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**JURIES: FROM SELECTION
TO MISCONDUCT**



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PATTERN JURY CHARGES



COME, LET US REASON TOGETHER

BY TIM CHOVANEC

HE QUIETLY MOVED INTO HIS son's room in the reflected light of a quarter moon. Listening a moment for the sound of breathing, he readjusted the baby blanket. Stroking the child's forehead, he whispered a gentle goodbye and left. These winter PJC meetings were always more of an inconvenience because to be on time he had to leave the house before first light. It made it easier, though, when he considered that at this same instant all across the state, the other nine members of the committee were doing the same.

"Sorry I'm late, everybody," he said as he entered the conference room at One American Center, three hours later. "Fog at the airport."

"No sweat," Steve said, "we were just looking at Roger's latest memo." Steve was the current chair of the committee and was reputed to have never missed a meeting in the twenty years he had served on PJC, despite having a demanding defense practice for one of the "big five" in Houston.

"My memo basically argues," began Roger, "that the form of the question currently on the table is defective because one of the essential elements of the cause of action isn't being submitted. I argue that *Jenkins* stands for the proposition that evidence of reliance is an essential element that the jury must find for the plaintiff to recover. Since *Jenkins* is a Texas Supreme Court case, I don't see that we have any choice but to add reliance to the question."

"I read your memo, Roger, and I certainly understand the language upon which you're relying to make your argument," said Marta, the vice-chair of the committee. "However, *Jenkins* is a summary judgment case where the plaintiff lost on a no-evidence point. I'm not sure it was ever intended to inject a new element of the claim."

"Well, I think it does," he responded.

"Maybe so, but I don't think it's certain. Don't forget that *Slimline Plastics*, also a supreme court case, explicitly outlines

the essential elements of the cause of action and affirms a submission almost identical to what the subcommittee has presented to us in this draft."

Marta's comment reminded everyone that before a draft is approved by the general committee, a subcommittee usually spends twelve to eighteen months writing and re-writing the new sections before they are acted on by the full group. In this particular case, the draft from the subcommittee had taken almost two years to prepare, and the general committee had undertaken its review about six months ago.

"I chaired the subcommittee that authored this draft, and I can tell you that ever since *Jenkins* came down last summer we have gone around and around on this issue," said Rosemary, a solo practitioner from San Antonio who generally represented the plaintiff's side of the docket. "On the one hand we have *Slimline*, which, like all the cases in this area, lists the four elements of the cause of action. It's cited in every court of appeals case in this area. On the other hand, we now have *Jenkins*, which in a fairly unique factual situation appears to suggest that reliance may be an issue. What the subcommittee finally concluded was that *Jenkins* wasn't sufficient authority to—on our own—add another element to the question. We thought the better approach was to embrace the traditional *Slimline* formulation and put a very specific comment below the line to remind practitioners and the trial bench that the *Jenkins* issue is out there." ('Below the line' was PJC shorthand for items in the comment. Ironically, items below the line usually took much more of the committee's time to approve than those 'above the line,' the items proposed for submission to the jury.)

Rosemary continued, "Don't forget that *Jenkins* in no way overruled *Slimline*. In fact, *Slimline* is hardly even mentioned in the opinion, which does give credence to the argument that they were merely discussing evidentiary issues in *Jenkins* and didn't intend to add an element to the cause of action. Chuck, you were on the subcommittee, isn't that where we eventually ended up?"

Chuck, a defense attorney from Amarillo, looked up from his thick casebook. “Well, I’ve never thought that *Jenkins* was ‘merely evidentiary.’ Language in Texas Supreme Court opinions, in my experience, is the product of careful thought and analysis, so it’s my firm belief that we are witnessing an evolution of the cause of action. Having said that, though, my opinion is that it’s too great a risk from our perspective—as a PJC committee—to opine based on *Jenkins* that every case in this area must now be submitted with a fifth element. I wrote the comment that you see in the draft on behalf of the subcommittee on *Jenkins*. It is an attempt to draw everyone’s attention to this issue. If we start getting some submissions with the fifth element approved by courts of appeals, based on *Jenkins*, then that would justify changing the language above the line in my opinion. Until then, or until the Supreme Court posits the fifth element explicitly, I’d be concerned that we would be hanging out a little bit if we proposed a fifth element above the line in absolutely every case. Having said that though, I think plaintiffs would be wise to submit the fifth element. The comment is an attempt to draw everyone’s attention to that fact.”

Jane, from Texarkana, asked, “Is there a single Texas case from any level that approves a submission including the fifth element?”

“Admittedly, no,” responded Roger, “but the Restatement does acknowledge that reliance is customarily an element of the cause of action.”

“Roger, you’re not seriously proposing that we add a fifth element to a Texas charge because the Restatement says so, are you?” offered Frasier, perhaps the committee’s most prominent plaintiff’s attorney.

The committee took a collective deep breath. Roger and Frasier had a history of spirited exchanges on the committee, and there was a palpable sense that history would soon be repeating itself.

“Of course not, man. I’m saying that the Texas Supreme Court requires it. And that promulgating a ‘pattern jury charge’ that omits an element the court has said is required is doing a disservice to the bench, the bar, and the people of the great state of Texas!”

The room held quiet for a second. Then, in what can only be described as a collective, cathartic guffaw, the room erupted in laughter from all corners, with Roger and Frasier chortling the loudest.

“I was wondering when we were going to get to the ‘Great State of Texas’ argument. Deep down, Roger, you really won’t be happy until *Lemos v. Montez* has gone the way of the dodo,” said Frasier.

“You’re just disappointed that the 80’s Court never got around to your ultimate general submission, ‘How much?’” responded Roger.

“Cretin!”

“Philistine!”

The room erupted again, loudly enough this time to cause the receptionist, visible through the glass windows of the conference room, to look back over her shoulder quizzically.

“Perhaps it would be a good time to order lunch, and after that to look at the proposed submission of damages,” Steve interjected with aplomb. Clearly, it would be a few more meetings before a genuine consensus emerged . . .

“So, is he asleep?” he asked his wife as he closed the door from the garage behind him.

“Yeah, I just put him down.” Her husband’s shoulders noticeably slumped.

“How was your meeting?”

“Great. I think we’ll be able to publish something by spring,” he said as he loosened his tie, took off his coat, and put his briefcase on the counter.

“Why do you keep putting yourself through this?”

“It’s important, honey. It’s really, really important.”

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