

**CAUSATION AND
DAMAGES**

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Causation and Damages

I. INTRODUCTION

This paper offers a preliminary discussion of the law governing evidentiary requirements and proof techniques for causation and damages in personal injury cases. A brief, but comprehensive, discussion on the recent "paid and incurred" issue that has arisen with the passage of the (relatively) new Texas Civil Practice & Remedies Code §41.0105 is also included. Finally, it discusses easily quantifiable damages, such as medical expenses and damages that are more difficult to calculate, such as pain and suffering and loss of consortium.

II. CAUSATION

How you prove causation in your cases can depend on the type of case and the type of injuries at issue. Some cases, by their very nature, require the use of expert testimony. Other cases do not. The following cases provide an overview of recent Texas appellate rulings in various types of personal injury cases.

A. Medical Records and Expert Testimony on Causation; Affidavits of Reasonable and Necessary Medical Expenses

In *Bullard v. Lynde*, 292 S.W.3d 142 (Tex. App.—Dallas 2009, no pet.), the trial court entered judgment notwithstanding the verdict to award a motor vehicle wreck plaintiff all of her past medical expenses (\$11,660.50) after the jury returned a verdict for \$3,344.50 in past medical expenses. At trial, the defendant did not contest the reasonableness and necessity of the medical expenses or present medical testimony to support the argument the plaintiff's injuries

In *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007), the Texas Supreme Court reversed the court of appeals holding lay person testimony was insufficient to prove the causal nexus between the underlying car wreck and the plaintiff's injuries. The Court recognized non-expert evidence alone would be sufficient to support a finding of causation where "both the occurrence and conditions complained of are such that the general experience and common sense of laypersons [sic] are sufficient to evaluate the conditions and whether they were probably caused by the occurrence." *Id.* at 668. Note, the Court remanded the cause for remittitur instead of rendering judgment because the lay person evidence supported some of the damages awarded in the original \$1.1 million dollar verdict.

Hong v. Bennett, 209 S.W.3d 795 (Tex. App.—Fort Worth 2006, no pet.) (November 22, 2006), relying on the court of appeals decision in *Ferrer*, stated that "an uncontroverted [affidavit of reasonable and necessary medical expenses] provides legally sufficient—but not conclusive—evidence to support a jury's finding" of reasonable and necessary medical expenses. *Id.* at *2. Without an affidavit, the party must show the expenses are reasonable and necessary through expert testimony. By filing a controverting affidavit, an opposing party can force the other party to prove reasonable and necessary medical expenses through expert testimony. In this case a chiropractor's controverting affidavit was sufficient to refute the plaintiff's affidavit for an injured motorist's chiropractic expenses. It was not sufficient, however, to controvert the affidavits for expenses filed by the medical doctor, the radiologist, and pharmacist.

were not related to the wreck. The court of appeals, citing evidence the plaintiff played sports after the wreck but before a surgery "could have" aggravated the original injury, found that more than a scintilla of evidence existed to support the original jury verdict on medical expenses.

Note, the *Bullard* decision seems to contradict the ruling in *Columbia Med. Ctr. of Las Colinas v. Hogue*, 271 S.W.3d 238 (Tex. 2008), where the Texas Supreme

Court explained the defendant must present some evidence that the plaintiff contributed to cause his own injury. The court stated: “[P]roof of causation to support its contributory negligence submission must rise above mere conjecture or possibility.” *Id.* at *5. It went on to hold physician testimony that the plaintiff “possibly” contributed to his own injuries was not enough to sustain the defendant’s burden.

In *Figueroa v. Davis*, 318 S.W.3d 53 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.), a jury found the defendant in a car wreck negligent for running a stop sign and hitting the plaintiffs’ vehicle. The jury awarded the plaintiff-driver \$42,482.78 in total damages. The defendant challenged the legal and factual sufficiency of the award for future medical care contending the plaintiff’s failure to present expert testimony connecting his dental injuries to the wreck prevented him from recovering any damages for the injury. The trial court admitted the plaintiff’s medical records under Texas Civil Practices and Remedies Code § 18.001(b), which the appellate court found only proved the reasonableness and necessity of the expenses, and not causation. However, the plaintiff testified when the his body went forward, his teeth and neck hit the steering wheel on impact. He explained his teeth were not bleeding or missing but were cracked directly after the wreck. Evidence also showed the officer responding asked him what was wrong with his mouth and he said he could not talk because it hurt. The plaintiff testified he woke up a few days later with his teeth as pieces in his mouth.

In *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765 (Tex. 2007), the Texas Supreme Court held that there was insufficient evidence to show that a mechanic’s asbestosis was the result of asbestos-containing brake pads. Flores presented expert evidence that the brake

Reviewing the evidence, the appellate court affirmed the award, explaining the testimony established a sequence of events that provided a strong, logically traceable connection between the event and the condition.

B. Probability v. Possibility

In *Bartosh v. Gulf Health Care Center-Galveston*, 178 S.W.3d 434 (Tex. App.—Houston[14th Dist.] 2005, no pet.), the court of appeals upheld the trial court’s exclusion of a medical expert’s testimony. The expert “stated that he was hired to speculate on what may have caused [decedent’s] health to deteriorate, that he gave his best speculation regarding possible causes, and that he was just offering an opinion on what might have happened.” *Id.* at 442.

In *W.C. Larock, D.C., P.C. v. Smith*, 310 S.W.3d 48 (Tex. App.—El Paso 2010, no pet.), a police officer injured while getting in her patrol car brought a medical malpractice suit against the provider she saw for physical therapy, alleging a re-herniated a disc after it was surgically fixed. On appeal, the defendant employee who performed the therapy at issue argued the officer did not present legally and factually sufficient evidence to establish causation, and the officer argued her treating physician’s testimony was adequate to establish causation.

When asked whether the employee’s actions caused the re-herniation, the doctor responded, “It’s possible.” The court of appeals agreed with the employee, explaining the doctor’s testimony was not competent as he testified to possibility rather than probability.

C. Asbestos Cases

Asbestos-containing brake pads contained asbestos, that a mechanic could have been exposed during certain activities, and the frequency, regularity, and proximity of his exposure, but failed to present any dosage-related evidence to show approximately how much asbestos he might have inhaled. Therefore, there was legally

insufficient evidence to establish that the manufacturer's brake pads were a substantial factor in causing his asbestosis.

D. Products Liability

In the realm of products liability, in *Ford Motor Co. v. Ridgway*, 135 S.W.3d 598 (Tex. 2004), the Texas Supreme Court declined to decide whether Section 3 of the Third Restatement of Torts accurately reflects Texas law, and stated that even if Section 3 were the law in Texas, it would generally apply only to new or almost new products. The Restatement provides:

“It may be inferred that if the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of the kind that ordinarily occurs as a result of a product defect; and (b) was not, in the particular case, solely the result of causes other than the product defect existing at the time of sale or distribution”

The Court stated that Section 3 is limited by the drafters in a note stating that “the inference of defect may not be drawn...from the mere fact of a product-related accident.”

In *Merrell v. Wal-Mart Stores, Inc.*, 276 S.W.3d 117 (Tex. App.—Texarkana 2008, pet. filed), parents of a fire victim filed a products liability action against Wal-Mart alleging a defective halogen lamp caused a deadly apartment fire. The trial court granted summary judgment but considered the expert affidavit of Dr. Craig Beyler included in the parent's summary judgment response. Both parties appealed, and the appellate court reversed the summary judgment. In its appeal, Wal-Mart claimed Dr. Beyler's affidavit was inadmissible because it relied on an unsworn witness affidavit and was scientifically unreliable. It further argued the affidavit was

Id. at 601.

“Producing Cause” is no longer the standard in products liability claims. Rejecting the PJC definition, the Supreme Court of Texas in *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007), decided that the new standard of proof requires evidence that the defect was a “substantial cause” of the injuries and damages.

The Supreme Court's new formulation requires that the jury be charged that: (1) the cause must be a substantial cause of the even in issue and (2) it must be a but-for cause, namely one without which the event would not have occurred.

The expert opinions were admissible even though he could not explain *why* the nuts were not tightened sufficiently. However, the Supreme Court cautioned that to prove a manufacturing defect, Ledesma need not prove that the manufacturing process is flawed, only that it produced a flawed product. Thus, there was not an analytical gap sufficient to show error on the part of the trial court.

The Supreme Court also found admissible the testimony of an accident reconstruction expert testifying mostly on the basis of photographs of the scene, who stated the pavement marks and damage supported Ledesma's claims. Ford argued this testimony “contain[ed] too many assumptions and logical leaps to be reliable.” But the Court stated that Ford's criticisms of Hall's testimony went to the credibility, not the reliability of Hall's theories, and these were subject to vigorous cross-examination regarding the accuracy of his opinions.

inadmissible because it relied on post hoc reasoning and, thus, could not support a finding on causation. The appellate court disagreed, explaining that the Rules of Evidence allow experts to rely on otherwise inadmissible evidence. It also found the affidavit sufficiently reliable, explaining: “Dr. Beyler's affidavit provides expert testimony bridging the analytical gap between the origin of the fire . . . and the conclusion that the halogen lamp was the cause-in-fact of the fire. Based on Dr. Beyler's affidavit, the appellate court found more than a mere scintilla of evidence on the element of causation and ultimately reversed summary judgment.

In *Driskill v. Ford Motor Co.*, 269 S.W.3d 199 (Tex. App.—Texarkana 2008, no pet.), car owners brought a products liability action against manufacturers after a defect in a speed control deactivation switch allegedly caused their car and house to burn in a fire. The owners appealed after the trial court granted the manufacturer’s no-evidence motion for summary judgment. Prior to ruling on the summary judgment, the trial court excluded the testimony of the plaintiffs’ expert as to causation but allowed the expert to testify regarding the fire’s origin. The expert testified the fire started in the left rear portion of the engine compartment. Photographs of the car and testimony by the plaintiffs that the cruise control device had stopped working prior to the fire were also admitted into evidence. Nonetheless, the appellate court affirmed, finding no evidence of proximate cause.

In *Rentech Steel, L.L.C. v. Teel*, 299 S.W.3d 155 (Tex. App.—Eastland 2009, pet. dismissed), a young man and his parents brought claims against his employer for hand injuries he sustained while cleaning a power roller

In *Towers of Town Lake Condominium Ass’n, Inc. v. Rouhani*, 296 S.W.3d 290 (Tex. App.—Austin 2009, pet. denied), Dr. Venus Rouhani, a dentist who lost the ability to continue in her profession, filed suit when she fell on a slick deck area coated with enamel paint near the defendant’s swimming pool. The jury returned a verdict for Dr. Rouhani, finding the unreasonably dangerous condition caused her injuries. The defendant appealed, claiming the jury’s findings were not supported by the evidence.

The court of appeals affirmed, explaining the testimony of Dr. Rouhani’s expert (a professional engineer with training in decks) was legally sufficient to support finding causation. It explained the expert properly based his opinion on an inspection of the deck and a review of the material used to coat the deck. The court further commented that Dr. Rouhani’s testimony about how the fall occurred was also legally sufficient to support finding causation even without the expert’s testimony because a slick pool deck was within a layperson’s common understanding.

machine on the job when he was sixteen. Prior to trial the plaintiffs settled with the machine’s manufacturer and owner, but the negligence of those parties was still submitted to the jury along with the employer’s negligence. The jury found only the employer negligent and awarded the young man and his parents over \$12 million dollars. On appeal, the employer argued it had conclusively proven the negligence of the machine’s manufacturer and owner by calling the plaintiff’s previously retained expert witness to testify about the presence of defects and lack of warning at trial. The court of appeals disagreed, finding causation in the case “was not a matter for experts alone and did not require a technical or scientific explanation. . . .” *Id.* at 161. It was within the jury’s ability to determine what caused the accident and injuries and the jury could have disregarded the expert’s conclusion regarding causation.

E. Premises Liability

F. Automobile Wrecks

In *Lincoln v. Clark Freight Lines, Inc.*, 285 S.W.3d 79 (Tex. App.—Houston [1st Dist.] 2009, no pet.), reviewed a trial court’s decision to allow expert testimony in a wrongful death action against a trucker and trucking company. The defendants offered the testimony of a deputy who served as the county’s accident reconstructionist. The plaintiff moved to strike the expert’s testimony because it was based on an unreliable method. The deputy testified that he would need to determine the coefficient of friction (using information about the vehicle tires) to determine who caused the wreck. To calculate the coefficient of friction, the deputy “eyeballed” the tires and performed testing with a Camber rather than the Mustang involved in the wreck. The trial court allowed the deputy to testify and the officer concluded that the driver of the decedent’s vehicle caused the wreck. The appellate

court affirmed the lower court, finding the deputy's methods reliable and grounded in procedures of science.

Byrd v. Delasancha, 195 S.W.3d 834 (Tex. App.—Dallas 2006, no pet.), involved a car wreck where the defendant ran a red light and struck the plaintiff's car while she was crossing an intersection. The force of the wreck deployed the plaintiff's air bag and she told first responders on the scene that she was not okay. After arriving home from the wreck, the plaintiff's mother took her to the emergency room and she was diagnosed with soft tissue injuries. At trial, the plaintiff testified she did not have any injuries before the wreck but she did have them afterwards. Those injuries were also documented in the medical records admitted into evidence. The defendant moved for directed verdict, claiming the plaintiff failed to establish the causal nexus between her injuries and the wreck and the trial court agreed. The

In any circumstance, Texas courts require the plaintiff to demonstrate a clear connection between the injury and the damages sustained. *Leitch v. Hornsby*, 935 S.W.2d 114 (Tex. 1996). Remote damages, or damages that are purely conjectural, speculative, or contingent, are too uncertain to be ascertained and cannot be recovered. *Tate v. Goins, Underkofler, Crawford*, 24 S.W.3d 627, 635 (Tex. App.—Dallas 2000, pet. denied). Specifically, the Texas Supreme Court in *Leitch* requires that where there is no medical testimony linking the alleged negligence to the injury, a claimant must provide probative evidence connecting the injury to the alleged negligence through expert testimony. *Leitch*, 935 S.W.2d at 119; see also, *Lenger v. Physician's Gen. Hosp., Inc.*, 455 S.W.2d 703, 706 (Tex. 1970); *Sears, Roebuck & Co. v. Hurst*, 652 S.W.2d 563, 565 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.); *Orkin Exterminating Co. v. Davis*, 620 S.W.2d 734, 736-37 (Tex. Civ. App.—Dallas 1981, writ ref'd n.r.e.); cf. *Royal Globe Ins. Co. v. Suson*, 626 S.W.2d 161, 163-64 (Tex.

appellate court reversed, finding the plaintiffs testimony and medical records established a sequence of events from which the jury could infer causation without the aid of medical expert testimony.

III. INJURY

Damages are intended to compensate the victim for the injuries he or she incurred as a result of the negligent or intentional harm of the defendant. Texas courts historically construed the limits of "physical injury" liberally, including in its definition psychological and physiological manifestations of physical injury or in some instances, the physical results of sheer fright or psychic shock.

App.—Fort Worth 1981, writ ref'd n.r.e.) (holding that expert testimony not required to establish link between back injury and on-the-job incident).

IV. ACTUAL DAMAGES

Actual damages are damages recoverable under common law. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 939 (Tex. 1980). The purpose of the law in awarding actual damages is to repair the wrong that has been done or to compensate for the injury inflicted, but not to impose a penalty. *Press v. Davis*, 118 S.W.2d 982, 993 (Tex. Civ. App.—Fort Worth 1938), modified on other grounds sub nom. *Quinn v. Press*, 140 S.W.2d 438 (Tex. 1940).

Actual damages come in two flavors: general ("direct") and special ("consequential"). *Fox v. Parker*, 98 S.W.3d 713 (Tex. App.—Waco 2003, reh'g. of pet. denied) (citing *Arthur Andersen & Co. v. Perry Equip. Corp.*, 945 S.W.2d 812, 816 (Tex. 1997)). General, or direct,

damages are "those conclusively presumed as a matter of law to have been foreseen by the defendant as a necessary and usual result of the defendant's wrongful act." *Fox*, 98 S.W.3d at 726. They need not be specifically pled. In a personal injury case, general damages would include pretrial pain and suffering.

All other actual damages are special, or consequential, damages which must be foreseeable to the defendant but are not the necessary and usual result of the wrong, and these must be specifically pled. *Fox*, 98 S.W.3d at 726; *Burke v. Union Pacific Resources Co.*, 138 S.W.3d 46 (Tex. App.—Texarkana 2004, pet. dismissed). One must remember, however, that if these damages are too remote, uncertain, or speculative they still cannot be recovered. *Arthur Andersen*, 945 S.W.2d at 816.

Special damages would include medical expenses and loss of earning capacity. See *Young v. Howell*, 236 S.W.2d 247 (Tex. Civ. App.—Texarkana 1951, no writ); *Weingartens, Inc. v. Price*, 461 S.W.2d 260 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ refused n.r.e.). The Texas Civil Practice & Remedies Code, however, refers to damages only in terms of economic, non-economic, and exemplary damages. TEX. CIV. PRAC. & REM. CODE §41.001. In personal injury cases, roughly

A plaintiff can recover reasonable expenses incurred for medical, surgical, hospital and nursing services and any other items reasonably and necessarily incurred in effecting a cure of one's injuries. *Texas & N.O.R. Co. v. Parry*, 1 S.W.2d 760 (Tex. Civ. App.—Texarkana 1927), *rev'd on other grounds*, 12 S.W.2d 997 (Tex. 1929); *Travelers Ins. Co. v. Brown*, 750 S.W.2d 916 (Tex. App.—Amarillo 1988, pet. denied). For instance, transportation expenses in relation to medical treatment are recoverable. *Coca-Cola Bottling Co. of*

speaking, the term "actual damages" corresponds to all compensatory (non-punitive) damages, and thus to economic and non-economic damages, as those terms are defined in §41.001. Economic damages are intended to compensate a plaintiff for actual economic or pecuniary loss, while non-economic damages are intended to compensate for: physical pain and suffering; mental pain or anguish; loss of consortium; disfigurement; physical impairment; loss of companionship and society; inconvenience; loss of enjoyment of life; injury to reputation; and all other non-pecuniary losses other than exemplary damages. TEX. CIV. PRAC. & REM. CODE §§ 41.001(4) and (12).

V. ECONOMIC DAMAGES

These damages are the most easily measured. They include damages that can be easily reduced to figures which may be reflected in hospital bills or other documents, such as medical expenses, loss of earning capacity and loss of household services. The term does not include non-economic or exemplary damages. TEX. CIV. PRAC. & REM. CODE §41.001(4).

A. Medical Expenses

Plainview v. White, 545 S.W.2d 279 (Tex. Civ. App.—Waco 1977, no writ). Recovery of medical expenses is not barred by the fact that medical bills are paid by insurance or Social Security or by the fact that treatment was rendered gratis. *Morgan v. Woodruff*, 208 S.W.2d 628 (Tex. Civ. App.—Galveston 1948, no writ).

Under the 2003 Texas tort reform legislation, 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. Therefore, if an applicable fee or expense is in any way discounted, written off, or negotiated down by the provider, then the recovery may be limited to the reduced, actually incurred, amount. However, this law has not been addressed in any published opinion in Texas, and it does not seem to have any affect on the collateral source rule, which precludes admissibility of evidence of third-party payments from insurance or worker's compensation. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931 (Tex. 1980). Moreover, a defendant physician or health care provider can opt to pay medical expenses awarded in a health care liability claim in periodic payments rather than one lump sum. TEX. CIV. PRAC. & REM. CODE § 74.503(a). The implications and effects of the new § 41.0105 are discussed in depth in the section of this paper regarding "The Paid vs. Incurred Controversy."

In *Rentech Steel, L.L.C. v. Teel*, 299 S.W.3d 155 (Tex. App.—Eastland 2009, pet. dism'd), the employer of a sixteen year-old young man injured cleaning a

To recover past and future medical expenses the plaintiff must prove the actual amount of expenses incurred and establish that the expenses are "reasonable" and that the treatment was "necessary." *Travelers Ins. Co. v. Brown*, 750 S.W.2d 916 (Tex. App.—Amarillo 1988, writ denied); *Monsanto Company v. Johnson*, 675 S.W.2d 305, 312 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.); *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377 (Tex. 1936). Mere proof that medical services were rendered to the plaintiff does not suffice to show that such services were necessary. See *Orkin Exterminating Co., Inc. v. Davis*, 620 S.W.2d 734 (Tex. Civ. App.—Dallas 1984, writ ref'd n.r.e.). Medical expense must be comparable to the

power roller machine. At trial, the jury awarded the young man's parents \$550,000 in past medical expenses and the young man \$1,000,000 in future medical expenses. Only \$381,788 in past medical expenses were proven at trial and the plaintiffs agreed on appeal to accept a remittitur of the excess amount. The defendant, however, argued a remittitur was not the proper remedy because there was no evidence to support the award given and claimed a new trial must be given. The appellate court agreed with the plaintiffs and found the case appropriate for remittitur. The defendant also claimed it was entitled to credit for past medical expenses paid by its insurer. The family argued the collateral source rule. During trial the defendant offered the testimony of its plan administrator outside the jury's presence to establish the amount paid and support its affirmative defense of an offset. The appellate court held the employer was entitled to an offset because it was the purchaser of the plan, not the plaintiff.

1. Proving Medical Expenses

usual and customary charges for such services at the time and place the service was rendered in order to be "reasonable." *Fort Worth v. Barlow*, 313 S.W.2d 906 (Tex. Civ. App.—Fort Worth 1958, writ ref'd n.r.e.). Moreover, courts have interpreted the term "necessary" to mean treatment was required as a result of the injury. *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377 (Tex. 1936). Because a plaintiff can only recover for past medical expenses arising from treatment necessitated by a defendant's negligence, a plaintiff being treated for multiple conditions brought on by independent causes must segregate the medical expenses attributable to each condition. *Texarkana Mem'l Hosp, Inc., v. Murdock*, 946 S.W. 2d

836, 839-840 (Tex. 1997); *B.T. Healthcare, Inc. v. Honeycutt*, 196 S.W.3d 296, 300 (Tex. App.—Amarillo 2006, no pet.).

This author suggests a four-pronged attack to have medical records and bills admitted into evidence. Medical records and bills should be initially obtained by affidavit from the records custodian. If an opposing party requests medical records by deposition on written questions, and you are offering them by affidavit, prove up the medical (business) records exception to the hearsay rule by cross question. If you take your medical expert's deposition, stretch his or her testimony as far as it will go to prove up the hearsay exceptions. Finally, send requests for admission to your opponent, requesting them to admit that medical records meet the hearsay exceptions and the bills were reasonable and necessary.

a. Admitting Medical Bills by Affidavit

The Texas Rules of Evidence and the Texas Civil Practice & Remedies Code outline the process by which a party may admit medical records and bills by affidavit to the court. The affidavit for admitting records is governed by Texas Rule of Evidence 803(4) or 803(6) in combination with Texas Rule of Evidence 902(10). The admissibility of medical bills is governed by Texas Civil Practices and Remedies Code § 18.001 *et seq.*

The need for evidence of the

It is important to note that the party offering the affidavit into evidence must file the affidavit at least thirty (30) days "before the day on which evidence is first presented at the trial of the case." TEX. CIV. PRAC. & REM. CODE § 18.001(d). The rule is very specific that it is the commencement of evidence and not the trial setting that is important.

A doctor or health care provider does

reasonableness and necessity of the medical expenses has been upheld on a number of occasions. See *Dallas Railway and Terminal Co. v. Gossett*, 294 S.W.2d 377, 382-83 (Tex. 1956); *Monsanto Company v. Johnson*, 675 S.W.2d 305, 312 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.). Several courts have held that without evidence supporting the reasonableness and necessity of the medical bills, such bills will not be admitted. See *Six Flags Over Texas, Inc. v. Parker*, 759 S.W.2d 758 (Tex. App.—Fort Worth 1988, no writ). If a properly worded affidavit is supplied with the medical records, however, they will be admissible. *Id.* at 761. See also, *Southwestern Bell Telephone Co. v. Wilson*, 768 S.W.2d 755 (Tex. App.—Corpus Christi 1988, writ denied); *National Union Fire Ins. Co. of Pittsburgh v. Wyar*, 821 S.W.2d 291, 297 (Tex. App.—Houston [1st Dist.] 1991, no writ). The requirements for this affidavit are set out in § 18.001 *et seq.* That section provides for the admissibility of an affidavit, so long as it is filed more than thirty (30) days before the day on which the evidence is first presented at the trial of the case. The affiant must be a person who provided the services, or the person in charge of the records showing that the services provided and the charges made were reasonable and necessary. An itemized statement of the services and charges must be provided.

not have to sign the affidavit. Rather, the records custodian who is in charge of billing can fill out the affidavit. However, a party intending to controvert a claim reflected by the affidavit must file a counter-affidavit signed by such an expert. TEX. CIV. PRAC. & REM. CODE § 18.001(f). The counter-affidavit must be filed with the clerk and served on each of the parties or the parties' attorneys of record no later than

thirty (30) days after the day he receives a copy of the affidavit, and at least fourteen (14) days before the day on which evidence is first presented at the time of trial. TEX. CIV. PRAC. & REM. CODE § 18.001(e).

The counter-affidavit must give reasonable notice of the bases on which the party filing it intends at trial to controvert the claim reflected by the initial affidavit, and must be taken before a person authorized to administer oath. The counter-affidavit must be made by a person who is qualified, by knowledge, skill, experience, training, education, or other expertise to testify in contravention of all or part of any of the matters contained in the initial affidavit. Tex. Civ. Prac. & Rem. Code § 18.001(f); *see Turner v. Peril*, 50 S.W.3d 742 (Tex. App.—Dallas 2001, pet. denied). In other words, the person submitting the affidavit does not have to have an expert sign the affidavit; however, the person controverting the affidavit must be such an expert.

In *Hong v. Bennett*, 209 S.W.3d 795 (Tex. App.—Fort Worth 2006, no pet.), the Fort Worth Court of Appeals addressed sufficiency of controverting affidavits. Plaintiff Hong timely filed affidavits to support medical bills from his chiropractor, medical doctor, radiologist, and pharmacist. Defendant Bennett filed a controverting affidavit signed by a chiropractor with an attached report asserting that none of Hong's

This case is contrasted with *Hill v. Clayton*, 827 S.W.2d 570 (Tex. App.—Corpus Christi 1992, no writ). In *Hill*, the plaintiff admitted medical evidence by affidavits. However, the affidavits had shown without contradiction that the medical expenses were reasonable and necessary, and resulting from the incident. As a result, the affidavits established causation without question. Therefore, an affidavit under § 18.001 *et seq.* should

bills were reasonable and necessary. The trial court, after hearing, found all of Hong's affidavits were controverted, and ruled that both parties' affidavits were admissible. The Court of Appeals reversed the trial court, holding that the chiropractor's controverting affidavit only controverted the affidavit supporting Hong's chiropractic bills. The affidavit itself only provides for the admissibility of medical bills that the party has incurred in the past. It does not allow for the admissibility of future damages or estimated damages.

If the affidavit only proves up the reasonableness and necessity of the charges, it does not necessarily establish the amount of damages as a matter of law. For instance, in *Kulms v. Jenkins*, 557 S.W.2d 149 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.), Mr. Jenkins was involved in an automobile accident. Affidavits were submitted showing the reasonableness and necessity of medical expenses totaling over \$1700. However, no evidence was admitted to show that the medical records were as a result of the collision. The plaintiff's attorney pointed out to the appellate court that notations referring to the accident appeared in the hospital's records. However, the court found that, without more, the notations were hearsay and were, therefore, properly excluded. All damage awards for the medical bills were excluded.

contain language linking the services to the incident complained of in the suit, since courts have ruled that the medical records themselves may not show causation. *See contra, Hilland v. Arnold*, 856 S.W.2d 240 (Tex. App.—Texarkana 1993, no writ). Remember, § 18.001 does not address causation. *Beauchamp v. Hambrick*, 901 S.W. 2d 747, 749 (Tex. App.—Eastland 1995, no writ).

b. Admitting Medical Bills by Deposition on Written Questions

Reasonableness and necessity of medical expenses may also be established through the use of written depositions. *See* TEX. R. CIV. P. 200, *et seq.*

In obtaining the deposition on written question for bills, the person who is answering the deposition must be qualified to testify that in their opinion the bills were reasonable and necessary. TEX. R. EVID. 701. Obviously, unlike the affidavit, this would require the testimony of the medical doctor. Generally, medical doctors charge for their time in rendering such an opinion. Moreover, the scheduling of the doctor's deposition could be costly and time-consuming.

As with the deposition upon oral examination, after the commencement of a lawsuit, any person can be compelled to respond to a deposition on written questions.

See TEX. R. CIV. P. 200.2. The notice requirements are similar to those of Rule 199, and leave of court is not required unless the deposition is sought outside of the discovery period (unless the parties agree otherwise). TEX. R. CIV. P. 200.1. The most significant differences are that the notice must be served at least twenty (20) days prior to the date that the testimony is taken and must include the direct examination questions to be propounded to the witness. *Id.*

Rule 200.3 states that any party may serve cross-questions upon each party within ten (10) days of the date of service, redirect questions may be served with in five (5) days of the receipt of the cross-examination, and re-cross should be served within three as to the reasonableness of those particular expenses.

d. Admitting Medical Bills by Request

(3) days of the receiving of the redirect questions. Any objections must be made within five days after the earlier of when recross questions are served or the time of the deposition on written questions. *See* TEX. R. CIV. P. 200.3.

The deposition by written questions can, however, be a rather rigid form which does not permit the examiner to follow up a line of inquiry or develop a more detailed response. The attorneys do not have the opportunity to explain their questions or help define the requests if the witness misunderstands. Moreover, there is no way to observe the witness' demeanor. For these reasons, it is not advisable to rely upon this type of deposition for obtaining information regarding medical bills.

c. Admitting Medical Bills by Expert Testimony

Obviously, most medical records and bills are admitted through the use of expert testimony. In a personal injury case, many times the plaintiff's main treating physician's deposition is taken in order to get an understanding of past and future medical damages. During this time, it is usually customary to ask questions to prove up the plaintiff's medical bills. Testimony is usually elicited about future medical expenses as well. However, many times the plaintiff's expert is limited to his area of specialty. For example, an orthopedic surgeon may not be familiar with the costs that are reasonable and necessary for neurologists, radiologists, or doctors of internal medicine to charge the plaintiff. To prove the reasonableness of medical expenses via expert testimony, you must show the expert to be qualified to testify

for Admission

The request for admission is a very practical tool to prove medical damages.

See TEX. R. CIV. P. 198, *et seq.* If admitted to in a properly phrased admission, the medical records and bills become admissible automatically. TEX. R. CIV. P. 198.3.

Under Rule 198.1, requests for admission may relate to any matter deemed discoverable under Rule 192.3. Further, Rule 192.3 provides that it is not grounds for objection that a request propounded pursuant to Rule 198 may not be admissible at trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence. TEX. R. CIV. P. 192.3.

2. *Future Medical Expenses*

To recover future medical expenses, the plaintiff must establish that there is a reasonable probability that such medical expenses will be incurred in the future. *Doctor v. Pardue*, 186 S.W.3d 4 (Tex. App.—Houston [1st Dist.] 2006, pet. denied); *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817 (Tex. App.—Houston [1st Dist.] 1999, pet. denied); *City of Rosenberg v. Renken*, 616 S.W.2d 292 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Six Flags Over Texas, Inc. v. Parker*, 759 S.W.2d 758 (Tex. App.—Fort Worth 1988, no writ). An award of future medical expenses lies largely within the discretion of the jury. *Antonov v. Walters*, 168 S.W.3d 901, 908 (Tex. App.—Fort Worth 2005, pet. denied); *Brookshire Grocery Co. v. Goss*, 208 S.W.3d 706, 720 (Tex. App.—Texarkana 2006), *rev'd on other grounds*, 208 S.W.3d 706 (Tex. 2008). Because issues such as life expectancy, medical advances, and the future costs of products and services are, by their very nature, uncertain, appellate courts

Cases are in conflict as to just what the doctor must say to establish future

are particularly reluctant to disturb a jury's award of future medical expenses. *Sanmina-SCI Corp. v. Ogburn*, 153 S.W.3d 639, 642-43 (Tex. App.—Dallas 2004, pet. denied). Generally, an award of future medical expenses is always speculative. *Pipgros v. Hort*, 832 S.W.2d 360 (Tex. App.—Fort Worth 1992, writ denied).

The jury may make its award based on the injuries suffered, the medical care rendered before trial, progress toward recovery under the treatment received, and the condition of the injured party at the time of trial. *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 827 (Tex. App.—Houston [1st Dist.] 1999, writ denied); *Hughett v. Dwyre*, 624 S.W.2d 401 (Tex. Civ. 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.); *see also*, *Southwestern Bell Tel. Co. v. Davis*, 582 S.W.2d 191 (Tex. Civ. App.—Waco 1979, no writ). However, in order to sustain the jury's award a plaintiff must present evidence to establish that in all reasonable probability, future medical care will be required and the reasonable cost of that care.

Rosenboom, 995 S.W.2d at 827. No rule requires a plaintiff to establish such expenses through expert testimony or based on reasonable medical probability. *Antonov v. Walters*, 168 S.W.3d 901, 908 (Tex. App.—Fort Worth 2005, pet. denied). However, the preferred practice is to establish future medical expenses based on reasonable medical probability as to the probability and certainty of future medical services. *Rosenboom*, 995 S.W.2d at 827; *See also*, *City of Rosenberg v. Renken*, 616 S.W.2d 292 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).

medical expenses. It is always safest to use the specific term "in reasonable medical

probability." However, it is the substance of the expert's testimony and not the use of any particular term or phrase that governs. *Ins. Co. of North America v. Myers*, 411 S.W.2d 710 (Tex. 1966); *see also, Hughett v. Dwyre*, 624 S.W.2d 401 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

The most liberal cases hold that it is enough for a doctor to state that future treatment is needed and the jury can estimate the future medical based on the amount of past medical. *Brown v. Friedman*, 451 S.W.2d 588 (Tex. Civ. App.—Houston [1st Dist.] 1970, no writ). Conservative cases, however, hold that a doctor must state the specific dollar amount of necessary future medical expenses and the jury cannot award more than that amount. *Union Oil Co. v. Richard*, 536 S.W.2d 955 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

Most decisions hold that the doctor only has to estimate the amount of future medical expense and the jury can award an amount greater than the doctor's estimate so long as the excess is not too gross. *See Browning v. Paiz*, 586 S.W.2d 670 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.), in which the doctor testified that "the patient will require medical care...,they would be expected to run into the thousands of dollars, and really the way prices are escalating, I don't know how many it would be...I would say a minimum of ten thousand." *Browning*, 586 S.W.2d at 679.

The jury is not bound by the doctor's estimate but can add something for inflation and a longer than normal life expectancy. *Keller Industries, Inc. v. Reeves*, 656 S.W.2d 221 (Tex. App.—Austin 1983, writ ref'd n.r.e.). A plaintiff is not required to prove her life expectancy to a reasonable medical probability-in fact, such a burden of proof

is impossible because life expectancy by its very nature is uncertain. *Colombia Medical Center of Las Colinas v. Bush ex rel. Bush*, 122 S.W.3d 835 (Tex. App.—Ft. Worth 2003, pet. denied).

Also in *Figueroa v. Davis*, ___ S.W.3d ___ (Tex. App.—Houston [1st Dist.] 2010, no pet. h.), the defendant challenged the legal and factual sufficiency of the jury's award for future medical care estimating the cost of replacing the plaintiff's broken teeth with permanent fixtures. The jury awarded the exact amount of an estimate provided by the plaintiff, who also testified that while he would like to get permanent fixtures, he was currently planning to receive treatment at a less costly provider. The defendant claimed the plaintiff could not recover because he was not having his work done at the facility for which the estimate was provided. The appellate court rejected the defendant's argument, explaining the plaintiff did not testify that he would absolutely receive treatment at the less costly facility and that he would prefer to follow the treatment at the facility which provided the estimate.

In *Rentech Steel, L.L.C. v. Teel*, 299 S.W.3d 155 (Tex. App.—Eastland 2009, pet. dismissed), the employer of a sixteen year-old young man injured cleaning a power roller machine. At trial, the jury awarded the young man \$1,000,000 in future medical expenses. At trial, the young man's doctor testified he would undergo ten to fifteen more surgeries ranging from \$5,000 to \$20,000 per surgery. A life care planner calculated his future medical and related expenses to be approximately \$3,000,000 with \$1.9 million being for home maintenance, a bookkeeper, a housekeeper, and a home health aide. The appellate court affirmed the jury's award, finding it was factually supported by the young man's injuries, his condition at trial, the testimony about his need for future surgeries, and the

life care plan.

a. Future Medical Expenses in

Healthcare Liability Claims

It is worth noting that since House Bill 4 became law in 2003, defendant physicians or health care providers have the option of paying judgments, including future medical expenses, in which the present value of future damages equals or exceeds \$100,000 in periodic payments rather than in one lump sum. TEX. CIV. PRAC. & REM. CODE § 74.503(b).

3. *Medical Care for Minors*

Because parents are legally responsible for the medical expenses of their children, when a minor child is injured, recovery of medical expenses up until the age of eighteen (18) is a cause of action which belongs to the parents. *See Sax v. Vottelot*, 648 S.W.2d 661 (Tex. 1983); *Coates v. Moore*, 325 S.W.2d 401 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.). The minor child is entitled to recover for future medical expenses incurred after majority. *Dartez v. Gadbois*, 541 S.W.2d 502 (Tex. Civ. App.—Houston [1st Dist.] 1976, no writ). Therefore, future medical expenses should be submitted separately to segregate the parents' and minors recovery. *Roth v. Law*, 579 S.W.2d 949 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

It should be noted that the minor's negligence or comparative negligence affects both his and his parents' recovery; while the parents' negligence or comparative negligence affects only the parents' recovery. *See Roth*, 579 S.W.2d at 950-52.

B. *The Paid v. Incurred Controversy*

During the 78th Texas Legislative

Session, House Bill 4 added the new Texas Civil Practice and Remedies Code § 41.0105, which states:

**EVIDENCE RELATING TO
AMOUNT OF ECONOMIC
DAMAGES**

In addition to any other limitation under law, recovery or medical or health care expenses incurred is limited to the amount actually paid or incurred by or on behalf of the claimant.

This new statute was passed as part of the 2003 "Tort Reform" package. Some have argued, and continue to argue, that §41.0105 effectively obliterates the longstanding collateral source rule in Texas. Others retort that §41.0105 is entirely consistent with the collateral source doctrine and, indeed, may even be a codification of the collateral source rule. And there is much bickering back and forth over the meaning of "incurred" and whether or not the disjunctive "paid or incurred," makes any difference at all (I submit that it does). Thus, there has been a great deal of confusion over what this statute was intended to do and what it really does, if anything.¹

¹Jim Perdue's article "Maybe it Depends on What Your Definition Of 'Or' Is? – A Holistic Approach to Texas Civil Practice and Remedies Code §41.0105, The Collateral Source Rule, and Legislative History" provides a comprehensive overview of this issue. It was published in Volume 38, Book 2 of the Texas Tech Law Review.

1. The Collateral Source Rule

a. In General

The collateral source rule is a rule of both evidence and damages. *Taylor v. American Fabritech, Inc.*, 132 S.W.3d 613, 626 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (citing *Lee v. Lee*, 47 S.W.3d 767, 777 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)); *Exxon Corp. v. Shuttlesworth*, 800 S.W.2d 902, 907-08 (Tex. App.—Houston [14th Dist.] 1990, no writ); RESTATEMENT (SECOND) OF TORTS § 920A (1979). In general, the collateral source rule precludes a tortfeasor from presenting evidence of, or obtaining an offset for, funds received by the plaintiff from a collateral source. *Id.* The collateral source rule is defined as "the doctrine that, if an injured party receives compensation for its injuries from a source independent of the tortfeasor, the payment should not be deducted from the damages that the tortfeasor must pay." Black's Law Dictionary (7th ed.1999). The rationale behind the collateral source rule corresponds to the rationale behind TEX. R. EVID. 411 which precludes introduction of evidence of insurance - whether or not a party is covered by insurance is usually irrelevant. A tortfeasor should not have the benefit of insurance independently procured by the injured party, and to which the tortfeasor was not privy. *Brown v. American Transfer & Storage Co.*, 601 S.W.2d 931, 935 (Tex. 1980). This would result in a windfall to the defendant.

In Texas, the collateral source rule has been held to apply in cases where the injured party received insurance benefits.

The current version of § 41.0105 is actually the fifth revised version of the statute. The first version, which was a part of House Bill 3, was a new addition to the then-existing Texas Civil Statutes Ann.

See Brown, 601 S.W.2d at 935; general fringe benefits, *McLemore v. Broussard*, 670 S.W.2d 301, 303 (Tex. App.—Houston [1st Dist.] 1983, no writ); gratuitous services, *Oil Country Haulers, Inc. v. Griffin*, 668 S.W.2d 903, 904 (Tex. App.—Houston [14th Dist.] 1984, no writ); and worker's compensation benefits, *Lee-Wright, Inc. v. Hall*, 840 S.W.2d 572, 582 (Tex. App.—Houston [1st Dist.] 1992, no writ). "Medical insurance, disability insurance, and other forms of protection purchased by a plaintiff, as well as gifts a plaintiff receives are easily identifiable as 'independent' sources of income that are subject to the collateral source rule." *Lee-Wright, Inc.*, 840 S.W.2d at 582.

b. The Collateral Source Rule and § 41.0105

The legislature is presumed to enact legislation "with complete knowledge of the existing law and with reference to it." *Acker v. Texas Water Com'n*, 790 S.W.2d 299, 301 (Tex. 1990). So did the Texas Legislature truly intend to repeal the collateral source rule? No. If they had intended such a thing, they would have either stuck to one of the many earlier versions of §41.0105 rather than the final version which was passed by both houses, or they would have at least made their intentions clearer in the final statute. As it stands, however, the Legislature contemplated the option of repealing the collateral source rule but chose not to do so.

article 4590i. Version one contained §§ 9.01 and 17.01-04, which would have repealed the collateral source rule only in medical malpractice lawsuits for Medicare, Medicaid, worker's

compensation, state or federal disability benefits including social security, and private health, accident, and disability insurance benefits. It also may have eliminated recovery for future medical expenses. This first version was rejected in favor of the committee substitute for House Bill 4, which expanded the applicability of version one to all lawsuits, not just medical malpractice suits. The second version, the committee substitute, was also rejected.

The second version was then modified into version three, still considered an addition to article 4590i, on the House floor, and omitted the previous language explicitly repealing the collateral source rule. It also once again restricted application of the law to medical negligence cases and clarified that it applied only to past medical or health care expenses.

The fourth version of the statute was revised in the Senate and again expanded to include cases other than medical malpractice claims. This time, the statute became Texas Civil Practice & Remedies Code § 41.0105 and included a limited repeal of the collateral source rule as applied to governmental benefits only (such as Medicare and Medicaid) while leaving out any mention of private insurance. This version, again, explicitly repealed the collateral source rule - in part. But it too was rejected in favor of the final version.

The final version of the bill - the current § 41.0105 - was amended to delete all provisions relating to collateral source evidence and subrogation interests. Thus, the legislature deliberately contemplated repealing the collateral source rule but rejected that approach before the final passage of House Bill 4. Therefore any attempt to read into the final version of § 41.0105 a legislative intent to repeal the collateral source rule must be rejected - the final statute simply does not mention the

collateral source rule, although it clearly could have done so as it did in earlier versions.

Members of the defense bar argue, relying on the House Research Organization's Bill Analysis, that the legislature intended to change the collateral source rule. Such reliance is improper because that analysis relies on language that is not contained in the final version of the bill. *See* House Research Org. Bill Analysis of HB4, March 25, 2003 at 14. Additionally, Texas State Representative David Farabee, Vice Chairman of the HRO, has specifically stated that the report "should not be used as a final analysis of House Bill 4, as changes were made to the legislation subsequent to the original analysis dated March 25, 2003." *See* Exhibit A, Aff. of Texas State Rep. David Farabee.

c. No Changes in TEX. CIV. PRAC. & REM. CODE

As discussed above, § 18.001 of the Texas Civil Practice and Remedies Code provides a method for proving up reasonable and necessary medical expenses before trial via affidavit. The legislature itself designed the specific forms of affidavits to be used in § 18.001. These forms require a healthcare provider/custodian or records to swear to the charge of the service and the amount charged for the services.

The legislature is presumed to create a new statute with full knowledge of and reference to existing statutes, and new statutes should be read in harmony with existing statutes. *Acker v. Texas Water Com'n*, 790 S.W.2d 299, 301 (Tex. 1990); *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 498 (Tex. 2001). If § 41.0105 was truly intended to repeal the collateral source rule, as the proponents of

the Tort Reform agenda argue, then § 18.001 would have been revised to conform with that agenda. But instead § 18.001 remains

Since § 18.001 retains the word "charged" in affidavits to be used as proof of damages before a jury, then the amount "charged," or, in other words, the amount "incurred," should be submitted to the jury via affidavit, without any reference to amounts "paid" by or on behalf of a plaintiff by any collateral source.

2. *The Furor Over "Or"*

a. Paid OR Incurred - Supporting the Disjunctive Meaning

The language of TEX. CIV. PRAC. & REM. CODE § 41.0105 incorporates the word "or," indicating the authors of this statute recognized a difference between the amount "paid" and the amount "incurred."

Texas case law has held the use of the word "or" is disjunctive, demonstrating the terms coming before and after the word "or" are different. Ordinarily the words "and" and "or" are not interchangeable. *Bayou Pipeline Corp. v. Railroad Com'n.*, 568 S.W.2d 122 (Tex. 1978). A construction interpreting 'or' as 'and' "is never resorted to except for strong reasons and the words should never be so construed unless the context favors the conversion; as where it must be done in order to effectuate the manifest intention of the user; and where not to do so would render the meaning ambiguous, or result in an absurdity; or would be tantamount to a refusal to correct a mistake." *Id.* (citing *Board of Ins. Commissioners v. Guardian Life Ins. Co.*, 180 S.W.2d 906 (Tex. 1944)).

Texas Courts must read statutes as a whole and interpret them so that every part is given effect. *Nabors Corp. Servs, Inc. v.*

Senator Ratliff draws on the same distinction between "paid" and "incurred"

untouched and still refers to the amount charged, rather than the amount paid.

Northfield Ins. Co., 132 S.W.3d 90, 96 (Tex. App.—Houston [14th Dist.] 2004, no pet.). A statute should also be construed so as to harmonize its provisions. *Helena Chemical Co. v. Wilkins*, 47 S.W.3d 486, 498 (Tex. 2001). Section § 41.0105 was deliberately written in the disjunctive, and the disjunctive interpretation of "or" in the statute does not result in an absurdity or mistake. The authors of the statute could have used "incurred" rather than "paid or incurred," but they chose not to do so. Therefore, recovery or medical or health care expenses incurred by a claimant is limited to the amount actually paid or, instead, the amount actually incurred by or on behalf of the claimant.

It seems even the legislators discussing this bill understood there was a difference between charges "paid" and charges "incurred." Senator Bill Ratliff, the Senate sponsor of House Bill 4, explained the legislative intent behind §41.0105 when he stated during floor debate:

[This provision] means that economic damages are limited to those actually incurred. You can't recover more than you've actually paid or been charged for your health care expenses in the past or what the evidence shows you will probably be charged in the future.

SENATE JOURNAL, 78th Legislature, Regular Session, (June 1, 2003) pp. 5003-5008 (emphasis added). discussed in *Texarkana Memorial Hosp. v. Murdock*, 903 S.W.2d 868 (Tex.

App.—Texarkana 1995, writ granted) *rev'd on other grounds*, 946 S.W.2d 836 (Tex. 1997). In that case, the defendant argued that because the plaintiff was not personally liable for medical expenses in excess of the Medicaid assignment (which amounted to \$352,784), the plaintiff should not have been entitled to the full \$500,000 awarded by the jury. However, the appellate court disagreed because the plaintiff would have been liable for all the necessary medical expenses if Medicaid had not paid the bills. In other words, the Plaintiff still "incurred" all the medical expenses (he was charged for them) regardless of the fact that Medicaid had only "paid" a portion of those bills.

b. The Meaning of "Incurred"

Often the arguments about § 41.0105 include heated discussions over the meaning of "incurred" in the statute. As one of the judges stated candidly in a conversation with the author, "incurred means incurred." But what exactly does that mean?

Black's Law Dictionary defines "incur" as "to suffer or bring on oneself (a liability or expense)." Black's Law Dictionary (8th ed. 2004). In *Black v. Am. Bankers Ins. Co.*, 478 S.W.2d 434, 437 (Tex. 1972), the Supreme Court of Texas noted that the word "incur" means simply to become liable. The insured in that suit selected a treatment facility and thus "occasioned, caused, or brought on" the obligation to pay for the services rendered" at that facility. The Court held, as a matter of law, that when an insured enters a hospital and receives services, there is an implied contract to pay for those services, and the insured is liable until he or a third party pays the bill. *Id.* The fact that the insured's action creates a derivative obligation on the part of a third party to pay the hospital or reimburse the insured does not affect the insured's

obligation under the implied contract. *Id.* If the third-party failed to pay, the hospital would have a claim against the insured. *Id.* at 438 (citing *Republic Bankers Life Ins. Co. v. Anglin*, 433 S.W.2d 795 (Tex. Civ. App.—Texarkana 1968, no writ) and *Am. Indemnity Co. v. Olesijuk*, 353 S.W.2d 71 (Tex. Civ. App.—Texarkana 1961, writ dismissed)). Therefore, the insured in *Black* 'actually incurred' the hospital expenses in question even though they were paid on his behalf by Medicare.

And as discussed above, *Texarkana Memorial Hosp. v. Murdock*, 903 S.W.2d 868 (Tex. App.—Texarkana 1995, writ granted) *rev'd on other grounds*, 946 S.W.2d 836 (Tex. 1997), found a plaintiff still incurs all medical expenses regardless of whether any of those incurred expenses are "written off" by Medicaid or another collateral source. Reasonable and necessary medical expenses may be "incurred" even if they are never "paid." "Incurred" and "paid" mean different things. Just because incurred expenses are written off via a regulatory arrangement with a healthcare provider does not mean the expenses are not "incurred." This means the recovery of charges incurred by or on behalf of the claimant equals the full amount of a hospital charge, even when it is paid by Medicare or another source.

Other Texas case law has defined "incur" to mean "to become liable to pay."

In *United Services Automobile Ass'n v. Gordon*, 103 S.W.3d 436, 443 (Tex. App.—San Antonio 2002, no pet.), a homeowner couple brought action against an insurer alleging that foundation movement in their home was caused by plumbing leaks. The jury found the insurer failed to comply with the terms of the homeowners' insurance policy and

awarded \$100,000 in damages plus attorneys' fees. Included in those damages was an award for the homeowners' additional living expenses. The insurer argued the homeowners were not entitled to recover those expenses unless and until they were "incurred." *Id.* at 442. The Court, taking the plain, ordinary, and generally accepted meaning of the word "incurred"

In *Keever v. Finlan*, 988 S.W.2d 300, 308 (Tex. App.—Dallas 1999, pet. dismissed), a dispositive issue was whether or not Keever "incurred" the attorneys fees which were to be awarded to him as a prevailing party under TEX. GOVT. CODE §552.323(a). The Court found because Keever had not become liable to pay for the attorneys' fees in the case (there was no evidence of any oral or written agreement with Keever to pay attorney's fees and Keever's attorney had been hired and paid by the Dallas Independent School District) then he had not incurred those fees at all. *Id.*

General consensus in Texas case law points to one definition of "incurred" expenses - expenses that a person or entity has become liable to pay. Generally these are expenses that are "occasioned, caused, or brought on" by a person, making that person liable for those expenses. *Black v. Am. Bankers Ins. Co.*, 478 S.W.2d 434, 437 (Tex. 1972). And of course, under *Black* and *Murdock* an injured person becomes liable for his or her medical expenses regardless of whether those expenses are written off or reimbursed by a third party. The injured person remains liable for all "incurred" expenses.

3. *So What are the Courts Doing?*

There are only a few appellate cases on the paid or incurred issue: (1) *Mills v. Fletcher*, 229 S.W.3d 765 (Tex. App.—San Antonio 2007, no pet.); (2) *Gore v. Faye*,

within the insurance policy, found the term "incur" generally means to "become liable or subject to or become liable to pay." *Id.* at 443 (citing *Keever v. Finlan*, 988 S.W.2d 300, 308 (Tex. App.—Dallas 1999, pet. dismissed)). Since the homeowners were not yet liable for the additional living expenses, those expenses had not yet been "incurred."

253 S.W.3d 785 (Tex. App.—Amarillo 2008, no pet.); (3) *Garza De Escabedo v. Haygood*, 283 S.W.3d 3 (Tex. App.—2009, pet. granted) (April 8, 2010).

I encourage anyone confronting the paid or incurred issue to carefully read these opinions.

The plurality opinion in *Mills v. Fletcher* mistakenly restricted the collateral source rule to preventing a wrongdoer from benefitting from insurance independently procured by an injured party to which the wrongdoer was not privy. *Id.* at 769 n.3. The collateral source rule is not limited to situations involving private insurance procured by the victim. It applies in various contexts in addition to the private insurance context including free medical services given to a plaintiff. See *Brown v. Am. Transfer & Storage Co.*, 601 S.W.2d 931, 934 (Tex. 1980); *McLemore v. Broussard*, 670 S.W.2d 301, 303 (Tex. App.—Houston [1st Dist.] 1983, no writ); *Houston Belt & Terminal Ry. Co. v. Johansen*, 107 Tex. 336, 339-40, 179 S.W. 853, 853-54 (1915).

Justice Stone, the author of the dissent in *Mills*, offered an analysis more in line with the rules of statutory construction. He pointed out section 41.0105 is less than clear and noted that the Code Construction Act informs that when the legislature enacts a statute "it is presumed that the entire statute is meant to be effective; a just and reasonable result is

intended; feasible execution of the statute is contemplated; and **public interest is favored over an private interest.**" *Id.* at 771 (citing TEX. CIV. PRAC. & REM. CODE § 311.021) (emphasis added). Justice Stone rejected the plurality's opinion because it failed to give a meaning to the term "incurred" and failed to produce a just or reasonable result.

Following the plurality's opinion, a wrongdoer is rewarded by the injured party's

The plurality opinion seems to disregard standard rules of statutory construction- particularly those requiring the presumption that the legislature enacts legislation "with complete knowledge of the existing law and with reference to it," and that statutory analysis should include consideration of applicable common law. *Helena Chem. Co. & Hyperformer Seed Co. v. Wilkins*, 47 S.W.3d 486, 493 (Tex. 2001); *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 301 (Tex. 1990). The proper analysis of the meaning of section 41.0105 is more adequately set forth in Justice Stone's dissenting opinion. Furthermore, since the plurality opinion is not binding and is on par with the dissenting opinion in its persuasive authority, the court should embrace the more complete analysis contained in Justice Stone's opinion.

The narrow issue before the court in *Gore v. Faye*, was whether the trial court properly implemented section 41.0105 when it considered paid or incurred evidence post-verdict and pre-judgment. The Amarillo Court of Appeals noted: "The correctness of [Defendant's] position that the trial court was required to admit her section 41.0105 evidence before the jury is not apparent from the language of section 41.0105." 253 S.W.3d at 789. The court did not address whether or not the presentation of section 41.0105 evidence before a jury would violate the collateral

foresight to obtain medical insurance, and in many instances it will likely be the wrongdoer's liability insurance carrier that actually benefits from the injured party's foresight. *Id.* As Justice Stone pointed out, "insult is added to injury when the injured party pays premiums for medical insurance coverage and then watches the benefits of that coverage lower the accountability of the tortfeasor for her negligent conduct." *Id.*

source rule. Instead, it held the presentation of such evidence post-verdict and pre-judgment was not an abuse of discretion based on the lack of procedural guidance in section 41.0105.

In *Garza De Escabedo v. Haygood*, the defendant in a car wreck case moved for the trial court to exclude the plaintiff's medical billing records, contending the affidavits did not reflect the adjustments by insurance, and such were irrelevant and inadmissible because they did not address the correct measure of damages. The trial court denied the motion and allowed the plaintiff to put on the affidavits of evidence of her medical damages. It did not allow the defendant to put on evidence of the amounts paid. The jury awarded the plaintiff the entire amount of her medical bills.

On appeal, the Tyler Court of Appeals found the evidence was legally insufficient to support the entire award of past medical care expenses and suggested a voluntary remittitur equal to the amount written off by the plaintiff's health care providers.

Even with the recent appellate decisions, the question remains: So how have trial court judges really been handling this issue?

This writing includes several trial court rulings. In Dallas County, the 193rd District Court has officially ruled in favor

of Plaintiff Lynda Norwood against Defendant G.W. Imports, Inc. d/b/a/ Goodson Acura and denied the Defendant's Motion to Compel the Plaintiff to limit her damages to only those incurred before trial (excluding future medical expenses) which had been paid before trial. The court denied the discovery of collateral source payments because: (1) the statute states it relates to

The 193rd District Court of Dallas County also ruled in favor of Plaintiff Joe Dominguez and his minor children against Defendant Hilary A. Funk and granted Plaintiff's Motion to exclude Evidence on Amounts Paid for Medical and Health Care Expenses. The court also granted the plaintiffs' no-evidence and traditional motions for summary judgment as to medical procedures and charges. The court held that there was no genuine issue of material fact as to: "(1) the necessity of the medical procedures provided, (2) the amount of charges **incurred** by the Plaintiff for such procedures and (3) **the amount of charges indicated incident to each procedure represents the reasonable charge for such medical services and that such issues are established as a matter of law.**" Exhibit C, Order Granting Plaintiff's No Evidence and Traditional No Genuine Issue of Material Fact Motion for Partial Summary Judgment as to Medical Procedures and Charges.

In Harris County, the 270th District Court denied Defendant Hubert Knight's and Allright Parking System, Inc. a/k/a Central Parking System of Texas, Inc.'s Motion to Limit Plaintiff's Medical Expenses to the Amount Actually Incurred, allowing Plaintiff Kasey Schott to submit all her medical expenses to the jury. Exhibit D, Order on Defendants' Motion to Limit Plaintiff's Medical Expenses to the Amount Actually Incurred.

The County Court at Law Number 2 in

'recovery of medical of health care expenses incurred, and since "incurred" is used in the past tense, it can pertain only to past medical expenses; and (2) the disjunctive "or incurred," allows for recovery of medical expenses that are incurred but not paid. Exhibit B, Partial Order on Defendant's Motion to Compel.

Smith County granted Plaintiff Frank McGowen's motion to exclude collateral source evidence. Thus, Defendant William James Staton was prohibited "from mentioning, directly or indirectly, the existence of collateral sources." Exhibit E, Order on Plaintiff's Motion to Exclude Collateral Source Evidence.

Judge Love of the United States District Court for the Eastern District of Texas issued an order on motions in limine regarding the collateral source rule in *Self v. Wal-Mart Stores, Inc.*, No. 2:05-cv-00301-JDL, defining the term "incurred" as the full amount of a plaintiff's medical bills, even when the amount is ultimately paid by insurance or written off." Exhibit F, Order in *Self v. Wal-mart Stores, Inc.*

Likewise, in *Coppedge v. K.B.I., Inc.*, No. 9:05-cv-00162-TH-KFG, Judge Giblin of the United States District Court for the Eastern District, concluded:

Any evidence, statement, or argument that any of Levi Coppedge's medical expenses have been reduced, discounted, adjusted or written off by virtue of the medical care provider accepting payment from a collateral source. Further, Plaintiff is entitled to present the full amount of medical expenses that were charged by his medical care providers, and therefore 'incurred' by Plaintiff.

Any effort to present evidence of discounts, adjustments, reductions, or write-offs, would inject collateral source payments into the trial and the relevance of such information would be outweighed by the unfair prejudice it would cause Plaintiff.

Exhibit G, Memorandum Opinion in Support of this Court's Evidentiary Rulings Regarding Plaintiffs' Medical or Health Care Expenses (internal citations omitted).

House Bill No. 3281 would reverse Texas' sweeping lawsuit reforms passed in 2003 that reasonably limited the amount of medical bills a plaintiff could recover to the amount actually paid or incurred by the individual or their insurer.

The bill would permit an individual in a personal injury lawsuit (other than a medical malpractice claim) to recover more money for medical expenses than actually was or will be paid. This would be done by allowing a person to submit bills that are higher than those actually paid to health care providers. For example, if this bill became law, an individual who was billed \$20,000 by a hospital, but whose insurance company negotiated the bill down to an actual amount paid of \$12,000, could still submit the original \$20,000 bill to the jury as if their insurance company actually paid that amount. This would deceive the jury as to the true amount of actual medical damages.

4. So What are the Legislative and Executive Branches Doing?

On June 15, 2007, Governor Rick Perry vetoed HB 3281, a bi-partisan supported bill which would have repealed section 41.0105 except for medical malpractice cases. The statement Governor Perry use to justify his veto is as follows:

Our civil justice system holds a defendant accountable for economic damages caused, including medical bills. A person should not be allowed to recover, and a defendant should not be required to pay, an inflated amount of actual medical costs. If a defendant has caused damage in addition to medical expenses, those damages should be addressed and recovered under the rules of our civil justice system, rather than inflating medical bills to cover them.

Proponents of this bill argue it would reverse the "collateral source" rule, which prevents defendants from introducing evidence that an insurance company, rather than the individual, paid all or a portion of the medical bills. This is not true. Nothing in Section 41.0105 allows a defendant to introduce this evidence or hinders an individual's ability to recover the amount of the medical bills paid by their insurance company.

The purpose of damages in a civil lawsuit is to make an injured individual whole by reimbursing the actual amount they have been deprived by the defendant's actions. It should not be used to artificially inflate the recovery amount by claiming economic damages that were never paid and never required to be paid.

Veto Message of Gov. Perry - June 15, 2007.

During the 2009 legislative session,

The Texas Legislature contemplated expressly repealing the collateral source rule several times in several different versions of House Bills 3 and 4, but rejected that approach in the final enrolled bill. Therefore, § 41.0105 cannot and does not have such an effect. The collateral source rule is not dead. The full amount of reasonable and necessary medical bills should still be submitted under TEX. CIV. PRAC. & REM. CODE § 18.001.

So then how should the new § 41.0105 be handled so as to give it proper effect? First, since "incurred" means "incurred," and not "paid," and those two words are used in the disjunctive, then all reasonable and necessary medical expenses charged to the Plaintiff should be submitted to the jury. This also avoids any violation of the collateral source rule, which was not repealed under House Bill 4 despite defendants' arguments to the contrary.

Since § 41.0105 seems to be a remedial statute rather than an evidentiary one, the burden is on the defendant to achieve any post-verdict reduction in the medical expenses. *See* TEX. CIV. PRAC. & REM. CODE § 41.012 (omitting § 41.0105 from the Chapter 41 sections on which the jury should be instructed); *see also*, TEX. CIV.

House Representative Smithee and state Senator Hinojosa offered identical bills amending § 41.0105 to apply to only medical malpractice cases. The language of the bills was identical to the language passed by both houses and vetoed by Governor Rick Perry in 2007. The Senate Bill made it out of committee but never came to the floor for a vote. The House version received a hearing in committee, but was never voted out of committee.

5. Recommendations for Handling the Issue

PRAC. & REM. CODE § 18.001 (precluding the tortfeasor from presenting evidence of funds received by the plaintiff from a collateral source). The collateral source rule should still govern during the trial and prevent any mention of collateral source benefits in front of the jury. *See* TEX. CIV. PRAC. & REM. CODE § 18.001. Then once the verdict has been returned, a defendant has the burden of proving under § 41.0105 that any charges awarded by the jury were not "paid or incurred." *See id.* This means he must present evidence that the amount paid is all that will ever be charged to the plaintiff, and that any charges above those paid can no longer be considered "incurred." Any defendant attempting to do this must also consider any subrogation or liens put upon the plaintiff. This way a trial court can make a finding on "paid" expenses post-verdict and when the case is appealed, the appellate court can affirm or reverse and render without having to remand solely on the "paid or incurred" issue.

It helps to know that most judges at the trial court level have made no ultimate decision on how to handle § 41.0105 - there is no definitive bright line here. Oftentimes it is much smarter to

try and work out an amicable solution to the problem than take the issue up on appeal after a formal ruling. Judges are also handling the issue differently according to the particular circumstances of the case - and depending on whether or not anyone objects in the first place. Some defendants argue against the collateral source rule outright, others argue only the "paid vs. incurred" issue, and some take up both.

C. Loss of Earning and Earning Capacity

Loss of earnings capacity damages compensate the plaintiff for the diminished capacity to earn a livelihood after trial. *Koko Motel, Inc. v. Mayo*, 91 S.W.3d 41, 51 (Tex. App.—Amarillo 2002, pet. denied);

Because loss of earning capacity damages focus on the capacity to earn, such damages are not limited by the plaintiff's salary prior to injury. *Detar Hosp., Inc. v. Estrada*, 694 S.W.2d 359, 363 (Tex. App.—Corpus Christi 1985, no writ). Thus, a plaintiff may recover loss of earning capacity damages despite being unemployed at the time of injury, *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 35 (Tex. App.—Tyler 2003, no pet.); *Wal-Mart Stores, Inc. v. Cordova*, 856 S.W.2d 768 (Tex. Civ. App.—El Paso 1993, no writ); continuing to work while impaired, see *Springer v. Baggs*, 500 S.W.2d 541 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.); receiving wages although not working, see *Ryan v. Hardin*, 495 S.W.2d 345 (Tex. Civ. App.—Austin 1973, no writ); or earning more income after an injury than he/she did before. See *City of Houston v. Riggins*, 568 S.W.2d 188 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

Loss of earning capacity damages are also not limited by the plaintiff's profession as of the time of injury. For instance, in

Border Apparel-East, Inc. v. Guardian, 868 S.W.2d 894 (Tex. App.—El Paso 1993, no writ) (citing *Bonney v. San Antonio Transit Co.*, 325 S.W.2d 117, 121 (Tex. 1959)). Such damages may be awarded for the difference between what the plaintiff was capable of earning prior to the injury and the amount the plaintiff is capable of earning after the injury. *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880 (Tex. App.—Texarkana 2004, pet. denied); *Crown Plumbing Inc. v. Petrozak*, 751 S.W.2d 936, 938 (Tex. App.—Houston [14th Dist.] 1988, writ denied). Loss of earning capacity is the proper measure of damages, not loss of earnings. *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 35 (Tex. App.—Tyler 2003, no pet.). *Wichita Valley Ry. Co. v. Williams*, 6 S.W.2d 439, 442 (Tex. Civ. App.—Eastland 1925, writ ref'd), a medical student who was teaching in order to obtain enough money to prepare for the practice of medicine was allowed to offer evidence that the loss of an arm prevented him from realizing his ambition of becoming a surgeon.

Although the proper measure of damages in a personal injury case is loss of earning capacity, Texas courts have permitted the submission of loss of earnings. See State Bar of Texas, *Texas Pattern Jury Charges* PJC 8.2 (2002). However, when loss of earnings are submitted, Texas courts hold plaintiffs to a higher burden of proof. See *City of Rosenberg v. Renken*, 616 S.W.2d 292 S.W.2d 292, 293-294 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ); *Ryan v. Hardin*, 495 S.W.2d 345, 358-360 (Tex. Civ. App.—Austin 1973, no writ); *Ortiz v. Furr's Supermarkets*, 26 S.W.3d 646, 654 (Tex. App.—El Paso 2000, no pet.). Unlike loss of earning

capacity, to recover loss of earning damages, the plaintiff must prove such damages with reasonable certainty. Moreover, evidence must be offered to establish the actual amount of earnings lost in the past. *Id.*

I. Proving Loss of Earning Capacity

Loss of earning capacity damages are always uncertain, and therefore, left largely to the sound discretion of the jury. *Clayton v. Wisener*, 169 S.W.3d 682 (Tex. App.—Tyler 2005, no writ) (citing *McIver v. Gloria*, 169 S.W.2d 710, 712 (Tex. 1943)); *Border Apparel-East, Inc. v. Guardian*, 868 S.W.2d 894 (Tex. App.—El Paso 1993, no writ). The jury's assessment of such

Evidence of lost earnings, although the most obvious and direct proof of loss of earning capacity, is not required. *Springer v. Baggs*, 500 S.W.2d 541, 544 (Tex. Civ. App.—Texarkana 1973, writ ref'd n.r.e.); *Ryan v. Hardin*, 495 S.W.2d 345 (Tex. Civ. App.—Austin 1973, no writ). However, some evidence from which a jury may reasonably measure, in monetary terms, the plaintiff's earning capacity prior to the injury must be introduced absent some reason for the failure to do so. *Tagle v. Galvan*, 155 S.W.3d 510, 519 (Tex. App.—San Antonio 2004, no writ); *Bonney v. San Antonio Transit Co.*, 25 S.W.2d 117, 121 (Tex. 1959); *McIver v. Gloria*, 169 S.W.2d 710, 712 (Tex. 1943). Thus, earnings prior to an injury must ordinarily be shown. *Id.*

Evidence of prior earnings need not, however, be limited to those earnings derived from the plaintiff's employment immediately prior to the injury. *Springer v. Baggs*, 500 S.W.2d 541, 544-545 (Tex. Civ. App.—Texarkana, 1975 writ ref'd n.r.e.). Any past employment which may fairly and legitimately throw light upon what the plaintiff's probable future earnings may have been should be admitted for that purpose.

damages must, however, be based upon more than mere conjecture. *Id.* There must be some evidence the plaintiff had the capacity to work prior to the injury and her capacity was impaired because of the injury. *Tagle v. Galvan*, 155 S.W.3d 510, 519 (Tex. App.—San Antonio 2004, no writ).

There is no general rule governing the proof required, except that each case is judged on its particular facts and that such damages must be proven "to the degree of certainty to which it is susceptible." *McIver*, 169 S.W.2d at 712; *see also Strauss v. Continental Airlines, Inc.*, 67 S.W.3d 428 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

Id. Plaintiff can also introduce evidence of the plaintiff's stamina, efficiency, and ability to work with pain; the weaknesses and degenerative changes that will naturally result from the plaintiff's injury; and the plaintiff's work-life expectancy. *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21, 36 (Tex. App.—Tyler 2003, no pet.); *Brookshire Grocery Co. v. Goss*, 208 S.W.3d 706, 720 (Tex. App.—Texarkana 2006), *rev'd on other grounds*, 208 S.W.3d 706 (Tex. 2008). Evidence of a plaintiff's health prior to his/her injury may also be utilized to access loss of earning capacity damages. *See McIver*, 169 S.W.2d at 711.

Thus, as recognized in *Border Apparel-East, Inc. v. Guardian*, 868 S.W.2d 894, 897 (Tex. App.—El Paso 1993, no writ), "damages for loss of earning capacity need not be based on any specific degree of physical impairment, but can, and should be based on a composite of the above factors, all of which affect one's capacity to earn a livelihood."

The recent case of *Towers of Town Lake Condominium Ass'n, Inc. v. Rouhani*,

296 S.W.3d 290 (Tex. App.—Austin 2009, pet. denied), provides another example of proving earning capacity. In that case, the defendant appealed a \$900,000 jury award in favor of a dentist who suffered injuries in a slip and fall case that ultimately prevented her from practicing. To support her claim for lost earning capacity, the dentist offered the expert testimony of Dr. Glass, an economist and certified public accountant with experience valuing dental practices like the one the plaintiff was ultimately forced to sell. Dr. Glass relied on earnings history, business records, profit and loss statements, and tax returns. He testified the dentist would have experienced a net income growth of 20% per year until 2010, and supported his opinion with the dentist's past income growth. The court of appeals affirmed the jury's award, finding Dr. Glass's assumptions were not unreasonable and provided legally sufficient evidence to

Loss of earning capacity damages may be awarded even when a self-employed plaintiff is unable to show profits from his/her business based upon evidence that reasonably indicates that the plaintiff is likely either to succeed in the business or to obtain other work of an estimable value. For instance, in *Pressey v. Patterson*, 898 F.2d 1018, (5th Cir. 1990) (applying Texas law), the plaintiff was entitled to recover loss of earning capacity damages despite lack of profits from a new business because the evidence showed that the economic outlook for the plaintiff's business was good and the plaintiff had been working hard to achieve success.

Other methods of proving loss of earning capacity damages where the plaintiff is self-employed include the following:

(a) Plaintiff's probable earnings had he performed the same tasks for another employer rather than in his

support the jury's award.

2. *Loss of Earning Capacity Where Plaintiff is Self-Employed*

Lost profits resulting from the inability to carry on business in the usual manner may serve as evidence of loss of earning capacity where the plaintiff is self-employed. *Strauss v. Continental Airlines, Inc.*, 67 S.W.3d 428, 437 (Tex. App.—Houston [14 Dist.] 2002, no pet.); *Dallas Ry. & Terminal Co. v. Darden*, 38 S.W.2d 777 (Tex. Com'n. App. 1931, opinion adopted). However, when profits do not result solely from the plaintiff's personal earning capacity, but also from the labor of their employees and the return on capital invested in machinery, profits from self-employment are not a true measure of one's earning capacity. *King v. Skelly*, 452 S.W.2d 691 (Tex. 1970).

own employ. *Pilgrim's Pride Corp. v. Smoak*, 134 S.W.3d 880 (Tex. App.—Texarkana 2004, pet. denied); see also *McCandless v. Beech Aircraft Corp.*, 779 F.2d 220 (5th Cir. 1985), *vacated on other grounds*, 798 F.2d 163 (5th Cir.1986);

(b) The effect of injury on the financial returns of the business, that is, a comparison of the before and after financial returns or income of the business. *Red Arrow Freight Lines v. Gravis*, 84 S.W.2d 540 (Tex. Civ. App.—San Antonio 1935, no writ);

(c) The cost of hiring someone to take plaintiff's place at a stated wage or what it would cost to hire such a person. *Id.*

(d) Testimonial evidence by

Plaintiff as to weekly earning capacity prior to and during the seventeen (17) month period after the injury. *Smith v. Scott*, No. 07-04-0362-CV, 2005 WL 3440772 (Tex. App.—Amarillo Dec. 15, 2005, pet. denied) (not designated for publication).

It is not error to permit plaintiff who knows his own business, its earnings and expenses, to testify to same, notwithstanding that the books of the business would be the best evidence. *Cummings v. Van Valin*, 363 S.W.2d 385 (Tex. Civ. App.—Waco 1962, writ ref'd n.r.e.). While evidence of the business profits before and after the injury are admissible, *Greyhound Lines, Inc. v. Craig*, 430 S.W.2d 573 (Tex. Civ. App.—Houston [1st Dist.] 1968, writ ref'd n.r.e.), mere proof that profits decreased after the owner's injury will not support a recovery; nor will mere proof that profits rose or stayed the same after the injury bar

(a) Jobs that the plaintiff held and amount of money earned. *Jones v. Martin*, 481 S.W.2d 467 (Tex. Civ. App.—Texarkana 1972, no writ);

(b) Tax records, to the extent they show earnings from work. *Wilkins v. Royal Indemnity Co.*, 592 S.W.2d 64 (Tex. Civ. App.—Tyler 1979, no writ);

(c) Plaintiff's physical and mental ability and his education and training for work. *Martin v. Jenkins*, 381 S.W.2d 115 (Tex. Civ. App.—Amarillo 1964, writ ref'd n.r.e.);

(d) Testimony from both a vocational specialist and an economist as to the plaintiff's lost earning capacity if she never worked again and lost earning capacity if she went back to work part time until age sixty-six.

recovery. *Greyhound Lines, Inc. v. Duhon*, 434 S.W.2d 406 (Tex. Civ. App.—Houston [1st Dist.] 1968, no writ).

As regards "retired" persons, in *Wharf Cat, Inc. v. Cole*, 567 S.W.2d 228 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.) the Corpus Christi Court of Appeals held that a sixty-five year old retiree could not recover for future lost earnings when he was not looking for work when injured but testified he "might" want to work in the future and he would work if he found the right job.

3. *Evidentiary Questions*

Generally, any evidence tending to show the plaintiff's ability to work and earn money before or after his injuries is admissible. The following are illustrations of evidence held admissible to prove loss of earning capacity:

Brookshire Grocery Co. v. Goss, 208 S.W.3d 706, 720 (Tex. App.—Texarkana 2006), *rev'd on other grounds*, 208 S.W.3d 706 (Tex. 2008);

(e) Before his injury, plaintiff finished building an addition to his home for the purposes of starting his own business. *Pilgrim's Pride Corp. v. Cernat*, 205 S.W.3d 110, 120 (Tex. App.—Texarkana 2006, pet. filed);

(f) Fringe benefits in addition to the base salary. *Tom's Toasted Peanuts, Inc. v. Doucette*, 469 S.W.2d 399 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.); and

(g) Prospects for advancement or promotion with increased pay, if

there is "reasonable prospect thereof." *Smith v. Triplett*, 83 S.W.2d 1104 (Tex. Civ. App.—Galveston 1935, no writ).

The collateral source rule renders inadmissible, of course, any gratuitous payments to plaintiff or payments from third party sources such as Social Security payments, workers' compensation payments and welfare benefits. *R.E. Dumas Milner Chevrolet Co. v. Morphis*, 337 S.W.2d 185 (Tex. Civ. App.—Fort Worth 1960, writ ref'd n.r.e.).

3. Loss of Earnings and Earning Capacity After HB4

As opposed to loss of consortium, which is a separate and distinct cause of action that compensates for the loss of emotional and intangible elements of a marriage, loss of household services compensates a husband or wife for the loss of services provided by the injured spouse. *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978). The services that are lost generally include household and domestic services, such as caring for children, tending to family financial matters and performing house or yard work. *See Dougherty v. Gifford*, 826 S.W.2d 668 (Tex. App.—Texarkana 1992, no writ). However, the value of a husband or wife is not measured necessarily by a pecuniary wage but is intangible and within the sound discretion of a jury in light of their experience in everyday affairs. *C.E. Duke's Wrecker Service v. Oakley*, 526 S.W.2d 228 (Tex. Civ. App.—Houston [1st Dist.] 1975), *opinion on remand*, *Oakley v. C.E. Duke's Wrecker Service*, 557 S.W.2d 810 (Tex. Civ. App.—Houston [1st Dist.] 1977, writ ref'd n.r.e.).

If the negligence of the injured spouse is in question, the jury will be instructed not to consider such negligence, if any, to reduce the damages of the other spouse. *See State*

Under the version of TEX. CIV. PRAC. & REM. CODE § 18.091, passed in 2003 as part of the tort reform package, proof of lost earnings and income, including past earnings and future earning capacity, must be presented in the form of net earnings, after reduction for income tax payments or unpaid tax liability pursuant to any federal income tax law. The jury must be instructed as to whether any recovery for compensatory damages sought is subject to federal or state income tax.

D. Loss of Household Services

Bar of Texas, 3 *Texas Pattern Jury Charges* § 8.3 (2002). However, because a claim for loss of consortium or services is derivative of the injured spouse's claim, the recovery will be reduced by the percentage of the injured spouse's contributory negligence. *City of Denton v. Page*, 683 S.W.2d 180, 206 (Tex. App.—Fort Worth 1985), *rev'd on other grounds*, 701 S.W.2d 831 (Tex. 1986); *Dawson v. Garcia*, 666 S.W.2d 254, 259 (Tex. App.—Dallas 1984, no writ).

In some instances, the right to recover for loss of household services may belong to both spouses. In *Rainbo Baking Co. v. Stafford*, 764 S.W.2d 379 (Tex. App.—Beaumont 1989), *writ denied per curiam*, 787 S.W.2d 41 (Tex. 1990), the plaintiffs presented evidence that prior to her injury, the wife performed most of the household work so that the couple could enjoy their free time hunting and fishing. She was unable to perform her household work, or to hunt or fish, following her injury. *Id.* at 381. The jury awarded damages to the wife for physical impairment, and the loss of household services. *Id.* The husband had not brought suit. The defendant appealed,

and argued that the loss of services belonged only to the spouse of the injured person, and since he had not sued, neither one could recover. *Id.* at 384. The court did not agree, and held that under the circumstances of the case, it could not hold that the husband owned the element of damages of loss of household services to the exclusion of the wife. *Id.*

1. Proving Loss of Household Services

The plaintiff is not required to put a monetary value on the loss of household services. *Arando v. Higgins*, 220 S.W.2d 291 (Tex. Civ. App.—El Paso 1949, writ ref'd n.r.e.). Evidence of a homemaker's education, training, experience, state of health and life expectancy may be presented to aid the jury in ascertaining the value of such services. *Texas Telegraph & Telephone Co. v. Scott*, 60 Tex. Civ. App. 39, 127 S.W. 587 (1910, writ ref'd). Moreover, the plaintiff must present some evidence of what services, if any, the injured spouse can no longer perform. See *Gerland's Food Fair, Inc. v. Hare*, 611 S.W.2d 113 (Tex. Civ. App.—Houston [1st Dist.] 1980, writ ref'd n.r.e.); *Six Flags Over*

Damages for mental anguish, physical pain, loss of enjoyment of life and loss of relationship with the injured victim are not as easy to quantify as purely economic damages and are thus more difficult to discover and prove. This section focuses on the more "intangible" kinds of damage resulting from harm to or invasion of an individual's body.

A. The 2003 Legislation and Its Effects on Non-Economic Damages

1. The 2003 Definition of Non-Economic Damages

As mentioned previously, under the

Texas, Inc. v. Parker, 759 S.W.2d 758, 761-762 (Tex. App.—Fort Worth 1988, no writ).

Evidence of the cost to replace one's household services is admissible but does not limit recovery. *Craver-Hicks Building Maintenance, Inc. v. Vanlandingham*, 444 S.W.2d 663 (Tex. Civ. App.—El Paso 1969, no writ); *Armellini Express Lines of Florida, Inc. v. Ansley*, 605 S.W.2d 297 (Tex. Civ. App.—Corpus Christi 1980, writ ref'd n.r.e.).

In the case of an injured woman, the value of services is not to be computed as though a woman were a servant or employee but is to be computed from the value as a wife and mother. *Fort Worth v. Weisler*, 212 S.W. 280 (Tex. Civ. App.—Fort Worth 1919, no writ). For an injured man, the value as a husband or father would serve as a basis for computation.

VI. NON-ECONOMIC DAMAGES RESULTING FROM PHYSICAL INJURY

recently enacted Texas Civil Practice and Remedies Code § 41.001(12), "non-economic" damages include "damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other non-pecuniary losses of any kind other than exemplary damages."

2. Caps on Damages for Medical Malpractice Claims

As part of the 2003 tort reform laws that are now in place, there are now caps on the non-economic damages that claimants may recover for health care liability claims against physicians, health care providers, and health care institutions. TEX. CIV. PRAC. & REM. CODE §§ 74.301-303. House Bill 4, Article 10 repealed the Medical Liability and Insurance Improvement Act of Texas, Article 4590i, Texas Revised Civil Statutes, but recodified many of its provisions, with changes, in Section 74 of the Civil Practice & Remedies Code. In addition to changing the liability limits, a number of definitions have changed or been expanded, including "health care liability claim," "health care provider," and "physician."

As a general rule, civil liability of physicians and other health care providers, other than a health care institution, may not exceed a total of \$250,000 for non-economic

The 2003 legislation rewrites longstanding Texas law requiring a lump sum payment of damages, including damages for future losses (discussed supra, "Future Medical Expenses in Healthcare Liability Claims"). Presently, if a defendant physician or health care provider or claimant requests, the court must order that future medical, health care, or custodial services awarded be paid in whole or in part in periodic payments. TEX. CIV. PRAC. & REM. CODE § 74.503(a). Additionally, if the physician, health care provider, or claimant requests, the court may order that other (presumably non-economic) future damages be paid in periodic payments as well. TEX. CIV. PRAC. & REM. CODE § 74.503(b). The court will specify the dollar amount of periodic payments for future damages. TEX. CIV. PRAC. & REM. CODE § 74.503(c). Note that this periodic payment option is available only in actions in which the present value of the award of future

damages. This limit applies for each claimant, regardless of the number of physicians or health care providers the claimant has sued or the number of separate causes of action on which the claim is based. TEX. CIV. PRAC. & REM. CODE § 74.301(a).

Similarly, each claimant is limited to a maximum of \$250,000 of non-economic civil damages against a single health care institution. TEX. CIV. PRAC. & REM. CODE § 74.301(b). Where a final judgment is rendered against multiple health care institutions, the damages for each health care institution shall not exceed \$250,000 per claimant, and the total non-economic liability for all health care institutions is limited to \$500,000 per claimant. TEX. CIV. PRAC. & REM. CODE § 74.301(c).

3. *Periodic Payments*

damages, as determined by the court, equals or exceeds \$100,000. TEX. CIV. PRAC. & REM. CODE §74.502. (Presumably, the court would calculate this award by deducting any applicable credits from the fact-finder's damages award, and reducing this amount back to its present value.)

The option of electing periodic payments of future damages may be unavailable if the defendant(s) are "inadequately insured." In such cases, the court may require the defendant to provide evidence of financial responsibility to assure full payment of the awarded damages before allowing periodic payments. TEX. CIV. PRAC. & REM. CODE § 74.505(a).

4. *Notes on These Changes*

The economic portions of compensatory damages (medical expenses,

loss of earnings, and loss of household services) remain unaffected by the limits imposed by House Bill 4. Further, a single claimant subject to the limitation may include multiple persons, including estates. TEX. CIV. PRAC. & REM. CODE § 74.001(a)(2). It is also notable that unlike the old Article 4590i, Chapter 74 does not contain any requirement subjecting the caps on damages to consumer price index adjustments.

B. Physical Pain and Suffering

Physical pain is a proper item of recovery and the law recognizes that it is susceptible only of approximate money evaluation. *Hernandez v. Baucum*, 344 S.W.2d 498 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.). As such, the amount of damages necessary to compensate for "pain" cannot be determined by a set formula. *Green v. Meadows*, 527 S.W.2d 496 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) Instead, damages for physical pain are left to the sound discretion of the jury based upon their common knowledge and sense of justice. *Hernandez*, 344 S.W.2d at 498. The amount of such damages, however, must be compensatory in nature, based upon the facts of the particular case and free from sentimental and fanciful standards. *Apache Ready Mix Co., Inc. v. Creed*, 653 S.W.2d 79 (Tex. App.—San Antonio 1983, writ ref'd n.r.e.). There must be some evidence to justify the amount awarded. *Saenz v. Fid. & Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996).

Physical pain damages may only be recovered for pain that is consciously experienced. *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 248 (Tex. App.—Texarkana 2005, no pet.); *Lee Lewis Construction, Inc. v. Harrison*, 64 S.W.3d 1,

14 (Tex. App.—Amarillo 1999), *aff'd*, 70 S.W.3d 778 (Tex. 2001). Thus, when a plaintiff suffers physical pain subsequent to an injury, yet prior to death or loss of consciousness, evidence must be offered to establish the length of time in which the plaintiff was conscious. *Sharpe*, 256 S.W.2d at 892-93. If the evidence shows that the plaintiff's ability to experience pain has been totally destroyed, there can be no recovery for physical pain. *Western Union Tel. Co. v. Tweed*, 138 S.W. 1155 (Tex. Civ. App.—Dallas 1911), *aff'd*, 166 S.W. 696 (Tex. 1914).

Physical pain is sometimes referred to as "physical suffering," but the more accepted usage for jury submission purposes is "physical pain." Moreover, the terms "conscious pain" or "conscious physical pain" are more appropriately used in

wrongful death or coma cases and are not customarily used in a personal injury case.

In order to recover for future physical pain, evidence must be presented to establish that there is a reasonable probability that the plaintiff will continue to experience pain in the future. *Verhalen v. Nash*, 330 S.W.2d 676 (Tex. Civ. App.—Texarkana 1959, writ ref'd n.r.e.).

"A jury may award 'zero damages' when the injuries sustained are subjective in nature or there is both subjective and objective evidence of damages." When the evidence of the plaintiff's additional back pain as a result of the accident was almost entirely subjective based on his own personal reports of pain to his doctors, supervisor, and family members, the jury's award of damages for medical expenses and lost earning capacity, but not for physical pain and mental anguish, were not fatally inconsistent. *Biggs v. GSC Enterprises, Inc.*, 8 S.W.3d 765, 769 (Tex. App.—Fort Worth 1999, no pet.). Still, a jury may not disregard objective symptoms of an injury. *Gonzales v. Wal-Mart Stores, Inc.*, 143 S.W.3d 118 (Tex. App.—San Antonio 2004, no pet.).

1. Proving Pain and Suffering

The Plaintiff may offer evidence of physical pain by describing both objective symptoms, such as a bump on the head, and subjective symptoms, such as headaches. *Tamburello v. Welch*, 383 S.W.2d 936 (Tex. Civ. App.—Waco 1964), *rev'd on other grounds*, 392 S.W.2d 114 (Tex. 1965). He/she may also describe how his/her pain has improved or worsened and show the jury the injured part of his/her body. *Loughry v. Hodges*, 215 S.W.2d 669 (Tex. Civ. App.—Fort Worth 1948, writ ref'd n.r.e.). Inarticulate cries, screams, groans or facial contortions are also admissible. *United*

When a plaintiff receives a serious bodily injury, the jury may presume or infer the plaintiff suffered physical pain and suffering or that a certain degree of physical pain existed. *Lee Lewis Construction, Inc. v. Harrison*, 64 S.W.3d 1, 14 (Tex. App.—Amarillo 1999), *aff'd*, 70 S.W.3d 778 (Tex. 2001); *Luna v. Southern Pacific Transp. Co.*, 724 S.W.2d 383, 385 (Tex. 1987). Thus, no direct proof of the existence of pain is necessary if the evidence of the nature and extent of injuries permits an inference that pain would be suffered. *Coastal States Gas Producing Co. v. Locker*, 436 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). In other words, a plaintiff may establish conscious pain and suffering via circumstantial evidence. *Borth v. Charley's Concrete Co.*, 139 S.W.3d 391, 395 (Tex. App.—Fort Worth 2004, pet. denied). However, if there is any controversy about the existence of pain, then evidence must be adduced that the plaintiff did suffer physical pain in order to submit this element of damages to the jury. *Walker v. Kellar*, 218 S.W. 792 (Tex. Civ. App.—San Antonio 1920) *on rehearing*, 226 S.W. 796 (Tex. 1921); *Panhandle & Santa Fe v. Jones*, 105 S.W.2d 443 (Tex. Civ. App.—Amarillo 1937, no writ).

States Fidelity & Guaranty Co v. Nettles, 21 S.W.2d 31 (Tex. Civ. App.-Waco 1929), *rev'd on other grounds*, 35 S.W.2d 1045 (Tex. Comm'n App. 1931, holding approved). Even a quadriplegic was found to have experienced pain from pressure ulcers based upon evidence: (1) he had complained of pain in his hospital admission form; (2) his family members could not touch him around the sore areas without him screaming; and (3) quadriplegics can experience "deep primitive sensations through their autonomic nervous system." *BT. Healthcare, Inc. v. Honeycutt*, 196

S.W.3d 296 (Tex. App.—Amarillo 2006, no pet.). Also remember the duration of the pain is important. *SunBridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 250 (Tex. App.—Texarkana 2005, no pet.).

The plaintiff's medical records, particularly nurses' notes during hospitalization, are a good source of proof of physical pain, especially when supported by testimony of the nursing staff or pain medication prescriptions.

Photographs and other demonstrative aids showing the injuries are admissible and very effective for conveying the extent of one's pain to a jury. *Irving v. Shipp*, 342 S.W.2d 449 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.); TEX. R. EVID. 901(a).

Counsel may suggest to the jury what is fair compensation for pain in view of the evidence. Third parties, such as friends or relatives, may testify as to their observations of the plaintiff's suffering. *Classen v. Benfer*, 144 S.W.2d 633 (Tex. Civ. App.—San Antonio 1940, writ dismiss'd judgment cor.). Moreover, declarations or statements by the plaintiff to such individuals about his pain or anguish may be admissible under an exception to the hearsay rule. See TEX. R. EVID. 803(3); *Carrico v. Busby*, 325 S.W.2d 413 (Tex. Civ. App.—Houston 1959, writ ref'd n.r.e.).

The testimony of medical experts may be invaluable in proving the existence of pain. Such experts, with the use of medical demonstrations and explanations, can

In *Figueroa v. Davis*, 318 S.W.3d 53 (Tex. App.—Houston [1st Dist.] 2010, no pet. h.), a jury found the defendant in a car wreck negligent for running a stop sign and hitting the plaintiff's vehicle. The jury awarded the plaintiff \$10,000 and \$450, respectively for physical pain and mental anguish sustained in the past and future. The defendant challenged the factual sufficiency supporting the awards for all

educate the jury on the anatomical and psychological basis of pain. For instance, a doctor can testify that the injury in question is a "painful injury"; that the patient's history included complaints of pain, and that the doctor found objective signs of injury, e.g., muscular spasticity, which confirm the presence of pain. See *Missouri P.R.R. v. Cunningham*, 515 S.W.2d 678 (Tex. Civ. App.—San Antonio 1974, writ dismiss'd). Additionally, the patient's declarations to the treating physician concerning his/her pain are admissible. *Austin Road Co. v. Thompson*, 275 S.W.2d 521 (Tex. Civ. App.—Fort Worth 1955, writ ref'd n.r.e.); TEX. R. EVID. 803(4). However, expert testimony is not required to prove causation between an incident and a plaintiff's injuries if it establishes a sequence of events "providing a strong logically traceable connection between the event and the injury." *Morgan v. Compugraphic Corp.*, 675 S.W.2d 729, 733 (Tex. 1984).

In *Guevara v. Ferrer*, 247 S.W.3d 662 (Tex. 2007), the Texas Supreme Court distinguished its holding in *Morgan*. It explained: "Thus, non-expert evidence alone is sufficient to support a finding of causation in limited circumstances where both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence." *Guevara*, 247 S.W.3d at 668.

non-economic damages. The appellate court recounted the plaintiff's testimony regarding the pain he experienced during and since the wreck, that left him with cracked and missing teeth. It found the evidence of past physical pain and past mental anguish supported the award because the charge did not ask for separate damage figures for each type of injury alleged. It further found the evidence was not so weak

to render the \$10,000 award for past physical pain manifestly unjust, and that undergoing the procedure required to fix his teeth would cause some physical pain in the future. The jury also awarded \$10,000 and \$450, respectively for past and future disfigurement, and awarded \$10,000 and \$450, respectively for past and future physical impairment. Based on the plaintiff's testimony, the appellate court affirmed those awards as well.

The defendant in *Rentech Steel, L.L.C. v. Teel*, 299 S.W.3d 155 (Tex. App.—Eastland 2009, pet. dismissed), also challenged the jury's award for damages as a whole was excessive. In addition to the economic damages discussed previously, the jury awarded the young man \$1,500,000 for past disfigurement, \$50,000 for future disfigurement, \$2,500,000 for past pain and suffering, \$1,000,000 for future pain and suffering, \$1,750,000 for past mental anguish, \$300,000 for future mental anguish, \$2,000,000 for past physical impairment, and \$1,000,000 future physical impairment. The appellate court rejected the defendant's argument, explaining the injuries sustained in this case were unique and the defendant had not cited any case to support finding the young man was not entitled to those damages for the degloving injuries to both his hands.

2. *Closed Head Injuries*

A plaintiff who has suffered a closed head injury (CHI) may potentially recover for damages in two major areas: physical and psychological damages. Physically, the outcome of a CHI is often severe. First, the patient may suffer from permanent cognitive defects, including a disturbance of memory, concentration, intellect, and language. Neil Brooks, *Closed Head Injury: Psychological, Social, and Family*

Consequences 44-74 (1984). Attentional defects are also common. *Id.* at 74-107.

Cases which involve injury to the plaintiff's head often present unique problems. In addition to potentially devastating physical damage, which may no longer visibly appear to be critical, the psychological implications of CHI are intense, they do not subside quickly, and the patient is in a vulnerable position for a long period of time. Lester Kaiser, M.D., *The Traumatic Neurosis* 135 (1968). In most cases, there is no medical proof of what causes post-head injury symptoms. *Id.* at 137. The body's emotional response to head injury may, however, include nervousness, irritability, fatigability, changes in personality, depressions, and tinnitus. *Id.* In turn, these symptoms may result in the plaintiff/patient's becoming socially isolated, especially from his family.

Often, a client who has suffered a CHI will be a limited source of testimony on his own damages. Commonly, a patient recovering from such an injury will be aware only of his constant anger, frustration, and confusion at his diminished capacity. Practically, the client may not be very likable because of these feelings, and the attorney should, in some cases, warn the jury of that fact.

Family members and friends of the plaintiff may provide testimony regarding the changes in the plaintiff's personality and behavior of which even the plaintiff himself may not be aware. Counsel should ask the client's family members as to whether he or she has experienced any symptoms related to a CHI. J. Hadley Edgar & James B. Sales, 4 TEXAS TORTS AND REMEDIES § 81.101[1] (1993). Evidence that the client has become "harder to live with," or has "not been the same" since the accident all tend to prove the client's damage as a result of the injury. *Id.*

Expert testimony is essential in any suspected CHI case. *Id.* at § 81.101[2][a]. A neurologist will be able to document and confirm the diagnosis of head injury for the jury and explain to the trier of fact the effects of the injury. *Id.* In addition, a psychiatrist or psychologist can assist the neurologist in presenting and proving the extent of injury. *Id.* Neuropsychiatrists and neuropsychologists may also be helpful in dealing with issues such as whether the plaintiff's intelligence or other mental faculties have been impaired. *See, e.g. Kennedy v. Missouri Pac. R.R. Co.*, 778 S.W.2d 552, 555-557 (Tex. App.—Beaumont 1989, writ denied).

C. Physical Impairment

Physical impairment is defined as impairment beyond loss of earning capacity or mere pain and suffering. *Green v. Baldree*, 497 S.W.2d 342 (Tex. Civ. App.—Houston [14th Dist.] 1973, no writ). In order to recover damages for physical impairment, "the effect of any physical impairment must be substantial and extend beyond any pain, suffering, mental anguish, lost wages or diminished earning capacity." *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757, 772 (Tex. 2003).

"Loss of enjoyment of life" may be considered as a factor in assessing damages for physical impairment. *Golden Eagle Archery*, 116 S.W.3d at 772. Physical impairment encompasses the loss of the injured party's former lifestyle. *Patlyek v. Brittain*, 149 S.W.3d 781 (Tex. App.—Austin 2004, pet. denied) (citing *Ramirez v. Fifth Club, Inc.*, 144 S.W.3d 574, 591 (Tex. App.—Austin 2004) *aff'd in part, rev'd in part*, 196 S.W.3d 788). It includes the loss of the ability to participate in such activities as walking, climbing, running, dancing and other recreational or social

activities. *See French v. Grigsby*, 567 S.W.2d 604 (Tex. Civ. App.—Beaumont 1978, writ ref'd n.r.e.); *Goldston Corp. v. Hernandez*, 714 S.W.2d 350, 352 (Tex. App.—Corpus Christi 1986, writ denied); *Texas Farm Products Co. v. Leva*, 535 S.W.2d 953 (Tex. App.—Tyler 1976, no writ); *Brookshire Grocery Co. v. Goss*, 208 S.W.3d 706, 720 (Tex. App.—Texarkana 2006), *rev'd on other grounds*, 208 S.W.3d 706 (Tex. 2008). For example, a paralyzed person confined to a wheelchair suffers considerable disability beyond a loss of earning capacity, for his life in general is destroyed. In *Ramirez*, the plaintiff was able to recover damages for physical impairment after evidence was submitted demonstrating Ramirez had difficulty eating and communicating and withdrew from friends and family after his closed-head injury. *Ramirez*, 144 S.W.3d at 592.

Physical impairment is also distinguishable from pain and mental anguish. *See Johnson v. King*, 821 S.W.2d 425 (Tex. App.—Fort Worth 1991, writ denied). While depression and other emotional manifestations of injuries are compensable as physical pain and mental anguish, loss of memory and problem-solving deficits would be recoverable under physical impairment. *Id.*

Physical impairment also includes loss of memory and decreased problem-solving ability as a result of the plaintiff's injuries. *Russell v. Hankerson*, 771 S.W.2d 650, 652-53 (Tex. App.—Corpus Christi 1989, writ denied); *Sutton Motor Co. v. Crysel*, 289 S.W.2d 631, 634 (Tex. Civ. App.—Beaumont 1956, no writ).

The defendant, however, is entitled to a jury instruction not to award any sum for physical impairment that has otherwise been awarded for the same loss under another element of damages. *French v. Grigsby*, 567 S.W.2d 604 (Tex. Civ.

App.—Beaumont 1978, no writ). Damages for physical impairment may be recovered for the curtailment of activities expected to

Damages for physical impairment may be awarded even though the injury "bears no relation to economic loss and does not necessarily affect an injured person's capacity to work and earn money." *Texas Farm Prods. Co. v. Leva*, 535 S.W.2d 953, 959 (Tex. Civ. App.—Tyler 1976, no writ); *Benefit Trust Life Ins. Co. v. Littles*, 869 S.W.2d 453 (Tex. App.—San Antonio, 1993), writ granted and vacated by agmt., 873 S.W.2d 704 (Tex. 1994). Pleadings alleging physical impairment need not use the particular words "physical impairment." *Rosenboom Mach. & Tool, Inc. v. Machala*, 995 S.W.2d 817, 824 (Tex. App.—Houston [1st Dist.] 1999, pet. denied) (allegations that plaintiff suffered "serious and disabling injuries, being primarily a fractured vertebrae" provided sufficient notice plaintiff was seeking damages for past and future physical impairment).

1. Proving Physical Impairment

To recover physical impairment damages, a plaintiff must prove that he/she has a physical disability which extends beyond mere pain or impairment of his earning capacity to an extent that it produces a separate and distinct loss that is substantial and for which he should be compensated. *Plainview Motels, Inc. v. Reynolds*, 127 S.W.3d 21 (Tex. App.—Tyler 2003, pet. denied). The evidence must focus on restriction of activities caused by the injury. *Estrada v. Dillon*, 44 S.W. 3d. 558 (Tex. 2001). The plaintiff must show that the impediment extends beyond past earning capacity and pain and suffering, otherwise the plaintiff may be overcompensated. See *Blankenship v. Mirick*, 984 S.W.2d 771, 777 (Tex. App.—Waco 1999, pet. denied);

be pursued in the future in addition to those engaged in the past.

Pipgras v. Hart, 832 S.W.2d 360, 366 (Tex. App.—Fort Worth 1992, writ denied); *Southern Pacific Transport Co. v. Harlow*, 729 S.W.2d 946, 950 (Tex. App.—Corpus Christi 1987, writ denied).

Where injuries are extremely severe, such as in the case of paralysis or amputations, physical impairment may be inferred. *Sunset Brick & Tile, Inc. v. Miles*, 430 S.W.2d 388 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.). Plaintiff does not need to show that, as a result of the injurious event, he is unable to perform an act he was able to perform before; it is sufficient that his activities are restricted in some way due to the nature of the injury or because of the pain suffered when he tries to perform the act. See *Dodge v. Watts*, 876 S.W.2d 542, 544 (Tex. App.—Amarillo 1994, no writ). In cases of less demonstrable disability, the plaintiff should testify directly as to how disability causes him a separate and distinct loss that is substantial.

Evidence can be discovered from various sources such as friends, family, and physician that the plaintiff has given up his recreational activities, can no longer do car or home repairs, and will always have impairment and loss of function of arm. *Southern Pac. Transp. Co. v. Harlow*, 729 S.W.2d 946, 950 (Tex. App.—Corpus Christi 1987, writ denied); see also *Brookshire Grocery Co. v. Goss*, 208 S.W.3d 706, 720 (Tex. App.—Texarkana 2006), rev'd on other grounds, 208 S.W.3d 706 (Tex. 2008), (testimony from former mother-in-law that plaintiff had lost weight and was no long able to enjoy hunting and fishing was sufficient to support \$43,000 award). Where the proper predicate is established, a plaintiff's physical impairment

may be demonstrated by a "Day in the Life" film. See, e.g. *Apache Ready Mix Co. v. Creed*, 653 S.W.2d 79, 84 (Tex. App.—San Antonio 1983, writ dismissed) (twenty minute videotape of the injured minor plaintiff was held admissible to show extent of her injuries); see also *Air Shields v. Spears*, 590 S.W.2d 574, 580 (Tex. Civ. App.—Waco

D. Disfigurement

Disfigurement has been defined as "that which impairs the beauty, symmetry, or appearance of a person or thing; that renders unsightly, misshapen, or imperfect, or deforms in some manner." *Sunbridge Healthcare Corp. v. Penny*, 160 S.W. 3d 230, 252 (Tex. App.—Texarkana 2005, no pet.); *Houston Transit Co. v. Felder*, 208 S.W.2d 880, 883 (1949). It is an element of damages separate and apart from physical pain and mental anguish. *Pedernales Electric Cooperative, Inc. v. Schulz*, 583 S.W.2d 882 (Tex. Civ. App.—Waco 1979, writ refused n.r.e.).

Disfigurement damages are typically recovered in cases involving scarring, amputation, deformity or other changes in appearance that result from an injury. For instance, in *Southwestern Bell Telephone Co. v. Ferris*, 89 S.W.2d 229 (Tex. Civ. App.—Dallas 1935, writ dismissed), disfigurement damages were recovered for a scar on the plaintiff's forehead. However, as illustrated in *Baptist Memorial Hosp. v. Smith*, 822 S.W.2d 67 (Tex. App.—San Antonio 1991, writ denied), *abrogated on other grounds* by *Sampson v. Baptist Memorial Hosp. System v. Smith*, 940 S.W.2d 128 (Tex. App.—San Antonio 1996, writ granted) disfigurement may arise from injuries not traditionally associated with disfigurement.

In *Baptist Memorial Hosp. v. Smith*, a plaintiff suffered severe brain damage as the result of an emergency room accident. As a

1979, writ refused n.r.e.) ("Day in the Life" videotapes admissible to show extent of injuries) *but see*, *Karp v. Cooley*, 493 F.2d 408 (5th Cir. 1974) (portions of videotape excluded by court where content was prejudicial showing of an operation performed on plaintiff).

result of his injury, he experienced flexion contractures of the left arm and both legs. The court, in rejecting the hospital's argument that damages for disfigurement could only be assessed for scars, burns, or amputations, allowed recovery of disfigurement damages "for the contorted limbs and facial deformity he demonstrated at trial".

Future disfigurement damages may also be recovered under Texas law. See *Hopkins County Hosp. Dist. v. Allen*, 760 S.W.2d 341 (Tex. App.—Texarkana 1988, no writ); *Baptist Memorial Hospital System v. Smith*, 822 S.W.2d 67 (Tex. App.—San Antonio 1991, writ denied), *abrogated on other grounds* by *Sampson v. Baptist Memorial Hosp. System v. Smith*, 940 S.W.2d 128 (Tex. App.—San Antonio 1996, writ granted). Because such damages compensate for the future embarrassment and suffering that arises from an existing injury, future disfigurement damages do not require evidence of future or further disfigurement. However, evidence of further disfigurement would be relevant in assessing the amount of damages.

At times, a plaintiff may recover for the self-consciousness and embarrassment associated with an injury under either disfigurement or mental anguish damages. Therefore, when disfigurement is submitted to the jury as a damage issue separate and apart from physical pain and mental anguish, an instruction should be given against double recovery. See *Rosenblum v. Bloom*, 492 S.W.2d 321 (Tex. Civ. App.—Waco

1973, writ ref'd n.r.e.).

1. Proving Disfigurement

The existence of disfigurement at the Testimony of a physician concerning the likelihood and extent of disfigurement is admissible, as is the plaintiff's own testimony concerning his/her embarrassment or despondence. See *Southwestern Bell Telephone Co. v. Ferris*, 89 S.W.2d 229 (Tex. Civ. App.—Dallas 1935, writ dismissed).

To illustrate, testimony by a plaintiff that his hand "appeared deformed" and that "he was reluctant to show his hand to his wife" and "embarrassed to shake hands" supported recovery of disfigurement damages. See *Texas Farm Products Co. v. Leva*, 535 S.W.2d 953 (Tex. Civ. App.—Tyler 1976, no writ).

Counsel for plaintiff may give his opinion in argument as to what would be a reasonable value and may argue for recovery based on per diem or unit of time formula. *International Harvester, Co. v. Zavala*, 623 S.W.2d 699 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.); *Coastal States Gas Producing Co. v. Locker*, 436 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). Proof of disfigurement may also be established by allowing the jury to inspect the plaintiff's injury. *Southwestern Bell Telephone Co. v. Ferris*, 89 S.W.2d 229 (Tex. Civ. App.—Dallas 1935, writ dismissed).

E. Mental Anguish

Pain and suffering describes the physical sensations when an injury has occurred to the body. *Ford Motor Co. v. Durrill*, 714 S.W.2d 329, 343 (Tex. App.—Corpus Christi 1986), vacated by *agm't*, 754 S.W.2d 646 (Tex. 1988). Mental anguish, on the other hand, includes "a mental sensation of pain resulting from

time of trial will permit a reasonable inference of future disfigurement. *Robertson v. Rig-A-Lite Co.*, 394 S.W.2d 838 (Tex. Civ. App.—Houston 1965, writ ref'd n.r.e.).

such painful emotions as grief, severe disappointment, wounded pride, shame, despair, and public humiliation." *Benefit Trust Life Ins. Co. v. Littles*, 869 S.W.2d 453, 469-70 (Tex. App.—San Antonio 1993, writ granted), vacated pursuant to settlement, 873 S.W.2d 704 (citing *GAB Business Servs., Inc. v. Moore*, 829 S.W.2d 345, 350 (Tex. App.—Texarkana 1992, no writ)). Mental anguish, for the injured victim, connotes a state of mind which includes contemplation by that party of the disfigured or maimed condition which he is in as a result of an injury. *Id.* It includes such items as worry, concern, fear, embarrassment and despondence and may exist while one is not currently experiencing pain from a physical injury. See *Southwestern Bell Tel. Co. v. Cook*, 30 S.W.2d 497 (Tex. Civ. App.—Fort Worth 1930, writ ref'd).

At common law, damages for mental anguish were not recoverable. *Cactus Drilling Co. v. McGinty*, 580 S.W.2d 609, 611 (Tex. App.—Amarillo, 1979, no writ); *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995). Historically, some jurisdictions did not allow individuals to recover damages for mental anguish under the theory that such damages were too remote and intangible to accurately calculate. See *Houston Electric Co. v. Dorsett*, 194 S.W.2d 546, 547 (Tex. 1946). The Texas Supreme Court's ruling in *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649 (Tex. 1987), overruled by *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), however appeared to recognize negligent infliction of emotional distress as an independent cause of action. *Id.* at 652. The pendulum

rapidly swung however in the opposite direction when the Court held in *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993) that there was no general claim for negligent infliction of emotional distress under Texas law, as there is for intentional infliction of emotional distress. *Id.* at 594; *see Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993).

While physical pain and mental anguish are usually treated as one element of damages for jury submission purposes, mental anguish is a separate and distinct element of Texas damages recognized under Texas law. *Tex. & N.O.R. Co. v. Cammack*, 280 S.W. 864 (Tex. App.—Texarkana 1926, error ref'd); *Leyendecer v. Harlow*, 189 S.W.2d 706 (Tex. Civ. App.—Galveston 1945, writ ref'd w.o.m.). Thus, mental anguish damages may be the only element of actual damages. *Id.* Mental anguish damages may arise from a variety of circumstances. For instance, consciousness of approaching death is a proper element to consider in evaluating mental anguish. *Jenkins v. Hennigan*, 298 S.W.2d 905 (Tex. Civ. App.—Beaumont 1957, writ ref'd n.r.e.). In *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630 (Tex. 1986) the Texas Supreme Court upheld an award of mental anguish damages to the estates of several decedents involved in an airplane crash for the anguish experienced by those decedents from the time in which the aircraft broke up in flight until the plane crashed to the ground.

One's fear of possible paralysis resulting from an injury or contemplation of changed physical condition may also support the recovery of mental anguish damages. *See Dulaney Inv. Co. v. Wood*, 142 S.W.2d 379 (Tex. Civ. App.—Fort Worth 1940, writ dis'm'd judg't. cor.); *Missouri, K. & T. Railway Co. v. Miller*, 61 S.W. 978 (Tex. Civ. App. 1901, writ ref'd.). Mental anguish may also arise from humiliation,

In other words, Texas does not recognize a general legal duty not to negligently inflict mental anguish-damages for such are only recoverable for the breach of some other legal duty. *Robinson v. University of Texas Medical Branch at Galveston*, 171 S.W.3d 365 (Tex. App.—Houston 14th Dist. 2005, no pet).

mortification, fright, apprehension as to effects of injury, nervousness and/or embarrassment. *See Houston Lighting & Power Co. v. Reed*, 365 S.W.2d 26 (Tex. Civ. App.—Houston 1963, writ ref'd n.r.e.).

Disfigurement, although described as a sub-element of mental anguish, should be treated as a separate item of damages for jury submission purposes. *See*, 3 State Bar of Texas, *Texas Pattern Jury Charges*, PJC 8.2 (2003).

Because mental anguish damages are so intangible, Texas courts have defined mental anguish as a heightened emotional injury beyond ordinary grief encompassing keen and poignant mental suffering, a high degree of mental suffering, or an intense pain of mind and body. *Larrumbide v. Doctors Health Facility*, 734 S.W.2d 685 (Tex. App.—El Paso 1990, writ denied) (child died five years before and parents recovering from grief). The court also noted that damages recoverable for mental anguish should be actual mental injuries rather than mere fear, anger or sorrow. *Id.*

To recover for mental anguish, a plaintiff must demonstrate a high degree of mental pain and distress that is more than mere worry, anxiety, embarrassment, or anger. *Parkway v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995); *National Union Fire Ins. Co v. Dominguez*, 793 S.W.2d 66, 73 (Tex. App.—El Paso 1990, writ granted), *judgment reversed on other grounds*, 873 S.W.2d 373; *State Farm Mut. Auto Ins. Co. v. Zubiata*, 808 S.W.2d 590, 599 (Tex. App.—El Paso 1991, no writ). Nonetheless,

Texas law does not require proof of a physical injury in order to recover mental anguish damages. *Boyles v. Kerr*, 855 S.W.2d 593, 597 (Tex. 1993); *Gill v. Boyd Dist. Center*, 64 S.W.3d 601, 604 (Tex. App.—Texarkana 2001, pet. denied). Nor does Texas law require proof of economic harm to recover mental anguish damages. *Gill*, 64 S.W.3d at 604; *Orkin Exterminating v. Williamson*, 785 S.W.2d 905, 912 (Tex. App.—Austin 1990, writ denied). Mental anguish damages, however, may not be predicated on mere anger. *Cronin v. Bacon*,

In *Ontiveroas v. Lozano*, No. 14-05-00294-CV, 2006 WL 1140374 (Tex. App.—Houston [14th Dist.] Apr. 27, 2006, no pet.), the court held that plaintiffs presented sufficient evidence to support an award for mental anguish through their own testimony. Both men testified they feared not being able to return to their pre-accident physical activities. *Id.* at *2. Additionally, the plaintiffs testified they were placed in fear of serious bodily injury or death during the course of the collision. *Id.* The court held "fear of imminent death or serious injury, even for a matter of seconds, provides some evidence of mental anguish that is more than mere worry, anxiety, vexation or anger." *Id.*

The San Antonio court upheld an award of damages for mental anguish on testimony that the plaintiff remained scarred after the accident made the basis of the suit, he lacked the ability to turn his neck, was "bothered," "insecure," and "burdened" by the scarring, and that he was no longer outgoing and social. *Littles*, 869 S.W.2d at 12. The plaintiff's wife testified to his suffering and personality change. *Id.*

Similarly, one court upheld an award of damages for mental anguish stemming from the plaintiff's embarrassment and humiliation on being beaten and forcibly ejected from a bar. *See Country Roads, Inc.*

837 S.W.2d 265, 269 (Tex. App.—Fort Worth 1992, writ denied). Nor will mere sadness support recovery of mental anguish damages. *Worsham Steel Co. v. Arias*, 831 S.W.2d 81, 87 (Tex. App.—El Paso 1992, no writ). One court has even held that "mere worry, anxiety, vexation, resentment, embarrassment or anger" is insufficient to support mental anguish damages. *Phar-Mor, Inc. v. Chavira*, 853 S.W.2d 710 (Tex. App.—Houston [1st Dist.] 1993, no writ).

v. Witt, 737 S.W.2d 362, 365 (Tex. App.—Houston [14th Dist.] 1987, no writ). In another case, a mental anguish award was supported by evidence that surgeons advised the plaintiff of potential complications resulting from negligently performed surgery, which in turn left the plaintiff with uncertainty of future health problems. *See Hopkins County Hosp. Dist. v. Allen*, 760 S.W.2d 341, 343 (Tex. App.—Texarkana 1988, no writ). In *McAllen Coca-Cola Bottling Co. v. Alvarez*, the court allowed damages for mental anguish suffered after the plaintiff drank a bottle of soda in which a hairpin was wedged resulting in nausea, cramps, and diarrhea. 581 S.W.2d 201, 205 (Tex. Civ. App.—Corpus Christi 1979, no writ).

To rebut evidence of mental anguish, where relevant, defendants may discover evidence that will allow them to argue that the plaintiff suffers mental anguish for reasons other than his injuries. *See, e.g., Marange v. Lew Williams Chevrolet Co.*, 371 S.W.2d 900, 903-04 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

There are no objective standards to measure mental anguish damages, and the amount of such damages is largely left to the discretion of the jury. *Lacoure v. Lacoure*, 820 S.W.2d 228, 234 (Tex. App.—El Paso 1991, writ denied). The El Paso Court of

Appeals has said that the translation of mental anguish into a dollar amount is, of necessity, an arbitrary process, not subject to objective analysis. *Dominguez*, 793 S.W.2d at 72. If there is sufficient evidence to support a jury finding of mental anguish, the finding must be upheld. *Id.* Thus, courts have no authority to suggest remittitur of mental anguish damages, "no matter how manifestly unjust or shocking to the conscience of the Court the amount of the award may be." *Id.*

The Texas Supreme Court held that mental anguish damages are not recoverable under the unfair insurance practices statute,

Mental anguish damages are not recoverable in cases involving negligent misrepresentation, *Federal Land Bank Assoc. v. Stone*, 825 S.W.2d 439 (Tex. 1991); negligent property damage, *City of Tyler v. Likes*, 962 S.W.2d 489, 494, 495 (Tex. 1997); *see also City of Palestine v. Davis*, 977 S.W.2d 328 (Tex. 1998); DTPA violations absent proof of a willful or grossly negligent conduct, *Boyles v. Kerr*, 855 S.W.2d 593, 598 (Tex. 1993); or attorney negligence causing economic loss, *Douglas v. Delp*, 987 S.W.2d 879, 883-85 (Tex. 1999).

The situations in which a plaintiff not physically injured by the defendant's breach of a duty may recover mental anguish damages include the following: *See, e.g., Freeman v. City of Pasadena*, 744 S.W.2d 923, 923-924 (Tex. 1988) (bystander recovery); *Silcott v. Oglesby*, 721 S.W.2d 290, 292 (Tex. 1986) (intentional tort of child abduction); *Fisher v. Carrousel Motor Hotel*, 424 S.W.2d 627 (Tex. 1967) (battery), *Billings v. Atkinson*, 489 S.W.2d 858 (Tex. 1973) (invasion of privacy); *State Farm Ins. Co. v. Beaston*, 907 S.W.2d 430, 436 (Tex. 1995); *Luna v. North Star Dodge Sales, Inc.*, 667 S.W.2d 115 (Tex. 1984) (DTPA cases not involving personal injuries

TEX. INS. CODE, art. 21.21, §16(a), absent a jury finding of a culpable mental state. *State Farm Life Ins. Co. v. Beaston*, 907 S.W.2d 430 (Tex. 1995). The court pointed out that knowingly is the only mental state to which the statute currently refers. *Id.* In another Supreme Court case, *Rodriguez v. Motor Express*, 925 S.W.2d 638 (Tex. 1996), the Court acknowledged that there are few situations in which mental anguish damages can be recovered without being physically injured. *See also Parkway v. Woodruff*, 901 S.W.2d 434, 444 (Tex. 1995).

where plaintiff shows as a prerequisite that the defendant committed a willful tort, gross negligence, willful disregard, or a knowing violation of the statute (requires a finding of culpable mental state)); *Leyendecker & Assoc. Inc. v. Wechter*, 683 S.W.2d 369 (Tex. 1984) (defamation); *Twyman v. Twyman*, 855 S.W.2d 619 (Tex. 1993) (intentional infliction of emotional distress); cases under the insurance code that require a finding of culpable mental state; in a limited number of cases involving breach of contract (although mental anguish damages are generally not recoverable for breach of contract, *See Latham v. Castillo*, 972 S.W.2d 66 (Tex. 1998)); and "special relationship" cases that give rise to a duty that, if breached, supports an emotional distress award such as failure of telegraph company to timely deliver a death message. *Stuart v. Western Union Tel. Co.*, 18 S.W. 351 (1885) and a funeral home's negligent handling of a corpse. *Pat H. Foley & Co. v. Wyatt*, 442 S.W.2d 904 (Tex. Civ. App.—Houston [14th Dist.] 1969, writ ref'd n.r.e.). Special relationship cases generally have three common elements: (1) a contractual relationship between the parties; (2) a particular susceptibility to emotional distress on the part of the plaintiff; and (3)

the defendant's knowledge of the plaintiff's particular susceptibility to the emotional distress, based on the circumstances. *Lions Eye Bank v. Perry*, 56 S.W.3d 872, 877 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

Further, mental anguish damages are recoverable by the surviving spouse, children and parents of a deceased in a wrongful death action under TEX. CIV. PRAC. & REM. CODE §§ 71.002-71.003 and by the estate of the deceased in a survival action under TEX. CIV. PRAC. & REM. CODE

There is no set formula for establishing the amount of money to be awarded for mental anguish. *Green v. Meadows*, 527 S.W.2d 496 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). That amount is left largely to the jury's discretion and need not be proportional to damages for any pecuniary loss. *Lacoure v. Lacoure*, 820 S.W.2d 228 (Tex. App.—El Paso 1991, writ denied); *Missouri Pacific R. Co. v. Lane*, 720 S.W.2d 830 (Tex. App.—Texarkana 1986, no writ). Thus, once a plaintiff establishes some amount of mental anguish, the jury's decision as to the amount awarded "is virtually unreviewable." *Dillard's Department Store v. Strom*, 869 S.W.2d 654 (Tex. App.—El Paso 1994, writ dism'd w.o.j.).

The evidence required to support an award of mental anguish damages is set forth in *Parkway Co. v. Woodruff*, 901 S.W.2d 434 (Tex. 1995). The Court said that a jury finding that compensable mental anguish exists will be upheld on review if the plaintiff introduces direct evidence of the: (1) nature of the mental anguish; (2) its duration; and (3) its severity. These must establish a "substantial disruption in the plaintiffs' daily routine." *Id.* This evidence may be elicited from the testimony of the plaintiff, the testimony of a third party, or that of an expert. *Id.* at 444. The plaintiff

§ 71.021.

Allegations of mental anguish do not implicitly include claims for resulting physical manifestations of that anguish. *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 823-23 (Tex. 1997). Proof of a physical manifestation of the emotional distress is not required in order to recover mental anguish damages. *Boyles v. Kerr*, 855 S.W.2d 593, 598 (Tex. 1993).

I. Proving Mental Anguish

is not obligated to produce this type of evidence, but "the absence of this type of direct evidence, particularly when it can be readily supplied or procured by the plaintiff, justifies close judicial scrutiny of other evidence offered on this element of damages." *Id.* Without direct evidence of the elements required by Parkway, the court will apply "traditional 'no evidence' standards to determine whether the record reveals any evidence of a high degree of mental pain and distress that is 'more than mere worry, anxiety, vexation, embarrassment or anger' in order to sustain an award on appeal." *Id.*; see also *Nat'l Union Fire Ins. Co. v. Dominguez*, 793 S.W.2d 66, 73 (Tex. App.—El Paso 1990, writ denied), *rev'd on other grounds by* 873 S.W.2d 373 (Tex. 1994); *Tagle v. Galvan*, 155 S.W.3d 510 (Tex. App.—San Antonio 2004, no writ).

Mental anguish damages may be inferred from the nature and extent of the injuries. *Robertson v. Rig-A-Lite Co.*, 394 S.W.2d 838 (Tex. Civ. App.—Houston 1965, writ ref'd, n.r.e.); *Coastal States Gas Producing Co. v. Locker*, 436 S.W.2d 592 (Tex. Civ. App.—Houston [14th Dist.] 1968, no writ). However, there can be no recovery for mental anguish if the evidence shows that the plaintiff's ability to experience pain has been totally destroyed as

is often contended by the defendant in a coma case. *Western Union Tel. Co. v. Tweed*, 138 S.W. 1155 (Tex. Civ. App.—Dallas 1911), *aff'd*, 166 S.W. 696 (Tex. 1914).

No one is permitted to testify as to the value of pain or the anguish; however, the plaintiff's attorney may argue for a certain value and may use a per diem or unit of time argument. *Hernandez v. Baucum*, 344 S.W.2d 498 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.); *City of Houston v. Jean*, 517 S.W.2d 596 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.). Future mental anguish damages are recoverable upon a showing that there is a reasonable probability that such anguish will be suffered in the future. *City of Ingleside v. Kneuper*, 768 S.W.2d 451, 461 (Tex. App.—Austin 1989, writ denied).

Individuals predisposed to
2. Submitting Mental Anguish to the Jury

The Texas Supreme Court in *Trotti v. K-Mart Corp.*, 686 S.W.2d 593 (Tex. 1985) disapproved instructing the jury on the definition of "mental anguish." The Houston 14th Court of Appeals had held earlier, in *Gulf States Util. Co. v. Reed*, 659 S.W.2d 849 (Tex. App.—Houston [14th Dist.] 1983, writ ref'd n.r.e.), that the term "mental anguish" was not a legal term but one of ordinary significance and meaning and should not be defined. See also *Stevens v. Nat'l Educ. Centers, Inc.*, 990 S.W.2d 374 (Tex. App.—Houston [14th Dist.] 1999, reh'g overr.). Note, however, that in wrongful death cases, discussed *infra*, mental anguish is now to be defined for the jury.

3. Mental Anguish in Non-Death, Non-Bystander Negligence Cases

St. Elizabeth Hospital v. Garrard, held

psychological trauma due to pre-existing emotional conditions may still recover mental anguish damages. *Padgett v. Gray*, 727 S.W.2d 706 (Tex. App.—Amarillo 1987, no writ). However, to rebut evidence of mental anguish the defendant may show, under some circumstances, that the plaintiff is suffering mental anguish for reasons other than the injuries. See *Marange v. Lew Williams Chevrolet Co.*, 371 S.W.2d 900 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.); *White v. McElroy*, 350 S.W.2d 251 (Tex. Civ. App.—El Paso 1961, no writ).

For the tort of intentional infliction of emotional distress, a defendant spouse's conduct throughout marriage may be considered for mental anguish damages because it is considered a "continuing tort." *Toles v. Toles*, 45 S.W.3d 252 (Tex. App.—Dallas 2001, pet. denied).

that mental anguish damages were recoverable for the negligent infliction of emotional trauma without a death. *St. Elizabeth Hospital v. Garrard*, 730 S.W.2d 649 (Tex. 1987). *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993), overruled *Garrard*.

The court notes that *Garrard* is out of step with most American jurisdictions. The court went on to hold that "mental anguish damages should be compensated only in connection with defendant's breach of some other duty imposed by law." *Boyles*, 855 S.W.2d at 595-96.

The *Boyles* Court explicitly stated that it is not broadening any right to recover mental anguish damages. It seems to stress that it is leaving the right to recover mental anguish damages caused by breaches of existing duties only. Bystander recovery, physical injury, wrongful death, invasion of privacy, negligent handling of a corpse, and failure of a telegraph company to timely deliver a death message are listed as duties which will give rise to mental anguish

damages.

4. *Latent Diseases Like Asbestos*

In *Temple-Inland Forest v. Carter*, 993 S.W.2d 88 (Tex. 1999), the Texas Supreme Court held that workers exposed to asbestos fibers while installing electric outlets and computer jacks at a paper mill, but who had not developed an asbestos-related disease, could not recover mental anguish damages for the reasonable fear of possibility of developing such disease in the future. The Court noted that the case did not fall within any of the categories for which recovery had been allowed. *Id.* at 91. The Court reiterated its observations in *City of Tyler v. Likes*, “[w]ithout intent or malice on the defendant’s part, serious bodily injury to the plaintiff, or a special relationship between the two parties, we permit recovery for mental anguish only in a few type of cases involving injuries of such a shocking and disturbing nature that The Texas Supreme Court, however, has allowed a plaintiff to bring separate actions for separate latent occupational diseases caused by exposure to asbestos. *Pustejovsky v. Rapid American Corp.*, 35 S.W.3d 643 (Tex. 2000). In *Pustejovsky*, Henry Pustejovsky, a metal pourer employed by Alcoa Aluminum in Rockdale, Texas, was diagnosed with asbestosis in 1982 after being exposed to asbestos fibers at work. Asbestosis is a non-malignant disease caused by inhaling asbestos fibers. He filed suit against Johns-Manville Corporation, an asbestos supplier, for damages related to his asbestosis. The suit was settled out of court for approximately \$25,000. In 1994, Pustejovsky began experiencing shortness of breath, cold-like symptoms and fatigue. He was re-examined and diagnosed with malignant pleural mesothelioma, a cancerous tumor of the lung lining. Two months later, Pustejovsky joined with three other plaintiffs and sued Rapid American Corporation, Owens Corning Fiberglass Corporation, Pittsburg Corning Corporation and other suppliers of asbestos products. The asbestos companies filed a motion for

mental anguish is a highly foreseeable result.” *Likes*, 962 S.W.2d at 496.

The Court explained that while the law generally allows recovery of mental anguish damages in personal injury cases, allowing recovery for fear of a disease when the plaintiff has no symptoms results in systematic under-compensation of those who actually contract the disease and a windfall for those who do not. *Temple-Inland Forest*, 993 S.W.2d at 93. The Court expressly did not decide whether “a plaintiff who has developed an asbestos-related disease may recover mental anguish damages for a reasonable fear of developing other asbestos-related diseases.” *Id.* at 94. The holding in *Temple-Inland Forest* is expressly limited to asbestos exposure cases and the principles used by the court to deny mental anguish to the workers exposed to asbestos may not yield the same result in cases involving other dangerous or toxic elements.

summary judgment asserting that Pustejovsky’s claim was barred by the statute of limitations, which they claimed began to run in 1982, when Pustejovsky was diagnosed with asbestosis. Pustejovsky contended that limitations did not bar his second suit.

F. *Loss of Consortium*

“The injury or death of a spouse, parent, or child causes a great loss to the familial relationship that is worthy of compensation.” *Enochs v. Brown*, 872 S.W.2d 312, 322 (Tex. App.—Austin 1994, no writ). The Texas Pattern Jury Charges define consortium as the mutual right of the husband and wife to that affection, solace, comfort, companionship, society, assistance, sexual relations, emotional support, love, and felicity necessary to a successful marriage. See State Bar of Texas, 3 *Texas Pattern Jury Charges* § 8.3 (2003); *Wal Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322 (Tex. 1993).

Loss of society and companionship are elements of loss of consortium. *Texas Dept. of Transp. v. Ramming*, 861 S.W.2d 460, (Tex. App.—Houston [14th Dist.] 1993, no

pet) (citing *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978)). Consortium can be spousal, parental or filial.

1. *Spousal Consortium*

The Texas Supreme Court first recognized damages for loss of spousal consortium in *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978). Where a plaintiff is injured, his or her spouse has an independent cause of action for loss of consortium and household services as the result of the physical injuries caused to the other spouse. *Whittlesey*, 572 S.W.2d at 666. In *Reed Tool Co. v. Copelin*, 610 S.W.2d 736 (Tex. 1980), the Texas Supreme Court held that although a claim for loss of consortium was a separate and distinct cause of action belonging to the deprived spouse, it nevertheless was a derivative cause of action. As a result, any contributory negligence assessed against the injured spouse is adduced to the deprived spouse's recovery in accordance with comparative negligence principles. *Id.* The jury will be instructed, however, not to consider the negligence of the injured spouse to reduce the damages of the spouse who recovers consortium damages. See State Bar of Texas, 3 *Texas Pattern Jury Charges* § 8.3 (2003).

Similarly, if an injured spouse's claim against his or her employer is barred under the Texas Worker's Compensation Act, then the deprived spouse's claim will also be barred. *Id.* However, because a consortium claim is "a separate and distinct cause of action," damages recovered from the loss of consortium are characterized as separate property under Texas community property law. *Reed*, 610 S.W.2d 736. Moreover, settlement releases executed by the injured spouse do not affect the deprived spouse's right to recover for loss of consortium. *Id.*

A spouse may not recover for loss of consortium absent a physical injury. *Browning-Ferris Indus. Inc. v. Lieck*, 881 S.W.2d 288, 294 (Tex. 1994) (no loss of consortium for malicious prosecution because plaintiff's husband was not physically injured). A spouse's claim for loss of consortium may be supported by testimony from the primary victim concerning activities in which he engaged with his family prior to his injury and that the injury

Distinguished from loss of services damages, consortium does not include the services rendered by the spouse to the marriage. *Id.*

Loss of spousal consortium damages are intended to compensate for a single tortious act which injures both spouses by virtue of their relationship to each other. *Id.*

The impaired spouse sustains direct physical injuries while the deprived spouse sustains damages to the emotional interest stemming from their relationship. Recovery for loss of consortium is the separate property of the spouse who claims the loss. *Id.* at 669.

interfered with the family activities. See *Wal-Mart Stores, Inc. v. Alexander*, 868 S.W.2d 322, 328 (Tex. 1993).

2. *Parental Consortium*

In *Reagan v. Vaughn*, 804 S.W.2d 463 (Tex. 1990), the Texas Supreme Court held that a child may recover for loss of parental consortium when a third party causes serious, permanent, and disabling injury to his or her parent that severely impairs the ability for and quality of society and companionship of the parent-child relationship. The Court recognized in its holding that "the loss of a parent's love, care, companionship, and guidance can severely impact a child's development and have a major influence on a child's welfare and personality throughout life." *Id.*

The child may recover, as loss of parental consortium, for such non-pecuniary damages as loss of the parent's love, affection, protection, emotional support, services, companionship, care, and society. *Id.* at 467. The child may not recover for mental anguish. *Id.* at 466-67. The Court enumerated that the age of the child, the child's relationship with the parent, the child's emotional and physical characteristics, and whether other consortium-giving relationships are available to the child as relevant to an award for loss of parental consortium. *Id.* at 467.

Although a claim for parental consortium is derivative of the parents' negligence action and subject to being reduced by the contributory negligence of the parent, it is, nonetheless, an independent cause of action belonging to the injured child. *Id.* at 468.

Arguments that loss of parental consortium has its own statute of limitations that is tolled as to minors under the provisions of TEX. CIV. PRAC. & REM. CODE § 16.001 have been largely unsuccessful in Texas. Due to the derivative nature of the cause of action, the majority of Texas appellate courts have held that the running of the statute of limitations on the injured parent's cause of action extinguishes the child's claim for loss of consortium, especially since limitations is a defense which would bar the injured parent's recovery. *Nash v. Selinko, M.D.*, 14 S.W.3d 315 (Tex. App.—Houston [14th Dist.] 1999, pet. denied) See also *Howard v. Fiesta Texas Show Park*, 980 S.W.2d 716, 719 (Tex. App.—San Antonio 1998, no pet.); *Martinez v. Humble Sand & Gravel*, 940 S.W.2d 139, 148 (Tex. App.—El Paso 1996, writ granted); *Upjohn Co. v. Freeman*, 885 S.W.2d 538, 541 (Tex. App.—Dallas 1994, writ denied). See also, William L. Prosser, *The Law of Torts* 892 (1971). The only court reaching the opposite conclusion is the Corpus Christi Court of Appeals. See *Browning-Ferris Industries, Inc. v. Lieck*, 845 S.W.2d 926, 949 (Tex. App.—Corpus Christi 1992), *rev'd on other grounds*, 881 S.W.2d 288 (Tex. 1994) (loss of consortium is an independent tort governed by two year statute of limitations).

3. *Filial Consortium*

In *Roberts v. Williamson*, 111 S.W. 3d 113 (Tex. 2003), the Texas Supreme court held that although parents customarily enjoy the consortium of their children, in the ordinary course of events a parent does not depend on a child's companionship, love, guidance, and nurture in the same way and to the same degree that a husband depends on his wife, a wife depends on her husband, or a minor or disabled adult child depends on his or her parent. *Id.* at Damages for loss of consortium are not required to be reasonably proportional to the damages for pecuniary loss.

See *Missouri Pacific Railroad v. Lane*, 720 S.W.2d 830 (Tex. App.—Texarkana 1986, no writ). The determination of such damages should be left to the sole discretion of the jury. *Id.* An expert may testify as to the value of a plaintiff's damages or loss of consortium. In *Celotex Corp. v. Tate*, 797 S.W.2d 197, 202 (Tex.

117. Thus, parents are not entitled to claim a loss of consortium for children that have been seriously injured. The court reached this conclusion despite the fact that in *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983), the Texas Supreme Court had ruled that parents are entitled to a recovery for loss of consortium in wrongful death cases.

4. *Consortium Damages for a Sibling*

Although no Texas cases have addressed the issue of whether siblings may recover loss of consortium in non-fatal injury cases, the First Court of Appeals refused to allow the recovery of loss of consortium damages upon the death of a sibling. *Williams v. Texaco Refining and Marketing*, 868 S.W.2d 873, 874 (Tex. App.—Houston [1st Dist.] 1993, no writ). The Court noted that:

To the extent that the Texas Supreme Court has created a common law cause of action for loss of consortium, it has done so only as to spouses and children, and only when the loss is the result of an injury, rather than death.

Id.

Moreover, the Court in *Reagan v. Vaughn*, in addressing the possible "snowball" effect of allowing damages for the loss of parental consortium, expressly stated that the Court would have "little difficulty limiting recovery to the parent/child relationship." See also *Ford Motor Co. v. Miles*, 967 S.W.2d 377, 378-79 (Tex. 1998).

5. *Proving Loss of Consortium*

App.—Corpus Christi 1990, no writ), the Corpus Christi Court of Appeals held that an economist could properly explain to the jury how to compute present dollar value of damages for lost affection based on hypothetical figures, but the expert was improperly permitted to suggest specific dollar amounts for the loss of the decedent's guidance and counsel. The Court noted that experts should be allowed to calculate specific dollar amounts for

the jury only when they have special knowledge that the jurors themselves do not possess. *Id.* Moreover, *Seale v. Winn Exploration Co.*, 732 S.W.2d 667 (Tex. App.—Corpus Christi 1987, writ denied) disallowed the testimony of an economist on the value loss of parental consortium. The economist's testimony was based on the per hour average income of a psychiatrist. The court noted that expert testimony was not required since the value of the loss of love, affection and companionship could be determined by a jury. The hourly rate of a psychiatrist is not relevant, and the court noted that the jury was well qualified to ascertain the amount of damages on this issue.

G. Other Elements of Damage

1. Loss of Part of the Body

Texas courts have permitted separate jury submission, as a separate item of damages, for a loss of a part of the body. Of course, in such an instance, the cautionary instruction against a double recovery would be necessary. The following illustrate areas where Texas courts have recognized damages for the loss of a body part.

a. Loss of Teeth. In *Houston Transit Co. v. Felder*, 208 S.W.2d 880 (Tex. 1948), the Supreme Court approved the submission of "loss of teeth" as a separate element of damages. It should be noted that in that case this element was submitted in addition to disfigurement.

b. Loss of Hearing. In *City of Houston v. Riggins*, 568 S.W.2d 188 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.), the court approved the submission of this element of damages separately, along with physical impairment, with cautionary The court in *Sherrod v. Berry*, 629 F.Supp. 159 (N.D. Ill. 1985) *aff'd* 827 F.2d 195 (7th Cir. 1987), first coined the term "hedonic damages" to describe the recovery of

instructions to avoid overlap.

2. Loss of Mental/Intellectual Function

In *Western Union Tel. Co. v. Tweed*, 138 S.W. 1155 (Tex. Civ. App.—Dallas 1911), *aff'd*, 166 S.W. 696 (Tex. 1914), the plaintiff sustained catastrophic injuries, including brain damage, which gave rise to the question of whether the plaintiff could perceive pain and experience mental anguish. The court held that in such a case the loss of mental and intellectual function which precludes such "appreciation" is itself a separate element of damages. The court noted that "if plaintiff's mind was destroyed by reason of the injuries he received, such result, we think, would be an element of his damage, instead of mental suffering."

3. Damage for the Loss of Enjoyment of Life: Hedonic Damages

Loss of enjoyment of life damages, also known as hedonic damages, compensate for the loss of the pleasures and rewards inherent in living. As opposed to pain and suffering damages, which compensate for the physical and mental discomfort caused by an injury, loss of enjoyment of life damages compensate for the limitations placed upon a person's life. See T. Branch, *Seeking Recovery for Loss of Enjoyment of Life*, Trial (April 1994). As noted by the dissent in *McDougald v. Garber*, 536 N.E.2d 372, 377 (W.Y. 1989) (Titone, Jr., dissenting):

The capacity to enjoy life—by watching one's children grow, participating in recreational activities, and drinking in the many other pleasures life has to offer, is unquestionably an attribute of an ordinary healthy individual.

damages for the value of a deceased person's life. See, Blodgett, *Hedonic Damages*, 71 A.B.A. Jnl. 25 (February 1985). In *Sherrod*, the court stated:

The loss of life means more than being deprived of the right to exist, or of the ability to earn a living, it includes the deprivation of pleasures of life.

Loss of enjoyment of life damages have been almost universally recognized under one label or another. T. Branch, *Seeking Recovery for Loss of Enjoyment of Life*, Trial 40 (April 1994) (citing Preiser, et al., *Trial Manual for Proving Hedonic Damages* 6, 14-15 (1992)). However, questions remain as to whether loss of enjoyment of life damages should be recovered as a distinct type of damages separate from pain and suffering. *Id.*

Texas courts have traditionally recognized loss of enjoyment of life as a factor in determining damages for pain and suffering. *See Pool v. Fibreboard Corp.*, 813 S.W.2d 658 (Tex. App.—Texarkana 1991, no pet.); *Luna v. Southern Pacific Trans. Co.*, 724 S.W.2d 383 (Tex. 1987); *Missouri Pacific Railroad Co. v. Lane*, 720 S.W.2d 830 (Tex. App.—Texarkana 1986, no writ); *Santa Rose Medical Ctr. v. Robinson*, 560 S. W.2d 751 (Tex. App.—San Antonio 1977, no writ). However, while Texas courts have refused to recognize loss of enjoyment of life damages as

Since 1890, Texas courts have allowed plaintiffs witnessing an injury suffered by a third party to recover damages for mental anguish. *Hill v. Kimball*, 13 S.W. 59 (1890). Before a bystander plaintiff may recover mental anguish damages, he or she must establish that the defendant had negligently inflicted serious or fatal injuries on the primary victim. *Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993).

Moreover, the injury to the bystander must have been foreseeable to the defendant. *See Kaufman v. Miller*, 414 S.W.2d 164 (Tex. 1967); *Freeman v. City of Pasadena*, 744 S.W.2d 923 (Tex. 1988). Foreseeability in bystander cases hinges on the three-pronged Dillon test applied by the California Supreme Court in *Dillon v. Legg*, 441 P.2d 912 (Cal. 1968) and adopted by the Supreme Court of Texas in *Freeman*. The three

an independent element of damages, evidence may be presented as to a plaintiff's loss of enjoyment of life, argued by counsel, and considered by the jury in deciding the extent of the injured party's injuries and damages in general and for pain and suffering. *See Missouri Pacific Railroad Co. v. Handley*, 341 S.W.2d 203 (Tex. Civ. App.—San Antonio 1960, no writ).

The most recent development in this area of the law comes from the case *Golden Eagle Archery, Inc. v. Jackson*, 116 S.W.3d 757 (Tex. 2003), in which the Texas Supreme Court ruminated as to whether "loss of enjoyment of life" was covered by the category "physical impairment" (the Court decided it should be) and, more importantly, whether or not it was compensable at all. The court stated that when a jury has multiple categories of damages to decide and is instructed not to overlap between those categories, a court of appeals reviewing such cases must consider whether the jury might have awarded damages for a particular category in one of the other categories and must presume that the jury did not award damages twice for overlapping elements.

VII. BYSTANDER DAMAGES

Dillon factors are: (1) whether plaintiff was located near the scene of the accident as contrasted with one who was a distance away from it; (2) whether the shock resulted from a direct emotional impact upon plaintiff from the sensory and contemporaneous observance of the accident, as contrasted with learning of the accident from others after its occurrence; and (3) whether the plaintiff and the victim were closely related, as contrasted with an absence of any relationship or the presence of only a distant relationship. *Billington v. Lamberson*, 190 S.W.3d 115, 117 (Tex. App.—Amarillo 2005, no pet.).

This three-part test, however, is not inflexible, and is tempered with the caveat that each case must be evaluated on its own merits. *See Robinson v. Chiarello*, 806 S.W.2d 304 (Tex. App.—Fort Worth 1991,

writ denied). The requirement of a contemporaneous perception of the incident giving rise to the injuries has been liberally construed. The bystander need not have actually observed the incident so long as he/she was brought so close to the reality of the accident as to render his/her experience an integral part of it.

The rule that plaintiff and the victim must be "closely related" limits the bystander recovery to close family members.

See, e.g., *Genzer v. City of Mission*, 666 S.W.2d 116, 121-122 (Tex. App.—Corpus Christi 1983, ref'd n.r.e.) (grandparents); *General Motors v. Grizzle*, 642 S.W.2d 837, 844 (Tex. App.—Waco 1982, writ dismissed) (mother); *Hinojosa v. South Texas Drilling & Exploration*, 727 S.W.2d 320, 321, 324 (Tex. App.—San Antonio 1987, no writ) (recovery denied to victim's coworker and close friend who had no familial relationship); *Landreth v. Reed*, 570 S.W.2d 486, 490 (Tex. Civ. App.—Texarkana 1978, no writ) (sister). "Closely related" has been defined as "relatives residing in the same household, or parents, siblings, children and grandparents of the victim." Thus, parents, siblings, children and grandparents may recover as bystanders even if they did not live with the victim, while other relatives must prove that they lived in the same residence with the victim in order to recover.

Garcia v. San Antonio Housing Authority,

Bystander recovery is not limited by governmental immunity if bystander satisfies the three part test in *Edinberg* and established that the defendant negligently inflicted serious or fatal injuries on the primary victim. *Hermann Hospital v. Martinez*, 900 S.W.2d 476 (Tex. App.—Houston [14th Dist.] 1999).

In a related case with this outcome, *General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005), stating that claims such as those in *Rigby* were based upon "inadequate monitoring, supervision, and health care,"

859 S.W.2d 78, 81 (Tex. App.—San Antonio 1993, no writ) (uncle of victim may recover if he lived in same household as victim).

A stepfather who did not have contemporaneous perception of his stepson's injuries was denied recovery for mental anguish damages suggesting that step-relationships are excluded from the bystander doctrine. However, in affirming the court of appeals judgment, the Texas Supreme Court relied solely on the contemporaneous perception test. *City of Pasadena v. Freeman*, 731 S.W.2d 590, 595 (Tex. App.—Houston [14th Dist.] 1987), *aff'd on other grounds*, 744 S.W.2d 923 (Tex. 1988). The question remains open as to whether the "familial relationship" covers stepparents and stepchildren.

The Texas Supreme Court limited bystander recovery in *Edinburg Hospital Authority v. Trevino*, 941 S.W. 2d 76 (Tex. 1997), to exclude medical malpractice cases as a matter of law. The Court reasoned that the bystander's inability to distinguish between medical malpractice and helpful medical treatment, as well as the physician's primary duty to the patient, prevents recovery of bystander damages in medical malpractice actions. *Morrell v. Finke*, 184 S.W.3d 257 (Tex. App.—Fort Worth 2005, pet. abated).

App.—Houston [14 Dist.] 2002, pet. denied). The Houston appellate court allowed recovery by distinguishing the assault from a medical procedure governed by an accepted standard of safety within the health care industry. *Id.* at 621-22. However, the Texas Supreme Court *disagreed with this outcome*. *General Partner, Inc. v. Rubio*, 185 S.W.3d 842 (Tex. 2005), stating that claims such as those in *Rigby* were based upon "inadequate monitoring, supervision, and health care,"

and thus disapproved of Rigby, and other cases with similar holdings, "to the extent they hold that the patients' claims for assault by other patients are not health care liability claims, as the Legislature defined that term."

Id.

The following are illustrative of some cases in which bystander recovery of mental anguish damages has been allowed, together with an analysis of how the facts of each of these cases match the criteria of (1) proximity, (2) contemporaneous perception, and (3) relationship of the parties. Additionally, a summary of the physical manifestations noted in each case is discussed:

a. *Dave Snelling Lincoln-Mercury v. Simon*, 508 S.W.2d 923 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ).

1. Proximity to scene: mother was in automobile with son who fell out of vehicle into path of following car.
2. What observed: mother observed son run over and was with him on way to hospital when he died.
3. Relationship: mother/son.
4. Physical manifestations/injuries: traumatic depressive reaction.

b. *Landreth v. Reed*, 570 S.W.2d 486 (Tex. Civ. App.—Texarkana 1978, no writ).

1. Proximity to scene:

d. *Bedgood v. Madalin*, 589 S.W.2d 797 (Tex. Civ. App.—Corpus Christi 1979), *aff'd in part & rev'd in part*,

sisters attending the same day nursery.

2. What observed: No evidence that sister observed the other sister drowning, but did observe desperate attempts to save her sister's life (the resuscitation efforts).

3. Relationship: sister/

sister.

4. Physical manifestations/injuries: hyperactivity; distract-ability; weight loss; extreme nervousness; difficulty sleeping.

c. *Covington v. Estate of Foster*, 584 S.W.2d 726 (Tex. Civ. App.—Waco 1979, writ ref'd n.r.e.).

1. Proximity to scene: in same automobile with injured daughter, and parents themselves were injured.

2. What observed: the accident itself, plus child comatose for days, paralyzed, spastic on left side, suffered brain damage, etc.

3. Relationship: parents/minor child.

4. Physical manifestations/injuries: nervous stomach ulcers; general nervousness; difficulty sleeping; unable to concentrate.

600 S.W.2d 773 (Tex. 1980).

1. Proximity to scene: father

in backyard with son in front of house.

2. What observed: father heard a scream and a thud like a watermelon being dropped from a great height and rushed to the front yard where he found his fatally injured son.

child.
3. Relationship: father/

4. Physical manifestations/injuries: depression; sleeplessness; nerves; testimony that depression causes changes in the brain cells.

e. *Haught v. Maceluch*, 681 F.2d 291 (5th Cir. 1982), *rehearing denied*, 685 F.2d 1385 (1982)

1. Proximity to scene: Because case involved the traumatic experience of a mismanaged childbirth (medical malpractice case), the court observed that "not only was [plaintiff] located near the scene of the accident, she was, in some sense, the scene itself."

2. What observed: Mother was conscious throughout a protracted and difficult labor and delivery which lasted more than eleven hours. "She perceived that something was wrong, wrong

4. Physical manifestations/injuries: difficulty concentrating; crying spells;

enough to cause her to fear for her child's life. She was aware of Dr. Maceluch's negligent acts..."

child.
3. Relationship: mother/

4. Physical manifestations/injuries: no mention is made in the court's decision of physical manifestations, and apparently the issue was submitted to the jury on a "mental anguish" theory. On the other hand, the evidence may have been undisputed that she had physical manifestations, and therefore went undiscussed.

f. *Apache Ready Mix Co. v. Creed*, 653 S.W.2d 79 (Tex. App.—San Antonio 1983, writ *dism'd*).

1. Proximity to scene: mother in car with daughter (mother also injured in accident).

2. What observed: Following the impact, the mother saw blood on face of her child and observed crushed glass, then the mother lost consciousness and didn't see her daughter for ten days.

3. Relationship: mother/minor daughter.

nightmares; sleeplessness; apathy; no energy; depressive neurosis; delayed stress

syndrome.

g. *Genzer v. City of Mission*, 666 S.W.2d 116 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.).

1. Proximity to scene: both grandparents and parents were involved and seriously injured in same explosion that killed the grandchild.

2. What observed: both grandparents and the father observed the injuries to the child but the mother was rendered unconscious and was apprised of the child's injuries upon regaining consciousness.

3. Relationship: grand-parents and parents/minor child.

4. Physical manifestations/injuries: The court did not discuss physical manifestations. Both the grandparents and parents seeking bystander recovery damages were themselves injured in the explosion.

h. *Dawson v. Garcia*, 666 S.W.2d 254 (Tex. App.—Dallas 1984, no writ).

1. Proximity to scene: wife and children with their husband and father in the same car (wife and children also injured in accident).

2. What observed: The

plaintiffs did not actually see or hear the injury or death of their husband and father, but they were in the same accident and were held to have had an experiential perception of the accident as they were injured in and survived the very same accident.

3. Relationship: wife and children/deceased husband and parent.

4. Physical manifestations/injuries: This was not discussed in the opinion, as each of the plaintiffs was injured in the same accident.

[NOTE: Although this was a death case it was tried as a bystander case, and it is assumed that it was tried before *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983)].

i. *Williams v. Steves Industries, Inc.*, 678 S.W.2d 205 (Tex. Civ. App.—Austin 1984), *aff'd.*, 699 S.W.2d 570 (Tex. 1985).

1. Proximity to scene: mother in car with her two minor children (mother also injured in accident).

2. What observed: The mother was confused, semi-conscious, unconscious following the accident and defendant challenged whether she perceived the injuries.

3. Relationship: mother/minor children.

4. Physical manifestations/injuries: The court did not discuss any physical manifestations of mental anguish, but plaintiff, herself (the mother), was injured.

j. *City of Austin v. Davis*, 693 S.W.2d 31 (Tex. Civ. App.—Austin 1985, writ ref'd n.r.e.).

1. Proximity to scene: father intensely involved in search for his son confined in a hospital and was present when his son's body was found at the bottom of an air shaft on the hospital premises.

2. What observed: Observed and participated in the search for his son and was present and observed the discovery of his son's body at the bottom of an air shaft.

3. Relationship: father/son.

4. Physical manifestations/injuries: The appellate court noted that the parties had stipulated that the plaintiff suffered physical injury from emotional distress.

In the California case of *Ochoa v. Superior Court of Santa Clara County*, 216 Cal.Rptr. 661 (Cal. 1985), the California Supreme Court held that a parent witnessing ongoing harm to a child, as distinguished

The statutory beneficiaries are surviving parents, children and spouses. Brothers and sisters may not recover for the

from a sudden occurrence, can recover for negligent infliction of mental distress. The mother was with her son who died of bilateral pneumonia when his pain, fever, etc. went untreated in the county facility.

In a case from the Corpus Christi Court of Appeals, *Rodriguez v. Motor Express, Inc.*, 909 S.W.2d 521 (Tex. App.—Corpus Christi 1995), *rev'd on other grounds*, 925 S.W.2d 638 (Tex. 1996), the Supreme Court held that a cousin-in-law was not so closely related that he could pursue a bystander theory to recover damages. The Court based much of its reasoning on the three-part test in *Freeman* as well as *Garcia v. San Antonio Housing Authority*, 859 S.W.2d 78, 81 (Tex. App.—San Antonio 1993, no writ). *Garcia* limited recovery to relatives residing in the same household or parents, siblings, children, and grandparents of the victim. A more recent case limiting bystander recovery even further is *Billington v. Lamberson*, 190 S.W.3d 115, 117 (Tex. App.—Amarillo 2005, no pet.), in which the Amarillo Court of Appeals held an adult grandchild could not recover bystander damages for the death of her grandmother because they were not "closely related" - the adult grandchild had never shared common residence with her grandmother, and the grandchild was married and lived in adjoining county.

VIII. DAMAGES FOR WRONGFUL DEATH

The Texas Wrongful Death Act, TEX. CIV. PRAC. & REM. CODE § 71.002, provides that certain statutorily designated beneficiaries may recover their "actual damages" sustained as a result of a decedent's wrongful death.

wrongful death of their siblings under the Texas Wrongful Death Act. *Perez v. Central Power & Light Co.*, 27 S.W.2d 641

(Tex. Civ. App.—San Antonio 1930, writ ref'd.). In *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983), the Texas Supreme Court abolished the pecuniary damage rule and allowed parents to recover damages for loss of companionship and society, as well as mental anguish arising from the death of their child. In *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), the Texas Supreme Court, realizing that no logical reason existed for treating statutory beneficiaries under the Wrongful Death Act differently, held that children were entitled to recover loss of companionship and mental anguish damages resulting from the death of their parents. The court in *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630 (Tex. 1986) allowed statutory beneficiaries to recover loss of inheritance damages. Lastly, the court held in *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986), that mental anguish damages were recoverable in wrongful death actions without the necessity of proving "physical manifestations" of the mental anguish.

Recently the San Antonio Court of Appeals ruled that transsexual spouses cannot be statutory beneficiaries under the wrongful death statutes, since such marriages are not recognized under Texas law. *Littleton v. Prange*, 9 S.W.3d 223, 224 (Tex. App.—San Antonio 1999, pet. denied).

A. Changes in the Law

According to the tort reform laws that went into effect in 1993, damages for civil liability in wrongful death or survival actions against a physician or health care provider are now limited to \$500,000 per claimant, regardless of the number of defendant physicians or health care providers against whom the claim is asserted or the number of separate causes of action

on which the claim is based. TEX. CIV. PRAC. & REM. CODE § 74.303(a). Unlike the damage caps for personal injury damages, these are adjusted according to fluctuations of the consumer price index. TEX. CIV. PRAC. & REM. CODE § 74.303(b).

This limit encompasses all wrongful death and survival damages against a physician or health care provider (including exemplary damages) except expenses for necessary medical, hospital, and custodial care received before judgment or required in the future for treatment of the injury. TEX. CIV. PRAC. & REM. CODE § 74.303(a)-(c). Jurors will be instructed not to consider whether any damages limits apply. TEX. CIV. PRAC. & REM. CODE § 74.303(e)(1). Also, the liability of any insurer under the "Stowers Doctrine," shall not exceed the liability of the insured. TEX. CIV. PRAC. & REM. CODE § 74.303(d).

B. Elements of Wrongful Death Damages

The elements of damages recoverable by parents for wrongful death are generally divided into four categories: (1) pecuniary loss; (2) loss of companionship and society; (3) mental anguish; and (4) loss of inheritance. These four kinds of damages were set out and discussed at length in the landmark wrongful death case *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986).

In *Sanchez v. Schindler*, Texas joined the majority of American jurisdictions to abolish the pecuniary loss rule, which *required* that a wrongful death beneficiary show pecuniary loss to recover. *Sanchez v. Schindler*, 651 S.W.2d 249, 252-53 (Tex. 1983). Now, wrongful death beneficiaries may recover for loss of companionship and society, mental anguish, and loss of inheritance, in addition to, or even in the absence of, pecuniary loss. *See Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986).

The jury is also to be instructed, where such elements are submitted, that mental anguish, loss of society and companionship, loss of inheritance, or pecuniary loss are

separate elements of recovery. *Moore*, 722 S.W.2d at 685.

"Pecuniary loss" means the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, excluding loss of inheritance, that the plaintiff, in reasonable probability, would have received from the deceased had he/she lived.

See *Moore v. Lillebo*, 722 S.W.2d 683 (Tex. 1986); see also State Bar of Texas, 3 *Texas Pattern Jury Charges* § 9.2 (2003); *El Paso Elec. Ry. Co. v. Benjamin*, 202 S.W. 996, 998 (Tex. App.—El Paso 1918, writ dismissed); *International & G. N. Ry. Co. v. McVey*, 87 S.W. 328, 329 (Tex. 1905).

To support an award for pecuniary loss, the plaintiff beneficiaries must demonstrate through evidence the loss of support or services of their deceased family member.

Reasonable and necessary expenses for psychological counseling, both past and future, may also be recovered as pecuniary losses suffered as the result of a wrongful death.

City of Dallas v. Cox, 793 S.W.2d 701, 734 (Tex. App.—Dallas 1990, no writ).

Evidence of pecuniary loss should be specific. J. Hadley Edgar & James Sales, *Texas Torts & Remedies* § 86.03[2][iii][B], 86-46 (Supp. 1992). A jury's failure to award damages for pecuniary loss was found to be proper where the only evidence of pecuniary loss was the testimony of decedent's mother that her son "helped her when he could afford it," and that on the day of his death, he had given her \$40.00. *Seale v. Winn Exploration Co.*, 732 S.W.2d 667, 670 (Tex. App.—Corpus Christi 1987, writ denied).

2. Loss of Support or Services of a Parent

A parent is entitled to recover the pecuniary value of the child's services until he would have reached majority (eighteen years). See State Bar of Texas, 3 *Texas Pattern Jury Charges* §9.4 (2003). The theory behind allowing this recovery is that the earnings of the minor child are subject to the "joint management, control, and disposition of the parents." TEX. FAM. CODE § 3.103. The State Bar Committee which drafted the Pattern Jury Charges expresses no opinion as to whether this type of pecuniary

1. Pecuniary Loss

The child in a wrongful death suit is entitled to recover, as pecuniary damages, for the loss of the care, maintenance, support, services, advice, counsel, and reasonable contributions of a pecuniary value, excluding loss of inheritance, that the plaintiff in reasonable probability, would have received from the deceased parent. TEX. CIV. PRAC. & REM. CODE § 71.001-.011; see State Bar of Texas, 3 *Texas Pattern Jury Charges* § 9.3); *Moore v. Lillebo*, 722 S.W.2d 693 (Tex. 1986); *Cavnar v. Quality Control Parking, Inc.*, 696 S.W.2d 549 (Tex. 1985), *overruled on other grounds, Johnson & Higgins, Inc. v. Renneco Energy Inc.*, 962 S.W.2d 507 (Tex. 1998); *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983); *Hope v. Seahorse, Inc.*, 651 F. Supp 976 (S. D. Tex. 1986); *Samford v. Duff*, 483 S.W.2d 517, 528-29 (Tex. Civ. App.—Corpus Christi 1972, writ refused n.r.e.). If the adult child is physically or mentally challenged or handicapped, additional pecuniary damages which the deceased parent would have contributed to the child for his maintenance and support may be appropriate.

3. Loss of Support or Services of a Child

Pecuniary damages for a deceased child are considered the separate property of the spouse who suffers for the child's loss. Thus, if the negligence of one spouse contributed to the death of the child, damages for loss of pecuniary benefits to the non-negligent spouse is not subject to reduction for contributory negligence. See, e.g., *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W.2d 641, 646 (Tex. App.—Amarillo 1987, no writ).

loss should be awarded jointly to the parents, or to each parent separately, unless the parents are divorced or separated. 3 *Texas Pattern Jury Charges* § 9.4 (2000); see TEX. CIV. PRAC. & REM. CODE § 71.010(b).

Evidence of a close mother-child relationship was held sufficient to support an inference that the child would have been of great financial assistance to his mother in her advanced years, or in the event of hardship. *Mercy Hosp. of Laredo v. Rios*, 776 S.W.2d 626, 633 (Tex.

App.—San Antonio 1989, writ denied).

For the loss of an adult child, a parent is entitled to pecuniary damages of "care, maintenance, support, services, advice, counsel, and reasonable contributions" that, in reasonable probability, the parent would have received from the child had he lived. *Moore v. Lillebo*, 722 S.W.2d 683, 687 (Tex. 1986); State Bar of Texas, 3 *Texas Pattern Jury Charges* § 9.5 (2003). Such pecuniary losses may include the monetary value of lost advice, counsel, and services of the child, such as in business decisions, family financial decisions, and personal difficulties. See *Borak v. Bridge*, 524 S.W.2d 773, 776 (Tex. Civ. App.—Corpus Christi 1975, writ ref'd n.r.e.); see also J. Hadley Edgar & James Sales, 4 *Texas Torts & Remedies* § 86.03[2][a], n. 64 (1993).

Evidence of lost care, maintenance, and support must be shown. The plaintiff may demonstrate lost care, maintenance, and support by evidence of the decedent's past history of regularly contributing to the support of his family.

For example, in *Levinge Corp. v. Ledezma*, there was evidence that since age 7, the decedent had worked to help support his family. 752 S.W.2d 641, 643 (Tex. App.—Houston [1st Dist.] 1988, no writ). He had always given a part or all of his earnings from his various jobs to his mother. **When he worked for a fruit store, he brought home fruit.** When he was 13 years old, he worked at a bakery and brought bread for the family. As a houseboy at age 15, he gave his entire

Loss of society was first recognized by the supreme court in *Sanchez v. Schindler*, a case which allowed parents to recover for the loss of companionship and society for the wrongful death of a minor child. 651 S.W.2d 249 (Tex. 1983). Later, in *Cavnar v. Quality Control Parking, Inc.*, the court expanded the holding in *Sanchez* to declare that all wrongful death beneficiaries, surviving spouse, children, and parents -- even parents of deceased adult children--have a cause of action for loss of society. 696 S.W.2d 549, 551 (Tex. 1985); see also *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 635-36 (Tex. 1986).

salary to his mother, and on occasion brought home food.

When he worked a beer delivery route, he brought his mother 20-25 pesos a week. At age 18, when he sold snack foods to restaurants and bars, he contributed 2,000 pesos to his mother and brought home groceries. When he worked in the United States, he sent his mother \$300 per month, which was 45% of his income.

Based on such evidence, and evidence from economists to calculate the loss of income, the court of appeals upheld an award of \$215,000 to the decedent's mother for loss of support.

4. *Loss of Companionship and Society*

Loss of society and companionship are elements of loss of consortium. *Texas Dept. of Transp. v. Ramming*, 861 S.W.2d 460, (Tex. App.—Houston [14th Dist.] 1993, no writ) (citing *Whittlesey v. Miller*, 572 S.W.2d 665, 666 (Tex. 1978)).

"Loss of society" is the loss of the positive benefits which flowed from the love, comfort, companionship, and society to the family by the decedent's being a part of the family. *Moore v. Lillebo*, 722 S.W.2d at 688; *Levinge Corp.*, 752 S.W.2d at 646. Loss of society asks includes the positive benefits that have been taken away from the beneficiaries by reason of the wrongful death. *Moore*, 722 S.W.2d at 688.

The supreme court has held that loss of companionship and society is to be defined in the court's charge as the loss of positive benefits flowing from the love, comfort, companionship, and society the named plaintiff would, in reasonable probability, experience if the decedent lived. 3 *Texas Pattern Jury Charges* §§ 9.2-9.5 (2003).

In addition to lost financial contribution that the decedent spouse would have made, a surviving spouse is also entitled to recover for the value of lost services, advice, and counsel. See *Page v. Scaramozi*, 288 S.W.2d 909, 912 (Tex. Civ. App.—San Antonio 1956, writ ref'd

n.r.e.); State Bar of Texas, 3 *Texas Pattern Jury Charges* §9.2 (2003).

As with mental anguish damages, the jury is instructed that in awarding damages for loss of companionship and society, it may consider:

- (1) the relationship between the husband and wife, or parent and child;
- (2) the living arrangements of the parties;
- (3) any absence of the deceased from the beneficiary for extended periods;
- (4) the harmony of family relations; and
- (5) common interests and activities

Moore, 722 S.W.2d at 688.

Thus, the evidence of the wrongful death beneficiary should concentrate on these elements.

Proof of loss of companionship and society may be established through the testimony of family members or other witnesses.

For example, in *Moore v. Lillebo*, the decedent's father testified that Paul had lived with his father during high school, and accompanied him to military duty stations in Europe. 722 S.W.2d at 687. He testified that Paul "was always helping us in anything we had to do." Paul and his father confided in each other, and talked about important decisions. There was evidence

In *Living Centers of Texas, Inc. v. Penalver*, 217 S.W.3d 44 (Tex. App.—San Antonio 2006, pet. granted) *rev'd on other grounds*, 256 S.W.3d 678. The San Antonio Court of Appeals sustained damages awarded to two sons for past and future loss of companionship and support after their mother's death. The sons had both kept a close relationship with their mother throughout life, and visited her often. At least one of the sons visited their mother each day to pray, socialize, and take care of her general needs. The court explained, "that [the decedent] was an integral part of her sons' daily lives until the very moment of her death." It further explained the fact that the sons had begun to mentally prepare for their ailing mother's death did not negate the mental anguish

that Paul had written to his father, expressing his love, and asked him to come to graduation from basic training because he wanted to make his father proud.

The decedent's mother testified that she and Paul competed together in rifle competitions. **She taught Paul to cook, and he was cooperative with household chores.** Mother and son spent summers together at a lake house in Michigan, and enjoyed cooking together, and when apart, they exchanged recipes by mail.

He helped her with cooking, yardwork, and repairing the family car.

Levinge Corp. v. Ledezma provides another example of proof of loss of companionship and society. 752 S.W.2d at 646. In *Levinge*, testimony from the decedent's parents and sister was the decedent was a generous young man who regularly brought home food, gifts, and school supplies for the family. 752 S.W.2d 646. The decedent always worked, gave money to his mother. **He paid for doctor bills and medicine for his siblings, and planned to purchase a house someday for his mother.** His mother testified that she loved him very much, and will never again have a child like him. There was also testimony that the decedent was the one who organized the family get-togethers, unified the family, and was his parent's hope to escape poverty. This testimony supported an award to the parents of \$100,000 for loss of society.

they suffered when the defendant negligently-caused her death.

At least one court has held, in a wrongful death case, that non-pecuniary damages for loss of companionship and mental anguish need not be reasonably proportional to any damages awarded for pecuniary loss. *Missouri Pac. Ry. Co. v. Lane*, 720 S.W.2d 830, 833 (Tex. App.—Texarkana 1986, no writ).

a. Use of Expert Testimony

Expert opinion may also be used to assist the jury to measure damages for loss of society. In *Guzman v.*

Guajardo, the plaintiff was assisted by the testimony of an economist, who testified as to the average income of members of the "helping professions, such as counselors or clergy, as some proof of the positive benefits which a supportive relationship provides, and as a guide to measure the value of non-pecuniary losses. 761 S.W.2d 506, 511-512 (Tex. App.—Corpus Christi 1988, writ denied). The economist assessed a dollar value for each plaintiff's loss of society with their son, by application of the average hourly rate of a professional counselor to the number of hours the decedent would have probably spent with each plaintiff during his normal life expectancy.

5. *Mental Anguish*

Since *Sanchez v. Schindler*, 651 S.W.2d 249 (Tex. 1983), a parent is entitled to recover damages for mental anguish experienced because of the wrongful death of a child. See also *Levinge Corp. v. Ledezma*, 752 S.W.2d 641, 646 (Tex. App.—Houston [1st Dist] 1988, no writ).

However, another court has noted that a distinction can be made between a recovery for grief and bereavement and one of mental anguish, although the distinction is difficult. *Missouri Pac. R. R. Co. v. Dawson*, 662 S.W.2d 740, 742-43 (Tex. App.—Corpus Christi 1983, writ ref'd n.r.e.). The First Court of Appeals indicated it might uphold separate recoveries for "mental anguish" and "grief and bereavement." *Levinge Corp.*, 752 S.W.2d at 646-47. However, because the plaintiffs had not distinguished between "mental anguish" and "grief and bereavement" in the presentation of their case, the awards for past and future "grief and bereavement" were deleted. *Id.* However, note that one justice would not so hold. *Id.*

The supreme court has held that mental anguish is to be defined in the court's charge, in a wrongful death case, as "the emotional pain, torment, and suffering that the named plaintiff would, in reasonable probability,

For wrongful death cases, "mental anguish" has been defined as an emotional response to the wrongful death of another. *Moore v. Lillebo*, 722 S.W.2d 683, 687 (Tex. 1986); *Levinge Corp. v. Ledezma*, 752 S.W.2d 641, 646 (Tex. App.—Houston [1st Dist] 1988, no writ). Awards for mental anguish are to compensate the wrongful death beneficiary's pain, torment, and suffering which he experienced from the death of the family member. *Moore*, 722 S.W.2d at 688; *Levinge*, 752 S.W.2d at 646.

In a wrongful death case, mental anguish is concerned not with benefits which may have been lost, but with compensating the beneficiary for his harrowing experience resulting from the death of a loved one. *Moore*, 722 S.W.2d at 688. The supreme court has said that mental anguish damages ask about the negative effect of the death on the beneficiary: "what deleterious effect has the death . . . had upon the claimants?" *Id.*

At least one court has held that "grief and bereavement" are not separate elements of recovery for wrongful death, but are elements of "mental anguish." *Whipple v. Deltscheff*, 731 S.W.2d 700, 703 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.); see also *Levinge Corp.*, 752 S.W.2d at 647 (Cohen, J., concurring).
experience from the death of the family member." *Moore*, 722 S.W.2d at 688; see also State Bar of Texas, 3 *Texas Pattern Jury Charges* §§ 9.2-9.5 (2003).

a. Proving Mental Anguish Damages in Wrongful Death

Proof of a close family relationship is evidence of mental anguish. See *Johnson v. Holly Farms of Texas, Inc.*, 731 S.W.2d 641, 647 (Tex. App.—Amarillo 1987, no writ). Wrongful death beneficiaries do not have to establish psychic or physical detriment to recover for mental anguish. *Whipple v. Deltscheff*, 731 S.W.2d 700, 703 (Tex. App.—Houston [14th Dist.] 1987, writ ref'd n.r.e.). Testimony which establishes a bond of affection between parents and a child is sufficient to establish entitlement to mental anguish damages. *Id.*

The supreme court has held that proof of the family relationship constitutes some evidence that the parents of a decedent suffered mental anguish from the death of their son. *Moore*, 722 S.W.2d at 686. It criticized the opinion of the court of appeals, which had held there was no evidence of mental anguish because there was no testimony as to how the parents learned of their son's death, whether they attended the funeral, or what effect the loss of their child had on their lives. *Id.*

The supreme court quoted, with approval, the following language from the Eight Circuit's opinion in *Connell v. Steel Haulers, Inc.*:

We do not think that Arkansas law requires that parents of a deceased child necessarily make a public exhibition of their grief before or during trial We are not convinced that mental anguish necessarily manifests itself objectively to the world, nor do grief stricken parents need to offer

In short, in a wrongful death case, proof of the family relationship is, at the least, some evidence to support a verdict for mental anguish. *Id.* Family members are not deprived of their ability to recover for mental anguish, merely because they suffer quietly or are stoic. However, as a practical matter, the practitioner is cautioned that it is advisable to introduce evidence of the mental anguish of the family member, within the bounds of good taste.

Proof of mental anguish may be established through the testimony of family members or other witnesses. *See, e.g., Levinge Corp. v. Ledezma*, 752 S.W.2d at 646 (testimony by mother and father of their mental anguish due to son's death); *Guzman v. Guajardo*, 761 S.W.2d 506, 511-512 (Tex. App.—Corpus Christi 1988, writ denied)(testimony of family relationships by psychologist who briefly interviewed parents of decedent).

In wrongful death cases, it is no longer necessary to prove that mental anguish is physically manifested. *Moore*, 722 S.W.2d at 686. A physical manifestation of mental anguish is evidence of the extent of the mental

evidence of physical symptoms such as sleeplessness, weight loss, nervousness, personality changes, and the like. Mental anguish represents a deep inner feeling of pain and hurt often borne in silence. We are satisfied from our reading of the Arkansas cases that parents, such as the Connells, are entitled to have the jury on the basis of the emotional impact suggested by the circumstances surrounding their loss. We are convinced that assessment of the resulting grief is a task for which juries have traditionally be considered well-suited, and in which they can be properly expected to draw upon their own experience and empathy. *Id.*, quoting *Connell v. Steel Haulers, Inc.*, 455 F.2d 688, 691 (8th Cir. 1972).

anguish suffered, but it is no longer the only proof of mental anguish. *Id.*

However, as a practical matter, where physical manifestations of a beneficiary's suffering are present, it is important to demonstrate them to a jury.

For example, in *Levinge Corp. v. Ledezma*, there was testimony from the mother and decedent's sibling that the decedent's mother developed health problems soon after her son died. 752 S.W.2d at 646. Her health problems included pains in her head, legs, and left arm, high blood pressure, insomnia, and nervousness. Mrs. Ledezma testified that not one day passed that she did not think about her son. She testified that the entire family had been saddened by her son's death, to the point of making her ill. She had not told her two youngest daughters of her son's death, because she knew that it would make them ill.

Mrs. Ledezma and her daughter, Patricia, testified that Mr. Ledezma was sad, and cries over his son's death.

Mr. Ledezma testified that his health had been perfect before his son died, but that subsequently he had been ill and developed

a drinking problem. He testified that not a day went by that he did not think about his dead son.

The evidence of mental anguish for the death of a son, through testimony from the parents and a sibling, supported an award of \$475,000 in mental anguish.

Another extreme case serves as an example. In *Harris County Hosp. Dist.*, family members testified to their close relationship. 872 S.W.2d 759 (Tex. App.—Houston [1st Dist.] 1993, writ denied). The family watched the decedent, conscious and alert, suffer a slow, painful death for sixteen days. Her body smelled like burned meat, and her skin came off when the bedsheet was lifted. The court held the evidence sufficient to support the damage award.

A mother may recover for mental anguish damages for the loss of the fetus as a part of the woman's body. *Krishnan v. Rameriez*, 42 S.W.3d 205 (Tex.App.—Corpus Christi 2001, pet.denied); *Edinburg Hospital Authority v. Trevino*, 941 S.W.2d 76 (Tex.1997). The court's ruling in *Edinburg* supported the court's previous decision in *Krishnan v. Sepulveda*, 916 S.W.2d 478, 481 (Tex.1995), that allowed a mother to recover mental anguish damages in a personal injury action that has as an element the loss of a fetus. The Texas legislature mirrored Texas case law in 2003 when it amended the TEX.CIV.PRAC.& REM CODE § 71.003(a) to say "This subchapter applies only if the individual injured would have been entitled to bring an action for the injury if *the individual had lived or had been born alive.*" (*Emphasis added*).

Please note, only a mother may recover damages for the loss of a fetus. *Cathey v. Booth*, 900 S.W.2d 339, 342 (Tex. 1995). Mental anguish damages for loss of a fetus are not recoverable by the father from either the treating physician or the hospital because neither owes a duty to him. *Id.*

6. Loss of Inheritance

"Loss of inheritance" means the earnings, if any, of the decedent in excess of the amount he would have used for the support of himself and his family, and which in reasonable probability would have been added to his

The assessment of a mental anguish award is not subject to precise calculation, and is thus particularly within the province of the trier of fact. *Levinge Corp. v. Ledezma*, 752 S.W.2d 641, 646 (Tex. App.—Houston [1st Dist] 1988, no writ); *Gulf States Util. v. Dryden*, 735 S.W.2d 263, 268 (Tex. App.—Beaumont 1987, no writ). It is set aside or remitted only if the award was based upon passion, prejudice, or improper motive. *Levinge Corp.*, 752 S.W.2d at 646.

b. Mental Anguish for Wrongful Death of a Fetus

estate and left to [legal beneficiary] at his natural death had [legal beneficiary] survived him. See *Yowell v. Piper Aircraft Corporation*, 703 S.W.2d 630 (Tex. 1986).

C. Death of a Statutory Beneficiary

A personal injury or wrongful death action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives. TEX. CIV. PRAC. & REM. CODE § 71.021. A statutory beneficiary may not assign his cause of action except under the provisions of Sec. 12.014, Texas Property Code. *Trinity County Lumber Co. v. Holt*, 144 S.W. 1029 (Tex. Civ. App.—El Paso 1912, writ ref'd).

D. Effect of Remarriage

Remarriage does not prevent a surviving husband or wife from bringing a cause of action for death of his or her spouse. See *Bell Aerospace Corp. v. Anderson*, 478 S.W.2d 191 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.). This is true because damages are established at the time of death. See *Richardson v. Holmes*, 525 S.W.2d 293 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.). The mere fact of remarriage is admissible by statute. See TEX. CIV. PRAC. & REM CODE § 71.005. The fact of remarriage cannot, however, be used to mitigate

damages, and proof of effect of remarriage is inadmissible.

Most judges would instruct the jury, if requested, not to consider remarriage in mitigation of damages. See *Conway v. Chemical Leaman Tank Lines, Inc.*, 540 F.2d 837 (5th Cir. 1976). See also *Exxon v. Brecheen*, 526 S.W.2d 519 (Tex. 1975). The statute allows proof of remarriage permits proof only of a ceremonial marriage. All the statutory beneficiaries who are alive must be made parties, or one of the beneficiaries may bring the suit on behalf of all the statutory beneficiaries. See *Henwood v. Richardson*, 163 S.W.2d 256 (Tex. Civ. App.—Texarkana 1942, writ ref'd w.o.m.); *Avila v. St. Luke's Lutheran Hosp.*, 948 S.W.2d 841 (Tex. App.—San Antonio 1997, no pet.).

Non-joinder of all the beneficiaries is no longer fundamental error and will be waived if the defendant fails to object. See *Schafer v. Stevens*, 352 S.W.2d 471 (Tex. Civ. App.—Dallas 1961, no writ). A beneficiary may execute a disclaimer of any interest in the suit and waive any claim under the Texas Wrongful Death Act and thereby avoid being joined as a beneficiary against his will.

See *Rivera v. Chapa*, 233 F. Supp. 428 (S.D. Tex. 1964).

F. Relationship Between Pecuniary Losses and Human Losses

There is no requirement that damages for mental anguish and loss of society and companionship (human losses) in a death case be reasonably proportional to damages for pecuniary loss. *Missouri Pacific Railroad Co. v. Lane*, 720 S.W.2d 830 (Tex. App.—Texarkana 1986, no writ).

IX. SURVIVAL DAMAGES

The damages recoverable in a survival action consist of those for which the decedent could have recovered if he/she had lived, plus funeral expenses. See TEX. CIV. PRAC. & REM. CODE § 71.021; *Landers v. B. F. Goodrich Co.*, 369 S.W.2d 33 (Tex. 1963). Thus, recovery is allowed for medical and funeral expenses, property damage, physical pain and mental anguish, and other damages sustained by the decedent prior to his death. *Piper Aircraft Corp. v. Yowell*, 674 S.W.2d 447 (Tex.

and not a common law marriage, extramarital relation or prospective marriage. TEX. CIV. PRAC. & REM. CODE § 71.005.

E. Joinder of Parties

App.—Fort Worth 1984), *rev'd on other grounds*, 703 S.W.2d 630 (Tex. 1986).

Wrongful death actions and survival actions are separate and distinct causes of action. In a wrongful death action the legal beneficiaries under the Texas Wrongful Death Act recover their own damages suffered as a result of the death of the decedent, while under the Texas Survival Statute the decedent's estate recovers those elements of damages which the decedent might have sought had he or she lived. *Goode v. Shoukfeh*, 863 S.W.2d 547, 551 (Tex. App.—Amarillo 1993, no writ); See also *Carriere v. State Farm Mutual Auto Ins. Co.*, 581 S.W.2d 797 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.). For instance, in the context of an airplane crash the mental anguish suffered by a decedent from the time of the mid-air breakup until impact with the ground is a claim which would belong to and be brought by the decedent's estate. See *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 634 (Tex. 1986).

With respect to funeral bills which are properly pursued by the estate, the funeral bills must be reasonable.

See *Solis v. Garcia*, 702 S.W.2d 668 (Tex. Civ. App.—Houston [14th Dist.] 1985, no writ); *Tex & N.O.R. Co. v. Landrum*, 264 S.W.2d 530 (Tex. Civ. App.—Beaumont 1954, writ ref'd n.r.e.).

When an injured party lives for a short time before dying, there is often a dispute over whether the decedent experienced conscious pain and suffering before his or her death. Because the evidence is usually sparse about the decedent's comprehension of the injuries or condition, any verdict is generally attacked as being excessive. In the recent case of *Luna v. Southern Pacific Transportation Co.*, 724 S.W.2d 383 (Tex. 1987), the Supreme Court upheld a \$50,000 award for the estate of a four year old child who lived for approximately two weeks after the accident and

although he was completely paralyzed and severely unresponsive, there was evidence that he would open his eyes when his father visited him. The Supreme Court

The district court is still a proper forum for survival actions, notwithstanding an estate proceeding in the probate court and notwithstanding the amendment to the Texas Probate Code § 5(e), which provides, "In actions by or against a personal representative, the statutory probate courts have concurrent jurisdiction with the district courts." *Yowell v. Piper Aircraft Corp.*, 703 S.W.2d 630, 634 (Tex. 1986).

Hospital liens placed against the proceeds of a suit for personal injury damages for medical services rendered survives the death of a patient. However, only the amounts recovered under the survival statute are subject to the hospital lien. *See Tarrant County Hospital Dist. v. Jones*, 664 S.W.2d 191 (Tex. App.—Fort Worth 1984, no writ).

A. Prenatal Injuries

A child, if born alive, is entitled to maintain an action for prenatal injuries, reversing a well-settled rule of tort law. Texas was the last jurisdiction to allow recovery for prenatal injuries. *Leal v. C.C. Pitts Sand & Gravel Co.*, 419 S.W.2d 820 (Tex. 1967), overruling *Magnolia Coca-Cola Bottling Co. v. Jordan*, 78 S.W.2d 944 (Tex. Comm'n App. 1935).

The cause of action does not depend on the fetus being viable at the time of injury. A cause of action for prenatal injuries sustained at any prenatal stage exists as long as the child is born alive and survives. *Delgado v. Yandell*, 468 S.W.2d 475 (Tex. Civ. App.—Fort Worth 1971), *aff'd*, 471 S.W.2d 569 (Tex. 1971).

The Texas Courts have long held that "there is no wrongful death or survival cause of action for the death of a fetus." *Pietila v. Crites*, 851 S.W.2d 185, 187 (Tex. 1993).

But in *Krishnan, M.D. v. Sepulveda*, 916 S.W.2d 478 (Tex. 1995)(discussed *supra*) the court allowed a patient to recover mental anguish damages for the loss of the fetus as a part of the mother's body. The Sepulvedas had alleged negligence in the care and treatment of the

held that this constituted some evidence to support the jury's award.

mother, not the care and treatment of the fetus. The Court further held that the father could not recover for the mental anguish as a result of the negligent care and treatment of his wife. In 1987, the Supreme Court of Texas, construing the Wrongful Death Act, held that a fetus' parents have no cause of action for the fetus' death in the absence of a subsequent live birth. *See Witty v. American Gen. Capital Dist., Inc.*, 727 S.W.2d 503, 504-05 (Tex. 1987).

The supreme court has consistently affirmed this rule of law, even where the undisputed evidence has established that the fetus was in the third trimester, and would have been viable had it not been injured in the automobile collision. *See Blackman v. Langford*, 795 S.W.2d 742, 743 (Tex. 1990); *see also Tarrant County Hosp. Dist. v. Lobdell*, 726 S.W.2d 23, 23 (Tex. 1987). In *Edinburg Hospital Authority v. Trevino*, 941 S.W. 2d 76 (Tex. 1997), the supreme court again affirmed that no cause of action exists in Texas for wrongful death when the child is stillborn.

X. WRONGFUL LIFE CASES

Medical expenses were allowed as a recovery item where a child was born healthy after a negligently performed sterilization procedure, with the court denying recovery for loss of earnings and physical pain and mental anguish resulting from the birth. *Garwood v. Locke*, 552 S.W.2d 892 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

A claim for the care and maintenance of a child born healthy following an unsuccessful sterilization operation was denied on public policy grounds, i.e., the joy, benefit and value to the parents of a healthy child exceeded as a matter of law the expense of raising the child. *Terrell v. Garcia*, 496 S.W.2d 124 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.), *cert. den.*, 415 U.S. 927 (1974).

The same result was reached when parents brought a claim for the expenses of raising a healthy child conceived following an unsuccessful sterilization operation in *Sutkin v. Beck*, 629 S.W.2d 131 (Tex. Civ. App.—Dallas 1982, writ ref'd n.r.e.).

In *Crawford v. Kirk*, 929 S.W.2d 633 (Tex.App. — Texarkana, 1996 reh'g overr.), the Texarkana Court of Appeals held that the parents of a healthy child born after a negligently performed sterilization may recover only actual medical expenses from the failed sterilization procedure.

In the landmark case of *Nelson v. Krusen*, 678 S.W.2d 918 (Tex. 1984) the Texas Supreme Court squarely faced the issue of whether a cause of action exists on behalf of a child born with an impaired condition who is the result of a wrongful birth. In *Nelson*, the defendant physician failed to advise a couple that the mother was a genetic carrier of Duchenne muscular dystrophy which failure prevented the parents from terminating the pregnancy. The Texas Supreme Court held that Texas did not recognize a cause of action for "wrongful life". The Court reasoned that "ultimately, the infant's complaint is that he would be better off not to have been born. Man who knows nothing of death or nothingness, cannot possibly know whether this is so." *Id.* at 924. However, the parents' cause of action for the child's impairment was upheld, and they were awarded as damages the expenses necessary for care and treatment of

The Texas Supreme Court has allowed a plaintiff to bring separate actions for separate latent occupational diseases caused by exposure to asbestos. *Pustejovsky v. Rapid American Corp.*, 35 S.W.3d 643 (Tex. 2000). In *Pustejovsky*, Henry Pustejovsky, a metal pourer employed by Alcoa Aluminum in Rockdale, Texas, was diagnosed with asbestosis in 1982 after being exposed to asbestos fibers at work. Asbestosis is a non-malignant disease caused by inhaling asbestos fibers. He filed suit against Johns-Manville Corporation, an asbestos supplier, for damages related to his asbestosis. The suit was settled out of court for approximately \$25,000. In 1994, Pustejovsky began experiencing shortness of breath, cold-like symptoms and fatigue. He was re-examined and diagnosed with malignant pleural mesothelioma, a

the child's impairment proximately caused by the defendant's negligence. *Id.* at 923-24.

The Texas Supreme Court denied a claim for mental anguish brought by the parents of a child born deformed following the defendant doctor's negligent failure to diagnose and to inform the pregnant parent that she had rubella, which created a risk of infant deformity. The claim was permitted so far as the expenses necessary for the care and treatment of the child's physical impairment caused by the rubella. *Jacobs v. Theimer*, 519 S.W.2d 846 (Tex. 1975).

The same result was reached in *Hayes v. Hall*, 488 S.W.2d 412 (Tex. 1972), when the Texas Supreme Court allowed recovery for the medical and hospital expenses for treating a deformed child during the nine months the child lived, where a child was born following a negligently performed vasectomy.

Where the birth of a deformed child is not a foreseeable consequence of a negligent act (no proximate cause) such as negligence in the performance of an unsuccessful bilateral tubal ligation, no cause of action exists. *LaPoint v. Shirley*, 409 F.Supp. 118 (W.D. Tex. 1976).

XI. OTHER MISCELLANEOUS DAMAGES

A. Occupational Diseases & Time of Injury

cancerous tumor of the lung lining. Two months later, Pustejovsky joined with three other plaintiffs and sued Rapid American Corporation, Owens Corning Fiberglass Corporation, Pittsburg Corning Corporation and other suppliers of asbestos products. The asbestos companies filed a motion for summary judgment asserting that Pustejovsky's claim was barred by the statute of limitations, which they claimed began to run in 1982, when Pustejovsky was diagnosed with asbestosis. Pustejovsky contended that limitations did not bar his second suit.

1. Accrual of the Cause of Action

Texas courts have adopted the “manifestation theory” in deciding when a cause of action for latent occupational disease accrues. In *Childs v. Haussecker*, 974 S.W.2d 31, 33 (Tex. 1998), the Texas Supreme Court addressed the correct formulation and application of the discovery rule in the latent occupational disease context in setting forth the rule that a cause of action in such a case accrues whenever a plaintiff’s symptoms “manifest themselves to a degree or for a duration that would put a reasonable person on notice that he or she suffers from some injury and he or she knows, or in the exercise of reasonable diligence should have known, that the injury is likely work-related.”

In *Childs*, the court addressed two separate cases in which the plaintiffs had silicosis, a disease that results from “occupational exposure to and inhalation of silica dust over a period of years” and is characterized by a slowly progressive fibrosis of the lungs. It was left to the court to determine when their respective causes of action accrued.

The court found that the plaintiff in the underlying *Childs* suit, Haussecker, had diligently consulted several doctors about the cause of his injuries, but was repeatedly assured that his symptoms were not work-related. Defendant Childs had offered no summary judgment evidence indicating whether Haussecker continued to consult doctors from 1978 to 1988 or, assuming he had not, whether Haussecker’s idleness during this time kept him from discovering that he had an occupational illness.

Still, lawyers must occasionally look to scientific evidence to determine exactly when an injury occurs. A large body of scientific information is developing with respect to asbestos, and that connection is becoming very shortly (within minutes to hours) after asbestos fibers are deposited in the lungs. All asbestos-related diseases, whether benign or malignant, are characterized by relentless progression. Lung injury is produced by at least three separate mechanisms:

a. Mechanical Injury

This is produced by direct penetration of the fibers from the alveolar septa and capillaries. Such injury has been

Under these circumstances, a material fact question existed regarding whether Haussecker discovered or, through reasonable care and diligence, should have discovered that he likely suffered from an occupational disease before April 1988. Addressing the consolidated case of *Martinez v. Humble Sand & Gravel, Inc.*, 940 S.W.2d 139 (Tex. App.—El Paso 1996, no writ), the court also found that although plaintiff Martinez failed to exercise reasonable diligence by not consulting a doctor until eleven months after he was on notice of an injury that he suspected might have been work-related, Defendant Humble Sand & Gravel did not present any evidence to establish as a matter of law that Martinez could have discovered he had a work-related injury had he conducted a diligent investigation.

The court in *Childs* stated that in most cases, a cause of action accrues when a wrongful act causes an injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur. However, in those rare cases when “the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable,” courts will apply the discovery rule.

Id. at 36 (citing *Computer Assocs. Int’l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1994)). Under this rule, a cause of action does not accrue until a plaintiff knows or, through the exercise of reasonable care and diligence, should have known of the wrongful act and resulting injury.

within five hours after a short period of asbestos exposure.

Mechanical injury to the pleura occurs when fibers penetrate the pleura lining the exterior of the lungs.

b. Chemical Injury

This form of injury occurs when certain cells in the lung secrete toxic enzymes and other digestive ferments, causing lung damage. The cells responsible for this process are called “alveolar macrophages.” When asbestos fibers reach the lungs, they are rapidly engulfed by alveolar macrophages. As a consequence of becoming “activated,” they release large amounts of digestive enzymes into the surrounding tissues. This

produces further injury in the lungs.

c. Immunologic Injury

The immune system is composed of certain white blood corpuscles known as "lymphocytes." These cells are responsible for making antibodies and for protecting the body against microbes (e.g., viruses and bacteria) and against cancer. Following asbestos exposure, the immune system becomes overactive and additional injury is caused to the lungs. At a later stage, when the immune system breaks down, cancer may develop.

From the analysis described above one could argue that the injury occurred at the time of inhalation of asbestos fibers, that is, at the time of exposure. The scientific knowledge about the progression of asbestos has led one judge to rule that there is a legitimate justification for distinguishing between asbestos claimants and other types

The Sixth Circuit Court of Appeals, in *INA v. Forty-Eight Insulations, Inc.*, 633 F.2d 1212 (6th Cir. 1980), held that under Illinois and New Jersey laws governing interpretation of products liability insurance policies issued by various insurers of asbestos manufacturers, the term "bodily injury" as universally used in the policies providing coverage for various time periods would be construed to include tissue damage taking place upon inhalation of asbestos. Thus, the court adopted the "exposure theory" as opposed to the "manifestation theory" in determining which insurers would be obligated to defend suits brought for asbestos-related diseases against various manufacturers.

Those who advocate the exposure theory of "bodily injury" argue that when asbestosis or cancer manifests has nothing to do with when the bodily injury took place, relying on medical testimony that establishes that tissue damage starts to occur shortly after the initial inhalation of asbestos fibers and that the tissue damage worsens as the victim breathes in more and more asbestos fibers. Thus, the argument under the exposure theory is

of claimants because of the nature of the asbestos-related diseases, and in that connection wrote:

It will simply be noted that among the many factors which place asbestos-related injuries in a class by themselves, it is known that asbestos-related diseases are not dependent upon repeated inhalations or exposures, but upon the presence of the fiber in the lungs from potentially one initial exposure.

Pottratz v. Davis, 588 F.Supp. 949 (D.C., Md. 1984); Mansfield, *Asbestos: The Cases and the Insurance Problems*, 15 The Forum (ABA) 860, 861 (1980). There is usually a long period of latency of up to more than thirty years before onset of the diseases. *Fibreboard Paper Products Corp. v. Borel*, 493 F.2d 1076, 1083-5 (5th Cir. 1973), *cert. den.*, 419 U.S. 869, 95 S.Ct. 127, 42 L.Ed.2d 107 (1974).

that the disease, when it is finally contracted, is simply a series of continuing injuries to the body which accumulate to cause death or disability (sort of a "continuing tort" theory). To strengthen the exposure theory is the proposition that when a disease such as asbestos finally manifests itself, no doctor will say that it suddenly occurred when it was discovered or manifested, but rather it was progressively leading up to the point where it finally manifested itself.

The Fifth Circuit, in *Porter v. American Optical Corp.*, 641 F.2d 1128 (5th Cir. 1981), adopted the exposure theory, noting that "there was medical evidence that each introduction of fibers into Porter's lungs was 'bodily injury,' cumulatively and progressively more harmful to the victim.

B. Enhanced Risk of Contracting Disease and Emotional Distress Damages

In this age of toxic tort, certainly including asbestos exposure, the question has arisen whether there is a cause

of action in those cases where plaintiffs have been exposed to some sort of toxic chemical or material, have not yet contracted any disease, but who nonetheless are now in a class of people who have an enhanced risk of mental anguish and suffering in connection therewith.

Texas law prohibits recovery for future diseases unless there is a reasonable medical probability the disease will occur. *Exxon Corp. v. Makofski*, 116 S.W.3d 176 (Tex. App.—Houston [14th Dist.] 2003); *See Pustejovsky v. Rapid-American Corp.*, 35 S.W.3d 643, 652 (Tex.2000). It also prohibits recovery of mental anguish damages for an increased risk of developing a disease that is not presently manifest. *See Temple-Inland Forest Prods. Corp. v. Carter*, 993 S.W.2d 88, 93 (Tex.1999).

In *Temple-Inland*, electrical workers exposed to asbestos on business premises sued business for

The principles we have used to deny recovery of mental anguish damages for fear of the possibility of developing a disease as a result of an exposure to asbestos may not yield the same result when the exposure is to some other dangerous or toxic element...[t]he consequences of exposure to other toxic materials vary, and while the analysis in other circumstances should be the same as that which we have employed here, the outcomes may be different.

Id. at 95.

The Houston appeals court in *Verinakis v. Medical Profiles, Inc.*, 987 S.W.2d 90 (Tex.App.—Houston [14.Dist.] 1998 pet. denied), also found that medical testing laboratories could not be liable to a life insurance applicant on claim of negligent misdiagnosis, for mental anguish caused by false positive report for human immunodeficiency virus (HIV), where applicant did not claim actual HIV exposure during testing and misdiagnosis, or fear that he was exposed during testing and misdiagnosis.

C. Medical Surveillance Damages

negligence and gross negligence. The trial court granted the defendant summary judgment, and the workers appealed. The Texas Supreme Court held that workers exposed to asbestos who did not have asbestos-related disease could not recover damages for fear of possibility of developing such disease in future. "While the existence of physical injury is ordinarily *necessary* for recovery of mental anguish damages except in those instances already mentioned, such injury may not be *sufficient* for recovery of mental anguish damages when the injury has not produced disease, despite a reasonable fear that such disease will develop." *Id.* at 92. The court did add a cautionary note, however, stating:

Finally, in New Jersey in *Ayres v. Township of Jackson*, 461 A.2d 184 (N.J.Sup.Ct. 1983), a third element of damages in the realm of occupational diseases called "medical surveillance" was recognized when the court provided experts testified that it was medically necessary to perform examinations and tests for early detection of cancer and that conventional medical tests were inadequate. In short, the court held that damages may be recovered for the prospective consequences of a tortious injury. The court pointed out that it was not necessary that it be medically probable that the plaintiffs will suffer cancer in the future in order to recover medical surveillance damages, but rather whether, based on medical judgment, the plaintiff who has been exposed to known carcinogens should undergo annual medical testing in order to properly diagnose the warning signs of the development of the disease. The court reasoned that if the plaintiffs were deprived of any necessary diagnostic services in the future because they have no source of funds to pay for the testing, the consequences may result in serious if not fatal illness. It explained that public policy supported a conclusion that if such illness could be prevented by surveillance then the tortfeasor should bear the cost.

The Third Circuit Court of Appeals, applying New Jersey law, recognized the cost of preventive monitoring in an asbestos exposure case as an element of damages in

Herber v. Johns-Manville Corp., 785 F.2d 79 (3rd Cir. 1986). The court went further and allowed recovery for emotional distress occasioned by plaintiff's fear of developing cancer in the future, reasoning that the infiltration of plaintiff's lungs by asbestos dust and the pleural thickening thereby, satisfied the impact and injury requirements of New Jersey law.

XII. USE OF SPECIALIZED EXPERTS TO PROVE DAMAGES

A. Using an Economist

1. Future Loss of Earning Capacity

In projecting future wages and wage increases an economist must look to the past and be prepared to testify as to the historical impact of inflation on wages. In discussing the easement of inflation an economist may speak in terms of the loss of purchase power of the dollar or the decrease in the value of the dollar due to inflation. In order to reduce to present value an economist must also be prepared to testify as to the historical patterns of interest rates and yields on government bonds and other "safe" investments.

An economist must be prepared to discuss the needs of a plaintiff for some degree of liquidity to replace the income stream, the lack of sophistication of the average plaintiff, the cost of investment counseling and expenses to the average unsophisticated plaintiff-investor, what risk-free investments are available, and the return on such investments, vicissitudes of investments, and the like.

Projecting future wage increases due to inflation does not take into consideration merit increases, upward mobility, achieving supervisory/management status, change of occupations, etc. See, e.g., *Missouri-Kansas-Texas Railroad Co. v. Wright*, 311 S.W.2d 440 (Tex. Civ. App.—Fort Worth 1958, writ dismissed).

2. Medical Expenses in the Future

Calculation of the present value of future medical expenses has been held to be properly within the province of economist expert testimony. *Williams v. General*

Probably all jurisdictions have recognized either explicitly or implicitly the admissibility of economists' testimony on calculating items of damages such as loss of wages and loss of wage earning capacity in the future. In Texas, for example, the courts have recognized the admissibility of such testimony noting that it does not invade the province of the jury. See *Bristol-Myers Co. v. Gonzales*, 548 S.W.2d 416 (Tex. Civ. App.—Corpus Christi 1976, writ granted), *rev'd on other grounds*, 561 S.W.2d 801 (Tex. 1978); *Texas Steel Co. v. Recer*, 508 S.W.2d 889 (Tex. Civ. App.—Fort Worth 1974, writ refused n.r.e.); *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671 (Tex. App.—Dallas, 2004, pet. withdrawn), *aff'd in part & rev'd in part*, 271 S.W.3d 238. *Motors Corp.*, 501 S.W.2d 930 (Tex. Civ. App.—Houston [1st Dist.] 1973, writ refused n.r.e.).

By reference to existing statistical documents available through the federal government, an economist can testify as to the prospective future increases in the cost of medical care. This would ordinarily be broken down between medical services and medical goods and equipment, with the latter showing a much slower growth rate because it does not contain the same "labor" component.

3. Loss of Household Services

The Fifth Circuit, in a Georgia case, approved the testimony of an economist which placed a monetary value on a housewife's services in *Har-pen Truck Lines, Inc. v. Mills*, 378 F.2d 705 (5th Cir. 1967). It should be noted that in that case the witness used the "utility producing power" measurement rather than the sum which the decedent might have earned, noting that the decedent's utility producing power was much greater than her money income producing power. That is, if you hire a substitute for the housewife in the marketplace you would have to pay a greater amount of money than that which the decedent could have earned. See also *Columbia Medical Center of Las Colinas, Inc. v. Hogue*, 132 S.W.3d 671 (Tex. App.—Dallas, 2004, pet. withdrawn), *aff'd in part & rev'd in part*, 271 S.W.3d 238.

4. *Loss of a Mother*

The value of the training which a parent would have given to a minor, using the cost of substitute services, i.e., that of a teacher, was approved in *Main Bank and Trust v. York*, 498 S.W.2d 953 (Tex. Civ. App.—San Antonio 1973, writ ref'd n.r.e.). See also *Garza v. Berlanga*, 598 S.W.2d 377 (Tex. Civ. App.—El Paso 1980,

A Corpus Christi opinion disallowed testimony of an economist in valuing these elements of damage in *Seale v. Winn Exploration Co.*, 732 S.W.2d 667 (Tex. App.—Corpus Christi 1987, writ denied). An economist had adopted the per hour charge of a psychiatrist in his calculations and the court ruled it irrelevant, noting further that calculation of the damages are within the range of expertise of jurors. However, analogizing to the substitute services in the loss of parental guidance and household services, it is believed that the benefits of these emotional elements of marriage and companionship and society include such things as security, feelings of "well-being", etc., and that such benefits are provided by clergy, psychiatrists, social workers, and vocational and education counselors, all of whose services can be valued. See *Economic Insights*, published by Everett G. Dillman, July, 1983. [Dillman was the expert in the *Seale* case].

6. *Other*

As discussed above, the economist's testimony is helpful in evaluating and placing a value on such things as household services of an injured or deceased spouse, loss of parental guidance and training, and perhaps other tangibles such as loss of consortium. See *Sherrod v. Berry*, 827 F.2d 1191 (7th Cir. 1987), *opin. withdrawn*, 835 F.2d 1545 (1988), where an economist was permitted to value the enjoyment of life. However, an economist's testimony was considered irrelevant to value loss of society and companionship. *Seale v. Winn Exploration*

writ ref'd n.r.e.), in which the economist valued "moral guidance" given by the mother to her child as comparable to the salary of a school teacher.

5. *Loss of Consortium and Loss of Society and Companionship*

Co., 732 S.W.2d 667 (Tex. App.—Corpus Christi 1987, writ denied).

7. *Kinds of Economic Testimony*

Economist - obviously, a professor of economics or one schooled in economics and actively involved in economic appraisal work, labor economics or economics statistics.

Home Economist - the Iowa Supreme Court approved the use of a home economist to testify and evaluate the damages in the death of a housewife. *Schmitt v. Jenkins Truck Lines, Inc.*, 170 N.W.2d 632 (Iowa 1969).

Employment Agency Worker - the Third Federal Circuit approved the use of an employment agency owner whose agency specialized in placement of domestics (dishwashers, cooks, etc.) to testify as to the hourly rates of pay for various positions. *Haddigan v. Harkins*, 441 F.2d 844 (3d Cir. 1970).

Industrial Psychologist - In *Recer*, an industrial psychologist was permitted to testify concerning loss of earning capacity in the future.

8. *What an Economist is Entitled to Consider*

a. **Inflation**

In Texas it has always been permissible for a jury to take into consideration inflationary forces (the rapidly decreasing value of the dollar) in assessing future damages. See, for example, *Halliburton Co. v. Olivas*, 517 S.W.2d 349 (Tex. Civ. App.—El Paso 1974, no writ); *Wharf Cat Inc. v. Cole*, 567 S.W.2d 228 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

For the period 1975 through 1982, inflation could not be considered in federally created causes of action, including FELA cases which were sometimes tried in state court. *Johnson v. Penrod Drilling Co.*, 510 F.2d 234 (5th Cir. 1975) (en banc), *overruled*, *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982). Even while the Fifth Circuit prohibited evidence of inflation in federal causes of action, *Penrod*, *supra*, in diversity cases the state's substantive law applied and inflation could always be considered in determining future damages. *Weakley v. Fischbach & Moore, Inc.*, 515 F.2d 1260 (5th Cir. 1975).

In *Culver v. Slater Boat Co.*, 688 F.2d 280 (5th Cir. 1982) (en banc), *cert. denied*, 469 U.S. 819, 105 S.Ct. 90, 83 L.Ed.2d 37 (1984), the Fifth Circuit reversed *Penrod*, *supra*, on the impact of inflation on assessing future damages. After this decision in *Culver*, the United States Supreme Court decided *Jones & Laughlin Steel Corp. v. Pfeifer*, 462 U.S. 523 (1983). It held that the Third Circuit Court of Appeals had erred in applying a "total offset rule" under which future inflation was presumed to equal future interest rates with those factors offsetting and canceling one another in determining present value of a future stream of income in a Longshoremen's and Harbor Workers' Compensation Act case. The Supreme Court, in *Pfeifer*, discussed different ways of calculating lost future wages in civil damage actions and chose to leave the decision to the trial judge as to which method to adopt. However, it cautioned against using a discount rate and estimated lost stream of future earnings premised on forecasts of future inflation as it impacts on wages and interest rates, noting that "the average accident trial should not be converted into a graduate seminar on economic forecasting."

After *Culver I*, *supra*, it could be said that the same rule applied in both state and federal court as to both state law cases and federal causes of action, that is, inflation could be considered. Since *Culver II*, the rule in the Fifth Circuit of federal causes of action (such as FELA cases and Longshoremen's and Harbor Workers' Compensation Act cases) is that damage awards are to be adjusted to account for inflation by using the "below-market discount rate" method which does not involve a specific forecast of

Thereafter, the Fifth Circuit Court of Appeals withdrew its opinion in *Culver I*, insofar as it went beyond overruling *Johnson v. Penrod Drilling Co.*, and taking to heart the Supreme Court's philosophy of not allowing a trial to be converted into a graduate seminar on economic forecasting, issued a second *Culver* opinion, *Culver v. Slater Boat Co.*, 722 F.2d 114 (1983), in which it adopted a single method for adjusting damage awards for inflation. The method adopted by the Fifth Circuit is called a "below-market discount rate" and is to be used as the sole method to adjust loss-of-future-earnings awards to present value to account for the effect of inflation. This method is designed to eliminate the specific forecasts of future inflation.

The idea under this method is to mathematically compute the "real" wage growth rate due to productivity, collective bargaining, and other societal forces, but exclude inflation. Then, the average interest rate is determined using a safe investment such as treasury securities and subtracting therefrom the average inflation rate in the past so as to determine the "real" interest rate. Thus, the component of inflation is deleted from the projected future income stream as well as the projected future interest that can be earned on a present lump sum payment. This results in comparing apples with apples, since inflation is now removed from the wage growth side of the equation. Having removed the inflation factor from both sides of the equation, using the below-market discount method, one now compares the *real* wage growth with the *real* interest rate to determine the discount rate or the negative discount rate (negative discount if the real future wage growth exceeds the real interest that can be earned during the projected future time frame).

future inflation rates, or how such inflation rate would affect the particular plaintiff. Rather, the below-market discount rate method will remove the inflation components in both the wage growth rate and the interest rate so as to compare the two and arrive at a discount rate or negative discount rate that is adjusted for inflation without having to determine what that inflation rate is.

b. Income Tax

It once had long been Texas law that juries were not to take into consideration or be advised of the fact that the recovery in a personal injury or wrongful death case was not subject to income taxation. *Turner v. General Motors*, 584 S.W.2d 844 (Tex. 1979); *Missouri K.T. Ry. Co. v. McFerrin*, 291 S.W.2d 931 (Tex. 1956). Both *Turner* and *McFerrin* courts noted that inquiry into subject of income tax was an immaterial collateral matter as to the damages.

Nor was it permissible to show that part of one's income, for which claim is made in the form of loss of earnings or earning capacity, would be paid in income tax, as a jury should not be concerned with how plaintiff might spend or be obligated to spend any compensation that he or she might receive. *Buckner & Sons v. Allen*, 289 S.W.2d 387 (Tex. Civ. App.—Austin 1956, no writ); *Caterpillar Tractor Co. v. Gonzales*, 599 S.W.2d 633 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

However, Texas law was changed in 2003 to include TEX. CIV. PRAC. & REM. CODE §18.091. According to this new provision, the effect of taxation on an award is now considered in making the award. For the recovery of loss of earnings, loss of earning capacity, loss of contributions of a pecuniary value, or loss of inheritance, the person must establish the amount of the claimant's net loss after an appropriate reduction for federal income tax payments that would have been due or any unpaid federal tax liability. *Id.* §18.091(a). Additionally, the court must instruct the jury as to whether the claimant's recovery of compensatory damages will be subject to federal or state income taxes. *Id.* §18.091(b).

d. Effects of Remarriage in a Death Case

Some jurisdictions do not allow proof of remarriage in a wrongful death case, based on the philosophy that the damages are fixed at the time of death.

Even in Texas, where evidence of remarriage has been made specifically admissible in wrongful death cases by legislative enactment, the courts have interpreted the law, nonetheless, so that remarriage does not operate to diminish the damages which are recoverable and that no evidence as to the effects of remarriage is admissible on

The United States Supreme Court has held that in an FELA case where income taxation would have a substantial impact, it was error to exclude evidence of income taxes payable on decedent's past and estimated future income. *Norfolk & Western R.R. Co. v. Liepelt*, 444 U.S. 490, 100 S.Ct. 755, 62 L.Ed.2d 689 (1980).

c. Collateral Source

An economist would not be permitted to take into consideration collateral sources in those jurisdictions that recognize the collateral source rule which prohibits the wrongdoers from benefitting by any collateral source available to the plaintiff. *See Twin City Fire Ins. Co. v. Gibson*, 488 S.W.2d 565 (Tex. Civ. App.—Amarillo 1972, writ ref'd n.r.e.).

In a case applying the substantive law of Texas, e.g., a diversity case, a Federal Tort Claims Act case, etc., collateral sources could not be considered.

Even in a claim against the United States under the Federal Tort Claims Act, receipt of Social Security benefits would be recognized as a collateral source and not to be a matter which the economist would have to take into consideration in calculating future losses, provided the state law recognized the collateral source rule. *See Smith v. United States*, 587 F.2d 1013 (3d Cir. 1978). The reasoning is that the monies expended under Social Security do not come from the general treasury but from a special fund appropriated expressly for a particular benefit or amassed from contributions by plaintiff, so there is no double payment out of the treasury of the United States.

the matter of damages. *See Richardson v. Holmes*, 525 S.W.2d 293 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.).

e. Other

An economist could testify as to the cost of an annuity to replace an income stream. *Missouri-Kansas-Texas Railroad Co. v. Wright*, 311 S.W.2d 440 (Tex. Civ. App.—Fort Worth 1958, writ dismiss'd).

An economist, like a jury, would not be limited to his testimony to the customary retirement age, provided there is evidence in the record to show when the plaintiff or decedent might have retired.

An economist is entitled to place a plaintiff in a statistical group for purposes of projecting one's future loss of earnings, and this is especially necessary where the plaintiff or decedent is a child and has no work or earnings history. *Roth v. Law*, 579 S.W.2d 949 (Tex. Civ. App.—Corpus Christi 1979, writ ref'd n.r.e.).

An economist can add a percentage fringe benefit figure provided he can explain the source of such fringe benefit estimate. *Garza v. Berlanga*, 598 S.W.2d 377 (Tex. Civ. App.—El Paso 1980, writ ref'd n.r.e.).

Unless the economist, in testifying to fringe benefits, is relying on statistical data that can be pointed to, there must be evidence in the record of fringe benefits for that particular plaintiff or decedent.

An economist may rely upon learned treatises, government reports, books and reports identified as recognized authorities, and such sources as annuity tables and almanacs. *Bair v. American Motors Corp.*, 473 F.2d 740 (3d Cir. 1973).

Rule 47 of the Texas Rules of Civil Procedure only permits the statement that the damages sought in a personal injury or wrongful death (claim for unliquidated damages) exceed the minimum jurisdictional limits of the Court. This rule was adopted effective January 1, 1978. At least one attorney has been disciplined under the State Bar Disciplinary Rules for violating this rule and suing for specific sums of money. Under the newly enacted TEX. CIV. PRAC. & REM. CODE § 74.053, pleadings in a suit specifically based on a health care liability claim shall not specify an amount of money claimed as damages. But the defendant may file a special exception to the pleadings on the ground the suit is not within the court's jurisdiction, in which event the plaintiff must inform the court and defendant in writing of the total dollar amount claimed.

XIII. MISCELLANEOUS CONSIDERATIONS

A. Jury Argument

1. State Court Rule

A per diem argument on pain, anguish, impairment and disfigurement was upheld in *International Harvester v. Zavala*, 623 S.W.2d 699 (Tex. Civ. App.—Houston [1st Dist.] 1981, writ ref'd n.r.e.).

2. Federal Court Rule

The "unit of time" argument was criticized by the Fifth Circuit Court of Appeals (Judges Clark, Goldberg and Rubin) in *Westbrook v. General Tire and Rubber Co.*, 754 F.2d 1233 (5th Cir. 1985), holding that such argument was improper in the absence of a suitable cautionary instruction. The court cautioned that they were not holding that a unit of time argument is reversible per se, but rather that it may be allowed when "couched with proper safeguards or otherwise cured."

B. Pleading of Ad Damnum

C. Separate/community Property Status of Damages

By statute a recovery in a personal injury suit is the separate property of the injured party with respect to all elements except loss of earnings. TEX. FAM. CODE § 3.001.

Loss of consortium is the separate property of the deprived spouse. *Id.*; see also, *Whittlesey v. Miller*, 572 S.W.2d 665 (Tex. 1978). However, loss of services recoverable by the deprived spouse as a result of the injured spouse's injuries is community property.

Recovery for loss of a child in a wrongful death case is the separate property of the plaintiff parent. Like loss of consortium, it is considered to constitute damage to emotional interests and thus a claim separate and apart from the physical injury claim of the "injured party."

Williams v. Steves Industries, 678 S.W.2d 205, 210 (Tex. App.—Austin 1984), *aff'd*, 699 S.W.2d 570 (Tex. 1985). Therefore, the negligence of the one spouse does not diminish the recovery of the other parent. You may not impute negligence of one spouse to another so as to bar recovery of separate property. *Graham v. Franco*, 488 S.W.2d 390 (Tex. 1972).

D. Admissibility of Life Expectancy Tables to Prove Damages

The U.S. Life Expectancy Tables are summaries of actuarial calculations designed to provide an estimate of the life expectancy of a person at any given age and may form the basis for certain calculations by the jury.

1. Poor Health

Poor health goes to the weight, not the admissibility, of the life expectancy tables. *Harwell & Harwell, Inc. v. Rodriguez*, 487 S.W.2d 388 (Tex. Civ. App.—San Antonio 1972, writ ref'd n.r.e.).

2. Ultrahazardous Occupation

The tables are admissible even if the deceased was engaged in an ultrahazardous occupation, and regardless of his health. *Bell Aerospace Corp. v. Anderson*, 478 S.W.2d 191 (Tex. Civ. App.—El Paso 1972, writ ref'd n.r.e.).

3. Plaintiff Not U.S. Citizen

The tables are admissible in cases involving Mexican nationals injured in Texas. *Byrd v. Trevino Bermea*, 366 S.W.2d 632 (Tex. Civ. App.—Austin 1963, no writ).

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