## PJC 1.13 Instructions on Jurors' Use of Electronic Technology (Comment)

A number of trial judges restrict jurors' electronic communications as well as use by jurors of the Internet to conduct independent research. Tex. R. Civ. P. 226a (trial judge may modify the Rule 226a instructions "as the circumstances of the particular case may require"). The Committee suggests that such instructions may be given by the court, either sua sponte or at the request of the parties, before voir dire, after the jury is seated, and in the jury charge itself.

Some of the points a judge may wish to cover are contained in the following sample instructions.

*[To be included in PJC 1.1 (instructions to jury panel before voir dire examination):]*

Do not communicate with anyone electronically while you are in the courtroom. Do not photograph or record the proceedings or your fellow jurors.

*[To be included in PJC 1.2 (instructions to jury after jury selection):]*

Do not communicate with anyone electronically while you are in the courtroom or while you are deliberating. Do not post information about the case on the Internet. Do not try to learn more about the case, the parties, or the witnesses by looking anything up on the Internet.

*[To be included in PJC 1.3 (charge of the court):]*

Remember my previous instructions. Do not discuss the case with anyone else. Do not do any independent investigation about the case or conduct any research. Do not look up any words in dictionaries or any information on the Internet. Do not use your mobile phone or any other electronic devices during your deliberations.

**Caveat.** As this edition went to press, the Supreme Court Advisory Committee had recommended changes in the admonitory instructions to the Supreme Court of Texas. Please note that most of the above instructions are included in those recommended changes. For updates on the status of these recommendations, any changes to the approved instructions under rule 226a of the Texas Rules of Civil Procedure adopted by the Supreme Court, and any new pattern jury charges promulgated in response to such changes, visit **Update.TexasBarBooks.com** (book ID: 6461).

## PJC 2.4 Proximate Cause

"Proximate cause" means a cause that was a substantial factor in bringing about 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.

### COMMENT

**Source of instruction.** This definition of proximate cause is based on language from *Transcontinental Insurance Co. v. Crump*:

> [W]e first examine the causation standards for proximate cause and producing cause. "The two elements of proximate cause are cause in fact (or substantial factor) and foreseeability. . . . Cause in fact is established when the act or omission was a substantial factor in bringing about the injuries, and without it, the harm would not have occurred." *IHS Cedars Treatment Ctr. v. Mason*, 143 S.W.3d 794, 798–99 (Tex. 2004). "The approved definition of 'proximate cause' in negligence cases and the approved definition of 'producing cause' in compensation cases are in substance the same, except that there is added to the definition of proximate cause the element of foreseeableness." [*Texas Indemnity Insurance Co. v. Staggs*, 134 S.W.2d 1026, 1028–29 (Tex. 1940).] In other words, the producing cause inquiry is conceptually identical to that of cause in fact.

*Transcontinental Insurance Co. v. Crump*, 2010 WL 3365339, at *9 (Tex. Aug. 27, 2010). *See also Ford Motor Co. v. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007).

The *Crump* and *Ledesma* opinions address the definitions of "producing cause" and "cause in fact." As of the publication date of this edition, there is no decision that expressly overrules the traditional definition of "proximate cause" below:

> "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.

Former PJC 2.4. This definition was based on the definition approved by the court in *Rudes v. Gottschalk*, 324 S.W.2d 201, 207 (Tex. 1959), and has been cited in many cases.

**When to use.** PJC 2.4 should be used in every negligence case in which the cause of action requires that the negligence be a proximate cause of the occurrence. For discussion of the element of "foreseeability," see *Motsenbocker v. Wyatt*, 369 S.W.2d 319, 323 (Tex. 1963); *Carey v. Pure Distributing Corp.*, 124 S.W.2d 847, 849 (Tex. 1939).

**Modify if "ordinary care" not applicable to all.** If "ordinary care" is not the standard applicable to all whose conduct is inquired about, the phrase *the degree of care required of him* should replace the phrase *ordinary care* in the second sentence of this definition of "proximate cause." *See Rudes*, 324 S.W.2d at 206–07.

**Substitute PJC 3.1 if evidence of "new and independent cause."** If there is evidence of a "new and independent cause," the definitions in PJC 3.1 rather than PJC 2.4 should be submitted.

## PJC 3.1 New and Independent Cause

"Proximate cause" means a cause, unbroken by any new and independent cause, that was a substantial factor in bringing about 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.

"New and independent cause" means the act or omission of a separate and independent agency, not reasonably foreseeable, that destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question and thereby becomes the immediate cause of such occurrence.

### COMMENT

**When to use—given in lieu of PJC 2.4.** PJC 3.1 should be used in lieu of the usual definition of "proximate cause" (see PJC 2.4) if there is evidence that the occurrence was caused by a new and independent cause. *See Tarry Warehouse & Storage Co. v. Duvall*, 115 S.W.2d 401, 405 (Tex. 1938); *Phoenix Refining Co. v. Tips*, 81 S.W.2d 60, 61 (Tex. 1935). Submission if there is no such evidence is improper and may be reversible error. *Galvan v. Fedder*, 678 S.W.2d 596, 598–99 (Tex. App.—Houston [14th Dist.] 1984, no writ). *See also James v. Kloos*, 75 S.W.3d 153, 162–63 (Tex. App.—Fort Worth 2002, no pet.).

Because a new and independent cause is in the nature of an inferential rebuttal, it should be submitted by instruction only. Tex. R. Civ. P. 277. For elements to consider when determining whether a new and independent cause exists, see *Phan Son Van v. Peña*, 990 S.W.2d 751, 754 (Tex. 1999), and *Teer v. J. Weingarten, Inc.*, 426 S.W.2d 610, 613 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.). The "new and independent cause" instruction is not used when the intervening forces are foreseeable and within the scope of risk created by the actor's conduct. *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450–53 (Tex. 2006).

**Modify if "ordinary care" not applicable to all.** If "ordinary care" is not the standard applicable to all whose conduct is inquired about (see PJC 2.2 and 2.3), the phrase *the degree of care required of him* should replace the phrase *ordinary care* in the second sentence of this definition of "proximate cause." *See Rudes v. Gottschalk*, 324 S.W.2d 201, 206–07 (Tex. 1959).

**Caveat.** The Texas Supreme Court has acknowledged that inferential rebuttals "serve a legitimate purpose." The court also cautioned, however, that multiple inferential

rebuttal instructions have “the potential to skew the jury’s analysis.” *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 433 (Tex. 2005).

## PJC 14.1 Limitations—Tolling by Diligence in Service

QUESTION ______

Did *Paul Payne*, or someone acting on his behalf, exercise diligence to have *Don Davis* served?

> The standard of diligence required is that diligence to procure service which an ordinarily prudent person would have used under the same or similar circumstances. The duty to use diligence continues from the time suit was filed against *Don Davis* on [*date*] until *Don Davis* was served on [*date*].

Answer "Yes" or "No."

Answer: _______________

### COMMENT

**When to use.** The above question and instruction should be used when the plaintiff filed a petition within the applicable limitations period but did not serve the defendant until after limitations expired, the defendant has pleaded the affirmative defense of limitations, and the plaintiff has offered evidence of due diligence in effecting service. The court will insert the appropriate dates in the brackets contained in the above instruction.

If the petition is filed within the applicable limitations period, service outside the limitations period may still be valid if the plaintiff exercises due diligence in procuring service on the defendant. *Ashley v. Hawkins*, 293 S.W.3d 175, 179 (Tex. 2009); *Gant v. DeLeon*, 786 S.W.2d 259, 260 (Tex. 1990) (per curiam) (citing *Zale Corp. v. Rosenbaum*, 520 S.W.2d 889, 890) (Tex. 1975) (per curiam)). When service is diligently effected after limitations have expired, the date of service will relate back to the date of filing. *Proulx v. Wells*, 235 S.W.3d 213, 215–16 (Tex. 2007) (per curiam); *Gant*, 786 S.W.2d at 260.

When the defendant has pleaded the affirmative defense of limitations and has shown that service was not timely, the burden shifts to the plaintiff to prove diligence. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 215–16. Whether the plaintiff exercised due diligence in obtaining service on the defendant, so as to allow the date of service to relate back to the date of filing of suit for limitations purposes, is ordinarily a question of fact. *Ashley*, 293 S.W.3d at 179; *Proulx*, 235 S.W.3d at 216; *Mauricio v. Castro*, 287 S.W.3d 476, 479 (Tex. App.—Dallas 2009, no pet. h.).

**Source of definition.** "Diligence" is determined by asking "whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and was diligent up until the time the defendant was served." *Proulx*, 235

S.W.3d at 216; *see Zimmerman v. Massoni*, 32 S.W.3d 254, 255–56 (Tex. App.—Austin 2000, pet. denied) (quoting jury question and definition submitting issue of diligence).

**Caveat.** Once the defendant has affirmatively pleaded the limitations defense and shown that service was effected after limitations expired, it is the plaintiff's burden to present evidence regarding the efforts made to serve the defendant and, also, to explain every lapse in effort or period of delay. *Proulx*, 235 S.W.3d at 216. The relevant inquiry is two-pronged: (1) whether the plaintiff acted as an ordinarily prudent person would have acted under the same or similar circumstances and (2) whether the plaintiff acted diligently up until the time the defendant was served. *See Proulx*, 235 S.W.3d at 216; *Mauricio*, 287 S.W.3d at 479; *Hodge v. Smith*, 856 S.W.2d 212, 215 (Tex. App.—Houston [1st Dist.] 1993, writ denied). In some statutory cases, when the defendant engages in conduct solely calculated to induce the plaintiff to refrain from or postpone filing suit, an extra 180 days may be tacked onto the original limitations period. See PJC 102.23 (DTPA/Insurance Code) in the current edition of State Bar of Texas, *Texas Pattern Jury Charges—Business, Consumer, Insurance & Employment*. The Committee expresses no opinion about whether the same standard of diligence applies to the joinder of responsible third parties.

## PJC 15.3 Personal Injury Damages—Basic Question

QUESTION ______

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?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

Answer separately, in dollars and cents, for damages, if any. Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne*. Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

a. Physical pain and mental anguish sustained in the past.

Answer: _______________

b. Physical pain and mental anguish that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _______________

c. Loss of earning capacity sustained in the past.

Answer: _______________

d. Loss of earning capacity that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _______________

e. Disfigurement sustained in the past.

Answer: _______________

f. Disfigurement that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _______________

g. Physical impairment sustained in the past.

Answer: _______________

h. Physical impairment that, in reasonable probability, *Paul Payne* will sustain in the future.

Answer: _______________

i. *Medical care expenses* incurred in the past.

Answer: _______________

j. *Medical care expenses* that, in reasonable probability, *Paul Payne* will incur in the future.

Answer: _______________

## COMMENT

**When to use.** PJC 15.3 is the basic general damages question to be used in the usual personal injury case. The above question separately submits past and future damages. *See* Tex. Fin. Code § 304.1045. The "do not compensate twice" instruction is adapted from *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 770 (Tex. 2003).

**Separate answer for each element.** For actions filed on or after September 1, 2003, the Code requires economic damages to be determined "separately from the amount of other compensatory damages." Tex. Civ. Prac. & Rem. Code § 41.008(a). Also, separate submission of elements may be called for in the following instances.

A. *Insufficient evidence.* Broad-form submission of multiple elements of damages may lead to harmful error if there is a proper objection raising insufficiency of the evidence to support one or more of the elements submitted. *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002). If there is any question about the sufficiency of the evidence to support one or more of the elements, the Committee recommends that the elements of damages be separately submitted to the jury as above.

B. *Community property.* Separate answers may also be required if someone other than the injured party is entitled to part of the recovery. For example, certain elements of personal injury damages are community property. Tex. Fam. Code § 3.001(3); *see also Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

C. *Exemplary damages.* For actions accruing on or after September 1, 1995, and filed before September 1, 2003, if exemplary damages are sought in addition to compensatory damages, it is necessary to obtain separate answers for economic and noneconomic damages. "Economic damages" means "compensatory damages for pecuniary

loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society." *See* Acts 1995, 74th Leg., R.S., ch. 19, § 1 (S.B. 25), eff. Sept. 1, 1995.

**Broad-form submission of elements.** Where separate answers are not required, the following broad-form submission may be appropriate.

QUESTION ______

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?

Consider the elements of damages listed below and none other. Consider each element separately. Do not award any sum of money on any element if you have otherwise, under some other element, awarded a sum of money for the same loss. That is, do not compensate twice for the same loss, if any. Do not include interest on any amount of damages you find.

a. Physical pain and mental anguish.

b. Loss of earning capacity.

c. Disfigurement.

d. Physical impairment.

e. *Medical care expenses*.

Do not reduce the amounts, if any, in your answers because of the negligence, if any, of *Paul Payne.* Any recovery will be determined by the court when it applies the law to your answers at the time of judgment.

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

were sustained in the past; Answer: _______________

in reasonable probability will be sustained in the future. Answer: _______________

**One element only.** Only those elements for which evidence is introduced should be submitted. If only one element is submitted, the question should read—

What sum of money, if paid now in cash, would fairly and reasonably compensate *Paul Payne* for *medical care expenses*, if any, resulting from the occurrence in question?

The phrase *medical care expenses* may be replaced by any applicable element.

**No evidence of physical pain.** If there is no evidence of physical pain but there is evidence of compensable mental anguish, element *a* should submit only "mental anguish." *See St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649 (Tex. 1987), *overruled on other grounds by Boyles v. Kerr*, 855 S.W.2d 593, 595–96 (Tex. 1993).

**Medical care in actions filed on or after September 1, 2003.** For actions filed on or after September 1, 2003, recovery of medical or health-care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant. Tex. Civ. Prac. & Rem. Code § 41.0105. *Compare Irving Holdings, Inc. v. Brown*, 274 S.W.3d 926, 931–32 (Tex. App.—Dallas 2009, pet. denied), *and Tate v. Hernandez*, 280 S.W.3d 534, 540 & n.7 (Tex. App.—Amarillo 2009, no pet.), *with Garza de Escabedo v. Haygood*, 283 S.W.3d 3, 6–8 (Tex. App.—Tyler 2009, pet. granted).

**Reasonable expenses and necessary medical care.** If there is a question whether medical expenses are reasonable or medical care is necessary, the following should be substituted for elements *i* and *j*:

i. Reasonable expenses of necessary medical care incurred in the past.

Answer: _______________

j. Reasonable expenses of necessary medical care that, in reasonable probability, *Paul Payne* will incur in the future.

Answer: _______________

*Medical care expenses* may also be replaced by the specific items (e.g., *physicians' fees*, *dental fees*, *chiropractic fees*, *hospital bills*, *medicine expenses*, *nursing services' fees*) raised by the evidence. In an appropriate case, the phrase *health-care expenses* may replace *medical care expenses*.

**Existence of injury.** Under *Texas & Pacific Railway v. Van Zandt*, 317 S.W.2d 528 (Tex. 1958), a separate question was required on the existence of injury if a genuine dispute was raised by the evidence. Now, given the preference for broad-form submission, *Lemos v. Montez*, 680 S.W.2d 798 (Tex. 1984), the Committee believes that a separate question is no longer necessary. The issue, if raised, would be subsumed under the damages question, which includes the phrase "if any." Further, if there is doubt whether the injury resulted from the occurrence in question or from another cause, an exclusionary instruction may be appropriate. See PJC 15.8 (for other condition), PJC 15.9 (for preexisting condition), and PJC 15.10 (for failure to mitigate).

**Bystander injury.** This question may be used to submit a bystander's injury in appropriate cases. *But see Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76 (Tex. 1997).

**Physical impairment and lost earning capacity.** If both physical impairment and lost earning capacity are included, the instruction in the second paragraph of the question will avoid a possible double recovery. *See French v. Grigsby*, 567 S.W.2d 604, 608 (Tex. Civ. App.—Beaumont), *writ ref'd n.r.e. per curiam*, 571 S.W.2d 867 (Tex. 1978).

**Physical impairment and disfigurement.** For the difference between physical impairment and cosmetic disfigurement, see *Texas Farm Products v. Leva*, 535 S.W.2d 953 (Tex. Civ. App.—Tyler 1976, no writ). See also *Golden Eagle Archery, Inc.*, 116 S.W.3d at 772, for a discussion of physical impairment.

**Loss of earning capacity.** The proper measure of damages in a personal injury case is loss of earning capacity, rather than loss of earnings in the past. *Dallas Railway & Terminal v. Guthrie*, 210 S.W.2d 550 (Tex. 1948); *T.J. Allen Distributing Co. v. Leatherwood*, 648 S.W.2d 773 (Tex. App.—Beaumont 1983, writ ref'd n.r.e.). However, loss of earnings has been allowed in some cases. *See Home Interiors & Gifts v. Veliz*, 695 S.W.2d 35 (Tex. App.—Corpus Christi 1985, writ ref'd n.r.e.); *Carr v. Galvan*, 650 S.W.2d 864 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). For loss of earning capacity if the plaintiff is self-employed, see *King v. Skelly*, 452 S.W.2d 691 (Tex. 1970), and *Bonney v. San Antonio Transit Co.*, 325 S.W.2d 117 (Tex. 1959).

**Future medical care.** If the need for future medical care is established by the evidence, it may be considered even if there is no evidence of the exact dollar amount of the future care. *Hughett v. Dwyre*, 624 S.W.2d 401 (Tex. App.—Amarillo 1981, writ ref'd n.r.e.); *City of Houston v. Moore*, 389 S.W.2d 545 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

**Instruction not to reduce amounts because of plaintiff's negligence.** If the plaintiff's negligence is also in question, the exclusionary instruction given in this PJC immediately before the answer blanks is proper. *See* Tex. Civ. Prac. & Rem. Code § 33.001; Tex. R. Civ. P. 277. This instruction should be omitted if there is no claim of the plaintiff's negligence. Also, if an exclusionary instruction for failure to mitigate damages is required, this instruction should be modified. See PJC 15.10.