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TAKING DEPOSITIONS IN A TORT CASE

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1. PREPARATION FOR THE DEPOSITION

A. The Elements of Proof in a Tort Case

(1) Introduction

One of the keys to taking a deposition in a tort case is preparation. A significant part of deposition preparation is becoming familiar with the elements of the causes of action or defenses asserted, so that the attorney may obtain evidence supporting or negating the elements at the deposition. One of the best sources of information about the elements of a cause of action or defense in a tort case is the *Texas Pattern Jury Charges*.

(2) Basic Negligence Claims

The elements of a basic negligence case are (1) a duty owed to plaintiff, (2) a breach of that duty, and (3) damages proximately caused by the breach of duty. *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex.1995).

Whether there is a duty owed to the plaintiff is a question of law for the court to decide. *Golden Spread Council, Inc. v. Akins*, 926 S.W.2d 287, 291 (Tex. 1996). In determining whether a common law duty exists, courts must weigh 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 the burden on the defendant. The court in *Golden Spread Council* also emphasized other factors, including whether one party had superior knowledge of the risk or a right to control the actor who caused the harm. Thus, where there is a question about whether a duty exists, information obtained in a deposition can address some of these factors.

The basic negligence question that is submitted to the jury is:

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

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

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

5. *Connie Contributor* _____

Texas Pattern Jury Charges § 4.1

Section 2.1 of the *Texas Pattern Jury Charges* (“*TPJC*”) defines negligence and ordinary care as follows:

“Negligence” means failure to use ordinary care, that is, failing to do that which a person of ordinary prudence would have done under the same or similar circumstances or doing that which a person of ordinary prudence would not have done under the same or similar circumstances.

“Ordinary care” means that degree of care that would be used by a person of ordinary prudence under the same or similar circumstances.

Obviously, one of the key areas of depositions in negligence cases is whether or the parties’ conduct falls within these definitions.

Section 2.4 of the *TPJC* defines “proximate cause” as:

“Proximate cause” means a cause that was a substantial factor in bringing about an [occurrence] [injury] [occurrence or injury], and without which cause such [occurrence] [injury] [occurrence or injury] would not have occurred. In order to be a proximate cause, the act or omission complained of must be such that a person using *ordinary care* would have foreseen that the [occurrence] [injury] [occurrence or injury], or some similar [occurrence] [injury] [occurrence or injury], might reasonably result therefrom. There may be more than one proximate cause of an [occurrence] [injury] [occurrence or injury].

Proximate cause often comes into play when the plaintiff has had prior injuries, and there is an issue as to how much the prior injury and how much the negligence of defendant contributed to plaintiff’s condition. At the plaintiff’s deposition, defendants should inquire of the plaintiff about the plaintiff’s prior conditions and prior injuries that may be related to the injury at issue in the lawsuit.

In some cases there may be an issue as to whether the driver or other negligent actor was in the course and scope of their employment. The following *TPJC* definitions would be relevant to the course and scope issue:

An “employee” is a person in the service of another with the understanding, express or implied that such other person has the right to direct the details of the work and not merely the result to be accomplished.

An employee is acting in the scope of his employment if he is acting in the furtherance of the business of his employer.

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