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Revised Rule 227 - A Better Special Verdict System for Texas

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THE Texas Supreme Court's revision of rule 2771 which became effective September 1, 1973, marks the first major change in the manner for the submission of jury issues since 1913.2 Hopefully the burdens on jurors, practitioners, and the courts will be lightened by the change. The effective date for the revised rule coincided with the effective date for the adoption of comparative negligence3 in Texas, and the two reforms should simplify trials in a great number of cases. This Article is written with two purposes in mind: (1) to explain the probable nature of the changes in the practice which will flow from the revision, and (2) to discourage the importation of former practices, especially in the area of negligence law, into the new system. The revised rule commences:

In all jury cases the court may submit said cause upon special issues without request of either party, and, upon request of either party, shall submit the cause upon special issues controlling the disposition of the case that are raised by the written pleadings and the evidence in the case, except that, for good cause subject to review or on agreement of the parties, the court may submit the same on a general charge.4

The quoted portion of the rule means that the special verdict will be the dominant mode of jury submission in Texas. Sound reasons support the special verdict practice as a fairer method of trial than that afforded by the general charge. Professor Sunderland wrote in 1920:

The peculiarity of the general verdict is the merger into a single indivisible residuum of all matters, however numerous, whether of law or fact. It is a compound made by the jury which is incapable of being broken up into its constituent parts. No judicial reagents exist for either a qualitative or a quantitative analysis. The law supplies the means for determining neither what facts were found, nor what principles of law were applied, nor how the application was made. There are therefore three unknown elements which enter into the general verdict: (a) the facts; (b) the law; (c) the application of the law

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1 Tex. R. Civ. P. 277.
2 In 1913 the Texas Legislature established the Texas special issue practice 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." Ch. 59, § 1, [1913] Tex. Laws 113.
3 Ch. 28, § 1, [1973] Tex. Laws 41.
to the facts. And it is clear that the verdict is liable to three sources of error, corresponding to these three elements. . . . No one but
the jurors can tell what was put into it [the general verdict] and the
jurors will not be heard to say. The general verdict is as inscrutable
and essentially mysterious as the judgment which issued from the an-
cient oracle of Delphi. Both stand on the same foundation—a pre-
sumption of wisdom. 6

The same view more recently was expressed by Chief Judge Brown of the
Fifth Circuit in a concurring opinion that criticized the federal practice which
resulted in a remand of a cause for another trial. 6 He urged the judges
of the courts in the circuit to "take a page from the book of their brothers
in Texas by using that remarkable tool, F.R.Civ.P. 49(a)." 7 The opinion
continued, "a case that could be disposed of by a simple rendition had spe-
cial interrogatories been employed, goes back for a second, and wholly
needless trial." 8 Judge Brown said that the special verdict system is not
only a doubt eliminator but also a waste eliminator. The superiority of the
special verdict over the general charge appears to be the view of most
of the scholars who have compared the systems. 9

The special verdict originated sometime during the twelfth century. It
was an invention of the common law, and it came in response to the de-
mands of jurors that they be required only to answer questions of fact,
leaving the doom to the bench. 10 Jurors were thus shielded from the pen-
alties of the attaint. Six centuries later, article VII of Plans and Pow-
ers of the Provisional Government of Texas, adopted November 13, 1835,
provided for jury trials in all cases, 11 and the First Congress of the Provi-
sional Government of Texas passed an Act Establishing the Jurisdiction
and Powers of the District Courts. 12 Section 46 of that Act provided that
the jury "shall report in their verdict all the material facts of the case
. . . ." Then, on January 25, 1841, the Fifth Congress passed an act
empowering the judges of district courts to submit issues of fact to a jury in
chancery cases whereby the judge could "order issues of fact to be made up
and submitted to a jury empaneled for that purpose . . . ." 13 The founda-
tion for the special verdict was laid.

5 Sunderland, Verdicts, General and Special, 29 Yale L.J. 253, 258 (1920).
6 Jones v. Petroleum Carrier Corp., 483 F.2d 1369 (5th Cir. 1973).
7 Id. at 1372.
8 Id.
9 See, e.g., Skidmore v. Baltimore & O. Ry., 167 F.2d 54 (2d Cir.), cert. denied,
335 U.S. 816 (1948); Brown, Federal Special Verdicts: The Doubt Eliminator, 44
F.R.D. 338 (1967); Denton, Informing a Jury of the Legal Effect of Its Answers, 2
St. Mary's L.J. 1 (1970); Driver, A More Extended Use of the Special Verdict, 9
F.R.D. 495 (1949); Green, A New Development in Jury Trial, 13 A.B.A.J. 715 (1927);
McCormick, Jury Verdicts upon Special Questions in Civil Cases, 2 F.R.D. 176 (1941);
Nordbye, Use of Special Verdicts Under Rules of Civil Procedure, 2 F.R.D. 138 (1941);
Sunderland, supra note 5; Wright, The Use of Special Verdicts in Federal Court, 38
10 2 F. Pollock & F. Maitland, The History of English Law 630 (2d ed. 1898).
14 An Act To Regulate the Granting and Trial of Injunctions, and To Empower the
Judges of the District Courts To Submit Issues of Fact to a Jury in Chancery Cases 9
The First Legislature of the State of Texas included in its laws a provision for the special verdict in civil cases. It was provided that “the jury may find and return a special verdict in writing, in issues made up under the direction of the court . . . .” The revision of the statutes in 1879 found a refinement in the provisions for the special verdict. The statutes defined both the general and the special verdicts and it was provided that “[t]he special verdict must find the facts as established by the evidence, and not the evidence by which they are established, and the findings must be such as that nothing remains for the court but to draw from such facts the conclusions of law.”

Finally, in 1913 article 1984a was passed, which was destined to become, with but very little change, the basis for the submission of special issues in Texas until September 1, 1973. For the first time, a party could demand that his case be submitted upon special issues, thereby no longer leaving the mode of submission of his case solely to the discretion of the trial court as had previously been the rule. Unfortunately, article 1984a contained the language that “[s]uch special issues shall be submitted distinctly and separately, and without being intermingled with each other, so that each issue may be answered by the jury separately.” That phrase introduced a system of fractionization of special issues far beyond that employed in any other jurisdiction in the common-law world.

Rule 277 carried the phrase forward into the 1941 Rules of Civil Procedure and, though often criticized, few attempts were made to correct the rule. Perhaps the strongest attempt was made at the Supreme Court Advisory Committee conference of April 22, 1949. Franklin Jones of Marshall proposed the repeal of rules 277-279 and the adoption of a rule similar to the federal rule 49. Professor Robert W. Stayton, on the other hand, advocated a continuance of rule 277 with modifications, the most important of which would have required that “all issues should be submitted in plain and simple language,” and that the burden of proof be eliminated from the framing of the issue. The victorious opposition to both these proposed changes was led by Roy McDonald. He stated the following reason for his opposition to the adoption of the federal rule:

In effect this proposal would return Texas to the general charge, or to the general charge supplemented by special issues. We are presumably not yet ready to adopt in Texas the federal practice which permits the judge to array the evidence . . . . To adopt Federal Rule 49 while still restraining our trial judges from commenting on the evi-

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16 “A general verdict is one whereby the jury pronounce generally in favor of one or more parties to the suit upon all or any of the issues submitted to them.” Tex. Civ. Stat. art. 1329 (1879).
17 “A special verdict is one wherein the jury find the facts only on issues made up and submitted to them under the direction of the court.” Tex. Civ. Stat. art. 1330 (1879).
19 Ch. 59, § 1, [1913] Tex. Laws 113.
20 The effective date of the newly promulgated TEX. R. CIV. P. 277.
dence would be inviting greater confusion than exists at present. I have been told by older lawyers... that the special issue practice was adopted because it was virtually impossible to prepare a general charge in a complicated case which would stand up on appeal. Our present bar is largely unfamiliar with the general charge in civil cases and the proposal would in my opinion create turmoil.22

I. THE "DISTINCTLY AND SEPARATELY" RULE HAS BEEN ABANDONED

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.23

The most dramatic change effected by the revised rule is the abandonment of the requirement that special issues be submitted distinctly and separately. The trial judge is now afforded wide discretion in the method of submitting special issues. He may submit an issue broadly, even though it includes a combination of elements or issues, or he may submit the issues more narrowly, by listing and grouping the specific elements of the claim.

What is an issue? Justice Sharp, in Wichita Falls & Oklahoma Railway v. Pepper, struggled for an answer, but after reviewing many precedents and texts, could only conclude that "the decisions are in hopeless conflict."24 A tremendous amount of skill and thought has not resolved the problem upon the basis of any helpful rule.25

23 TEX. R. CIV. P. 277.
24 134 Tex. 360, 368, 135 S.W.2d 79, 83 (1940).
25 See Freeman v. McAnnich, 87 Tex. 132, 135, 27 S.W. 97, 98 (1894); Jack Cane Corp. v. Gonzalez, 410 S.W.2d 953 (Tex. Civ. App.—San Antonio 1967); G. Hodges, SPECIAL ISSUES SUBMISSION IN TEXAS § 35 (1959); 3 R. McDonald, TEXAS CIVIL PRACTICE § 12.06.1 (rev. ed. 1970); Green, Identification of Issues in Negligence Cases, 26 Sw. L.J. 811 (1972); Comment, Ultimate or Controlling Issues in Texas:
Revised rule 277 should clarify this problem that has existed for six decades. The rule now states that it shall not be objectionable that a question is general or includes a combination of elements or issues. This is at the opposite pole from the former rule that required the issues to be distinct and separate. Let us suppose a case in which the judge submits the issue, “On the occasion in question, was the defendant negligent?” followed by the question conditioned upon the first answer, “On the occasion in question, was such negligence a proximate cause of the occurrence in question?” Such a broad submission boggles the mind of Texas practitioners who have lived under Fox v. Dallas Hotel Co. for half a century. On the other hand, most jurisdictions would not regard such a submission as strange at all, and it would seem that the revised rule would permit that form of submission. The alternative form for special verdicts suggested in the rule is similar to the form employed by Wisconsin. Like Texas, that jurisdiction approves both the “ultimate fact” verdict, which would embrace the first broad form supposed above, and the alternate listing form, which it terms the specific special verdict. The Pattern Jury Charges Committee of the State Bar of Texas has recently developed a revised form (included in the pocket supplement to volume I of Texas Pattern Jury Charges) in keeping with the second alternative method. This form of the special verdict appears to be the one most favored in Wisconsin.

Practitioners rightly wish to avoid risking their client’s rights and are consequently concerned that the new practice leaves them with no “black letter” precedents to which they might anchor. An analysis of the prior Texas system, however, reveals three areas to which the practitioner might turn in attempting to formulate the parameters within which he must now work. First, there are the precedents, primarily in the personal injury fields of the

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Special Issue Submissions, 25 TEXAS L. REV. 391 (1947); 10 TEXAS L. REV. 217 (1932), listing four different meanings for the term.

26 111 Tex. 461, 240 S.W. 517 (1922).

27 It shall be discretionary with the court whether to submit such questions in terms of issues of ultimate fact, or to submit separate questions with respect to the component issues which comprise such issues of ultimate fact. In cases founded upon negligence, the court may submit separate questions as to the negligence of each party, and whether such negligence was a cause without submitting separately any particular respect in which the party was allegedly negligent. Wis. Stat. § 270.27 (1957). The Wisconsin statute has been construed:

Prior to the above amendment it was necessary in a negligence action to submit separate questions concerning each respect in which it was alleged that a party was negligent provided there was credible evidence to support an affirmative answer. For example, it might be necessary to submit separate questions with respect to speed, lookout, management and control, and failure to yield the right-of-way. The amendment authorized the use of an ultimate fact verdict which merely inquires, “At and immediately before the collision was defendant John Doe negligent in the operation of his motor vehicle?” followed by a causation question to be answered in the event the negligence question was answered in the affirmative.


28 See Appendix. The material contained in the appendix is taken from Sample Charge “A” of the Explanatory Note in 1 Texas Pattern Jury Charges 11 (Supp. 1973).

29 C. HEFT & C. HEFT, supra note 27, § 8.30.
law, which cut the issues very fine and which the new rule is obviously try-
ing to eliminate. Second, we have the precedents in the fields of law other
than personal injury, which have long permitted broader issues. And, fi-
nally, there are the precedents which for a period of time permitted the
submission of the broad issue inquiring as to the proper control of a ve-

dicle.

A. The Practice Which Rule 277 Rejects

Fox v. Dallas Hotel Co. declared the meaning of submitting issues
“distinctly and separately” as required by the legislature in 1913. Alexander Fox died as the result of injuries he sustained while trying to operate
a defective elevator. In the action brought by his widow and children the
trial court separately submitted each group of issues inquiring into the spe-
cific acts of negligence on the part of the defendant Dallas Hotel. Only one
issue, however, was submitted inquiring into Fox’s possible contributory
negligence, even though the plaintiffs had pleaded many specific acts. The
trial court simply asked whether Alexander Fox was “guilty of contribu-
tory negligence in his conduct in, around, or about the elevator, or the shaft
thereof, prior to or at the time he was injured?” The supreme court re-
jected that broad submission because the statutes controlling the submission
of special issues made it “the duty of the court in trials by jury: First, to
submit all the controverted facts issues made by the pleadings; [and] second,
to submit each issue distinctly and separately, avoiding all intermingling
. . . .” With Fox the course for negligence submissions was set.

Thirty-one years after Fox the supreme court restated the rule in Roosth & Genecov Production Co. v. White. Lee White sued for injuries he suf-
ered in the collapse of an oil well drilling derrick owned by Roosth & Gene-
cov Production Company. He alleged more than twenty specific negligent
acts or omissions by the defendant; but the trial court, over objection, sub-
mitted the broad issue which asked if “such completed derrick, as it stood,
was defective at the time it was furnished” by Roosth & Genecov. The
supreme court rejected the issue by reason of the Fox rule.

30 111 Tex. 461, 240 S.W. 517 (1922).
32 111 Tex. at 476, 240 S.W. at 522.
33 Id. at 475, 240 S.W. at 521-22.
34 In Solgaard v. Texas & N.O.R.R., 149 Tex. 181, 185, 229 S.W.2d 777, 779 (1950), the full extent of the specificity required for negligence issues was realized when the court stated that “each party is entitled to adequate presentation of all details of fact supported by pleadings and evidence and essential to its own theory of the case.” (Emphasis added.) See also Kainer v. Walker, 377 S.W.2d 613 (Tex. 1964); Agnew v. Coleman County Elec. Coop., 153 Tex. 587, 272 S.W.2d 877 (1954); City of Fort Worth v. Lee, 143 Tex. 551, 564, 186 S.W.2d 954, 961 (1945); Walgreen-Texas Co. v. Shivers, 137 Tex. 493, 154 S.W.2d 625 (1941); Wichita Falls & Okla. Ry. v. Pepper, 134 Tex. 360, 135 S.W.2d 79 (1940); Coleman v. Texas & Pac. Ry., 241 S.W.2d 308, 310 (Tex. Civ. App.—Dallas 1951), error ref.; Weidmer v. Scott, 48 S.W.2d 389 (Tex. Civ. App.—Fort Worth 1932), error ref.; 42 Texas L. Rev. 931 (1964); 8 S. Tex. L.J. 142 (1966).
35 152 Tex. 619, 262 S.W.2d 99 (1953).
The real significance of the opinion in *Roosth* is that the court exposed the difference in the submission of negligence cases and the submission of cases in other fields of the law. It cited some of its own decisions in recognition of the fact that a narrow specificity was required in the former, while issues which included a combination of elements or issues were permissible in the latter. In other words, the court fully acknowledged that the same rule 277 had produced two different forms for the Texas special issue practice—one for negligence cases and another for other kinds of cases.

*Fox* and *Roosth* symbolized the prior Texas special issue practice with its excess of issues. The new rule 277 has attempted to revise that system by providing that an issue may include a combination of elements or issues. An understanding of the *Fox*-type submission will teach the practitioner what the revised rule is attempting to avoid.

**B. Precedents in Fields of Law Other than Negligence Law**

We can now import into negligence cases the longstanding special issue practice employed in non-negligence cases. This is what the court rejected in *Roosth*. A study of some of the leading non-negligence cases reveals that the narrow *Fox* submission was, in fact, the exception rather than the rule.\(^\text{37}\)

The city of Houston, pursuant to one of its ordinances, sued Mrs. Aneeth P. Lurie for a declaration that two buildings owned by her should be condemned as serious fire hazards to life and property.\(^\text{38}\) The city alleged numerous specific facts as to the construction, maintenance, condition, and use of the buildings which would make the buildings fire hazards. Over objections filed by Mrs. Lurie, the trial court refused to inquire into each specifically alleged fact and submitted the case on only two issues.\(^\text{39}\) An issue was submitted as to each building inquiring whether it “constitutes a serious fire hazard to life and property.”\(^\text{40}\) Justice Smedley, writing for a unanimous court, concluded that such submission was appropriate as it submitted “the controlling issues made by the written pleadings and the evidence.”\(^\text{41}\) He reasoned:

The ultimate and controlling fact which the petitioner seeks to establish in this case is that the buildings in their construction, present condition and use are serious fire hazards. The several specific allegations that the buildings are dilapidated, of rotten material, cut into small rooms and halls, . . . and the other specific allegations . . . are allegations of matters of fact that fall within the scope of the ultimate question. They are evidentiary in their character, being facts that


\(^{38}\) City of Houston v. Lurie, 148 Tex. 391, 224 S.W.2d 871 (1949).

\(^{39}\) Actually, there were four issues; however, the two issues inquiring as to whether each of the two buildings could not “be repaired so as to no longer constitute a serious fire hazard to life and property without undertaking repairs amounting to a substantial reconstruction of the buildings” are omitted from this discussion as irrelevant. See Lurie v. City of Houston, 220 S.W.2d 320, 323 (Tex. Civ. App.—Galveston), rev'd, 148 Tex. 391, 224 S.W.2d 871 (1949).

\(^{40}\) Id.

\(^{41}\) 148 Tex. at 399, 224 S.W.2d at 876.
tend to prove that the buildings are fire hazards, facts to be consid-
ered by the jury in answering the issues submitted.\textsuperscript{42}

In the divorce case of Howell v. Howell\textsuperscript{43} the Texas Supreme Court, on
certified question, was asked to determine whether the case was properly
submitted by the use of a single issue inquiring generally if the husband had
committed acts amounting to cruel treatment of the wife.\textsuperscript{44} In approving
the submission, the court stated:

The issue to be determined is the total effect of the defendant’s con-
duct considered in the light of all of the evidence. This in many cases
will require the jury to consider a number of facts, but a ‘group of
facts’ may constitute the ultimate issue rather than one single fact.
See Fox v. Dallas Hotel Co., 111 Tex. 461, 475, 240 S.W. 517, 522.
Where, as in this case, the one ultimate issue embraces a number of
subsidiary facts, it is not improper to include in the issue these several
facts, and a special issue so framed is not duplicitous.\textsuperscript{45}

An adverse possession case is also submitted with broader issues than
those dictated by Fox, as illustrated by Pearson v. Doherty.\textsuperscript{46} The appeal
in Pearson was based upon the contention that two of the issues were in
irreconcilable conflict. The first question inquired whether Pearson “had
peaceable, adverse and continuous possession of” the land in question and
whether he had been “using or enjoying the same for a period of 10 years
or more.”\textsuperscript{47} The second question inquired whether during the same ten-
year period Pearson “was holding the land . . . adversely and in hostility
against the true owner.”\textsuperscript{48} The jury answered “yes” to the first question
and “He was not” to the second question. As the trial court had, in con-
nection with the first question, defined “adverse possession” as the actual
holding of the land with a claim of right “hostile to the claim of another,”
the supreme court held that the answers were in irreconcilable conflict.
Both questions were found to be inquiring as to whether or not Pearson
was holding the land with hostility as against Doherty, the holder of record
title. The significance of this opinion is found in the instructions that on
retrial the second question should be eliminated and an instruction substi-
tuted in its place which would tell the jury that, in order to answer the first
question in the affirmative, they must find that Pearson held the land “in hos-
tility to the claim of Doherty.”\textsuperscript{49}

\textsuperscript{42}Id.
\textsuperscript{43}147 Tex. 14, 210 S.W.2d 978 (1948).
\textsuperscript{44}The issue approved was “Do you find from a preponderance of the evidence
that the acts or conduct of the defendant toward the plaintiff, if any, constituted such
excesses, cruel treatment, or outrages, of such a nature as to render their further living
together as husband and wife insupportable, as that term is hereinafter defined in this
charge?” “Insupportable” was then defined to mean “incapable of being supported, or
borne, unendurable, intolerable, insufferable.” Howell v. Howell, 206 S.W.2d 616, 618
\textsuperscript{45}Id. at 67-68, 183 S.W.2d at 454.
\textsuperscript{46}Id. at 67-68, 183 S.W.2d at 454-55.
\textsuperscript{47}See also Green v. Blanks, 342 S.W.2d 141 (Tex. Civ. App.—Austin 1961), error
ref. n.r.e.; Mills v. Vinson, 342 S.W.2d 33 (Tex. Civ. App.—Texarkana 1960), error
In *Hough v. Grapotte* the plaintiff Hough, as executor of the estate of George Galbraith, had to prove that Galbraith was domiciled in Iowa, a non-community property state, when he purchased certain real property in order to establish the separate nature of the property. The trial court submitted a single issue asking whether Galbraith was domiciled in Iowa on the date the property was purchased, and then defined “domicile” as including both the elements of residence and an intention to make the residence his permanent home. In response to the proposition that the trial court erred in not submitting separate issues as to each element, then-Commissioner Hickman responded, “Multiplicity of issues should be avoided and only those ultimate issues submitted which will form the basis of a judgment. The issues of residence and intention are merely elements of the controlling issue of domicile and were included in and disposed of by the answer to the more comprehensive issue.”

Finally, there is the case of *Grieger v. Vega*, wherein Mrs. Vega sued Grieger for the wrongful killing of her son. Grieger answered with a claim of self-defense. The trial court sent the case to the jury on only two questions, inquiring as to whether “the action of Fred Grieger in shooting and killing the deceased . . . was wrongful” and as to the amount of the damages. Along with the first issue the court submitted an exhaustive definition of “wrongful,” covering forty-nine lines of the *South Western Reporter*. By choosing this form of submission, the trial court avoided submitting the many separate issues relating to self-defense, as requested by Mrs. Vega. The supreme court, in upholding the trial court’s conclusion that all the elements of self-defense that are raised by the evidence should be included in one instruction and submitted in one issue, concluded:

The method employed by the trial court of grouping several elements of an ultimate issue into one special issue is to be commended. The ultimate issue in this case was whether or not the killing was wrongful. The instruction was placed in the charge for the purpose of enabling the jury to answer that particular question, and it was not error for the court to decline to break down that instruction and submit the elements of self-defense in the special issues requested.

Although there has not been complete acceptance of the above approach, there is a wide-ranging scope of the law which is committed to such a practice. It is to this type of decision which the bench and bar can look to

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ref. n.r.e.; Viduarri v. Bruni, 179 S.W.2d 818 (Tex. Civ. App.—San Antonio 1944), error ref. w.o.m.; 23 Texas L. Rev. 190 (1945).
127 Tex. 144, 90 S.W.2d 1090 (1936).
Id. at 146, 90 S.W.2d at 1091.
153 Tex. 497, 271 S.W.2d 85 (1954).
8. The first requested issue “inquired whether or not at the time Arthur Vega was killed he was making an assault upon petitioner; another whether the assault was of such a nature as to produce in petitioner a reasonable expectation of death or bodily injury; another whether petitioner used more force than was necessary in his self-defense; and another whether petitioner had at his disposal other reasonable means of repelling the attack then being made upon him, if any.” Id. at 503, 271 S.W.2d at 88. See 34 Texas L. Rev. 138 (1955).
153 Tex. at 504, 271 S.W.2d at 88.
54 *Common law marriage*: The court asked the jury whether there was a common law marriage between George Brown and Merenda Brown, and instructed the jury that
receive guidance from the past practice in Texas in submitting broader issues in negligence cases.

C. The Proper Control Issue

There are also many precedents which developed between 1935 and 1965 during which time the broad "proper control" issue was tolerated in automobile cases. Strangely, the issue was not attacked as being too broad until Barclay v. C.C. Pitts Sand & Gravel Co. The trial court had submitted issues which inquired whether the defendant (1) was driving at an excessive speed, (2) was driving with defective brakes, and (3) failed to keep its truck under proper control. A unanimous court found that the first two issues were distinct and separate issues but the third one was too general because it included the first two issues, and reversed the judgment because the plaintiff was not entitled to both a specific and a general submission of the same issues. Of greater significance, however, was the disapproval of the further use of the proper control issue. Thus ended the practice which was leaning toward a broader submission of issues even in negligence cases.

Four times previously the issue had reached the attention of the supreme court without disapproval, and a number of specific matters had been recognized as falling within the ambit of "proper control." Although the such a marriage required an agreement between unmarried persons, their living together, and their holding themselves out to the public as husband and wife. Brown v. Brown, 256 S.W.2d 143 (Tex. Civ. App.—Beaumont 1953), error ref. n.r.e. Child custody: Fatheree v. Eddleman, 363 S.W.2d 784 (Tex. Civ. App.—Amarillo 1962). Condemnation: The court submitted a single damage issue as to four separate remainder tracts. State v. Oakley, 163 Tex. 463, 356 S.W.2d 909 (1962). Contracts: Defendant contractor's issue asked whether the contractor was prevented from substantial performance of the contract by the acts of the maker of the note or her agent. Kleiner v. Eubank, 358 S.W.2d 902 (Tex. Civ. App.—Austin 1962), error ref. n.r.e. See also Houston Fire & Cas. Ins. Co. v. Riesel Ind. School Dist., 375 S.W.2d 323, 328 (Tex. Civ. App.—Waco 1964), error ref. n.r.e.; Sands Motel v. Hargrave, 358 S.W.2d 670 (Tex. Civ. App.—Texarkana 1962), error ref. n.r.e. Workmen's compensation: "Do you find from a preponderance of the evidence that the plaintiff . . . sustained an accidental injury to his body on or about the 30th day of July, 1938?" Maston v. Texas Employers' Ins. Ass'n, 160 Tex. 439, 331 S.W.2d 907 (1960); Eubanks v. Texas Employers' Ins. Ass'n, 151 Tex. 67, 246 S.W.2d 467 (1952); Southern Underwriters v. Boswell, 138 Tex. 255, 260, 158 S.W.2d 280, 283 (1942); Shirley, Special Issue Submission in Workmen's Compensation Cases, 18 Texas L. Rev. 365 (1940). Wrongful collection efforts: Issue approved which inquired whether the defendant, through its agents, servants or employees made any unreasonable collection efforts against Mr. Crit C. Latham, from, on, or about May 1957. Employee Fin. Co. v. Latham, from, on, or about May 1957. Employee Fin. Co. v. Latham, 363 S.W.2d 899 (Tex. Civ. App.—Fort Worth), error dismissed. 369 S.W.2d 927 (Tex. 1963). See also Moore v. Savage, 362 S.W.2d 298 (Tex. 1962); Signature Indorsement Co. v. Wilson, 392 S.W.2d 484 (Tex. Civ. App.—Texarkana 1965), error ref. n.r.e. See also G. Hodges, supra note 25, § 40 (1969 Supp.); 3 R. McDONALD, supra note 25, § 12.06.1.

56 387 S.W.2d 644 (Tex. 1965).

57 Texas & N.O. Ry. v. Hayes, 156 Tex. 148, 293 S.W.2d 484 (1956); 3 R. McDONALD, supra note 25, § 12.09.1.

58 Triangle Cab Co. v. Taylor, 144 Tex. 568, 192 S.W.2d 143 (1946); Blaugrund v. Gish, 142 Tex. 379, 379 S.W.2d 266 (1944); Schuhmacher Co. v. Holcomb, 142 Tex. 332, 177 S.W.2d 951 (1944); Northeast Tex. Motor Lines v. Hodges, 138 Tex. 280, 158 S.W.2d 487 (1942).

proper control issue was out of step with the “distinctly and separately” form of jury submission, the revised rule 277 should restore it or a similar broad issue to the practice.

II. MORE EXPLANATORY INSTRUCTIONS

In submitting the case, the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict and in such instances the charge shall not be subject to the objection that it is a general charge.\(^6\)

Explanatory instructions should now replace many of the special issues which were formerly employed in negligence cases. In looking for guidance in drawing up instructions under our new system, the practitioner has two available sources. First, he may look to the recent supreme court decisions which, even though written under the old rule, were written with an obvious intent to simplify trials.\(^61\) Second, he would profit from a study of the Wisconsin experience under a special verdict system which is very similar to that authorized by our revised rule 277.\(^62\) That jurisdiction also has comparative negligence.\(^63\) In Wisconsin a system has developed which appears to give more emphasis to the correctness of instructions than to the

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Footnotes:

61. Southern Pac. Co. v. Castro, 493 S.W.2d 491 (Tex. 1973) (substituted an instruction for the excuse issue); Adam Dante Corp. v. Sharpe, 483 S.W.2d 452 (Tex. 1972) (eliminated the awkward open and obvious issue as well as most of the discovered peril issues); Yarborough v. Berner, 467 S.W.2d 188 (Tex. 1971) (substituted instructions for the sudden emergency and unavoidable accident issues); Moulton v. Alamo Ambulance Serv., Inc., 414 S.W.2d 444 (Tex. 1967) (eliminated issues as to mitigation of damages); Dallas Ry. & Terminal Co. v. Bailey, 151 Tex. 359, 250 S.W.2d 379 (1952) (eliminated new and independent cause). See also Jackson v. Fontaine’s Clinics, Inc., 499 S.W.2d 87 (Tex. 1973); Green, The Submission of Issues in Negligence Cases, 18 U. MIAMI L. REV. 30 (1963); Green, Assumed Risk as a Defense, 22 LA. L. REV. 77 (1961).
63. Id. § 895.045.
refinement of the issues; primary and contributory negligence issues are submitted by a listing of the specifically claimed negligent acts or omissions, and instructions then help the jury in answering those rather simple issues.

The common-law negligence system has been harsh to claimants and defenders alike. A system which results in total victory or total defeat when there is fault on both sides, has been the fertile field for the emergence of a number of ameliorative concepts designed to make the system fairer. There has thus been a spin-off of a number of satellite concepts such as the no-duty issues, voluntary assumption of risk, attractive nuisance, sudden emergency, imminent peril, discovered peril, excuse, the rescue doctrine, and unavoidable accident. There are others. Some of these doctrines have been analyzed and refined into a number of subsidiary elements or facets and each has often been the basis for a separate special issue in Texas. The new rule will probably eliminate the necessity to submit most of these concepts by separate special issues.

Our adoption of comparative negligence law also presents some new practice problems. At common law, contributory negligence is a total bar to recovery; not so, under comparative negligence. Voluntary assumption of risk is an outgrowth of contributory negligence and it, too, is a total bar to recovery at common law. A future decision must be made whether a system which rejects contributory negligence as a total bar can retain voluntary assumption of risk as such a bar.

III. Do Not Comment—Do Not Advise the Jury of the Effect of Answers

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers where it is properly a part of an explanatory instruction or definition.

The change in this part of the rule is guarded. The court may incidentally comment on the weight of the evidence or advise the jury of the

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64 C. Heft & C. Heft, Comparative Negligence Manual (1971); J. Winslow, Winslow's Forms of Pleading and Practice Annotated (1934); Wisconsin Jury Instructions (Conway ed. 1963).
effect of the answers if the comment or advice is properly a part of the explanatory instruction or definition. Comments on the weight of the evidence and advice about the effect of the answers have been forbidden in Texas since 1853, but there are still differences of opinion about the rule. The revised rule accepts the premise that the design of the special verdict is to elicit a statement from jurors concerning a disputed fact and that the jurors' concern is not that of achieving a particular result.

We can anticipate the use of many explanations and definitions in the practice, but it would be well that we avoid the excesses in instructions that once drove the Texas practice to the "distinctly and separately" rule. The practice to which we must not return was one by which the judge would array the evidence or the factual contentions of a party in an instruction, and then add such instructions as, "if you so believe these to be the true facts then find for the plaintiff," or the defendant, as the case might be. That practice is still unacceptable under the Texas special issue system.

*Pittsburg Coca-Cola Bottling Works v. Ponder* epitomizes the rule prior to the revision of rule 277, and it probably is still the rule. Ponder, who operated a cafe, asserted two distinct grounds of recovery, strict liability and negligence, in which she relied on *res ipsa loquitur*. She alleged and proved that a bottle exploded, injuring her, while she was moving it from a storeroom to a cooler behind a counter. The issue about strict liability was a simple inquiry about the reasonable fitness of the product. The explanatory charge which accompanied the issue instructed the jury about the law of implied warranty and told the jury that liability would reach the bottler under that doctrine. The supreme court disapproved the use of the instruction because it was not "necessary" to enable the jury properly to pass upon and render a verdict as the rule then required. The instruction probably still cannot be used as, under the new rule, an instruction which incidentally comments on the evidence or advises the jury of the effect of their answers is tolerated if it is "helpful" to their understanding the issue. The instruction about the legal effect of the implied warranty on the jury finding would probably be improper under the new rule since it instructs as to the result rather than the issue. Texas practitioners have had extensive experience in preparing instructions which correctly omit the statements that a particular belief or finding will lead to a victory or defeat for one of the parties.

68 An Act to amend the 99th, 130th and 131st sections of an act to regulate proceedings in the District Court § 1, [1853] Tex. Laws, 3 H. GAMMEL, LAWS OF TEXAS 1303 (1898); see Coles v. Perry, 7 Tex. 109, 140 (1851).
72 443 S.W.2d 546 (Tex. 1969).
IV. CONCLUSION

The revision of rule 277 rids us of the "separate and distinct" requirement and should bring to Texas a simpler special verdict practice. The differences between the methods for submitting negligence and non-negligence cases should now be put to rest. The rule permits the trial court to submit the negligence and contributory negligence issues as the controlling issues, or to submit these issues more specifically. Many of the satellite concepts which surround the negligence practice will probably be handled in the future by instructions rather than by special issues. The rule brings to an end the need for submission of inferential rebuttal issues, such as unavoidable accident, sole proximate cause, independent contractor, and, in some instances, borrowed servant. Whether voluntary assumption of risk and last clear chance should be submitted by an issue or by an instruction must await some future decisions. Finally, the trial judge is not permitted to inform the jury directly of the effect of its answers, although indirect comments will be permitted if the instruction helps the jury understand an issue.

Hopefully, the new system will not slip back to the "separate and distinct" practice of the past. If we transfuse the old practices into the new one, the submission of personal injury cases may again become laborious to the point that the jury system will be endangered, and the public, in the end, will be the losers.
APPENDIX

QUESTION 1: On the occasion in question, was Don Davis negligent in his speed, in the application of his brakes, or in his lookout? Answer “Yes” or “No” on each line in Column 1. If any of your answers in Column 1 are “Yes,” was any such negligence a proximate cause of the occurrence in question? Answer “Yes” or “No” on the corresponding line of Column 2.

<table>
<thead>
<tr>
<th>Column 1 Negligence</th>
<th>Column 2 Proximate Cause</th>
</tr>
</thead>
<tbody>
<tr>
<td>a. Speed</td>
<td></td>
</tr>
<tr>
<td>b. Brakes</td>
<td></td>
</tr>
<tr>
<td>c. Lookout</td>
<td></td>
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</tbody>
</table>

QUESTION 2: On the occasion in question, was Paul Payne negligent in his speed, in the application of his brakes, or in his lookout? Answer “Yes” or “No” on each line in Column 1. If any of your answers in Column 1 are “Yes,” was any such negligence a proximate cause of the occurrence in question? Answer “Yes” or “No.” on the corresponding line of Column 2.

<table>
<thead>
<tr>
<th>Column 1 Negligence</th>
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</tr>
</thead>
<tbody>
<tr>
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<td></td>
</tr>
<tr>
<td>c. Lookout</td>
<td></td>
</tr>
</tbody>
</table>

If any of your answers in Column 2 of Question 1 are “Yes,” and if any of your answers in Column 2 of Question 2 are also “Yes,” then answer Question 3; otherwise, do not answer Question 3.

QUESTION 3: From a preponderance of the evidence, find the percentage of the negligence that caused the occurrence in question that is attributable to each of the parties found by you to have been negligent.

The percentage of negligence attributable to a party is not necessarily measured by the number of acts or omissions found.

State the percentage opposite each name.

Don Davis _________%  
Paul Payne _________%  

QUESTION 4: What sum of money, if any, if paid now in cash, do you find from a preponderance of the evidence would fairly and reasonably compensate Paul Payne for his injuries, if any, which you find from a preponderance of the evidence resulted from the occurrence in question?

Do not reduce the amount in your answer because of Paul Payne's negligence, if any. Consider the following elements of damage, if any, and none other:
a. Physical pain and mental anguish in the past.

b. Physical pain and mental anguish which, in reasonable probability, he will suffer in the future.

c. Loss of earnings in the past.

d. Loss of earning capacity which, in reasonable probability, he will sustain in the future.

Answer in dollars and cents, if any.

Answer:____________