

Background – Potential Amendment of Rules 226a and 292

In its most recent session, the Texas Legislature added the following two provisions to Texas Civil Practice and Remedies Code § 41.003:

- (d) Exemplary damages may be awarded only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.
- (e) In all cases where the issue of exemplary damages is submitted to the jury, the following instruction shall be included in the charge of the court:
“You are instructed that, in order for you to find exemplary damages, your answer to the question regarding the amount of such damages must be unanimous.”

These new provisions require that changes be made to the admonitory instructions given a jury as part of the court’s charge and to various other sections of Rules 226a and 292 relating to the submission of exemplary damages.

Section 41.003(d) provides that exemplary damages “may be awarded only if the jury was unanimous in regard to finding liability for ... exemplary damages.” Thus, it appears that the jury must now be unanimous to *find* liability for exemplary damages and to *award* an amount of exemplary damages.

This provision does not change the law relating to the basic number of jurors required to render a verdict. Under Rule 292, the vote of at least 10 members of the jury is still necessary to render a verdict at all. Therefore, it appears that the effect of the changes to Chapter 41 is that a unanimous 12-0 vote is necessary to answer the predicate exemplary damages question “Yes,” a 10-2 vote is necessary to answer the question “No,” and a failure to get at least 10 jurors to agree results in a hung jury. In other words, the jury can answer “No” to a gross negligence or malice question upon the vote of 10 jurors, but must have the vote of 12 jurors to answer “Yes” to a gross negligence or malice question.

In addition, Section 41.003(d) provides that the jury must be “unanimous in regard to ... the amount of exemplary damages.” Consequently, this provision provides another independent change in the requisite number of jurors required to render a verdict. Presumably, any failure to achieve a 12-0 vote on this question also results in a hung jury.

There are several items for the consideration of the full committee:

- 1) Two alternative proposals relative to the amendment of Rule 226a (with sample jury charges for illustration purposes); and
- 2) A proposal for amending Rule 292.

The proposal regarding Rule 292 is intended to make only minimal changes in the existing rule consistent with the referenced statutory mandate. In fact, the proposed new language tracks the language of the statute as closely as possible.

The alternatives regarding Rule 226a are, of necessity, more extensive. Background information is included with each. In addition, the transcript of the last SCAC meeting (which included substantial background and discussion of these issues) is also available for review.

REVISIONS TO TEXAS RULE OF CIVIL PROCEDURE 226a

Several specific changes must be made to Rule 226a to reflect the mandate of § 41.003. First, the part of the current rule providing that a verdict may be rendered on the vote of ten or more jurors is no longer accurate and must be changed. The following alternative is suggested:

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

This proposed instruction accounts for the requirement of a unanimous vote for exemplary damages by using the phrase “unless otherwise instructed”. The instruction relating to unanimity must be given with the exemplary damage questions themselves. Thus, the jury will be “otherwise instructed” with respect to their vote on those questions.

The proposed instruction also corrects an existing problem by providing that “the same group of at least ten” may agree on the answers. Currently, Rule 226a states that “the same ten or more” jurors must agree on all questions. This incorrectly suggests that if any question is answered upon the vote of eleven jurors, it is not possible to answer other questions upon the vote of only ten jurors. The proposed instruction clarifies that only ten, but the same ten, jurors are needed to render a verdict (unless otherwise instructed).

Second, it is proposed that the verdict form be divided into two parts in cases involving exemplary damages. Part 1 of the verdict form will consist of all questions relating to liability and compensatory damages. Part 2 will consist of the questions pertaining to exemplary damages including the predicate question for exemplary damages. The jury will certify their verdict as to each part separately with a two-part certificate similar to the current certificate. The certificates follow the last question of each part. The language of the certificates has been changed to modernize the usage and to have the jury certify 1) whether they are unanimous or not, 2) whether they have answered as instructed, and 3) whether they agree on all of the answers given.

Section 41.003 clearly requires unanimity for a “Yes” finding to award exemplary damages. It also requires unanimity as to the amount of exemplary damages. However, Section 41.003 does not specifically address whether the jury must have been unanimous as to the underlying liability question in order to consider awarding exemplary damages at all. In the proposal, the jury is instructed to answer the exemplary damage predicate question only if they are unanimous in answering “Yes” to the underlying predicate liability question. The reasoning behind this is: if the vote on the underlying liability question is less than unanimous, not all jurors are convinced the defendant is liable. In such a case, it would be impossible for the jurors who did not believe the defendant was liable at all to then find that the defendant’s conduct met the requirements for exemplary damages. For example, it is inconsistent for a juror to vote “No” when asked if the defendant is negligent, but vote “Yes” when asked if the defendant is grossly negligent. Those two answers simply cannot legally coexist. Therefore, if the jury must be

unanimous in finding a defendant grossly negligent, it must also be unanimous in finding the defendant negligent.

This same concept applies to all other types of underlying liability questions that could be the basis for the award of exemplary damages. However, it does not mean that the jury's answer to the underlying liability question has to be unanimous. Compensatory damages may still be awarded on a 10-2 vote of the jury. It simply means that the jury should be instructed that it should not answer the exemplary damages questions if it was not unanimous in regard to the underlying predicate liability question. This reasoning is reflected in the new instructions that are proposed.

In multiple defendant cases, there will also need to be a separate exemplary damages predicate question for each defendant rather than a single question with multiple blanks. This is because the jury may be unanimous as to the underlying liability of one defendant but 10-2 as to the underlying liability of another defendant. In such an event, the jury should not consider the exemplary damages predicate question for any defendant as to which the vote on the underlying liability question was less than unanimous. Thus, a single exemplary damages instruction that explicitly (or impliedly) references multiple defendants could create confusion and promote inconsistent answers.

Proposal

RULE 226a INSTRUCTIONS TO JURY PANEL AND JURY

The court must give such instructions to the jury panel and to the jury as are prescribed by the Supreme Court.

. . . . [Admonitory Instructions Omitted]

COURT'S CHARGE

Before closing arguments begin, the court must give to each member of the jury a copy of the charge, which must include the following written instructions with such modifications as the circumstances of the particular case may require:

Ladies and Gentlemen of the Jury:

. . . . [Text Omitted]

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

. . . . [Text Omitted]

Certificate For Part 1

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

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

SIGNATURE OF PRESIDING JUROR

PRINTED NAME OF PRESIDING JUROR

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

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

	<u>SIGNATURE OF JUROR</u>	<u>PRINTED NAME</u>
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

EXEMPLARY DAMAGES

Certain cases may present issues as to exemplary damage liability for one or more defendants. The submission of a question on the exemplary damage liability of a defendant must be predicated on a unanimous jury finding on one or more underlying claims against that defendant for liability for actual damages. An award of exemplary damages against a defendant must also be the result of a unanimous jury finding on the issues of liability for and amount of exemplary damages.

In such cases, the Court should provide instructions (with such modifications as the circumstances of a particular case require) and a separate jury certificate as set forth below.

Part 2

Answer Question _____ below only if: (1) you answered “Yes” as to [*insert name of relevant defendant*] in response to Question _____ [on underlying liability], and (2) you were unanimous in answering “Yes” as to Question _____ as to [*relevant defendant*]. Otherwise, do not answer Question _____.

You are instructed that in order to answer “Yes” to Question _____, you must be unanimous. You may answer “No” to Question _____ upon a vote of 10 or more jurors.

Question _____

[*Insert Exemplary Damage Liability Question*]

Answer Question _____ only if you answered “Yes” as to [*the relevant Defendant*] in response to Question _____. Otherwise, do not answer Question _____.

You are instructed that in order to find exemplary damages, your answer to Question _____ must be unanimous.

Question _____

[*Insert Question on Amount of Exemplary Damages*]

Certificate For Part 2

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

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

SIGNATURE OF PRESIDING JUROR

PRINTED NAME OF PRESIDING JUROR

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

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

	<u>SIGNATURE OF JUROR</u>	<u>PRINTED NAME</u>
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

Sample Jury Charge

CAUSE NO. 123,456

<i>PAUL PAYNE</i>	§	<i>IN THE DISTRICT</i>
Plaintiff,	§	<i>COURT OF</i>
	§	
vs.	§	_____ <i>COUNTY,</i>
	§	<i>TEXAS</i>
<i>DON DAVIS</i>	§	
Defendant.	§	_____ <i>JUDICIAL</i>
	§	<i>DISTRICT</i>

CHARGE OF THE COURT

LADIES AND GENTLEMEN OF THE JURY:

[Instructions Omitted]

PART 1

QUESTION NO. 1

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

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

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

Answer Question No. 2 if you have answered “Yes” to Question No. 1 for both persons named in Question No. 1. Otherwise, do not answer Question No. 2.

QUESTION NO. 2

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

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

a.	Paul Payne	_____
b.	Don Davis	_____
	TOTAL	_____100%

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

QUESTION NO. 3

What sum of money, if paid now in cash, would fairly and reasonably compensate Paul Payne for his injuries, if any, that resulted from the occurrence in question?

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

Answer in dollars and cents for damages, if any, that—

were sustained in the past: \$ _____

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

Certificate For Part 1

If you are unanimous as to every answer in Part 1, the presiding juror must certify the verdict in Part 1 on behalf of the jury by signing in the space provided below.

I, the Presiding Juror of the jury, certify that the jury has answered the above and foregoing questions in Part 1 as instructed, the jury is unanimous as to every answer in Part 1, and the jury returns the above answers into court as its verdict on Part 1.

SIGNATURE OF PRESIDING JUROR

PRINTED NAME OF PRESIDING JUROR

If you are not unanimous as to every answer in Part 1, the jurors who have agreed to each answer in Part 1 must certify the verdict as to Part 1 by signing in the spaces provided below.

We, members of the jury, certify that we have answered the above and foregoing questions in Part 1 as instructed, the undersigned group of us has agreed as to every answer in Part 1, and we return the above answers into court as our verdict on Part 1.

	<u>SIGNATURE OF JUROR</u>	<u>PRINTED NAME</u>
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____
9.	_____	_____
10.	_____	_____
11.	_____	_____

PART 2

Answer Question 4 below only if: (1) you answered “Yes” as to Don Davis in response to Question 1, and (2) you were unanimous in answering “Yes” as to Question 1. Otherwise, do not answer Question 4.

You are instructed that in order to answer “Yes” to Question 4, you must be unanimous. You may answer “No” to Question 4 upon a vote of 10 or more jurors.

QUESTION NO. 4

Was the negligence of Don Davis “gross negligence”?

“Gross negligence” means an act or omission: (A) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and (B) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

Answer “Yes” or “No”: _____

Answer Question No. 5 only if you answered “Yes” as to Don Davis in response to Question No. 4. Otherwise, do not answer Question No. 5.

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

QUESTION NO. 5

What sum of money, if any, should be assessed against Don Davis and awarded to Paul Payne as exemplary damages for the conduct found in response to Question 4?

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

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

- a. The nature of the wrong.
- b. The character of the conduct involved.
- c. The degree of culpability of the wrongdoer.
- d. The situation and sensibilities of the parties concerned.

- e. The extent to which such conduct offends a public sense of justice and propriety.
- f. The net worth of Don Davis.

Answer in dollars and cents, if any: \$ _____

Certificate For Part 2

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

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

SIGNATURE OF PRESIDING JUROR

PRINTED NAME OF PRESIDING JUROR

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

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

	<u>SIGNATURE OF JUROR</u>	<u>PRINTED NAME</u>
1.	_____	_____
2.	_____	_____
3.	_____	_____
4.	_____	_____
5.	_____	_____
6.	_____	_____
7.	_____	_____
8.	_____	_____

9. _____

10. _____

11. _____

RULE 292. Verdict by Portion of Original Jury

- (a) **Except as otherwise provided in subsection (b) of this rule,** a verdict may be rendered in any cause by the concurrence, as to each and all answers made, of the same ten **or more** members of an original jury of twelve or of the same five **or more** members of an original jury of six. However, where as many as three jurors die or be disabled from sitting and there are only nine of the jurors remaining of an original jury of twelve, those remaining may render and return a verdict. If less than the original twelve or six jurors render a verdict, the verdict must be signed by each juror concurring therein.
- (b) **A verdict may be rendered awarding exemplary damages only if the jury was unanimous in regard to finding liability for and the amount of exemplary damages.**