

Don't *Casteel* my charge error

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Texas Appellate Law Podcast

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People doing jury charges in late 2024



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What are we talking about?

- *Casteel* error in broad form charges: avoid/protecting;
- What it is and isn't;
- How to preserve challenges;
- New Supreme Court decision in *Horton*.

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What is *Casteel* error?

- *Casteel* error is the harmful error that comes from asking a jury a single broad-form question based on both valid and invalid theories, allegations, or elements;
- Creates harmful, reversible error under Texas Rules of Appellate Procedure 44.1(a)(2) and 61.1(b);
- Gets you a new trial free from the invalid theories, allegations, or elements.

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Where does it come from?

- Texas Rule of Civil Procedure 277, which requires broad-form jury submissions “whenever feasible;”
- Texas Rule of Appellate Procedure 44.1(a)(2), which makes an error harmful when it “probably prevented the appellant from properly presenting error;” and
- The veil of secrecy that we impose over jury deliberations (Tex. R. Evid. 606(b)).

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The beginnings

- *Crown Life Ins. v. Casteel*, 22 S.W.3d 378 (Tex. 2000);
- Casteel (insurance broker) sold policies for Crown Life;
- Clients sued both for DTPA/insurance statutes;
- Casteel sued Crown Life for DTPA/insurance statutes.

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Casteel error in submitting invalid theory

- Single broad-form question on Crown Life liability to Casteel based on 13 grounds—DTPA and insurance laws;
- Yes answer for liability;
- Supreme Court held Casteel not a consumer for DTPA so error to submit to jury;

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But was there harm?

- COA said no because other grounds for liability meant that submission didn't cause rendition of improper judgment;
- SCOTX—wrong standard. Not improper judgment harm, but harm because cannot properly present appeal (TRAP 61.1(b), 44.1(a)(2));
- “The error is harmful and a new trial is required when the appellate court cannot determine whether the jury based its verdict on an improperly submitted invalid theory.”

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The solution

- Break out liability theories—multiple questions, or at least multiple blanks;
- Avoids new trial because appellate court can render judgment;
- Comports with Rule 277, despite broad form language (*i.e.* not “feasible”).

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How far does *Casteel* go?

- SCOTX expanded *Casteel* to damages in *Harris County v. Smith*, 96 S.W.3d 230 (Tex. 2002);
- Single damage blank combined four damage elements, including loss of earning capacity;
- SCOTX—no evidence of earning capacity, so *Casteel* harm because we can’t know if jury awarded damages for it;
- Solution: separate blanks for each damage element.

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Proportionate fault

- *Romero v. KPH Consolidation, Inc.*, 166 S.W.3d 212 (Tex. 2005);
- Two liability theories with separate blanks (no *Casteel* problem);
- But only one proportionate responsibility question based on either;
- SCOTX—no evidence of one theory, so harmful error because we can't tell basis for proportionate fault.

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But how to fix it?

- SCOTX: real problem isn't two questions needed for proportionate fault, but one bad liability theory;
- Risk of new trial is on party submitting invalid theory in broad form—alternatives: ask separate questions or withdraw questionable claim;
- Could preserve error even though rejected trial court's offer of two proportionate responsibility questions.

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Refused instructions

- *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851 (Tex. 2009);
- Plaintiff sued hospital for negligence and question allowed negligence for various actors imputed to hospital;
- Hospital asked for instruction withdrawing consideration of independent contractor doctor;
- Not exactly *Casteel* but close enough because we can't tell if jury considered doctor's conduct under question.

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More refused instructions

- *Texas Commission on Human Rights v. Morrison*, 381 S.W.3d 533 (Tex. 2012) (EEOC bar);
- *Benge v. Williams*, 548 S.W.3d 466 (Tex. 2018) (disclaimed theory);
- Harmful error when jury is allowed to consider conduct or claims not supported by law or evidence in single-liability case, esp. when defendant asks for limiting instruction.

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No-no's (we thought)

- One blank for valid/invalid liability theories (*Casteel*);
- One blank for valid/invalid (no evidence) damage elements (*Harris County*);
- Funneling multiple liability theories into single proportionate responsibility (*Romero*);
- Refusing limiting instructions on unsupported claims (*Hawley, Benge, Morrison*).

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The limits

- Defensive instructions/inferential rebuttals (like unavoidable accident) don't trigger *Casteel* harm (*Bed, Bath & Beyond v. Urista*);
- Multiple negligence blanks coupled with defensive instructions (new and independent cause, unavoidable accident) didn't get there (*Thota v. Young*).

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Or so we thought...

- Until last year, everyone assumed “invalid” included both legally invalid claims/theories/allegations and those unsupported by evidence;
- SCOTX had said so in *Harris County, Romero, Morrison, Benge*, and *Interest of J.W.*—legally unsupported triggered *Casteel* harm.

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Horton v. Kansas City S. Railway Company

- 2024 WL 3210468 (Tex. June 28, 2024);
- Train collision with car and plaintiffs sued for negligence: (1) negligent maintenance created humped crossing and (2) missing yield sign;
- Jury found negligence for plaintiff and defendant and 50/50 fault.

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Horton (cont.)

- COA—humped crossing preempted, created *Casteel* harm and required new trial;
- SCOTX 2023—humped crossing ok, but no evidence of yield sign claim, *Casteel* harm and new trial;
- But then it granted rehearing for Horton on *Casteel*.

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Horton (re)hears a wholesale charge-error rewrite.

- SCOTX 2024: Still agree that humped crossing ok, yield sign unsupported by evidence;
- BUT: *Casteel* holding flipped;
- Now: *Casteel* presents a rebuttable “presumption” of harm (used to be direct harm under 44.1(a)(2)). Prevailing party can show it didn’t prevent from presenting appeal.

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What is *Casteel* now?

- If not *Casteel* harm under 44.1(a)(2), you can still show—based on whole record—that it probably caused rendition of improper judgment;
- Rejects any limitation in single-theory-of-liability cases: it applies in any case “where a jury charge, as a whole, permits the jury to reach a finding based on a legally invalid theory or allegation[.]”

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What is *Casteel* not now?

- But a theory, claim, or allegation is no longer “invalid” for *Casteel* purposes because it is not supported by legally-sufficient evidence;
- So cases like *Benge*, *Harris County*, *Interest of J.W.*, *Romero*, *Morrison* are no longer good law?
- Court reasoned that a jury is better able to disregard claims unsupported by evidence than legally invalid ones....

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Castillo—the magic bullet?

- Court says it held in *Ford Motor Co. v. Castillo*, 444 S.W.3d 616, 621 (Tex. 2014) (per curiam), that legally-insufficient evidence doesn't trigger presumed harm.
- *Castillo* issue was whether use of "or" in claim element required evidence of both parts. SCOTX said not a *Casteel* issue because invalidity of element not at issue.
- Did that work a rewrite of Texas law?

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What else?

- Appellate courts should not presume harm under *Casteel* when a theory is simply unsupported by evidence;
- Must look to the entire record to determine potential harm;
- Not much in the way of guidance, but if the theory isn't mentioned much at trial, probably not enough harm (*Horton* application).

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How finely do we parse it?

- *Horton* tries to walk a line between prior cases and the new rule on when no evidence triggers *Casteel*—not clear where it stands:
 - “[B]road-form submission ... is *less likely* to be harmful when the invalidity results *only* from a lack of legally sufficient evidence than when it results from legal invalidity.”
 - “But harm will be more likely if the trial court expressly instructs the jury that it must base a finding on a factually unsupported theory or allegation.” (i.e. damages/proportionate fault)

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Dissent—Young and Blacklock

- Says that “presumption” subject to rebuttal misreads the harm;
- COAs should not be speculating whether jury considered or not;
- If record is unclear about impact, new trial is needed;
- Not properly deferential to jury—requires judges to second guess.

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Appellate lawyers now



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What happens now?

- It used to be that objecting to “no evidence” for submission of a liability/damage theory preserved a *Casteel* issue;
- Does that still suffice? Probably not;
- Also didn’t have to submit separate questions to preserve *Casteel*. Probably also out when unsupported by evidence;
- Didn’t have to mention *Casteel*—probably still ok.

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Preservation tips

- If you don't know whether invalid or simply unsupported by evidence, object to both;
- If you think legally invalid, explain why in addition to no evidence;
- Ask the trial court to separate them out—may not create harm if not, but preserves error;
- Provide draft question with multiple blanks/questions.

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More preservation thoughts

- Provide draft instruction(s) telling jury to disregard theories you believe unsupported by evidence (*Benge, Morrison*);
- Explain why the jury will consider unsupported theory without instruction (number of witnesses, testimony, argument on bad theory) or ask to reword question to remove mandatory consideration;
- Move for new trial based on overall harm from the record.

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Don't forget the ethical duties

- Post-*Horton*, we don't really know what the law requires. And many judges and practitioners may not know about it;
- So don't forget duties under Rule 3.03:
 - No false statements of law to the tribunal;
 - Failing to disclose controlling authority adverse to client's position not disclosed by opposing counsel.

Tex. Discip. R. Prof'l Conduct 3.03.

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The good news about ethics...

- Not knowing what *Horton* requires yet leaves you lots of room to argue;
- Comment 3: "A lawyer is not required to make a disinterested exposition of the law, but should recognize the existence of pertinent legal authorities."
- "The underlying concept is that legal argument is a discussion seeking to determine the legal premises properly applicable to the case."

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But wait there's more... for appellate lawyers

- Texas has Standards for Appellate Conduct (non-disciplinary);
- “Through briefs and oral submissions, counsel provide a fair and accurate understanding of the facts and law applicable to their case.”
- “Counsel will advise the Court of controlling legal authorities, including those adverse to their position[.]”

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So tell your trial and appellate courts



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What have we seen post-*Horton*?

- Really only two cases that spend much time on it and they give some—but not a lot of guidance.
- *World Food Imports, Inc. v. HHO United Group, Inc.*, No. 05-22-01160-CV, 2024 WL 4553211, at *11 (Tex. App.—Dallas Oct. 23, 2024, no pet. h.) (mem. op.);
- *White v. White*, No. 08-23-00243-CV, 2024 WL 5171388, at *18 (Tex. App.—El Paso Dec. 19, 2024, no pet. h.).

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White v. White (El Paso COA)

- Dispute over trusts covering Brite Ranch;
- Plaintiffs claimed BOFD for both self-dealing and general FD failures;
- Charge placed burden to prove compliance for all on defendant;
- COA—error because only self-dealing flips BOP to defendant.

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White v. White (cont.)

- COA noted *Horton* and distinction it draws between legally invalid and no evidence;
- Doesn't say which and because BOP issue, not really *Casteel*;
- COA found harm on the record because most evidence was about general FDs and jury found no profits from any transaction;
- Remanded for new trial.

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World Food Imports, Inc. v. HHO United Group, Inc., (Dallas COA)

- Defendant: Trial court submitted single breach question with two theories—(1) failure to close and convey property; and (2) failure to permit inventory;
- Def: *Casteel* because you can't tell basis;
- COA: No *Casteel* issue because inventory issue wasn't a pleaded claim, it was defendants' issue raised as a condition precedent to enforcement. So not standalone breach claim.

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But interesting discussion

- “*Casteel*’s presumed harm rule applies when a jury charge permits the jury to reach a finding based on a legally invalid theory or allegation presented to the jury.”
- “In other words, the presumed-harm rule applies when a jury charge permits a jury to consider erroneous matters.”
- Interesting to see what that second sentence means.

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Appellate points

- Argue why it’s both legally invalid and unsupported;
- Use the record to explain (1) why you can’t tell from the jury’s finding whether it relied on bad theory and (2) why the jury necessarily considered it based on trial proceedings;
- Explain why your proposed instructions would have removed error/harm and push for a new trial anyway.

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What is the “entire record”

- *Horton* tells us in footnote 23:
 - The parties pleadings and theories asserted;
 - Whether a theory was critical to the case;
 - Voir dire statements;
 - Evidence admitted and excluded and reasons for that;
 - Strength and weakness of the evidence;
 - Whether theory was “hotly” contested;
 - Entire jury charge;
 - Closing arguments;
 - Jury questions;
 - Whether verdict was unanimous.

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What is “invalid” now?

- Preempted claims;
- Jurisdictionally barred claims (EEOC);
- Legal impediments—no duty, defamation (truth/privilege?);
- Affirmative defenses, conclusive? (SOL, invalid contract, fraudulent inducement?, waiver?).

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Wrapping up

- *Casteel* error/harm still exists, but the universe is narrowed;
- Don't know how narrow yet;
- Plan ahead on your jury charge (whether plaintiff or defendant);
- Overpreserve until we know more.