compensation to instances in which the principal sustains actual damages would conflict with both justifications for the rule . . . the central purpose of the equitable remedy of forfeiture is to protect relationships of trust by discouraging agents' disloyalty."); *see also* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 49 (Proposed Final Draft No. 1, 1996) (stating "[a] lawyer engaging in clear and serious violation of duty to a client may be required to forfeit some or all of the lawyer's compensation for the matter").

isting under well-recognized common law principles may be an unwise undertaking, unless there is some principled reason for doing so.[222] Certainly, the adoption of a particularized foreseeability analysis of the type used by Justice Cardozo in the *Palsgraf* case would be exactly the wrong approach. To borrow a phrase from Dean Green, in the "mine run of cases" the general negligence standards of ordinary care and proximate causation have not only withstood the test of time and changing circumstances, they have provided sufficient guidance to juries in the determination of individual controversies.[223]

XIV. CONCLUSION

The division of labor between judges and juries is an important one. Who decides what happened, whether the conduct of the actors involved violated applicable standards of care, and the institutional deference accorded those determinations in the litigation process are critical questions. Many debates have raged about the proper approach and what a wrong choice means to the administration of justice and the right to trial by jury. A reasonable assessment of Texas jurisprudence is that Texas law, and particularly Texas negligence law, has permitted and required juries to set the particularized standard of conduct, as well as to decide what happened. Even during the ascendency of Texas special issue practice, juries decided the ultimate questions of negligence and causation, pursuant to the trial court's instructions, while reviewing courts were required by the standards and scope of review to credit verdicts based on probative evidence. This is the right approach to the litigation process, and the Texas Supreme Court should not abandon it either forthrightly, by reinterpretation or by accidental modification of the traditional standards of evidentiary review.

222. *See* RESTATEMENT (THIRD) OF TORTS: GENERAL PRINCIPLES § 5 cmt. c (Discussion Draft 1999).

223. *See supra* note 143.