State Bar of Texas Justice of the Peace Courts section

1 hour online CLE– April 23, 2021

"Premises Liability Part II Trial Issues"

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(With special contributions by: Judge Ralph Swearingin Jr. –Tarrant County & Marty Leewright– Attorney at Law)

Special Thanks also to Texas Justice Court Training Center and Texas Justice Court Quick Reference Trial Handbook 2013

WHAT TO EXPECT TODAY

This class will cover The What, The Why and The When of the following;

- A review of the two types of Premises Liability
- A review of who is an invitee, licensee and trespasser and distinguish the difference between these.
- Sample Definitions to the Jury
- Spoliation of Evidence
- Affidavits, controverting affidavits and expert witnesses
- Designation of responsible third party
- Attorney Fees (Are they appropriate?)

Premises Defect vs. Negligent Activity

There are two types of Premises Liability Cases:

1) Those arising from a **premises defect** (dangerous condition), and

2) Those arising from a **negligent activity** on the premises.

Premises defect (dangerous condition) unreasonable risk of harm.

Negligent activity = general negligence

An "**Invitee**" is a person who is on the premises at the express or implied invitation of the possessor of the premises and who has entered thereon either as a member of the public for a purpose for which the premises are held open to the public or for the purpose connected with the business of the possessor that does or may result in their mutual economic benefit. One who is an invitee cannot be a licensee at the same time.

- Example: Customer

A "**Licensee**" is a person on the premises of another with the express or implied permission of the possessor but without an express or implied invitation.

- Example: Salesman

A "**Trespasser**" is a person who enters on property of another without consent of the owner, express or implied.

- Example: Poacher

Pattern Jury Charge (PJC) 66.4 Premises Liability – Plaintiff is Invitee
Example: Customer

Question
Did the negligence, if any, of those named below proximately caused the [injury] [occurrence] in question?

With respect to the condition of the premises, Don Davis was negligent if –

1. The condition posed an unreasonable risk of harm, and
2. Don Davis knew or reasonably should have known of the danger, and
3. Don Davis failed to exercise ordinary care to protect Paul Payne from the danger, by both failing to adequately warn Paul Payne of the condition and failing to make that condition reasonably safe.

"Ordinary care," when used with respect to the conduct of Don Davis as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.

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

1. Don Davis
2. Paul Payne
3. Sam Settlor
4. Responsible Ray

PJC. 66.5 Premises Liability – Plaintiff is Licensee
Example: Salesman

Question
Did the negligence, if any, of those named below proximately caused the [injury] [occurrence] in question? With respect to the condition of the premises, Don Davis was negligent if –

1. The condition posed an unreasonable risk of harm, and
2. Don Davis had actual knowledge of the danger, and
3. Paul Payne did not have actual knowledge of the danger, and
4. Don Davis failed to exercise ordinary care to protect Paul Payne from the danger, by both failing to adequately warn Paul Payne of the condition and failing to make that condition reasonably safe.

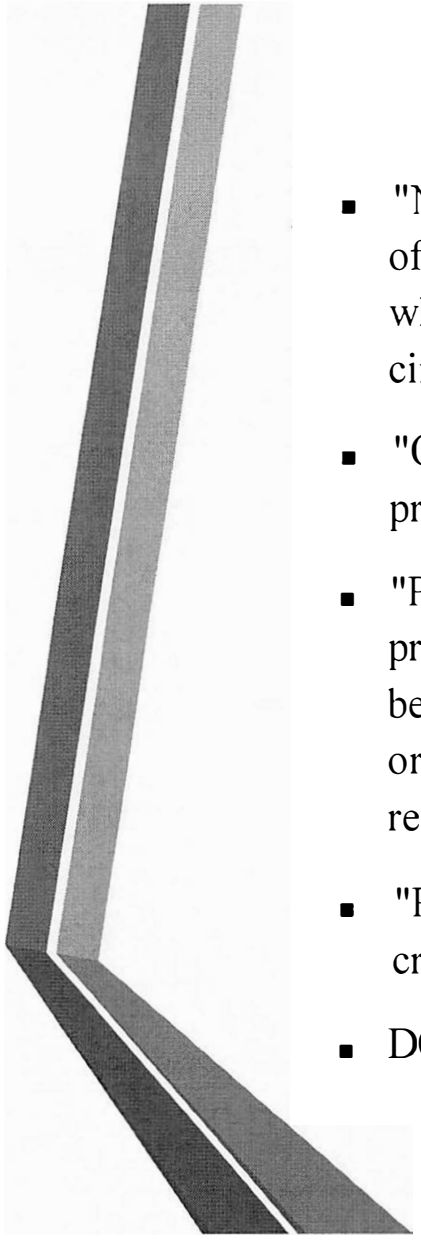
"Ordinary care," when used with respect to the conduct of Don Davis as an owner or occupier of a premises, means that degree of care that would be used by an owner or occupier of ordinary prudence under the same or similar circumstances.
Answer "Yes" or "No" for each of the following:

1. Don Davis
2. Paul Payne
3. Sam Settlor
4. Responsible Ray
5. Connie Contributor

PJC. 66.9 Premises Liability – Plaintiff is Trespasser
Example: Poacher

Question
Did the negligence, if any, of those named below proximately caused the [injury] [occurrence] in question?
Was Done Davis's gross negligence with respect to the condition of the if –

1. The condition posed an unreasonable risk of harm, and
2. Don Davis both failed to adequately warn Paul Payne of the danger and failed to make that condition reasonably safe, and
3. Don Davis's conduct was an act or omission –
    a. which, when viewed objectively from the standpoint of Don Davis at the time of its occurrence, involved an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
    b. of which Don Davis had actual, subjective awareness of the risk involved, but nevertheless proceeded with conscious indifference to the rights, safety, or welfare of others.



Legal definitions- NEGLIGENCE Case

- "NEGLIGENCE" means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same ·or similar circumstances.
- "ORDINARY CARE" means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.
- "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.
- "PREPONDERANCE OF THE EVIDENCE" means the greater weight and degree of credible testimony or evidence introduced before you and admitted in this case.
- DO NOT LET BIAS, PREJUDICE OR SYMPATHY play any part in your deliberations.

Spoliation of Evidence

"Spoliation of Evidence" is when someone with an obligation to preserve evidence with regard to a legal claim neglects to do so or intentionally fails to do so. Can be by destruction of the evidence, damage to the evidence, or losing the evidence. It must seriously prejudice the opposing party. Party responsible may be held accountable in court through appropriate sanctions. Judge has broad discretion.

Must exercise reasonable care in preserving evidence once litigation is reasonably anticipated and material and relevant. (Duty to preserve.) *Wal–Mart Stores, Inc. v. Johnson,* 106 S.W.3d 718, 722 (Tex. 2003)

Adverse Inference: Well–settled that a party's bad–faith with holding, destruction, or alteration of a document or other physical evidence relevant to proof of an issue at trial gives rise to a presumption or inference that the evidence would have been unfavorable to the party responsible for its non–production, destruction, or alteration.

Note: Texas does not recognize and independent cause of action for intentional or negligent spoliation of evidence.

Rule 702. Testimony by Expert Witness

A witness who is qualified as an expert by knowledge, skill, experience, training or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

Rule 703. Based on an Expert's Opinion Testimony

An expert may base an opinion on facts or date in the case that the expert has been made aware of, reviewed, or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject they need not be admissible for the opinion to be admitted.

Recovery of Attorney Fees

1) American Rule: Each side pays its own fees

Example: Negligence Case

Most Auto Cases & Premises Cases

2) Exceptions

A. Oral or written contract (Chapter 38 Civil Practice and Remedies Code)

B. Declaratory Judgment (CPRC Chapter 37)

C. Deceptive trade practices (DPTA)

D. Property Code (Example: a lease); and

E. Miscellaneous:

Texas Insurance Code (Example: PIP, UM/UIM); Social Security; workers compensation cases; other state or federal statues.

3) Generally, no recovery of attorney fees in tort cases

Affidavit Concerning Cost and Necessity of Services

(Civil Practice & Remedies Code Chapter 18)

A) Not sworn account (TRCP 185 yet in Justice Court "Claim based on written document" 503.1 (A)(1))

B) Affidavit is sufficient evidence that charges reasonable and service necessary; but is not evidence of causation (No evidence that the injury was caused by the accident.)

C) 1) Oath
2) Person who provided the service or person in charge of records
3) itemized bill

D) Timing
1) 90 days after answer filed
2) Affidavit singed by person designated as an expert witness in discovery
3) Filed affidavit (not records) with clerk
4) Affidavit and records sent to opposing party

E) Controverting affidavit
1) Timing within 120 days of answer
2) Expert designated as an expert witness in discovery
3) Intent to testify at trial

(see forms 18.002 Civil Practice & Remedies Code & Business Records 902 (10)(8) forms Texas Rules of Evidence)

Motion to Strike Controverting Affidavit (some grounds)

- Not sworn to
- Controverting affidavit NOT qualified (same school) Dr. Sibley case, Tumer v. Peril, 50 SW3d 742, Tex App, Dallas 2001
- Not based upon RMP or RCP. (Reasonable Medical Probability / Reasonable Chiropractic Probability)
- Affidavit based on inadmissible evidence. (Medicare/Medicaid or W. C. reimbursement rates)
  - Affidavit not identified as expert in Discovery
  - Option must be admissible at trial
- Affidavit exceed scope of initial affidavit
- Causation (degenerative arthritis or pre-existing condition) = not admissible
- Conclusory, without a coherently articulated and scientifically reliable methodology (not evidence)
- Timeless

AFFIDAVITS VS. EXPERT WITNESSES

Affidavits : Benefits

1. Don't have to bring healthcare providers (Doctors) to prove up their bills and records (cost).
2. Affidavit not subject to cross examination.
3. Reasonableness of charges NOT contested*
4. Necessity of service NOT contested*

* Opposing counsel cannot argue these matters

Expert witness : Benefits

1. If medical doctor, probably will be a good witness for your client.
2. Can testify about causation (what caused the injury).
3. Defense must call doctor to rebut (cost defense money).

"Designation of Responsible Third Party"

(Ch.33 Texas Civil Practice & Remedies Code)

A defendant may seek to designate a person as a Responsible Third Party (RPT) by filing a motion to designation the person as an RPT; However, the motion must be filed on or before the 60th day before the trial unless the court finds good cause to allow a later filing.

The com1 shall grant leave to designate the named person as an RPT unless another pa1ty files an objection to the motion for leave on or before the 15th day after the date the motion is served.

The com1 shall grant the motion unless the objecting party establishes that the defendant has not plead sufficient facts within the pleadings. The court may grant the defendant an oppo11unity to re-plea sufficient facts to support a showing alleging responsibility of a RPT.

By granting a motion to designate a person as an RPT, the person named is designated as an RPT without further action by the court or any patty.

"Designation of Responsible Third Party" - Continued

(Ch.33 Texas Civil Practice & Remedies Code)

The filing or granting of a motion for leave to designate a person as an RPT or a finding of fault against a person: does not by itself impose liability on the person and may not be used in any other proceeding to establish res judicita, collateral estoppel or any other legal theory to impose liability on the person.

After discovery, a party may move to strike the designation of an RPT on the ground that there is no evidence that the designated person is responsible for any portion of the alleged injury or damage. The court should grant the motion to strike, unless the defendant produces sufficient evidence to raise a genuine issue of fact regarding the designated person's responsibility for the injury or damage.

Additionally, a designation of an RPT can be filed with the court, if the RPT is an unknown person alleged to have committed a criminal act that was the cause of the loss or injury. (See 33.004 (j-1))

Ethical Obligation of Candor to the Tribunal

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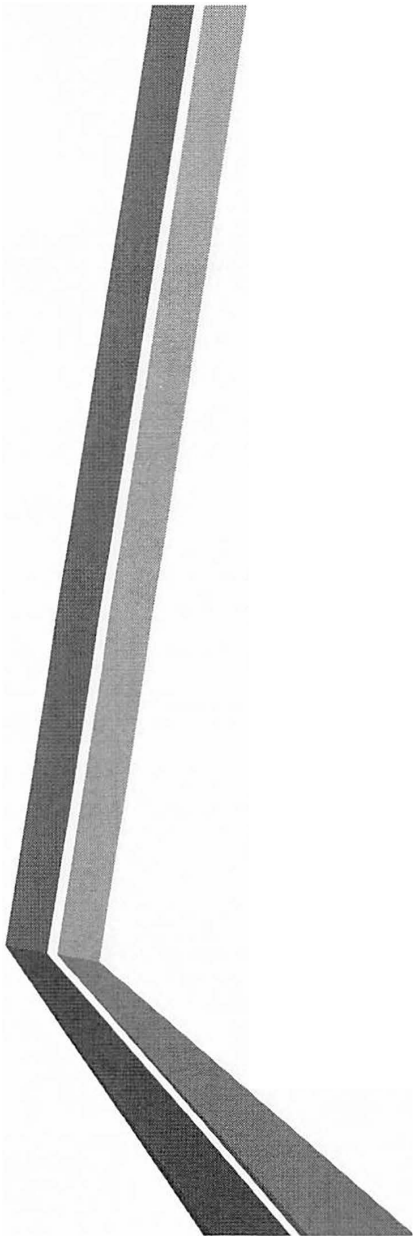

Lawyers are the original spin doc-rs. The first thing we learn in law hool is how to distinguish the cases .at hurt our clients from those that :lp, so it is no surprise that 140 years :o Ambrose Bierce's famous Devil's ictionary, defined "lawyer" as "one illed in circumventing the law." onetheless, as much as we enjoy the ke, there are limits, one of the most ucial of which is found in Rule 3.03 the Texas .Disciplinary Ru Les of Prossional Conduct—"Candor Toward 1e Tribunal."

Most of Rule 3.03 deals with facts. ıbsections (a)(1), (2), (3) and (5) rbid making false statements of fact, iling to disclose facts and using false ıidence. This is not as straightfor-ard as it sounds of course—"What is uth?" asked Pontius Pilate—but most of us have grasp of reality that allows us to distinguish lies from fiction.

Rule 3.03(a)(4) is trickier. It deals with legal authorities instead of facts. It forbids *knowingly* failing to disclose to the tribunal authority in the *con-trolling jurisdiction* known to the lawyer to be *directly adverse* to the position of the client and *not disclosed* by opposing counsel.

As trained spin doctors, we immediately recognize the problematic words in this rule. *Knowingly* arguably adopts Thomas Grey's aphorism "where ignorance is bliss 'tis folly to be wise." One way to approach writing a motion or brief is to look no further than the first helpful case or other authority. Quitting while we are ahead while doing research seems like a good way to never *knowingly* fail to disclose contrary authorities. Unfortunately, ignorance is not a good way to win or avoid violating Rule 3.03(a)(4). If our opponent is even moderately good at doing research, she is likely to find the authorities we did not look for, and there is nothing more embarrassing than not being able to explain to a Court of Appeals why it should ignore a case you never found. This also raises issues f competence under Rule 1.01, since it is a matter of competence to be aware of adverse legal authority.

What about authority in the *controlling jurisdiction*? Controlling jurisdiction can be quite narrow. According to the Texas Supreme Court our state courts of appeals are only obligated to follow their own precedents and those of the Texas Supreme Court and United States Supreme Court, even when the issue concerns federal law. In the federal system, a district court is bound only by decisions of the Supreme Court and the Court of Appeal for the circuit in which it sits; it can ignore decisions from state appellate and supreme courts as well as other district courts and other circuit courts. On issues that have not been frequently litigated, the best authority for your client may lie outside the *controlling jurisdiction*. Nonetheless, Rule 3.03 requires acknowledging contrary authorities only from within the controlling jurisdiction despite the fact that the best or most on point authority comes from elsewhere.

The third element of Rule 3.03(a)(4) requires that the authority be *directly adverse* to the client's position. When we find a truly unfavorable case the temptation is to figure out why it is wrong, and then wait to see if our opponent will discover it before telling the court it exists. After all, if I file my brief first how can I know whether my opponent will disclose it or not?

It is a clever argument, but the written judicial opinions discussing undisclosed contrary authority agree that the obligation exists whether or not you know that opposing counsel is aware of the authority. If your opponent mentions the authority first, the *not disclosed by opposing counsel* condition lets you off the hook from an ethics standpoint. On the other hand, if you get to file the first brief, you will have to take the risk of educating your opponent to avoid the risk of running afoul of Rule 3.03(a)(4).

One of my law school professors at the University of Texas said that good lawyers win when the law is on their side, but great lawyers win when the law is against them. Whether or not you are that cynical, Rule 3.03(a)(4) describes a requirement that turns out to be practical as well as ethical. To win despite adverse law, you must find it, gain the court's trust by acknowledging it, and then put your spinning skills to work showing why it does not matter. **HN**

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PJC 65.7 Unavoidable Accident

An occurrence may be an "unavoidable accident," that is, an occurrence not proximately caused by the negligence of any party to the occurrence.

COMMENT

When to use—given immediately after definition of "proximate cause." PJC 65.7 should be given immediately after the definition of "proximate cause" in PJC 65.4 if there is evidence that the occurrence was caused by unforeseeable nonhuman conditions. "Unavoidable accident" is an inferential rebuttal and should be submitted by instruction. *Yarborough v. Berner*, 467 S.W.2d 188, 192 (Tex. 1971).

Definition. The above definition of "unavoidable accident" was recognized by the Texas Supreme Court in *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 432 (Tex. 2005). *See also Dallas Railway & Terminal v. Bailey*, 250 S.W.2d 379, 385 (Tex. 1952) (approving definition); *Yarborough*, 467 S.W.2d at 191 (darting out by child too young to be negligent was in nature of "physical condition or circumstance" constituting unavoidable accident).

Caveat. The Texas Supreme Court has acknowledged that inferential rebuttals "serve a legitimate purpose." The court also cautioned, however, that multiple inferen-tial rebuttal instructions have "the potential to skew the jury's analysis." *Dillard*, 157 S.W.3d at 433.

PJC 65.8 Act of God

If an occurrence is caused solely by an "act of God," it is not caused by the negligence of any person. An occurrence is caused by an act of God if it is caused directly and exclusively by the violence of nature, without human inter-vention or cause, and could not have been prevented by reasonable foresight or care.

COMMENT

When to use—given immediately after definition of "proximate cause." PJC 65.8 should be given immediately after the definition of "proximate cause" in PJC 65.4 if there is evidence that the occurrence was caused by an act of God. "Act of God" is a variation of "unavoidable accident." It requires, in addition, that the occur-rence be caused directly and exclusively by the violence of nature. It should be given in lieu of (and not in addition to) PJC 65.7 when it refers to the same condition. "Act of God" is an inferential rebuttal and should be submitted by instruction. *Scott v. Atchison, Topeka & Santa Fe Railway*, 572 S.W.2d 273, 279 (Tex. 1978).

Definition. PJC 65.8 is based on the definition given by the trial court and approved in *Scott*, 572 S.W.2d at 280. *See also Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 432 (Tex. 2005).

Caveat. The Texas Supreme Court has acknowledged that inferential rebuttals "serve a legitimate purpose." The court also cautioned, however, that multiple inferen-tial rebuttal instructions have "the potential to skew the jury's analysis." *Dillard*, 157 S.W.3d at 433.

PJC 65.9 Emergency

If a person is confronted by an "emergency" arising suddenly and unexpect-edly, which was not proximately caused by any negligence on his part and which, to a reasonable person, requires immediate action without time for deliberation, his conduct in such an emergency is not negligence or failure to use ordinary care, if, after such emergency arises, he acts as a person of ordi-nary prudence would have acted under the same or similar circumstances.

COMMENT

When to use—given immediately after definition of "negligence." PJC 65.9 should be given immediately after the definition of "negligence" if there is evidence that a person whose conduct is inquired about was confronted by an emergency. "Emergency" is an inferential rebuttal and should be submitted by instruction. *McDonald Transit, Inc. v. Moore*, 565 S.W.2d 43 (Tex. 1978); *Yarborough v. Berner*, 467 S.W.2d 188 (Tex. 1971). *See generally Thomas v. Oldham*, 895 S.W.2d 352, 360 (Tex. 1995) (evidence insufficient to support submission of "sudden emergency").

Definition. The above definition of "emergency" was recognized by the Texas Supreme Court in *Dillard v. Texas Electric Cooperative*, 157 S.W.3d 429, 432 (Tex. 2005).

Caveat. The Texas Supreme Court has acknowledged that inferential rebuttals "serve a legitimate purpose." The court also cautioned, however, that multiple inferen-tial rebuttal instructions have "the potential to skew the jury's analysis." *Dillard*, 157 S.W.3d at 433.