LAWSUIT SHAPING AND LEGAL SUFFICIENCY: THE ACCELERATOR AND THE BRAKES OF CIVIL LITIGATION

David Peeples*

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* B.A., Austin College; M.A., J.D., University of Texas. Judge Peeples served seventeen years as a district judge in San Antonio and six years as a justice on the Fourth Court of Appeals. In 2004, he left the active bench and became a senior judge. He now sits by assignment, serves as Presiding Judge of the Fourth Administrative Judicial Region of Texas, and chairs the Texas Panel on Multi-District Litigation.

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I. INTRODUCTION

Legal sufficiency is a concept whose importance is hard to overstate. The legal sufficiency of a cause of action can be challenged throughout the life of a lawsuit—before trial, at trial, and after verdict.[1] Evaluation of legal sufficiency by courts has been called a "universal procedural principle."[2]

But what does legal sufficiency mean, and what role does it play in the legal system? This Article seeks to answer these questions. Legal sufficiency means three different things because it consists of three distinct components: duty (and a corresponding standard of conduct),[3] sufficiency of the proof of historical events,[4] and reasonableness of the decisions about mixed questions of law and fact.[5] A claim or defense is legally insufficient if it is not founded on a legal duty,[6] or there is insufficient proof of disputed historical events,[7] or it requires an answer to a mixed law-fact question that

[1] *See* RICHARD D. FREER, INTRODUCTION TO CIVIL PROCEDURE §§ 9.4–.5 (2006). Historically, legal insufficiency has been asserted by demurrer, pretrial dismissal for failure to state a claim, summary judgment, directed verdict, and judgment n.o.v. *See id.*; JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE §§ 5.22, 9.1–.3, 12.3 (4th ed. 2005); JOSEPH W. GLANNON, CIVIL PROCEDURE: EXAMPLES & EXPLANATIONS 473–515 (6th ed. 2008); FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE §§ 4.1–.2, 4.10–.16, 7.21, 7.30 (5th ed. 2001).

[2] *See* ALI/UNIDROIT PRINCIPLES OF TRANSNATIONAL CIVIL PROCEDURE R. 19 cmt. R-19A (2004). Rule 19 provides that "the court at any stage before the final hearing may . . . [r]ender a complete or partial judgment" by deciding questions of law or fact. *Id.* R. 19. "It is a universal procedural principle that the court may make determinations of the sufficiency of the pleadings and other contentions, concerning either substantive law or procedure . . . . Judgment is appropriate when the claim or defense in question is legally insufficient as stated." *Id.* R. 19 cmt. R-19A. This procedure, according to the comments, corresponds to summary judgment, demurrer, and motion to dismiss for failure to state a claim. *See id.* R. 19 cmts. R-19A, R-19C.

[3] *See infra* Part III.A.

[4] *See infra* Part III.B.

[5] *See infra* Part III.C.

[6] *See* RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 328A (1965); *infra* Part III.A.

[7] *See* Robert W. Calvert, *"No Evidence" and "Insufficient Evidence" Points of Error*, 38 TEX. L. REV. 361, 366 (1960); *infra* Part III.B.

would be outside the bounds of reasonableness.[8]

The role that legal sufficiency plays in the litigation system is to balance and provide a counter-weight to lawsuit shaping. Legal sufficiency procedures[9] are boundary-setting procedures; they place outer limits around a plaintiff's ability to shape a case by naming defendants and pleading causes of action.[10] Clients do not walk into the law office with a list of defendants to sue and causes of action to plead. Those decisions will be made by their lawyers, who have both an ethical duty to advocate their clients' cause fully[11] and a financial incentive to structure their clients' lawsuits for maximum recovery.[12] When lawyers shape lawsuits to their clients' advantage, they are lawfully asserting their clients' rights; the procedural rules allow lawsuit shaping,[13] and the rules of sanctions and ethics let plaintiffs file civil suits in hope of discovering factual support and developing a legal basis for their case.[14] Although most cases are simple, and there is no need to shape them creatively, when a death or serous injury has occurred, a good lawyer will shape the case to include a solvent or insured defendant.

But lawsuit shaping is only part of the story—it is balanced by judicial boundary-setting. The same rules of civil procedure that permit lawsuit shaping instruct judges to set litigation boundaries by requiring that lawsuits be legally sufficient. By screening claims and setting litigation boundaries, legal sufficiency standards provide a counter-weight to the lawsuit-shaping realities of civil litigation.

Boundaries are an essential part of the civil litigation system. From the rigid common-law forms of action to the Field Code of 1848, to the Federal

[8] *See infra* Part III.C.

[9] In federal court a claim may be challenged as legally insufficient by motion to dismiss for failure to state a claim, motion for summary judgment, and motion for judgment as a matter of law. In Texas the legal sufficiency procedures are: special exception, motion for summary judgment, objection to a jury question, motion for directed verdict, and motion for judgment n.o.v.

[10] *See* FRIEDENTHAL, KANE & MILLER, *supra* note 1, §§ 5.22, 9.1 (discussing how challenges to pleadings and summary judgment can be used to challenge specific causes of action or parties).

[11] *See, e.g.*, Tex. Disciplinary R. Prof'l Conduct 3.01 cmt. 1, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9).

[12] *See infra* Part II.E.

[13] *See infra* Part II.A–D.

[14] *See* 27 C.J.S. *Discovery* §§ 1–2 (2009) (noting that the purpose of discovery to is to allow a plaintiff to obtain additional information from a defendant after filing suit but before trial, including the "exact nature" and "extent" of the plaintiff's claim); *infra* notes 47–48 and accompanying text (discussing the rules of sanctions and ethics for lawyers).

Rules of 1938 and the Texas Rules of 1941, two procedural developments have balanced each other: as rule changes made it easier for plaintiffs to plead their way through the courthouse door,[15] legal sufficiency procedures became stronger and more refined.[16] Jury trial developed at a time when the forms of action themselves set the litigation boundaries and allowed less freedom to shape a lawsuit than exists now.[17] As the Field Code and the Federal Rules permitted the filing of cases that did not fit an existing pigeonhole, the rules also developed procedures for the dismissal of cases that were legally insufficient.[18]

The effect of legal sufficiency dismissals is to prevent claims from reaching the jury, but that is not their purpose.[19] Legal sufficiency serves

[15] *See generally* Stephen N. Subrin, *How Equity Conquered Common Law: The Federal Rules of Civil Procedure in Historical Perspective*, 135 U. PA. L. REV. 909, 914–26 (1987) (describing how the Federal Rules relied more on the flexible equity procedures than the rigid common-law procedures, thereby relaxing common-law limits on lawsuits and allowing lawyers greater latitude to name parties and plead legal theories). In two recent cases involving antitrust and official immunity, the United States Supreme Court has tightened the usual rules of notice pleading. *See* Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949 (2009) (suit against high governmental officials entitled to official immunity); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007) (antitrust suit). To survive a motion to dismiss in such cases, said the Court, a complaint must plead facts, not mere legal conclusions or the elements of a cause of action. *See Iqbal*, 129 S. Ct. at 1949; *Twombly*, 550 U.S. at 570. Time will tell whether stricter pleading standards are imposed in all cases.

[16] *See* Galloway v. United States, 319 U.S. 372, 389–92 & n.23 (1943) (discussing development of the demurrer to the evidence, the nonsuit, and the directed verdict).

[17] *See* Robert G. Bone, *Mapping the Boundaries of a Dispute: Conceptions of Ideal Lawsuit Structure from the Field Code to the Federal Rules*, 89 COLUM. L. REV. 1, 7–8 (1989); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment*, 80 COLUM. L. REV. 43, 45–50 (1980) (discussing the development of the jury trial during the time in which the Seventh Amendment was adopted).

[18] *See Galloway*, 319 U.S. at 389–92 & n.23.

[19] Some scholars refer to legal sufficiency procedures as ways of controlling the jury. *See, e.g.*, FRIEDENTHAL, KANE & MILLER, *supra* note 1, § 12.3 ("Directed verdicts and judgments notwithstanding the verdict . . . are two mechanisms by which the judge controls the jury, since the granting of either motion essentially takes the case out of the jurors' hands."); JAMES, HAZARD & LEUBSDORF, *supra* note 1, §§ 7.20–.30 (discussion of controlling the jury through preverdict and postverdict procedures); STEPHEN C. YEAZELL, CIVIL PROCEDURE 592–603 (6th ed. 2004) (discussion of controlling juries before and after verdict).

Others view legal sufficiency procedures as methods of judicial gatekeeping and screening. *See, e.g.*, DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, TORTS AND COMPENSATION: PERSONAL ACCOUNTABILITY AND SOCIAL RESPONSIBILITY FOR INJURY 19–24 (5th ed. 2005) (judges are gatekeepers who decide legal sufficiency issues and sometimes screen out entire cases); FREER, *supra* note 1, § 9.5 ("In civil cases . . . the judge has always played a gatekeeping

not to oppose the jury but to set the outer boundaries of litigation.[20] To use a different metaphor, lawyers press the accelerator while judges operate the brakes.

A comparison of the civil and criminal litigation systems[21] highlights how lawsuit shaping works. Civil lawsuits are characterized by: (1) unimpeded filing of civil suits by anyone, not just the district attorney;[22] (2) no initial screening or gatekeeping by any public official, in contrast to pre-suit screening of criminal cases by prosecutor and grand jury;[23] (3) easy joinder of multiple defendants, not just the accused;[24] (4) a dynamic and adaptable common law, which can expand existing causes of action (and recognize new ones), rather than a fixed and finite penal code;[25] and (5) a financial incentive to shape the case for maximum recovery, not just the desire to imprison the defendant.[26]

These five realities push civil litigation toward expansive lawsuits by coupling lenient, wide-open legal procedures with the financial incentive to shape the lawsuit creatively. Criminal cases are kept within fixed limits from the beginning;[27] after filing they are seldom trimmed or dismissed by the court.[28] Civil cases, by contrast, face no limits at the beginning;[29] but as

function" by allowing the jury to decide the case only if the evidence is legally sufficient.).

[20] Critics have said the Texas Supreme Court has used these procedures to place juries "under siege" and to achieve "judicial tort reform." See Phil Hardberger, *Juries Under Siege*, 30 ST. MARY'S L.J. 1, 1, 4–5 (1998) (discussed *infra* notes 167, 206, 273, & 276); David A. Anderson, *Judicial Tort Reform in Texas*, 26 REV. LITIG. 1, 1–5 (2007) (discussed *infra* notes 123 & 268 and Part IV).

[21] The major differences between civil and criminal cases are well known: in criminal prosecutions, the state faces a higher burden of proof, the defendant may assert the privilege against self-incrimination, and the jury verdict must be unanimous. Criminal and civil cases also have vastly different discovery procedures. The additional differences discussed in Part II are less well known but more important in understanding lawsuit shaping.

[22] *See infra* Part II.A.

[23] *See infra* Part II.B.

[24] *See infra* Part II.C.

[25] *See infra* Part II.D.

[26] *See infra* Part II.E.

[27] *See infra* Part II.A–E.

[28] *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2122–23 (1998). Courts rarely dismiss criminal cases for legal insufficiency over the state's objection. *See id.* But the state often moves to dismiss cases for lack of proof. *See id.* at 2122 n.3; William J. Stuntz, *Plea Bargaining and Criminal Law's Disappearing Shadow*, 117 HARV. L. REV. 2548, 2552–53 (2004). And in many cases the state will move to dismiss one or more counts so the trial may proceed, or the court may accept a plea, on the remaining charges. *See*

this Article explains, they are subject to screening and boundary-setting as the case progresses.[30] In any particular case, fair-minded observers might disagree about where the litigation boundaries should be set—whether a case (or cause of action) should be dismissed or allowed to proceed—but at some point during the life of a civil lawsuit there have always been limits, from the common-law writ system to the present.[31]

This Article begins by examining in Part II the five features of civil procedure that hard-wire the litigation system for lawsuit shaping. Part II then reviews a sixth reality—the legal developments in Texas that cumulatively have stimulated lawsuit shaping by making damage lawsuits easier to win. Part III explains that legal sufficiency means much more than whether there was enough proof; it consists of law declaration, sufficient factual proof, and reasonable law application. Part III also describes how courts, by making legal sufficiency decisions, are adjusting the litigation boundaries to contain (or permit) the expansive tendencies of lawsuit shaping. Part III makes two observations about how legal sufficiency has operated in Texas: first, juries have more latitude (that is, less judicial supervision) to decide issues of historical fact than mixed questions of law and fact; and second, they have more latitude to decide the historical facts when there is direct evidence of them and not just inferences from the circumstances. Part IV seeks to sharpen our understanding of legal sufficiency by discussing two arguments—that it undermines the right to jury trial, and that a court's legal sufficiency decisions should, over a period of time, be proportionate with respect to plaintiffs and defendants.

II. LAWSUIT SHAPING: PRESSURES TOWARD EXPANSIVE LITIGATION

Five realities of civil procedure encourage lawsuit shaping. To clarify these realities, Part II contrasts them with analogous criminal procedures. A sixth reality is that civil law in Texas has evolved generally in a lawsuit-friendly direction since the 1970s, and this has given impetus to lawsuit shaping.

Lynch, *supra*, at 2122; Stuntz, *supra*, at 2552–53.

[29] *See infra* Part II.A–E.

[30] *See infra* Part III.

[31] *See* Devlin, *supra* note 17, at 45–50 (discussing limits on causes of action in English common law); *infra* notes 124–126 (discussing current federal and Texas procedural rules that set litigation boundaries).

A. Filing by Anyone

Criminal prosecutions can be brought only by the official prosecutor.[32] When a crime has been committed, neither the victim nor the victim's family nor interested bystanders can file a criminal case; nor can they force the prosecutor to file one.[33] They can file a complaint, and they can contact the district attorney (or the United States Attorney) to urge that charges be brought.[34] But the decision whether to prosecute will be made by the prosecutor.

In contrast, anyone can file a civil lawsuit—with or without a lawyer.[35] Even if several lawyers have reviewed a case and rejected it, the civil litigant can shop around until he finds a lawyer willing to bring suit for him. And if he cannot find a lawyer to represent him, he can file suit himself pro se.[36] In stark contrast to the criminal system of filing only by public officials, the civil system is one of unrestricted open filing.

B. No Substantive Screening

Felony criminal prosecutions must be presented to the grand jury,[37] which has the right to reject them by refusing to indict.[38] In practice, grand juries do not reject many cases;[39] but they have the power to reject them,

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[32] *See* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 13.1(a) (5th ed. 2009) (noting that prosecutors are responsible for bringing charges against defendants but also commenting that for some minor offenses, like traffic violations, a police officer can actually charge defendants); Erin C. Blondel, Note, *Victims' Rights in an Adversary System*, 58 DUKE L.J. 237, 246 (2008).

[33] *See* Tex. Code Crim. Proc. Ann. art. 56.02(d) (Vernon 2006 & Supp. 2009) ("A victim, guardian of a victim, or a close relative of a deceased victim does not have standing to participate as a party in a criminal proceeding or to contest the disposition of any charge."); Blondel, *supra* note 32, at 246 ("[F]ederal prosecutors, not victims, have carried sole responsibility to prosecute federal offenses since the Judiciary Act of 1789.").

[34] *See* Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491, 524 (discussing the effect a victim's notification of the commission of a crime to authorities has on the ultimate prosecution of the crime).

[35] *See, e.g.*, 28 U.S.C. § 1654 (2006) ("In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein.").

[36] *See, e.g.*, *id.*

[37] *See* U.S. CONST. amend. V. *But see* Hurtado v. California, 110 U.S. 516, 535, 538 (1884) (holding that the Fifth Amendment right to indictment by grand jury does not apply to the States).

[38] *See* LAFAVE ET AL., *supra* note 32, § 15.2(g). In Texas, misdemeanor complaints are screened by the district attorney but not by a grand jury. Tex. Const. art. I, § 10.

[39] *See* Thomas P. Sullivan & Robert D. Nachman, *If It Ain't Broke, Don't Fix It: Why the*

and the prosecutor is always aware of it.[40] Moreover, before cases are presented to the grand jury, the prosecutor herself has an obligation to weed out the ones that have no merit.[41] No prosecutor pursues every case that a complainant brings to her office.[42] Often she will refuse to present a case to the grand jury,[43] or will present a case with a wink and try to have it no-billed.[44]

By contrast, civil litigants face no substantive screening when they file a lawsuit. There is no official gatekeeper to review civil cases for merit at the threshold.[45] Indeed, an indigent litigant will not have to pay a filing fee or post security for costs.[46] The rules of sanctions[47] and the canons of ethics[48]

Grand Jury's Accusatory Function Should Not Be Changed, 75 J. CRIM. L. & CRIMINOLOGY 1047, 1050 (1984) ("When a federal prosecutor seeks an indictment from the grand jury, almost invariably the grand jury returns a true bill. Indeed, 'no bills' are so rare that prosecutors regard them as freak occurrences.")

[40] *See* LAFAVE ET AL., *supra* note 32, § 15.2(g) ("The grand jury retains complete independence in refusing to indict.").

[41] *See, e.g.*, Tex. Disciplinary R. Prof'l Conduct 3.09(a) & cmt. 2, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9) (stating that prosecutors generally have a duty to "refrain from prosecuting . . . a charge that the prosecutor knows is not supported by probable cause" but qualifying that limitation significantly in the context of grand juries such that the prosecutor must only "believe[] that the grand jury could reasonably conclude that some charge is proper").

[42] *See* Stuntz, *supra* note 28, at 2552 (commenting on how prosecutors will normally only prosecute a case when they have a high chance of winning at trial and will dismiss weaker cases).

[43] *See id.* at 2552–53; LAFAVE ET AL., *supra* note 32, § 13.1(a)–(c).

[44] *See* Sullivan & Nachman, *supra* note 39, at 1050 (discussing the profound influence the prosecution has over the grand jury members, who normally "come to trust the prosecutors' judgment")

[45] While there is no official civil gatekeeper, lawyers often function as informal gatekeepers by declining to represent clients whose cases seem to have no merit, or no solvent or insured defendant to sue. *See* Howard B. Eisenberg, *Rethinking Prisoner Civil Rights Cases and the Provision of Counsel*, 17 S. ILL. U. L.J. 417, 488 (1993) ("[A] lawyer who has done the research and investigation can explain to the client that the case has no merit . . . ."); *infra* Part II.E. These clients may then look for another lawyer, file suit pro se, or decide not to pursue the matter.

[46] *See* Tex. R. Civ. P. 145 (providing procedure for cost-free filing by indigents); *compare* Tex. Civ. Prac. & Rem. Code Ann.§ 13.001(b)–(c) (Vernon 2002) (permitting trial courts to dismiss cases filed by indigents if: "(1) the action's realistic chance of ultimate success is slight; (2) the claim has no arguable basis in law or in fact; or (3) it is clear that the party cannot prove a set of facts in support of the claim").

[47] The sanctions rules permit lawsuits that may not be supported by existing law or known facts; in this sense they permit creative lawsuit shaping. *See* FED. R. CIV. P. 11(b); Tex. Civ. Prac. & Rem. Code Ann.§ 10.001. In federal court, pleadings may not be filed for "any improper purpose"; claims and contentions must be "warranted by existing law or by a nonfrivolous

present no real threat to the civil litigant who tests the frontiers of the law and whose case is eventually dismissed by the court or rejected by the jury. In contrast to the criminal system, in which the prosecutor and the grand jury act as gatekeepers, there is no official in the civil system to screen cases for factual or legal support when they are filed.[49]

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argument for extending, modifying, or reversing existing law or for establishing new law"; and factual contentions must have "evidentiary support" or be likely to have such support after investigation and discovery." *See* FED. R. CIV. P. 11(b). A Texas statute, enacted in 1995, adopts the federal standard almost verbatim. *See* Tex. Civ. Prac. & Rem. Code Ann.§ 10.001.

In addition, Texas Rule of Civil Procedure 13, adopted in 1987, contains a different and more lenient standard. *See* Tex. R. Civ. P. 13. It authorizes sanctions for pleadings that are "groundless" and brought either in "bad faith" or "for the purpose of harassment." *See id.* "Groundless" means "no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law." *Id.* Factual assertions that are knowingly groundless and false are sanctionable only if they were made for the purpose of delaying a trial setting. *See id.* The Texas statutes also contain provisions similar to Rule 13. *See* Tex. Civ. Prac. & Rem. Code Ann. § 9.001(3).

Thus, freedom to shape the case is not unlimited. *See, e.g.*, Low v. Henry, 221 S.W.3d 609, 622 (Tex. 2007) (upholding sanctions against attorney for alleging that two doctors prescribed drug for the plaintiff when medical records in attorney's possession negated that assertion).

[48] *See* Tex. Disciplinary R. Prof'l Conduct 3.01, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (Tex. State Bar R. art. X, § 9). Texas Disciplinary Rule 3.01 states, "A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless the lawyer reasonably believes that there is a basis for doing so that is not frivolous." *Id.* The comments make clear that a lawyer (1) has a duty to advocate for the client fully within the rules, (2) may file a suit anticipating that the law will expand or change to support the suit that has been filed, and (3) may seek to develop factual support for the suit through discovery:

> The advocate has a duty to use legal procedure for the fullest benefit of the client's cause, but also a duty not to abuse legal procedure. The law, both procedural and substantive, affects the limits within which an advocate may proceed. . . . However, the law is not always clear and never is static. Accordingly, in determining the proper scope of advocacy, account must be taken of the law's ambiguities and potential for change. . . . A filing or contention is frivolous if it contains knowingly false statements of fact. It is not frivolous, however, merely because the facts have not been first substantiated fully or because the lawyer expects to develop vital evidence only by discovery. Neither is it frivolous even though the lawyer believes that the client's position ultimately may not prevail.

Id. R. 3.01 cmts. 1, 3.

[49] Although there is no official screener of civil cases, the legislature has limited the usual open-filing rules for a few specified litigants and cases. *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. §§ 11.051–.057 (authorizing courts to declare certain litigants "vexatious" and thereby limit their right to file civil suits); *id.* §§ 14.001–.014 (placing limits on the ability of prison inmates to file lawsuits); *id.* § 74.351 (requiring plaintiff in health-care case to file expert-witness report

C. Expansive Joinder

In criminal cases the district attorney prosecutes only the criminal actor[50] (and any other parties[51] to the crime).[52] Criminal prosecutions involving multiple defendants or conspirators are the exception and not the rule.[53]

But the civil litigant can bring suit against any number of defendants[54] because the civil rules permit broad joinder of both parties and claims.[55] The civil plaintiff can sue the individual actor and also others who perhaps might have prevented the event. For example, after an automobile fatality involving alcohol, the district attorney would prosecute the negligent driver for intoxication manslaughter.[56] There would be one defendant. But the civil attorney might sue the driver and also the tavern or restaurant that served him too much liquor.[57] And until the courts said no, there were suits

stating standard of care, with details of breach and causation, before suit may be pursued); Tex. Prop. Code Ann. § 27.004(a) (Vernon 2000 & Supp. 2009). (plaintiffs alleging residential construction defects must give contractor notice and allow opportunity to settle dispute or cure defects before suit is filed).

[50] *See* LAFAVE ET AL., *supra* note 32, § 1.2(g) ("With the filing of the complaint, the arrestee officially becomes a 'defendant' in a criminal prosecution.").

[51] *See* Tex. Penal Code Ann. § 7.01 (Vernon 2003). The Texas Penal Code calls them "parties" instead of using the older term "accomplices." *See id.*

[52] *See* LAFAVE ET AL., *supra* note 32, §§ 17.2–.3 (discussing joinder and severance of criminal defendants).

[53] *See* Tex. Code Crim. Proc. Ann. art. 36.09 (Vernon 2007) (allowing co-defendants in a criminal case to move for separate trials and requiring the court to sever trials upon timely motion and presentation of evidence when it is "made known to the court that there is a previous admissible conviction against one defendant or that a joint trial would be prejudicial to any defendant"). *But see* Andrew D. Leipold & Hossein A. Abbasi, *The Impact of Joinder and Severance on Federal Criminal Cases: An Empirical Study*, 59 VAND. L. REV. 349, 360–61 (2006) (commenting that federal courts are generally "disinclined to find misjoinder and miserly in granting severance").

[54] *See* FED. R. CIV. P. 20(a)(2); Tex. R. Civ. P. 40(a) (allowing the plaintiff to join as defendants in one suit all persons who may be liable from the same transaction or occurrence).

[55] *See* FED. R. CIV. P. 18(a), 20(a); Tex. R. Civ. P. 40(a), 52(a).

[56] *See, e.g.*, Garcia v. State, 112 S.W.3d 839, 843–44 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

[57] *See, e.g.*, El Chico Corp. v. Poole, 732 S.W.2d 306, 308 (Tex. 1987), *superseded by statute*, Tex Alco. Bev. Code Ann. § 2.03 (Vernon 2007), *as recognized in* F.F.P. Operating Partners, L.P. v. Duenez 237 S.W.3d 680 (Tex. 2007); *infra* Part III.A.2 (discussing tort suits against commercial alcohol providers).

against social hosts who had served the driver,[58] against brewers for not warning drivers that too much beer can get a person drunk,[59] and even against a radio station that had promoted cut-rate drinks for "Ladies Night."[60] In contrast to the typical criminal prosecution against one defendant, larger civil suits often involve several defendants.[61] Most civil cases are simple and do not involve multiple defendants. But when damages are large, plaintiffs will often find a way to sue one or more defendants with assets or insurance.

D. Open-Ended Common Law

The criminal prosecutor can bring charges only for violations of the Penal Code or some other criminal statute.[62] The prosecutor cannot ask a court to create common-law crimes after the event; courts cannot condemn conduct as criminal unless the statutes have already made it illegal.[63]

Civil litigation, however, is not limited to statutory causes of action or those already recognized in existing case law.[64] Because the common law

[58] *See* Graff v. Beard, 858 S.W.2d 918, 918–19 (Tex. 1993).

[59] *See* Morris v. Adolph Coors Co., 735 S.W.2d 578, 581, 585 (Tex. App.—Ft. Worth 1987, writ ref'd n.r.e.) (plaintiff motorist injured by drunk driver has no cause of action against Coors or Anheuser-Busch for failing to warn consumers of the dangers of drinking beer and driving while intoxicated).

[60] *See* Triplex Commc'ns, Inc. v. Riley, 900 S.W.2d 716, 717–18 (Tex. 1995) (plaintiffs injured by drunk driver sued nightclub and bartender that served drunk driver and also radio station that advertised and promoted Ladies Night jointly with nightclub).

[61] In addition to casting the net wide to include target defendants who can satisfy a money judgment, civil plaintiffs may also add defendants for other reasons, such as: (1) to prevent removal to federal court and (2) to establish favorable venue. *See* 28 U.S.C. §§ 1332, 1441(b) (2006); Tex. Civ. Prac. & Rem. Code Ann. § 15.005 (Vernon 2002). For removal prevention, a plaintiff might add a non-diverse or local defendant. *See* 28 U.S.C. § 1332 (requiring complete diversity of citizenship for federal diversity jurisdiction); *id.* § 1441(b) (disallowing removal in diversity cases when any defendant is a citizen of the forum state). For favorable venue, a plaintiff might add a defendant who resides in a county with a favorable jury pool or judges. *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.005 (if plaintiff establishes venue against one defendant, venue is proper as to all other defendants in actions arising from the same transaction or occurrence).

[62] *See, e.g.*, Tex. Penal Code Ann. § 1.03 (Vernon 2003).

[63] *See id.* ("Conduct does not constitute an offense unless it is defined as an offense by statute, municipal ordinance, order of a county commissioners court, or rule authorized by and lawfully adopted under a statute."). *See also* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.1 (2d ed. 2003 & Supp. 2009) (common-law crimes).

[64] *See* Anita Bernstein, *How to Make a New Tort: Three Paradoxes*, 75 TEX. L. REV. 1539,

is malleable and open-textured, the civil litigant can allege almost anything.[65] In particular, the negligence cause of action is not confined to types of conduct that have already been held to be actionable.[66] The civil attorney can seek to have a jury decide whether the act or omission of any person or business entity fell below the level of a person exercising ordinary care, whether it contributed to cause harm to his client, and whether the defendant should be held legally responsible for money damages.[67] Although such allegations will eventually be reviewed by the courts for legal sufficiency, the lawyer is initially free to make them part of his lawsuit.

E. Compensation, Incentives, and Creativity

The desire for compensation is the engine that drives civil litigation and encourages creativity. This is a fifth reality that pushes the civil system toward expanding the universe of litigation. While a criminal prosecution is fueled by the desire to discipline the wrongdoer, the civil lawsuit for damages is fueled by the desire to compensate the plaintiff.[68] The criminal prosecutor wants a verdict and judgment that the accused is guilty.[69] She wants him punished with a term of years in prison or a fine, or both.[70]

By contrast, the civil attorney is not primarily interested in disciplining the person who injured his client.[71] The civil attorney instead wants compensation for his client and, through the contingent fee, for himself.[72] The civil attorney's goal is not merely a jury finding that the wrongdoer injured his client; he wants a collectible money judgment. This reality

1544–47 (1997).

[65] *See id.*

[66] *See id.*; R.W.M. Dias, *The Duty Problem in Negligence*, 1955 CAMBRIDGE L.J. 198, 199.

[67] *See* RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 281 (1965) (elements of negligence liability).

[68] *See* Stuntz, *supra* note 28, at 2551–54 (comparing the motives of a prosecutor and a civil plaintiff). This statement of course applies only to suits for damages and not to family law cases or to suits that seek only equitable relief.

[69] *See id.* at 2552–54.

[70] *See id.* The statements in the text are qualified by the prosecutor's ethical duty "to see that justice is done, and not simply to be an advocate." *See* Tex. Disciplinary R. Prof'l Conduct 3.09 cmt. 1, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005) (State Bar R. art. X, § 9).

[71] *See* Stuntz, *supra* note 28, at 2551–54.

[72] *See id.*

explains many joinder decisions.

There can be several reasons why the goal of compensation might motivate a plaintiff to sue multiple defendants instead of one. First, when the core tortfeasor has no insurance and no assets, the only way to obtain compensation is to find another defendant with resources or insurance to satisfy a judgment.[73] If the injury is serious and the damages great, the plaintiff will often expand the lawsuit to include a solvent or insured defendant.[74] Second, even when the core tortfeasor can respond in damages, the plaintiff may simply prefer to have more (or better-insured) defendants.[75] Furthermore, the plaintiff will usually want to include target defendants, because juries are more likely to find liability and award substantial damages against large corporations, which are impersonal and often have no local connections.[76] Moreover, the plaintiff will occasionally name several defendants to prevent the shifting of blame to a non-party,[77] or to promote finger-pointing among the defendants.[78] And in one highly

[73] *See, e.g.*, Golden Spread Council, Inc. No. 562 of the Boy Scouts of Am. v. Akins, 926 S.W.2d 287, 289 (Tex. 1996) (victim who was molested by scoutmaster sued national and local scout organizations, in addition to the judgment-proof scoutmaster, who was serving twenty-year prison term); Triplex Commc'ns, Inc. v. Riley, 900 S.W.2d 716, 717–18 (Tex. 1995) (plaintiffs injured by drunk driver sued nightclub and bartender that served drunk driver and also radio station that advertised and promoted Ladies Night jointly with nightclub); Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 314, 316–17 (Tex. App.—San Antonio 1994, writ ref'd) (court rejected attempt by plaintiff, who was injured by allegedly defective ladder, to find an insured defendant by releasing manufacturer in return for assignment of manufacturer's right to sue its lawyers for malpractice); Russell v. Tex. Dep't of Human Res., 746 S.W.2d 510, 511–12 (Tex. App.—Texarkana 1988, writ denied) (alleged sexual abuse victim sued Department of Human Resources and two of its caseworkers for negligent investigation of sexual abuse but did not sue the abuser).

[74] *See supra* note 73.

[75] *See, e.g.*, Baptist Mem. Hosp. Sys. v. Sampson, 969 S.W.2d 945, 946–47 (Tex. 1998) (suit against both emergency-room doctor and hospital, which in all likelihood had larger insurance policy limits than doctor); City of Denton v. Van Page, 701 S.W.2d 831, 833 (Tex. 1986) (tenant injured in fire sued landlord and also city, alleging negligent inspection and investigation of previous arson attempts).

[76] *See, e.g.*, Reliance Steel & Aluminum Co. v. Sevcik 267 S.W.3d 867, 869, (Tex. 2008) (large judgment reversed because attorney for plaintiff elicited evidence of California corporate defendant's gross sales receipts).

[77] *See, e.g.*, Sanchez v. Mica Corp., 107 S.W.3d 13, 20–21 (Tex. App.—San Antonio 2002, no writ) (plaintiffs sued all the entities that had worked on the instrumentality that electrocuted their mother as she walked on sidewalk).

[78] *See, e.g.*, Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 VAND. L. REV. 2053, 2086–88 (2006) (discussing situations where defendants would engage in

publicized case, where the suit was against the obvious tortfeasor alone, the plaintiff tried to reach his insurance coverage by abandoning intentional-tort theories and pursuing only a negligence cause of action, which was covered by the defendant's insurance.[79] In many cases, defendants are added for a combination of these reasons.[80] In all these situations, if the case against an additional defendant proves not to have merit, that defendant may be willing to pay something to settle and extricate itself from the case.[81]

finger-pointing in the context of insurance coverage, construction defects, and traditional personal injury claims).

[79] *See* Boyles v. Kerr, 855 S.W.2d 593, 603–05 (Tex. 1993). In *Boyles v. Kerr*, Boyles had shown to several friends a videotape depicting sexual intimacy between him and Kerr. *Id.* at 594. This was clearly an intentional invasion of Kerr's right to privacy. *See id.* at 594. Because Boyles's homeowner's insurance policy insured him against negligence claims but not intentional torts, Kerr tried to reach the insurance coverage by asserting only a cause of action for negligent infliction of emotional distress. *See id.* at 603–05 (Gonzalez, J., concurring). The court held there is no general duty to avoid negligently inflicting emotional distress but remanded in the interest of justice to give Kerr a chance to retry the case as an intentional tort. *Id.* at 603 (majority opinion).

[80] *See, e.g.*, *In re* McAllen Med. Cent., Inc., 275 S.W.3d 458, 462 (Tex. 2008) (in addition to suing three doctors and a medical group, the plaintiffs also sued a hospital on negligent credentialing theory, which added a large defendant and made evidence of one doctor's unimpressive credentials admissible); Firestone Steel Prods. Co. v. Barajas, 927 S.W.2d 608, 611–12 (Tex. 1996) (after a tire exploded and killed worker who was mounting it on wrong-size wheel, suit was brought against manufacturer of wheel, manufacturer of tire, and company whose wheel design was copied); St. John v. Pope, 901 S.W.2d 420, 422 (Tex. 1995) (patient sued emergency room physician, hospital, and on-call physician who was consulted by telephone); Brownsville Navigation Dist. v. Izaguirre, 829 S.W.2d 159, 160 (Tex. 1992) (leg of trailer sank in mud during loading, causing heavy cargo to shift and fall on worker, causing fatal injuries; beneficiaries sued owner-lessor of land, two trucking companies, railroad company, and manufacturer of trailer); Wofford v. Blomquist, 865 S.W.2d 612, 613 (Tex. App.—Corpus Christi 1993, writ denied) (plaintiff injured in car wreck sued teen-age driver with bad driving record; her mother; her grandparents, who bought truck for her; Ford Motor Company; and Ford dealership); Watkins v. Davis, 308 S.W.2d 906, 907 (Tex. Civ. App.—Dallas 1957, writ ref'd n.r.e) (a customer's idling truck suddenly lurched forward through defendant's open storefront and pinned another customer against wall; plaintiff sued driver of truck and owner of store, arguing that store had duty to erect concrete curb).

In contract cases, where the elements of damages are limited by contract law, the plaintiff will sometimes plead a tort and try to obtain greater damages. *See, e.g.*, Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210, 211–13 (Tex. 1988) (imposing duty of good faith and fair dealing in workers' compensation cases); Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 166–67 (Tex.1987) (imposing duty of good faith and fair dealing in first-party insurance cases and authorizing mental anguish and punitive damages).

[81] *See, e.g.*, Katie Melnick, Note, *In Defense of the Class Action Lawsuit: An Examination of the Implicit Advantages and a Response to Common Criticisms*, 22 ST. JOHN'S J. LEGAL COMMENT. 755, 780 (2008).

In summary, the criminal system has boundaries that are essentially fixed, due to its finite universe of parties, its system of official screening, and its stable substantive law. The civil system is open and lenient at the time of filing, with limits set later by the requirement that cases be legally sufficient.

F. Changes in the Texas Litigation System Since 1973

The five features of civil litigation discussed above are the procedural foundations of lawsuit shaping. Texas damage litigation also received a boost from a sixth source in the 1970s and 1980s—from the collective impact of case law, new statutes, and rule changes. Most of these changes made lawsuits easier to win, which in turn fueled boundary-stretching litigation and pushed legal sufficiency issues into the appellate system.

The 1970s were a time of real legal change in Texas. In 1973, the Legislature abolished contributory negligence as a complete bar and substituted comparative negligence.[82] It also enacted the Deceptive Trade Practices-Consumer Protection Act,[83] which provided a statutory cause of action in most commercial transactions and overrode important principles of contract law.[84] In the same year the supreme court adopted rules allowing 10-2 jury verdicts[85] and permitting broad-form jury questions instead of separate and distinct special issues.[86] It also held in a vehicle case that a plaintiff's failure to wear a seat belt was not negligence and would not reduce his damages.[87] Trial judges who set limits on discovery

[82] *See* Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3271 ("In an action to recover damages for negligence resulting in death or injury to a person or property, contributory negligence does not bar recovery if the contributory negligence is not greater than the negligence of the person or persons against whom recovery is sought.") (current version at Tex. Civ. Prac. & Rem. Code Ann. § 33.001 (Vernon 2008)).

[83] *See* Deceptive Trade Practices-Consumer Protection Act, 63rd Leg., R.S., ch. 143, § 1, 1973 Tex. Gen. Laws 322, 322–34 (current version at Tex. Bus. & Com. Code Ann. §§ 17.41–.63 (Vernon 2002 & Supp. 2009)).

[84] *See id.* at 322–24, 326–27 (modifying doctrine of waiver, specifying list of deceptive trade practices, authorizing lawsuits for damages, and adding to common-law remedies) (current version at Tex. Bus. & Com. Code Ann. §§ 17.42, 17.46, 17.50).

[85] *See* Tex. R. Civ. P. 292(a) (permitting 10-2 verdict instead of requiring unanimity).

[86] *Compare* Tex. R. Civ. P. 277, 493 S.W.2d XXXII–XXXIII (1973, superseded 1988) (giving trial courts discretion to submit issues "broadly"), *with* Tex. R. Civ. P. 277 (mandating broad-form jury questions "whenever feasible").

[87] *See* Carnation Co. v. Wong, 516 S.W.2d 116, 117 (Tex. 1974) ("[P]ersons whose negligence did not contribute to an automobile accident should not have the damages awarded to

by plaintiffs were reviewed by mandamus in the appellate courts.[88] The Texas courts also developed the basic principles of strict liability for products in a series of cases in the 1960s and 1970s.[89] At the close of the decade, the court protected jury verdicts by making it difficult for courts to set them aside because improper jury argument was made.[90] Each of these changes—favored by the plaintiffs' bar and opposed by business interests—made damage verdicts easier for plaintiffs to win in the trial court and protect on appeal.

In the 1980s, a plaintiff-friendly Texas Supreme Court accelerated the trend through further rule changes and judicial decisions.[91] One group of changes clearly benefitted plaintiffs. The plaintiff's choice of forum was protected by new venue rules contained in the statutes[92] and the rules of civil procedure[93] and later by a decision depriving trial courts of the power to order a forum non conveniens transfer.[94] Landmark decisions made it easier to sustain a punitive damages verdict on appeal,[95] mandated that

them reduced or mitigated because of their failure to wear available seat belts."). *See also* Kerby v. Abilene Christian Coll., 503 S.W.2d 526, 527–28 (Tex. 1973) (no reduction in plaintiff's recovery even though jury found that plaintiff enhanced his injuries 35% by driving his van with door open).

[88] *See, e.g.*, Allen v. Humphreys, 559 S.W.2d 798, 801 (Tex. 1977); Barker v. Dunham, 551 S.W.2d 41, 42 (Tex. 1977). *See also* Jampole v. Touchy, 673 S.W.2d 569, 572 (Tex. 1984).

[89] The principal early cases adopting strict product liability are *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 788–90 (Tex. 1967), and *Shamrock Fuel & Oil Sales Co. v. Tunks*, 416 S.W.2d 779, 786 (Tex. 1967). In the 1970s strict liability principles were further refined. *See* Turner v. Gen. Motors Corp., 584 S.W.2d 844, 847, 851 (Tex. 1979) (specifying jury instructions); Henderson v. Ford Motor Co., 519 S.W.2d 87, 89–90 (Tex. 1974) (contributory negligence not a defense to strict products liability), *overruled by* Duncan v. Cessna Aircraft Co., 665 S.W.2d 414, 428 (Tex. 1984) (adopting comparative fault in products cases). *See generally* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 70.1–.14 (2008).

[90] *See* Standard Fire Ins. Co. v. Reese, 584 S.W.2d 835, 836 (Tex. 1979).

[91] *See, e.g.*, Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985); Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981).

[92] *See* Tex. Civ. Prac. & Rem. Code Ann. § 15.003 (Vernon 2002 & Supp. 2009) (abolishing interlocutory venue appeals).

[93] *See* Tex. R. Civ. P. 86–89.

[94] *See* Dow Chem. Co. v. Alfaro, 786 S.W.2d 674, 679 (Tex. 1990) (holding that a 1913 statute abolished forum non conveniens in Texas), *superceded by statute*, Act of Feb. 23, 1993, 73d Leg., R.S., ch. 4, § 1, 1993 Tex. Gen. Laws 10, 11–12 (current version at Tex. Civ. Prac. & Rem. Code Ann. § 71.051), *as recognized in* Tullis v. Georgia Pacific Corp., 45 S.W.3d 118 (Tex. App.—Fort Worth 2000, no pet).

[95] *See Burk Royalty*, 616 S.W.2d at 922.

money judgments award pre-judgment interest,[96] broadened wrongful death damages,[97] made a defendant's net worth discoverable and relevant on the issue of punitive damages,[98] and created a new tort cause of action for bad-faith insurance denial.[99] One decision told trial courts to grant post-verdict amendments to the pleadings when juries awarded more damages than the plaintiff's trial pleadings had sought.[100] The court held several liability-limiting statutes unconstitutional.[101]

A second group of changes in the 1980s, though facially docket-neutral, had the practical effect of benefitting plaintiffs more often than defendants by easing the plaintiff's task of proving the defendant liable and establishing damages. New discovery rules, for example, put the burden on the party responding to document discovery (usually a defendant) to convince the court to set limits; previously the party seeking documents (usually the plaintiff) had to show good cause to get them.[102] Broad-form jury questions were no longer merely permitted; amendments to the rules mandated them whenever feasible.[103] Jury verdicts were protected by decisions that restricted appellate review of the adequacy of the factual

[96] *See* Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549, 554 (Tex. 1985).

[97] *See* Sanchez v. Schindler, 651 S.W.2d 249, 251 (Tex. 1983).

[98] *See* Lunsford v. Morris, 746 S.W.2d 471, 473 (Tex. 1988).

[99] *See* Aranda v. Ins. Co. of N. Am., 748 S.W.2d 210, 215 (Tex. 1988); Arnold v. Nat'l County Mut. Fire Ins. Co., 725 S.W.2d 165, 167 (Tex.1987).

[100] *See* Greenhalgh v. Serv. Lloyds Ins. Co., 787 S.W.2d 938, 941 (Tex. 1990) (holding that when verdict exceeds pleadings it is an abuse of discretion to deny plaintiff a post-verdict amendment to conform pleadings to damages awarded).

[101] *See, e.g.*, Whitworth v. Bynum, 699 S.W.2d 194, 197 (Tex. 1985) (automobile guest statute); Nelson v. Krusen, 678 S.W.2d 918, 923 (Tex. 1984) (statute of limitations that expired in medical malpractice case before patient had opportunity to discover negligence); Sax v. Votteler, 648 S.W.2d 661, 667 (Tex. 1983) (statute of limitations that barred minor's suit before she reached majority).

[102] Before 1981, the discovery rules required the party seeking documents to file a motion and show good cause; in 1981 the court eliminated the good-cause burden and authorized a simple request for documents; if the responding party objected, either party could seek a hearing and the court would have the discretion to order or deny production. *Compare* Tex. R. Civ. P. 167, 483 S.W.2d XXXII–XXXIV (1973, superseded 1981) ("Upon motion . . . showing good cause" the court may order document production), *with* Tex. R. Civ. P. 167, 599 S.W.2d XL–XLII (1981, repealed 1999) ("Any party may serve on any other party [a request for document production] . . . . If objection is made . . . either party may request a hearing. The court may order or deny production . . . .").

[103] *See supra* note 86 and accompanying text.

proof to support them,[104] while rule changes made jury misconduct almost impossible to prove.[105] All these changes made it easier for a plaintiff to win and preserve a damage verdict.

Concurrently with these changes in Texas law, the United States Supreme Court was restricting the ability of courts and bar associations to regulate lawyer advertising.[106] As a result, on billboards and in the attorney section of the yellow pages in most major cities, lawyers now advertise for cases with high verdict potential.[107] Lawyers who attract clients with

[104] *See* Pope v. Moore, 711 S.W.2d 622, 624 (Tex. 1986) (disapproving a discretionary remittitur standard and replacing it with a more deferential-to-verdict factual-sufficiency standard); Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986) (confirming power of court of appeals to reverse and remand when jury verdict is not supported by factually sufficient evidence, but requiring court to summarize the evidence in detail and explain why it is factually insufficient).

[105] *See* Tex. R. Civ. P. 327 (jurors are not competent to testify or give affidavit concerning (1) their mental processes or (2) statements or events occurring during deliberations); Tex. R. Evid. 606 (same). *See also* Golden Eagle Archery, Inc., v. Jackson, 24 S.W.3d 362, 368 (Tex. 2000) (applying the rules to various allegations of juror misconduct).

[106] In a steady line of cases since 1977, the Court has set the boundary between the lawyer's constitutional right to advertise and solicit and the state's right to regulate the legal profession. *See* Fla. Bar v. Went For It, Inc., 515 U.S. 618, 635 (1995) (upholding thirty-day waiting period on direct-mail solicitations); Shapero v. Ky. Bar Ass'n, 486 U.S. 466, 473–74 (1988) (Constitution protects direct-mail solicitation); Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 647 (1985) (Constitution protects targeted advertising for personal-injury clients); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 449 (1978) (allowing states to prohibit in-person solicitation of personal-injury clients); Bates v. State Bar of Ariz., 433 U.S. 350, 384 (1977) (establishing First Amendment right to advertise truthfully about price and availability of routine legal services).

[107] *See, e.g.*, John Browning, Editorial, *Low Points in Lawyer Advertising*, ROCKWALL HERALD-BANNER, Aug. 16, 2009, http://rockwallheraldbanner.com/opinion/x1896336995/-Low-points-in-lawyer-advertising. More cases are brought to the courts now because of advertising, which appears to be successful in attracting potential clients to the law office. *See* Sara Parikh, *How the Spider Catches the Fly: Referral Networks in the Plaintiffs' Personal Injury Bar*, 51 N.Y.L. SCH. L. REV. 243, 264 (2006). Television commercials and advertisements in the Yellow Pages are now common in urban areas. *See id.* at 254. Some lawyers advertise to attract traditional injury cases, such as those involving automobiles, premises, construction, aircraft and boating, medical malpractice, railroads, and unsafe products. *See, e.g., id.* Some also advertise for less traditional cases involving inadequate security or nursing-home abuse and neglect. Certain law firms make known their desire to represent only clients who are seriously injured. While ordinary advertisements for automobile cases are common, some also solicit serious burn cases and accidents involving "18-wheelers."

Yellow Pages advertisements are increasingly creative. One San Antonio firm offers nonlegal services to attract clients: free transportation to medical providers, a free copy of the

genuine and serious injuries will then try to maximize recovery by shaping the case to fasten liability on a solvent or insured defendant. In many instances, the legal sufficiency of these cases will eventually be challenged, though most of them will be settled or not heard by the appellate courts for other reasons.[108]

By the early 1990s the voters had placed a different court in office,[109] and the tendency to change the law toward more expansive recovery came to a halt. The new court did not set aside the changes of the two previous decades, though the Legislature did modify several of them. The court began to set outer limits in products liability cases[110] and tightened the standards for recovering punitive damages.[111] New discovery rules gave trial courts explicit power to curtail excessive discovery.[112] Trial courts were reminded of their responsibility to police the qualifications of expert witnesses[113] and the reliability of their opinions.[114] By rule change, the

police accident report, a "non-injury accident kit" to advise clients of their rights, and physician referrals with no "up front" cost. Ads now commonly display mock newspaper headlines from the attorney's previous litigation victories. Many list the law firm's website and invite potential clients to log on and browse.

[108] Legal sufficiency issues do not advance beyond the trial court in two instances: when the loser chooses not to appeal, and when the jury decides the issue adversely to the plaintiff, making a denied legal sufficiency motion moot.

[109] *See* Hardberger, *supra* note 20, at 3–4. Perhaps stimulated by an exposé of the Texas Supreme Court on CBS's "60 Minutes," there was a public reaction to the perceived excesses of the court of the 1980s. *See id.* at 3. At the same time Texas was gradually becoming a Republican state, which elected more conservative justices to the court. *See id.* at 3–4. "By the end of the 1980s, the expansion of rights and remedies in the Texas court system reached its apex." *Id.* at 2.

[110] *See, e.g.*, Uniroyal-Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 335 (Tex. 1998) (plaintiff must establish that a safer alternative design was available); Sauder Custom Fabrication, Inc. v. Boyd, 967 S.W.2d 349, 349 (Tex. 1998) (no duty to warn of risks obvious to ordinary user); Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 71.4B (2008) (safer design).

[111] *See* Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 23, 30 (Tex. 1994) (requiring bifurcation of liability and punitive-damage phases and requiring proof that defendant had actual knowledge of an extreme risk of harm).

[112] *See* Tex. R. Civ. P. 192.4 (stating that trial courts should limit discovery, on motion or sua sponte, if: (1) it is unreasonably cumulative or duplicative; (2) it may be obtained from a more convenient source, or a less expensive or burdensome source; or (3) its burden or expense outweighs its likely benefit).

[113] *See, e.g.*, Broders v. Heise, 924 S.W.2d 148, 152 (Tex. 1996) (trial court must ensure that "those who purport to be experts truly have expertise concerning the actual subject about which they are offering an opinion").

court adopted a no-evidence summary judgment procedure, which operates essentially as a pretrial motion for directed verdict.[115] The legislature enacted a tort reform package that limited joint and several liability,[116] made favorable venue a bit harder to choose,[117] capped some elements of damages and required an expert witness report in health care cases,[118] tightened the standard of proof for punitive damages,[119] and required that punitive-damage findings be unanimous.[120]

When the dust had settled, the net movement of the law since the early 1970s had been in the direction of lawsuit expansion and easier recovery.[121]

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[114] *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 597 (1993) (court may admit opinion evidence only when it is reliable); E.I. du Pont de Nemours & Co., Inc. v. Robinson, 923 S.W.2d 549, 556 (Tex. 1995) (following *Daubert*).

[115] *See* King Ranch, Inc. v. Chapman, 118 S.W.3d 742, 750–51 (Tex. 2003) (holding that a no-evidence summary judgment is essentially a pretrial directed verdict, and courts apply same legal sufficiency standard to both). Texas Rule of Civil Procedure 166a(i) provides that a litigant "may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense. . . ." *See* Tex. R. Civ. P. 166a(i). The respondent "need only point out evidence that raises a fact issue on the challenged elements." *See* Tex. R. Civ. P. 166a(i) & 1997 cmt. The reality is that no-evidence summary-judgment motions, like motions for directed verdict, are almost always filed by defendants, though plaintiffs sometimes use them to challenge affirmative defenses and counter-claims. *See* David Hittner & Lynne Liberato, *Summary Judgment in Texas: State and Federal Practice*, 46 HOUS. L. REV. 1379, 1464–65 (2010) (discussing plaintiff as movant on no-evidence summary judgment motions); *infra* note 124. By approving no-evidence summary judgment motions, the court brought Texas into conformity with the federal practice and the practice in many other states. *See infra* note 124.

[116] *See* Act of May 18, 1995, 74th Leg., R.S., ch. 136, § 1, 1995 Tex. Gen. Laws 971, 971–73 (allowing defendant to allege fault against responsible third party and requiring that a defendant be held liable only for percentage of responsibility found by jury, unless its percentage exceeds 50% or it violated a specified provision of Penal Code with specific intent to injure) (current version at Tex. Civ. Prac. & Rem. Code Ann. §§ 33.004, 33.013 (Vernon 2008)).

[117] *See* Act of May 4, 1995, 74th Leg., R.S., ch. 138, § 1, 1995 Tex. Gen. Laws 978, 979 (authorizing trial court to transfer venue for convenience of parties and witnesses and in interest of justice and also requiring each plaintiff to establish venue independently of other plaintiffs) (current version at Tex. Civ. Prac. & Rem. Code Ann. §§ 15.002–.003).

[118] *See* Act of June 2, 2003, 78th Leg., R.S., ch. 204, § 10.01, 2003 Tex. Gen. Laws 864, 873–77 (damage caps and expert witness reports) (current version at Tex. Civ. Prac. & Rem. Code Ann. §§ 74.301–.303, 74.351).

[119] *See* Act of April 6, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108, 110 (current codification at Tex. Civ. Prac. & Rem. Code Ann. § 41.003(a)–(b)).

[120] *See id.* (current codification at Tex. Civ. Prac. & Rem. Code Ann. § 41.003(d)).

[121] The statement in the text—that the legal basis for filing damage suits in Texas is more favorable now than in the early 1970s—is a statement of opinion, to be sure. But if there is any doubt about its accuracy, the reader is asked to compare the present state of Texas law, in its

Most of the changes of the 1970s and 1980s remain in place, and it is hard to think of many cases that could have been brought in 1973 that cannot be brought now.[122] The result has been a greater volume of legal sufficiency issues in the courts.[123]

III. LEGAL SUFFICIENCY: JUDICIAL BOUNDARY-SETTING

The legal sufficiency of a cause of action can be challenged throughout the life of a lawsuit, from the initial pleadings through trial and judgment. The Federal and Texas Rules permit legal sufficiency challenges before trial,[124] at trial,[125] and after verdict.[126] To be legally sufficient, a claim must

entirety, with pre-1973 Texas law, in its entirety.

[122] I recognize, for example, that some expert testimony that cannot satisfy *Daubert* and *Robinson* might have been allowed in 1973. *See supra* note 114.

[123] This review of legal developments since 1973 suggests the answer to Professor Anderson's criticism that the Texas Supreme Court has pursued "judicial tort reform" by deciding more no-evidence cases in recent years than previously. *See* David A. Anderson, *supra* note 20, at 21–22 (arguing that comparison of 1966 cases with recent cases "shows that the modern court decides more cases on no-evidence grounds, and finds no evidence more often, than it did in 1966"). The response to Professor Anderson on this point is that there is more creative lawsuit shaping now than there was earlier, which generates more legal sufficiency issues for the courts. *See infra* Part III.

[124] *See* FED. R. CIV. P. 12(b)(6). The Federal Rules permit a pretrial challenge to the legal sufficiency of a claim as pleaded. *See id.* (authorizing trial court to grant motion to dismiss all or part of a lawsuit for "failure to state a claim upon which relief can be granted"). While no Texas Rule uses the 12(b)(6) language, Texas courts have precisely the same power. Rule 91 says a litigant may attack a pleading's insufficiency by special exception, *see* Tex. R. Civ. P. 91, and the case law makes clear that the Texas special exception functions like the Federal Rule 12(b)(6) motion to dismiss for failure to state a claim. *See, e.g.*, Baylor Univ. v. Sonnichsen, 221 S.W.3d 632, 635 (Tex. 2007); El Chico Corp. v. Pool, 732 S.W.2d 306, 309 (Tex. 1987); Uvalde Constr. Co. v. Hill, 142 Tex. 19, 21, 175 S.W.2d 247, 248 (1943). Special exception is also the procedure for challenging a pleading as vague, imprecise, or unintelligible, or for failure to give fair notice. *See* Townsend v. Mem'l Med. Ctr., 529 S.W.2d 264, 267 (Tex. Civ. App.—Chorpus Christi 1975, writ ref'd n.r.e.). In this sense it resembles Federal Rule 12(e). *See* FED. R. CIV. P 12(e) (allowing a party to move for a more definite statement of a pleading "which is so vague or ambiguous that the party cannot reasonably prepare a response").

Both the Federal and Texas Rules also allow pretrial challenge to the legal sufficiency of a claim in light of the evidence. *See* FED. R. CIV. P. 56(c)(2) (trial court shall grant summary judgment if summary judgment record shows that there is "no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law"); Tex. R. Civ. P. 166(a)(i) (authorizing no-evidence summary judgment). The Court in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), approved no-evidence summary judgments and also elevated the status of summary judgment generally by saying it is not a disfavored procedure. *See id.* at 322, 327 ("[T]he plain

have both legal and factual support.[127] Factually, there must be proof of the historical events—that is, sufficient proof of what happened.[128] Legally, the defendant must owe the plaintiff a duty[129] (which will often be elaborated in a standard of conduct),[130] and the mixed questions of law and fact must be

language of Rule 56(c) mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial. . . . Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole . . . .").

[125] Sufficiency challenges may be made at trial after the adverse party has rested its case. *See* FED. R. CIV. P. 50(a) (stating that trial court may grant judgment as a matter of law against a party who has been fully heard if "a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on [an essential] issue"); Tex. R. Civ. P. 268 (directed verdict). In Texas courts, legal sufficiency arguments may also be made by objecting to the charge. *See* Tex. R. Civ. P. 278 ("The court shall submit the questions, instructions and definitions . . . which are raised by the . . . evidence.").

[126] Sufficiency may also be challenged after the jury has returned its verdict and been discharged. *See* FED. R. CIV. P. 50(b) (authorizing judgment as a matter of law after verdict); Tex. R. Civ. P. 301 (authorizing judgment n.o.v.).

[127] *See* JOEL WM. FRIEDMAN, JONATHAN M. LANDERS & MICHAEL G. COLLINS, THE LAW OF CIVIL PROCEDURE 525–26 (2d ed. 2006) ("[S]ome cases . . . do not warrant a trial. Plaintiff may have no substantive theory giving a right to recover. Or, the plaintiff may have a theory but [no] evidence to support the theory. . . . [G]iven the law and the available evidence, one side would have to win and thus a trial would be a waste of time."). Another civil procedure casebook explains that legal sufficiency motions may assert either a lack of evidence or a lack of law, or both:

> Defendants make motions for directed verdict based on many different theories. . . . (a) There is insufficient evidence of one or more elements to permit reasonable people to find that it is true. This is often a matter of arguing that inferences do not stretch so far as the plaintiff claims. . . . (b) The facts are in a "fog." No one knows what happened. Therefore the plaintiff cannot make out a prima facie case. . . . (c) We know what happened, but reasonable people cannot find that it meets the legal standard. For instance . . . there was "no duty" or the activity does not add up to negligence or whatever wrongdoing is alleged.

STEPHEN N. SUBRIN, MARTHA L. MINOW, MARK S. BRODIN & THOMAS O. MAIN, CIVIL PROCEDURE: DOCTRINE, PRACTICE, AND CONTEXT 523–24 (3d ed. 2008).

[128] *See* Ford Motor Co. v. Ridgway, 135 S.W.3d 598, 600 (Tex. 2004) (requiring plaintiff to produce more than a scintilla of evidence establishing the existence of a material fact); *see infra* Part III.B.

[129] *See* RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 328B(b) (1965); *infra* Part III.A.1.

[130] *See* RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 328B(c); *infra* Part III.A.2.

such that a jury could reasonably find liability.[131]

The following sections will elaborate on these three aspects of legal sufficiency: law declaration (duty and standard of conduct), sufficient factual proof, and reasonable law application (mixed questions of law and fact).[132]

A. Law Declaration

Law declaration is perhaps the best-known function of courts; the lay public knows that courts tell us what the law is.[133] Law declaration is an

[131] *See* RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 328B(d); *infra* Part III.C.

[132] *See* HENRY M. HART, JR. & ALBERT M. SACKS, THE LEGAL PROCESS: BASIC PROBLEMS IN THE MAKING AND APPLICATION OF LAW 350–51 (Eskridge & Frickey eds. 1994). *See also* Stephen A. Weiner, *The Civil Jury Trial and the Law-Fact Distinction*, 54 CAL. L. REV. 1867, 1868–76 (1966) (discussing questions of law, questions of historical fact, and the process of law application). The three aspects of legal sufficiency correspond to the three-fold judicial process that Professors Hart and Sacks described as law declaration, fact identification, and law application. *See* HART & SACKS, *supra*, at 350–51. First, the court must decide the law to be applied. *See id.* Hart and Sacks call this the function of law declaration. *See id.* In declaring the law, the court must exercise its judgment in deciding both the content of the law and the "degree of precision" with which it will be stated. *See id.* This degree of precision corresponds to what this Article calls the standard of conduct. *See id.* A second aspect of the judicial function is fact identification, which is a question of "what happened here." *See id.* The third function is law application, which involves "linking up the particular with the general." *See id.*

These three questions are ultimately questions for the court, as stated in Restatement (Second) of Torts § 328B:

> § 328B. Functions of Court.
>
> In an action for negligence the court determines
>
> > (a) whether the evidence as to the facts makes an issue upon which the jury may reasonably find the existence or non-existence of such facts;
> >
> > (b) whether such facts give rise to any legal duty on the part of the defendant;
> >
> > (c) the standard of conduct required of the defendant by his legal duty;
> >
> > (d) whether the defendant has conformed to that standard, in any case in which the jury may not reasonably come to a different conclusion . . . .

RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 328B. Subsections (a) through (d) are discussed in Part III, with the treatment of (b) and (c) (duty and standard of conduct) coming before (a) and (d) (historical fact and law application). *See infra* Part III.A–C.

[133] *See* Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").

especially important function because the substantive law often determines whether evidence is legally sufficient. Professors Powers and Ratliff have illustrated the relationship between law declaration and legal sufficiency through the example of *Fisher v. Carrousel Motor Hotel, Inc.*,[134] where a slight change in the substantive law made the difference between legal sufficiency and insufficiency.[135] While attending a conference at the hotel, Fisher (an African-American) lined up with others for the luncheon buffet.[136] As he stood in line, the hotel manager snatched the plate from his hands and told him he would not be served. A jury found the hotel liable for battery[137] and assessed actual and punitive damages. The trial court, feeling bound by existing law, granted judgment n.o.v. on the ground that the tort of battery required an offensive bodily touching, an element that the plate-grabbing did not satisfy. The Texas Supreme Court disagreed, holding that to touch something intimately identified with the plaintiff's person sufficed as a touching for the tort of battery. The court therefore reversed and rendered judgment on the verdict.[138] As Powers and Ratliff point out, the plaintiff's evidence would not have been legally sufficient if the substantive law of battery had required a touching of the plaintiff's person.[139] But with the supreme court's decision that grabbing an object from the plaintiff's hand sufficed, the plaintiff's proof became legally sufficient, and judgment on the verdict was proper.[140]

The same linkage of law declaration and legal sufficiency is illustrated by *Rothermel v. Duncan*,[141] a will contest filed by several siblings against their uncle.[142] The testatrix's grandchildren (through her deceased son Bill) complained that she left her entire estate to her other son Louis because he had exerted undue influence over her. The plaintiffs' evidence of undue

[134] 424 S.W.2d 627 (Tex. 1967).

[135] *See* William Powers, Jr., *Judge and Jury in the Texas Supreme Court*, 75 TEX. L. REV. 1699, 1710–11 (1999); William Powers, Jr. & Jack Ratliff, *Another Look at "No Evidence" and "Insufficient Evidence,"* 69 TEX. L. REV. 515, 522–23, 542 (1991). Then-Professor Powers is now President of the University of Texas at Austin.

[136] *Fisher*, 424 S.W.2d at 628.

[137] *Id.* at 629. Because Fisher testified that he was not in fear of physical injury, he had no cause of action for assault. *See id.*

[138] *Id.* at 631.

[139] *See* Powers & Ratliff, *supra* note 135, at 522–23.

[140] *See Fisher*, 424 S.W.2d at 630 ("We hold . . . that the forceful dispossession of plaintiff Fisher's plate in an offensive manner was sufficient to constitute a battery . . . .").

[141] 369 S.W.2d 917, 921–24 (Tex. 1963).

[142] *Id.* at 919–20.

influence was that: (1) the testatrix was old, infirm, and fragile; (2) she lived with Louis on his farm; (3) she trusted him and relied upon his judgment completely, leaving all her financial affairs to him; and (4) he wrote a new will for her that left everything to him, which she signed while he was in the house and which was witnessed by his two employees. The court held that these facts did not constitute legally sufficient evidence of undue influence. Distilling the law from earlier cases, the court announced that undue influence requires proof of the following elements: (1) the existence and exertion of an influence, (2) which subverted or overpowered the testatrix's free will, (3) and caused her to choose and execute an estate plan that she would not have otherwise chosen. Because the plaintiffs' proof did not satisfy all these elements, the court held they had not presented legally sufficient evidence of undue influence.

Fisher and *Rothermel* illustrate that the legal sufficiency of a given body of evidence is not determined in a vacuum. It depends upon how the substantive law has been declared by either the legislature or the courts.

The substantive law consists of both duty and standard of conduct. "It is for the plaintiff to prove facts which establish a legal duty on the part of the defendant to conform to a legal standard of conduct for his protection."[143] Prosser reminds us that duty and standard of conduct cannot be separated.[144] In negligence cases, he says, duty is "an obligation . . . to conform to a particular standard of conduct."[145] Standard of conduct concerns "[w]hat the defendant must do, or must not do . . . to satisfy the duty."[146]

1. Duty

When cases push against the existing litigation boundaries, courts must decide the location of those boundaries through their rulings about duty.[147]

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[143] *Id.* § 328A, cmt. c.

[144] W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 53 (5th ed. 1984 & Supp. 1988) (duty and standard of conduct "are correlative, and one cannot exist without the other").

[145] *Id.*

[146] *Id.*

[147] Duty is always a question of law for the court. *See* Gen. Elec. Co. v. Moritz, 257 S.W.3d 211, 217 (Tex. 2008); Otis Eng'g Corp. v. Clark, 668 S.W.2d 307, 312 (Tex. 1983); Tex. & New Orleans Ry. Co. v. Echols, 87 Tex. 339, 343, 27 S.W 60, 61 (1894) (whether employer had duty to make safety rules was question of law for court); KEETON ET AL., *supra* note 144, § 37 (commenting that duty "is entirely a question of law, to be determined by reference to the body of

When the legal system holds an actor liable for negligence or other conduct, it is saying he had a legally enforceable duty to act a certain way and he breached that duty.[148] In lay terms, the defendant failed to do something he should have done, or did something he should not have done.[149]

The courts have decided issues of duty from the earliest times. In *Texas & New Orleans Railway Co. v. Echols*, a stack of railroad ties tumbled and injured the plaintiff;[150] he alleged that the railroad's failure to have rules for safe stacking was negligence. The court held that an employer has no duty to establish safety rules when the activity is ordinary and not complex or dangerous.[151] Similarly, in *Freeman v. Gerretts*, the court held that a railroad had no duty to make a component part of its brake system safe for employees to use as a step for mounting the train, even though the railroad had acquiesced in that use before.[152]

Duty issues arise in a wide variety of situations. For example, in *Wichita County Water Improvement District v. Curlee*, the district had built a canal across the plaintiff's leasehold.[153] When five of the plaintiff's cows drowned in the canal, he sued the district, arguing that it was negligent in not building a fence beside its canal. The court held that the district had no legal duty to fence cattle out of its canal.

In more recent cases, issues of duty often arise in cases of serious injury, when a simple suit against the individual tortfeasor will not produce a collectible judgment because that individual is judgment-proof and has no insurance.[154] In these situations the lawsuit will seek to reach other actors

statutes, rules, principles and precedents which make up the law; and it must be determined only by the court"); RESTATEMENT (SECOND) OF TORTS: NEGLIGENCE § 328B ("In an action for negligence the court determines . . . whether [the] facts give rise to any legal duty on the part of the defendant . . . .").

[148] *See, e.g.*, Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 2.1 (2008).

[149] *See, e.g., id.* This is essentially what the Texas definition of negligence says. *See id.* ("'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.")

[150] 87 Tex. 339, 343, 27 S.W. 60, 61 (1894).

[151] *Id.* at 344–45, 27 S.W. at 62.

[152] 109 Tex. 78, 81, 83, 196 S.W. 506, 506–07 (1917).

[153] 120 Tex. 103, 104, 35 S.W.2d 671, 671 (1931).

[154] *See, e.g.*, MARC A. FRANKLIN, ROBERT L. RABIN & MICHAEL D. GREEN, TORT LAW AND ALTERNATIVES: CASES AND MATERIALS 167 (8th ed. 2006) (stating that duty issues arise most often when the "immediately responsible party" is not solvent).

who have assets or insurance.

Duty-to-warn cases are illustrative. In *Praesel v. Johnson*, an epileptic named Peterson had a seizure while driving and broadsided Praesel, causing her death.[155] Praesel's family did not sue Peterson; they sued the doctors (and a clinic and hospital) who were treating him for epilepsy, on the theory that the defendants owed a legal duty to other motorists to warn Peterson not to drive. The supreme court affirmed a summary judgment for the doctors, holding that they owed no common-law duty to warn Peterson for the benefit of other motorists. Similarly, in *Santa Rosa Health Care Corp. v. Garcia*, a wife who feared that she had contracted the HIV virus from her husband sued the husband's physicians for failing to warn her of this danger.[156] The court held that the doctors owed no common-law or statutory duty to inform their patient's wife that he was HIV positive. And in *Kroger Co. v. Elwood*, a Kroger employee was injured when a customer closed her car door on his hand, which he had rested on the doorjamb while loading groceries into the car.[157] We are not told whether Elwood sued the customer, but he did sue Kroger, arguing that as his employer it owed him a duty to warn and train him about such dangers.[158] The court rejected that theory of liability and held that "Kroger had no duty to warn Elwood not to place his hand in a doorjamb."[159]

In each of these cases, lawyers representing their clients within the principles discussed in Part II had shaped their lawsuits for maximum recovery, but the courts set limits on the boundaries of legal duty and sustained legal sufficiency challenges.[160]

Additional examples abound in motor vehicle cases. In most automobile accident cases, the drivers (and occasionally their employers

[155] 967 S.W.2d 391, 392 (Tex. 1998).

[156] 964 S.W.2d 940, 942 (Tex. 1998).

[157] 197 S.W.3d 793, 794 (Tex. 2006) (per curiam).

[158] *Id.*

[159] *Id.* at 795. The court summarized other principles of employer-employee duties: "An employer has a duty to use ordinary care in providing a safe workplace. . . . [But it] owes no duty to warn of hazards that are commonly known or already appreciated by the employee." *Id.* at 794. Because Kroger was not a worker's compensation insurance subscriber, Elwood pursued a simple negligence case against it for actual damages. *See id.*

[160] *See also* Gen. Elec. Co. v. Moritz, 257 S.W.3d 211, 218 (Tex. 2008) (holding that landowner has no duty to warn another company's worker that a ramp he had used for almost a year had no handrail); Joseph E. Seagram & Sons, Inc. v. McGuire, 814 S.W.2d 385, 388 (Tex. 1991) (holding that liquor manufacturers and distributors have no duty to warn alcoholics about the dangers of prolonged and excessive alcohol consumption).

and passengers) are the only parties. But sometimes the plaintiff will broaden the suit to include a more attractive defendant, who has either assets or insurance. These cases often present legal sufficiency issues. For example, in *City of McAllen v. De La Garza*, a passenger died when the driver fell asleep at the wheel and the car left the road, crashing through a fence and into a deep caliche pit.[161] Though the driver was the obvious tortfeasor, the decedent's family sought recovery from the owner of the land adjoining the highway, where the pit had been dug. The court held that owners of land adjoining the roadway owe a legal duty of care concerning excavations only to persons traveling with reasonable care on the highway when the deviation from the highway occurred. Similarly, in *Texas & New Orleans Railroad Co. v. Alexander*, a car failed to turn to the left when the road turned left, and the injured driver sued the railroad whose rails beside the road apparently enhanced his injury.[162] The court rejected the suggestion that the railroad company had a duty to warn drivers that the highway turned left. Another effort to reach a solvent defendant in an automobile case is found in *Wofford v. Blomquist*.[163] In *Wofford*, an injured motorist sued the other driver's grandparents,[164] who had helped their granddaughter purchase the truck she was driving even though she had been involved in four previous wrecks. The court affirmed a summary judgment, holding that the grandparents had not violated any legal duty.

Many duty cases involve intentional torts, in which the tortfeasor is judgment-proof and has no insurance to cover his willful conduct. For example, in *Lefmark Management Co. v. Old*, the plaintiff's husband was shot and killed at a doughnut store in a shopping center.[165] Plaintiff brought a wrongful death suit against the doughnut store, the shopping center, and its former management company (Lefmark). Although Lefmark had never owned or occupied the property, the plaintiff alleged it had a legal duty to tell the new management company about criminal activity that it knew about. The court affirmed a summary judgment and held that Lefmark owed no such duty. In *Reeder v. Daniel*, a teenager named Lawson injured another teenager named Daniel in a fistfight at a party.[166] Daniel sued

[161] 898 S.W.2d 809, 810 (Tex. 1995).

[162] 163 Tex. 531, 531–32, 358 S.W.2d 584, 584–85 (1962).

[163] 865 S.W.2d 612 (Tex. App.—Corpus Christi 1993, writ denied).

[164] *Id.* at 613. The plaintiff also sued the driver, her mother, Ford Motor Company, and the Ford dealership. *Id.*

[165] 946 S.W.2d 52, 53 (Tex. 1997).

[166] 61 S.W.3d 359, 361 (Tex. 2001).

Lawson (who had consumed twelve beers), Reeder (the teenager who hosted the party), and Reeder's parents. The theory against the parents was that they had participated in making alcohol available to Lawson, the minor who committed the battery. The court held that Daniel had no common-law cause of action against the parents because social hosts have no common-law duty to refrain from making alcohol available to minors.

The common thread in these cases is that courts must decide issues of duty and set the litigation boundaries when a plaintiff, exercising her right to shape the lawsuit for maximum recovery, has added defendants who did not physically injure anyone.[167]

Most duty cases, like those discussed above, involve whether a defendant owed a duty of care. But there are also cases limiting the duty of care owed by plaintiffs. For example, in some personal injury cases when contributory negligence has been alleged, the courts have held that plaintiffs owe no legal duty to keep a lookout to the rear[168] or to anticipate that another car would run a red light.[169]

2. Standard of Conduct

As *Fisher* and *Rothermel* illustrate,[170] any discussion of legal sufficiency must begin with the standard of conduct that translates the legal

[167] "No duty" has been characterized as a "legal tool" for overturning jury verdicts. *See* Phil Hardberger, *supra* note 20, at 4 ("Legal tools of 'no duty,' . . . 'no evidence,' . . . [and] 'insufficient evidence[]' . . . wiped out many jury verdicts."). I respectfully disagree with this view, which is at odds with the authorities discussed in this section, especially those in note 147 showing that duty has always been a question of law for the court, in Texas and elsewhere. *See supra* note 147.

[168] *See, e.g.*, Colom v. Vititow, 435 S.W.2d 187, 190 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.) (stating that a plaintiff who stops for a yellow or red traffic light and is rear-ended owes no legal duty to keep lookout and avoid car approaching from the rear; but a plaintiff who is changing lanes or who stops suddenly without cause may be found contributorily negligent).

[169] Courts have set aside jury findings of contributory negligence where plaintiff entered an intersection on a green light but did not see and avoid the defendant, who was running a red light. *See* Porter v. Hajovsky, 537 S.W.2d 501, 502 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); Williams v. Hill, 496 S.W.2d 748, 752 (Tex. Civ. App.—Tyler 1973, writ ref'd n.r.e.). Similarly, "[a] pedestrian crossing a street on a proper signal light is not charged by law with the duty of looking up the street beyond the intersection to discover approaching cars and anticipating that the drivers may disobey signal lights." Seinsheimer v. Burkhart, 132 Tex. 336, 341, 122 S.W.2d 1063, 1065 (1939).

[170] *See* text *supra* notes 134–142 and accompanying text.

duty into specific elements. This section will further illustrate how the law of Texas has developed standards of conduct in recurring situations.

First-year law students become familiar with negligence per se, where a court borrows a specific standard of conduct from a criminal statute and adopts that standard for tort cases.[171] Less familiar is the common-law process of developing standards of conduct case by case. The general standard of the reasonable person "is, without more, incapable of application to the facts of a particular case. It requires further definition, so as to express the opinion of society as to what should be done or left undone by a reasonable man under the circumstances of the particular case."[172] Society can make the general "reasonable man" standard more specific in four ways:[173] (1) by an express civil liability statute that states the standard; (2) by a statute that states a standard but does not expressly impose civil liability; (3) by a judicial decision or series of decisions, or (4) by a jury in an individual case.[174]

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[171] *See, e.g.*, RICHARD A. EPSTEIN, TORTS § 6.4 (1999); PROSSER AND KEETON ON THE LAW OF TORTS § 36 (4th ed. 1984).

[172] RESTATEMENT (SECOND) OF TORTS § 285 cmt. d (1965).

[173] The Restatement summarizes the four methods of establishing standards of conduct in these words:

> § 285. How Standard of Conduct is Determined.
>
> The standard of conduct of a reasonable man may be:
>
> (a) established by a legislative enactment or administrative regulation which so provides, or
>
> (b) adopted by the court from a legislative enactment or an administrative regulation which does not so provide, or
>
> (c) established by judicial decision, or
>
> (d) applied to the facts of the case by the trial judge or the jury, if there is no such enactment, regulation, or decision.

Id. § 285. Legislatures and courts have steadily filled in the details of general duties and made them more specific. "Once the existence of a legal duty is found, it is the further function of the court to determine and formulate the standard of conduct to which the duty requires the defendant to conform. . . . [T]he court will normally apply it in the form of an appropriate instruction to the jury." *Id.* § 328B cmt. f.

[174] A fifth method applies in Texas medical malpractice cases, where the standard of care is set by expert testimony tailored to the fact situation. *See* Tex. Civ. Prac. & Rem. Code Ann.§§ 74.001–.507 (Vernon 2005 & Supp. 2009). To maintain a health care liability suit, a plaintiff must submit a report by a qualified expert that "provides a fair summary of the expert's

A standard of conduct is the law's effort to state the law with more specificity than simply the duty to act reasonably or with ordinary care. If a case is submitted to a jury with only general instructions about negligence, the jurors will decide what seems to them reasonable without further guidance about what reasonableness means. If the law states a more particular standard of conduct, the jury decides whether the defendant has breached that standard, not just whether the defendant acted unreasonably, or failed to exercise ordinary care. When a standard of conduct is summarized and stated in a jury instruction, it will usually require the jury to decide both issues of historical fact and law application. Several examples will illustrate how specific standards of conduct have developed.

a. Alcohol Provider's Duty of Care to the Public

Standard of conduct is illustrated by the process through which Texas imposed on commercial providers of liquor a duty of care to the motoring public. Two intermediate appellate courts, the supreme court, and the legislature imposed a duty of care, but they defined the standard of conduct in four different ways. In *El Chico Corporation v. Poole*[175] the Texas Supreme Court reviewed two companion cases in which a restaurant and a tavern had served alcohol to customers, who then drove their cars and caused serious injuries. In both cases suits were brought against the drunk drivers and also against the alcohol providers, and the appellate courts held that commercial providers of alcohol owe a duty of care to the innocent motoring public.

In such cases, should the jury be told simply to assess the provider's reasonableness, or should the law give the jury (and alcohol providers generally) more specific guidance? One court of appeals stated the standard of conduct with only two elements: "[A] bar operator owes a duty to the motoring public to not [1] knowingly sell an alcoholic beverage to [2] an already intoxicated person."[176] The other court of appeals stated a much more specific standard of conduct, which could be fairly summarized as the

opinions . . . regarding applicable standards of care, the manner in which the care rendered by the physician or health care provider failed to meet the standards, and the causal relationship between that failure and the injury, harm, or damages claimed." *See id.* § 74.051. *See also* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises, and Products* PJC 50.1 (2008).

[175] 732 S.W.2d 306 (Tex. 1987).

[176] Poole v. El Chico Corp., 713 S.W.2d 955, 958 (Tex. App.—Houston [14th Dist.] 1986), *aff'd*, 732 S.W.2d 306 (Tex. 1987).

following three elements: A tavern owner who continues to serve alcohol to a patron after he [1] knows or should know that the patron [2] is intoxicated and will operate a motor vehicle on the streets, and who can [3] foresee injury to third persons, has a duty to take reasonable precautions to prevent the intoxicated patron from driving.[177]

The supreme court agreed with both appellate courts that commercial alcohol providers should owe a duty of care to the public.[178] But it stated a third standard of conduct:

> [W]e hold an alcoholic beverage licensee owes a duty to the general public not to serve alcoholic beverages to a person when the licensee [1] knows or should know the patron [2] is intoxicated.[179]

As the court then recognized, the legislature had recently created a similar cause of action, with a fourth standard of conduct that required more demanding proof. The legislature imposed liability when:

> [1] it was apparent to the provider that the individual being . . . served . . . was [2] obviously intoxicated to the extent [3] he presented a clear danger to himself and others.[180]

El Chico illustrates how a duty of ordinary care can be made specific by different standards of conduct, both by common-law decisions and by statute.[181] The supreme court simply required proof that the provider "knew or should have known that [the patron] was intoxicated."[182] The legislature required proof that it was "apparent to the provider" that the patron was "obviously intoxicated to the extent he presented a clear danger to himself and others."[183] The four standards of conduct are summarized and compared in the following chart:

[177] Evans v. Joleemo, Inc., 714 S.W.2d 394, 396 (Tex. App.—Corpus Christi 1986), *aff'd sub nom.* El Chico Corp. v. Poole, 732 S.W.2d 306 (Tex. 1987). The statement in the text is the author's summary of the court's more lengthy holding.

[178] *El Chico Corp.*, 732 S.W.2d at 312–13.

[179] *Id.* at 314.

[180] Tex. Alco. Bev. Code Ann. § 2.02 (Vernon 2007).

[181] *El Chico Corp.*, 732 S.W.2d at 309–12.

[182] *Id.* at 315.

[183] Tex. Alco. Bev. Code Ann. § 2.02.

Different Standards of Conduct for Commercial Alcohol Providers

14th Court of Appeals[184]	13th Court of Appeals[185]	Texas Supreme Court[186]	Texas Legislature[187]
Provider had actual knowledge that	Provider had actual or constructive knowledge that	Provider had actual or constructive knowledge that	It was apparent to provider that
patron was intoxicated	patron was intoxicated and would operate vehicle and	patron was intoxicated	patron was obviously intoxicated and
	injury to other motorists was foreseeable		patron presented clear danger to himself and others

Two points should be noted. First, all four standards of conduct were more specific than a general negligence standard, in which the jury would be asked simply whether the provider failed to act as a person exercising ordinary care. Second, a given quantity of evidence could be legally sufficient under some standards and insufficient under others.

In the following situations, the common-law process has also developed specific standards of conduct beyond a general duty of ordinary care.

b. Gross Negligence

For many years the standard of conduct to avoid liability for gross negligence was to exercise "some care."[188] To state the standard

[184] Poole v. El Chico Corp., 713 S.W.2d 955, 958 (Tex. App.—Houston [14th Dist.] 1986), *aff'd*, 732 S.W.2d 306 (Tex. 1987).

[185] Evans v. Joleemo, Inc., 714 S.W.2d 394, 396 (Tex. App.—Corpus Christi 1986), *aff'd sub. nom.* El Chico Corp. v. Pool, 732 S.W.2d 306 (Tex. 1987).

[186] *El Chico Corp.*, 732 S.W.2d at 314.

[187] Tex. Alco. Bev. Code Ann. § 2.02.

[188] *See* Burk Royalty Co. v. Walls, 616 S.W.2d 911, 917–20 (Tex. 1981) (summarizing the

conversely, to prove gross negligence a plaintiff had to prove the defendant acted with a complete absence of care.[189] The supreme court in *Wal-Mart Stores v. Alexander* changed this standard to require proof that the defendant had actual knowledge of an extreme risk of harm.[190] Thus, Texas has had two standards of conduct which a defendant must fulfill to avoid acting with gross negligence. The pre-1993 standard was "don't act with an entire want of care."[191] The post-1993 standard is "don't act with actual knowledge of an extreme risk of harm."[192]

c. Railroad's Duty to Alighting Passengers

In an earlier era, when travel by railroad was common, passengers occasionally sustained injuries while boarding or leaving the train.[193] If a railroad wants to exercise ordinary care in these situations, what does the law expect it to do? Through the common-law process, the courts gradually developed a standard of conduct that made specific a railroad's duty to its passengers.[194] The railway must provide: (1) safe equipment and (2) a reasonable time for alighting. Only in limited circumstances must it go further and provide personal assistance.[195]

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cases concerning the standard of "some care"). For many years, Texas courts defined gross negligence as "that entire want of care which would raise the belief that the act or omission complained of was the result of a conscious indifference to the right or welfare of the person or persons to be affected by it." *Id.* at 920 (quoting Mo. Pac. Ry. Co. v. Shuford, 72 Tex. 165, 171, 10 S.W. 408, 411 (1888)). The court in *Burk Royalty* did not change this standard; it held that a defendant could not avoid liability for punitive damages as a matter of law by presenting evidence of "some care" because a jury might not believe that evidence. *Id.* at 920–21.

[189] *See* Mo. Pac. Ry. Co. v. Shuford., 72 Tex. 165, 170, 10 S.W. 408, 411 (1888).

[190] 868 S.W.2d 322, 326 (Tex. 1993).

[191] *See Burk Royalty Co.*, 616 S.W.2d at 917–20.

[192] Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 21 (1994); *see also* Tex. Civ. Prac. & Rem. Code Ann. § 41.001 (Vernon 2008) (adopting for actions brought after September 1, 2003 essentially the *Wal-Mart* standard for gross negligence and also requiring clear and convincing proof and unanimous verdicts); *id.* § 41.003 (requiring clear and convincing proof and unanimous verdicts).

[193] *See* Lattimer v. Tex. Pac. Ry. Co., 106 S.W.2d 727, 727 (Tex. Civ. App.—Eastland 1937, no writ) (passenger fell when departing from train at destination); Bird v. Schaff, 206 S.W.711, 712 (Tex. Civ. App.—Dallas 1918, no writ) (passenger boarding a train was knocked over and injured by another passenger who was exiting the train).

[194] *See Lattimer*, 106 S.W.2d at 729 (citing the decisions that developed a railroad's required conduct and stating that standard).

[195] The court in *Lattimer* explained:

d. Premises Liability

It is in the nature of things that injuries happen in a place, usually in an automobile or on premises that are owned and occupied by someone. In suits against a premises owner, Texas law distinguishes between suits about an activity on the premises and suits about the condition of the premises.[196] For injuries from an activity, the law imposes a general duty of care, and the court will instruct the jury about negligence in general terms.[197] But for injuries from a condition on the premises, the cases have developed a more specific standard of conduct.[198] To hold an owner or occupier liable for a

> [I]t is the duty of the carrier to furnish safe appliances and facilities for alighting from the train and give the passenger a reasonable time within which to alight upon arrival at his destination. . . . [O]rdinarily the carrier is not burdened with the duty of a personal assistance to a passenger. . . [Unless] the passenger is "blind, sick, aged, very young, crippled, or infirm and his condition is apparent or made known to the carrier."

Id. (citation omitted). The standard of conduct summarized in the foregoing quotation exemplifies case-by-case development mentioned by the Restatement: "The standard with which the actor's conduct is to be compared may be more or less precisely defined by a decision or series of decisions of an appellate court. Certain situations . . . recur with such frequency that it is possible to find a fairly definite expression of judicial opinion as to the manner in which persons who find themselves therein should conduct themselves." RESTATEMENT (SECOND) OF TORTS § 285, cmt. e (1965).

There are sound policy reasons why courts develop standards of conduct case-by-case. "[T]he decision of an appellate court controls the action of trial courts and juries in all identical or closely similar cases. To the extent that the decision declares particular conduct to be up to or below the socially required standard, it defines the conduct of the reasonable man and narrows the field in which the opinion of the trial judge or jury is operative. Occasionally a situation occurs so often that a series of appellate decisions deals with so much of the customary conduct of both parties as to afford a fairly exhaustive definition of the conduct of reasonable men in such situations." *Id*.

[196] *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 75.001–.002.

[197] *See id*.; Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 2.1 (2008).

[198] In *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749 (Tex. 1998), the court distinguished between the two different legal theories and their standards of conduct:

> Negligence [from a negligent activity] means simply doing or failing to do what a person of ordinary prudence in the same or similar circumstances would have not done or done [i.e., general negligence]. Negligence [concerning a premises condition] means "failure to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition which the owner or occupier knows about or in the exercise of ordinary care should know about."

condition, an invitee plaintiff must show that: (1) the owner or occupier knew or should have known of some condition on the premises; (2) the condition posed an unreasonable risk of harm to the invitee; (3) the landowner did not exercise reasonable care to reduce or eliminate the risk; and (4) the failure to use such care proximately caused the invitee's injuries.[199] These elements of proof, which focus and channel the jury's inquiry, are probably more difficult to establish than breach of a general, unspecific duty to exercise ordinary care. In a case about a premises condition, the court's instructions will state the more detailed and specific standard of conduct.[200]

e. Negligent Entrustment

When a plaintiff seeks to hold an automobile owner liable for the negligence of a driver to whom the owner entrusted his car, the plaintiff cannot simply obtain a finding that a person exercising ordinary care would not have entrusted the car to the driver. Instead the plaintiff must prove that: the owner entrusted the vehicle to a driver who was unlicensed, reckless, or incompetent; the owner knew or should have known this; and the driver's negligence proximately caused the accident.[201]

f. Summary

By elaborating on a general duty to act reasonably, specific standards of conduct serve two important goals.[202] First, specific standards promote the

Id. at 753 (quoting Keetch v. Kroger Co. 845 S.W.2d 262, 267 (Tex. 1992)).

[199] *See, e.g.*, Meeks v. Rosa, 988 S.W.2d 216, 217 (Tex. 1999); s*ee also* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 66.4 (2008).

[200] *Compare* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 66.4 (2008), *with* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 2.1 (2008).

[201] *See* Williams v. Steves Indus., Inc., 699 S.W.2d 570, 571 (Tex. 1985); Mundy v. Pirie-Slaughter Motor Co., 146 Tex. 314, 321–22, 206 S.W.2d 587, 591 (1947); Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 7.12 (2008).

[202] Standards of conduct require jury findings about the historical facts and mixed law-fact questions. They should not be confused with rules of law that leave no room for jury discretion. The classic example of overly rigid negligence rules is Justice Holmes's opinion imposing the "stop, look and listen" rule for automobiles crossing railroad tracks. *See* Baltimore & Ohio R.R.

rule of law by implementing the principle that like cases should be treated alike instead of ad hoc (based perhaps on extraneous factors, such as bias, prejudice, or sympathy).[203] A jury that is asked simply to decide whether a party acted reasonably is less influenced by law than a jury that is instructed to decide whether a party complied with a more specific standard of conduct. After hearing the evidence, most jurors will have their own ideas about whether a defendant should compensate a plaintiff. They will decide the case using their own notions of fairness and justice. Through standards of conduct, society (speaking through the judiciary or the legislature) imposes guidelines on the jury's thought process. Specific standards of conduct allow the larger community (through statutes and reported decisions) to influence how juries decide specific cases, by specifying rules for all to obey. By them, society injects law into the litigation process.

Specific standards of conduct also serve a second goal: they help give notice to all members of society by stating with some specificity what they must do to avoid being held liable. Instead of saying, "Be reasonable" or "Use ordinary care," a specific standard goes further and says, "To be reasonable and careful, you must do A, B, and C." In this sense, the development of specific civil standards of conduct complements a fundamental principle of due process—that members of society are entitled to fair notice of what conduct is forbidden by law and subject to penalty.[204]

Co. v. Goodman, 275 U.S. 66, 70 (1927) (motorist who does not stop and look for train before crossing the tracks is contributorily negligent as a matter of law). A short time later a unanimous Court, speaking through Justice Cardozo, "limited" *Goodman*, stating that standards of prudent conduct that are appropriate for the normal situation might not be proper for exceptional situations, which should be decided by the jury. *See* Pokora v. Wabash Ry. Co., 292 U.S. 98, 105–06 (1934). Cardozo was not condemning standards of conduct. *See id.* (explaining that there are places were standards are helpful and places where standards are a hindrance). It was he, after all, who helped popularize negligence per se, the notion that specific standards of conduct should sometimes be adopted from criminal statutes and used to spell out the reasonableness standard in civil cases. *See* Martin v. Herzog, 126 N.E. 814, 815 (N.Y. 1920) (adopting for civil trials the statutory criminal standard requiring motorists to display lights on cars after dark).

[203] *See* RICHARD A. EPSTEIN, CASES AND MATERIALS ON TORTS 247 (8th ed. 2004) (stating that juries are expected to apply the court's legal instructions, instead of simply deciding cases on their individual notions of fairness, because unlimited discretion might promote verdicts based on prejudice or class bias, and because "unlimited jury discretion repudiates or at least undermines the central principle of distributive justice—that like cases be treated alike, no matter what substantive principles apply").

[204] *See* WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 2.3(b) (2d ed. 2003) ("[T]he Supreme Court has frequently stressed that everyone is entitled to be informed what the law commands or forbids.").

In short, standards of conduct guide both defendants and juries by making the law more specific.[205] In any particular case, observers may of course disagree about how specific a standard of conduct should be.[206] "There is no intrinsically correct answer to the question of how broad or particularized our legal standards should be. That is itself an important policy question for our legal system to decide."[207]

B. Sufficient Proof of Historical Facts

In most cases, the court's charge asks the jury to do two things: to decide what happened (the historical facts), and to evaluate the conduct of

[205] We have seen, for example, that potential defendants like railroads are not told simply to use ordinary care when passengers are boarding or alighting. *See supra* notes 200–03 and accompanying text. They are told specifically what it means to be careful: they must furnish safe equipment and provide a reasonable period of time; only if the passenger is young, aged, or infirm must the railroad provide hands-on, personal assistance. *See supra* notes 200–203 and accompanying text. Similarly juries, like defendants, are given guidance. In a tort suit by a passenger injured while boarding the carrier, the jury would not simply decide reasonableness. It would be instructed about the specific standard of conduct and would decide whether the defendant breached that standard.

[206] Chief Justice Harberger has argued that specific standards of conduct invade the jury's province. *See* Hardberger, *supra* note 20, at 14–18 (arguing that jury should simply decide whether insurance agent behaved reasonably, not whether he satisfied a more specific standard of conduct); *id*. at 21–33 (arguing that in failure-to-settle cases against liability insurers jury should simply be asked whether insurer behaved reasonably, not whether it satisfied a more specific standard of conduct); *id*. at 97–110 (arguing for "a single duty of reasonable care" in premises cases, not the well-established standard of conduct for premises owners and occupiers); *id*. at 13–16, 22–24, 89, 110 (complaining that a specific standard of conduct "narrows" the duty owed and thereby prevents some cases from reaching the jury). It should be noted that Hardberger goes beyond simply advocating a preference for general duties instead of specific standards of conduct; he says that specific standards of conduct trespass on the jury's domain. *See id*. at 14–18. But on this point Professor Powers is clearly correct: "Just as the legislature does not invade the jury's province when it makes particularized rules, neither does a court invade the jury's province when it decides that a legal standard should be particularized rather than broad." *See* Powers, *supra* note 135, at 1712.

The Texas Constitution's open-courts guarantee prevents the Legislature from unreasonably abridging a well-established common-law cause of action. *See*, *e.g.*, Baptist Mem'l Hosp. Sys. v. Arredondo, 922 S.W.2d 120, 121 (Tex. 1996); Tex. Workers' Comp. Comm'n v. Garcia, 893 S.W.2d 504, 521 (Tex. 1995); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 355 (Tex.1990). But nothing in the constitution prevents courts or legislatures from giving specific content to the substantive law by declaring the law of duty and standard of conduct. *See generally* Tex. Const. Arts. III, V.

[207] *See* Powers, *supra* note 135, at 1712.

the parties (law application).[208] "[T]he jury's function may extend to two kinds of questions: first, what were the happenings, occurrences, or conduct of the parties—that is, what did the parties do and what were the circumstances? Second, what are the legal consequences . . . ?"[209]

In Texas the failure to distinguish between findings of historical fact and mixed law-fact questions is understandable because Texas law uses the same terminology to describe both, and because the same legal sufficiency procedures are used to ask for a judicial ruling on both. When reviewing both historical fact findings and mixed findings of law and fact, courts say: (1) there is some evidence (or no evidence); (2) there is proof (or failure to prove) as a matter of law; (3) the evidence raises (or does not raise) a fact issue; and (4) the evidence is legally sufficient (or insufficient). Procedurally, courts deal with both kinds of questions—historical-fact questions and mixed law-fact questions—when deciding motions for summary judgment, directed verdict, and judgment n.o.v.

Examples of historical-fact questions are: Which driver ran the red light? Did a product have a certain characteristic at the time it left the manufacturer's control? Did a user alter a product after purchase? Did a step-parent sexually abuse a child? Did a salesman represent that a widget would perform in a certain way? Did an employer make a disputed remark to the plaintiff? Was the plaintiff's seat belt fastened when the wreck happened? These are issues of historical fact. They involve what happened. They could be decided conclusively—and correctly—if only someone had been present to record the events electronically. A jury can

[208] "The tribunal's first job is to determine what the parties did and what the circumstances surrounding their conduct were. This we denote as the *facts* of the specific case, as distinguished from an evaluation or interpretation of those facts in terms of their legal consequences." 3 FOWLER HARPER, FLEMING JAMES, JR., & OSCAR S. GRAY, THE LAW OF TORTS § 15.2 (2d ed. 1986) (emphasis in original). "The other main job confronting the tribunal . . . to evaluate the conduct of the parties, in the light of the circumstances, in terms of its legal consequences." *Id.* § 15.3. In addition to pure questions of law, "each case also involves a more specific evaluation of the conduct in the concrete situation with which it deals. . . . On the whole the rules of accident law . . . give the jury considerable scope in deciding what the parties should have done, in each specific case, as well as what they did do. . . . [But] the courts set outer limits. A jury will not be permitted to require a party to take a precaution that is clearly unreasonable. Nor may it excuse a party from taking a precaution that all reasonable people would clearly take in the circumstances." *Id.* The same points were earlier made in Fleming James, Jr., *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667, 668, 676–77 (1949).

[209] JAMES, HAZARD & LEUBSDORF, *supra* note 1, § 7.18.

decide what happened without knowing the relevant legal principles. [210]

Factual review by judges is limited because jury findings on factual matters, which often require assessment of credibility, are entitled to deference. On issues of historical fact, the court will view the evidence favorably to the litigant who wants the issue submitted to the jury.[211] A court does not invade of the jury's province when it assesses the legal sufficiency of factual proof using this deferential standard, although decisions supported by direct evidence receive more deference than those resting on circumstantial evidence alone.[212]

In some cases direct evidence to prove historical events is simply missing, and there is a failure (or an inability) to prove a vital fact. In *Rounsaville v. Bullard*, for example, the Bullards' son was fatally injured when the Rounsaville car hit his motor scooter on the open highway.[213] Rounsaville placed the negligence on Bullard. She testified that as her car

[210] Weiner, *supra* note 132, at 1875 (stating that "a jury can determine historical facts without any awareness of the governing legal principles").

[211] For example, the court in *City of Keller v. Wilson*, 168 S.W.3d 802 (Tex. 2005), clarified conflicting decisions and declared the standard for assessing legal sufficiency in these words:

> If the evidence at trial would enable reasonable and fair-minded people to differ in their conclusions, then jurors must be allowed to do so. . . . [T]he court must consider evidence in the light most favorable to the verdict, and indulge every reasonable inference that would support it. But if the evidence allows of only one inference, neither jurors nor the reviewing court may disregard it. . . .
>
> The standards for taking any case from the jury should be the same, no matter what motion [e.g., summary judgment, instructed verdict, judgment n.o.v] is used.

Id. at 822, 825. The discussion of historical-fact review in the text should not be confused with the distinction in Texas between legal and factual sufficiency. A court performing legal sufficiency review will assess the evidence under the standard stated in the quotation from *City of Keller* immediately above. *Id*. A court performing factual sufficiency review will consider all the evidence, both for and against the verdict, and order a new trial only if the verdict is so against the great weight and preponderance of the evidence as to be manifestly wrong and unjust. *See* Pool v. Ford Motor Co., 715 S.W.2d 629, 635 (Tex. 1986). When a court sustains a legal sufficiency argument, it will render judgment. *See id.* When a court sustains a factual sufficiency argument, it will order a new trial. *See id*. at 634.

[212] "The court determines the sufficiency of the evidence to show the existence of a fact. When there is direct evidence of the existence of a fact in issue, a jury will in most cases be authorized to find the existence of that fact. . . . Where the question is one of the sufficiency of circumstantial evidence to prove a fact in issue the courts have exercised more control . . . ." HARPER, JAMES & GRAY, *supra* note 208, § 15.2; *see also* James, *supra* note 208 at 672–73.

[213] 154 Tex. 260, 261, 276 S.W.2d 791, 791 (1955).

overtook Bullard, driving in the same direction, his scooter skidded on the wet highway into her lane as she tried to pass him, and she was not able to avoid a collision. Bullard was not alive to give a different version. Skid marks and physical damage were inconclusive. There was no expert testimony. Even though Rounsaville's version of events was disregarded when she moved for a directed verdict, the Bullards had no evidence that she was negligent. The supreme court affirmed the directed verdict because there was no factual proof that Rounsaville did anything improper or negligent. The conduct of the two persons—who did what—was a pure issue of historical fact.

Similarly, in *Texas & Pacific Railway Company v. Shoemaker*, evidence was lacking in a suit against a railroad for the wrongful deaths of two young men who had apparently been walking on the tracks at night.[214] The question, said the court, was whether the evidence was "legally sufficient to warrant the submission of the case to the jury."[215] One ground of alleged negligence was the railroad's failure to give a statutory warning sound at a grade crossing. But without evidence from the two decedents, the plaintiffs were unable to prove that the deaths occurred at a crossing, the only place where the statutory warning was required. There was no proof of where the incident happened, a historical fact.

When there is no direct evidence of the disputed historical events, the case will require an assessment of the circumstantial evidence. The question will be whether the circumstances are sufficient proof of the historical events. In *Rounsaville* and *Shoemaker* the courts held implicitly that the circumstances would not justify a finding of the disputed historical facts. Another circumstantial evidence case is *Joske v. Irvine*, where a police officer had arrested Irvine and charged him with stealing Joske's goods.[216] Irvine sued Joske for wrongful arrest. To hold Joske liable for the officer's conduct, Irvine needed to prove a historical fact: that Joske had asked the officer to file the charges. Joske denied that he asked the officer to charge Irvine, and there being no direct proof on the matter, the issue was whether the circumstances permitted the jury to infer that Joske had done so. The supreme court held that even though the arrest was unlawful, the circumstances and sequence of events constituted no evidence that Joske had asked the officer to make the arrest. There was evidence that Joske had

[214] 98 Tex. 451, 453–55, 84 S.W. 1049, 1050–51 (1905).

[215] *Id.* at 452, 84 S.W. at 1050.

[216] 91 Tex. 574, 576–78, 44 S.W. 1059, 1060–61 (1898).

said he intended to file a complaint against Irvine and that the officer arrested Irvine a short time after Joske and the officer had spoken privately. Whether Joske had asked the officer to charge Irvine was an issue of pure historical fact. Joske either made such a request or he did not. An eyewitness who saw and heard Joske and the officer at the appropriate times could have given direct evidence on the question.

A poignant illustration of circumstantial evidence was presented in *Lozano v. Lozano*, where, during a child custody case, the father had absconded and gone into hiding with his young daughter.[217] Unable to locate and recover her daughter after several months of searching, the mother sued each member of the father's extended family for willful interference with child custody, a statutory tort cause of action granted to her by the Family Code.[218] A jury found that the father's parents and his three siblings had knowingly and willfully aided him in taking the child and keeping her hidden. As might be expected, there was no direct evidence linking any family member to the father's disappearance with the child. But there was circumstantial evidence, whose quality and amount varied with respect to each family member.

A badly splintered court found the circumstantial evidence legally sufficient to sustain the findings that the grandmother, a brother, and a sister (but not the grandfather and a second sister) had willfully aided and assisted the father in interfering with the mother's right to possession. For each family member there were varying combinations of the following circumstantial evidence. One or more family members had: (1) removed some of the mother's missing-child posters,; (2) made large and suspicious cash withdrawals after the father and child disappeared; (3) given money to the father (who did not own a car or have a job) shortly before he absconded; (4) refused to cooperate with the mother as she searched for the child and refused to answer her phone calls; (5) resisted discovery and asserted the Fifth Amendment privilege; and (6) falsely accused the mother of child abuse. Whether the family members had knowingly helped the father was a question of historical fact. *Lozano* illustrates that different combinations of circumstantial evidence against different parties can be legally sufficient and insufficient.[219]

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[217] 52 S.W.3d 141, 144 (Tex. 2001).

[218] The Family Code provides, to a person who has a right to possession of a child, a cause of action for damages against anyone who knowingly aids or assists in interfering with that right. *See* Tex. Fam. Code Ann. § 42.003 (Vernon 2008).

[219] There seems to be no limit to the varied circumstances that are said to be legally sufficient

When there is direct evidence of disputed historical events—that is, evidence from persons with personal knowledge—the courts seldom keep the case from the jury. But when there is only circumstantial evidence, the courts have always assessed that evidence for legal sufficiency. It is worth remembering that every incident has its own set of facts, its own circumstances. But the circumstances—the facts of the case—cannot always be legally sufficient to prove the elements of a cause of action. When the plaintiff has no direct proof and must rely on the circumstances, it will often be for the jury to decide whether inferences are reasonable. Still, there are cases when the court will have to say that no inference about historical events can be reasonably made.

C. Reasonable Law Application

There is a third aspect of legal sufficiency, in which the courts review issues of law application, which are also known as mixed questions of law and fact.[220] To answer a mixed law-fact question, the trier of fact must be told something about the law. Law application requires the exercise of

to sustain a finding of fact. For instance, one issue in *Hammerly Oaks, Inc. v. Edwards*, 958 S.W.2d 387, 388 (Tex. 1997), was whether Hammerly was liable for exemplary damages. Corporations may be required to pay exemplary damages for the gross negligence of their vice-principals. One asserted basis for holding Hammerly liable was the conduct of a certain employee, but the only evidence that she was a vice-principal was that she was alone in Hammerly's leasing office when the conduct occurred, which might suggest that she was in charge. The court held that this circumstance fell "far short of a showing that [she] had the authority to hire and fire employees or that she presided over the management of a department of Hammerly Oaks."

Another case analyzing circumstantial evidence was *Browning-Ferris, Inc. v. Reyna*, 865 S.W.2d 925, 926–28 (Tex. 1993). After animosity had developed between Condor Industries (owned by Reyna) and Browning-Ferris Inc. (BFI), Condor underbid BFI and won a street-sweeping contract with the state. When the state terminated its contract with Condor after only one month, Condor blamed BFI and sued it for tortious interference, which required proof that BFI intentionally interfered with the contract. There being no direct evidence of intentional interference, Condor cited the following circumstantial evidence. A state employee had told Reyna that he and his supervisor were working with BFI to terminate Condor's contract, and that this would happen "no matter what"; there was vandalism to Condor's street sweeping equipment, including theft of equipment vital to its sweeping operations but of little monetary value, while tools and other personal items were left untouched by the vandals; and a Condor street sweeper had a wreck with a BFI truck, which resulted in litigation. The court held this circumstantial evidence was not legally sufficient to prove an intentional act of interference by BFI.

[220] Because the cases and the commentators use the terms "law application" and "mixed questions of law and fact" interchangeably, this Article uses both terms.

judgment. Persons with different value systems and life experiences will often decide these questions differently.

Examples of mixed law-fact questions are: Did a driver exercise ordinary care?[221] Was a product unreasonably dangerous?[222] Did the parties have a confidential relationship?[223] Would a child custody decision (or a termination of parental rights) be in a child's best interest?[224] Is a division of marital property just and right?[225] Did a plaintiff exercise diligence in having a defendant served with citation?[226] Was an unconsented touching offensive?[227] Has there been a substantial and material change in the circumstances of a child or parent to justify modifying child custody?[228] Has there been substantial performance of a construction contract?[229] These are normative, value-rich decisions. They are different from deciding what happened in the past. Questions such as whether conduct was reasonable, what a litigant should have done, what is best for a child, and whether something was done in good faith or would be an undue hardship—these are mixed questions of law and fact. An electronic recording would not resolve these normative issues because resolving them requires an evaluation of past conduct, even if there is no dispute about what happened.

Several common situations will illustrate how the Texas courts have decided legal sufficiency issues of law application.

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[221] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 2.1 (2008) (definitions of negligence and ordinary care); *id*. PJC 4.1 (basic negligence question).

[222] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Malpractice, Premises & Products* PJC 71.3 (manufacturing defect); *id*. PJC 71.4 (2008) (design defect).

[223] *See* Crim. Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 594 (Tex. 1992).

[224] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Family* PJC 215.1 (2008) (definition of best interest); *id*. PJC 217.1A (2008) (modification from one sole managing conservator to another); *id*. PJC 218.1A (2008) (termination of parent-child relationship).

[225] *See* Tex. Fam. Code Ann. § 7.001 (Vernon 2008).

[226] *See, e.g.*, Gant v. DeLeon, 786 S.W.2d 259, 259 (Tex. 1990); Rodriguez v. Tinsman & Houser, Inc., 13 S.W.3d 47, 49 (Tex. App.—San Antonio 1999, pet. denied).

[227] See *supra* notes 134–138 and accompanying text.

[228] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Family* PJC 217.1 (2008).

[229] *Id.* PJC 101.46.

1. Foreseeability

Whether a danger was reasonably foreseeable is a mixed question of law and fact, which the courts have reviewed for reasonableness from early times. For example, in *Brush Electric Light & Power Company v. Lefevre*, the court considered a freakish electrocution.[230] The defendant's electric wires, which were strung across a street intersection, blocked the passage of a house that was being moved from one location to another. Lefevre positioned himself on an awning to raise the wires with a rope. When he fell through the awning and grabbed the wires for stability, he was electrocuted.[231] The court held that as a matter of law the event was not reasonably foreseeable. An equally unusual fact situation was presented in *Texas & Pacific Railway Company v. Bigham*.[232] The plaintiff was keeping cattle in the defendant's corral, which had a defective gate latch. As the plaintiff was fastening the gate with a rope, the noise of a passing train frightened his cattle into a stampede. The plaintiff sued to recover for his own personal injuries and also for the damage to his cattle. The court held that no reasonably prudent person would have foreseen personal injuries from the defective latch, but that injury to the cattle was foreseeable. The issues of foreseeability in *Lefevre* and *Bigham* were mixed law-fact questions.[233]

[230] 93 Tex. 604, 606, 57 S.W. 640, 641 (1900).

[231] *Id.*

[232] 90 Tex. 223, 224–25, 38 S.W. 163, 163 (1896).

[233] Other seemingly unique injuring events have been held unforeseeable as a matter of law. For example, in *Carey v. Pure Distrib. Corp.*, 133 Tex. 31, 124 S.W.2d 847 (1939), an oil drum fell from the defendant's truck through the negligence of its driver. The lid of the drum was dislodged and propelled into Carey's head while he was camped beside the road. Hearing the commotion, his pregnant wife came from inside the trailer to investigate. The sight of her husband's injury caused her to miscarry. The court held that the head injury to Carey, but not his wife's miscarriage, was foreseeable. In *Bell v. Campbell*, 434 S.W.2d 117 (Tex. 1968), Campbell's negligence had caused a highway collision with Marshall. Bell stopped to assist and help clear the highway, but was killed when a car driven by Fore rammed into the accident scene. Bell's beneficiaries sued all three drivers (Campbell, Marshall, and Fore). The supreme court held that the second collision which fatally injured Bell was not a foreseeable consequence of Campbell's original negligence, and therefore as a matter of law Campbell's negligence was not a proximate cause of the second collision. And in *Colvin v. Red Steel Company*, 682 S.W.2d 243 (Tex. 1984), a steel supplier had furnished eight-foot beams instead of the longer beams that had been ordered. Colvin fell and was injured when he grabbed an unanchored beam, which was lying on two cross-beams, to pull himself to a higher place. He would not have been injured if the beam that he grasped had been the correct longer size. Was such an event foreseeable to the supplier? Though the short beams may have caused other problems on the jobsite, said the court, there was

2. Extreme and Outrageous Conduct

The cause of action for intentional infliction of emotional distress requires proof that the defendant's conduct was extreme and outrageous, a mixed question of law and fact. Whether conduct is extreme and outrageous is a matter of assessment and evaluation—that is, it is a matter of law application.[234] Thus in *Wornick Company v. Casas*, the court held that an employer's decision to have a security guard escort a terminated employee from the premises was, as a matter of law, not outrageous.[235] And in *Randall's Food Markets, Inc. v. Johnson*, as a matter of law a merchant's questioning of a customer about possible theft was not extreme and outrageous conduct.[236]

3. False Imprisonment

False imprisonment requires proof of a willful detention, done without consent and without the authority of law.[237] A statutory defense known as the "shopkeeper's privilege" expressly grants a person the authority to detain a customer in a reasonable manner and for a reasonable period of time to investigate the ownership of property if the person has a reasonable belief that the customer has stolen or is attempting to steal store merchandise.[238] What constitutes a detention, and whether it was done reasonably and for a reasonable period of time, are mixed questions of law and fact. Thus in *Randall's Food Markets, Inc. v. Johnson*, the store's request that the plaintiff-employee stay away from a particular area of the business premises during work hours as a matter of law did not constitute a detention.[239] And in *Wal-Mart Stores, Inc. v. Resendez*, the court held that as a matter of law a detention of ten or fifteen minutes was not an

no evidence that Red Steel could have foreseen that the shorter beams would contribute to an injury like the one involving Colvin.

[234] *See* Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 6.5 (2008).

[235] 856 S.W.2d 732, 736 (Tex. 1993).

[236] 891 S.W.2d 640, 644 (Tex. 1995).

[237] *See* Sears, Roebuck & Co. v. Castillo, 693 S.W.2d 374, 375 (Tex. 1985); Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: General Negligence & Intentional Personal Torts* PJC 6.1 (2008).

[238] *See* Tex. Civ. Prac. & Rem. Code Ann. § 124.001 (Vernon 2005).

[239] 891 S.W.2d 640, 644–45 (Tex. 1995).

unreasonable length of time.[240]

4. Business and Consumer Law Concepts

Many commercial law concepts are mixed questions of law and fact, such as failure to perform services in a good and workmanlike manner;[241] engaging in an unconscionable action or course of action;[242] failing to attempt in good faith to effectuate a prompt, fair, and equitable settlement of a claim when the insurer's liability has become reasonably clear;[243] refusing to pay an insurance claim without conducting a reasonable investigation;[244] and selling a house that is not suitable for human habitation.[245] In employment law, several mixed questions of law and fact would be submitted in a jury question asking whether an employer tried in good faith to make reasonable accommodations to a plaintiff's disability which would not cause undue hardship to the employer's business.[246]

5. Dangerous Condition

Most causes of action require the trier of fact to decide what happened and also to evaluate the conduct of the parties. In premises liability cases, for example, the plaintiff must prove that the injury resulted from (1) an unreasonably dangerous condition that the defendant (2) knew or should have known about—that is, dangerousness and actual or constructive notice.[247] Dangerousness and notice are not contested issues in every case.[248] Some premises cases are primarily dangerousness cases; the real

[240] 962 S.W.2d 539, 540 (Tex. 1998).

[241] Comm. on Pattern Jury Charges, State Bar of Tex., *Texas Pattern Jury Charges: Business, Consumer, Insurance & Employment* PJC 102.12 (2008).

[242] *Id*. PJC 102.7.

[243] *Id*. PJC 102.18.

[244] *Id*.

[245] *Id*. PJC 102.13.

[246] *Id*. PJC 107.14.

[247] *See supra* note 199 and accompanying text (discussing the elements of premises liability); *see also* Wal-Mart Stores, Inc. v. Reece, 81 S.W.3d 812, 813 (Tex. 2002) ("To prevail in a premises-liability case, an invitee must prove that the premises owner had actual or constructive knowledge of a dangerous condition on the premises").

[248] *Compare* Wal-Mart Stores, Inc. v. Gonzales, 968 S.W.2d 934, 938 (Tex. 1998) (stating that the issue was whether the defendant had constructive notice of the danger), *with* Seideneck v. Cal Bayreuther Assocs., 451 S.W.2d 752, 753 (Tex. 1970) (stating that the issue was whether the defendant's rug was dangerous).

issue—the one that is fought at trial—is whether a fixed condition that was put there by the defendant (such as a rug or a stairway) was unreasonably dangerous.[249] Other premises cases are primarily constructive notice cases in which the real issue is whether an admittedly slippery and dangerous condition (such as food or water spilled by a customer on a supermarket floor) was on the floor long enough to place the defendant on constructive notice that it was there, triggering the duty to either clean it up or warn invitees about it.[250] Premises cases can be analytically difficult because dangerousness is a mixed question of law and fact, while notice consists of both a historical fact question (how long the substance was there) and a mixed law-fact question (whether a premises owner using ordinary care should have known about it).[251]

When the landowner created the condition that caused harm, the trial will not really focus on the issue of notice. After all, a premises owner cannot plausibly deny knowing about a condition that he created. Instead the contested liability issue will be whether the condition was dangerous. Several examples will illustrate this point. In *Seideneck v. Cal Bayreuther Associates*, the plaintiff tripped on a rug on the defendant's showroom floor.[252] The issue of notice could not have been truly disputed; the defendant had actual notice because it had selected the rug and placed it on the floor. The real issue was dangerousness, or unreasonable risk of harm, a mixed question of law and fact.[253] The court upheld a directed verdict for the defendant. Similarly, in *McElhenny v. Thielepape*, the court held that a glider swing for children, which injured the plaintiff as she walked through the defendant doctor's waiting room, was not dangerous.[254] And in *Stinnett v. City of Waco*, the court held there was no evidence of negligence when the plaintiff tripped on the city's uneven sidewalk, where one section was

[249] *See, e.g.*, *Seideneck*, 451 S.W.2d at 753 (stating that the issue was whether the rug on the floor was dangerous).

[250] *See, e.g.*, *Gonzales*, 968 S.W.2d at 938 (stating that the issue was whether the foreign substance was on the floor long enough to give the defendant constructive notice).

[251] *Compare* McElhenny v. Thielepape, 155 Tex. 319, 322, 285 S.W.2d 940, 941–42 (1956) *with Gonzales.*, 968 S.W.2d at 936.

[252] 451 S.W.2d 752, 753 (Tex. 1970).

[253] *Id*. at 754. On this issue the court said there was no evidence that the rug was unusual or that anyone else had tripped on it, and there was no evidence of negligence in the rug's condition or placement. *Id.* at 754–55.

[254] 155 Tex. 319, 322, 285 S.W.2d 940, 941–42 (1956).

one and three-forths inches higher than an adjoining section.[255] Dangerousness was also the issue in *Hall v. Medical Building of Houston*.[256] There the court held that the evidence raised a fact issue of negligence where a door could open suddenly without warning and injure persons walking in a lobby.[257] Another common mixed law-fact question of dangerousness is presented by produce displays in grocery stores.[258] In each of these cases the courts have focused on the mixed law-fact issue of dangerousness.[259]

Foreign-substance cases are analytically different from fixed-condition cases because fixed conditions were placed on the premises by the defendant, while most foreign substances were spilled carelessly by a customer. The real liability dispute in a foreign-substance case is not dangerousness but constructive notice: was the substance on the floor long enough to put the owner on constructive notice? How long a condition had been on the floor before the plaintiff slipped on it is a question of historical fact. The next question—whether a premises owner should have known about it—is a mixed question of law and fact. The plaintiff usually has no direct evidence that an employee actually knew of a slippery substance, or that the substance had been on the floor long enough to put any employees on constructive notice that it was there. The question then becomes whether the circumstances constitute legally sufficient evidence of constructive notice. For example, in *Wal-Mart Stores, Inc. v. Gonzalez*, the court held that track marks and dirt in spilled macaroni were not legally sufficient proof that the macaroni had been on the floor long enough to give any employee constructive notice of it.[260] How long the macaroni had been on the floor was an issue of historical fact.[261]

[255] 142 Tex. 648, 649–50, 180 S.W.2d 433, 434 (1944).

[256] 151 Tex. 425, 431, 251 S.W.2d 497, 501 (1952).

[257] *Id*. at 432, 251 S.W.2d at 501.

[258] *Compare* H.E. Butt Grocery Co. v. Resendez, 988 S.W.2d 218, 218–19 (Tex. 1999) (holding that there was no evidence that a display of grapes for customer sampling, surrounded by three-inch railing and non-skid floor mats, was unreasonably dangerous), *with* Corbin v. Safeway Stores, 648 S.W.2d 292, 297 (Tex. 1983) (stating that the question of dangerousness was for jury where grapes were displayed in a slanted bin over linoleum tile floor with no mat).

[259] *See supra* notes 252–258.

[260] Wal-Mart Stores, Inc. v. Gonzales, 968 S.W.2d 934, 938 (Tex. 1998).

[261] *See id*. at 936.

D. "No Evidence"

When courts decide issues of law application, they are not reweighing the evidence or second-guessing the jury's assessment of credibility. They are deciding the legal portion of mixed law-fact questions, even though they sometimes use the term "no evidence" or "some evidence" to describe the decision.

Imprecise legal terms can be a hindrance to clear legal analysis. For example, the term "no evidence" can refer to proof of the historical facts and also to mixed questions of law and fact. Justice Holmes explained long ago that courts often say there is "no evidence" of negligence when they really mean that the defendant did all that the law required it to do:[262]

> When a judge rules that there is no evidence of negligence, he does something more than [decide] . . . that there is no evidence of a fact. He rules that the acts or omissions . . . in question do not constitute a ground of legal liability . . . .[263]

To illustrate his point, Holmes mentioned a premises case in which the plaintiff had slipped on stairs whose brass edges had worn smooth. The plaintiff presented evidence from a builder that the stairs were unsafe and that a handrail would have prevented the accident. The defendant proved that many persons had used the stairs without incident.[264] The appellate court set aside a verdict for the plaintiff.

Holmes observed that the appellate court's no-evidence ruling was not a ruling about the sufficiency of the factual proof. Holmes explained the court's decision:

> The ruling was in form that there was no evidence of negligence to go to the jury; but this was obviously equivalent to saying, and did in fact mean, that the [defendant] had done all that it was bound to do in maintaining such a staircase as was proved by the plaintiff. A hundred other equally concrete instances will be found in the text-books.[265]

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[262] O. W. HOLMES, JR., THE COMMON LAW 121 (Little, Brown, and Co. 1881).

[263] *Id.* at 120–21.

[264] *Id.*

[265] *Id.*

No matter how the no-evidence decision in the stairway case might be decided today, Holmes' point is still true: issues of "no evidence" and legal sufficiency encompass both factual review and mixed law-fact questions. The Texas decisions confirm Holmes' observation that courts often say "no evidence" when they make mixed law-fact decisions.[266]

IV. CRITICISMS OF LEGAL SUFFICIENCY IN PRACTICE

Because the requirement of legal sufficiency is so firmly established as a part of civil procedure,[267] it is hard to find explicit criticism of it.

[266] *See, e.g.*, Wal-Mart Stores, Inc. v. Resendez, 962 S.W.2d 539, 540 (Tex. 1998) (stating that in a false imprisonment case, there was no evidence that detention for ten or fifteen minutes was an unreasonable length of time); Ricardo N., Inc. v. Turcios de Argueta, 907 S.W.2d 423, 429 (Tex. 1995) (stating that there was no evidence that failure to throw flotation device to a seaman who jumped overboard was cause in fact of drowning); Colvin v. Red Steel Co., 682 S.W.2d 243, 245 (Tex. 1984) (stating that there was no evidence that a construction injury caused by improper length of beams was foreseeable); Seideneck v. Cal Bayreuther Assocs., 451 S.W.2d 752, 754–55 (Tex. 1970) (stating that in a premises case there no evidence that the rug presented an unreasonable risk of harm); Tex. & New Orleans R.R. Co. v. Alexander, 163 Tex. 531, 533, 358 S.W.2d 584, 585–86 (1962) (stating that there was no evidence of negligence where the railroad did not warn motorists that the city's street curved); Thompson v. Gibson, 156 Tex. 593, 607–08, 298 S.W.2d 97, 106 (1957) (stating that there was no evidence of negligence where plaintiff fell on unpacked gravel of variable size in the railroad yard); Houston Nat'l Bank v. Adair, 146 Tex. 387, 391, 207 S.W.2d 374, 376 (1948) (stating that the presence of dim lighting, lack of handrails, and marble stairs failed to raise a fact issue of negligence in maintaining the stairway); W. Union Tel. Co. v. Coker, 146 Tex. 190, 194–95, 204 S.W.2d 977, 979 (1947) (stating that there was no evidence that employer's failure to provide worker with a helper while lifting unwieldy object was negligence); L.G. Balfour Co. v. Gossett, 131 Tex. 348, 356, 115 S.W.2d 594, 599 (1938) (finding that there was no evidence of estoppel); Tex. Pac. Coal & Oil Co. v. Robertson, 125 Tex. 4, 6, 79 S.W.2d 830, 831 (1935) (finding that there was no evidence of gross negligence); Ford v. Magnolia Petroleum Co., 118 Tex. 461, 462, 17 S.W.2d 36, 36 (1929) (finding that there was no evidence of gross negligence); Int'l & Great N. R.R. v. Addison, 100 Tex. 241, 243, 245, 97 S.W. 1037, 1038, 1039 (1906) (stating that there was no evidence that the railroad's negligence was a proximate cause of plaintiff's injury where the train failed to stop in cold weather for plaintiff, who then traveled to his destination by buggy and became ill); Graham v. Chicago, Rock Island & Gulf R.R., Co., 99 Tex. 589, 591, 91 S.W. 1081, 1081 (1906) (stating that there was no evidence that railroad was negligent in maintaining the ladder on which plaintiff was injured); Tex. & New Orleans Ry. v. Echols, 87 Tex. 339, 343, 345, 27 S.W. 60, 61 (1894) (stating that there was no evidence that failure to have rules for stacking of railroad ties, which fell on plaintiff, was negligence).

[267] The requirement that claims be legally sufficient is expressed in the Restatement (Second) of Torts, the treatises and hornbooks, the Federal Rules, and the Texas Rules. *See* supra note 132 (Restatement); *supra* notes 1, 19, & 127, (treatises and hornbooks); *supra* notes 124–126 (Federal Rules of Civil Procedure); and *supra* notes 124–126 (Texas Rules of Civil Procedure).

Nevertheless critics have argued that in Texas legal sufficiency procedures are used disproportionately and are used to deny jury trial. Our understanding of this subject will be sharpened by assessing these two criticisms.

The first argument is that a high court should be "proportionate" or "even-handed" when it considers whether causes of action are legally sufficient.[268] Judges should certainly be fair and even-handed. Rule of law involves, at the least, a system in which rules are known in advance and applied fairly and even-handedly to everyone, high and low, including the government.

But any statistical criticism of a court's decisions as disproportionate should first show that the decisions being criticized are the kind that we would expect a court to decide proportionately, or even-handedly. This is not true of all legal decisions. For example, judges are not expected to strive for a proportionate statistical record in their criminal-law rulings for the state and the defense,[269] or in their child-custody decisions between mothers and fathers, or their decisions to grant or deny discovery requests,[270] or when they say "sustained" and "overruled" at trial. On these and other matters, where litigants are asking courts for damages or other relief, one does not expect judges to be proportionate in their decisions because litigants are not proportionate in their requests of the legal system. There is no reason to assume, without discussion, that attempts by litigants to shape their lawsuits and test the litigation frontiers will be legally sufficient roughly half the time and insufficient the other half.

There is an additional problem with statistical criticisms of a high court. A supreme court decides only a fraction of the cases in which review is sought, which is a fraction of the cases appealed to the courts of appeals,

[268] *See* Anderson, *supra* note 20, at 7, 10, 12, 17 (stating that Texas Supreme Court's tort decisions "disproportionately favor defendants," and imputing "disproportions," "disparity," and lack of "even-handedness").

[269] Research has not located any serious argument by a lawyer that in criminal cases trial judges should have a "proportionate" statistical record when they decide motions to suppress confessions or the fruits of searches, motions to revoke probation, or issues of guilt and innocence in nonjury trials.

[270] In most cases the discovery sought by both parties is proper, is not resisted in court, and is done by agreement. But when contested discovery issues are taken to court, it is difficult to see how one could decide, without analyzing each case, whether the disputed discovery requests should be granted or denied equally or proportionately.

which is a fraction of the cases tried, which is a fraction of the cases filed.[271] The legal sufficiency cases at the top of this appellate pyramid are not a random sample of cases from the trial courts. For two reasons, they are skewed in favor of plausible legal sufficiency arguments. First, legal sufficiency issues are presented to the appellate courts only when a defendant thought the issue was worth raising and therefore made a legal sufficiency motion in the trial court. In many cases, this does not happen. Unless such a motion is filed and pushed to a ruling, the issue will not even be preserved for appellate review. Second, because summary judgment denials are appealable only in limited circumstances,[272] the only summary judgment cases that advance beyond the trial courts into the appellate system are those in which a trial judge has granted the motion. This means that in virtually all of the summary judgments that are reviewed by the appellate courts, a trained and presumably neutral decision maker has already assessed the legal sufficiency argument and concluded that it has merit. These two realities—that legal sufficiency contentions reach the appellate system only when a defendant thought the argument worth making (and appealing), and summary judgments are appealed only when a trial judge thought the argument had merit and granted the motion—skew a supreme court's caseload toward legal insufficiency. Any criticism of a

[271] For example, the Texas Supreme Court reviews approximately 0.65% of the cases that might raise legal sufficiency issues. *See* OFFICE OF COURT ADMIN., ANN. STATISTICAL REP. FOR THE TEX. JUDICIARY FISCAL YEAR 2008 19, 21, 27, 34, 38 (2008), *available at* http://www.courts.state.tx.us/pubs/AR2008/AR08.pdf. In fiscal year 2008, the Texas district courts disposed of 534,498 civil cases. *Id*. at 34. Of these dispositions, 17,330 cases might have involved legal sufficiency issues. *See id.* at 38. This 17,330 figure includes cases disposed of by jury, after trial without a jury, by summary judgment, and by directed verdict. It excludes tax cases, accounts, contracts and notes cases, reciprocals, divorce cases, and all other family law matters. *See id.* The losing party sought review in the courts of appeals in 4949 cases. *Id*. at 27. After the appellate court's ruling, the losing party sought supreme court review in 825 cases. *Id*. at 19. The supreme court granted review in 112 cases. *Id*. at 21. Thus, in 2008, the supreme court reviewed 112 of 17,330 (.0065) of the trial court judgments that might have involved issues of legal sufficiency. I recognize that cases disposed of in the trial courts in fiscal year 2008 would hardly ever be decided by the supreme court in that year; but the figures are virtually identical for fiscal year 2007 (when the district courts disposed of 547,152 civil cases), and using them would not have changed the percentage appreciably. OFFICE OF COURT ADMIN., ANN. STATISTICAL REP. FOR THE TEX. JUDICIARY FISCAL YEAR 2007 38 (2007), *available at* http://www.courts.state.tx.us/pubs/AR2007/AR07.pdf.

[272] *See* Tex. Civ. Prac. & Rem. Code Ann. §§ 51.014(a)(5) & (6) (Vernon 2008) (permitting interlocutory appeal when trial court denies summary judgment based on: (1) official immunity defense; or (2) First Amendment defense asserted by print or electronic media).

high court's evenhandedness should take these realities into account.

Legal sufficiency decisions should be evaluated on the merits, case-by-case, not by comparison to an a priori statistical template. To be sure, assessing individual decisions on the merits is tedious and labor-intensive. But it is necessary if there is to be serious discussion of the correctness of a court's legal sufficiency decisions.

The second argument is that legal sufficiency rulings infringe on the right to have a jury decide the case.[273] This argument overlooks a basic principle: no litigant is entitled to try a legally insufficient claim to a jury because the right to jury trial is the right to have a jury decide cases that are legally sufficient. To be precise, the right to jury trial is the right to have a jury decide: (1) issues of historical fact for which there is legally sufficient direct or circumstantial evidence, and (2) mixed questions of law and fact on which jurors could reasonably disagree. In most cases, at the trial court level, the issues of historical fact and the mixed law-fact issues are within the jury's domain. They will not be decided as a matter of law. As Part III has explained, when the court rules that a case is legally sufficient, a jury will decide whether the defendant lived up to the standard of conduct. This will require jury decisions about the historical facts and the mixed questions of law and fact that the standard of conduct contains. But when a claim is legally insufficient, as that concept is explained in Part III, it does not infringe on the right to jury trial for a court to sustain a legal sufficiency motion.[274]

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[273] *See, e.g.*, Hardberger, *supra* note 20, at 39, 47, 49, 141 (arguing that Texas Supreme Court's legal sufficiency decisions have put juries "under siege" by usurping the jury's role, distrusting and mistrusting juries, and eroding their significance).

[274] Other articles have discussed the review of jury findings in Texas, arguing that the Texas legal and factual sufficiency standards are designed to protect the boundary between judge and jury. *See, e.g.*, William V. Dorsaneo, III, *Judges, Juries, and Reviewing Courts*, 53 S.M.U. L. REV. 1497, 1498 (2000) (arguing that Texas Supreme Court has recently changed the no-evidence standard of review and modified the respective roles of judges, juries, and reviewing courts); Royal Furgeson, *Civil Jury Trials R.I.P.? Can It Actually Happen in America?* 40 ST. MARY'S L.J. 795, 847–58 (2009) (lamenting appellate disregard of jury verdicts and tendency of trial courts to grant dispositive motions too readily); W. Wendell Hall & Mark Emery, *The Texas Hold Out: Trends in the Review of Civil and Criminal Jury Verdicts*, 49 S. TEX. L. REV. 539, 540 (2008) (arguing that legal and factual sufficiency standards are designed to protect the boundary between judge and jury). This Article has addressed a different issue: how courts decide where to locate the judge-jury boundaries through their legal sufficiency decisions. This issue can be understood only by starting with the reality that our wide-open civil lawsuit system is balanced by the legal sufficiency components of duty, mixed law-fact questions, and historical fact questions.

Observers (and judges) will sometimes disagree about where the litigation boundary lines should be drawn.[275] But if there is to be useful analysis of legal sufficiency decisions, there must be a common understanding of what the concept means.[276] And there should be an understanding that legal sufficiency provides balance to the reality of lawsuit shaping. To upset this balance would simply allow more litigation, by more people, against more people, about more things.

V. CONCLUSION

Lawsuit shaping is a reality of civil litigation. It is permitted by the rules and stimulated by the incentive to achieve maximum recovery. But it is balanced by a second reality—the requirement that claims be legally sufficient. When lawsuits push against the litigation frontiers, the legal system expects courts to set boundaries. In contrast to the criminal system, which screens cases at filing and allows very little lawsuit shaping, the wide-open civil system screens cases for legal sufficiency only after they are filed. Lawsuit shaping and legal sufficiency go hand in hand. They are component parts of a larger whole. They might be called the accelerator and the brakes of the civil litigation system.

If there is to be clear analysis of legal sufficiency, courts and commentators must have a common understanding of it and must keep its distinct parts in mind. Legal sufficiency does not mean simply that there is enough evidence. It consists of legal duty (and a corresponding standard of conduct), sufficient proof of historical events, and reasonable law

[275] The Texas Supreme Court of the 1980s, for example, set more expansive litigation boundaries than its predecessors of the 1960s and 1970s, more expansive than its successors of the 1990s and 2000s.

[276] For example, the Hardberger article does not simply say, "I would have decided certain cases differently, and here are my reasons." *See* Hardberger, *supra* note 20, at 39, 47, 49, 141. It says instead that the Texas Supreme Court has changed the rules of the game by using legal sufficiency procedures to deny the right to jury trial. *Id*. The article refers to concepts of duty and no-evidence as "legal tools" and then says the court has changed them. *Id*. at 4. "Legal tools of 'no duty' . . . 'no evidence' [and] 'insufficient evidence' . . . wiped out jury verdicts. . . . In all areas of the law, concepts of duty [and] no evidence . . . have been greatly altered." *See id*. at 4, 141. These arguments are made with no mention of the relationship between lawsuit shaping and legal sufficiency discussed in this Article, and no recognition of two undeniable facts, as shown in Part III: (1) the federal system and the other forty-nine state court systems have comparable (or the same) legal sufficiency procedures, and (2) the Texas courts have employed them since the 1800s with no complaint that they deny the right to jury trial.

application. If a claim lacks any of these three components, it is legally insufficient. In a given case we may disagree about whether a defendant should owe a duty to a plaintiff (and the reach of that duty); but there should be agreement that the existence and scope of legal duties are issues for the court. We may disagree about how specific a standard of conduct should be; but there should be agreement that courts (and legislatures) are expected to define the standard of conduct—to specify its content and how general or specific it will be. We may disagree when we assess the sufficiency of the proof of historical events; but there should be agreement that the system grants more deference to jury decisions about the historical facts when there is direct evidence of them and not circumstantial evidence alone. And we may disagree when we assess whether mixed law-fact questions are for the jury in a particular case; but there should be agreement that the legal system has historically granted more deference to a jury's findings about the historical events than to its decisions about mixed law-fact questions.

The three-fold character of legal sufficiency is of practical importance because lawyers and judges who understand it will better assess whether a cause of action should reach the jury. Courts and commentators could promote clarity and sound legal analysis by distinguishing among the three components. Summary judgments and directed verdicts, for example, can be better evaluated if there is a disciplined focus on the elements of legal sufficiency: First, does the law impose a duty, and what does the standard of conduct require? That is, what historical events and mixed law-fact issues must be proved? Second, does the motion challenge the sufficiency of the factual proof of historical events? Is there direct evidence of them, or is the evidence limited to the circumstances? Third, does the motion assert that the claim will require a mixed law-fact decision that would lie outside the area that society would define as the realm of reasonableness?

No legal system in history has allowed litigation without boundaries set by judges. The terminology and the stage of the litigation have varied—sufficiency issues have been decided by general demurrer (directed to the pleadings), demurrer to the evidence, special exception, motion to dismiss, directed verdict, and judgment n.o.v. (Even the more youthful summary judgment procedure has been part of the Federal Rules since 1938 and the Texas Rules since 1950.) The very purpose of these procedures is to separate the issues that are properly for the jury from those that are not. Without them there would be nothing to balance lawsuit shaping. Litigants could name defendants, assert legal theories, and trace causal responsibility

with no societal limits except those set by juries in each individual case.

Lawyers and judges have different jobs to do, and this sometimes puts them in conflict. For their part, lawyers should not be faulted for pushing against the litigation boundaries because they are representing their clients within the rules. By the same token, the courts should not be faulted for doing their job, which is to decide where to set the litigation boundaries. The same rules of civil procedure that let lawyers shape their lawsuits expansively also require judges, upon request, to ensure that claims are legally sufficient.

The common law is a tree that grows steadily and needs constant pruning. As the law does its daily work in our courts, it exhibits a steady wisdom that we take for granted and seldom notice. This Article has sought to deepen our understanding of an important part of the common-law system, the meaning of legal sufficiency and the balance it provides to lawsuit shaping.