COLLISION COURSE: TEXAS HOUSE BILL 19 AND PROPORTIONATE RESPONSIBILITY IN COMMERCIAL MOTOR VEHICLE LITIGATION

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Texas has long recognized a duty to exercise ordinary care in entrusting a vehicle to another. Texas also adheres to the doctrine of respondeat superior, which holds employers liable for torts committed by employees in the course and scope of employment. Thus, when an employer entrusts a vehicle to an employee despite knowing he is unlicensed, reckless, or incompetent to drive—and that employee injures others on the road while driving in the course and scope of employment—one may expect an injured party to have two viable theories of recovery against the employer: negligent entrustment and respondeat superior. Yet, the issue divides jurisdictions across the country, including the Texas Courts of Appeals.

Some courts adhere to the "Admission Rule," which bars negligent entrustment claims against employers that admit their employee acted in the course and scope of employment during a collision. Other courts—recognizing that the Admission Rule developed in the era of contributory negligence—hold that comparative negligence principles demand allowing juries to consider the role of each tortfeasor who caused or contributed to cause injuries.

In 2021, the Texas Legislature had the opportunity to address the issue with the enactment of Texas House Bill 19 ("H.B. 19"), which governs cases where an employer in the commercial motor vehicle industry is potentially liable under respondeat superior and negligent entrustment. But the Legislature seems to have unsettled an already uncertain area of Texas law. The statutory framework includes a bifurcated trial procedure and a limitation on employer liability, but the statute is silent as to where apportionment of responsibility fits within its framework.

While H.B. 19 raises a host of issues for Texas courts and litigants in commercial motor vehicle litigation, this Note is principally concerned with

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identifying H.B. 19's ramifications on proportionate responsibility. The statute's complicated framework does not provide a clear answer, so this Note also proposes modifications to H.B. 19 that (1) clarify the statute's effects on the issue; and (2) avoid collision with Texas's proportionate responsibility statute.

INTRODUCTION

Chapter 785 of the Texas General and Special Laws, "an Act relating to civil liability of a commercial motor vehicle owner or operator, including the effect that changes to that liability have on commercial automobile insurance" ("H. B. 19"), took effect on September 1, 2021.[1] The bill addresses a species of automobile-collision cases that pose challenges for Texas courts.

These cases involve defendants that are potentially liable for a collision based on their own negligence in entrusting a vehicle to a reckless, incompetent, or unlicensed employee[2] and potentially liable for the employee's negligence under respondeat superior.[3] Some courts adhere to the "Admission Rule," which holds that when an employer admits her employee acted in the course and scope of employment during a collision, a negligent

[1] Act of May 31, 2021, 87th Leg., R.S., ch. 785, § 1, 2021 Tex. Gen. Laws 1855, 1855−59 (amended 2023) (current version at TEX. CIV. PRAC. & REM. CODE ANN. §§ 38.005, 72.051−72.055).

[2] Negligent entrustment holds a vehicle owner liable if the owner fails to exercise reasonable care in entrusting a vehicle to another because the owner knew or should have known the entrustee to be an "unlicensed, incompetent, or reckless driver." Schneider v. Esperanza Transmission Co., 744 S.W.2d 595, 596 (Tex. 1988). But liability attaches only if the driver was "negligent on the occasion in question," the driver's negligence "proximately causes the accident," and the owner's entrustment is also "a proximate cause" of the accident. *Id.* at 596–97; Endeavor Energy Res., L.P. v. Cuevas, 593 S.W.3d 307, 311 (Tex. 2019) (citing both negligent entrustment and negligent hiring precedent) ("Both [the entrustor-employer's and entrustee-employee's] negligent acts must proximately cause the injury.").

[3] Unlike negligent entrustment, the doctrine of respondeat superior does not require that the defendant "personally commit[] a wrong" to face liability. *See* Baptist Mem'l Hosp. Sys. v. Sampson, 969 S.W.2d 945, 947 (Tex. 1998). Instead, "an employer is vicariously liable for the negligence of an agent or employee acting within the scope of his or her agency or employment." *Id.* The doctrine reflects a policy choice that "losses caused by the torts of employees, which as a practical matter are sure to occur in the conduct of the employer's enterprise, are placed upon that enterprise itself, as a required cost of doing business." St. Joseph Hosp. v. Wolff, 94 S.W.3d 513, 540 (Tex. 2002) (quoting KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 69, at 499–501 (5th ed. 1984)).

entrustment[4] claim against the employer is "immaterial" and must be dismissed.[5] Other courts recognize the tension between deeming a tortfeasor's conduct immaterial—a line of reasoning fashioned in the era of contributory negligence[6]—and Texas's proportionate responsibility statute, which demands apportioning responsibility between all tortfeasors that "caus[e] or contribut[e] to cause" injuries "in *any* way."[7]

The principal purpose of this Note is to examine H.B. 19's ramifications on apportionment of responsibility. Texas's modified comparative negligence scheme makes the issue take on added importance, because claimants that are apportioned more than 50% responsibility recover nothing at all.[8] To appreciate the significance of whether Texas law excludes negligent entrustors from proportionate responsibility, consider the following hypothetical.

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[4] While this Note primarily discusses negligent entrustment claims, H.B. 19 governs claims "such as" negligent entrustment. TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(e). Common law devices like the Admission Rule have been used to dismiss negligence claims against employers who fail to exercise ordinary care in hiring, training, supervising, and retaining employees. *See, e.g.*, Williams v. McCollister, 671 F. Supp. 2d 884, 888 (S.D. Tex. 2009) (collecting Texas cases and concluding that a defendant's admission to respondeat superior precludes ordinary negligence claims against employers for negligent hiring, training, supervision, and retention). As Chief Justice Tracy Christopher observed in her dissenting opinion in *Werner Enterprises*, the issues animating the Admission Rule also arise in cases where a hospital is sued both for its own negligence and that of a nurse under respondeat superior. *See* 672 S.W.3d 554, 624 n.5 (Tex. App.—Houston [14th Dist.] 2023, pet. granted) (en banc) (Christopher, C.J., dissenting).

[5] *Werner Enters.*, 672 S.W.3d at 625 (Wilson, J., dissenting) ("This court should . . . adopt the Admission Rule."); Patterson v. E. Tex. Motor Freight Lines, 349 S.W.2d 634, 636 (Tex. App.—Beaumont 1961, writ ref'd n.r.e.).

[6] J.J. Burns, Note, *Respondeat Superior as an Affirmative Defense: How Employers Immunize Themselves from Direct Negligence Claims*, 109 MICH. L. REV. 657, 662 (2011) ("Perhaps the most important historical note about the rule is that it was first formed and adopted in an environment of contributory negligence.").

[7] Bedford v. Moore, 166 S.W.3d 454, 460 (Tex. App.—Fort Worth 2005, no pet.) (observing that Rodgers v. McFarland, 402 S.W.2d 208 (Tex. App.—El Paso 1966, writ ref'd n.r.e.), which held that in negligent entrustment cases "the degree of negligence of the owner is of no consequence," *Rodgers*, 402 S.W.2d at 210, "was written before the adoption of the Proportionate Responsibility Act."); TEX. CIV. PRAC. & REM. CODE § 33.003(a) ("The trier of fact, as to each cause of action asserted, *shall determine the percentage of responsibility*, . . . with respect to *each person's causing or contributing to cause in any way the harm for which recovery of damages is sought*, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.") (emphasis added).

[8] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001.

EDNA's Enterprises, Inc. ("EDNA's") employs David, a truck driver who had an unexplained stroke while driving ten months ago. David tells EDNA's about the incident and that he does not know the source of the stroke. An EDNA's supervisor, short on drivers for a major last-minute delivery, hands David the keys to an eighteen-wheeler that carries thirty tons of cargo. Meanwhile, Patrick, an expectant father, rushes to the hospital after learning that his wife has gone into labor. While driving, Patrick gets multiple texts from his wife. In the adjacent lane, David suddenly struggles to see clearly and feels a sharp headache. He desperately searches for a place to pull over. As Patrick's concern grows, he decides to send a quick text to his wife, just as David's stroke causes him to lose control of the eighteen-wheeler. Patrick dies in the collision.

Common Law Admission Rule. In a jurisdiction that adheres to the Admission Rule, if EDNA's admits that David was an EDNA's employee acting in the course and scope of employment at the time of the collision, the negligent entrustment claim against EDNA's must be dismissed.[9] The jury only gets to hear about David and Patrick's tortious conduct, even though Texas recognizes both a duty to avoid negligent driving and a duty to avoid negligent entrustment.[10] The jury might apportion responsibility as follows: David 49%, Patrick 51%. Under this result, Patrick's surviving family is barred from any recovery.[11]

[9] *See* Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. App.—Tyler 1979, writ ref'd n.r.e.). Many courts recognize an exception when the claimant is able to raise a fact issue as to gross negligence. This is based on the notion that when an employer stipulates to vicarious liability, "the employer becomes liable for one hundred percent of the [compensatory] damages attributable to the employee's negligence," *Werner Enters.*, 672 S.W.3d at 631 (Wilson, J., dissenting), and gross negligence provides an "independent and separate ground of recovery." Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 654 (Tex. App.—Dallas 2002, pet. denied). But, under Texas's proportionate responsibility statute, a negligence claim against the employer now materially affects compensatory damages, so the distinction is meritless. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (barring recovery for claimant if apportioned more than 50%); *id.* § 33.012(a) (reducing claimant's damages according to claimant's percentage of responsibility if claimant is not barred from recovering).

[10] 4Front Engineered Sols., Inc. v. Rosales, 505 S.W.3d 905, 907 n.4 (Tex. 2016) ("Generally, every person has a duty not to negligently entrust a vehicle to another."); *see, e.g.*, *Werner Enters.*, 672 S.W.3d at 575 ("Under this court's precedent, Ali had a common law duty to operate the Werner Truck at a speed at which an ordinarily prudent person would operate it under the same or similar circumstances.").

[11] TEX. CIV. PRAC. & REM. CODE ANN. § 33.001; Dugger v. Arredondo, 408 S.W.3d 825, 831 (Tex. 2013) ("Chapter 33's proportionate responsibility scheme applies to wrongful death cases.").

Proportionate Responsibility. In a jurisdiction that applies the plain language of Texas's proportionate responsibility statute, Patrick's family is allowed to present evidence of EDNA's role in the story so the jury may determine whether EDNA's is a tortfeasor that "caus[ed] or contribut[ed] to cause" the injuries.[12] If the jury determines EDNA's is a tortfeasor like Patrick and David, then the jury apportions responsibility among all tortfeasors.[13] When allowed to hear the full story, the jury might apportion responsibility as follows: EDNA's 1%, David 49%, Patrick 50%. Under this result, Patrick's family recovers damages, reduced by 50%,[14] but they recover something because Patrick did not bear a disproportionate share of responsibility relative to his true culpability. EDNA's responsibility had a material impact—in this case, a determinative one.

A result in which meritorious claimants are completely barred from recovery after receiving a disproportionate share of responsibility seems inconsistent with the Legislature's intent. During a hearing on H.B. 19, the bill's author made the following commitment:

> We will not pass—I can promise you this: we will not pass a single bill out of this committee this session that hinders any victim's or any injured Texans' ability to seek justice, to be made whole, to right wrongs, and to hold any wrongdoer—whether that's an individual or a company—responsible and liable.[15]

Further, in a debate before the Texas House of Representatives, the author sought to dispel the notion that H.B. 19 will prevent injured claimants from recovering:

> I can unequivocally state and commit to you that this bill that is in front of you today provides full protections for any injured Texan—for every injured Texan, actually—who is in an accident with a commercial motor vehicle on a Texas roadway. This allows every and any injured Texan to be

[12] TEX. CIV. PRAC. & REM. CODE ANN. § 33.003.

[13] *Id.*

[14] *Id.* § 33.012(a).

[15] *Hearing on Tex. H.B. 19 Before the H. Comm. on Judiciary & Civ. Juris.*, 87th Leg., R.S. (Mar. 29, 2021) (statement of Rep. Jeff Leach) (digital recording available through https://tlchouse.granicus.com/MediaPlayer.php?view_id=46&clip_id=19558) [hereinafter *Hearing Before Judiciary Committee*].

> made whole and to seek justice from drivers of commercial vehicles and from the employers who send them out onto our roadways. So despite what you might have heard, the bill ensures that full protection for those injured Texans and their families.[16]

As Patrick's example demonstrates, if the statute excludes a class of tortfeasors from proportionate responsibility, then some meritorious claimants will not be "made whole" after receiving a disproportionate share.[17] But despite the author's intent to allow "every and any injured Texan to be made whole," and "seek justice" from wrongdoers, several witnesses testifying in hearings for H.B. 19 assumed that the bill requires the jury to apportion responsibility before hearing evidence of the employer's negligence—or even gross negligence.[18]

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[16] *Debate on Tex. H.B. 19 on the Floor of the House*, 87th Leg., R.S. (Apr. 29, 2021) (statement of Rep. Jeff Leach) (digital recording available through https://tlchouse.granicus.com/MediaPlayer.php?view_id=47&clip_id=20585) [hereinafter *Debate Before the House*].

[17] Because of legislative discussions focusing on protecting victims on Texas roads, *see supra* notes 15–16 and accompanying text, this Note focuses on apportionment effects on a claimant's recovery under Texas law. But it is important to remember that claimants "are not the only participants in a comparative negligence regime who are adversely affected by the [Admission] rule." Burns, *supra* note 6, at 665. It also disadvantages other defendants. For instance, in Am. Honda Motor Co. v. Milburn, 668 S.W.3d 6 (Tex. App.—Dallas 2021, pet. granted), *rev'd on other grounds*, No. 21-1097, 2024 WL 3210146, (Tex. June 28, 2024), it was the corporate defendant, Honda, arguing that Uber should be subject to proportionate responsibility for negligent entrustment, while the injured claimant (who settled with Uber) argued that defendants liable for negligent entrustment, hiring, and similar theories are excluded from apportionment. *See id.* at 31–32. Responsibility that would have gone to an excluded tortfeasor must go elsewhere, and it will not always fall on claimants.

[18] *See Hearing Before Judiciary Committee*, *supra* note 15, ("There would be comparative negligence" most likely between the driver "and the plaintiff" in the first phase of trial) (statement of Mitchell Smith, Texas Association of Defense Counsel); *Hearing on Tex. H.B. 19 Before the S. Comm. on Transp.*, 87th Leg., R.S. (Mar. 29, 2021) (claiming that jury will be asked which parties caused the accident and to allocate fault "in the first phase.") (statement of Lee Parsley, Texans for Lawsuit Reform) (digital recording available through https://tlcsenate.granicus.com/MediaPlayer.php?view_id=49&clip_id=15995) [hereinafter *Hearing Before Transportation Committee*]. As Part II.0. discusses, requiring apportionment in the first phase of a bifurcated trial could insulate negligent entrustors—or even grossly negligent ones—from apportionment of responsibility.

This Note focuses on whether the bill avoids—or cements—the collision between Texas's proportionate responsibility statute and a rule[19] that deems some tortfeasors immune from a jury's comparison. A court seeking guidance on H.B. 19's effects would find that the only Texas appellate reference to the statute appears in a footnote in a dissenting opinion, in a case that was not governed by H.B. 19.[20] And if the court turned to the Pattern Jury Charges to see how Texas law generally handles apportionment in negligent entrustment cases, it would find that whether the entrustor is subject to apportionment "is uncertain."[21]

Part I provides background on the unique issues that arise in cases where an employer is potentially liable both as a negligent entrustor and as an employer under respondeat superior. Part II dives into H.B. 19's solution to these issues—a "complicated" bifurcated-trial framework—to highlight the potential conflicting interpretations of the bill's proportionate responsibility effects.[22] To avoid an interpretation that insulates negligent entrustors—or even grossly negligent entrustors—from apportionment, Part III proposes a bifurcated trial procedure that gives effect to the Legislature's intent and to the plain language of Texas's proportionate responsibility statute. Part IV identifies other significant issues a Texas court navigating H.B. 19 may encounter, and Part V concludes.

[19] For simplicity, this Note groups the Admission Rule with other rules that exclude negligent entrustors from proportionate responsibility. But it is worth noting that some courts broadly exclude negligent entrustors from apportionment—even in cases with no respondeat superior admission or even relationship. *See, e.g.*, *Am. Honda Motor Co.*, 668 S.W.3d at *31–32 (holding that negligent entrustors are excluded from proportionate responsibility even when the person they entrusted is an independent contractor).

[20] *See* Werner Enters., Inc. v. Blake, 672 S.W.3d 554, 636 n.6 (Tex. App.—Houston [14th Dist.] 2023, pet. granted) (en banc) (Wilson, J., dissenting).

[21] COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., *Texas Pattern Jury Charges: General Negligence, Intentional Personal Torts, and Workers' Compensation* PJC 10.12 cmt., at 144 (2022); COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., *Texas Civil Pattern Jury Charges: General Negligence, Intentional Personal Torts, and Worker's Compensation* PJC 4.1 cmt. LexisNexis (database updated 2024) ("Despite the potential bifurcation of claims permitted by [H.B. 19], PJC 4.1 remains the appropriate broad-form liability question for negligence . . . The committee expresses no opinion for reconciling apportionment-of-responsibility conflicts, if any, between Tex. Civ. Prac. & Rem. Code Ann. §§ 72.051-.055 . . . and . . . chapter 33.").

[22] D.J. Young III, *Override the "Business Immunity Rule"*, TRIAL, Feb. 2023, at 20, 28 n.8.

I. BACKGROUND: THE ROAD TO H.B. 19

During a hearing before the House Committee on Judiciary & Civil Jurisprudence, several witnesses claimed that H.B. 19 codifies Texas law as existing since 1961.[23] Specifically, the witnesses referenced the Beaumont Court of Appeals' 1961 decision in *Patterson v. E. Tex. Motor Freight Lines*.[24] This Part first traces the contributory negligence origins of the Admission Rule—and shows that Texas courts have recited vestigial precedent without analyzing its continued applicability. Next, this Part navigates the road ahead for the Admission Rule in Texas, particularly in light of the Texas Supreme Court granting review of *Werner Enterprises v. Blake*, a case in which the Houston Court of Appeals for the 14th District affirmed a trial court's declined to reach the merits of the rule. Lastly, this Part provides background on other issues in negligent entrustment cases that seemed to turn the Legislature's attention to bifurcated trials.

A. The Admission Rule and its Contributory Negligence Origins in Texas

In *Patterson*, the claimants asserted two theories of recovery against East Texas Motor ("ETM") after a collision with the company's driver: respondeat superior and negligent entrustment.[25] The company's driver had a history of speeding, reckless driving, and other collisions.[26] ETM stipulated that its employee acted in the course and scope of employment and "the doctrine of respondeat superior would apply."[27] Based on this stipulation, the trial court struck the negligent entrustment claim and excluded the evidence of the driver's history.[28]

The jury determined the company driver was not negligent, and the claimants appealed, arguing that they should have been allowed to introduce the driver's past history to establish ETM's negligent entrustment.[29] But the

[23] *See Hearing Before Judiciary Committee*, *supra* note 15, ("In reading the introduced bill, I do not really see anything new. It goes back to 1961.") (statement of Mitchell Smith, Texas Association of Defense Counsel).

[24] Patterson v. E. Tex. Motor Freight Lines, 349 S.W.2d 634 (Tex. App.—Beaumont 1961, writ ref'd n.r.e.).

[25] *Id.* at 636.

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

Patterson court affirmed, holding that the company's negligence became "immaterial" when it stipulated that respondeat superior would apply.[30] This is the first time a Texas court applied what will be later called the "Admission Rule."[31]

But this line of reasoning is firmly rooted in the contributory negligence setting in which *Patterson* was decided. Back in 1961, Texas adhered to a radically different scheme,[32] in which claimants who tortiously caused their own injuries, no matter how slight their role in the accident, were completely barred from recovery.[33] Contributory negligence thus created an all-or-nothing system of recovery that explains why the *Patterson* court would call a potential tortfeasor's role "immaterial" once it admitted to respondeat superior. If an employer stipulated that its employee acted in the scope of employment, a meritorious claimant would recover 100% of his damages simply by showing the employee was a tortfeasor.[34] Back then, examining whether the employer was also a tortfeasor would not affect the claimant's recovery for compensatory damages—which were already guaranteed under respondeat superior so long as the claimant could show the employee was a tortfeasor.[35]

But when Texas shifted to a comparative negligence in 1973, the relative fault of each tortfeasor became unquestionably material to whether and what

[30] *Id.*

[31] Werner Enters., Inc. v. Blake, 672 S.W.3d 554, 625 (Tex. App.—Houston [14th Dist.] 2023, pet. granted) (en banc) (Wilson, J., dissenting); Burns, *supra* note 6, at 662.

[32] Dugger v. Arredondo, 408 S.W.3d 825, 830 (Tex. 2013) ("Before the Legislature enacted the proportionate responsibility scheme, Texas followed the all-or-nothing system of contributory negligence.").

[33] *Id.* ("Under contributory negligence, if a plaintiff was even one percent at fault, he or she could not recover.").

[34] Lorio v. Cartwright, 768 F. Supp. 658, 660 (N.D. Ill. 1991) ("If on the other hand the entrustee was liable and the entrustor's responsibility for the acts of the agent admitted, the entrustor-principal would be liable under the respondeat superior theory. Under the latter circumstances, it is unnecessary to determine whether the entrustor-principal was also liable under the negligent entrustment theory as the amount of plaintiff's recovery under that theory would be identical to the amount of plaintiff's recovery under the respondeat superior theory. Because it is unnecessary, and because the evidence of negligent entrustment tends to be highly prejudicial, *the* [Admission Rule] *makes eminent sense in a contributory negligence jurisdiction*.") (emphasis added).

[35] *Id.* ("The rationale of [the Admission Rule] is very powerful in a contributory negligence jurisdiction. In such a jurisdiction, the entrustee-agent will be either totally liable for plaintiff's damages or not at all liable for plaintiff's damages.").

amount a claimant recovers.[36] The premise of the Admission Rule—that the employer's negligence is immaterial to recovery—collapsed. As the Northern District of Illinois in *Lorio v. Cartwright* put it:

> Under contributory negligence that difference did not matter for purposes of liability; if the entrustee . . . was liable, the entrustor . . . was necessarily liable under respondeat superior. . . . [U]nder comparative negligence that difference between the negligence of the entrustor and the entrustee matters a great deal.[37]

In a modified comparative negligence system like Texas's, a negligent entrustor escapes liability if the claimant is deemed more than 50% responsible for her injuries, so entrustors are no longer "necessarily liable" when they admit the entrustee acted in the course and scope of employment and the claimant shows the entrustee is a tortfeasor.[38] Instead, Texas's comparative negligence regime raises an additional hurdle to recovery: the claimant must not only prove that the employee committed a tort, but the jury must also find that the claimant's relative responsibility among the tortfeasors does not exceed 50%.[39] The role of each tortfeasor is thus material.[40]

Texas courts that exclude negligent entrustors from apportionment have not addressed this issue head on, and instead focus on the fact that negligent entrustment and respondeat superior both hold a defendant liable after a third

[36] William V. Dorsaneo, III & David W. Robertson, *Comparative Negligence in Texas*, 10 TEX. TECH. L. REV. 933 (1979); *see* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (barring recovery for claimants apportioned more than 50% responsibility); TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a) (reducing recovery for claimants that survive the § 33.001 threshold by the claimants' percentage of responsibility).

[37] *Lorio*, 768 F. Supp. at 660.

[38] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001.

[39] *Id.*

[40] But, as discussed in Part III.A**Error! Reference source not found.**, there are some situations—even now—where an employer's admission to respondeat superior *does* render their negligence immaterial to recovery.

party commits a tort.[41] While this observation is correct,[42] its relevance to the apportionment issue is questionable. Respondeat superior holds an employer liable due to her relationship with a tortfeasor, not because the employer herself was negligent.[43] Negligent entrustment, on the other hand, requires showing that the entrustor's negligence proximately caused injuries.[44]

This distinction is the very thing that makes the plain language of the proportionate responsibility statute—which requires apportionment to all who cause or contribute to cause injuries in any way—apply to negligent entrustors.[45] Moreover, as one scholar put it, an overlap between respondeat superior and negligent entrustment "fails to explain why the employer's own negligence should not be considered in the jury's . . . apportionment and, more simply, it does not address why or how a court can ignore a proximate cause to an injury."[46]

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[41] *See, e.g.*, Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 656 (Tex. App.—Dallas 2002, pet. denied) ("Although negligent entrustment and negligent hiring are considered independent acts of negligence, these causes are not actionable unless a third party commits a tort. In that respect, these causes are similar to the respondeat superior theory of recovery where, unless the employee commits a tort in the scope of employment, the employer has no responsibility.") (citations omitted).

[42] *See id.* (explaining that under "the respondeat superior theory of recovery . . . unless the employee commits a tort in the scope of employment, the employer has no responsibility."); Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 (Tex. App.—Texarkana 1992, no writ) ("[O]ne may be extremely negligent in entrusting and yet have no liability until the driver causes an injury.").

[43] Bedford v. Moore, 166 S.W.3d 454, 461 (Tex. App.—Fort Worth 2005, no pet.).

[44] While older cases hold that "[t]he proximate cause of the accident or occurrence is the negligence of the driver and not that of the owner," *see, e.g.*, Rodgers v. McFarland, 402 S.W.2d 208, 210 (Tex. App.—El Paso 1966, writ ref'd n.r.e.), the Texas Supreme Court has implicitly overruled this notion. *See, e.g.*, Schneider v. Esperanza Transmission Co., 744 S.W.2d 595, 596–97 (Tex. 1987) (discussing requirements for entrustment "to be a proximate cause," and holding that entrustor was not liable for negligent entrustment because "[t]he risk that caused the entrustment to be negligent did not cause the collision."); *see also*, Endeavor Energy Res., L.P. v. Cuevas, 593 S.W.3d 307, 311 (Tex. 2019) ("Both negligent acts must proximately cause the injury.") (discussing negligent hiring and entrustment); TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 240 (Tex. 2010) ("In a negligent-hiring or negligent-entrustment claim, a plaintiff must show that the risk that caused the entrustment or hiring to be negligent *also* proximately caused plaintiff's injuries.") (emphasis added). The *Rodgers* court, in 1966, reasoned that the liability for the employee's negligence is "passed on" to the entrustor. 402 S.W.2d at 210. Percentages of responsibility did not yet exist. More likely, the court was explaining that, traditionally, negligent entrustment subjects the entrustor to joint and several liability.

[45] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003.

[46] Burns, *supra* note 6, at 665.

Despite this, many Texas courts continue to hold that an employer's admission to respondeat superior requires dismissal of negligent entrustment claims. But a close inspection of the precedent reveals that cases decided after Texas's shift to comparative negligence merely recite pre-1973 contributory negligence reasoning, without accounting for the shift.[47] The only Texas court to consider the shift concluded that a negligent entrustor is subject to apportionment because negligent entrustment requires showing wrongful conduct, unlike respondeat superior liability.[48]

Thus, the current dominance of the Admission Rule in Texas may stem from a failure to account for the radical shift to comparative negligence, rather than the merits of insulating a class of tortfeasors from comparison.[49]

[47] *See* Loom Craft Carpet Mills, Inc. v. Gorrell, 823 S.W.2d 431, 432 (Tex. App.—Texarkana 1992, no writ) (citing *Rodgers*, 402 S.W.2d 208, when declaring that "the negligence of the owner would be of no consequence" if it is established the entrustee committed a tort); Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 657 (Tex. App.—Dallas 2002, pet. denied) (citing *Loom Craft* and Estate of Arrington v. Fields, 578 S.W.2d 173, 178 (Tex. App.—Tyler 1979, writ ref'd n.r.e.), to hold that the negligence of the "owner/employer is of no consequence" if it is established that the entrustee committed a tort); Conkle v. Chery, No. 03-08-00379-CV, 2009 WL 483226, at *4 (Tex. App.—Austin, Feb. 25, 2009, no pet.) (mem. op.) (citing *Rosell* to hold the same). Although *Fields* is a post-1973 case, the *Rosell* court's reliance on the case was misguided because in *Fields*, a negligent hiring case, the jury found that the claimant was not negligent. *See Fields*, 578 S.W.2d at 176. Thus, the *Fields* court was not facing the issue of whether an employer's negligence is of no consequence in a case where proportionate responsibility could limit or bar a claimant's recovery.

[48] *See* Bedford v. Moore, 166 S.W.3d 454, 459–62 (Tex. App.—Fort Worth 2005, no pet.). The court analogized negligent entrustment to dram shop liability, concluding that both require showing "distinct wrongful conduct" by the defendant, thus subjecting negligent entrustors to apportionment. *Id.* at 462. However, federal courts have questioned *Bedford*'s precedential value. *See, e.g.*, Plascencia v. Hillman, No. EP-19-CV-40-PRM, 2019 WL 4087439, at *5 (W.D. Tex. July 3, 2019) (mem. op.). This skepticism stems from *Bedford*'s reliance on a Texas Supreme Court opinion that was later withdrawn and superseded by F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680 (Tex. 2007). While both *Duenez* opinions hold that alcohol vendors subject to dram shop liability must be included in apportionment, the substitute opinion, in dicta, refers to negligent entrustment as a "form of vicarious liability." *Id.* at 686. Importantly, Texas's proportionate responsibility statute focuses on whether a party "cause[d] or contribut[ed] to cause" injuries "in any way," rather than conceptual labels. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a). Cases after *Duenez* make clear that negligent entrustment requires showing the entrustor proximately caused injuries. *See, e.g.*, *TXI Transp. Co.*, 306 S.W.3d at 240 ("The plaintiff must also prove that the risk that caused the entrustment or hiring to be negligent caused the accident at issue.")

[49] This would not be the first time a jurisdiction struggles to wrestle with the sea change from contributory to comparative negligence. For an analysis of how jurisdictions failing to contend with this change might have led the breach element of negligence to sneak into the "strict" products liability cause of action, see Luke Meier, *Achieving True Strict Product Liability (But Not for Plaintiffs with Fault)*, 57 U. MICH. J.L. REFORM 301, 1–2 (2024).

Jurisdictions across the country—with comparative negligence statutes or rules like Texas's—increasingly reject the Admission Rule.[50]

B. The Prejudicial Evidence Issue Survives the Shift to Comparative Negligence

The *Patterson* case highlights another issue that courts point to when holding that an admission to the potential applicability of respondeat superior requires dismissal of a negligent entrustment claim.[51] Recall that ETM's driver had a history of other car accidents, reckless driving, and speeding.[52] Generally, evidence that someone acted negligently in past occasions is not admissible to show they acted negligently during a particular occasion.[53] But this kind of evidence could be admissible to show that an entrustor knew or should have known to avoid entrusting the vehicle.[54]

So while the foundation of the Admission Rule—that the role of a tortfeasor is "immaterial"—collapsed with the advent of comparative negligence, some courts justify keeping the Admission Rule on life support due to the risk negligent entrustment evidence unfairly prejudices the jury against the driver.[55] Without evidence of the driver's past history in the

[50] *See, e.g.*, Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 251 (Tenn. 2024) (holding that Admission Rule is inconsistent with Tennessee's modified comparative negligence regime); McQueen v. Green, 202 N.E.3d 268, 280 (Ill. 2022) (rejecting Admission Rule because admitting to one claim should not completely bar the pursuit of another meritorious claim); Ramon v. Nebo School Dist., 493 P.3d 613, 620 (Utah 2021) (holding Admission Rule incompatible with Utah's comparative negligence system); Quynn v. Hulsey, 850 S.E.2d 725, 728–29 (Ga. 2020) (holding that Georgia's comparative negligence statute, which requires apportionment of fault to "all those who contributed to the plaintiff's injury," abrogates common law Admission Rule).

[51] *See* Patterson v. E. Tex. Motor Freight Lines, 349 S.W.2d 634, 636 (Tex. App.—Beaumont 1961, writ ref'd n.r.e.) (refusing to permit appellants to offer evidence that driver had a history of automobile accidents and reckless driving).

[52] *Id.*

[53] *Id.* ("We think the rule is well settled that when the question is whether or not a person has been negligent in doing, or in failing to do, a particular act, evidence is not admissible to show that he has been guilty of a similar act of negligence, or even habitually negligent upon a similar occasion.") (quoting Missouri, K. & T. Ry. Co. v. Johnson, 48 S.W. 568, 569 (Tex. 1898)).

[54] Stephen M. Blitz, *Conduct Evidencing Negligent Entrustment Is Provable Despite Admission of Vicarious Liability*, 17 STAN. L. REV. 539, 541 (1965).

[55] *See, e.g.*, Jeld-Wen, Inc. v. Superior Court, 131 Cal. App. 4th 853, 871 (2005) ("There is nothing in *Armenta* [our Admission Rule precedent] that is adversely affected by the development of these comparative negligence principles, because *Armenta* represents a different and still viable policy rule that is based upon evidentiary concerns.").

Patterson case, the jury found that ETM's driver was not negligent.[56] The concern is that if the jury heard that the driver engaged in reckless driving in the past, that may have unfairly influenced the jury's assessment of whether the driver was negligent on the day of the accident.[57]

Texas trial courts are already empowered to exclude evidence if it is substantially more unfairly prejudicial than probative.[58] That the ability to make this determination case-by-case already exists is important because the prejudicial evidence problem in Patterson is not present in all negligent entrustment cases.[59] Consider whether applying the *Patterson* rule makes sense in the hypothetical from the Introduction, where David suffered from a stroke behind the wheel. There, Patrick's family did not allege that David had a history of wrongdoing, but instead alleged that EDNA's was a wrongdoer for sending David on the road even though there was no reason to believe whatever caused his first stroke was no longer a risk. The theory simply does not raise the same prejudicial evidence issue that the *Patterson* court faced in 1961.[60] If the Admission Rule's claim to survival in a comparative negligence regime is addressing a narrow evidentiary issue that Texas trial courts already have tools to handle, it is a "blunt instrument" to address it.[61]

C. The Road Ahead for the Admission Rule in Texas

The Texas Supreme Court may soon clarify the proper submission of the proportionate responsibility question in negligent hiring, entrustment, supervision, and other claims that require showing the employer's

[56] *Patterson*, 349 S.W.2d at 636.

[57] Blitz, *supra* note 54, at 542.

[58] *See* TEX. R. EVID. 403.

[59] Burns, *supra* note 6, at 672–73.

[60] *See id.* (citing Wise v. Fiberglass Sys., Inc., 718 P.2d 1178, 1185 (Idaho 1986) (Bistline, J., dissenting)).

[61] The Utah Supreme Court rejected the Admission Rule due to its overbroad nature in Ramon v. Nebo School Dist., 493 P.3d 613 (Utah 2021). The Court addressed the prejudicial evidence concern by noting that trial courts already have the ability and discretion to exclude unfairly prejudicial evidence. *Id.* at 619–20. The Court also addressed the questionable notion that the Admission Rule serves to prevent plaintiffs from receiving a "double recovery." *Id.* at 619 ("The [Admission] rule is, however, a blunt instrument to deal with that potential issue. A district court has myriad other tools to address a potential double recovery: it can instruct the jury, provide special verdict forms, or even remove the doubly-covered portion through post-trial motions.").

wrongdoing in addition to another tortfeasor's.[62] While there are several compelling reasons to reject the Admission Rule, the Court need not reject the rule wholesale. If the defendant does not assert a proportionate responsibility defense against the claimant, then the difference in fault between the entrustor-employer and entrustee-employee truly is "superfluous to the plaintiff's recovery" (unless there is a viable claim for punitive damages).[63] But when proportionate responsibility is in play, employer-entrustors should not be able to point to the conduct of others while shielding their own under the pretense it is immaterial. The very object of such defense is to materially reduce a claimant's damages, or eliminate them entirely.[64] Thus, the Admission Rule should be unavailable to tortfeasors who make the relative responsibility of each tortfeasor a material issue in the case.[65]

The Court may be asked to immunize negligent entrustors from apportionment based on prior dicta in *F.F.P. Operating Partners v. Duenez*, a dram shop case, calling negligent entrustment a "form of vicarious liability" because it requires showing the owner's negligent exercise of control of an object.[66] But as the Texas Supreme Court explained in *Schneider v. Esperanza Transmission Co.*, negligent entrustment does not "rest upon imputed negligence."[67] And while *Schneider* precedes *Duenez*, cases after *Duenez* reinforce that it is not enough to prove "that the entrustee's negligence proximately caused the harm," and instead negligent entrustment liability requires showing that "[b]oth negligent acts [of the entrustor and

[62] *See* Werner Enters., Inc. v. Blake, 672 S.W.3d 554 (Tex. App.—Houston [14th Dist.] 2023, pet. granted) (en banc).

[63] *See id.* at 633 (Wilson, J., dissenting); Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 654 (Tex. App.—Dallas 2002, pet. denied) (exemplary damages provide additional ground of recovery).

[64] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.001 (eliminating recovery for claimants with more than 50% responsibility); *id*. § 33.002(a)(1) (reducing recovery by percentage of responsibility even if not barred).

[65] Part III.C. proposes a similar solution to H.B. 19's potential conflict with Chapter 33.

[66] *See* Plascencia v. Hillman, No. EP-19-CV-40-PRM, 2019 WL 4087439, at *5 (W.D. Tex. July 3, 2019) (mem. op.) (declining to include negligent entrustor in apportionment because "in the new opinion entered after *Bedford*, the Texas Supreme Court in *Duenez* makes clear that . . . negligent entrustment is a form of vicarious liability in which the owner of a thing is liable for 'negligently exercising her control by entrusting an item to a person who the owner knew or should have known would act in a reckless or incompetent manner.'") (citing F.F.P. Operating Partners, L.P. v. Duenez, 237 S.W.3d 680, 686 (Tex. 2007)).

[67] 744 S.W.2d 595, 596–97 (Tex. 1987).

entrustee] proximately cause[d] the injury."[68] The Court should hold that this causation requirement subjects negligent entrustors to apportionment under the plain language of Chapter 33, unlike defendants that are merely liable vicariously (i.e., through imputed negligence).[69]

When the *Duenez* court rejected the call to shield dram shop defendants from apportionment, it delved into the heart of the issue underlying the Admission Rule debate. The Court refused to "take the question of apportioning responsibility away from the jury," and instead left "this determination to the fact-finder imbued with constitutional authority to weigh conflicting evidence."[70] If the Court reaches the Admission Rule issue in *Werner Enterprises*, it should again refuse to hinder the jury's ability to hear evidence of each tortfeasor's role in causing the harm, in order to ensure a fair apportionment among all who bear responsibility.[71] Chapter 33's language shows no concern for whether a tortfeasor causes injuries by negligently exercising control of an object, but whether the tortfeasor caused or contributed to cause the harm in any way.[72]

D. The Texas Legislature Joins the Fray with H.B. 19

Legislators identified another issue in cases where negligent entrustment and respondeat superior are both potentially in play. The bill's author expressed concerns that in some cases, employers "are not at fault," yet face

[68] Endeavor Energy Res., L.P. v. Cuevas, 593 S.W.3d 307, 311 (Tex. 2019) (citing TXI Transp. Co. v. Hughes, 306 S.W.3d 230, 240 (Tex. 2010)); *TXI Transp. Co.*, 306 S.W.3d at 240 ("In a negligent-hiring or negligent-entrustment claim, a plaintiff must show that the risk that caused the entrustment or hiring to be negligent also proximately caused plaintiff's injuries.").

[69] *See* Nabors Well Servs., Ltd. v. Romero, 456 S.W.3d 553, 562 (Tex. 2015) (Chapter 33's "in any way" language "can mean only what it says—there are no restrictions on assigning responsibility" to a person if the person "'caused or contributed to cause' . . . personal injury or death."); Bedford v. Moore, 166 S.W.3d 454, 462–63 (Tex. App.—Fort Worth 2005, no pet.) (distinguishing respondeat superior and negligent entrustment).

[70] *Duenez*, 237 S.W.3d at 693.

[71] Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 251–52 (Tenn. 2024) (internal citations omitted) (employing Admission Rule at the pleading stage forces juries to perform distorted apportionments of fault).

[72] Substantive merits aside, the factual predicate behind the distinction is questionable, because both dram shop and negligent entrustment liability require showing that the defendant made an unwise choice to surrender possession of a tangible object to a third party. *See Duenez*, 237 S.W.3d at 685, 686 (explaining that dram shop liability requires serving alcohol to an obviously intoxicated patron and that negligent entrustment requires entrusting a vehicle to a reckless or incompetent driver).

increasing insurance and litigations costs.[73] It is perhaps this issue that led the Legislature to turn its attention to a procedural tool available to Texas courts: bifurcated trials.[74] A bifurcated trial allows the court to divide a negligence case against the driver and her employer.[75] If the negligence case against the driver is litigated in the first phase of trial, and the jury finds the driver did not commit a tort, then the employer's liability is foreclosed.[76] A second phase of trial would be futile. A company that is "not at fault" would thus avoid defending its own practices in court unless and until a jury found the company's driver was a tortfeasor in the first phase of trial.[77]

Despite the potential benefits of bifurcating trial in negligent entrustment cases, H.B. 19's bifurcation system may go further than protecting employers who are "not at fault."[78] As Part II.B.1 discusses, one potential interpretation of the statute insulates negligent and even grossly negligent entrustors from proportionate responsibility.

[73] H. Comm. on Judiciary & Civ. Juris., Bill Analysis, Tex. H.B. 19, 87th Leg., R.S. (2021) ("Over the past 11 years, the number of motor vehicle lawsuits have increased by 118 percent while the number of collisions involving a fatality, severe injury, or any injury at all have increased by single-digit percentages or have decreased. *In many instances, the person being sued is not at fault, yet must spend increasing amounts of money in court* and to purchase insurance coverage.") (emphasis added).

[74] TEX. R. CIV. P. 174(b) ("The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.").

[75] *See id.*

[76] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(e).

[77] Blitz, *supra* note 54, at 545. ("Under the suggested [bifurcation] procedure, plaintiff would first attempt to prove that the driver's negligence was the proximate cause of his injury. The jury would decide this issue without having heard evidence of the driver's reckless character. If the jury found the driver not negligent, the case would be over, inasmuch as the entrustee's negligence as the proximate cause of plaintiff's injury is an essential part of the theory of negligent entrustment. If, however, the jury found the driver negligent, thus also finding defendant vicariously liable in accordance with his admission, plaintiff would then be allowed to prove negligent entrustment, preferably without delay and to the same jury. At this time evidence of the driver's general recklessness, incompetence, or inexperience, and the defendant's knowledge thereof, would be admissible.").

[78] *See*, *e.g.*, *id.* at 545. ("If the jury found the driver not negligent, the case would be over . . . .").

II. APPORTIONING RESPONSIBILITY UNDER THE TEXAS BIFURCATION REGIME

H.B. 19, codified in Subchapter B of Chapter 72 of the Texas Civil Practice & Remedies Code, introduces a mandatory bifurcated trial procedure in certain commercial motor vehicle cases.[79] This process is triggered when a defendant moves for a bifurcated trial under § 72.052(a).[80] But the effect of this bifurcated structure on the apportionment of responsibility issue in negligent entrustment and similar cases is unclear. The committee that drafted the Pattern Jury Charges declined to take a position on the statute's potential collision with Chapter 33.[81]

This Note demonstrates that H.B. 19 allows an interpretation that allows apportionment to occur in the second phase of trial if the liability of each tortfeasor has not yet been determined in the first phase. But before diving into the bifurcation framework, the Note discusses two main effects of the statute that may be pertinent to the apportionment discussion: its effects on liability and admissible evidence. First, this Part distinguishes liability and responsibility to demonstrate that the statute's effects on negligent entrustment liability do not determine the apportionment inquiry. Second, this Part navigates the conflicting interpretations of the statute's effects on apportionment, which includes an interpretation that avoids collision with

[79] TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(a) ("In a civil action under this subchapter, on motion by a defendant, the court shall provide for a bifurcated trial under this section."); *id.* § 72.051(2)(A)-(B) (defining a "[c]ivil action" as one where a "claimant seeks recovery of damages for bodily injury or death caused in a collision," against a defendant that either "operated a commercial motor vehicle involved in the collision," or "owned, leased, or otherwise held or exercised legal control over a commercial motor vehicle" or control over the driver). Subchapter B of Chapter 72 does not apply to "a passenger in a commercial motor vehicle unless the person is an employee of the owner, lessor, lessee, or operator of the vehicle." *Id.* § 72.051(3).

[80] *Id.* § 72.052(a). The statute's text suggests that a bifurcated trial is required, on the defendant's request, in any civil action governed by Subchapter 72, whether or not the defendant also avails herself of the admission to respondeat superior stipulation under § 72.054(a). Section 72.052(a) provides that in a "civil action under this subchapter . . . the court shall provide a bifurcated trial under this section," with no conditions tied to the stipulation.

[81] COMM. ON PATTERN JURY CHARGES, STATE BAR OF TEX., *Texas Civil Pattern Jury Charges: General Negligence, Intentional Personal Torts, and Worker's Compensation* PJC 4.1 cmt. LexisNexis (database updated 2024) ("Despite the potential bifurcation of claims permitted by [H.B. 19], PJC 4.1 remains the appropriate broad-form liability question for negligence . . . . The committee expresses no opinion for reconciling apportionment-of-responsibility conflicts, if any, between TEX. CIV. PRAC. & REM. CODE ANN. §§ 72.051-.055 . . . and . . . chapter 33.").

Chapter 33. Lastly, this Part discusses legislative history showing that the complexities of the apportionment issue may not have been fully considered.

A. Liability and Responsibility Distinguished

Under § 72.054(a), a defendant can limit its liability to respondeat superior by stipulating that its employee acted within the scope of employment during the collision.[82] This stipulation eliminates the defendant's direct liability for ordinary negligent entrustment.[83] But in Texas, even parties immune from liability are subject to apportionment of responsibility.[84] To understand why this is significant, consider the following hypothetical.

Patricia is involved in a collision with Daniel while both drivers speed in the rain. She then sues Daniel for negligence. Daniel has evidence that the City of Dallas proximately caused the collision by designing the road in a way that allowed heavy rainfall to accumulate,[85] and designates the City as a responsible third party.[86] The jury determines that Patricia, Daniel, and the City each proximately caused Patrick's injuries, and assigns responsibility as follows: City 30%, Daniel 60%, Patricia 10%.

This case implicates the difference between liability and responsibility. First, a "responsible third party" is not a defendant in the case against which

[82] In full, § 72.054(a) provides that:

Except as provided by Subsection (d), in a civil action under this subchapter, an employer defendant's liability for damages caused by the ordinary negligence of a person operating the defendant's commercial motor vehicle shall be based only on respondeat superior if the defendant stipulates, within the time provided by Section 72.052 for filing a motion to bifurcate, that, at the time of the collision , the person operating the vehicle was:

(1) the defendant's employee; and

(2) acting within the scope of employment.

[83] *See id.* (providing that if employer defendant makes requisite stipulation, its "liability shall be based *only* on respondeat superior.") (emphasis added). However, "nothing in this section [72.054] prevents a claimant from pursuing . . . a claim for exemplary damages under Chapter 41 for an employer defendant's conduct or omissions in relation to the collision that is the subject of the action . . . ." *Id.* § 72.054(f).

[84] *In re* Gamble, 676 S.W.3d 760, 776 (Tex. App.—Fort Worth 2023, no pet.).

[85] *See id.* at 791 (holding that it is unnecessary to decide if Texas Department of Transportation can be liable for accumulated rainfall on roadway, because the existence of an "applicable legal standard" (i.e., duty) allowed the government unit to be apportioned responsibility).

[86] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.004 (setting forth the procedure to designate a responsible third party).

a claimant can recover damages.[87] Second, poor road design is unlikely to qualify as an exception to the City's governmental immunity.[88] Patricia thus cannot hold the City liable for its share of responsibility. But, in Texas, that an "individual or entity . . . enjoys immunity from liability" does not mean they owe "no legal duty to refrain from wrongfully injuring another."[89] Texas's proportionate responsibility statute requires apportionment to persons who caused or contributed to injuries through "negligent acts or omissions," or other conduct that "violates an applicable legal standard," whether the person is liable for that violation or not.[90] So, despite the City's immunity, the jury was allowed to consider the City's role in the accident and apportion responsibility to it in accordance with Texas law.[91]

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[87] *See id.* § 33.011(2), (4) (defining a defendant as a person against which a "claimant seeks recovery of damages," and a responsible third party as "any person who is alleged to have caused or contributed to . . . the harm . . . ."); *In re Gamble*, 676 S.W.3d at 776 ("[C]onsistent with our sister courts, this court has previously interpreted the proportionate responsibility provisions of Chapter 33 to authorize the designation of persons who are not subject to the court's jurisdiction or who are immune from liability as responsible third parties.") (citations omitted).

[88] *See In re Gamble*, 676 S.W.3d at 790.

[89] *Id.* at 776. As Chief Justice Christopher observed in her dissent in *Werner Enters. v. Blake*, immunizing negligent employers from apportionment impairs this duty. 672 S.W.3d 554, 624, 624 at n.5 (Tex. App.—Houston [14th Dist.] 2023, pet. granted) (en banc) (Christopher, C.J., dissenting) ("Although Justice Wilson agrees such a duty exists, he supports a rule that would not have allowed a separate comparative question on [Werner's negligent hiring and entrustment] in light of Werner's stipulation that Ali was acting in the course and scope of his employment . . . . [Chapter 33] requires the trier of fact to determine the percentage of responsibility borne by each claimant, each defendant, each settling person, and each properly designated responsible third party."); *but see* William D. Underwood & Michael D. Morrison, *Apportioning Responsibility in Cases Involving Claims of Vicarious, Derivative, or Statutory Liability for Harm Directly Caused by the Conduct of Another*, 55 BAYLOR L. REV. 617, 642 (2003). Professors Underwood & Morrison believe that including a wrongdoer who enables another wrongdoer in the apportionment question impairs the duty to avoid enabling such wrongdoer. They provide an example, a pawnshop who negligently sells a gun to someone who then intentionally shoots others. *Id.* They conclude that if the jury must apportion responsibility between the pawnshop who was negligent and the shooter who intentionally pulled the trigger, the jury is "likely to apportion the lion's share of the responsibility" to the shooter. *Id.* Thus, in their view, it is better policy to exclude the pawnshop from apportionment. *Id.* However, the Texas Supreme Court has rejected similar reasoning when declining to insulate tortfeasors from apportionment. *See Duenez*, 237 S.W.3d at 693 (declining to insulate alcohol providers from apportionment because "it is not true that juries will always assign most of the responsibility for injury . . . to the patron.").

[90] *See Werner Enters.*, 672 S.W.3d at 624 (Christopher, C.J., dissenting); TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a).

[91] *In re Gamble*, 676 S.W.3d at 777.

Because Texas recognizes a duty to avoid negligently entrusting a vehicle to another,[92] even if an employer eliminates its direct liability for negligent entrustment under H.B. 19, it can still be subject to apportionment of responsibility if its negligent entrustment caused or contributed to cause the plaintiff's injuries.[93] H.B. 19 contains no language eliminating the duty to avoid negligent entrustment. Thus, the employer's immunity from liability does not negate its legal duty nor its potential responsibility for the harm caused by its breach of that duty.[94]

B. The Texas Bifurcation Regime: Does H.B. 19 Avoid Collision with Proportionate Responsibility?

Because H.B. 19's effects on liability do not inform the responsibility inquiry, the bifurcated trial provisions in § 72.052 are crucial to determine H.B. 19's potential impact on apportionment. The first phase of trial focuses on determining "liability for" and the "amount of" compensatory damages,[95] which aim to make the claimant whole.[96] Under § 72.054(b), if the defendant makes the requisite stipulation that its employee acted in the scope of employment, evidence of their "ordinary negligence" (e.g., "negligent entrustment") is generally excluded in the first phase.[97]

The second phase of trial requires the trier of fact to "determine liability for" and the amount of exemplary damages,[98] which are awarded to punish

[92] 4Front Engineered Sols., Inc. v. Rosales, 505 S.W.3d 905, 907 n.4 (Tex. 2016).

[93] *See* N.H. Ins. Co. v. Rodriguez, 569 S.W.3d 275, 299 (Tex. App.—El Paso 2019, pet. denied) (holding that an employer's statutory immunity from liability did not prohibit apportioning responsibility to employer).

[94] *See* Chenault v. Huie, 989 S.W.2d 474, 476 (Tex. App.—Dallas 1999, no pet.) ("[A]pplication of an immunity from liability and the recognition of a legal duty that is the prerequisite to a civil cause of action are two entirely separate issues.").

[95] TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(c).

[96] Horizon Health Corp. v. Acadia Healthcare Co., 520 S.W.3d 848, 873 (Tex. 2017) ("[C]ompensatory damages redress concrete losses caused by the defendant's wrongful conduct, while exemplary damages are aimed at deterrence and retribution.").

[97] TEX. CIV. PRAC. & REM. CODE ANN. § 72.054(b) ("Except as provided by Subsection (c), if an employer defendant stipulates in accordance with Subsection (a) and the trial is bifurcated under Section 72.052, *a claimant may not, in the first phase of the trial*, present evidence on an ordinary negligence claim against the employer defendant, such as negligent entrustment.") (emphasis added). Section 72.054(c) creates an exception for certain statutory violations that are admissible in the first phase of trial. Senator West noted that not all employers are subject to these regulations. *See Hearing Before Transportation Committee*, *supra* note 18 (statement of Sen. Royce West).

[98] TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(d).

egregious conduct like gross negligence.[99] Even if a defendant stipulates to respondeat superior, they can still be found liable for exemplary damages based on negligent entrustment in the second phase.[100]

The concern arises when considering how apportionment of responsibility fits into this bifurcated structure. One potential interpretation of H.B. 19, based on §§ 72.052(c) and (d), would require apportionment to occur in the first phase of trial—before the jury hears about an entrustor's negligence or even gross negligence in the second phase.[101] But another interpretation, based on § 72.052(e), allows juries to consider all proximate causes of an accident before apportionment.[102]

1. H.B. 19's Potential Collision with Texas's Proportionate Responsibility Statute

Section 72.052(c) requires the trier of fact to "determine liability" for compensatory damages in the first phase of trial.[103] Under Texas law, if a claimant is apportioned more than 50% responsibility, the defendant is not liable for the claimant's injuries.[104] This arguably suggests that apportioning responsibility is necessary in the first phase of trial to determine liability.

But this interpretation would require a jury to apportion responsibility for a collision before hearing evidence of the entrustor's negligence—or gross negligence—that "caus[ed] or contribut[ed] to cause" the collision, contrary to Texas's proportionate responsibility statute.[105] Consequently, some meritorious claimants may be barred from recovery after receiving a disproportionate share of responsibility compared to what they would have received if the jury heard the full story before apportionment. And although § 72.052(d) allows a jury to hear evidence of grossly negligent entrustment

[99] *Horizon Health*, 520 S.W.3d at 873; TEX. CIV. PRAC. & REM. CODE ANN. § 41.003(3) (including "gross negligence" as permissible ground for recovery of exemplary damages).

[100] *See* TEX. CIV. PRAC. & REM. CODE ANN. § 72.054(f).

[101] The statute creates an exception, allowing certain regulatory violations to be admitted in the first phase of trial to establish negligent entrustment. *See id.* § 72.054(c). But a witness before the Senate Committee on Transportation explained that only a limited number of companies are subject to the regulations. *Hearing Before Transportation Committee*, *supra* note 18 (statement of Jim Purdue Jr., Texas Trial Lawyers Association).

[102] *See* discussion *infra* Part II.B.2.

[103] TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(c).

[104] *Id.* § 33.001.

[105] *Id.* § 33.003 (requiring apportionment to defendants who tortiously cause or contribute to cause injuries in any way).

in the second phase,[106] if a claimant is barred from recovery in the first phase, they would never get the chance to present this evidence for a fair apportionment.[107]

Since the first phase of trial excludes evidence of the entrustor's "ordinary negligence," apportionment to a negligent entrustor who "caus[ed] or contribut[ed] to cause" injuries could generally not occur in the first phase of trial.[108] Unless a claimant has negligent entrustment evidence that meets the statutory-violation exception in § 72.054(c), the claimant cannot present any negligent entrustment evidence in the first phase.[109]

The focus thus turns to the second phase of trial. Section 72.052(d) requires the jury to "determine liability for" and the "amount of exemplary damages" in the second phase.[110] Under Texas law, a claimant may recover exemplary damages only if he is entitled to compensatory damages, and the claimant's share of responsibility does not reduce exemplary damages.[111] The lack of relationship between exemplary damages and apportionment[112] arguably suggests that there is no room for apportionment to a negligent entrustor in the second phase of trial, either.

This result conflicts with Texas's proportionate responsibility statute. Consider the hypothetical from the Introduction, where Patrick texted while driving and David had a stroke behind the wheel 10 months after his previous one. If the jury cannot hear evidence that EDNA's negligence proximately may have caused the accident in the first phase of trial, and a court interprets § 72.052(c) to require apportionment in the first phase, that means the jury would only hear about David and Patrick's conduct before apportioning responsibility. Thus, this interpretation might bar all recovery to a

[106]*Id.* § 72.054(d).

[107]*See id.* § 41.004 (providing that claimants may be awarded exemplary damages only if damages other than nominal damages are awarded).

[108]*See id.* § 72.054(b).

[109]*Id.* § 72.054(d)(2) (providing that if a trial is bifurcated under § 72.052, evidence under § 72.054(c) is "the only evidence that may be presented by the claimant in the first phase of the trial on the negligent entrustment claim").

[110]*Id.* § 72.052(d).

[111]*Id.* §§ 33.002(c)(2), 41.004(a).

[112]This is somewhat simplistic because a claimant must first be entitled to recover damages to be able to recover exemplary damages. *Id.* § 41.004(a). A claimant is only entitled to recover damages if his responsibility does not exceed 50%, so in a case with a comparative negligence defense against the claimant, surviving apportionment is a prerequisite to exemplary damages. *See id.* § 33.003. But once a claimant survives the apportionment threshold, the claimant's percentage of responsibility has no effect on the claimant's exemplary damages. *See id.* § 33.002(c)(2).

meritorious claimant that could have recovered damages if the jury considered each tortfeasor's role in the story.

This result is contrary not just to the Texas proportionate responsibility statute, but the Legislature's stated intent of creating a "fair framework" that allows injured Texans to "be made whole" and hold wrongdoers "responsible."[113] The key to avoiding collision with Texas's proportionate responsibility statute may lie in § 72.052(e). This provision is a potential avenue for claimants to proceed to the second phase of trial based on a finding of employee negligence—before the jury apportions responsibility.

2. Avoiding Collision with Proportionate Responsibility Under H.B. 19

Section 72.052(e) provides a path to avoiding collision with Texas's proportionate responsibility statute.[114] Unlike § 72.052(c), which requires the trier of fact to "determine liability," § 72.052(e) states that a finding of employee "negligence" in the first phase may serve as "a basis" to proceed to the second phase against the employer on "a claim, such as negligent entrustment."[115]

Determining whether an employee breached a duty of care (i.e., was negligent) does not require apportioning responsibility.[116] And calling employee negligence "*a* basis" to proceed implies that there are grounds for advancing to the second phase of trial beyond those outlined in §§ 72.052(c) and (d).[117] Moreover, the phrase "a claim, such as negligent entrustment"

[113]H. Comm. on Judiciary & Civ. Juris., Bill Analysis, Tex. H.B. 19, 87th Leg., R.S. (2021) ("C.S.H.B. 19 seeks to modify state law to streamline and create a fair framework for such litigation, thereby ensuring victims of collisions can have their day in court while also protecting commercial motor vehicle operators from unjust and excessive lawsuits."); *Hearing Before Judiciary Committee*, *supra* note 16 (statement of Rep. Jeff Leach) ("I can promise you this: *we will not pass a single bill out of this committee this session that hinders any victim's or any injured Texans' ability* to seek justice, *to be made whole*, to right wrongs*, and to hold any wrongdoer—whether that's an individual or a company—responsible* and liable.").

[114]TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(e).

[115]*Id.* ("A finding by the trier of fact in the first phase of a bifurcated trial that an employee defendant was negligent . . . may serve as a basis for the claimant to proceed in the second phase of the trial.").

[116]*See*, *e.g.*, Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 653–57 (Tex. App.—Dallas 2002, pet. denied) (affirming trial court's decision to ask the jury if employer was negligent in entrusting vehicle to employee, while also affirming trial court's decision to exclude the negligent entrustor from apportionment of responsibility).

[117]*See* TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(e) (emphasis added).

imposes no requirement that the "claim" be for exemplary damages.[118] Thus, if a claimant establishes the employee's negligence in the first phase of trial (and raises a fact issue as to a defendant's gross negligence) this section entitles the claimant to a second phase of trial on the defendant employer's liability for negligence.[119] In Texas, the traditional "liability" question asks the trier of fact to determine which persons' negligence proximately caused injuries, and the proportionate responsibility question asks the jury to apportion responsibility among those that it found liable.[120] Under H.B. 19's framework, the jury does not complete its inquiry about which persons' negligence proximately caused harm until the second phase of trial.[121] To avoid collision with Chapter 33, when the entrustor's negligence goes unexamined in the first phase, the proportionate responsibility question should be submitted in the second phase, after the jury determines which persons caused or contributed to cause the harm.[122]

This interpretation also finds support in § 72.054(b), which bars evidence of "ordinary negligence" in the "*first*" phase of trial if the employer makes the requisite stipulation.[123] By specifying "first" phase, the statute suggests the evidence could be admissible in the second phase. If the Legislature intended to prohibit this evidence entirely, it could have done so explicitly.[124]

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[118]*Id.*

[119]*Rosell*, 89 S.W.3d at 654 (Tex. App.—Dallas 2002) (because claimants viably "alleged gross negligence against Central West," they were entitled to "questions concerning Central West's negligent entrustment, hiring, supervision, and retention.").

[120]COMM. ON PATTERN JURY CHARGES, *supra* note 21, PJC 4.1, 4.3 (providing that liability question asks which persons' negligence proximately caused harm, while proportionate responsibility question asks jury to apportion responsibility among the persons it answered yes to in the liability question).

[121]TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(d) (requiring determination of whether employer is liable in the second phase of trial).

[122]*See id.* § 33.003; COMM. ON PATTERN JURY CHARGES, *supra* note 21, PJC 4.1, 4.3.

[123]TEX. CIV. PRAC. & REM. CODE ANN. § 72.054(b) (emphasis added).

[124]As a practical matter, it is logical to allow evidence of ordinary negligence in the second phase. Texas recognizes that "no exact line can be drawn between negligence and gross negligence." Williams v. Steves Indus., Inc., 699 S.W.2d 570, 573 (Tex. 1985), *superseded by statute on other grounds as recognized in* Transp. Ins. Co. v. Moriel, 879 S.W.3d 10, 20 (Tex. 1994), *superseded by statute on other grounds as recognized in* U-Haul Intern., Inc. v. Waldrip, 380 S.W.3d 118, 140 (Tex. 2012). Further, conduct "cannot be grossly negligent without being negligent," and gross negligence may even "result from a combination of negligent acts or omissions." Burk Royalty Co. v. Walls, 616 S.W.2d 911, 922 (Tex. 1981), *superseded by statute on other grounds as recognized in Moriel*, 879 S.W.3d at 20, *superseded by statute on other grounds as recognized in Waldrip*, 380 S.W.3d at 140. So, even if the Legislature hoped to eliminate ordinary negligent entrustment

To illustrate that this interpretation is consistent not only with Texas's proportionate responsibility statute, but H.B. 19's bifurcation regime and its elimination of liability for negligent entrustment, consider the following hypothetical.

In the first phase of trial under § 72.052(c), a jury finds that Patrick's family sustained $500,000 in compensatory damages. The jury also finds that Patrick and David are tortfeasors—which encompasses a finding they are both negligent.[125] Because the jury determined the employee was negligent, § 72.052(e) allows a second phase of trial against EDNA's.[126]

If the jury determines that EDNA's is indeed a tortfeasor, it could apportion responsibility as follows: David 25%, EDNA's 25%, Patrick 50%. Under § 72.054(a), EDNA's is not liable for its own share of responsibility, only for David's share under "respondeat superior."[127] Thus, EDNA's would be liable only for $125,000 out of $500,000 in damages. But because the jury heard the full story and considered each tortfeasor's role, Patrick did not receive a disproportionate share of responsibility, which allowed his family to recover some damages. This highlights that H.B. 19's language allows an interpretation that avoids collision with proportionate responsibility while still achieving the statute's objective of limiting the entrustor's liability to respondeat superior.

C. Lack of Legislative Guidance to Interpret H.B. 19's Effects on Apportionment

Given the dueling interpretations of H.B. 19's effects on apportionment, a court may turn to legislative history for answers, but likely find itself disappointed. Witnesses gave their opinions about the timing of apportionment under H. B. 19,[128] but legislators seemed to have glossed over

evidence entirely—excluding it from both the first and second phase—it may be difficult for a court to filter out evidence as solely relevant to an ordinary negligence claim.

[125]Hernandez v. Gonzalez-Flores, 530 S.W.3d 253, 256 (Tex. App.—Houston [14th Dist.] 2017, pet. denied) ("The elements of negligence are a legal duty, breach of that duty, and damages proximately caused by the breach.").

[126]TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(e) (providing that a finding of negligence in the first phase of trial may serve as a basis to allow a second phase of trial).

[127]*See* TEX. CIV. PRAC. & REM. CODE ANN. § 72.054(a) (limiting an employer's liability for damages to "respondeat superior" if employer makes requisite stipulation).

[128]*See Hearing Before Judiciary Committee*, *supra* note 15 (statement of Mitchell Smith, Texas Association of Defense Counsel) ("There would be comparative negligence" between the driver "and most likely the plaintiff" in the first phase); *Hearing Before Transportation Committee*, *supra*

it. During a debate in the Texas House of Representatives, one legislator claimed that "in phase one of the trial, as the bill is written, all that is considered is the defendant driver's negligence."[129] This suggests the jury would not consider the claimant's negligence, but that would be just as inconsistent with proportionate responsibility as excluding the employer's negligence.[130]

The Senate sponsor of the bill made a similar statement. According to him, the purpose of H.B. 19 is to:

> . . . strengthen the Civil Practice and Remedies Code by ensuring legitimate evidence directly relevant to causation and injuries arising from a commercial vehicle accident is presented to jurors without prejudice. Furthermore, H.B. 19 sets forth specific procedures by which the facts of a case are presented in court by both the plaintiff and defendant to determine negligence of a defendant and award fair compensation.[131]

There are two notable parts of this statement. On one hand, the statement confirms the Legislature was indeed concerned with prejudicial evidence when drafting H.B. 19—a concern that does not require insulating negligent entrustors from apportionment. On the other, the statement indicates that the Legislature may not have been concerned with comparative negligence when drafting the bill. Setting procedures to determine the "negligence of a defendant" ignores the possibility that a court will face a comparative negligence defense against the claimant.[132]

The Senate sponsor's testimony before the Senate Committee on Transportation provides another indication that the Legislature did not have the timing of apportionment in mind when drafting the bill.[133] He stated that the "first phase" of trial requires the jury to "determine . . .who caused the accident, and the amount of monies that should be paid to the plaintiff to

note 18 (statement of Lee Parsley, Texas for Lawsuit Reform) (claiming that jury will be asked which parties caused the accident and to allocate fault "in the first phase").

[129]H. J. of Tex., 87th Leg., R.S. 1857 (2021) (statement of Rep. Eddie Lucio).

[130]*See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003(a)(1) (including "each claimant" in category of persons that must be included in apportionment if the person "caus[es] or contribut[es] to cause" injuries).

[131]S. Rsch. Ctr., Bill Analysis, Tex. H.B. 19, 87th Leg., R.S. (2021).

[132]*Id.*

[133]*Hearing Before Transportation Committee*, *supra* note 18 (statement of Sen. Larry Taylor).

make them whole."[134] This assumes that there is no risk to a claimant's recovery in the first phase of trial, which also suggests that the timing of the proportionate responsibility question was not top of mind.

Because the Legislature did not seem to contemplate apportionment being restricted to a particular phase, a court is not required to insulate negligent entrustors from proportionate responsibility to give effect to the Legislature's intent.

III. THE NEED FOR NUANCE IN BIFURCATED TRIALS: PROMOTING EFFICIENCY AND FAIRNESS WHILE AVOIDING COLLISION WITH PROPORTIONATE RESPONSIBILITY

While H.B. 19 currently provides a court seeking to avoid collision with Texas's proportionate responsibility a narrow path forward,[135] H.B. 19 should expressly provide for a bifurcation system that allows Texas courts to streamline litigation without insulating negligent and grossly negligent entrustors from apportionment. First, this Part highlights that the first phase of trial may reveal that the entrustor's role is immaterial to the claimant's recovery or that it is material. Then, this Part proposes changes to H.B. 19 that promote efficiency when the role of the entrustor is immaterial in the case but allow juries to consider the role of each tortfeasor before apportionment in cases where the entrustor's responsibility could be significant or outcome determinative.

A. Whether Employer Negligence is Immaterial to Recovery Once Respondeat Superior Liability is Admitted Depends on the Outcome of the First Phase of Trial

While it is generally no longer true in a comparative negligence system that any tortfeasor's conduct is "immaterial," there are narrow situations in which the first phase of trial may reveal that the employer's admission makes it unnecessary to evaluate the employer's negligent entrustment.[136] Rather than dividing the phases of trial by their focus on compensatory or exemplary damages, whether the trial should proceed to the second phase should depend on whether the entrustor's negligence is potentially impactful or not.

[134] *Id.*

[135] *See supra* Part II.B.2.

[136] See Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 656 (Tex. App.—Dallas 2002, pet. denied) (holding that an employer could not be liable for negligent entrustment when its employee had not been negligent).

Consider the range of outcomes that a court may face after the first phase of trial, and how a one-size-fits all approach is insufficient to account for them.

1. Phase One Reveals the Employee is Not a Tortfeasor

If the jury determines the employee is not a tortfeasor in the first phase, there is no reason to have a second phase, as the employer cannot be liable.[137] This is because both negligent entrustment and respondeat superior liability require an underlying tort committed by the employee.[138] In this situation, the trial ends after the first phase, as proceeding further would be futile and would unnecessarily burden the parties with litigation expenses.

2. Phase One Reveals Only the Employee is a Tortfeasor Among the Drivers

If the jury determines that only the employee is a tortfeasor, whether the court proceeds to the second phase of trial should depend on whether the claimant raised a fact issue on the employer's liability for exemplary damages. If the claimant has no evidence to support gross negligence, then the jury's finding that the employee committed a tort—and that the claimant did not—guarantees 100% of compensatory damages because the employer admitted to respondeat superior.[139] Even though it is possible the employer is a tortfeasor, exploring its role in the story does not change the amount of damages if there is no fact issue as to the employer's gross negligence. Thus, courts can streamline the litigation by omitting the second phase under these circumstances to promote efficiency and avoid unnecessary litigation costs.

3. Phase One Reveals Both the Employee and Claimant are Tortfeasors

If the jury finds that both the employee and the claimant are tortfeasors and there is a fact issue about the employer's negligence, the trial should proceed to the second phase. In this scenario, the employer's tortious conduct is material to apportionment because even a 1% difference in apportionment can be outcome determinative for the claimant.[140] Thus, the jury should hear

[137]*Id.* at 656.

[138]*Id.*

[139]TEX. CIV. PRAC. & REM. CODE ANN. § 33.012(a). This section reduces a claimant's damages by her share of responsibility. *Id.* If the claimant is not a tortfeasor, there is no reduction. *See id.*

[140]*Id.* § 33.001.

evidence of the employer's potential responsibility before apportioning responsibility among the parties. This protects the principles of proportionate responsibility by ensuring the parties receive their fair share of responsibility based on their role in causing the harm.[141]

B. Avoiding Collision: Implementing Proportionate Responsibility within H.B. 19

Because it is not always true that an admission to respondeat superior renders the employer's negligence irrelevant, the statute should modernize the Admission Rule to promote efficiency when the entrustor's conduct is immaterial, but avoid a distorted apportionment when it is material. The following changes to § 72.052 give effect to the Legislature's intent to balance the interests of commercial motor vehicle owners and injured claimants without pouring meritorious claimants out of court:

> (a) In a civil action under this subchapter, on motion by a defendant, the court shall provide for a bifurcated trial under this section.
>
> . . .
>
> (c) The trier of fact shall determine liability for and the amount of compensatory damages in the first phase of a bifurcated trial under this section.
>
> (d) The trier of fact shall determine liability for and the amount of exemplary damages in the second phase of a bifurcated trial under this section.
>
> (e) *In cases in which a defendant asserts a claim or defense that a claimant [or other defendant or responsible third party] caused or contributed to cause the claimant's injuries, evidence that the defendant caused or contributed to cause the injuries that was excluded in the first phase of trial pursuant to 72.054(b) may be introduced in the second phase of trial for the purposes of apportionment of responsibility under Chapter 33. Nothing in this subsection affects the limitation on a defendant's liability described in section 72.054(a). This subsection does not apply if:*

[141] *Id.* § 33.003.

> *(1) after the first phase of trial, the trier of fact finds that the claimant did not cause or contribute to cause the claimant's injuries; or*
>
> *(2) after the first phase of trial, the trier of fact finds that the person operating the defendant's vehicle did not cause or contribute to cause the claimant's injuries.*

C. Benefits of Expressly Harmonizing Bifurcation with Chapter 33

The proposed modifications retain the efficiency and other benefits of the Admission Rule while ensuring a fair apportionment.

1. The Proposed Framework Retains the Admission Rule's Efficiency

When a defendant admits to the facts that would impose respondeat superior liability, the defendant's negligence is immaterial unless (1) the defendant asserts a comparative negligence defense, or (2) the claimant viably seeks exemplary damages.[142] If either condition is present, it is possible the case proceeds to the second phase, but the first phase of trial reveals whether it is necessary. The modified § 72.052(e)(1) generally does not allow a second phase of trial when the claimant is not a tortfeasor, because his compensatory damages are not at risk.[143] The modified § 72.052(e)(2) precludes a second phase of trial if the employee driver is not a tortfeasor, because the employee's tort is a prerequisite to the employer's liability.[144] This procedure thus allows courts to promote efficiency when the first phase reveals it is unnecessary to examine the employer's conduct.

[142]In the first scenario, the entrustor's negligence is material because excluding it "may result in the allocation of additional fault to a tortfeasor," which may well make the difference between some recovery or none (and the stipulation to respondeat superior does nothing to change that potential reduction or bar). Burns, *supra* note 6, at 644. In the second, the claimant's recovery is not at risk, but the employer's gross negligence may entitle the claimant to exemplary damages (which are not available via the ordinary negligence claim against the employee). *Id.* at 676.

[143]If the claimant has a viable claim for exemplary damages, then Tex. Civ. Prac. & Rem. Code Ann. § 72.052(d) would apply, rather than modified § 72.052(e).

[144]Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 656 (Tex. App.—Dallas 2002, pet. denied).

2. The Proposed Framework Prevents Litigants from Shielding Evidence of their Wrongdoing while Pointing to the Conduct of Others

Carrying over the Admission Rule to a comparative negligence setting allows a tortfeasor to call her own conduct immaterial, while attacking the conduct of others in hopes of materially reducing her liability.[145] These modifications clarify that if a defendant seeks to benefit from both H.B. 19 and comparative negligence, the jury should get to hear the full story—the role of each person who caused or contributed to cause the injuries—before apportionment.[146] Under this framework, if the employer makes the requisite stipulation and asserts a comparative negligence defense, she would still be entitled to the statute's limitation on liability for negligent entrustment.[147] But because a defendant made proportionate responsibility an issue in the case, this modified framework allows the jury to conduct its apportionment fairly. If the defense is not asserted, then the modified § 72.052(e) would not apply, and the first phase of trial would focus on determining the "negligence of a defendant and award[ing] fair compensation."[148]

3. The Proposed Framework Mitigates the Evidentiary Issues in Negligent Entrustment and Similar Claims

Because this framework does not modify the statute's exclusion on negligent entrustment evidence in the first phase of trial, the statute still gives effect to the Legislature's intent of "ensuring legitimate evidence . . . from a commercial vehicle accident is presented to jurors without prejudice."[149] The jury assesses whether the employee is a tortfeasor in the first phase before hearing potentially prejudicial negligent entrustment evidence in the second phase.[150]

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[145]Under the Admission Rule, "the entrustor's negligence cannot be compared, i.e., [the entrustor] is some sort of privileged character who is insulated from comparison." Burns, *supra* note 6, at 669 (quoting Willis v. Hill, 159 S.E.2d 145, 165 (Ga. Ct. App. 1967) (Hall, J., dissenting), *rev'd on other grounds*, 161 S.E.2d 281 (Ga. 1968)).

[146]*See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.003.

[147]*See id.* § 72.054(a).

[148]*See* S. Rsch. Center, Bill Analysis, Tex. H.B. 19, 87th Leg., R.S. (2021).

[149]*Id.*; Blitz, *supra* note 54, at 545.

[150]*See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 72.052(c), 72.054(b) (providing that liability for compensatory damages is determined in the first phase, and that evidence of negligent entrustment is excluded from the first phase).

This bifurcation approach strikes a balance between efficiency and fairness, minimizing unnecessary litigation costs while ensuring that the employer's conduct is examined when it is material to the case. The approach is consistent with H.B. 19's objective of limiting liability to "respondeat superior," because employers who face the second phase of trial for apportionment of responsibility are liable only for their employee's share of responsibility.[151] Even though the employer is not liable for its own share, including the employer in apportionment ensures that claimants do not receive a disproportionate share that unfairly bars recovery.[152]

IV. OTHER ISSUES IN THE TEXAS BIFURCATION REGIME

H.B. 19's uncertain ramifications extend beyond proportionate responsibility. The statute creates a host of issues for Texas courts and litigants to navigate—issues that this Note aims to identify but will not comprehensively examine.

A. Can Employers Unilaterally "Stipulate" to the Applicability of Respondeat Superior?

Although § 72.054(a) is conditioned on the employer's stipulation, H.B. 19 does not define the term. Under Texas law, a stipulation is "an agreement *between parties* that touches a pending lawsuit."[153] An "agreement, admission, or concession made in a judicial proceeding" may also qualify as a stipulation.[154] It is thus possible that H.B. 19 requires both parties to agree that an employee acted in the scope of employment to activate § 72.054(a). And if a claimant does not plead respondeat superior as a basis to recover, it is unclear how the employer could "admi[t]" or "conce[de]" to it.[155] Jurisdictions that adhere to the common law Admission Rule call negligent entrustment and respondeat superior "mutually exclusive" means of

[151]*See id.* § 72.054(a).

[152]*See id.* § 33.001; Binns v. Trader Joe's E., Inc., 690 S.W.3d 241, 251–52 (Tenn. 2024) (explaining that allowing employers to eliminate negligence claims by admitting to vicarious liability distorts apportionment in a way that may affect damages, "or more harshly, the ability of a plaintiff to recover at all.").

[153]Foote v. Texcel Expl., Inc., 640 S.W.3d 574, 585 (Tex. App.—Eastland 2022, no pet.) (emphasis added).

[154]Travelers Indem. Co. of R.I. v. Starkey, 157 S.W.3d 899, 904 (Tex. App.—Dallas 2005, pet. denied).

[155]*See id*.

recovery, so a Texas court may well face a claimant that asserts a negligent entrustment theory and not respondeat superior.[156]

B. H.B. 19's Effects on Affirmative Defenses of Comparative Negligence

H.B. 19 governs negligent entrustment claims for "recovery of damages."[157] That scope seems to exclude affirmative defenses. When a defendant prevails on a comparative negligence affirmative defense, the defense reduces or eliminates the defendant's liability for damages, but it does not entitle the defendant to recover damages. This provides for a curious result: H.B. 19 might limit a claimant's negligent entrustment claim to the second phase of trial, as that is a claim for "recovery of damages," but allow a defendant to present its negligent entrustment affirmative defense against another party in the first phase of trial.

V. CONCLUSION

While the Legislature made an effort to address the unique challenges that arise when an employer faces potential liability both as a negligent entrustor and as an employer under the doctrine of respondeat superior, H.B. 19's current framework is open to interpretations that may immunize negligent and grossly negligent entrustors from proportionate responsibility.

A court seeking to avoid an interpretation of H.B. 19 that conflicts with proportionate responsibility may rely on § 72.052(e) to allow a second phase of trial after a finding of employee negligence in the first phase. This way, the jury does not apportion responsibility until after they consider the role of each potential tortfeasor that proximately caused the collision.[158] Even though the statute eliminates employers' liability for ordinary negligent entrustment if they make the requisite stipulation, H.B. 19 does not eliminate the duty to avoid negligent entrustment, allowing apportionment of responsibility to this class of tortfeasors despite their immunity from liability.[159]

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[156]*See, e.g.*, Rosell v. Cent. W. Motor Stages, Inc., 89 S.W.3d 643, 654 (Tex. App.—Dallas 2002, pet. denied).

[157]*Id.* § 72.051(2)(A) (defining a "[c]ivil action" as one where a "claimant seeks recovery of damages for bodily injury or death caused in a collision").

[158]*See* TEX. CIV. PRAC. & REM. CODE ANN. § 72.052(e).

[159]*See supra* Part II.B.2.

This interpretation of H.B. 19 is consistent with the language of the statute and the Legislature's stated intent to create a "fair framework" that allows all injured Texans to be "made whole."[160] But to avoid a contrary interpretation that immunizes a class of tortfeasors from proportionate responsibility, H.B. 19 should be modified to make its effects on apportionment explicitly clear.

To accomplish the Legislature's goal of reducing unwarranted litigation costs for employers who are "not at fault," but still allowing for a fair apportionment of responsibility to employers who are at fault, H.B. 19 should expressly provide for a bifurcated trial procedure that allows Texas courts to tailor the process to the circumstances of each case. If the employer's tortious conduct can make a difference in the outcome or entitle a claimant to exemplary damages, then the trial should proceed to the second phase. If the jury determines the employer tortiously caused the collision in the second phase, the employer should be included in apportionment of responsibility like any other tortfeasor.

Even though H.B. 19 allows apportionment of responsibility to negligent entrustors in the second phase of trial through § 72.052(e), H.B. 19 should be modified to expressly give Texas courts the flexibility to promote efficiency when an employer's admission to respondeat superior indeed renders its negligence immaterial, but ensure that juries apportion responsibility to all tortfeasors when a fair apportionment can make the difference between a claimant recovering damages or nothing at all.

[160]H. Comm. on Judiciary & Civ. Juris., Bill Analysis, Tex. H.B. 19, 87th Leg., R.S., (2021); *Hearing Before Judiciary Committee*, *supra* note 15 (statement of Rep. Jeff Leach).