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NOTE

Special Issue Submission Under Revised Rule 277: *Scott v. Atchison, Topeka & Santa Fe Railway*

Allen J. Scott, a railroad employee, sustained injuries after a train on which he was riding derailed near Plantersville, Texas. The derailment occurred not long after the area had received an unusually heavy rain-storm. Scott brought suit in state district court to recover for his injuries, basing his cause of action on the Federal Employer's Liability Act.¹ The trial court submitted the case to the jury on a single, broad negligence issue.² The jury found in favor of the plaintiff; the defendant railroad appealed on the theory that the negligence issue should have been limited to the acts or omissions pleaded by the plaintiff and about which there was some proof to support the submission of an issue. The court of civil appeals reversed, stating that the general negligence issue as it was framed, having no limiting instructions, allowed the jury to consider acts and omissions alleged by the plaintiff in his complaint but upon which no evidence was offered at trial.³ The Texas Supreme Court granted a writ of error. *Held, affirmed*: Although the revision of rule 277 of the Texas Rules of Civil Procedure allows the court to submit broad issues in negligence cases, an issue is overly broad if it allows the jury to consider matters that were not both pleaded and proved. *Scott v. Atchison, Topeka & Santa Fe Railway*, 21 Tex. Sup. Ct. J. 126 (Jan. 4, 1978).

I. SPECIAL ISSUE SUBMISSION IN NEGLIGENCE CASES

For sixty years Texas procedure required that special issues be submitted "separately and distinctly."⁴ This language, however, was interpreted

1. 45 U.S.C. § 51 (1976).

2. Special Issue Number One read, "Do you find from a preponderance of the evidence that on the occasion in question the railroad was negligent?"

3. *Scott v. Atchison, Topeka & Santa Fe Ry.*, 551 S.W.2d 740 (Tex. Civ. App.—Beaumont 1977). Because the amount of rainfall during the storm was unusual for that area, the court of civil appeals also required the submission of an inferential rebuttal issue inquiring whether the accident was due solely to an act of God, despite the explicit prohibition of such issues in the revised rule. See note 14 *infra*. Predictably, the supreme court reversed this part of the holding. They did, however, say that the defendant railroad was entitled to an instruction relating to acts of God. Although submission of the matter as a separate inferential rebuttal issue was clearly prohibited, the court required submission of the same defensive aspect in an instruction.

4. The Texas Legislature established special issue practice in the state in 1913 by providing, in part, that "[i]n all jury cases, the court, upon request of either party, shall submit the cause upon special issues raised by the pleadings and the evidence in the case." 1913 Tex. Gen. Laws, ch. 59, § 1, at 113. Until rule 277 was revised in 1973, separate and distinct submission of all controlling elements was required.

differently in negligence cases than in non-negligence cases.⁵ In negligence cases application of the rule resulted in submission of narrower, more specific issues, whereas non-negligence cases were allowed to be submitted on broader, more general issues.⁶

The landmark decision regarding the degree of specificity required in a negligence case was *Fox v. Dallas Hotel Co.*⁷ This was a wrongful death action brought against the hotel for fatal injuries sustained by Alexander Fox while he was trying to operate a defective elevator. Although many specific acts of contributory negligence were pleaded, the trial court submitted only one issue to the jury regarding that defense: whether Fox was guilty of contributory negligence in his conduct in, around, or about the elevator or the elevator shaft prior to or at the time he was injured.⁸ The jury found for the plaintiff on that issue and defendant hotel appealed. The Amarillo court of civil appeals reversed the trial court and the Supreme Court of Texas affirmed that reversal, ruling that the defendant was entitled to a separate and distinct submission of each issue involved.⁹

The requirement of separate and distinct submission of each controlling issue created confusion in the courts and within the profession.¹⁰ Complicating this situation was the distinction between negligence cases and those tried on a non-negligence theory. The Supreme Court of Texas, in *Roosth & Genecov Production Co. v. White*, acknowledged that the distinction was illogical but nonetheless upheld the rule.¹¹

5. *Roosth & Genecov Prod. Co. v. White*, 152 Tex. 619, 262 S.W.2d 99 (1953).

6. 5 W. DORSANEO, TEXAS LITIGATION GUIDE § 122.03(5) (1977); G. HODGES, SPECIAL ISSUES SUBMISSION IN TEXAS § 36 (1959). Exceptions to the rule governing negligence cases were those cases tried on theories of *res ipsa loquitur* or failure to exercise proper control. In such cases, a broader submission of the jury question was allowed. An example may serve to clarify the distinction between negligence and non-negligence cases. In *City of Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871 (1949), a non-negligence case, the supreme court approved submission of an issue which asked if defendant's house constituted a serious fire hazard, instead of requiring several issues asking about specific conditions in the house. On the other hand, the court disapproved a submission in a negligence case which asked if an oil derrick, as it stood, was defective and also disapproved a corollary issue, conditioned on an affirmative answer to the first one, asking whether the derrick was defective to the extent that it was inherently dangerous. *Roosth & Genecov Prod. Co. v. White*, 152 Tex. 619, 622, 262 S.W.2d 99, 103 (1953).

7. 111 Tex. 461, 240 S.W. 517 (1922).

8. *Id.* at 476, 240 S.W. at 522.

9. *Id.* at 469, 240 S.W. at 519.

10. Two cases decided by the supreme court on the same day illustrate the problem. In *Barclay v. C.C. Pitts Sand & Gravel Co.*, 387 S.W.2d 644 (Tex. 1965), the court approved a submission which inquired generally as to failure to exercise proper control of a motor vehicle. The plaintiff's request for additional issues on failure to apply brakes and on an alleged left turn was denied by the trial court. In affirming, the supreme court concluded that the issue of proper control encompassed the two refused issues, and that refusal was therefore not error. *Id.* at 646. In *Whitfill v. Hunt*, 387 S.W.2d 653 (Tex. 1965), however, the supreme court considered a similar set of facts and held that issues which asked if plaintiff failed to keep a proper lookout, or if he failed to yield, did not encompass and render unnecessary issues which asked if plaintiff had failed to apply his brakes or if he had failed to sound his horn.

11. 152 Tex. at 628, 262 S.W.2d at 104. The court stated that a change in the rule would merely result in confusion. *Id.* at 627, 262 S.W.2d at 103.

With this confused situation in mind,¹² and because of political pressure,¹³ the drafters of the 1973 revisions to the Texas Rules of Civil Procedure wrote rule 277 to eliminate the separate and distinct requirement.¹⁴ Issues in negligence cases were no longer subject to attack on the grounds that they combined several controlling elements or that they were too general.¹⁵ The Texas Supreme Court addressed the new rule for the first time in *Mobil Chemical Co. v. Bell*.¹⁶ *Mobil Chemical* was tried on a res ipsa loquitur theory, and thus came under an exception to the *Fox v. Dallas Hotel* rule.¹⁷ The court discussed the new rule, stating:

12. 21 Tex. Sup. Ct. J. at 128; Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577 (1973).

13. The 1971 legislature had passed a bill abolishing special issue practice and instituting a general verdict system. Governor Smith vetoed the measure. The 1973 legislature postponed consideration of a similar bill because the supreme court was at that time in the process of amending rule 277. See generally Pope, *The Present Status of the Charge in Civil Cases*, in Southern Methodist University CLE series (June 24, 1977).

14. TEX. R. CIV. P. 277 now reads in part:

It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit issues broadly. It shall not be objectionable that a question is general or includes a combination of elements or issues. Inferential rebuttal issues shall not be submitted The court may submit special issues in a negligence case in a manner that allows a listing of the claimed acts or omissions of any party to an accident, event, or occurrence that are raised by the pleadings and the evidence with appropriate spaces for answers as to each act or omission which is listed. The court may submit a single question, which may be conditioned upon an answer that an act or omission occurred, inquiring whether a party was negligent, with a listing of the several acts or omissions corresponding to those listed in the preceding question and with appropriate spaces for each answer. Conditioned upon an affirmative finding of negligence as to one or more acts or omissions, a further question may inquire whether the corresponding specific acts or omissions (listing them) inquired about in the preceding questions were proximate causes of the accident, event, or occurrence that is the basis of the suit. Similar forms of questions may be used in other cases.

15. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245 (Tex. 1974); *Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.) (approving general submission of fraud). See generally Pope, *A New Start on the Special Verdict*, 37 TEX. B.J. 335 (1974); Pope & Lowerre, *supra* note 12; Morris, *Special Issues and Instructions—Current Problems*, in 1 State Bar of Texas Advanced Civil Trial Course (Jan. 1978); Scott, *Procedural Aspects of Special Issue Submission in Texas*, in 2 State Bar of Texas Advanced Civil Trial Course (Jan. 1978).

16. 517 S.W.2d 245 (Tex. 1974). The supreme court suggested that the following issue would be satisfactory:

1. Did Edward Bell sustain an injury while on the premises of the defendant on or about April 5, 1966?
2. Did J.A. Hurley sustain an injury while on the premises of the defendant on or about April 5, 1966?
3. Was the escape of the acetic acid on the occasion in question due to the negligence of defendant, its agents, servants, or employees?
4. Was such negligence, if you have so found, a proximate cause of the injuries, if any, to Edward Bell?
5. Was such negligence, if you have so found, a proximate cause of the injuries, if any, to J.A. Hurley?
6. Damages as to Edward Bell?
7. Damages as to J.A. Hurley?

Id. at 256-57.

17. See note 6 *supra*.

The rule means that in an ordinary negligence case, where several specific acts of negligence are alleged and evidence as to each is introduced, the submission of a broad issue inquiring generally whether the defendant was negligent is not error and is not subject to the objection that the single issue inquires about several elements or issues.¹⁸

This statement formed the basis for the holding in *Members Mutual Insurance Co. v. Muckelroy*,¹⁹ the leading civil appeals case on the revised rule. The court relied heavily on *Mobil Chemical*, overlooking the fact that *Mobil Chemical* was a *res ipsa loquitur* case and that the supreme court's reference to the revised rule was a mere dictum.²⁰ In approving a check-off form for issue submission in *Muckelroy*, the court of civil appeals also approved the broad submission of the negligence question.²¹ This submission was, however, accompanied by a limiting instruction that the court reasoned was sufficient to overcome an objection that the jury may have improperly considered testimony not raised by the pleadings or supported by the evidence.²²

The general trend of civil appeals decisions regarding the proper submission of special issues in negligence cases follows *Muckelroy* in allowing broader, more general issues. In *Gaber Co. v. Rawson*²³ the court of civil appeals approved an issue which inquired generally into a failure to exercise due care. This is a marked change from the old rule which would have required a separate and distinct submission of each act or omission

18. 517 S.W.2d at 255.

19. 523 S.W.2d 77 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). See Blanton, *The Nature of Damages in Personal Injury Actions as Viewed by a Trial Judge*, 18 S. TEX. L.J. 157, 163 (1977).

20. Because *Mobil Chemical* was decided before the new rule became effective and because of the peculiar nature of the liability question in a *res ipsa loquitur* case, the supreme court's statement on the revised rule must be taken within its context. In *Muckelroy* the Houston court took the *Mobil Chemical* statement out of its unique context and applied it in the broadest sense. *Muckelroy* declared that *Mobil Chemical* had said that broad submissions were acceptable. 523 S.W.2d at 81. It did not, however, address the meaning of the word "broad." The supreme court refused to grant a writ of error, thereby lending credence to the interpretation of the court of civil appeals. Subsequent cases dealing with issue submission under the new rule followed *Muckelroy* and allowed an undefined "broad submission." *Scott* was the one exception to this trend and the only case dealing with the point which the supreme court heard. When the supreme court agreed with the Beaumont court of civil appeals and began defining what were permissible submissions and what submissions would be overly broad, many attorneys were caught by surprise. *Mobil Chemical* and *Muckelroy*, both thought of as decisions from which to progress still further, were limited to their respective facts. In *Scott* the court dealt with specifics and attempted to clarify the true meaning of rule 277.

21. The special issue in *Muckelroy* asked the jury to determine:

"Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of this suit?"

ANSWER:

- (a) The defendant, Verdie Webber.
- (b) The plaintiff, Jasper Muckelroy.
- (c) Both.

For an excellent criticism of this case, see 5 W. DORSANEO, *supra* note 6, § 122.121(1)(d). See generally 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES (Supp. 1973).

22. 523 S.W.2d at 82.

23. 549 S.W.2d 19 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.).

that evidenced a lack of reasonable care.²⁴ Similarly, a court has permitted the submission of a general issue inquiring as to whether or not a traffic signal was in a malfunctioning condition, instead of asking about each alleged malfunction.²⁵ Perhaps the most liberal submission allowed under the new rule occurred in a malpractice suit in which the jury was simply asked whether or not a doctor was "negligent in his diagnosis and/or medical care and treatment" of his patient.²⁶

Not all courts of civil appeals agree with *Muckelroy*, however. While accepting an issue modeled on *Muckelroy*, the El Paso court has stated its preference for individual submission of each separate act or omission in regard to each party, despite the dominant trend towards broader, more comprehensive issues.²⁷

II. SCOTT V. ATCHISON, TOPEKA & SANTA FE RAILWAY

In *Scott* the Texas Supreme Court dealt directly with the revised rule for the first time. Justice Daniel, writing for the majority, affirmed the court of civil appeals, holding that to permit submission of a broad negligence issue without an accompanying instruction confining the jury's deliberations to those acts or omissions which were both raised by the pleadings and supported by the evidence was reversible error.²⁸

The court first addressed whether there was some evidence to support each of the plaintiff's specific allegations of negligence. It found evidentiary support for all of the allegations except for the allegation that the track, supporting bed, and ties were faulty in construction, materials, or maintenance. The special issue, which asked only if the defendant railroad was negligent, was, therefore, overly broad in that it allowed the jury to consider a factual theory which was raised by the pleadings but not supported by the evidence.²⁹

The court then dealt with plaintiff's argument that the above ruling was in conflict with the holdings in *Muckelroy* and *Mobil Chemical*. It distinguished *Muckelroy* on the ground that in that case there apparently was some evidence in support of all of the alleged acts of negligence, and that the procedural question involved there concerned the alleged failure of the issue to limit the jury's consideration to the pleadings.³⁰ That situation is clearly different from *Scott*, in which the procedural question involved the failure of the issue to limit the jury's consideration to the proof.

24. *Id.* at 23.

25. *State v. Norris*, 550 S.W.2d 386 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

26. *Lee v. Andrews*, 545 S.W.2d 238, 247 (Tex. Civ. App.—Amarillo 1976, writ dismissed by agr.).

27. *Herrera v. Balmorhea Feeders, Inc.*, 539 S.W.2d 84, 88 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

28. 21 Tex. Sup. Ct. J. 126, 128 (1978); see Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 32 Sw. L.J. 407, 420 (1978).

29. 21 Tex. Sup. Ct. J. at 127.

30. *Id.*

The court distinguished *Mobil Chemical* on three bases, the first being the fact that, as in *Muckelroy*, there appeared to have been some evidence in support of all the alleged acts of negligence. *Mobil Chemical* was further distinguishable on the basis that it was tried on a *res ipsa loquitur* theory, and as such, would have been an exception to the old *Fox v. Dallas Hotel* rule.³¹ Finally, and most importantly, the court recognized that in *Scott*, unlike *Mobil Chemical*, there were facts in evidence from which the jury might have inferred negligence, although those facts were not pleaded.³²

The purpose of special issue practice is to allow for greater judicial control over jury deliberations.³³ The supreme court did not intend to defeat that purpose when it revised Texas Rule of Civil Procedure 277. Instead, its purpose was to clarify and simplify the process of framing special issues.³⁴ To allow the jury to infer acts of negligence from the evidence when such acts have not been raised by the pleadings is contrary to the policy underlying special issue practice.³⁵ In light of this policy, the court held that failure to limit the broad ultimate fact issue to acts or omissions raised by both pleadings and proof violated rule 277, and under the facts in *Scott* probably caused the rendition of an improper judgment.³⁶

The court also considered whether a proposed limiting instruction would be sufficient to restrict the jury's consideration. The proposed instruction read: "In determining negligence you may consider only those acts or omissions which are both alleged in the pleadings and supported by the evidence."³⁷

The court rejected this proposal because it allows the jury to determine questions of law which are within the trial court's area of responsibility. Questions of adequacy of the pleadings and of the legal sufficiency of the evidence, the court concluded, have no place in the jury room.³⁸

The court suggested three possible ways to achieve the required limitation on what the jury may consider. The practice of listing the acts or omissions raised by both the pleadings and the evidence in a broad ultimate fact issue was specifically approved,³⁹ as was the practice of incorporating such a list in a checklist form.⁴⁰ In a case in which the listing of relevant acts or omissions in the issues themselves would be cumbersome, complicating, or otherwise undesirable, the court suggested that an instruction be given which would list the acts or omissions to which the jury must

31. See note 6 *supra*.

32. 21 Tex. Sup. Ct. J. at 128.

33. 5 W. DORSANEO, *supra* note 6, § 122.01.

34. 21 Tex. Sup. Ct. J. at 129. See generally Pope & Lowerre, *supra* note 12.

35. TEX. R. CIV. P. 279 requires that the court submit the controlling issues made by the pleadings and the evidence.

36. 21 Tex. Sup. Ct. J. at 128.

37. *Id.*

38. *Id.*

39. *Id.* at 128-29.

40. *Id.* at 125.

limit its consideration.⁴¹

Justice McGee dissented in *Scott*, stating that he felt that no additional instruction was necessary and that the broad form of special issue submission used was permissible under *Mobil Chemical* and *Muckelroy*.⁴² He feared that the use of instructions would be carried to excess, thus defeating the intent of revised rule 277 to have a simpler special verdict system.⁴³ Considered in light of the three alternative means of restricting the scope of the jury's deliberations proposed by the majority, such excesses appear unlikely.

III. CONCLUSION

In *Scott* the supreme court interpreted rule 277 to remove the old, narrow restrictions of the *Fox v. Dallas Hotel* rule, and yet to prevent the submission of an issue which asks merely if there was negligence without requiring a list of relevant acts or omissions which the jury can consider. Such an interpretation is in agreement with the underlying purposes of both special issue practice and the revision of rule 277.

After a brief period in which special issue charges began to look more and more like general charges, the court seems to be moving away from the very general type of special issue many thought permissible under rule 277. Instead the court appears to be favoring a more restricted submission that will focus the jury's attention on only those matters raised by the pleadings and supported by some evidence. A trial court can no longer ask merely if the defendant was negligent, but must ask if he was negligent in respect to certain acts or omissions which must be listed either in the issue or in a complementary instruction. This method of issue submission is in accord with the expressed intention behind the revised rule, that of simplifying the process of submitting the case to the jury while retaining as much control over the jury as possible.

Maxine Aaronson

41. The court gave the following instruction as an example: "In your determination of the above question you shall consider only whether the railroad company was negligent in failing to have necessary culverts or sluices at or near Bridge 46.3 or [here listing any other acts or omissions raised by the pleadings and the evidence upon the new trial]." *Id.*

From a practical standpoint there may actually be a great deal of difference between listing the relevant acts or omissions in an instruction and placing the list in the issue itself. Presumably, the placing of such a list in the actual issue would have more impact upon the jury than would the same list when contained in an instruction.

42. *Id.* at 131.

43. *Id.*

