

JUDGE AND JURY ISSUES

Richard P. Hogan, Jr.
Jennifer Bruch Hogan
HOGAN & HOGAN
909 Fannin, Suite 2700
Two Houston Center
Houston, Texas 77010
(713) 222-8800 / (713) 222-8810-Fax
rhogan@hoganfirm.com

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CHAPTER 9

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I. INTRODUCTION.

This paper circles back to a topic discussed by Bill Powers when he taught at the University of Texas Law School. Before he became Dean and then President at UT, Bill paid close attention to trends and decisions at the Texas Supreme Court. The Court's trends still may interest him, but Bill has many other pressing concerns in his new job.

In addition to academic types, many of us are interested in this jurisprudential issue, which defines and observes the roles played by judges, lawyers, and their review of jury findings appealed to the Texas Supreme Court. To appellate practitioners, the interaction among these players is perhaps the most fascinating tune in Austin. Bill's tag line 15 years ago was from the old Buffalo Springfield song: "There's something happening here. What it is ain't exactly clear." In the following discussion, we return to that tune to see if things have become any clearer.

Bill Powers has gone from an academician's office at a national law school and then to a university administrator's office, but where has the Texas Supreme Court gone in the 15 years since the Texas Law Review published *Judge and Jury in the Texas Supreme Court* as part of its W. Page Keeton Symposium on Tort Law? First, this paper reviews traditional—even worldwide—notions about the roles of judge and jury in common law jurisdictions. Second, this paper returns to its point of departure: in the Bill Powers *Judge and Jury* article, reprising its context and observations about the writings on the judge and jury interchange over the last 15 years. Third, we examine what writers have pondered since the Powers article and actual Texas Supreme Court case law, to examine whether there is any truth to criticisms now being made about the role of the Texas Supreme Court in overturning jury verdicts.

II. TRADITIONAL AND [UN]CONVENTIONAL NOTIONS ABOUT THE ROLES OF JUDGE AND JURY.

Judges do more than lay down the law, and juries work to decide more than just facts. As Chief Justice (Ret.) Tom Phillips writes, "[T]he demarcation of authority between the lay jury and the professional, or at least fulltime, judge has historically been in tension." Thomas R. Phillips and Elizabeth A. Dennis, *Judge and Jury Symposium: Foreword*, 47 S. TEX. L. REV. 157 (2005). Apart from deciding facts, juries tell us about the law's trajectory, and they balance the scales of justice.

A. Nullifying Legal Rules.

In studies on a jury's role to decide disputes, authors have remarked that "the American system grants authority to juries, in part, to protect litigants from legal rules that do not accord with the popular conscience." James K. Hammitt, Stephen J. Carroll and Daniel A. Relles, *Tort Standards and Jury Decisions*, XIV JOURNAL OF LEGAL STUDIES 751, 752 (Dec. 1985). Calling the "failure of juries' decisions to correspond to legal rules . . . not necessarily undesirable," *id.* at 752, the authors of this study into verdicts concluded that such a rejection of legal standards and of normative rules of conduct is understandable, even predictive of a change in the standards:

By refusing to decide cases strictly in accordance with the law, juries limit the influence of legal standards that are not acceptable to the public and may signal to the judiciary and the legislature that those standards ought to be changed. This power of juries to nullify legal rules too often goes unacknowledged by legal reformers.

Id. One recognized role for juries, then, is to reflect on and reject unpopular trends in the law and to predict new trends.

B. Balancing Powerful Interests.

Apart from nullifying the legal standards that are supposed to govern them, juries can play a balancing role between the powerful special interests at the courthouse and the individual plaintiff. No less a light than Joe Jamail has remarked that juries can level the playing field when judges bend to the will of the powerful: "I still get very angry when I recall how sometimes the big firms, because of their lethal political power, buy a few judges, not many, thank goodness, but a few judges. But eventually, even in those cases, I look back and realize that justice was done largely because of the jury." Joe Jamail, *Jury Symposium: The Presentation of an Ethical Jury Trial*, 47 S. TEX. L. REV. 357, 358 (2005).

C. Deciding Facts or Law?

Juries' roles are not typically expressed in terms of a counter-balance against the powerful, to act as bulwarks against judicial corruption, or to nullify prevailing legal standards and predict new ones. More often, juries and judges are placed within their usual fact/law rubric, with juries deciding facts and judges handling the law. This fact/law bromide has been expressed in the this country and elsewhere.

1. In the United States.

In the United States, jury-trial rights are mentioned repeatedly in the Constitution. See e.g., U.S. CONST. art. III, § 2; amend. VI; amend. VII. In Texas as well, as early as 1836, Santa Ana's Mexican government was criticized because "It has failed and refused to secure, on a firm basis, the right to trial by jury, that palladium of civil liberty, and only safeguard for the life, liberty, and property of the citizen." TEX. DECLARATION OF INDEPENDENCE, para. 10 (1836). Thomas Jefferson described trial by jury as "the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." Alexis de Tocqueville wrote that jury service "rubs off that private selfishness which is the rust of [democratic] society."

2. Other common-law countries.

Internationally, other common-law countries differentiate juries from judges in familiar ways. The Canadian Superior Courts Judges Association describes certain serious criminal cases in which "jurors become the triers of fact and assess the evidence while the judge takes on the role of legal advisor, explaining the law to the jurors." Canadian Superior Court Judges Association, *The Role of the Judge*, http://www.cscja-acjcs.ca/role_of_judge-en.asp. In other cases, the same organization of judges notes that "[i]n civil cases the judge decides whether a claim is valid and assesses damages, grants an injunction or orders some other form of redress to the plaintiff, unless a jury has been empanelled to make these decisions." *Id.* South Australia's Legal Services Commission delineates on its website the "very different parts" juries and judges have to play. In typical terms, their roles are differentiated:

The jury listen [sic] to the evidence and decide who or what to believe. They decide what the facts of the case are The judge sees that the proper procedures are followed and she or he makes decisions about all questions of what the law is in relation to the particular case. Because the jury do [sic] not decide these questions, many of the discussions and decisions related to the law are made when the jury is not in the courtroom.

The Legal Services Commission of South Australia, *Law Handbook: Role of Judge and Jury*, <http://www.lawhandbook.sa.gov.au/ch11s03s06s01.php>. Put simply, the roles of judge and jury do not fall neatly into generalizations about who makes law and fact determinations. Both in the United States and other common-law countries, juries can do more than just describe the facts; judges can do more than just hand

down rulings about legal norms. Beyond telling courts whom to believe and what happened, juries can balance power, negate rules of law they reject, and predict new trends. Against this background of multifaceted tasks and conventional judge/jury roles, Bill Powers took a look 15 years ago at court critics who decried the Texas Supreme Court's review of jury verdicts as a radical departure from traditional roles expected of judges who review jury verdicts.

III. A REPRIS OF THE BILL POWERS JUDGE AND JURY ARTICLE.

In his law review article, Bill Powers addressed the perception problem confronting the supreme court in the early-to-mid 1990s. William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699 (1997). Responding to the "inaccurate perception" that the court then was changing the no evidence standard of review, Bill surmised that the court was doing the "quite appropriate" task of "defining legal duties," which "has always been a proper role for courts." *Id.* at 1700. Bill's article recognized the court's proper role in "paying more attention to the distinction between questions of policy and questions of fact," with more of the policy questions falling to courts rather than juries. *Id.*

It is worth the short time it takes to read the article and follow its cogent analysis. The article looks at how differences between Dean Keeton and Dean Green's views of proximate cause inform "the role of duty in personal injury litigation." *Id.* at 1702. Their differences centered on whether a proper negligence claim should turn on questions of proximate cause (Keeton) or duty (Green). *Id.* at 1703. He wrote, "This difference is not just about allocating power in the litigation process. Duty is usually an issue for the court; breach and proximate cause are usually issues for the jury. The crucial difference is that Green's approach assigns more power to the court; Keeton's approach assigns more power to the jury." *Id.*

Moving from an analysis of the respective roles of duty and breach in tort law, Bill next looked at the "close relationship between a debate about duty, breach and proximate cause and a debate over the standard for reviewing jury verdicts. Both issues address the relative power of judges and juries." *Id.* at 1704. Thus, Bill perceived the court's tort jurisprudence as reflective of a debate over duty and proximate cause that evoked the old debate between Dean Keeton and Dean Green as they worked out the boundaries between duty and proximate cause as limiting principles in tort law.

In its essence, the court's 1990's jurisprudence was seen as "reinvigorating the concept of duty," and Bill noted that development in light of case law from the products-liability, negligence, and insurance bad faith arenas. In all three areas of tort law, Bill saw these precedents as addressing and determining issues of substantive law and policy considerations as opposed to "probative inferences to be drawn from the evidence" in the trial records of those cases. *Id.* at 1708. Again, the court's review involved the articulation of "more particularized duty rules, [by which] the court has clearly affected the relative power of judges and juries. Broad, amorphous definitions of duty, coupled with a weak no evidence standard of review, clearly give juries relatively more power. Narrower, more particularized definitions of duty clearly put more power in the hands of courts." *Id.* at 1710. An emphasis on duty rules directed more power to the judges and less power to juries.

In large part, Bill's conclusion about the supreme court moves the court's 1990's jurisprudence into line with the new Restatement (Third) of Torts' work on scope of liability and duty. Moving away from proximate cause as an analytical tool, the new Restatement uses the scope of a defendant's liability as one limiting principle of tort law; the other is duty:

Palsgraf's legacy has been a tension in tort law about the proper balance between duty rules and proximate cause limits to circumscribe appropriately the scope of liability Duty is a question of law for the court, see §7, while scope of liability, although very much an evaluative matter, is treated as a question of fact for the factfinder Duty is usefully employed when a court seeks to make a telling pronouncement about when actors may or, on the other hand, may not be liable.

RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29, cmt. b (Proposed Final Draft No. 1, April 6, 2005).

As distinguished from a court's role in defining duty, scope of liability is relegated to a jury question. "[W]hen the limits imposed on liability [for conduct] require careful attention to the specific facts of a case, and difficult, often amorphous evaluative judgments for which modest differences in the factual circumstances may change the outcome, scope of liability is a more flexible and preferable device for placing limits on liability. It is also consistent with the historic role of the jury in tort cases." *Id.*

In a later comment, the new Restatement's authors point out the way judge and jury work on tort law's limiting principles.

q. *Judge and Jury*. Scope of liability is a mixed question of fact and law, much like negligence. As with negligence, the court's role is to instruct the jury on the standard for scope of liability when reasonable minds can differ to whether the type of harm suffered by the plaintiff is among the harms whose risks made the defendant's conduct tortious, and it is the function of the jury to determine whether the harm is within the defendant's scope of liability.

Id. at cmt q. To a large extent, this comment goes to a question posed by Bill Powers in his article, about the roles of judge and jury:

It is clear that the jury's role is to determine what happened; that is a descriptive task. It is not so clear that it is the jury's role to determine how people should behave; that is a normative task. Broad, amorphous duty rules, with mixed questions of law and fact, put more of the normative work in the hands of the jury. Particularized duty rules put more normative work in the hands of judges. The question is how much of that normative work should be assigned to judges and juries.

Powers, *Judge and Jury*, 75 TEX. L. REV. at 1711-12. His ultimate resolution of this question on whether a judge or a jury should do the normative work is left to another day. Here is Bill's salient discussion, which is worth the lengthy quotation:

What, then, can be said about the merits of this issue—that is, are we better served by broad duty rules or narrow duty rules? There is no definitive answer to this question; what we need are appropriate duty rules. Defining appropriate duty rules is sure to be controversial because duty rules help define the relative roles of judge and jury, itself a controversial task. But we might agree about three preliminary points. First, there is something to be said for the status quo. A change in a settled practice can itself create dislocation, as lawyers, trial judges, and even potential parties adjust to a new practice. This concern counsels caution, but not paralysis. Second, it would be a mistake for the court to hold that, because all mixed questions of law and fact have some normative aspects, all of them are, *ipso facto*, questions of duty for the court. Whatever theoretical appeal such a claim might have, it would have the pernicious effect of turning every negligence or product

defect finding into a duty issue reviewable de novo by appellate courts. It would similarly make every negligence and product defect case potentially subject to resolution at the summary judgment stage because every claim of negligence or product defect could be decided as a matter of law. Thus, at a minimum, particularized duty rules should disentangle the policy questions from the purely factual questions, leaving factual questions to the jury with appellate review under the traditional legal sufficiency and factual sufficiency standards. Third, duty rules should, at a minimum, be sufficiently broad and categorical to be applied at the summary judgment stage based on relatively simple and uncontroverted facts.

Beyond these minimal criteria, however, there is still much room for debate. Ultimately, reasonable people will disagree whether we are better served by giving juries or judges more or less normative work to do. I tend to think we leave too much of this work to juries, but that is largely a political judgment, not a legal one. Thus, my purpose here is not to argue that narrow, particularized duty rules are necessarily better. Sometimes they are, and sometimes they are not. Instead, my points are (1) that this question is itself an important normative question; (2) that, as a normative question, it is appropriately a question for courts; and (3) that the current court is following its predecessor in this regard. There is nothing intrinsic in Texas practice that precludes a court from making that decision.

Id. at 1714-15. This observation, albeit lengthy, is helpful: juries do the factual work, and courts and judges perform the normative, policy work in the courthouse. To some extent, marking the line between those two roles is “largely a political judgment, not a legal one.” *Id.*

In his advice for Texas lawyers, Bill was prescient. He said they “should recognize that something important is occurring on the supreme court. Most Texas lawyers have misunderstood what is happening here. The court is shifting more of the normative work in tort litigation away from juries and towards judges, but the court is not accomplishing this, as many lawyers think, by abandoning the traditional standard of no evidence review. Instead, the court is doing it, quite properly, by particularizing the issues of

duty. This is proper because it shifts the normative, policy-oriented issues to the court, where they belong.” *Id.* at 1719. Quite correctly, Bill observed the shift away from the jury and toward the judge in accomplishing this role of policy formation.

Bill understands the supreme court and tort law quite well. However, he did not deny that others could disagree with him over what was then happening to duty rules and the standard of review at the court. He wrote to those who disagreed with his analysis, “it is important to understand where the shift is taking place—on the duty issue—and where it is not—on the no evidence standard of review.” *Id.* at 1719. Over the last 15 years, since the publication of the Powers *Judge and Jury* article, others have indeed disagreed about some of Bill’s conclusions, especially with regard to the standard of review

IV. THE TEXAS SUPREME COURT’S TRENDS SINCE THE POWERS ARTICLE.

Although even he could not predict the future, Bill Powers was right to argue in his *Judge and Jury* article that the supreme court had an interest in duty rules. Beyond tort duty, the court has narrowed, refined, and particularized duty rules and scope of liability principles in number of cases over the last 15 years. But it has done more than just work on duty and scope of liability. The court has worked wonders with the scope of review, if not the standard of review itself. We will turn now to the court’s recent work on duty, scope of liability, and the scope of review.

A. Recent Examples of New Particularized Duty and Liability Rules.

The article from 1997 discusses a number of tort cases and concludes with the observation that the Texas Supreme Court often looks at tort duty rules. “The current [1990’s-era] Texas Supreme Court is not the first to view duty rules [as a normative question for the court]. In fact, this view finds its greatest support in the work of Justice Kilgarlin and the court on which he served.” Powers, *Judge and Jury*, 75 TEX. L. REV. at 1713. So, from the early-1980s court until the late-1990s court, duty principles had been defined by the supreme court as the highest judicial law-giver in Texas. That role continues, as does the court’s work on making particularized duty pronouncements.

In the last court year, the court again refined duty rules in tort cases. One case examined the elements of proof for a negligent misrepresentation claim, and another case reflected an expansion of the equitable forfeiture claims available to plaintiffs who sue a fiduciary. *Grant Thornton LLP v. Prospect High Income Fund*, 314 S.W.3d 913 (Tex. 2010) (negligent

misrepresentation); *ERI Consulting Engineers, Inc. v. Swinnea*, 318 S.W.3d 867 (Tex. 2010). One case from 2008 is particularly instructive about the analysis used in the supreme court to decide duty questions. *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401 (Tex.2009).

1. Liability for Audit Reports.

In the *Grant Thornton* case, the court directed its duty analysis both to the elements of negligent misrepresentation claims as well as the scope of potential plaintiffs who could sue and audit firm. By posing the question its decision would answer, the court noted the particularized duty rule in negligent misrepresentation cases: “We must decide whether the law imposes an obligation on the auditor to provide an accurate accounting not to the corporation or known investor, but to anyone who reads and relies on it.” 314 S.W.3d at 915. With the question stated in terms that could either broaden or limit duties, it is not difficult to see that the court would answer its question in the negative, concluding that tort duties do not flow to everyone who reads an auditor’s report. From its conclusion that all readers of audit reports are outside the scope of liability for negligent-misrepresentation plaintiffs, the court then moved on to refine the reliance required to prove a claim. Each plaintiff must himself demonstrate his own reliance and may not substitute an escrow agent’s reliance on an auditor’s report for his own. *Id.* at 926. Finally, the court held that in a securities claim alleging fraud that induces stockholders to hold onto stock rather than selling it, a “direct communication between the plaintiff and defendant” is required. *Id.* at 930. In doing so, the court “merely delineat[ed] to permit such a claim in the absence of any direct communication.” *Id.* These are quintessentially duty questions for the court to delineate.

2. Equitable Remedies in Fiduciary-Duty Cases.

Not all tort cases coming before the supreme court for a decision result in limited tort-duty rules. Another 2010 case delineated an expansive reach for equitable remedies in fiduciary-duty cases. In *ERI Consulting Engineers*, the court answered a duty question again: “The primary question we must address is whether forfeiture of contractual consideration is available as a remedy” 318 S.W.3d at 872. Even though fiduciary-duty claims are based on equitable principles, the court allowed a plaintiff in such cases to seek forfeiture of contractual consideration “where a fiduciary takes advantage of his position of trust to induce a principal to enter into a contract.” *Id.* at 874. This is true because breaches of fiduciary duty need to have a remedy. Even forfeiture of contract payments

come within the ambit of the equitable remedies, which are “necessary to prevent such abuses of trust, regardless of actual damages.” *Id.* In its discussions of the policy reasons underpinning fiduciary-duty law, the court’s discussion is taken up with shoulds and oughts: “a fiduciary who breaches his duty *should not* be insulated from forfeiture if the party whom he fraudulently induced into contract is ignorant about the fraud, or fails to suffer harm. Likewise, the innocent party *should not* be put into a difficult choice regarding termination of the contract” *Id.* (emphasis added).

3. Employers’ Duties for Fatigued Workers.

In *Nabors Drilling*, the supreme court wrote a helpful opinion that makes this duty subject clearer. In *Nabors Drilling*, the court again considered the topic of employer liability for torts committed by workers who are off the clock. “Employers in Texas generally do not owe a duty to third parties for the tortious activities of off-duty employees occurring off the work site.” *Nabors Drilling*, 288 S.W.3d at 403. The court had to decide whether a worker who said he was tired from working too hard could make the employer liable. “In this case, we consider whether such a limited duty should extend to an employer whose work conditions could induce extreme fatigue in its employees. For the reasons expressed below, we hold that the employer had no duty to prevent injury due to the fatigue of its off-duty employee or to train employees about the dangers of fatigue.” *Id.* at 404. The court, acting as chief policymaker for common-law duties in Texas tort law, decided that the answer should be “no.” In doing so, it acknowledged that “[t]he existence of a duty is a question of law.” *Id.* (citing *e.g., Tri v. J.T.T.*, 162 S.W.3d 552, 563 (Tex.2005); *Fort Bend County Drainage Dist. v. Sbrusch*, 818 S.W.2d 392, 395 (Tex.1991) (reviewing judgment notwithstanding the verdict and recognizing that “[t]he existence of a legal duty is a question of law for the court although in some instances it may require the resolution of disputed facts or inferences which are inappropriate for legal resolution”).

Looking at the court’s own precedents, namely the *Otis Engineering Corp v. Clark* case from the 1980s-era court, and “every other court of appeals to address the issue,” as well as public policy and foreseeability considerations, the court held “an employer owes no duty to protect the public from the tortious acts of an off-duty employee unless the employer affirmatively exercised control because of the employee’s incapacity.” *Id.* at 409-10. Finally, the court rehearsed the analysis necessary to decide whether to adopt a new duty for employers. *Id.* at 410. This analysis required a balancing of “the risk, foreseeability, and likelihood of injury against the social utility of the

actor's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing that burden on the defendant." *Id.* at 410. (quoting *Praesel v. Johnson*, 967 S.W.2d 391, 397–98 (Tex.1998)). The Court also considers "whether one party would generally have superior knowledge of the risk or a right to control the actor who caused the harm." *Id.* at 410.

Based on the analysis and considerations of utility, the court observed that, "[c]onsidering the large number of Texans who do shift work and work long hours (including doctors, nurses, lawyers, police officers, and others), there is little social or economic utility in requiring every employer to somehow prevent employee fatigue or take responsibility for the actions of off-duty, fatigued employees." *Id.* at 410-11. Moreover, the court noted that "foreseeability alone is not sufficient to create a new duty." *Id.* at 411. "Having held that there is no employer duty with respect to off-duty accidents involving fatigue, we also decline to create a new duty requiring employers to train employees about fatigue." *Id.* at 412. Likewise, there would be no duty recognized to warn about such dangers, which are "common knowledge." "We conclude that, because the risk associated with driving while fatigued is common knowledge and appears to have been appreciated by Ambriz, Nabors owed no duty to train employees about those risks." *Id.* at 413.

Thus, the court's recent decisions prescribe duty rules, just as Bill Powers had envisioned as long as 15 years ago. Sometimes the court narrows the duty rules, as it did for an auditor's duty to anyone who reads an audit report, and sometimes the court broadens the scope of a duty, allowing recovery of contract damages even in a breach of fiduciary duty case, which many would have thought did not allow anything but an equitable forfeiture remedy. In the case of an employer's duty for workplace fatigue, the supreme court refused to expand or recognize new tort duties, explaining its analytical methods and holding them up to public scrutiny. The court's role as arbiter of duty continues apace.

B. Scope of Liability and Causation Decisions.

Earlier, this paper noted the new Restatement (Third) of Torts' assignment of proximate cause and scope-of-liability determinations to the jury. While its new discussion of tort law keeps duty issues for the courts, the new Restatement puts issues of a defendant's scope of liability—as a limiting principle—into the jury's prerogative to determine. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM § 29, cmt. f (Proposed Final Draft No. 1, April 6, 2005). This exercise has not escaped the Texas Supreme Court's attention.

In *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448 (Tex. 2006), the court decided a case presenting arguments on the Third Restatement of Torts' scope of liability principles. See 208 S.W.3d at 452 n.4. While the court "applaud[ed] any effort to bring greater clarity to this difficult area . . . [it declined] the invitation to abandon decades of case law, not to mention the Restatement (Second) of Torts, before even the American Law Institute has done so." *Id.* As of this paper's writing, the ALI has adopted the new scope-of-liability paradigm, replacing proximate cause as an analytical construct. RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §29, cmt. b (Proposed Final Draft No. 1, April 6, 2005).

Even though it did not call its analysis a "scope-of-liability" review, the court nonetheless focused on whether the defendants' conduct went beyond what had made its original actions negligent in the first place. See 208 S.W.3d at 453. In deciding that a defendant who had left a gaping manhole in a steel grating was not entitled to a new-and-independent cause instruction in the jury charge, the court noted that no intervening act, like taking down a rope barrier strung around the hole, could have taken away the original negligence in leaving the hole open in the oil derrick. "Any intervening acts which exploited this inadequacy did not fundamentally alter the foreseeable consequences of Crown Derrick's original negligence." *Id.* In defining how far the concept of superseding cause could go, the court helped to decide a basic principle of tort law and considered causation as a limiting principle for who could be liable to a plaintiff. Justice Medina wrote for the plurality that "[w]here the intervening acts' risk is the very same risk that renders the original actor negligent, the intervening act cannot serve as superseding cause." *Id.*

Later, in a products liability case, the supreme court determined that certain parts of the producing cause definition were missing from the standard form used by the Texas Pattern Jury Charge. *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007). Because the supreme court is the arbiter of what legal standard should define producing cause, the court adopted a new standard definition for producing cause, abrogating some of its older opinions that did not include a "substantial factor" analysis. The court determined:

Defining producing cause as being a substantial factor in bringing about an injury, and without which the injury would not have occurred, is easily understood and conveys the essential components of producing cause that (1) the cause must be substantial cause of the event in issue and

(2) it must be a but-for cause, namely one without which the event would not have occurred. This is the definition that should be given in the jury charge.

Id. at 46. Thus, the court established the appropriate Texas definition of producing cause, which is a traditional court-based task.

In both the area of tort duty and proximate cause (or scope of liability as the new Restatement calls it), the court has continued to perform its role as policy arbiter of tort principles. We should not expect the court to deviate from this role in prescribing and defining the parameters of tort duty and causation.

C. New Views on the Standard and Scope of Review for Legal Sufficiency.

One important premise of the Bill Powers article on *Judge and Jury* dealt with the standard of review. Bill was resolute in his defense of the court's use of the standard of review: he called it an "inaccurate perception" that the Texas Supreme Court "is increasingly willing to overturn jury verdicts in tort cases . . . by changing the no evidence standard of review." Powers, *Judge and Jury* 75 TEX. L. REV. at 1699. He wrote that while "[t]he court is shifting more of the normative work in tort litigation away from juries and towards judges, . . . the court is not accomplishing this, as many lawyers think, by abandoning the traditional standard no evidence review." *Id.* at 1719.

Not everyone agrees with the premise advanced by Bill Powers' article that the court upholds the standard of review. Several articles have been published by practitioners and professors on the subject of the supreme court's treatment of the standard of review. Here, in this paper, we draw on three of them—by Jack Ayres, by Wendell Hall, and by Bill Dorsaneo.

1. R. Jack Ayres, Jr.

In his article, trial lawyer Jack Ayres delivers a scathing attack on the court, as the title suggests: R. Jack Ayres, Jr., *Judicial Nullification of the Right to Trial by Jury by "Evolving" Standards of Appellate Review*, 60 BAYLOR L. REV. 337 (2008). He charges the modern-day supreme court of "nullification" because he contends the court changed the rules, and he glorifies judges from the early days of the court who wrote about following rules no matter what: "To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequences they may lead is a duty." Jack Ayres, *Judicial Nullification*, 60 BAYLOR L. REV. at 489 (quoting *Duncan v. Magette*, 25 Tex. 245, 253 (1860) (Roberts. J.)). He

stridently alleges the current-era court would ignore the rule by adopting new ones to reach a result: "Finally, the court will avoid, gloss over, or ignore any procedural rules which would otherwise frustrate or prevent it from imposing the result it desires." Ayres, *Judicial Nullification*, 60 BAYLOR L. REV. at 441. He strongly argues that the traditional no evidence standard of review has been more than just "tweaked" by the new scope of the record examined in a no evidence review: "the scope of review for all cases is now apparently inclusive as opposed to exclusive or traditional. Nonetheless, while exercising this scope of review, the court will nominally continue to state that it follows the traditional standard." *Id.* at 442.

Mr. Ayres did not pull punches in accusing the supreme court of duplicity in the opinion in *City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005). The accusation is that "[t]he Supreme Court of Texas has hopelessly confabulated the scope of review based on the nonsensical conclusion in *City of Keller* that the traditional scope of review and the inclusive scope of review are somehow in reality one in the same." Ayres, *Judicial Nullification*, 60 BAYLOR L. REV. at 443. According to Mr. Ayres, there are several reasons why the "new" standard in Texas appellate review should be considered wrong: he writes that (1) it is unnecessary; (2) it violates the state constitutional provision making review of facts conclusive in the courts of appeal; (3) it abrogates the rules of procedure; (4) it departs from the federal standard on which it is supposedly based; (5) it prescribes no real test at all for a clear and convincing test; and (6) it inherently lack objectivity. *Id.* at 418. Mr. Ayres looks at solutions for this alleged departure by Professors Gerald Powell, Bill Dorsaneo, and others while concluding that no solution would work because, "[t]he sad fact is . . . the Supreme Court of Texas is now clearly headed away from the traditional standard of review." *Id.* at 443-44.

Not surprisingly, Jack Ayres disagrees with Bill Powers' conclusion that the court is not changing the standard of review. Mr. Ayres blames the supreme court for not only changing the standard of review, but also for making the change while espousing adherence to the traditional standard.

2. William V. Dorsaneo, III.

Bill Dorsaneo is an esteemed professor of Texas civil procedure from SMU law school. In one article, he lamented the threats he perceived, endangering the right to trial by jury, from those who fail to pay attention to trends taking Texas appellate courts away from traditional standards of review, "consonant with the substance and the spirit of the Seventh Amendment." William V. Dorsaneo, III, *Reexamining the Right to Trial by Jury*, 54 SMU L. REV. 1695, 1698

(2001). In particular, he wrote that “[p]erhaps foremost among the reasons for this trend has been our preoccupation with the Seventh Amendment’s guarantee of the right to jury trial at the expense of that amendment’s prohibition against judicial reexamination of the jury’s findings of fact other ‘than according to the rules of the common law.’” *Id.* at 1697 (citing U.S. CONST. amend. VII). He was referring to the standard of review.

The Texas standard of review became the subject of a later article written by Dorsaneo as part of the Judge and Jury Symposium conducted by the South Texas Law Review. William V. Dorsaneo, III, *Evolving Standards of Evidentiary Review*, 47 S. TEX. L. REV. 225 (2005). Using as his starting point Justice Robert W. Calvert’s influential law review article, Professor Dorsaneo observed a change in its articulation of the traditional no evidence standard of review: “[I]t seemed reasonably clear that the traditional scope of ‘no evidence review’ had not been modified or replaced with another standard as the twentieth century came to a close. That is no longer so.” *Id.* at 226 (referring to Robert W. Calvert, “*No Evidence*” and “*Insufficient Evidence*” *Points of Error*, 38 TEX. L. REV. 361 (1960)). In introducing Professor Dorsaneo’s article, former Chief Justice Phillips wrote that Dorsaneo’s article “explains how the traditional scope of ‘no evidence review’ in Texas civil appeals (which had been the standard since Robert Calvert’s landmark law review article in 1960) has been replaced by the new standard set forth in the Texas Supreme Court’s 2005 opinion in *City of Keller v. Wilson*.” Thomas R. Phillips, *Judge and Jury Symposium: Foreword*, 47 S. TEX. L. REV. 157, 161-62 (2005). He described Professor Dorsaneo’s criticism as one that “decries [this new standard of review] as an unconstitutional invasion of the jury’s province.” *Id.* at 162.

Ultimately, Professor Dorsaneo not only points out the importance of review standards (because they “establish and govern the relationship between judges, juries and reviewing courts, [and] they are of enormous importance to the principled operation of any legal system that pretends to be governed by legal principles rather than a desire to achieve particular results”); he posits a criticism of the new scope of review. According to his analysis, Professor Dorsaneo believes the “Texas Supreme Court’s recapitulation of the scope of legal sufficiency review” was lacking because it did not treat undisputed evidence correctly. Dorsaneo, *Revising the Scope of Review*, 47 S. TEX. L. REV. at 243. “Such evidence must be considered to properly determine the reasonableness of inferences and because undisputed evidence may be conclusive.” *Id.*

Thus, Professor Dorsaneo argues two points: *first*, the court has changed or “recapitulated” the scope of no evidence review, but *second*, its “recapitulation” falls short because there is another kind of evidence that needs to be reviewed on appeal yet is left out of the inclusive review now performed by appellate courts in a legal sufficiency review.

3. W. Wendall Hall.

Perhaps no appellate lawyer has written more about the Texas standards and scope of review than Wendall Hall. In a 2008 law review article, he observes that “[t]he standards for reviewing jury verdicts in Texas are perennially watched and disputed because they serve the vital purpose of defining the roles of judge and jury in practice.” W. Wendall Hall and Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 540 (2008) (citing William V. Dorsaneo, III, *Judge, Juries and Reviewing Courts*, 53 SMU L. REV. 1497, 1501 (2000) (“There is probably no single legal subject that is more important to the administration of justice than the standards of judicial review of verdicts, judgments, and other orders based on the sufficiency of the evidence presented at a hearing or trial.”)). He surmised, (1) “[w]hile the roles of judge and jury still rightly receive much attention, such ‘deference’ is a moving target these days,” and also (2) “there has been a reconsideration by both [the supreme court and court of criminal appeals] of the scope and standards of review of jury verdicts.” Hall, *The Texas Hold Out*, 49 S. TEX. L. REV. at 541. To Hall, the decision in *City of Keller v. Wilson* is “a reformulated standard for legal sufficiency review,” that appears to chart a somewhat different course from its aging predecessor . . . associated with the ‘traditional’ standards articulated in the 1950s and 1960s by Chief Justice Robert Calvert.” *Id.*

It seems apparent from this discussion and series of quotes that Mr. Hall joins Mr. Ayres and Professor Dorsaneo in agreeing that the Texas standard of review is changed now from the old, “traditional” standard Bill Powers wrote about in 1997. Bill argued the court had not yet changed the standard of review. Ayres, Dorsaneo, and Hall seem to believe things have now changed, and even Chief Justice Phillips’ comments about Professor Dorsaneo’s work at the recent South Texas Judge and Jury Symposium signals a change.

According to Mr. Hall, the new paradigm for the Texas standard of review is a “reasonable juror analysis.” *Id.* at 542; 598-604. The editorial conclusion of the article by Mr. Hall is that Texas’ familiar factual sufficiency review would disappear in the new “reasonable juror” paradigm. “To the extent the civil and criminal courts continue to embrace

reasonable juror standards for reviewing jury verdicts at the expense of our traditional scope and standards of review (or refinements on them), they invite further swings in future elections at the expense of juries and justice.” *Id.* at 609. Of course, the court will also invite the problem of the over twenty presumably “unreasonable” people who disagree with the five “reasonable” judges who decide against a jury verdict. As Chief Justice Calvert’s article noted in doing the math: “It is theoretically possible, and sometimes not far from actual fact, that five members of the supreme court will conclude that the evidence supporting a finding of a vital fact has no probative force, and . . . in effect, that the trial judge who overruled an instructed verdict, the twelve jurors who signed the verdict, the three justices of the court of civil appeals, and four dissenting justices of the supreme court are not men of ‘reasonable minds.’” Robert W. Calvert, “*No Evidence*” and “*Insufficient Evidence*” *Points of Error*, 38 TEX. L. REV. 361 (1960).

V. WHAT’S HAPPENING HERE IS BECOMING MORE AND MORE CLEAR—TEXAS EMBRACES THE NATIONAL MAINSTREAM.

On the two principal items addressed in Bill Powers’ article—duty and the no evidence standard of review—the Texas Supreme Court has taken Texas law into the national mainstream.

First, duty rules have become particularized and specific, along the line adopted by the American Law Institute in its Third Restatement of Torts. As discussed earlier, the Restatement now describes duty rules as “a preferable means for addressing limits on liability when those limitations are clear, are based on relatively bright lines, are of general application, do not usually require resort to disputed facts in a case, implicate policy concerns that apply to a class of cases that may not be fully appreciated by a jury deciding a specific case, and are employed in cases in which early resolution of liability is particularly desirable Duty is usefully employed when a court seeks to make a telling pronouncement about when actors may or, on the other hand, may not be liable.” RESTATEMENT (THIRD) OF TORTS: LIABILITY FOR PHYSICAL HARM §29, cmt. f (Proposed Final Draft No. 1, April 6, 2005).

Second, further aligning Texas with the nationwide practice of reviewing jury verdicts on appeal, the *City of Keller* decision adopts a new standard and scope of review calculus based upon how a “reasonable juror” could view evidence. This amounts to a departure from the court’s former practice, and under the new scope of review, the court decided it could look at all the record evidence of a

disputed fact to decide if reasonable jurors could believe the evidence. This movement represents two principal changes; one concerns the scope of evidence reviewed, and one involves the “reasonable juror,” whoever that person is.

City of Keller first moved away from a limited scope of review, in which the appellate judge considers only the evidence favorable to a finding, and toward a fuller scope of review, which considers all the evidence on the fact issues being reviewed. *City of Keller v. Wilson*, 168 S.W.3d 802, 808-09 (Tex. 2005). The court referred to the earlier scope of review, which considers all the evidence, as “inclusive.” *Id.* at 809. As Wendall Hall notes, this movement from an exclusive scope of review to an inclusive one is something the United States Supreme Court has deemed less substantive than semantic. W. Wendall Hall, *Standards of Review in Texas*, 38 ST. MARY’S L. J. 47, 247 (2006) (citing *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150-51 (2000)). Our supreme court in Texas believes that the distinction between exclusive and inclusive review makes no difference in the outcome of an appeal. “Under either scope of review, appellate courts must view the evidence in the light most favorable to the verdict, crediting favorable evidence if reasonable jurors could, and disregarding contrary evidence unless reasonable jurors could not.” *City of Keller*, 168 S.W.3d at 807.

After adopting this new “inclusive” standard of review, the second change in *City of Keller* is its adoption—expressly—of “reasonableness” as a guide in deciding what could be believed as a controlling fact that jurors decide. The court wrote that it would look inside the mind of this paradigmatic “reasonable juror:”

If the evidence at trial will enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. A reviewing court cannot substitute its judgment for that of the trier-of-fact, so long as the evidence falls within these zones of reasonable disagreement.

Id. at 807; *see also* Hall, *Standards of Review*, 38 ST. MARY’S L. J. AT 248-49. In its opinion, the court did not discuss what a “zone of reasonable disagreement” would be, yet the court did nonetheless make the move to an inclusive scope of review. To underscore this point, the court returned to the “reasonable juror” test:

[t]he final test for legal sufficiency must always be whether the evidence at trial would enable reasonable people to reach the verdict under review. Whether a reviewing court begins by considering all the evidence or only the evidence supporting the verdict,

legal-sufficiency review in the proper light must credit favorable evidence if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not.

168 S.W.3d at 827. Undoubtedly, this focus on the juror with a “fair” and “reasonable mind” makes Texas practice more like other states’ appellate-review practices. As Mr. Hall has noted in another article, “*City of Keller* self-consciously brought the Texas civil legal sufficiency standard closer into line with the practice of other jurisdictions, including federal courts.” W. Wendall Hall and Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 597 (2008).

Moving toward a mainstream, national practice has important advantages for appellate courts and practitioners. There are at least three advantages that come to mind.

First, similar fact patterns and cases can be cited and compared across jurisdictional lines, because the standards of review employed by different state and federal courts are now the same. What a “reasonable juror” would believe in Nebraska about the cause of an airline crash might now be compared to the views of (presumably) reasonable jurors in Texas.

Second, moving legal sufficiency into a nationwide paradigm helps to refine the factual sufficiency review practice in Texas by making it almost *sui generis*. The Texas *factual* sufficiency appellate standard now stands in starker contrast to *legal* sufficiency review, and factual sufficiency review can be left to its own development, in line with its state constitutional basis that makes factual questions conclusive in the court of appeals. See TEX. CONST. art. V § 6(a) (“the decision of [courts of appeals] shall be conclusive on all questions of fact brought before them on appeal or error.”). Not many other states have a factual sufficiency review like the one used in Texas appeals, and this Texas practice of making factual decisions conclusive in the courts of appeals remains unchanged under the *City of Keller* standards. Therefore factual sufficiency review can live on and develop under its own rules, balancing the right to trial by jury with its own fact-jurisdiction limits, see *Herbert v. Herbert*, 754 S.W.2d 141, 142 (Tex. 1988), and the obligation to ensure the courts of appeals correctly apply the standards governing their review of the record. See *Dow Chem. Co. v. Francis*, 46 S.W.3d 237, 242 (Tex. 2001).

Third, by making the scope of review inclusive, appellate judges and appellate lawyers can write opinions and briefs that tell a more complete story. Whereas the old *In re Kings Estate* limited scope of review focused only on part of the story, now it is

possible to acknowledge everything in the record. Giving voice to all the facts in the appellate record has important advantages, particularly when an aberrational result happens at trial. Now, discussing the whole record, an appellate lawyer can explain the result more completely. Without resort to the entire record under an inclusive review standard, lawyers sometimes could not explain the result at trial—what inflamed the jury, what persuasive facts made a difference; or how witnesses contradicted each other. In short, when the multi-million dollar plaintiff’s verdict comes out of the Valley, or a defense verdict happens in Brazos County, lawyers can point to an entire record of facts that explain the result.