

Damage Issues in the Jury Charge

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Topics

- *Casteel*
- Tax Liability Instruction – CPRC § 18.091
- Direct v Consequential Damages
- Equitable Remedies
- Breach of Warranty and Limitations of Liability
- Punitive Damages Against a Corporation
- Ethics and the Jury Charge

The *Casteel* Challenge

- What is the *Casteel* Rule?
 - Broad Form Submission Remains (Rule 277)
 - Single submission for multiple theories is OK
 - Error is submitting invalid theories
 - Presumed Harm
 - Comingle valid and invalid theories of liability
 - Addresses CoA opinions finding harmless error if some evidence supported a valid theory
 - Key: CoA cannot determine whether jury verdict based on a valid theory

The *Casteel* Challenge

- Damages
 - *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2003).
 - Broad form remains standard
 - Presumed harm if broad form contains invalid element of damage
 - Defendant objected
- “Physical pain and mental anguish”
 - Separate elements of damage
 - PJC combines
 - Not error, but risky

The *Casteel* Challenge

- Proportionate Responsibility
 - *Romero v KPH Consol., Inc.*, 166 S.W.3d 212 (Tex. 2005).
 - Submitted invalid liability theory
 - Broad form proportionate responsibility
 - Presumed harm
 - Reversible unless “reasonably certain that the jury was not significantly influenced by issues erroneously submitted to it”.

The *Casteel* Challenge

- Practical Points
 - When in doubt, segregate
 - Damages - physical pain different from mental anguish
 - Segregation is not always enough – choose wisely

Tax Liability - CPRC § 18.091

- Evidentiary Rule – subsection (a)

Evidence to prove income-related damages must be presented in the form of a net loss after reduction for income tax payments . . . pursuant to any federal income tax law.

Tax Liability - CPRC § 18.091

- Evidentiary Rule – relevance to charge?
 - No evidence objection at charge conference
 - Implicates *Casteel*
 - No cases on point
- Non-Personal Injury Cases
 - Employment discrimination (“Lost earnings”)
 - Damage element – lost wages

Tax Liability - CIRC § 18.091

- Evidentiary Rule – Personal Injury
 - Rule refers to tax liability of the “loss”
 - Income-related loss not taxable “pursuant to federal income tax law.”
 - If the tax is \$0, net income-related loss is the same as the gross income-related loss

Tax Liability - CPRC § 18.091

- Subsection (b) Mandatory Instruction

If a claimant seeks income-related loss:

[T]he court shall instruct the jury as to whether any recovery for compensatory damages sought by the claimant is subject to federal or state income taxes.

Tax Liability - CPRC § 18.091

- Subsection (b) Mandatory Instruction
 - Defendants don't like the instruction – Fear jury compensation
 - Potentially beneficial to defendant in personal injury case
 - Not true in non-personal injury cases

Direct v. Consequential Damages

What's the difference?

Direct Damages

- Naturally and necessarily flow from wrongful act.
- Presumptively foreseen
- Examples
 - Benefit of the bargain
 - Mitigation damages
 - Reliance damages
 - Lost contractual profits

Consequential Damages

- Natural, probable, and foreseeable consequence
- Not necessarily flow from act
- Key is foreseeability
- Examples
 - Lost profits from other contracts
 - Some reliance and mitigation damages
 - Loss of Credit/Financing

Direct v. Consequential Damages

Why does it matter?

- Foreseeability
- Direct damages – only ask what amount “resulted from” the wrongful act
- Consequential damages– ask what amount was “natural, probable, and foreseeable consequence” of the act
- Practical – when in doubt, include the foreseeability requirement

Equitable Remedies

- Whether recoverable is for the court
- What is recoverable is for the jury
- Example – Breach of Fiduciary Duty
 - Fee Forfeiture
 - Profit Disgorgement
 - Contractual Consideration
 - Constructive Trust (Property)
- Court must find whether breach warrants equitable remedy

Breach of Warranty and Limitation of Remedies

- “Repair and replace” limitation on remedy
- Remedy “fails its essential purpose” – UCC sec. 2.719(b) (sale) and sec. 2A.503(b) (lease)
- “A limitation of remedies fails of its essential purpose when a warrantor fails to correct the defect within a reasonable time or after multiple attempts.”

Orthoflex, Inc. v. ThermoTek, Inc., 2013 WL 4045206 (N.D. Tex. 2013) (Fitzwater, J.)

- Damages permitted under the statute.

Breach of Warranty and Limitation of Remedies

How to submit “failure of essential purpose”?

- Question 1: Breach of warranty
- Conditional Question 2: Do you find that the remedy provided in the agreement failed of its essential purpose?
- Conditional Question 3:
 - Yes - Damages under UCC
 - No – Damages under contract

Punitive Damages Against a Corporation

What's wrong with this question?

Do you find by clear and convincing evidence that the harm cause to Plaintiff resulted from the gross negligence of *Defendant, Inc.*?

Punitive Damages Against a Corporation

- Punitive damages must be “attributable” to the corporation.
- Respondeat superior is not enough
- Exception – corporate policy

Punitive Damages Against a Corporation

Attributable to the Corporation

- Defendant Inc. authorized the doing and the manner of the act;
- Employee was unfit and Defendant Inc. was reckless in employing him;
- Employee was employed as a vice-principal and was acting in the scope of employment; or
- Defendant Inc. or a vice-principal of Defendant Inc. ratified or approved the act.

Punitive Damages Against a Corporation

Vice Principal

- The term “vice-principal” means:
 - A corporate officer;
 - A person who has authority to employ, direct, and discharge an employee;
 - A person engaged in the performance of nondelegable or absolute duties; or
 - A person to whom the entity has confided the management of the whole or a department or division of the business.

Punitive Damages Against a Corporation

Ratification

Ratification - Defendant Inc. retains the benefits of the transaction involving the unauthorized conduct after it acquired full knowledge of the unauthorized conduct.

Punitive Damages Against a Corporation

Typical Question

Do you find by clear and convincing evidence that the harm caused to Plaintiff resulted from the gross negligence attributable to *Defendant, Inc.*?

- Instruction for attribution
- Definition of vice principal
- Definition of ratification

Ethics in the Charge

Long (often heated) battle
+ The advocate's drive to win
Overreaching in the Charge

Ethics in the Charge

- Communicating with the client
 - Communication – Disciplinary Rule 1.03
 - Know what is going on
 - Participate intelligently
 - Clients deserve accurate advice
 - Disciplinary Rule 1.01
 - Not the time for advocacy
 - Mistake – oversell the charge
 - Know what is recoverable
 - Manage client expectations

Ethics in the Charge

- Disclosing Contrary Authority – A lawyer shall not:

[F]ail to disclose to the tribunal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclose by opposing counsel.

Disciplinary Rule 3.03(a)(4)

Ethics in the Charge

Binding Authority v. Controlling Jurisdiction

- Application of foreign law?
- Application of federal law?
 - Fifth Circuit authority not “binding authority.”
Penrod Drilling Corp. v. Williams, 868 S.W2d 294, 296 (Tex. 1993).
 - Southern District of Texas is “controlling jurisdiction.”
Ambulatory Infusion Therapy Specialist, Inc. v. North Am. Adm’r, Inc., 262 S.W.2d 107, 115 n.7 (Tex. App.—Houston [1st Dist.] 2008, no pet.).

Ethics in the Charge

Adverse Authority From Different CoA District

- *See Ambulatory Infusion Therapy Specialist, Inc.*
- Docket Equalization
 - There is only one sovereign, and only one law for the State
 - “Controlling jurisdiction” = Texas, not appellate district
- Absent binding authority, disclose.

Ethics in the Charge

Client's Best Interest

- Advocacy is good – Overreaching is bad
 - Errors = New Trials (e.g. *Casteel*)
 - Palatable Charge > New Trial
- Clients deserve
 - Ability to participate intelligently
 - Defensible judgment
- Courts deserve candor

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