



January 1967

A Special Issue Quandary - Submitting Partial Incapacity in Workmen's Compensation

James H. Wallenstein

Recommended Citation

James H. Wallenstein, Comment, *A Special Issue Quandary - Submitting Partial Incapacity in Workmen's Compensation*, 21 Sw L.J. 513 (1967)

<https://scholar.smu.edu/smulr/vol21/iss2/5>

This Comment is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Law Review by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

A SPECIAL ISSUE QUANDARY — SUBMITTING "PARTIAL INCAPACITY" IN WORKMEN'S COMPENSATION

by James H. Wallenstein

Texas' uniquely rigid regulation of jury verdicts has been the subject of much debate since its inception.¹ Particularly vulnerable is the frequent occurrence of totally incongruous elements within a single verdict. In workmen's compensation suits, for example, juries have returned verdicts (1) finding the claimant partially incapacitated but awarding no monetary recovery,² or (2) finding the claimant both partially incapacitated and totally incapacitated at the same time.³ The inexperienced logician pulls his hair in frustration. Most lawyers, however, try to operate at maximum efficiency under the rules of the game.⁴ This Comment will analyze conflicts in special issue submission, particularly as they relate to recovery for partial incapacity under the Texas Workmen's Compensation Law. In conclusion it will recommend special issues designed both to reduce conflicts and to represent accurately the concept of partial incapacity.

I. CONFLICT IN JURY VERDICTS: CAUSES AND JUDICIAL RECONCILIATION

Causes At least one philosophical view restricts the jury's function to deciding only the facts of the controversy, leaving all issues of law and all consequences resulting from the facts to the judge.⁵ The Texas special issue system attempts to enforce this restriction. Issues which are too "general"—which come too close to asking for a single ruling on the outcome of the case—may be rejected without request from either party,⁶ and the admission of such issues in the face of a proper objection is re-

¹ Pro: Gooch, *Submission to the Jury*, 18 TEXAS B.J. 155 (1955); Con: Stout, *Our Special Issue System*, 36 TEXAS L. REV. 44 (1957). For a law review dialogue, see Green, *Blindfolding the Jury* (Part II), 33 TEXAS L. REV. 273 (1955) (including an authoritative history of special verdicts in the United States and specifically in Texas); Gay, "Blindfolding" the Jury: Another View, 34 TEXAS L. REV. 368, 377 (1956); Green, *A Rebuttal*, 34 TEXAS L. REV. 382 (1956); Gay, *A Rejoinder*, 34 TEXAS L. REV. 514, 516 (1956); Green, *A Reply to Mr. Gay's Rejoinder*, 34 TEXAS L. REV. 681, 685 (1956). For a summary distinction and analysis of both general charges and special issues, see Masterson, *Preparation and Submission of Special Issues in Texas*, 6 SW. L.J. 163, 163-64 (1952). Non-Texas authorities are listed in VanDercreek, *Annual Survey of Texas Law—Texas Civil Procedure*, 21 SW. L.J. 155, 167 n.56 (1967).

² *Employers Reinsurance Corp. v. Holland*, 162 Tex. 394, 347 S.W.2d 605 (1961), 13 BAYLOR L. REV. 245, 252 (1961), 40 TEXAS L. REV. 591 (1962); *Indemnity Ins. Co. of No. America v. Craik*, 162 Tex. 260, 346 S.W.2d 830 (1961), 13 BAYLOR L. REV. 245, 253. See also Barrow, *Conflicts in Jury Findings*, 26 TEXAS B.J. 23, 80-81 (1963). See notes 73-86 *infra* and accompanying text.

³ The latest case is *Insurance Co. of No. America v. Brown*, 394 SW.2d 787 (Tex. 1965). See notes 72-108 *infra* and accompanying text.

⁴ The State Bar of Texas has encouraged both plaintiff-oriented and defendant-oriented lawyers to learn the rules. See Kronzer, *Special Issues, Definitions, Instructions, and Objections*, in PERSONAL INJURY LITIGATION IN TEXAS 732 (1961) and Shirley, *Special Issue Submission From a Defense View*, in PERSONAL INJURY LITIGATION IN TEXAS 775 (1961).

⁵ For an extensive and well-documented study of this area see Judge Jerome Frank's opinion in *Skidmore v. Baltimore*, 167 F.2d 54 (2d Cir. 1948). See also 1 MCCORMICK & RAY, TEXAS LAW OF EVIDENCE §§ 1-9 (2d ed. 1956); Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 273 (1955).

⁶ TEX. R. CIV. P. 277, 279.

versible error.⁷ Instead, the jury must receive separate issues concerning each vital factual element in dispute and must be expressly advised not to consider the effect of its answers.⁸ Unfortunately, although this system may reduce the effect of juror sympathy or prejudice,⁹ the abundance of written material presented to the jury is a breeding ground for abuse of semantics, legal jargon, and the kitchen-sink technique.

Moreover, the confusion is augmented by a problem which necessarily flows from the system itself. In order to insure equal consideration by the jury of both the plaintiff's and the defendant's argument, under Texas rules each party is entitled to an unconditional submission of his case.¹⁰ To be sure, a defendant may not restate in the negative his opponent's issues,¹¹ but, provided he has laid the proper predicate in his pleadings¹² and presentation of evidence,¹³ he may submit issues (1) which can result in a favorable judgment irrespective of the answers to his opponent's issues¹⁴ and (2) which by inference may rebut one or more of his opponent's issues. The distinction between a mere negative restatement and an inferential rebuttal is often difficult to determine¹⁵ and perhaps is not even

⁷ See 3 McDONALD, TEXAS CIVIL PRACTICE § 12.04, at 1058 (1950, as supplemented in 1967): "No case has been found, decided since 1913, where the trial judge refused to give a special issue charge after timely request and was sustained upon appeal." For a survey by the Texas Supreme Court concerning what issues are too general, see *Barclay v. C. C. Pitts Sand & Gravel Co.*, 387 S.W.2d 644 (Tex. 1965) (disallowing the issue "proper control," with two concurring opinions in substantial disagreement). See also Pope, *Broad and Narrow Issues*, 26 TEXAS B.J. 921 (1963) (pointing out inconsistencies in labelling issues too "general" between negligence and non-negligence controversies).

⁸ TEX. R. CIV. P. 226a (effective Jan. 1, 1967) (specifically part III, § 4, at 2 TEX. R. CIV. P. ANN. 365 (1967)). See also *Amarillo v. Huddleston*, 137 Tex. 226, 152 S.W.2d 1088, 1090 (1941); *Monkey Grip Rubber Co. v. Walton*, 122 Tex. 185, 53 S.W.2d 770, 772-73 (1932). For a detailed analysis of the rule see, in this issue, Comment, *Jury Misconduct in Personal Injury Litigation in Texas—A Need for Further Reform*, at note 64.

⁹ However, a juror can and does consider the effect of his verdict. Pope, *The Mental Operations of Jurors*, 40 TEXAS L. REV. 849, 855-56 (1962). Query: Does the special issue system rely on laboratory conditions of a disinterested, ignorant juror? The juror's mental process is considered, in connection with jury misconduct, in this issue. Comment, *supra* note 8, text accompanying notes 40-48, 110-16.

¹⁰ TEX. R. CIV. P. 277; *Barclay v. C. C. Pitts Sand & Gravel Co.*, 387 S.W.2d 644, 647 (Tex. 1965), 21 Sw. L.J. 155, 164 (1967); *Fox v. Dallas Hotel*, 111 Tex. 461, 240 S.W. 517, 521-22 (1922); *Smith v. Chase*, 405 S.W.2d 450, 453 (Tex. Civ. App. 1966) *error ref. n.r.e.*, 21 Sw. L.J. 155, 164 (1967).

¹¹ *Ross v. Texas Employers' Ins. Ass'n*, 153 Tex. 276, 267 S.W.2d 541 (1954); *Wright v. Traders & Gen. Ins. Co.*, 132 Tex. 172, 123 S.W.2d 314, 316-17 (Tex. Comm'n App. 1939) *adopted*; *Eckert-Fair Constr. Co. v. Flabiano*, 342 S.W.2d 629, 633-34 (Tex. Civ. App. 1960) *error ref. n.r.e.*

¹² TEX. R. CIV. P. 277, 279. See also *Rodriguez v. Zavala*, 279 S.W.2d 604, 606 (Tex. Civ. App. 1955); *Goldman v. Campbell*, 249 S.W.2d 633, 635 (Tex. Civ. App. 1952) *error ref. n.r.e.* Although a general denial may be sufficient to allow submission of evidence, it is not sufficient to allow submission of a special issue even though the evidence is adequate to raise such an issue. *Parker v. Gulf, Colo. & S.F. Ry.*, 401 S.W.2d 265, 267 (Tex. Civ. App. 1966); *Safety Cas. Co. v. Teets*, 195 S.W.2d 769, 770 (Tex. Civ. App. 1946) *error ref.*

¹³ TEX. R. CIV. P. 279. *Salley v. Black, Sivalls & Bryson*, 225 S.W.2d 426, 428 (Tex. Civ. App. 1949) *error dismissed*; *Cawthon v. Cochell*, 121 S.W.2d 414, 417 (Tex. Civ. App. 1938) *error dismissed*.

¹⁴ Professor Masterson called such a defense "confession and avoidance." Masterson, *Preparation and Submission of Special Issues in Texas*, 6 Sw. L.J. 163, 176 (1952). Most pleas of "confession and avoidance" are listed as "affirmative defenses." TEX. R. CIV. P. 94. And many must be verified by affidavit. TEX. R. CIV. P. 93.

¹⁵ 3 McDONALD, TEXAS CIVIL PRACTICE § 12.10, at 1073 n.81 (1950), citing among others, *Le Beau v. Highway Ins. Underwriters*, 143 Tex. 589, 187 S.W.2d 73, 74 (1945) and *Southern Underwriters v. Wheeler*, 132 Tex. 350, 123 S.W.2d 340 (Tex. Comm'n App. 1939) *adopted*.

logically defensible.¹⁶ However, courts have accepted the task of separating the "opposite" from the "contrary"¹⁷ and generally have been lenient in allowing the submission of inferential-rebuttal issues when properly plead.¹⁸

The defendant's inferential-rebuttal issue will not support a judgment when the finding to the plaintiff's rebutted issue is contrary.¹⁹ On the other hand, it must be submitted independently, *i.e.*, the right to jury consideration may not be conditioned on a negative (or affirmative) answer to the plaintiff's issue which it rebuts.²⁰ What can and often does result is a conflict in the verdict, which, if irreconcilable, prevents the rendering of any judgment.²¹ The right to object to such conflict is not waived by failure of either or both parties to do so before discharge of the jury—even when the trial judge has warned the parties of possible waiver.²² It is generally considered to be waived when not raised in the motion for new trial, although there is some authority holding its mere existence to be fundamental error.²³ If alerted to the conflict, the trial

¹⁶ 3 McDONALD, TEXAS CIVIL PRACTICE § 12.10, at 1074 n.82 (1950), quoting SCHILLER, FORMAL LOGIC 163 (1912): "Hardly any logician of repute will nowadays contend that these formal manipulations of symbols represent actual thinking."

¹⁷ Wright v. Traders & Gen. Ins. Co., 132 Tex. 172, 123 S.W.2d 314, 316-17 (Tex. Comm'n App. 1939) *adopted*.

¹⁸ At least two authorities agreed that the plaintiff has a heavy burden to show that a defendant's issue is "opposite" to his own. Masterson, *supra* note 14, at 179 (quoting Mr. Clayton Orn).

¹⁹ Professor Hodges points out that since inferential-rebuttal issues are evidentiary, they cannot even support a judgment standing alone. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 41 (1959).

²⁰ State v. Schlick, 142 Tex. 410, 179 S.W.2d 246, 248 (1944), quoted in Hughes v. Belman, 200 S.W.2d 431, 435 (Tex. Civ. App. 1947) *error ref. n.r.e.* Schuhmacher Co. v. Holcomb, 142 Tex. 332, 177 S.W.2d 951, 953 (1944), quoted in Simpson v. Barham, 292 S.W.2d 874, 881 (Tex. Civ. App. 1956).

²¹ See, *e.g.*, the cases listed in 57 TEX. JUR. 2d Trial §§ 550-51 (1964). For discussion of three recent cases of importance see VanDercreek, *Annual Survey of Texas Law—Texas Civil Procedure*, 21 Sw. L.J. 155, 164-65 (1967).

²² Little Rock Furniture Mfg. Co. v. Dunn, 148 Tex. 197, 222 S.W.2d 985, 991 (1949) cited for authority on this point in, among others, L. & L. Industrial Prods. Inc. v. Albert E. Kuehnert, Auctioneers, Inc., 404 S.W.2d 324, 330 (Tex. Civ. App. 1966) *error ref. n.r.e.* and Texas Employers' Ins. Ass'n v. Brown, 309 S.W.2d 295, 304 (Tex. Civ. App. 1958) *error ref. n.r.e.*

²³ Interpretation and extension of the waiver issue in *Little Rock* has not been consistent. The Texas Supreme Court in *St. Paul Fire & Marine Ins. Co. v. Murphee*, 163 Tex. 534, 357 S.W.2d 744, 748-49 (1962), when no assignment of error was made at the motion for new trial, cited *Little Rock* but then stated: "The entry of judgment by a trial court on conflicting findings does not constitute fundamental error. See *Ramsey v. Dunlop*, 146 Tex. 196, 205 S.W.2d 979; *McCaughey v. Consolidated Underwriters*, 157 Tex. 475, 304 S.W.2d 265. The passage was quoted in *Huff v. Insurance Co. of No. America*, 394 S.W.2d 849, 853 (Tex. Civ. App. 1965) *error ref. n.r.e.* See also *Lewis v. Texas Employers' Ins. Ass'n*, 151 Tex. 95, 246 S.W.2d 599, 601 (1952)—quoted in *State v. Wilemon*, 393 S.W.2d 816 (Tex. 1965) and in *Wilkerson v. Darrogh & Lyda, Inc.*, 408 S.W.2d 542, 544 (Tex. Civ. App. 1966) *error ref. n.r.e.*—which indicates a limiting of the *Little Rock* rule.

But see *Brooks v. Moreland*, 404 S.W.2d 949, 951 (Tex. Civ. App. 1966): "We believe there is a conflict of issues here within the rule of . . . [*Little Rock*], which is also authority for holding that this is one of fundamental error which we must consider even though not raised." Although the *Brooks* case cited no further authority, see *Kilgore v. Howe*, 204 S.W.2d 1005, 1007 (Tex. Civ. App. 1947). *Siratt v. Worth Constr. Co.*, 263 S.W.2d 842, 848 (Tex. Civ. App. 1953) quoted the *Kilgore* opinion and added that *Little Rock* was "to the same effect." The case was reversed by the Texas Supreme Court, *Siratt v. Worth Constr. Co.*, 154 Tex. 84, 273 S.W.2d 615 (1954), but that court did not discuss the *Kilgore* language and, in reversing the case on the point that the issues did not conflict, indicated by inference that error would have been preserved despite lack of timely objection.

For a bit more analysis and case authority, see Comment, *Waiver of Unanswered and Conflicting Special Issues*, 38 TEXAS L. REV. 93, 102 (1959).

judge must send the jury back to reconsider the verdict, and, if resolution is unobtainable, or if the jury has already been dismissed, he must declare a mistrial.²⁴

Because many conflicts are not resolved before dismissal of the jury, they greatly impede justice by delaying the final settlement of cases. Moreover, resolution upon jury reconsideration does not necessarily insure a just result. A conflict is, in one sense, merely a symptom of jury confusion; the resolution of conflict may well remove the symptom without curing the confusion.

*Judicial Resolution*²⁵ Just as practitioners have learned to work within the special issue framework, so also the courts have developed means of alleviating conflicts through various forms of special-issue qualitative analysis. Despite occasional reassurances that all issues are to be given equal weight,²⁶ courts often compare the answers in a jury verdict and thus reconcile apparent conflicts. Three broad and quite general premises pervade all analysis: (1) courts look to the verdict as a whole rather than to individual segments;²⁷ (2) they assume that the jury did not intend to create a conflict;²⁸ and (3) they attempt to reconcile apparent conflicts when reasonably possible.²⁹

In the most effective form of qualitative analysis the judge weighs the conflicting issues in comparison with the judgment itself. If, by alternately striking each of the conflicting issues, the conflict is shown not to be vital to the judgment, it will be disregarded. In *Little Rock Furniture Mfg. Corp. v. Dunn*,³⁰ a personal injury suit involving an automobile accident, the jury found, in answer to the defendant's contributory negligence issues, that the plaintiff had failed to keep proper lookout but that such failure was not negligence.³¹ Since failure to keep proper lookout had been defined in the charge to include negligence, the two answers conflicted. However, the jury had left unanswered the issue asking whether

²⁴ TEX. R. CIV. P. 295. The judge's functions are stated in detail at 3 McDONALD, TEXAS CIVIL PRACTICE § 15.03 (1950) and 57 TEX. JUR. 2d *Trial* §§ 553-55 (1964). See also note 112 *infra* and accompanying text.

²⁵ See 3 McDONALD, TEXAS CIVIL PRACTICE § 15.06 (1950); 57 TEX. JUR. 2d *Trial* §§ 549-57 (1964); Barrow, *Conflicts in Jury Findings*, 26 TEXAS B.J. 23 (1963); Miller, "Irreconcilable" *Conflicts in Special Issue Jury Verdicts*, 13 BAYLOR L. REV. 71 (1961); Note, 15 SW. L.J. 460 (1961); Note, 39 TEXAS L. REV. 671 (1961).

²⁶ When issues are held to be conflicting, courts may espouse "equal importance" or "equal weight" to all findings. See, e.g., *Continental Nat'l Bank v. Hall-Page Tire Co.*, 318 S.W.2d 127, 129 (Tex. Civ. App. 1958). Notes 27-44 *infra* and accompanying text should dispel ideas that such slogans are followed consistently.

²⁷ *Perkins v. Mitchell*, 153 Tex. 368, 268 S.W.2d 907, 909 (1954), quoting *Ford v. Carpenter*, 147 Tex. 447, 216 S.W.2d 558, 562 (1949); *State v. Hale*, 136 Tex. 29, 146 S.W.2d 731, 739 (1941); *Dobbins v. Gardner*, 402 S.W.2d 804, 806 (Tex. Civ. App. 1966) *error ref. n.r.e.*

²⁸ *Traywick v. Goodrich*, 364 S.W.2d 190, 191 (Tex. 1963), quoting *Casualty Underwriters v. Rhone*, 134 Tex. 50, 132 S.W.2d 97, 99 (Tex. Comm'n App. 1939) *adopted*.

²⁹ In addition to the cases cited in notes 27 and 28 *supra*, see *Billingsley v. Southern Pac. Co.*, 400 S.W.2d 789, 795 (Tex. Civ. App. 1966) *error ref. n.r.e.* and cases cited therein; *Wanda Petroleum Co. v. Reeves*, 385 S.W.2d 688, 691 (Tex. Civ. App. 1964) and cases cited therein.

³⁰ 148 Tex. 197, 222 S.W.2d 985 (1949). See Barrow, *Conflicts in Jury Findings*, 26 TEXAS B.J. 23, 24 (1963); Comment, 38 TEXAS L. REV. 93, 95, 102 (1959); and authorities cited in note 4 *supra*.

³¹ The latter issue was superfluous because "proper lookout" was defined to include negligence, but no objection had been raised to its submission.

the plaintiff's failure to keep a proper lookout was a proximate cause of the accident (a fact vital in establishing the plaintiff's contributory negligence). The Texas Supreme Court found that, although the issues were conflicting, the conflict was not fatal to the plaintiff's cause; the defendant had not sustained the burden of proving proximate cause.

The court quoted directly from two *prior* supreme court decisions³² what has since, interestingly enough, been referred to as the *Little Rock* "judgment test" for determining whether conflicting issues preclude a judgment:

The test in such case is, whether taking the finding alone in one instance, a judgment should be entered in favor of the plaintiff; and taking it alone in the other, judgment should be entered in favor of the defendant.³³

In the *Little Rock* situation, whether accepting as conclusive the proper lookout issue or the negligence issue, the court still would have to deny the defense of contributory negligence. Thus no fatal conflict existed.

The "judgment test" was itself tested eleven years later in *Bradford v. Arhelger*.³⁴ Although the jury had found that both the defendant and the plaintiff were guilty of negligence and that the negligence of each was a proximate cause of the collision, it also had found that the collision was a result of an unavoidable accident.³⁵ The supreme court, by a five-to-four majority, held that a fatal conflict existed. It emphasized that even though no combination of answers would support a judgment for the plaintiff, single elimination could create one combination where neither party could achieve a judgment.³⁶ Through the *Bradford* case the scope of fatal conflicts was expanded to include situations where one combination of answers results in judgment for one party and another combination results in a fatal conflict. To date *Bradford* has been cited in eleven

³² The original language was stated in *Howard v. Howard*, 102 S.W.2d 473, 475 (Tex. Civ. App. 1937) *error ref.* It was quoted by the supreme court in *Pearson v. Doherty*, 143 Tex. 64, 183 S.W.2d 453, 456 (1944) and by courts of appeals in *Goss v. Longview Hilton Hotel Co.*, 183 S.W.2d 998, 999 (Tex. Civ. App. 1944) and *Fort Worth & D.C. Ry. v. Welch*, 154 S.W.2d 896, 898 (Tex. Civ. App. 1941).

³³ *Little Rock Furniture Mfg. Corp. v. Dunn*, 148 Tex. 197, 222 S.W.2d 985, 991 (1949), quoted in *Freeman v. Commercial Union Assur. Co.*, 317 S.W.2d 563, 570 (Tex. Civ. App. 1958) *error ref. n.r.e.* and countless other cases. In *Pooler v. Klobassa*, 413 S.W.2d 768, 772 (Tex. Civ. App. 1967) the court refers to "the rule laid down in *Little Rock* . . ." See also Barrow, *Conflicts in Jury Findings*, 26 TEXAS B.J. 23, 24, 76 (1963). In one recent case, *Potter v. Garner*, 407 S.W.2d 537, 542 (Tex. Civ. App. 1966) *error ref. n.r.e.*, the judge evidently did a bit more homework and thus acknowledged *Little Rock*, *Pearson*, and *Howard*.

³⁴ 161 Tex. 427, 340 S.W.2d 772 (1960), 15 Sw. L.J. 460 (1961), 24 TEXAS B.J. 164 (1961).

³⁵ The trial judge had instructed the jury that a finding of "unavoidable accident" *excludes* negligence of either party as a proximate cause of the accident.

³⁶ *Bradford v. Arhelger*, 161 Tex. 427, 340 S.W.2d 772, 773 (1960). "We are confronted with two conflicts—a conflict between the finding of unavoidable accident and the finding that the defendant's negligence was a proximate cause of the injuries, and a conflict between the finding of unavoidable accident and the finding that the plaintiff's negligence was a proximate cause of the injury." The court was able to resolve the first conflict through the "judgment test" process, but as to the second conflict it concluded:

If we disregard the finding that the plaintiff's negligence was a proximate cause of the collision and consider the rest of the verdict, we are left with findings that the defendant's negligence was a proximate cause of the collision and that the collision was an unavoidable accident. . . . Such findings are themselves in fatal conflict and will not support a judgment.

The dissent argued that only two issues were controlling, the negligence-contributory negligence issue and the unavoidable accident issue, and that the defendant had won both.

cases, but it has substantially affected the outcome in only two—both cases concerning partial incapacity.³⁷

When conflicts cannot be reconciled through applying the "judgment test," courts may utilize other forms of special issue qualitative analysis in which the conflicting issues are weighed against each other. Stated summarily, a finding which is characterized as "specific,"³⁸ "ultimate,"³⁹ or "material"⁴⁰ will often supersede a conflicting finding which is characterized respectively as "general," "evidentiary," or "immaterial." Standards for such tests are more vague than the analytical "judgment test" and perhaps could even be termed "personal judgment" tests.⁴¹ Moreover, semantical problems plague any set of standards in which a "specific" issue overshadows a broader "general" issue and yet an "ultimate" issue overshadows a narrower "evidentiary" issue. The courts appear to be establishing a spectrum of special issue values. On one end, "immaterial" issues seek answers which do not further the outcome of the case. At the other end, "general" issues ask the jury to decide the case. Issues at either extreme may be only arguably admissible;⁴² therefore, when they

³⁷ Insurance Co. of No. America v. Brown, 394 S.W.2d 787, 789 (Tex. 1965) (the court relied on *Bradford* to defeat the plaintiff's claim that the conflict was not fatal under *Little Rock*). See note 104 *infra* and accompanying text. Employers Reinsurance Corp. v. Holland, 347 S.W.2d 605, 607 (Tex. 1961) (the court, in finding fatal conflict, cited *Bradford* instead of *Little Rock*). See text accompanying note 85 *infra*. Seven cases have cited both *Little Rock* and *Bradford* in declaring no conflict: Dobbins v. Gardner, 402 S.W.2d 804, 806 (Tex. Civ. App. 1966) *error ref. n.r.e.*; Bituminous Fire & Marine Ins. Co. v. Jones, 398 S.W.2d 577, 582-83 (Tex. Civ. App. 1966) *error ref. n.r.e.*; Howell v. Missouri-Kan.-Tex. Ry., 380 S.W.2d 842, 845 (Tex. Civ. App. 1964) *error ref. n.r.e.*; Vouras v. 3525 Turtle Creek, Inc., 369 S.W.2d 819, 822 (Tex. Civ. App. 1963) *error ref. n.r.e.*; Gray v. L-M Chevrolet Co., 368 S.W.2d 861, 866-67 (Tex. Civ. App. 1963) *error ref. n.r.e.* In one case, with facts similar to *Bradford*, the court cited *Bradford* alone but then found no conflict. Jackson v. Clark, 351 S.W.2d 292, 297 (Tex. Civ. App. 1961) *error ref. n.r.e.* The one remaining case found a conflict and cited both *Little Rock* and *Bradford*. Maryland Cas. Co. v. Massie, 387 S.W.2d 454, 456 (Tex. Civ. App. 1964) *error ref. n.r.e.*

³⁸ Barclay v. C. C. Pitts Sand & Gravel Co., 387 S.W.2d 644, 647 (Tex. 1965), 21 Sw. L.J. 155, 164 (1967), quoted in Smith v. Chase, 405 S.W.2d 450, 454 (Tex. Civ. App. 1966) *error ref. n.r.e.*, 21 Sw. L.J. 155, 164 (1967). See also Vouras v. 3525 Turtle Creek, Inc., 369 S.W.2d 819, 822 (1963) *error ref. n.r.e.*, citing authorities. *But cf.*, Pon Lip Chew v. Gilliland, 398 S.W.2d 98 (Tex. 1965) (especially Justice Hamilton's dissent at 103); Missouri-Kan.-Tex. Ry. v. Shelton, 383 S.W.2d 842, 847 (Tex. Civ. App. 1964) *error ref. n.r.e.*; Christie v. Tipps, 279 S.W.2d 142, 145 (Tex. Civ. App. 1955).

³⁹ Smith v. Chase, 405 S.W.2d 450, 454 (Tex. Civ. App. 1966) *error ref. n.r.e.*, 21 Sw. L.J. 155, 164 (1967), citing Schiller v. Rice, 151 Tex. 116, 246 S.W.2d 607 (Tex. 1952) (which, at 615, deals indirectly with the point). See also Bueche v. Eickenroht, 220 S.W.2d 911, 913-14 (Tex. Civ. App. 1949); State Nat'l Bank v. Woodfin, 146 S.W.2d 284, 287 (Tex. Civ. App. 1940) *error ref.*

⁴⁰ Pure Ice & Cold Storage Co. v. Exchange Bank & Trust Co., 408 S.W.2d 319, 324 (Tex. Civ. App. 1966), *rev'd on substantive grounds*, 10 Tex. Sup. Ct. J. 431 (1967) and cases cited therein; Smith v. Chase, 405 S.W.2d 450, 454 (Tex. Civ. App. 1966) *error ref. n.r.e.*, and cases cited therein; Vouras v. 3525 Turtle Creek, Inc., 369 S.W.2d 819, 822 (Tex. Civ. App. 1963) *error ref. n.r.e.*, and case cited therein. See also 4 McDONALD, TEXAS CIVIL PRACTICE, § 17.30, at 1407 (1950).

⁴¹ "These rules clearly give ample room for metaphysical exercise." 3 McDONALD, TEXAS CIVIL PRACTICE § 15.06, at 1275 (1950). Pages 1274-77 present the tests and describe certain unpredictable results.

⁴² In 1963 Justice Jack Pope, then on the San Antonio Court of Appeals, explained the admissibility of "broad issues" in non-negligence cases and listed several "broad issues" admissible even in negligence cases: damages, *res ipsa loquitur*, attractive nuisance, discovered peril, proper lookout, and proper control. Pope, *Broad and Narrow Issues*, 26 TEXAS B.J. 921, 979-81 (1963). In 1965 the Texas Supreme Court withdrew "proper control" from the list. Barclay v. C. C. Pitts Sand & Gravel Co., 387 S.W.2d 644 (Tex. 1965), 21 Sw. L.J. 155, 164 (1967). Justice Pope expressed his disapproval in concurring, as did Justice Norvell.

are admitted and thus cause conflict, judges discard them.⁴³ Between the two extremes courts prefer issues which are vital to the ultimate outcome of the case and probably give them slight preference in special issue reconciliation.⁴⁴

II. THE PERPLEXING CONCEPT OF PARTIAL INCAPACITY

Workmen's compensation laws protect an employee against a loss of *wage earning capacity*.⁴⁵ The legislatures could have eased the task of measuring such loss by making conclusive the differential in wages earned before and after an injury, but this relatively objective procedure would not have adequately compensated those who by necessity struggled through their former chores after an injury. The Texas act, though based on the subjective standard of capacity, does provide objective guideposts. Injuries to specific parts of the body are compensated uniformly by an express statutory schedule⁴⁶ (which may or may not exclude recovery under the "general" injury provisions).⁴⁷ And general injuries are expressly distinguished as creating either partial⁴⁸ or total⁴⁹ incapacity and as being either temporary or permanent in time.⁵⁰

Recovery for partial and for total loss of wage earning capacity is regulated by different statutory sections which, for the same period of time, are mutually exclusive.⁵¹ Thus, the special issue requesting a finding on

⁴³ This was, in effect, Justice Pope's argument in *Barclay*: "The opinion of the Court of Civil Appeals was right when it gave effect to the specific jury findings over the finding on proper control. That is settled law." 387 S.W.2d at 633. See also *Smith v. Chase*, 405 S.W.2d 450, 453-54 (Tex. Civ. App. 1966) *error ref. n.r.e.*, 21 Sw. L.J. 155, 164 (1967).

⁴⁴ For an example of the problems involved in such determination, see analysis of *C & R Transp., Inc. v. Campbell*, 406 S.W.2d 191 (Tex. 1966) in VanDercreek, *Annual Survey of Texas Law—Texas Civil Procedure*, 21 Sw. L.J. 155, 165 (1967).

⁴⁵ The act compensates for loss of earning capacity rather than for loss of actual earning or for the injury itself. *Employers Reinsurance Corp. v. Holland*, 162 Tex. 394, 347 S.W.2d 605, 606 (1961); *Texas Employers' Ins. Ass'n v. Clack*, 134 Tex. 151, 132 S.W.2d 399, 401 (Tex. Comm'n App. 1939) *adopted*; *Maryland Cas. Co. v. Drummond*, 114 S.W.2d 356, 360 (Tex. Civ. App. 1938) *error ref.*; *Maryland Cas. Co. v. Stevens*, 55 S.W.2d 149, 153 (Tex. Civ. App. 1932) *error ref.* See also 63 TEX. JUR. 2d *Workmen's Compensation* § 139 (1965) and authority cited therein.

⁴⁶ TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (1967); Comment, 12 Sw. L.J. 100, 106-15 (1958).

⁴⁷ Specific injuries which result solely in loss of certain faculties or of various members of the body (or of total loss of use of that member) enumerated in § 12 cannot be measured by the general injury provisions. *Texas Employers' Ins. Ass'n v. Brownlee*, 152 Tex. 247, 256 S.W.2d 76, 77-79 (1953), quoted in part in *Aetna Cas. & Sur. Co. v. Dooley*, 410 S.W.2d 314, 319 (Tex. Civ. App. 1966). However, the award for total and permanent loss of certain vital faculties or members (or total and permanent loss of use thereof) is measured as if the claimant were 100 per cent totally and permanently incapacitated. TEX. REV. CIV. STAT. ANN. art. 8306, § 11a (1967). Moreover, for other specific losses which are not enumerated in § 12 the claimant may prove that his injuries resulted in permanent, total incapacity. *Ibid.* See 63 TEX. JUR. 2d *Workmen's Compensation* §§ 147-54 (1965); Comment, 12 Sw. L.J. 100, 106-15 (1958).

⁴⁸ TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1967). See also Comment, *Partial Incapacity Under the Texas Workmen's Compensation Act*, 12 Sw. L.J. 100 (1958); Legislation Note, 9 BAYLOR L. REV. 358 (1957).

⁴⁹ TEX. REV. CIV. STAT. ANN. art. 8306, § 10 (1967). See also Akin, *Annual Survey of Texas Law—Workmen's Compensation*, 21 Sw. L.J. 75, 83-84 (1967).

⁵⁰ Since maximum periods of recovery are listed in each section "permanent" incapacity has a different meaning in weeks for each type of incapacity.

⁵¹ *Insurance Co. of No. America v. Brown*, 394 S.W.2d 787, 788 (Tex. 1965); *Texas Employers' Ins. Ass'n v. Phelan*, 103 S.W.2d 863, 865 (Tex. Civ. App. 1937) mentioned in *Liberty Universal Ins. Co. v. Gill*, 401 S.W.2d 339, 343 (Tex. Civ. App. 1966) *error ref. n.r.e.*

partial incapacity can be submitted not only by the claimant as an alternative ground of recovery⁵² but also by the defendant as an inferential rebuttal to total incapacity. If requested, the issue of partial incapacity must be submitted and must not be conditioned on a negative response to the issue of total incapacity.⁵³

As might be predicted from its dual purpose, the issue of partial incapacity is a hybrid, difficult to define and thus an almost incorrigible cause of conflicts in jury verdicts. Each word is misleading. The noun "capacity" can be related to functions other than earning a livelihood. But under the act a claimant is incapacitated only to the extent of his *earning* capacity.⁵⁴ Concerning the adjective "partial," students of geometry learn that the whole includes all of its parts. Under the act, however, partial incapacity directly conflicts with total incapacity. The substantive concept is further clouded by its statutory standard of measurement, comparing wages before the injury to wage earning capacity during incapacity.⁵⁵ Unfortunately, the jury, although prodded by careful instructions, often misses these distinctions. The resulting conflicts are somewhat unusual since a finding of partial incapacity can conflict not only the "total incapacity," but also with the measure of recovery.⁵⁶

A. "Incapacity" Without Recovery

When the jury confuses compensable incapacity with pure physical incapacity and/or ignores an employee's need to earn money despite incapacity, it may return a verdict finding the claimant partially incapacitated but at the same time possessing a wage earning capacity equal to his average weekly wage before the injury. The labyrinth of semantical difficulties thus involved must be analyzed in context with the legislative and judicial history concerning "wages" and "wage earning capacity." Compensation for general partial incapacity is calculated as "sixty per cent (60%) of the difference between his (the injured employee's) average weekly *wages* before the injury and his average weekly *wage earning capacity* during the existence of such partial incapacity."⁵⁷ However, prior to 1957 most appellate courts allowed, as an alternative to the express statutory formula, computations of recovery obtained by multiplying a

⁵² Of course, because the claimant prefers recovery for total incapacity, his issue on partial incapacity will always be conditioned on a negative finding to the issue of total.

⁵³ *Wright v. Traders & Gen. Ins. Co.*, 132 Tex. 172, 123 S.W.2d 314 (Tex. Comm'n App. 1939) *adopted*, cited for a related point in *Liberty Universal Ins. Co. v. Gill*, 401 S.W.2d 339, 343 (Tex. Civ. App. 1966) *error ref. n.r.e.* But see *Stone v. Texas Employers' Ins. Ass'n*, 154 Tex. 21, 273 S.W.2d 59 (1954), holding that the issue of partial incapacity can be conditioned on a finding that the claimant's total incapacity was temporary. The *Stone* case to date has been cited only five times, only once on point, *Texas Employers' Ins. Ass'n v. Collins*, 290 S.W.2d 693 (Tex. Civ. App. 1956) (attempting to expand the doctrine to make irrelevant a finding of partial incapacity following findings of total permanent incapacity), *rev'd*, 156 Tex. 376, 295 S.W.2d 902 (1956). For a suspicious view on *Stone*, see PEERY, TEXAS WORKMEN'S COMPENSATION PROCEDURE 34-35 (1960).

⁵⁴ See note 45 *supra*.

⁵⁵ TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1967).

⁵⁶ For an example of the *Bradford* test as it applies to partial incapacity cases, see *Insurance Co. of No. America v. Brown*, 394 S.W.2d 787, 789 (Tex. 1965).

⁵⁷ TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1967). (Emphasis added.)

jury-found percentage of disability times the average weekly wages before the injury. This alternative perhaps developed from a mistaken association of general partial incapacity with specific partial incapacity.⁵⁸ (The recovery provision for specific partial incapacity requires the percentage approach.⁵⁹) However, even after the two sections could be distinguished, most courts approved the percentage computation when dealing with general partial incapacity—and until 1940, without any express rationale except occasional citations of previous cases.⁶⁰ Presumably, most courts, including the supreme court,⁶¹ believed the alternative methods to be indistinguishable in effect. In 1940 one case stated just that,⁶² but by that time the trend was too deeply entrenched to need justification. No court stated the necessary underlying premise, that wages and wage earning capacity before the injury were equivalents (or were so similar that to submit issues comparing wages and wage earning capacity would be unduly burdensome to the jury). Only with the terms equal could recovery measured by a percentage of wages accurately represent recovery measured by the remainder of the respective wages minus wage earning capacity.⁶³ Nevertheless, although a few courts insisted on compliance⁶⁴ with the statutory means of computation and many courts expressly pre-

⁵⁸ Authority cited in note 47 *supra* indicates the possibility for confusion. The historical development and relationship of terms was first explained in *Texas Employers' Ins. Ass'n v. Moreno*, 277 S.W. 84 (Tex. Comm'n App. 1925) *adopted*.

⁵⁹ TEX. REV. CIV. STAT. ANN. art. 8306, § 12 (1967).

⁶⁰ The following decisions, in chronological order, contain no reasoning and cite no authority for the admission of a percentage special issue: *General Acc. & Life Assur. Corp. v. Bundren*, 274 S.W. 671 (Tex. Civ. App. 1925), *aff'd*, 283 S.W. 491, 494 (Tex. Comm'n App. 1926) *adopted*; *Texas Employers' Ins. Ass'n v. Shilling*, 289 S.W. 996, 998 (Tex. Comm'n App. 1927) *adopted*; *New Amsterdam Cas. Co. v. Crow*, 16 S.W.2d 560 (Tex. Civ. App. 1929); *Siller v. United States Fid. & Guar. Co.*, 93 S.W.2d 529, 530 (Tex. Civ. App. 1936) *error dismissed*. Added to that list is SPEER, SPECIAL ISSUES 790 (1931).

The following decisions contain no reasoning and cite only the previous cases listed or cases included in the following list itself: *Petroleum Cas. Co. v. Lewis*, 63 S.W.2d 1066 (Tex. Civ. App. 1933) *error ref.*; *Fidelity & Cas. Co. v. Bronton*, 70 S.W.2d 780, 785-86 (Tex. Civ. App. 1934) *error dismissed* (cites only *Bronton* and discusses only the issue of commenting on the weight of evidence); *Traders & Gen. Ins. Co. v. Patterson*, 123 S.W.2d 766 (Tex. Civ. App. 1938) *error dismissed*; *Associated Indem. Corp. v. McGrew*, 142 S.W.2d 567, 569, 573-74 (Tex. Civ. App. 1940), *aff'd*, 160 S.W.2d 912, 915 (Tex. Comm'n App. 1942) *adopted*.

⁶¹ The *Bundren*, *Shilling*, *Lewis*, and *McGrew* cases, *supra* note 60, bear supreme court approval.

⁶² *Federal Underwriters Exch. v. Price*, 145 S.W.2d 951, 958 (Tex. Civ. App. 1940) *error dismissed, judgment correct*.

⁶³ The validity of this statement can be proved algebraically.

W = wages before the injury

WEC = wage earning capacity before the injury

C = wage earning capacity after the injury

p = percentage of original wage earning capacity remaining after the injury ($p = C/WEC$)

P = percentage incapacity caused by the injury ($P + p = 100\% = 1.00$)

Statutory formula for computing recovery: $W - C = \text{recovery}$

Pre-1957 case formula for computing recovery: $(W)(P) = \text{recovery}$

Assuming recovery to be constant:

$W - C = (W)(P)$

$C = W - (W)(P)$

$C = (1.00 - P)(W) = (p)(W) = (C/WEC)(W)$

$(WEC/C)(C) = W$

$WEC = W$

⁶⁴ *Texas Employers' Ins. Ass'n v. Swain*, 278 S.W.2d 600, 604-05 (Tex. Civ. App. 1954) *error ref. n.r.e.* (both quoting the statute and giving reasons for following the statute); *Traders & Gen. Ins. Co. v. Hicks*, 94 S.W.2d 824, 825-26 (Tex. Civ. App. 1936) (giving no reasons).

ferred it,⁶⁵ most agreed that a trial judge could even refuse a requested issue based on the statutory requirements in favor of an issue concerning percentage incapacity.⁶⁶

In 1957 the Texas Legislature added the following sentence to the provision defining recovery: "Compensation for all partial incapacity resulting from a general injury shall be computed in the manner provided in this Section, and shall not be computed on a basis of a percentage of disability." The amendment settled all doubt concerning computation of recovery in favor of the prior minority view, and for two years only its retroactive effect was in question.⁶⁷ But imposing upon the jury the responsibility of distinguishing average weekly wages from average weekly wage earning capacity has sadistic overtones, and at least one jury in 1959⁶⁸ and two juries in 1960⁶⁹ were snared in this apple-orange trap.

In 1959 the Beaumont Court of Civil Appeals⁷⁰ examined a jury verdict which included a finding of partial incapacity but also a finding that average weekly wage earning capacity after the injury was equal to a stipulated average weekly wage before the injury. Of course this verdict would have allowed no recovery despite the finding of partial incapacity. The trial judge had declared a mistrial because of fatal conflict in the special issues, and the defendant sought a writ of mandamus to render judgment on the verdict. In upholding the trial judge the court of civil appeals cited no authority to support its finding of a conflict but based its finding solely on the definition of "partial incapacity" given to the jury.⁷¹ Under the terms of that definition a finding of "a depreciation or reduction in . . . [the claimant's] ability to work and earn money"

⁶⁵ *Scarborough v. Travelers Ins. Co.*, 189 S.W.2d 10 (Tex. Civ. App. 1945); *Texas Employers' Ins. Ass'n v. Reed*, 150 S.W.2d 858, 864 (Tex. Civ. App. 1941) *error dismissed, judgment correct*; *Lloyds Cas. Co. v. Meredith*, 63 S.W.2d 1051, 1054 (Tex. Civ. App. 1933).

⁶⁶ *Pacific Employers Ins. Co. v. Brasher*, 234 S.W.2d 698 (Tex. Civ. App. 1950) *error ref. n.r.e.*; *Texas Employers' Ins. Ass'n v. Spivey*, 231 S.W.2d 760 (Tex. Civ. App. 1950) *error ref. n.r.e.*, 3 BAYLOR L. REV. 476; *Associated Indem. Corp. v. McGrew*, 142 S.W.2d 567, 569, 573-74 (Tex. Civ. App. 1940), *aff'd*, 160 S.W.2d 912, 915 (Tex. Comm'n App. 1942) *adopted*. See also the cases cited in note 56 *supra*, although in most of these cases the insurance company had not requested an alternate issue; Comment, 12 Sw. L.J. 100, 100-03 (1958); Legislative Note, 9 BAYLOR L. REV. 358 (1957).

⁶⁷ Reviewing a decision concerning a 1949 injury, the Dallas Court of Civil Appeals held the following: (1) the amendment is not retroactive, and (2) the law prior to 1957 allowed a percentage computation. *Texas Employers' Ins. Ass'n v. Vineyard*, 340 S.W.2d 106 (Tex. Civ. App. 1960) *error ref. n.r.e.* See also *Martin v. Texas Employers' Ins. Ass'n*, 339 S.W.2d 413, 414-15 (Tex. Civ. App. 1960), *rev'd on other grounds*, *Texas Employers' Ins. Ass'n v. Martin*, 347 S.W.2d 916 (Tex. 1961), in which the El Paso Court of Civil Appeals in a suit involving a 1956 injury, did not mention the 1957 amendment and ruled the statutory issue irrelevant following a finding of percentage disability.

⁶⁸ *Fidelity & Cas. Co. v. Stephenson*, 325 S.W.2d 461, 463 (Tex. Civ. App. 1959). See notes 70-72, 86 *infra* and accompanying text.

⁶⁹ *Employers Reinsurance Corp. v. Holland*, 162 Tex. 394, 347 S.W.2d 605 (1961), 13 BAYLOR L. REV. 245, 252 (1961), 40 TEXAS L. REV. 591 (1962); *Indemnity Ins. Co. of No. America v. Craik*, 162 Tex. 260, 346 S.W.2d 830 (1961), 13 BAYLOR L. REV. 245, 253. See also Barrow, *Conflicts in Jury Findings*, 26 TEXAS B.J. 23, 80-81 (1963). See notes 73-86 *infra* and accompanying text.

⁷⁰ *Fidelity & Cas. Co. v. Stephenson*, 325 S.W.2d 461, 463 (Tex. Civ. App. 1959).

⁷¹ By the term 'partial incapacity' or 'partial incapacitated,' wherever it appears in this charge is meant: Where an employee by reason of an injury sustained in the course of his employment is only able to perform part of his regular labor, or a less remunerative class that he performed prior to his injury, whereby he suffers a depreciation or reduction in his ability to work and earn money.

was a necessary element. The court did not consider whether such depreciation or reduction could be read into the verdict as it stood. If the claimant's earning capacity before the injury had been higher than his wages, a depreciation in capacity could reduce it to a figure equal to pre-injury wages.⁷² Through its silence the court indicated its retention of the pre-1957 assumption that pre-injury wages are conclusive of pre-injury wage earning capacity.

Verdicts similar to that of the preceding case were returned by two juries in 1960. Again in both, judgment on the verdict would have allowed no recovery despite a finding of partial incapacity. The trial judges ordered mistrials, and the defendants brought original mandamus proceedings in the Texas Supreme Court. The two cases, *Indemnity Ins. Co. of North America v. Craik*⁷³ and *Employers Reinsurance Corp. v. Holland*,⁷⁴ are monumental because of their discussions of both the substantive law of partial incapacity and procedural law of special issues. Amidst dissenting and concurring opinions the court granted relief (held the issues to be reconcilable) in *Craik* and denied relief (held the issues to be irreconcilable) in *Holland*—seemingly because of one arguably distinguishable term and a comma blunder.⁷⁵

The verdict in *Holland* was certainly irreconcilable by the pre-1957 implied presumption that wages and wage earning capacity were equivalents. But if wages before the injury should now be considered only an inconclusive representation of wage earning capacity before the injury, both the *Holland* and *Craik* verdicts might be viewed as consistent. However, five members of the supreme court considered the philosophy of the act (to award recovery for loss of earning capacity) superior to a literal reading of its terms. In declaring irreconcilable conflict and thus upholding the trial judge, the court indicated that, despite the 1957 statutory mandate to measure incapacity in the prescribed manner, wages before an injury were still to be considered equivalent to wage earning capacity at that time.⁷⁶

The dissents in *Holland* emphasized that since wages during incapacity are not determinative of earning capacity after the injury,⁷⁷ wages before an injury should not be determinative of earning capacity before an

⁷² This argument was later advanced by Justices Greenhill and Smith in their dissenting opinions in *Employers Reinsurance Corp. v. Holland*, 347 S.W.2d 605, 607, 610 (1961). No case authority was cited by either justice.

⁷³ 162 Tex. 260, 346 S.W.2d 830 (1961), 13 BAYLOR L. REV. 245, 253. See also Barrow, *supra* note 69, at 80-81.

⁷⁴ 162 Tex. 394, 347 S.W.2d 605 (1961), 13 BAYLOR L. REV. 245, 252 (1961), 40 TEXAS L. REV. 591 (1962). See also Barrow, *supra* note 69, at 80-81.

⁷⁵ See notes 79-82, 86 *infra* and accompanying text.

⁷⁶ In order to uphold the purpose of the act, stated Chief Justice Calvert for the majority in *Holland*, "necessarily average weekly wages before injury *must* represent, in law, earning capacity before injury." 347 S.W.2d at 606. (Emphasis in original.)

⁷⁷ See Justice Greenhill's dissent in *Holland*, *id.* at 607, citing *Texas Employers' Ins. Ass'n v. Frankum*, 145 Tex. 658, 201 S.W.2d 800, 802 (1947). Justice Smith's dissent in *Holland*, 347 S.W.2d at 610, cites *Smith v. Consolidated Cas. Ins. Co.*, 290 S.W.2d 589, 591-92 (Tex. Civ. App. 1956) *error ref. n.r.e.* For a thorough analysis of the area, see *Argonaut Ins. Co. v. Shawver*, 375 S.W.2d 510, 515 (Tex. Civ. App. 1964) *error ref. n.r.e.* For a discussion of recent cases see Akin, *Annual Survey of Texas Law—Workman's Compensation*, 21 Sw. L.J. 75, 83-84 (1967).

injury.⁷⁸ They argued that, while wages may often "represent" earnings, to use the two as absolute equivalents would rob the 1957 amendment of any effect.

Although the majority in the two cases refused to accept the dissent's logical, if somewhat mechanical, interpretation of the statute, it did adopt its own mechanical analysis of special issues. As mentioned previously, the *Little Rock* "judgment test" and the *Bradford* modification have developed objective criteria for reconciling special issues.⁷⁹ Language in the *Craik* decision perhaps outdoes both former authorities in objectivity. In *Craik* the trial court's instruction of "partial disability" was as follows:

By the term 'partial disability' is meant disability less than total where an employee, by reason of injuries sustained in the course of his employment, is only able to perform part of the usual tasks of a workman, but, nevertheless, he is able to procure and retain employment reasonably suitable to his physical condition and ability to work, or he is only able to perform labor of a less remunerative class than he performed prior to his injury *whereby he suffers a depreciation or deduction in his earning capacity*.⁸⁰

In this instruction the clause "whereby he suffers a depreciation or deduction in his earning capacity" through absence of a preceding comma, applied to only the latter of two disjunctive definitions of "partial disability." (In *Holland* a comma had preceded that clause thus making it applicable to both definitions.⁸¹) The instruction in *Craik* would thus allow the claimant to be partially disabled without suffering a loss of earning capacity. Emphasizing this grammatical reconciliation of the issues—and by negative implication indicating a new legal distinction between "incapacity" and "disability"⁸²—the court granted mandamus and ordered judgment entered for the defendant.

Holland and *Craik* have been treated lightly as the "comma cases," but

⁷⁸ See note 72 *supra* and accompanying text.

⁷⁹ See notes 30-37 *supra* and accompanying text.

⁸⁰ 346 S.W.2d at 831. (Emphasis added.) This definition was approved in *Southern Underwriters v. Schoolcraft*, 138 Tex. 323, 158 S.W.2d 991 (Tex. Comm'n App. 1942) *adopted*. In *Craik*, however, it was suggested to be less accurate than the *Holland* instruction. See note 83 *infra* and accompanying text.

⁸¹ It shall mean where an employee by reason of injuries sustained in the course of his employment is only able to perform part of the usual task of a workman, but nevertheless, is able to procure and retain employment reasonably suitable to his physical condition and ability to work or is only able to perform labor of a less remunerative class than he performed prior to his injuries, *whereby he suffers a depression or reduction in his earning capacity*.

347 S.W.2d at 606. (Emphasis added.)

⁸² Compare the following statement in *Holland*, 347 S.W.2d at 606 (where the trial court used the term "incapacity"): "It is quite clear from the foregoing language of the Workman's Compensation Act that partial incapacity *cannot exist unless* the average weekly wage earning capacity after injury is less than average weekly wages before injury." (Emphasis added.) *with* the following statement in *Craik*, 346 S.W.2d at 831-32 (where the trial court used the term "disability"): "Under the definition, the jury was authorized to find partial disability . . . even though he [the claimant] had suffered no depreciation in his earning capacity." Before the 1957 amendment to § 11 the two terms had been considered equivalents. See authority cited in *Martin v. Texas Employers' Ins. Ass'n*, 339 S.W.2d 413, 414-15 (Tex. Civ. App. 1960), *rev'd on other grounds*, *Texas Employers' Ins. Ass'n v. Martin*, 347 S.W.2d 916 (Tex. 1961). See also *Superior Lloyds of America v. Foxworth*, 178 S.W.2d 724, 727 (Tex. Civ. App. 1944) *error ref. w.o.m.*

they contain important statements on both the substantive law of workmen's compensation and the procedural law of special issues. First, the court in *Craik* indicated its preference for the *Holland* definition of partial incapacity, compelling a corollary finding of loss of earning capacity.⁸³ Secondly, the court expressly stated that a monetary award must accompany such finding to prevent conflict. Both statements seem proper in giving the claimant the benefit of the doubt as to how a verdict like that in *Holland* arose. Quite probably in such situations the jury has adopted post-injury wages as the measure of wage earning capacity after the injury, disregarding the element of necessity peculiar to post-injury employment. Such confusion is highly prejudicial to the claimant's case. To be sure, the verdict may also be caused by an improper substitution of physical incapacity for wage earning capacity. However, this confusion, detrimental to the defendant before the 1957 amendment,⁸⁴ cannot prejudice his case under the post-1957 measurement of recovery.⁸⁵ Since juror confusion, as a practical matter, can be harmful to only the claimant, interpreting the statutory section on partial incapacity to precipitate conflict in *Holland* situations seems necessary to effectuate the purposes of the act.

Secondly, the court in *Craik* showed its commitment to an objective test of special issue reconciliation. In *Holland* the *Bradford* decision, not *Little Rock*, was cited for authority. Of course *Holland* like *Bradford* involved the finding of a conflict whereas in *Little Rock* potential conflict was resolved. But perhaps another reason exists for the *Holland* decision's being one of two decisions citing *Bradford* and ignoring *Little Rock*. Perhaps the court wished to emphasize that the two disjunctive segments in the instruction of partial incapacity or partial disability must be kept separate. (As mentioned previously, a question in *Bradford* was whether the separate issues of defendant's negligence should be considered as one matter in dispute. The majority in *Bradford* insisted on keeping the issues separate, thus recognizing conflict in a verdict containing affirmative answers to not only the issues of primary negligence and contributory negligence but also the issue of unavoidable accident.) Under rigid adherence to this objective, grammatical test the *Craik* verdict contains no irreconcilable conflict. And in this respect the supreme court's companion cases are consistent with each other and with the 1959 Beau-

⁸³ 346 S.W.2d at 832.

⁸⁴ In litigation involving pre-1957 injuries insurance companies instead of claimants often appealed judgments rendered on conflicting verdicts. See, e.g., *Lloyds Cas. Co. v. Meredith*, 63 S.W.2d 1051 (Tex. Civ. App. 1933) where the jury found the following: (1) 50 per cent partial incapacity, (2) wages before the injury, \$50, (3) wage earning capacity after the injury, \$15. The trial court, following the percentage computations of recovery, ignored the third issue and rendered judgment on the first two. The court of civil appeals reversed in favor of the insurance company, holding the finding of 50 per cent disability to be immaterial. See also cases cited in notes 60-66 *supra*.

⁸⁵ Since 1957 a vital element in determining recovery is wage earning capacity after the injury. The inclusion of this term prevents a monetary reward based on juror confusion mentioned in the above text. In other words the juror can still find the claimant "incapacitated" when he has not suffered a loss in wage earning capacity, but it can award him no money.

mont decision.⁸⁶ That the supreme court, under mandamus standards, ordered a trial judge to reverse his decision because of sentence construction, indicates that special issue objectivity in reducing conflicts must supersede both trial court discretion and substantive considerations.

B. "Partial" Incapacity With Total Recovery

Just as jurors often return findings of incapacity without loss in earning capacity, so do they find partial incapacity with one hundred per cent loss of earning capacity or with a concurrent grant of total incapacity. The problem stems from the juror's failure both to limit "capacity" to earning capacity and to find "total" and "partial" mutually exclusive. Interpreting special issue verdicts in this area is especially difficult since the "judgment test" does not apply literally, *i.e.*, under either partial or total incapacity the insurance company is liable. Potential conflict concerns only the extent of the recovery allowed.

Before 1940 numerous cases were decided in Texas courts of civil appeals in which both partial and total incapacity were granted by the jury. Several courts indicated that since affirmative findings of both conditions are *technically* inconsistent, any verdict containing them presents irreconcilable conflict.⁸⁷ In most cases, in addition to the technical inconsistency a monetary discrepancy existed because the claimant had received a judgment of total incapacity larger than the amount allowable under a partial incapacity verdict. However, in 1937 in *Traders & General Ins. Co. v. Woods*,⁸⁸ the jury had awarded both total incapacity for 300 weeks and 100 per cent partial incapacity for 300 weeks. Although the trial court granted a judgment of "total incapacity for a period of 300 weeks," this resulted in the same money judgment as if the judgment had been for 100 per cent partial incapacity for 300 weeks. That is, because recovery for partial incapacity was then measured by the percentage loss of capacity (here 100 per cent, the same as for total) and because the statute allows recovery for partial incapacity up to 300 weeks⁸⁹ (here the exact length of time awarded), no monetary discrepancy could have existed between recovery for partial and total incapacity. Nevertheless, the court, quoting liberally from a contemporary case in which both technical and monetary

⁸⁶ See notes 70-72 *supra* and accompanying text. This precedence of special issue reconciliation over other matters is reminiscent of a famous supreme court case, *Pearson v. Doherty*, 143 Tex. 64, 183 S.W.2d 453 (1944). In the "Jensen Case" segment of the decision, *id.* at 457, the court considered (1) a jury finding of adverse possession for a period of ten years continuously after 1911 and before April, 1939, (2) a jury finding of non-adverse possession from 1911 to 1924, (3) conclusive evidence that if possession was non-adverse before 1924, it was non-adverse after 1924. The court first reconciled the two issues and then discarded the second issue—which was supported by evidence unless the pre-1924 possession was established as non-adverse.

⁸⁷ *Traders & Gen. Ins. Co. v. Holtzclaw*, 111 S.W.2d 759, 760 (Tex. Civ. App. 1937) *error dismissed*; *Traders & Gen. Ins. Co. v. Milliken*, 110 S.W.2d 108 (Tex. Civ. App. 1937) (*dicta*); *Traders & Gen. Ins. Co. v. Woods*, 103 S.W.2d 1058, 1059-60 (Tex. Civ. App. 1937); *Texas Employers' Ins. Ass'n v. Phelan*, 103 S.W.2d 863, 865 (Tex. Civ. App. 1937); *New Amsterdam Cas. Co. v. Reeves*, 300 S.W. 206, 207 (Tex. Civ. App. 1927).

⁸⁸ 103 S.W.2d 1058 (Tex. Civ. App. 1937).

⁸⁹ TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1957).

conflicts existed,⁹⁰ concluded: "no cited authority extant . . . supports the trial court's holding of no irreconcilable conflict in this jury's quoted answers."⁹¹

The *Woods* case is important in light of the same appellate court's decision in *Fidelity & Casualty Co. of New York v. McLaughlin*,⁹² decided the same year. At the trial the jury had found that the injury had resulted, *prior* to trial (fifty-nine weeks after the injury), in both 111 weeks temporary total incapacity and 75 per cent permanent partial incapacity. On the basis of this verdict, the trial court had awarded recovery for only permanent partial incapacity. The court of civil appeals summarily distinguished *Woods* and approved a subjective test, treating the verdict as a whole and rationalizing the intent of the jury to find 111 weeks total *followed by* permanent partial.⁹³ This subjective test, seemingly at the other end of the spectrum from the technical test, had in fact been approved by various other courts,⁹⁴ including one in which writ of error was refused.⁹⁵ In fact, considering the history of such a test and the *McLaughlin* decision, the language and holding in *Woods* seem incongruous. Nevertheless, the court maintained that it was merely distinguishing its former case.

In 1940 the Texas Supreme Court, reviewing *McLaughlin*, rejected both technical and subjective extremes and, nine years before the decision in *Little Rock*, accepted a modified "judgment test."⁹⁶ Allowing only the 75 per cent permanent partial, the supreme court stated the following rule:

[W]e think that conflicting findings should not be held to destroy each other except to the extent of the conflict. Only to that extent could such findings possibly destroy each other.⁹⁷

⁹⁰ *Texas Employers' Ins. Ass'n v. Phelan*, 103 S.W.2d 863 (Tex. Civ. App. 1937). The jury had found total permanent incapacity and partial permanent incapacity with 100 per cent loss of earning capacity. The trial court had awarded recovery for 401 weeks, longer than the maximum period allowable for partial incapacity.

⁹¹ 103 S.W.2d at 1060.

⁹² 106 S.W.2d 815 (Tex. Civ. App. 1937), *aff'd*, 137 Tex. 613, 135 S.W.2d 955 (1940).

⁹³ 106 S.W.2d at 818. The claimant on appeal had not claimed a higher recovery, but if he had the court could have granted up to 401 weeks recovery for combined total and partial incapacity. TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1967).

⁹⁴ *Traders & Gen. Ins. Co. v. Snow*, 114 S.W.2d 682, 686 (Tex. Civ. App. 1938) *error dismissed*; *Texas Employers' Ins. Ass'n v. White*, 97 S.W.2d 960, 962 (Tex. Civ. App. 1936) *writ of error granted, dismissed by agreement*; *Traders & Gen. Ins. Co. v. Ross*, 88 S.W.2d 543, 545-46 (Tex. Civ. App. 1935), *rev'd on other grounds*, 117 S.W.2d 423 (Tex. Comm'n App. 1938) *adopted* (the Commission of Appeals affirmed the finding of no conflict, using both subjective and objective language, *id.* at 425); *Aetna Life Ins. Co. v. Culvahouse*, 10 S.W.2d 803, 805-07 (Tex. Civ. App. 1928) *error dismissed* (compare the court's disclaimer on subjectivity with its analysis of the potential conflict).

⁹⁵ *Commercial Cas. Ins. Co. v. Strawn*, 44 S.W.2d 805, 807 (Tex. Civ. App. 1931) *error ref.*, in which the court stated: "The finding of the jury that appellee was totally disabled [from November 13th] necessarily carried with it the lesser finding that he was partially disabled from November 13th."

⁹⁶ *Fidelity & Cas. Co. v. McLaughlin*, 134 Tex. 613, 135 S.W.2d 955 (1940). The court introduced the problem by stating: "We now come to the most difficult question in this case, and he one on which this writ was granted." *Id.* at 957. However, the standard adopted had been used by previous courts. *Texas Employers' Ins. Ass'n v. Olesky*, 288 S.W. 244, 247 (Tex. Civ. App. 1926) *error dismissed w.o.j.* The following cases, cited previously, had indicated acceptance of a "judgment test": *Traders & Gen. Ins. Co. v. Ross*, 117 S.W.2d 423 (Tex. Comm'n App. 1938) *adopted*; *Traders & Gen. Ins. Co. v. Milliken*, 110 S.W.2d 108, 114 (Tex. Civ. App. 1937).

⁹⁷ 135 S.W.2d at 958.

For over twenty-five years the *McLaughlin* rule was conclusive in the area, and claimants were allowed recovery if they would accept the minimum recoverable under the verdict.⁹⁸ Only in one case, never cited as authority by future cases (and which itself did not cite *McLaughlin*), did pre-*McLaughlin* technical language appear.⁹⁹ On the other hand, in 1965 one appellate court both cited *McLaughlin* and reverted to subjective language to support a finding of no fatal conflict when the jury had found 200 weeks total incapacity and 200 weeks partial incapacity with no wage earning capacity.¹⁰⁰ The case was reversed on other grounds, and the supreme court's decision contains the following enigmatic line: "The other points urged by Petitioner will doubtless not arise upon another trial, and we will forego consideration of them."¹⁰¹

The most recent statement in the area lends further doubt to the continued authority of the *McLaughlin* test. In 1965 in *Insurance Co. of North America v. Brown*¹⁰² the Texas Supreme Court reviewed a verdict awarding total incapacity for nine weeks and partial permanent incapacity with no earning capacity. The court of civil appeals had affirmed the trial court's award of recovery for nine weeks of total incapacity followed by 300 weeks of partial incapacity.¹⁰³ (The amount of the weekly award remained constant since recovery for partial incapacity was computed with zero earning capacity during the injury.) The supreme court applied a *Bradford* test to reverse,¹⁰⁴ and indicated that irreconcilable conflict exists whenever a defendant succeeds in limiting the period of total incapacity in time but finds himself paying recovery after that time equal to the recovery for total incapacity. The court did not seem concerned that the total award included recovery for more than 300 weeks, the maximum period allowable for partial incapacity.

The current vitality of the *McLaughlin* test might be subject to question in light of the summary treatment given it in *Brown*. The court labeled the *McLaughlin* situation as a partial incapacity-total incapacity conflict, therefore not controlling in the partial incapacity-total *recovery* conflict present in *Brown*. The distinction falls flat by the objective test, because in either case a claimant can choose an amount about which there

⁹⁸ *Hartford Acc. & Indem. Co. v. Murphy*, 158 F.2d 506, 506-08 (5th Cir. 1946); *Houston Fire & Cas. Ins. Co. v. Brittan*, 392 S.W.2d 604, 605 (Tex. Civ. App. 1965) *rev'd on other grounds*, 402 S.W.2d 509 (1966) (see notes 100 and 101 *infra* and accompanying text); *Indemnity Ins. Co. v. Marshall*, 308 S.W.2d 174, 181 (Tex. Civ. App. 1957) *error ref. n.r.e.* Texas Gen. Indem. Co. v. *Villa*, 297 S.W.2d 231, 233 (Tex. Civ. App. 1956) *error ref. n.r.e.*; *Maryland Cas. Co. v. Foote*, 139 S.W.2d 602, 604 (Tex. Civ. App. 1940) *error ref.*

⁹⁹ *Aetna Cas. & Sur. Co. v. Block*, 161 S.W.2d 872, 874 (Tex. Civ. App. 1942). The jury had awarded permanent total incapacity and 402 weeks of 80 per cent partial incapacity. Judge Funderburk, writing for the Eastland Court of Civil Appeals, stated: "Fundamental error is manifest from the record. . . . The two findings [total permanent and partial] being directly in conflict, nullify each other."

¹⁰⁰ *Houston Fire & Cas. Ins. Co. v. Brittan*, 392 S.W.2d 604, 605 (Tex. Civ. App. 1965).

¹⁰¹ *Houston Fire & Cas. Ins. Co. v. Brittan*, 402 S.W.2d 509, 511 (Tex. 1966).

¹⁰² 394 S.W.2d 787 (Tex. 1965).

¹⁰³ *Insurance Co. of No. America v. Brown*, 385 S.W.2d 489 (Tex. Civ. App. 1964).

¹⁰⁴ 394 S.W.2d at 788-89.

is no conflict.¹⁰⁵ But a sense of *déjà vu* compels reconsideration of the *Woods* case,¹⁰⁶ seemingly discarded after *McLaughlin*.¹⁰⁷ Perhaps the court has weighed the value of the issues (similar to a "personal judgment" test¹⁰⁸) and has given an award of zero earning capacity greater importance in conflicting with partial incapacity through specificity than an award of total incapacity. By this reasoning the jury has committed itself too clearly for reconciliation devices. Moreover, in the simple partial-total conflict at least the claimant must accept an award less than total.

III. CURE AND PREVENTION OF CONFLICTS

Post-Conflict Remedies Texas law does not leave parties with incurably conflicting findings. Conflicts which are discovered before the jury is released may be called to their attention in writing for reconsideration.¹⁰⁹ The judge, in his reconsideration instruction, must avoid either commenting on the evidence or informing the jury of the effect of their answers.¹¹⁰ To be absolutely safe, he may state merely, "Your findings to issues 5 and 11 conflict with each other." However, additional instructions, such as the one following, have been allowed:

You are instructed that a person cannot be in law totally and partially disabled at the same time. If the plaintiff was totally and permanently disabled to labor, he could not be partially disabled to any extent for any period of time; stating it another way (meaning the same thing) if the plaintiff was partially disabled to any extent for any period of time he cannot be totally disabled for that period of time.¹¹¹

¹⁰⁵ In *Brown* no combination of answers could give the claimant less than 300 weeks of recovery with zero earning capacity. The trial court awarded 309 weeks combined recovery. As much as 401 weeks of combined recovery is permissible under TEX. REV. CIV. STAT. ANN. art. 8306, § 11 (1967). See also *Texas Gen. Indem. Co. v. Villa*, 297 S.W.2d 231 (Tex. Civ. App. 1956) *error ref. n.r.e.*, where the court awarded 300 weeks at 100 per cent partial incapacity; *Commercial Cas. Ins. Co. v. Strawn*, 44 S.W.2d 805 (Tex. Civ. App. 1931) *error ref.*, where the court awarded seven weeks total followed by 300 weeks 50 per cent "partial permanent incapacity." On petition for rehearing to the supreme court the claimant in *Brown* waived his rights to the nine weeks recovery for total incapacity.

¹⁰⁶ *Traders & Gen. Ins. Co. v. Woods*, 103 S.W.2d 1058 (Tex. Civ. App. 1937). See notes 88-94 *supra* and accompanying text.

¹⁰⁷ As explained in text accompanying note 89 *supra*, no monetary conflict existed in the *Woods* verdict. Under strict application of the *McLaughlin* rule, quoted in text accompanying note 97 *supra*, the verdict would have been allowed to stand. *Woods* was distinguished the same year by the same court of civil appeals. See notes 92-94 *supra* and accompanying text. It was cited for authority only once, in a pre-*McLaughlin* case. *Traders & Gen. Ins. Co. v. Milliken*, 110 S.W.2d 108, 114 (Tex. Civ. App. 1937).

¹⁰⁸ See notes 38-44 *supra* and accompanying text, explaining the often greater importance given to "specific," "ultimate," or "material" issues when in potential conflict with, respectively, "general," "evidentiary," or "immaterial" issues.

¹⁰⁹ TEX. R. CIV. P. 295. See also 3 McDONALD, TEXAS CIVIL PRACTICE § 15.03, at 1265 (1950); 57 TEX. JUR. 2d *Trial* § 554 (1964).

¹¹⁰ TEX. R. CIV. P. 272: "The judge shall so frame his charge as to distinctly separate questions of law from questions of fact, and not therein comment on the weight of the evidence. . . ." Also *cf.*, *Uehlinger v. State*, 387 S.W.2d 427, 431 (Tex. Civ. App. 1965) *error ref. n.r.e.*; *Beck v. Craven*, 360 S.W.2d 827, 830 (Tex. Civ. App. 1962).

¹¹¹ *Traders & Gen. Ins. Co. v. Carlile*, 161 S.W.2d 484 (Tex. Comm'n App. 1942) *adopted*, cited in *Pacific Indem. Co. v. Anderson*, 350 S.W.2d 360, 364 (Tex. Civ. App. 1961). *Cf.*, PEERY, TEXAS WORKMEN'S COMPENSATION PROCEDURE 22 (1960), adding one sentence to the *Carlile* instruction for purposes of the court's initial instructions. The case (the evidence point which decided the case) is discussed in *Ray*, *Annual Survey of Texas Law—Evidence*, 21 Sw. L.J. 173, 179-80 (1967), and *Akin*, *Annual Survey of Texas Law—Workman's Compensation*, 21 Sw. L.J. 75, 80 (1967).

As mentioned previously, if the conflict is not discovered until the jury has been released or if the jury is unable to resolve its own conflict, the judge must call a mistrial.¹¹² Of course, inasmuch as justice suffers by the delay, the judge may attempt to reconcile the conflict. On the other hand, if the conflict is only questionably irreconcilable but the judge sees the need for a verdict without conflict, to avoid even further delay by appeal or mandamus, he may grant judgment on the verdict and then grant a motion for a new trial. In this latter maneuver he has nearly absolute authority.¹¹³

Pre-Conflict Precautions Even under the existing special issue system many conflicts can be prevented by careful preparation of the charge. At present, however, the standard charge on workmen's compensation incapacity seems to invite conflict. Usually presented are separate issues of total incapacity, partial incapacity, average weekly wages before the injury, and average weekly wage earning capacity during incapacity. Not only are relationships of such terms concealed from jurors, but also the definitions of the terms are quite cumbersome.¹¹⁴ The resulting confusion often goes deeper than mere separation of fact questions from legal consequences, and, as mentioned before, the disease of confusion is not cured merely by patching up the symptom of irreconcilable conflict in the verdict.

Lawyers can aid the jury by presenting well-organized arguments and by clarifying terms throughout the trial. In this respect effective utilization of the blackboard cannot be overemphasized.

Judges should also attempt to ease the juror's burden. For example, the standard definition of "partial incapacity" seems both long and unnecessary—and thus confusing. A shorter form, recommended by a leading commentator¹¹⁵ and adopted by many courts,¹¹⁶ is certainly preferable. The definition is as follows: "Any degree of incapacity to work, less than total incapacity, as defined herein, whereby a person suffers a depreciation or loss in his earning capacity."

Unfortunately, even though instructions in the charge are helpful in preventing confusion, often the jury either does not read them carefully or does not comprehend the concepts with precision. Three specific changes

¹¹² TEX. R. CIV. P. 295. *Graham v. Dallas Ry. & Terminal Co.*, 165 S.W.2d 1002, 1006 (Tex. Civ. App. 1942) *error ref.*, cited at *Continental Nat'l Bank v. Hall-Page Tire Co.*, 318 S.W.2d 127, 129 (Tex. Civ. App. 1958). See also note 24 *supra* and accompanying text.

¹¹³ *Hunsinger v. Boyd*, 119 Tex. 182, 26 S.W.2d 907, 907-08 (1930); *Spikes v. Smith*, 386 S.W.2d 346, 347 (Tex. Civ. App. 1965), and authority cited therein. *Cf.*, *Flato Bros., Inc. v. McKinney*, 399 S.W.2d 957 (Tex. Civ. App. 1966).

¹¹⁴ The *Holland* definition, approved by the supreme court, is quoted at note 81 *supra*. Equally intricate and confusing are the *Craik* definition (quoted in text accompanying note 81 *supra*) and the *Stephenson* definition (quoted at note 71 *supra*).

¹¹⁵ PEERY, *op. cit. supra* note 111, at 21.

¹¹⁶ An excellent analysis with extensive case authority can be found in *Liberty Universal Ins. Co. v. Gill*, 401 S.W.2d 339, 343-44 (Tex. Civ. App. 1966) *error ref. n.r.e.* The *Gill* case was followed in *Highlands Ins. Co. v. Daniel*, 410 S.W.2d 491, 493 (Tex. Civ. App. 1967) *error ref. n.r.e.* Often the instruction quoted in text accompanying note 111 *supra* is added, as is the sentence, "A person may be totally disabled for a period of time less than permanent and then may thereafter be partially disabled." See PEERY, *op. cit. supra* note 111, at 22.

in standard special issue submission might curb conflicts and confusion. First, one issue should be presented asking whether the claimant suffered reduction of wage earning capacity. Secondly, partial incapacity and total incapacity should be asked disjunctively. And thirdly, the amount of recovery for partial incapacity should be submitted in one issue as the reduction of wage earning capacity.

1. Do you find from a preponderance of the evidence that the plaintiff, as a result of the injury, if any, suffered a reduction in wage earning capacity?¹¹⁷

Answer "Yes" or "No."

Answer: _____

If your answer to special issue No. 1 was "Yes," and only if your answer to that issue was "Yes," then you will answer special issue No. 2.

2. Do you find from a preponderance of the evidence that the plaintiff's reduction in wage earning capacity, if any, was total or partial? If you find from a preponderance of the evidence the answer to be total, then answer "Total." Otherwise answer "Partial."

Answer: _____

As mentioned previously, one cause of conflicts is the jurors' equating "incapacity" with loss of physical ability rather than wage earning ability. An issue questioning the loss of wage earning capacity, while not free from confusion, at least states the problem more accurately than "total incapacity" or "partial incapacity." The second cause of conflicts, considering the whole (total) to include all of its parts (partial), can be cured by asking in one issue whether such loss of capacity was total or partial. Although an issue on partial incapacity cannot be conditioned on a negative answer to total incapacity,¹¹⁸ the two may be asked disjunctively in the same issue.¹¹⁹ Such a method of submission would reduce conflicts and avoid placing implied emphasis on either alternative.

The proposed issues are not new. Rule 277 of the Texas Rules of Civil Procedure gives express approval to the disjunctive form of submission, even mentioning as an example the permanent-temporary disjunctive

¹¹⁷ A definition of "wage earning capacity" can be selected from the following two recommendations:

Wage earning capacity means ability and fitness to work, considered in connection with the opportunity to work. It does not necessarily mean the actual earnings, or money, that one who suffers an injury is making during the time inquired about. It refers to that which, by virtue of training, the experience, and the business acumen possessed, an individual is capable of earning. (Judge Clarence A. Guittard, 14th District Court, Dallas, Texas)

Wage earning capacity means that amount that the plaintiff can reasonably be expected to regularly earn in some type of employment reasonably suitable to his physical condition and ability to work, or the amount he can reasonably be expected to regularly earn in a type of employment of a less remunerative class than he performed prior to his injuries. (Judge Charles J. Murray, 17th District Court, Fort Worth, Texas)

¹¹⁸ See discussion at note 53 *supra*.

¹¹⁹ TEX. R. CIV. P. 277. See also cases cited in notes 120-24 *infra* and accompanying text.

issue in workmen's compensation cases.¹²⁰ In *Southern Underwriters v. Schoolcraft*,¹²¹ a 1942 Commission of Appeals decision adopted by the Texas Supreme Court, the court held that disjunctive issues on partial and total incapacity were admissible and that refusal to substitute or add the traditional issues was not error. (The court also noted the trial court's skill in allowing the jury to consider whether the claimant might be incapacitated totally for a definite period and partially thereafter.¹²²) A civil appeals case decided the same year¹²³ also accepted the disjunctive, citing rule 277 but not the *Schoolcraft* case. Both the *Schoolcraft* decision and rule 277 were cited by the only other appellate decision in which the disjunctive issue was questioned.¹²⁴ Nevertheless, although the proposed submission has received approval from cases and rule 277, it has not been used extensively in workmen's compensation suits, and it has not been recommended by the writers.¹²⁵ Adherence to individual submissions of total incapacity and partial incapacity may be attributable to (1) an unjustifiable aversion to conditioning partial incapacity in any way,¹²⁶ (2) a more justifiable fear that jurors will be hindered in finding temporary total incapacity followed by permanent partial incapacity,¹²⁷ (3) fear by plaintiffs that juries, given a choice at the first, will never award total, (4) fear by defendants that juries will award only total, and/or (5) momentum of past practice.¹²⁸ Despite some validity in the second justification, the benefits of disjunctive submission seem superior for juror comprehension.

¹²⁰ The permanent-temporary disjunctive issue has gained practically universal acceptance. See PEERY, *op. cit. supra* note 111, at 30.

¹²¹ 138 Tex. 323, 158 S.W.2d 991 (Tex. Comm'n App. 1942) *adopted*. The court did not cite rule 277, perhaps because the total-partial question was considered to have more than two possible answers (an express restriction in the rule). For example, a claimant could be totally incapacitated for a temporary period and then partially incapacitated thereafter.

¹²² 158 S.W.2d at 993.

¹²³ *Wickson v. Service Mutual Ins. Co.*, 163 S.W.2d 668, 669 (Tex. Civ. App. 1942) *error ref. w.o.m.* Perhaps the court agreed so well with the reasoning in text accompanying note 123 *supra* that it felt such reasoning to be unnecessary and therefore anything other than rule 277 to be superfluous.

¹²⁴ *Traders & Gen. Ins. Co. v. Little*, 188 S.W.2d 786 (Tex. Civ. App. 1945), *error ref. w.m.* The court attempted to distinguish *Schoolcraft* and rule 277 by stating (1) that *Schoolcraft* did not face the disjunctive issue, and (2) that rule 277 followed and clarified *Schoolcraft*. Actually, (1) the *Schoolcraft* decision did discuss the question of disjunctive even though the case was not decided on that question, and (2) rule 277 was in existence prior to the *Schoolcraft* controversy. See commentary, 2 TEX. R. CIV. P. ANN. 641 (1967). *Cf.*, *Employers' Reinsurance Corp. v. Brantley*, 173 S.W.2d 233 (Tex. Civ. App. 1943) *error ref.*

¹²⁵ LIECK, LEGAL TRIAL AID 365-66 (2d rev. ed. 1959); PEERY, *op. cit. supra* note 111, at 34-35; STAYTON, TEXAS FORMS 360-61 (1962) (prepared by Mr. Peery). *But cf.*, HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS 77-78 (1959) which gives approval to the disjunctive (especially at note 22).

¹²⁶ The following statement in PEERY, *op. cit. supra* note 111, at 35, seems unduly critical: "The *Stone* case is authority for the conditional submission of this issue, but the writer recommends that the issue always be submitted unconditionally, as our appellate courts sometimes lack the luster of the jewel of consistency." Moreover, a disjunctive submission need not rely on the *Stone* decision for its validity. See notes 118-23 *supra* and accompanying text.

¹²⁷ *But see* discussion in *Southern Underwriters v. Schoolcraft*, 138 Tex. 323, 158 S.W.2d 991, 992-93 (Tex. Comm'n App. 1942) *adopted*. See also text accompanying note 122 *supra*.

¹²⁸ LIECK, *op. cit. supra* note 125, at 365, states merely: "Now, if one wishes, he can submit both total and partial in the same issue and it is proper, but the author does not deem it a satisfactory way, and prefers the single issue inquiring on each of these incapacities."

3. What amount in dollars, if any, do you find to be the plaintiff's average weekly reduction in wage earning capacity?

In answering the above issue, you will consider [your answer to issue _____] [_____ (stipulated)]¹²⁹ as representing his wage earning capacity before the injury.

The final issue in the series has not been tested in appellate courts, but it does not seem to violate any rules set by either the legislature or the courts. It does not measure recovery by percentages; it does place emphasis on the claimant's reduction of earning capacity rather than on his present earnings. Whereas the standard issues present both seemingly unrelated issues and a wealth of confusing terms, companion issues of incapacity and reduction would keep jurors thinking along parallel lines and thus avoid the wage-capacity confusion. In fact, the term "wages" is not even needed because the amount either will be stipulated or will be determined by the jury in a prior issue. The instruction seems proper after *Holland*.¹³⁰

The above three special issues, providing the basis for a new charge concerning partial incapacity, seem to alleviate much of the problems that caused the *Craik-Holland* and *Brown* conflicts. In an area regulated by statute in part to provide speedy remedies, it is ironic indeed that the statute itself causes unnecessary delay. Moreover, if such conflicts are merely symptoms of a more serious disease—juror confusion—cures should be tested continually. If the traditional issues are being honored mainly because of their own momentum, perhaps a new look would be advantageous to jurors and lawyers alike.

¹²⁹ If an average weekly wage before the injury is stipulated, that dollar amount can be used. If not, the amount will have been determined by an answer to a prior issue. In either case the jury need only compare dollar amounts. It need not consider the term "wages" in determining reduction in "wage earning capacity."

¹³⁰ If the remainder [from the statutory computation] is to represent extent of loss of earning capacity, necessarily average weekly wages before injury *must* represent, in law, earning capacity before injury. *Employers Reinsurance Corp. v. Holland*, 347 S.W.2d 605, 606 (1961). (Emphasis in original.) See note 76 *supra* and accompanying text.