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SPECIAL VERDICT FORMULATION IN WISCONSIN

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The authors had their first professional association in 1974-75 when one served as intern-law clerk to the other. That relationship was primarily student-teacher. Learning trial practice skills was handicapped by the oral tradition—so much is communication by folk tales in an unorganized fashion. Instruction with respect to special verdict formulation was frustrating to both of us. We concluded that a primary impediment was the lack of written preparatory material. This article resulted.

INTRODUCTION

The special verdict, viewed today as a means for court control over the jury,[1] has evolved as a pragmatic response of medieval juries to the burdens placed upon them. In early English law the inquest, of which the jury was a constituent part, was a method of proof imported by the Normans and was an alternative to ordeal, battle and wager of oath.[2] The resolutions provided by the latter methods of proof were final, since they were directed by the supernatural.[3] The inquest and the jury were early recognized to be human and fallible institutions, however, and some means of encouraging accuracy and correcting error was desired.[4] The means developed was the attaint.[5] If the inquest jury's verdict was challenged, an attaint jury, a more numerous body composed of as many as twenty-four jurors,[6] was assembled to pass on the verdict of the first jury. If the inquest jury was found to have given a false verdict, the jurors stood convicted of perjury[7] and were severely punished,[8]

1. F. JAMES, CIVIL PROCEDURE § 7.15 (1965). Justices Douglas and Black dissented to the 1963 amendments to FED. R. CIV. PROC. 49 on the ground that special verdicts were a means of excessive judicial control over the jury. *See* 374 U.S. 865, 867-68 (1963).

2. Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575 (1923).

3. *Id.*

4. 3 W. BLACKSTONE, COMMENTARIES *389.

5. A thorough discussion of the origins and development of the attaint as a form of jury control may be found in 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 337 *et. seq.* (3d ed. 1922).

6. *Id.* at 339.

7. "They supposed that . . . the proof of fact must be always so clear, that, if [the jury] found a wrong verdict, they must be wilfully and corruptly perjured." 3 BLACKSTONE, *supra* note 4, at *389. Attaching the penalty of perjury to the jurors was not illogical. Rendition of a false verdict was tantamount to false swearing since the evolving jury still retained its character as an assemblage of witnesses. *See* 1 HOLDSWORTH, *supra* note 4, at 337, 342.

8. "[The jurors] were imprisoned, their lands forfeited, their wives and children turned out of their possessions, and their goods forfeited to the King, and themselves outlawed." 1 HALSBURY'S LAWS OF ENGLAND 27 (3d ed. 1952).

and the inquest judgment was overturned.[9]

The province of the early jury was probably not limited to findings of fact alone.[10] Although questions of both fact and law were commonly submitted for determination by inquest juries,[11] the practice developed in the early thirteenth century for juries to return verdicts in which the facts of the case were determined, but the more difficult determination and application of the law was left to the court.[12] By this means, the jury could pass responsibility for an erroneous judgment from themselves to the judges.[13] Blackstone noted two ways in which a jury might make findings of fact but avoid the riskier application of the law:

> Sometimes, if there arises in the case of any difficult matter of law, the jury, for the sake of better information, to avoid the danger of having their verdict attainted, will find a *special* verdict: which is grounded on the statute of Westm. 2, 13 Edw. 1., c. 30, § 2. And herein they state the naked facts, as they find them to be proved, and pray the advice of the court thereon; concluding conditionally, that if upon the whole matter the court should be of the opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. . . .
>
> Another method of finding a species of special verdict, is when the jury find a verdict generally for the plaintiff, but subject nevertheless to the opinion of the judge of the court above, on a *special case* stated by counsel of both sides with regard to a matter of law . . . .[14]

The statute referred to by Blackstone was enacted in the year 1285 and expressly granted juries the right to return a special

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9. 1 HOLDSWORTH, *supra* note 5, at 337-38.

10. Morgan, *supra* note 2, at 575-77.

11. The function of the early jury was to announce "a simple statement of result, with no explanation of what facts were found or rules applied." Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 485 (1965) (footnote omitted).

12. Morgan, *supra* note 2, at 576-80. The rationale was explained by Coke as follows:

> Although the jurie if they will take upon them the knowledge of the law, may give a generall verdict, yet it is dangerous for them so to doe, for if they doe mistake the law, they run into the danger of an attaint; therefore to find the speciall matter is the safest way where the case is doubtfull.

2 E. COKE, A COMMENTARY UPON LITTLETON § 368 (1st Amer., from 19th London ed. 1853).

13. *Id.* at 586.

14. 3 BLACKSTONE, *supra* note 4, at *377-78.

verdict in specified cases. Nevertheless, interpretations of the statute recognized that it was but a declaration and affirmance of the common law.[15]

Thus the special verdict originally developed not as a judicial check on the jury, but rather as a means of self-protection for the jurors. Since the medieval judges might also be held accountable for an erroneous application of the law,[16] there was little inducement to encroach upon the province of the jury. To the contrary, "the evidence is clear that the contest between justices and the jurors was not one for the enlargement of jurisdiction, but for the evasion of responsibility."[17] The use of the special verdict expanded over the years by means of judicial interpretation, and by the early part of the seventeenth century it was an established proposition that a jury could return a special verdict on any issue in any case, whether civil or criminal.[18]

While the special verdict flourished, the reason for its instigation slowly disappeared. The public came to view the attaint as too harsh a remedy,[19] and when attaint juries were assembled, they tended to affirm the findings of the original jury in order to avoid imposition of the penalty.[20] By the late sixteenth century attaints were seldom put into use,[21] and the procedure was belatedly eliminated by statute in 1825.[22] In the meantime courts had begun to resort to new trials in order to remedy improper verdicts.[23]

The special verdict had its Wisconsin statutory origin in the Laws of 1856,[24] with modification in 1874 and 1878. In the original enactment, the special verdict was defined as "that by which the jury find the facts only leaving the judgment to the court."[25] The Wisconsin Supreme Court's first interpretation of

15. Sunderland, *Verdicts, General and Special,* 29 YALE L.J. 253, 257 (1920).

16. 1 HOLDSWORTH, *supra* note 5, at 213-14.

17. Morgan, *supra* note 2, at 586.

18. *Id.* at 588-89.

19. Objection to the attaint was aptly stated by Blackstone: "[B]ut the remedy, which they have provided, shows the ignorance and ferocity of the times . . . ." 3 BLACKSTONE, *supra* note 4, at *389.

20. *See* 1 HOLDSWORTH at 342; J. THAYER, A PRELIMINARY TREATISE ON EVIDENCE 139 (1898).

21. *See* 1 HOLDSWORTH, *supra* note 5, at 342-43.

22. Juries Act of 1825, 6 Geo. 4, c. 50, § 60.

23. *See* 3 BLACKSTONE, *supra* note 4, at *404.

24. 1856 Wis. Laws, ch. 120, §§ 170-172.

25. 1856 Wis. Laws, ch. 120, § 170.

the special verdict statute, in *Ryan v. Rockford Insurance Co.*,[26] stated that the purpose of the statute was "to secure a direct answer free from any bias or prejudice in favor of or against either party."[27]

The first modification of the common-law special verdict, as authorized by the Laws of 1856, occurred in 1874 when the legislature amended the law[28] to require the court to submit a special verdict as a matter of right if timely requested by a party. The special verdict was no longer the option of the jury, but the right of a litigant. This was the most significant change in the special verdict from that described by Blackstone. In 1878 a further change was made which authorized the court in its discretion, when the case presented only questions of law, to direct the jury to render a special verdict subject to the opinion of the court.[29] In contrast to the 1874 amendment, this change was merely a statutory adoption of a species of common-law verdict described long previously by Blackstone.

The preference for special verdicts continues apace in Wisconsin after 125 years of use in its trial courts. The recently adopted Wisconsin Rules of Civil Procedure have made special verdicts the ordinary form of verdict submission and have eliminated the need for a timely request for such a form of verdict.[30]

The special verdict must be distinguished from the general verdict with special interrogatories.[31] Use of general verdicts[32] makes it difficult if not impossible to ascertain the elements which entered into and formed the verdict of the jury.[33] The

26. 77 Wis. 611, 46 N.W. 885 (1890).

27. *Id.* at 615, 46 N.W. at 886.

28. 1874 Wis. Laws, ch. 194, § 1.

29. WIS. REV. STAT. § 2858 (1878). *See* Murphy v. Interlake Paper & Pulp Co., 162 Wis. 139, 155 N.W. 925 (1916); Keena v. American Box Toe Co., 144 Wis. 231, 128 N.W. 858 (1910); Baumann v. C. Reiss Coal Co., 118 Wis. 330, 95 N.W. 139 (1903).

30. WIS. STAT. § 805.12 (1973). *See* Graczyk, *The New Wisconsin Rules of Civil Procedure: Chapters 805-807*, 59 MARQ. L. REV. 671, 697-98 (1976).

31. Morgan, *supra* note 2.

32. "[A] special verdict is that by which the jury finds the facts only, leaving the judgment to the court. A general verdict is one by which the jury pronounces upon all or any of the issues either in favor of the plaintiff or the defendant." Boneck v. Herman, 247 Wis. 592, 595, 20 N.W.2d 664, 666 (1945).

33. 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 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

tutory authorization has been removed, however, by repeal of Wisconsin Statutes section 270.27 and the absence of a comparable provision in section 805.12 of the new rules of civil procedure.

This attempt to set forth the principles of special verdict formulation will be confined to civil cases. The use of special verdicts in criminal cases is not practiced in Wisconsin. Historically, special verdicts in criminal cases were the prerogative of the jury to avoid attaint.[41] At the present time, however, the question whether special verdicts survive in criminal cases is more historical than practical. Nevertheless, it was not long ago, in *City of Milwaukee v. Wuky,*[42] that a special verdict was disapproved in an ordinance forfeiture case employing a criminal procedure, although denominated a civil action.

The following discussion will necessarily be oriented heavily to negligence cases. These cases encompass a large area of tort law in Wisconsin (including medical malpractice, products liability, safe place, safety statute and many property nuisance actions) and form a large part of litigation. Negligence actions also tend to provide patterns more often than other tort or contract cases.

Special verdict formulation has been consigned to the "sound discretion" of the trial court.[43] Nevertheless, most trial judges desire more input from trial lawyers than is customarily received.[44] The collection of announced principles in a framework of rules for special verdict formulation may aid in the framing of special verdicts and stimulate trial counsel's assistance to trial judges.

The special verdict "rules" which follow must be prefaced, however, with a caveat best expressed by Thoreau: "Any fool can make a rule/And every fool will mind it."[45] The evidentiary facts are so infinite that it is impossible to structure the princi-

41. Attaint was certainly not as serious a threat in criminal cases as it was in civil actions at common law. According to Holdsworth, "[N]o one ever seems to have thought that [attaint] would lie against a jury who had found a verdict of guilty upon an indictment." 1 HOLDSWORTH, *supra* note 5, at 340. The commentators disagreed as to the applicability of attaint where a jury acquitted the accused. *Id.*

42. 26 Wis. 2d 555, 133 N.W.2d 356 (1965).

43. Dahl v. K-Mart, 46 Wis. 2d 605, 609, 176 N.W.2d 342, 344 (1970).

44. Although WIS. STAT. § 805.12(1) (1973) requires the court to formulate the special verdict, the trial judge may direct counsel to submit proposed or requested special verdict forms.

45. H. Thoreau, *Journal* (entry of Feb. 3, 1860).

ples announced in the case law into the form of commands. At best, they are guidelines, to be discarded whenever logic and human experience suggest a different course.

I. THE GENERAL STRUCTURE OF THE SPECIAL VERDICT

A. *The Sequential Arrangement of the Questions Should Be Logical.*

Calling for a logical arrangement of special verdict questions states a goal rather than a method. The adversary method, with the plaintiff proceeding first correlative to his burden of proof, suggests that the first special verdict question should inquire about the defendant's conduct. As chronology is frequently the better guide to formulating a direct examination, so may it serve as a basis for the special verdict, particularly in contract cases where the issues are framed in specific factual questions. On the other hand, in negligence cases, the fact that the plaintiff has the right to open and close lends itself to inquiries about conduct of the defendant first, although the plaintiff's contributory negligence may have antedated the negligence of the defendant.

Specific fact inquiries, if incorporated in the special verdict, might well be positioned ahead of general inquiries applying a broad standard of conduct. Similarly, defenses dependent upon the resolution of a particular issue of fact may call for specific questions and should precede those with respect to broader questions of ultimate fact. This method of requiring the jury to consider specific inquiries before more general questions should result in the application of a more logical reasoning process. A suggested sequence of special verdict questions is:

a. Inquiry with respect to the defendant's conduct.
b. Inquiry with respect to each defendant's conduct as a cause of the plaintiff's loss[46] (if a negligence case).
c. Inquiry with respect to the negligence of a third-party defendant or persons not parties whose conduct may arguably constitute negligence (if a negligence case).
d. Inquiry about causation of conduct described in (c) (if a negligence case).

46. Loss is a general term used here for brevity. As will be discussed later, the inquiry should specify injury, accident or collision to be properly phrased and to avoid an improper comparison. See Part III, sec. E *infra.*

e. Inquiry with respect to the plaintiff's conduct.
f. Inquiry with respect to the plaintiff's conduct as a cause of his loss (if a negligence case).
g. In a negligence case, a comparative negligence question.
h. Inquiry with respect to each plaintiff's damages.[47]
i. Inquiry with respect to the damage of each counter-claiming or cross-claiming defendant.

The format of inquiring first about the defendant's conduct and second about the plaintiff's conduct is correlative to the right of the plaintiff to open and close. The complaint attacks the defendant's conduct and asserts a basis of liability. Similarly, the third-party complaint or cross-claim asserts liability to another defendant arising from his liability to the plaintiff or from the same transaction, occurrence or property involved.[48]

In the case of multiple plaintiffs or defendants represented by different attorneys, the trial court may be required to rule upon the order and mode of presenting evidence and interrogating witnesses. The statute[49] and the case law[50] establish the guidelines to be applied by the court, but in the absence of compelling considerations, the order of the plaintiffs and defendants in the title to the action is the most usual. The same sequence seems appropriate in the special verdict inquiries—*i.e.*, inquiring about defendants in the order of the title and the same order with respect to the plaintiffs. However, the order in which persons are inquired about is within the discretion of the trial court. Inquiry about the conduct of released parties before the question with respect to the sole remaining party is not error.[51]

B. It May Be Necessary To Inquire About Those Who Are Not Parties to the Litigation.

A special verdict must inquire about negligence and causation of all parties to the transaction whether or not they are parties to the action and whether or not they are unknown to

47. In Loizzo v. Conforti, 207 Wis. 129, 240 N.W. 790 (1932) insertion of a plaintiff's damage question in the middle of the special verdict after the defendant's cause question, and before inquiries with respect to the plaintiff's negligence, and causation, was disapproved.

48. WIS. STAT. §§ 802.07(3), 803.05(1) (1973).

49. WIS. STAT. § 906.11(1) (1973).

50. Schueler v. City of Madison, 49 Wis. 2d 695, 183 N.W.2d 116 (1971).

51. Nolan v. Venus Ford, Inc., 64 Wis. 2d 215, 218 N.W.2d 507 (1974).

the parties[52] or immune to liability by settlement[53] or operation of law.[54] Also, the jury must be afforded the opportunity to compare the negligence of such a party to the occurrence.[55] In a third-party action pursuant to the Worker's Compensation Act,[56] the employer's negligence will usually be in issue and inquiry must be made in the special verdict. The trial judge formulating the special verdict should apply this standard with respect to nonparty negligence: "Is there evidence of conduct which, if believed by the jury, would constitute negligence on the part of the person or other legal entity inquired about?"[57]

Third-party actions pursuant to Wisconsin Statutes section 102.29 present a special problem.[58] If the employer has provided an unsafe place of employment, the tendency of a jury is to weigh that more heavily in the comparison than the negligence of a third party such as the premises owner or the machinery manufacturer. Thus, the employer is often found more negligent than the third party. This situation is further complicated by the logical inference that if the place of employment is unsafe, then it is probable that the jury will find the worker plaintiff negligent in working under such circumstances. To compensate for such an inference, the Wisconsin Supreme Court suggests:

> [I]n the employee situation . . . contributory negligence . . . carries with it . . . a different obligation upon an employee than upon another who may be on allegedly unsafe premises only for his own purposes. An employee, when at work in a place of employment is there because of the directions of his employer. In *Beck v. Siemers* (1921), 174 Wis. 437, 183 N.W. 157, the court stated that, under the safe place

52. Inquiry with respect to the negligence of a "phantom driver" (one whose existence may be in dispute but at least whose identity is unknown) is a frequent circumstance in bus passenger or expressway litigation.

53. *See, e.g.*, Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963) (release).

54. *See, e.g.*, WIS. STAT. § 102.03 (1973) (Worker's Compensation Act exclusion of liability).

55. Heldt v. Nicholson Mfg. Co., 72 Wis. 2d 110, 240 N.W.2d 154 (1976); Connar v. West Shore Equipment, Inc., 68 Wis. 2d 42, 227 N.W.2d 660 (1975); Payne v. Bilco, 54 Wis. 2d 424, 195 N.W.2d 641 (1972); Pierringer v. Hoger, 21 Wis. 2d 182, 124 N.W.2d 106 (1963).

56. WIS. STAT. § 102.29 (1973), as amended.

57. Connar v. West Shore Equipment, Inc., 68 Wis. 2d 42, 45, 227 N.W.2d 660, 662 (1975).

58. *See* Piper, *Problems in Third Party Action Procedure Under the Wisconsin Worker's Compensation Act*, 60 MARQ. L. REV. 91 (1976).

statute, merely to continue with the work directed by the employer although the premises are unsafe does not constitute contributory negligence. The court in *Beck* advised:

> "[I]t would seem best in cases of this character to instruct the jury that merely continuing in an employment and doing work as intended by the employer and the employee in the usual and ordinary manner, although the place of work or appliance is unsafe, does not constitute contributory negligence."[59]

Also involved in determining contributory negligence of an employee is the decreased duty of care when a worker is preoccupied with his work. When the evidence presents such a circumstance, Wisconsin Jury Instruction—Civil Number 1051, "Duty of Workman: Preoccupation in Work Minimizes Duty," should be given.

C. *Separate Inquiries About Negligence and Causation Are Proper But Not Required.*

In 1961 the Wisconsin Supreme Court amended Wisconsin Statute section 270.27 to permit a general (ultimate fact) inquiry with respect to negligence.[60] Eliminated was the earlier requirement that the inquiry be directed specifically to items of negligence such as lookout, speed, management and control, and right of way. A simple special verdict combining negligence and causation into one question was rejected in *Baierl v. Hinshaw*[61] as not in conformity with section 270.27. In a lengthy recital of the history behind the form of special verdict modification permitted by the amendment to section 270.27, the court relied upon the following statutory phrase to justify its conclusion that negligence and causation could not be combined: "[T]he court may submit separate questions as to the negligence of each party, and whether such negligence was a cause . . . ."[62]

Section 270.27 was substantially redrafted in its present form as section 805.12(1) and the phrase quoted above was deleted.[63] The Judicial Council Committee Note to the section

59. McCrossen v. Nekoosa Edwards Paper Co., 59 Wis. 2d 245, 255, 208 N.W.2d 148 (1973).

60. Supreme Court Order, 11 Wis. 2d v (effective June 1, 1961).

61. 32 Wis. 2d 593, 147 N.W.2d 433 (1966).

62. WIS. STAT. § 270.27 (1965).

63. The statute presently provides as follows:

acknowledges that the redrafted section "is generally based" upon section 270.27.[64] Although the Wisconsin law as discussed above has heretofore required inquiries of negligence and causation to be separately stated, that practice is no longer expressly required by statute.[65]

The net effect of redrafting section 805.12(1) appears to be a reversal of *Baierl* and a restoration of Wisconsin Jury Instruction—Civil Number 1001 as a proper method of submission, irrespective of consent of the parties. It would seem that in view of the January 1, 1976, statutory amendment, the following statement is appropriate not only to a general negligence inquiry as it was when made, but also to a combination of negligence and causation:

> The main argument by appellant is that there should have been a verdict on individual items of negligence and the trial court abused his discretion in failing to submit the case that way. This is nothing more than a reargument of the propriety of an ultimate-fact verdict. The proper way to change the rule is in a proceeding to change the rule, not in an individual case. On the merits the appellant presents nothing more than the usual arguments in favor of the particular-item verdict as against the ultimate-fact verdict. That the ultimate-fact verdict permits the jury to do better what it most practically does, namely, look at the overall negligence of the parties and attach the blame accordingly without being trapped by technicalities and inconsistencies when considering the negligence of the parties piecemeal, remains as the most-effective argument for the use of the ultimate-fact verdict.[65.1]

805.12 Special verdicts. (1) USE. Unless it orders otherwise, the court shall direct the jury to return a special verdict. The verdict shall be prepared by the court in the form of written questions relating only to material issues of ultimate fact and admitting a direct answer. The jury shall answer in writing. In cases founded upon negligence, the court need not submit separately any particular respect in which the party was allegedly negligent. The court may also direct the jury to find upon particular questions of fact.

64. 67 Wis. 2d at 703 (1975).

65. Some states which adopted Wisconsin-type comparative negligence have simplified their special verdict forms by such a combination. *See* PROPOSED KANSAS PATTERN JURY INSTRUCTIONS 20.04-.05. *See also* James, *Connecticut's Comparative Negligence Statute: An Analysis of Some Problems*, 1974 INS. L.J. 375.

65.1. Milwaukee Auto. Mut. Ins. Co. v. National Farmers Union Prop. & Cas. Co., 23 Wis. 2d 662, 666, 128 N.W.2d 12, 14 (1964).

D. Where the Law Requires Expert Testimony To Establish Negligence or Causation, in The Absence of Such Testimony, a Question Should Not Be Submitted.

> [T]he requirement of expert testimony is an "extraordinary one," and is to be applied by the trial court "only when unusually complex or esoteric issues are before the jury.[66]

The matter involved must be "not within the realm of the ordinary experience of mankind."[67] Determined on a case by case basis, expert testimony has been required to establish: the necessity of medical or dental care to promote healing;[68] permanency of an injury;[69] whether pain will continue into the future and for how long a period;[70] whether future medical expenses will be incurred;[71] whether a fall occurred because of a prior leg injury;[72] whether a piece of bone caused a pulmonary blood clot;[73] whether a driver's conduct after injury was caused by shock;[74] malpractice from allegedly improper or inadequate treatment (in the absence of res ipsa loquitur situations);[75] the cause of a barn fire;[76] the cause of death of heifers;[77] the cause of a person's death if a medical expert testifies that the test used by a layman cannot determine the cause of death;[78] an injured person's future medical expenses and future pain and

66. Netzel v. State Sand & Gravel Co., 51 Wis. 2d 1, 7, 186 N.W.2d 258, 262 (1971). *See also* Holz, *A Survey of Rules Governing Medical Proof in Wisconsin—1970,* 1970 WIS. L. REV. 989.

67. 51 Wis. 2d at 6, 186 N.W.2d at 261; Cramer v. Theda Clark Memorial Hosp., 45 Wis. 2d 147, 150, 172 N.W.2d 427, 428 (1969).

68. Wisconsin Tel. Co. v. Industrial Comm'n, 263 Wis. 380, 57 N.W.2d 334 (1953).

69. Borowske v. Integrity Mut. Ins. Co., 20 Wis. 2d 93, 121 N.W.2d 287 (1963); Lubner v. Peerless Ins. Co., 19 Wis. 2d 364, 120 N.W.2d 54 (1963); Rogers v. Adams, 19 Wis. 2d 141, 119 N.W.2d 349 (1963).

70. Rivera v. Wollin, 30 Wis. 2d 305, 140 N.W.2d 748 (1966); Huss v. Vande Hey, 29 Wis. 2d 34, 138 N.W.2d 192 (1965).

71. Sawdey v. Schwenk, 2 Wis. 2d 532, 87 N.W.2d 500 (1958).

72. Globe Steel Tubes Co. v. Industrial Comm'n, 251 Wis. 495, 29 N.W.2d 510 (1947).

73. Behr v. Larson, 275 Wis. 620, 83 N.W.2d 157 (1957).

74. Odya v. Quade, 4 Wis. 2d 63, 90 N.W.2d 96 (1958).

75. McManus v. Donlin, 23 Wis. 2d 289, 127 N.W.2d 22 (1964); Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963).

76. Kreyer v. Farmer's Cooperative Lumber Co., 18 Wis. 2d 67, 117 N.W.2d 646 (1962).

77. Peterson v. Greenway, 25 Wis. 2d 493, 131 N.W.2d 343 (1964).

78. Novakofski v. State Farm Mut. Auto. Ins. Co., 34 Wis. 2d 154, 148 N.W.2d 714 (1967); Lubner v. Peerless Ins. Co., 19 Wis. 2d 364, 120 N.W.2d 54 (1963).

suffering;[79] the identity of a dangerous drug;[80] an award for impairment of future earning capacity when premised upon post-traumatic neurosis;[81] and the relationship between neurosis and traumatic neurosis;[82] hysteria;[83] emotional disturbances;[84] personality changes;[85] aggravation of a cancerous tumor;[86] and heart failure.[87] When questions of negligence or causation require expert testimony and none is adduced, there is a failure of proof[88] and no special verdict question on that subject may be submitted to the jury.[89]

II. The General Extent of the Special Verdict Questions

Question formulation requires a sense of proportion in attempting to reconcile many competing and sometimes contradictory strictures. Issues should not be split, yet a verdict should not be so broad as to constitute a general verdict. The questions should resolve each disputed issue of material fact, but the questions should not constitute needless multiplicity, verbosity, or cross-examination of the jury, nor lead the jury into inconsistency. By court rule amending the special verdict statute,[90] a general question of ultimate fact negligence may be

79. Spleas v. Milwaukee & Suburban Transp. Corp., 21 Wis. 2d 635, 124 N.W.2d 593 (1963); Rogers v. Adams, 19 Wis. 2d 141, 119 N.W.2d 349 (1963); Diemel v. Weirich, 264 Wis. 265, 58 N.W.2d 651 (1953).

80. State v. Johnson, 54 Wis. 2d 561, 196 N.W.2d 717 (1972).

81. Peterson v. Western Cas. & Surety Co., 5 Wis. 2d 535, 93 N.W.2d 433 (1958).

82. Riehl v. DeQuaine, 24 Wis. 2d 23, 127 N.W.2d 788 (1964); McMahon v. Bergeson, 9 Wis. 2d 256, 101 N.W.2d 63 (1960); Johnson v. Industrial Comm'n, 5 Wis. 2d 584, 93 N.W.2d 439 (1958); Landrath v. Allstate Ins. Co., 259 Wis. 248, 48 N.W.2d 485 (1951); Heindel v. Wisconsin Traction, Light, Heat & Power Co., 169 Wis. 181, 171 N.W. 938 (1919).

83. Gallagher v. Industrial Comm'n, 9 Wis. 2d 361, 101 N.W.2d 72 (1960).

84. *Cf.* Klassa v. Milwaukee Gas Light Co., 273 Wis. 176, 77 N.W.2d 397 (1956); Waube v. Warrington, 216 Wis. 603, 258 N.W. 497 (1935) (by implication).

85. Paepcke v. Sears, Roebuck & Co., 263 Wis. 290, 57 N.W.2d 352 (1953).

86. City of Seymour v. Industrial Comm'n, 25 Wis. 2d 482, 131 N.W.2d 323 (1964).

87. Vogelsburg v. Mason & Hanger Co., 250 Wis. 242, 26 N.W.2d 678 (1947); Jerber v. Wloszczynski, 188 Wis. 344, 206 N.W. 206 (1925). *See also* Colla v. Mandella, 1 Wis. 2d 594, 85 N.W.2d 345 (1957).

88. *But cf.* Cedarburg Light & Water Comm'n v. Allis-Chalmers Mfg. Co., 33 Wis. 2d 560, 148 N.W.2d 13 (1967) (expert testimony not required to prove causation).

89. Hargrove v. Peterson, 65 Wis. 2d 118, 221 N.W.2d 875 (1974); Wisconsin Builders, Inc. v. General Ins. Co., 65 Wis. 2d 91, 221 N.W.2d 832 (1974); Johnson v. Heintz, 61 Wis. 2d 585, 213 N.W.2d 85 (1973). *See also* Cramer v. Theda Clark Memorial Hosp., 45 Wis. 2d 147, 172 N.W.2d 427 (1969); Bruss v. Milwaukee Sporting Goods Co., 34 Wis. 2d 688, 150 N.W.2d 337 (1967).

90. Supreme Court Order, 11 Wis. 2d v (effective June 1, 1961).

submitted with the instructions covering the varying specific kinds of negligence litigated (*i.e.*, lookout, speed, etc.).

The ultimate fact form of verdict is not limited to negligence cases.[91] It may be applied to all forms of issues, contract, tort or property. However, issues other than negligence do not always lend themselves to an ultimate fact question because of the interaction of several legal principles.

In *Peil v. Kohnke*[92] an insurance company attempted to avoid coverage on the ground of misrepresentation by its insured. To successfully avoid coverage, the company was required to establish that: (1) the representation was false; and either (2) the false representation was made with intent to deceive; or alternatively, (3) the false representation was material, *i.e.*, it increased the risk or contributed to the loss.[93] Each of those three elements was a question of fact.[94] The trial court framed the question: "Did the defendant, Delmar Kohnke, falsely represent to the Badger State Mutual Casualty Company any material facts concerning the ownership or use of the 1965 Cadillac automobile?"[95] Apparently there was no evidence of intent to deceive, thus materiality of the false representation was required. The jury was correctly instructed that to answer the question "yes," they must find false representations and materiality. The supreme court concluded: "[I]t was erroneous for the trial court here to submit a single question on the coverage wherein the jury was asked to determine both factors: (1) the fact of false representations, and (2) materiality."[96]

In *Schrank v. Allstate Insurance Co.*,[97] decided the same day as *Peil,* the court reviewed a jury's findings of noncausal negligence by the defendant driver in a pedestrian-automobile

91. Naden v. Johnson, 61 Wis. 2d 375, 212 N.W.2d 585 (1973) (breach of buyer-seller contract); Repinski v. Clintonville Fed. Savings & Loan Ass'n, 49 Wis. 2d 53, 181 N.W.2d 351 (1970) (breach of mortgage loan commitment).

92. 50 Wis. 2d 168, 184 N.W.2d 433 (1971).

93. WIS. STAT. § 209.06 (1973); Stockinger v. Central Nat'l Ins. Co., 24 Wis. 2d 245, 128 N.W.2d 433 (1964); Langlois v. Wisconsin Nat'l Life Ins. Co., 19 Wis. 2d 151, 119 N.W.2d 400, 120 N.W.2d 884 (1963).

94. *See* cases cited *supra* note 56.

95. 50 Wis. 2d at 198, 184 N.W.2d at 449.

96. *Id.* at 211, 184 N.W.2d at 455.

97. 50 Wis. 2d 247, 184 N.W.2d 127 (1971); *cf.* Rud v. McNamara, 10 Wis. 2d 41, 102 N.W.2d 248 (1960), where the court stated it was not convinced that the four elements of actionable fraud should be separated into four inquiries in the special verdict.

accident. Although the child pedestrian darted into the path of the defendant's car, the evidence relied upon for liability was testimony that the driver could have seen the child sooner and that the child was dragged either a disputed 100 feet or ten feet after impact. The court concluded that the evidence sustained a finding that the driver was negligent in not seeing the child sooner; that the evidence did not establish that the child was dragged more than ten feet; that the driver could not have stopped sooner if the child had earlier been seen; and that there was an absence of causal effect. The difficulty in reviewing the findings of the *Peil* jury and the *Schrank* jury was caused in each instance by a cumulative fact question. In the negligence case, however, it prompted no criticism of the question formulation because of the special provision of the special verdict statute authorizing an ultimate fact negligence question.

In special verdict question formulation one should avoid the too-specific questions that lead to issue division, multiplicity, jury cross-examination and verdict inconsistency, and at the same time avoid combining ultimate facts into one question equivalent to a general verdict. A review of the cases suggests that such proportion can be achieved if at the time of question formulation one identifies those factual issues that on motions after verdict or appeal will present a difficult question of law. If a serious question will be presented with respect to whether the law will prohibit or compel liability (a policy or sufficiency-of-the-evidence determination), then it may be administratively desirable to separate rather than accumulate specific issues to enable the trial or appellate court to know exactly what the jury did. Such a suggestion does not intimate that, because an appeal may or will be taken, the special verdict question should be more detailed.[98]

Counsel for the parties should be especially prepared in instances where an appeal may be taken because it may be desirable to submit questions in the more detailed form of special verdict in order to isolate the special findings of the jury and to enable the trial judge to determine which evidence the jury accepted or rejected. That practice may obviate the need for a new trial. Even a products liability special verdict may lend itself to this treatment where several issues of product defectiveness are presented.

98. Zartner v. Scopp, 28 Wis. 2d 205, 137 N.W.2d 107 (1965).

A. A Special Verdict Should Not Consist of So Many Questions that It Constitutes Needless Multiplicity or Verbosity or Leads the Jury into Inconsistency.

Material ultimate facts, not evidentiary facts, are the matters about which inquiry should be made.[99] A twenty-seven question verdict containing three questions on "proximate cause," one of which covered the subject and the other two of which cross-examined the jury was, of course, disapproved.[100] In *Howard v. Beldenville Lumber Co.*[101] the supreme court was particularly critical of the special verdict framed by the trial judge:

> So by submitting the four questions instead of one, the rule was violated that immaterial matters should not be included in the special verdict; also the rule was violated that questions should not be so framed as to cross-question the jury, and the further rule was violated that no question should be included in a special verdict not covering a distinct issuable controverted fact.[102]

In *Mauch v. City of Hartford*[103] the court analyzed a twenty-one question verdict and illustrated that only five questions were necessary. It found that the twenty-one question verdict improperly split issues, dealt with evidentiary rather than ultimate facts, and submitted inquiries upon which there was no evidence. The court rejected a mass of questions that would lead to jury confusion and elicit conflicting answers. In *Eberhardt v. Sanger*[104] the court found error in a thirty-seven question verdict where there were but two issues of material fact.

A minute cross-examination of the jury by multitudinous questions should be discountenanced by the trial court so that "the special verdict is not used to entrap the jury into error."[105] A classic case of special verdict question verbosity is *Hoffman*

99. WIS. STAT. § 805.12(1) (1973); Kellner v. Christiansen, 169 Wis. 390, 172 N.W. 796 (1919); Wawrzyniakowski v. Hoffman & Billings Mfg. Co., 146 Wis. 153, 131 N.W. 429 (1911); Cullen v. Hanisch, 114 Wis. 24, 89 N.W. 900 (1902).

100. Okonski v. Pennsylvania & Ohio Fuel Co., 114 Wis. 448, 90 N.W. 429 (1902).

101. 129 Wis. 98, 108 N.W. 48 (1906).

102. *Id.* at 113, 108 N.W. at 53.

103. 112 Wis. 40, 87 N.W. 816 (1901).

104. 51 Wis. 72, 8 N.W. 111 (1881).

105. Haley v. Jump River Lumber Co., 81 Wis. 412, 427, 51 N.W. 321, 51 N.W. 956, 958 (1892).

to the spirit of the special verdict statute.[110] Thus a question, "Was the defendant guilty of negligence in allowing the plaintiff to work upon its log-deck?" is an improper special verdict submission that cannot be rectified by a proper charge.[111]

Terms that are confusing and meaningless to lay persons should be avoided. For example, when the defense to an action for defamation is conditional privilege and the question is whether the conditional privilege is applicable because abused, the inquiry should avoid the term "malice" and the question should be framed in terms of abuse of privilege.[112]

E. Only Issues Pleaded (or Actually Tried) and Supported by Evidence Sufficient To Support an Affirmative Jury Finding Should Be Incorporated in the Question.

The duty of the trial judge in determining the issues to be submitted to the jury has been succinctly stated:

> In drafting a special verdict the trial court must first consider the issues raised by the pleadings. He should then eliminate from the issues so raised those that are determined by the evidence on the trial by admissions, by uncontradicted proof or by failure of proof. Only those remaining should go to the jury.[113]

An issue not supported by evidence sufficient to sustain an affirmative jury finding should not be submitted.[114] Where the evidence would not warrant an answer favorable to the party requesting the question, it should be refused.[115] When an issue is raised after the verdict has been returned (imputing negligence of a vehicle operator to the owner of a different vehicle) that was neither pleaded, tried, nor coverd by the jury instructions, and the issue could not be decided as a matter of law, it must be rejected.[116]

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110. Sladkey v. Marinette Lumber Co., 107 Wis. 250, 83 N.W. 514 (1900).

111. *Id.; see also* Olwell v. Skobis, 126 Wis. 308, 105 N.W. 777 (1905); *but see* Barnes v. Stacy, 79 Wis. 55 (1891), an early case in which the trial court included a general verdict question as the last question of a special verdict and the supreme court approved the practice.

112. Ranous v. Hughes, 30 Wis. 2d 452, 141 N.W.2d 251 (1966).

113. Bell v. Duesing, 275 Wis. 47, 53, 80 N.W.2d 821, 824 (1957); *see also* Brophy v. Milwaukee Elec. Ry. & Transp. Co., 251 Wis. 558, 30 N.W. 2d 76 (1947).

114. Wisconsin Builders, Inc. v. General Ins. Co., 65 Wis. 2d 91, 221 N.W.2d 832 (1974); Peter M. Chalik & Assoc. v. Hermes, 56 Wis. 2d 151, 201 N.W.2d 514 (1972).

115. Wisconsin Tel. Co. v. Matson, 256 Wis. 304, 41 N.W.2d 268 (1950); Hanson v. Johnson, 141 Wis. 550, 124 N.W. 506 (1910).

116. Soczka v. Rechner, 73 Wis. 2d 157, 242 N.W.2d 910 (1976).

Contributory negligence is usually pleaded; however, if it is not, should the question of such negligence be submitted to the jury if evidence supports such a contention? In Part I, section B, the need for inclusion of inquiries about all whose conduct may have constituted negligence was discussed. The context of that discussion was negligence of persons who are defendants or who might have been defendants if joined, whether or not immune or released from liability. Such inquiries are justified to achieve accuracy in the jury comparison inquiry. The same reason exists for inquiring with respect to contributory negligence, although not pleaded, if there is an evidentiary basis. In addition, the failure to plead contributory negligence is easily corrected by amendment during or after trial.[117] The amendment statute is remedial, accords the trial court wide discretion and should be liberally construed.[118] Further, it seems improbable that the plaintiff ordinarily would be surprised or ill-equipped to meet the issue of contributory negligence.

A verdict question not presented by the evidence is a ground for a new trial if it is prejudicially misleading.[119] However, an additional special question of fact, although not an ultimate fact, is proper when such a fact is a central focus of the evidence.[120]

The trial courts have been admonished that where an issue of fact is not present or controverted in the case, and is not submitted to the jury as a factual issue, an instruction on that subject should not be given even though it is a proper abstract of the law.[121] However, if not timely objected to, the error is waived. Unless prejudicial, the instruction is mere surplusage and a new trial is not warranted. The test to be applied in

117. WIS. STAT. § 802.09(1) (1973).

118. D.R.W. Corp. v. Cordes, 65 Wis. 2d 303, 222 N.W.2d 671 (1974); Bourassa v. Gateway Erectors, Inc., 54 Wis. 2d 176, 194 N.W.2d 602 (1972); Siedenburg v. Severson, 5 Wis. 2d 40, 183 N.W.2d 35 (1971); Wipfli v. Martin, 34 Wis. 2d 169, 148 N.W.2d 674 (1967); Girtz v. Oman, 21 Wis. 2d 504, 124 N.W.2d 586 (1963).

119. Wisconsin Builders, Inc. v. General Ins. Co., 65 Wis. 2d 91, 221 N.W.2d 832 (1974); Gilbert v. United States Fire Ins. Co., 49 Wis. 2d 193, 181 N.W.2d 527 (1970); Hoffman v. Regling, 217 Wis. 66, 258 N.W. 347 (1935). *See also* Behning v. Star Fireworks Mfg. Co., 57 Wis. 2d 183, 203 N.W.2d 655 (1973), where the period of negligence was inquired about in too restrictive a fashion; and Quick v. American Legion 1960 Convention Corp., 36 Wis. 2d 130, 152 N.W.2d 919 (1967), where the negligence question was directed to two defendants.

120. Dahl v. K-Mart, 46 Wis. 2d 605, 176 N.W.2d 342 (1970).

121. Wagner v. American Family Mut. Ins. Co., 65 Wis. 2d 243, 222 N.W.2d 652 (1974).

determining prejudice "is the probability and not mere possibility that the jury was misled thereby."[122]

It is not error to neglect or refuse to submit a special verdict question which could receive only one legitimate answer from the evidence.[123] However, the obvious answer must be in conformity with the ultimate judgment in the case.[124] Such an uncontroverted fact may be established by the trial court by a formal finding of fact,[125] decided as a matter of law,[126] because "[i]t would be absurd to submit a question of fact to the jury when there is no question that the fact exists."[127] When the special verdict is such that the jury has no need to know of the court's finding, it need not be brought to the jury's attention by a special verdict question answered by the court[128] nor by advising them of the ruling in the jury charge.[129] Although the better practice is to submit only controverted fact questions to the jury, it is not error to submit uncontroverted fact questions answered by the court;[130] however, such questions should not be accompanied by a "general charge" that informs the jury of the effect of the answers.[131]

A special verdict question is not defective if it incorporates questions about uncontroverted facts,[132] although ordinarily the question should not include a recital of facts.[133] When the trial court finds a fact as a matter of law, the special verdict is complete without such an answered question on that subject.[134] Some questions such as whether one person is the agent of another may be a mixed question of fact or law that may be

122. Lutz v. Shelby Mut. Ins. Co., 70 Wis. 2d 743, 751, 235 N.W.2d 426, 431 (1975).

123. Stringham v. Cook, 75 Wis. 589, 44 N.W. 777 (1890); Weisel v. Spence, 59 Wis. 301, 18 N.W. 165 (1884).

124. Weisel v. Spence, 59 Wis. 301, 18 N.W. 165 (1884).

125. Mayhew v. Mather, 82 Wis. 355, 52 N.W. 436 (1892).

126. Koepke v. Miller, 241 Wis. 501, 6 N.W.2d 670 (1942).

127. Leiterman v. Burnette, 271 Wis. 359, 362, 73 N.W.2d 490, 492 (1955), *quoting* Berg v. Chicago, M. & St. P. Ry., 50 Wis. 419, 425, 7 N.W. 347, 349 (1880).

128. Blazer v. Caldwell, 220 Wis. 270, 263 N.W. 705 (1936).

129. *Id.*

130. Bauman v. C. Reiss Coal Co., 118 Wis. 330, 95 N.W. 139 (1903).

131. Banderob v. Wisconsin Cent. Ry., 133 Wis. 249, 133 N.W. 738 (1907).

132. Meidenbauer v. Town of Pewaukee, 162 Wis. 326, 156 N.W. 144 (1916); Madison v. City of Antigo, 153 Wis. 448, 141 N.W. 287 (1913); Keena v. American Box Toe Co., 144 Wis. 231, 123 N.W. 858 (1910).

133. For a horrible example, see Hoffman v. Regling, 217 Wis. 66, 258 N.W. 347 (1935). *See also* Fanning v. Murphy, 126 Wis. 538, 105 N.W. 1056 (1906).

134. Murphy v. Interlake Pulp & Paper Co., 162 Wis. 139, 155 N.W. 925 (1916).

required to be answered by the court or the jury.[135]

When a determination of fact made by the court as a matter of law is required to be known by the jury in order to answer a question of controverted fact in the special verdict, the court must either incorporate an answered question in the verdict or advise the jury of the court's finding by the content of the jury instructions.[136]

Illustrative of a jury's "need to know" of a trial court's finding as a matter of law is the court's finding that a party is negligent, or causally negligent, as to one specific issue of negligence when the ultimate fact special verdict form is used and the evidence requires other additional issues to be submitted to the jury through appropriate instructions. In that instance the Wisconsin Supreme Court has held the trial court should answer the ultimate fact negligence question "yes" (including the cause question if it is also determined as a matter of law), and advise the jury in the instructions of the specific (causal) negligence found.[137] The jury must also be advised that they are to determine other issues of negligence and causation, and the appropriate jury instructions[138] should be given to admonish the jury not to weigh the judge's finding more heavily than a similar finding by the jury.

If the court answers special verdict questions of negligence and causation as a matter of law, its answers do not suggest to the jury that other parties are not negligent.[139] Only affirmative, not negative, answers by the court as a matter of law are to be included in the verdict. When the trial court exculpates a party from negligence, there is no issue to submit to the jury, and if the jury is informed of negative findings in the verdict, it may prejudicially affect the jury's comparison of negligence.[140]

When a material issue of ultimate fact is omitted from the verdict and is not brought to the attention of the trial court, although necessary to sustain the judgment, the trial court is

135. Cochran v. Allyn, 16 Wis. 2d 20, 113 N.W.2d 538 (1962).

136. Chopin v. Badger Paper Co., 83 Wis. 192, 53 N.W. 452 (1892).

137. Moose v. Milwaukee Mut. Ins. Co., 41 Wis. 2d 120, 163 N.W.2d 183 (1968); Moritz v. Allied American Mut. Fire Ins. Co., 27 Wis. 2d 13, 133 N.W.2d 235 (1965).

138. WIS. J.I.—CIVIL No. 108(5) (7), 1595; with respect to a damage question answered by the court, *see* WIS. J.I.—CIVIL No. 150.

139. Athanasiou v. Garton Toy Co., 157 Wis. 280, 147 N.W. 22 (1914).

140. Neumann v. Evans, 272 Wis. 579, 76 N.W.2d 322 (1956).

deemed to have determined the issue in conformity with the judgment on the jury's verdict.[141]

F. Special Verdicts Should Be So Drafted that Judgment in Favor of One Party or the Other May Be Based Upon the Verdict No Matter How the Jury Answers the Questions, So Long as the Answers Are Responsive.

By incorporating questions directed to the controverted issues, one usually will have selected the dispositive issues of the case. However, the verdict as formulated may be tested by analysis that is directed to whether the verdict as formulated will enable the court to direct judgment for one party as well as the other if the jury answers the questions responsively.[142] It should be remembered that issues of fact which are disposed of by failure of proof or uncontradicted proof may be relied upon by the court in support of the judgment, whether or not they are included in the special verdict.[143] It seems desirable that the court indicate those matters upon the record if there is objection to the verdict form or the instructions.[144] Nevertheless, one should not overlook the statutory cure for any omitted issue of ultimate fact not brought to the attention of the trial judge.[145] The statute specifies that such an omitted issue is deemed determined by the court in conformity with its judgment, and a jury trial on such omitted issue is deemed waived by the failure to request a finding on the issue. The case law has held that failure to request submission of such an issue constitutes a waiver of the right to a jury trial on that issue as well as a waiver of the right to later object to the verdict as submitted.[146]

G. Special Questions of "Additional" Fact Are Proper.

Sometimes the issues at trial and the evidentiary disputes are such that a standard form of special verdict strictly limited

141. WIS. STAT. § 805.12(2) (1973).

142. Stephenson v. Wisconsin Gas & Elec. Co., 186 Wis. 403, 202 N.W. 798 (1925); Schendel v. Chicago & N.W. Ry., 147 Wis. 441, 133 N.W. 830 (1911).

143. *See* text accompanying notes 75-79 *supra.*

144. WIS. STAT. § 805.13(3) (1973).

145. WIS. STAT. § 805.12(2) (1973).

146. Johnson v. Sipe, 263 Wis. 191, 56 N.W.2d 852 (1953); Smith v. Benjamin, 261 Wis. 548, 53 N.W.2d 619 (1952); Stellmacher v. Wisco Hardware Co., 259 Wis. 310, 48 N.W.2d 492 (1951); Nimits v. Motor Transp. Co., 253 Wis. 362, 34 N.W.2d 116 (1948). *See* Part VI *infra.*

to questions of ultimate fact obscures rather than reveals the jury's view of the evidence. When the fact of injury and the source of injury is in dispute, it may not be possible to ascertain from a standard special verdict what the jury's view was on each of those issues. Whether or not the jury determined that a person was acting on behalf of another as a prelude to imputing negligence may be obscured in a standard special verdict. Similarly, several acts of alleged negligence may be posed, although one or more may be borderline breaches of the standard of conduct or causation that will require review on motions after verdict or appeal.

A special verdict is not defective because the jury's view is not revealed with respect to each evidentiary dispute. Where some of the issues are close questions of policy, admissibility or sufficiency of the evidence, the trial and appellate courts may be called upon to review the evidence. When the jury's view of these disputes is ascertainable from the verdict, the task of reviewing judges is frequently simplified. The jury may have rejected the questionable evidence and adopted the sufficiently supportable or legally appropriate view of the case and this may be demonstrable from the verdict format.

A special question of additional fact is a useful tool to provide specific jury resolution of an evidentiary dispute. The phrase "additional fact" is used to acknowledge that such a fact question is not obligatory in the formulation of the special verdict; *i.e.*, the requirement that all issues of controverted ultimate fact be answered may not mandate a resolution of a lesser, nonultimate fact issue. Nevertheless, incorporation of such a question may aid the court by obtaining the jury's specific finding on the issue. Since the verdict is adequate if it disposes of the disputed issues of fact, the rejection of additional inquiries of fact is not error, nor is it error to include such inquiries if there is a need.

The following questions are illustrative of a number of such questions that have been posed: "Was the plaintiff, Isadora Dahl, injured as a result of the malfunctioning of the door?"[147] "At the time of the accident in question, was Janet Cochran driving the automobile of the defendant, John Allyn, as his agent?"[148] "Did the defendant Stanley H. Price, after coming

147. Dahl v. K-Mart, 46 Wis. 2d 605, 609, 176 N.W.2d 342, 344 (1970).
148. Cochran v. Allyn, 16 Wis. 2d 20, 21, 113 N.W.2d 538, 539 (1962).

to a stop in the vicinity of Florian's Inn on March 18, 1951, back his Pontiac automobile?"[149] A question inquiring whether an ambulance was on an emergency errand in a case involving an ambulance collision was properly refused.[150] Such questions may relate to negligence, causation or damage. Statutory motor vehicle safety regulations and the question of whether a driver invaded another's half of the roadway frequently lend themselves to special fact questions.[151] It has been suggested that if supported by the evidence in a case involving a pedestrian struck by an auto, the initial verdict question should be, "Was the plaintiff on the crosswalk when struck?"[152]

When a special fact question has been incorporated in a special verdict, it should override an answer to a general question that may overlap. Thus, if the special question determines negligence, an answer to a general question of negligence should, if necessary, be altered by the trial court to conform to the specific finding.[153]

Whether an accident was "unavoidable" is a special question which is seldom proper and the propriety of such an inquiry is rare.[154]

H. Multiple Special Verdicts Involving Multiple Parties and Separate Incidents May Be Submitted to the Jury.

Multiple occurrence cases where the claims of several plaintiffs are joined, but the events upon which recovery is based have time lapses which suggest that the events are successive occurrences and thus without joint liability present a special problem in special verdict use. "[T]o establish joint liability the independent torts must concur in point of time to thereafter inflict a single injury."[155] The single injury need not be found by the court or jury to be "indivisible" but should be such that the injuries in the successive torts are not patently separable. The automobile negligence cases in this area involve

149. Polsfuss v. Price 272 Wis. 99, 100, 74 N.W.2d 612, 613 (1956).

150. Merlino v. Mutual Serv. Cas. Ins. Co., 23 Wis. 2d 571, 127 N.W. 2d 741 (1964).

151. Odya v. Quade, 4 Wis. 2d 63, 90 N.W.2d 96 (1958).

152. Smith v. Superior & Duluth Transfer Co., 243 Wis. 292, 296, 10 N.W.2d 153, 154 (1943).

153. Dahl v. K-Mart, 46 Wis. 2d 605, 176 N.W.2d 342 (1970).

154. Van Matre v. Milwaukee Elec. Ry. & Transp. Co., 268 Wis. 399, 67 N.W.2d 831 (1955).

155. Butzow v. Wausau Memorial Hosp., 51 Wis. 2d 281, 288-89, 187 N.W.2d 349, 353 (1971).

separate impacts with a time interval of as much as twenty minutes[156] or personal injuries followed by negligent treatment by a physician or hospital.[157] A similar circumstance is presented by an action brought by three sibling plaintiffs to recover for bites by the same dog on different occasions.[158] In the latter case, the court approved the submission of the three claims to the jury in three separate special verdicts labeled (a), (b) and (c). The verdicts are not quoted in the supreme court's opinion, but they can be found in the appellant's appendix. In approving the multiple submission, the court said, "[A]n examination of the verdict questions reflect [*sic*] that they were complete and easily understandable and in the most appropriate form for cases of this type involving multiple parties and multiple incidents."[159]

I. Ordinarily the Question Should Be Framed To Put the Burden on the Affirmative.

The better way to frame a special verdict question is to submit the issue in a form that places the burden of proof on the person who has the affirmative of the issue.[160] Such question formulation accords with the pattern jury instruction for the ordinary burden of proof in civil cases.[161] That method of formulation is designed to avoid confusion in the jury instructions on the burden of proof.[162] If the jury instructions do not in fact confuse or erroneously instruct the jury with respect to the burden of proof, there is no error in formulating the question to put the burden of proof on the negative. When the burden of proof is on the negative, care must be taken to alter the appropriate pattern jury instructions which generally are formulated for the preferred affirmative special verdict submission.

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156. Johnson v. Heintz, 61 Wis. 2d 585, 213 N.W.2d 85 (1973), 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

157. Butzow v. Wausau Memorial Hosp., 51 Wis. 2d 281, 187 N.W.2d 349 (1971).

158. Dawson v. Jost, 35 Wis. 2d 644, 151 N.W.2d 717 (1967).

159. *Id.* at 651, 151 N.W.2d at 720.

160. Gilbert v. United States Fire Ins. Co., 49 Wis. 2d 193, 206, 181 N.W.2d 527, 534 (1970); Sloan v. Brown County State Bank, 174 Wis. 36, 182 N.W. 363 (1921); Kausch v. Chicago & M. Elec. Ry., 173 Wis. 220, 180 N.W. 808 (1921).

161. WIS. J.I.—CIVIL No. 200.

162. Carle v. Nelson, 145 Wis. 593, 130 N.W. 467 (1911); Pennsylvania Coal & Supply Co. v. Schmidt, 155 Wis. 242, 144 N.W. 283 (1913); Parker v. Hull, 71 Wis. 368, 37 N.W. 351 (1888).

III. The Form of Negligence, Causation and Comparison Inquiries[163]

One must have in mind that the radical revision of Wisconsin's special verdict statute[164] is as yet uninterpreted by judicial decision. A more simplified special verdict than those of the past now seems permissible. However, in discussing this subject there will be no attempt to combine the submission of negligence and causation in one question.[165]

A. Each Question Should Be Limited to a Single Direct and Controverted Ultimate Fact.

If issues are subdivided into evidentiary facts rather than ultimate facts, the spirit of special verdict submission is violated and a proliferation of inquiries results. On the other hand, an inquiry embracing more than one ultimate fact becomes a multiple question. The jury's answer to a multiple question is not always ascertainable and thus not responsive.[166] Where multiple questions have been propounded, the problems raised by conjunctive or disjunctive phraseology are necessarily encountered.[167]

Each question should be phrased in the simplest possible language[168] to elicit an answer that necessarily will be direct, positive and intelligible,[169] and dispositive of a fact in issue[170] requisite to the determination of the controversy.[171] Brevity in question formulation is desirable but the question should be broad enough to address itself to the issue. The substantial

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163. Most of the requisites of question formulation with respect to negligence are also applicable to other forms of liability. Negligence was chosen as the basis of the discussion because of the volume of that form of litigation and because the fact situations, although infinite, tend to form patterns that can be used for illustration.

164. Wis. Stat. § 805.12(1) (1973).

165. *See* Part I, sec. C. *supra.* Wis. J.I.—Civil No. 1001 illustrates the combination of negligence and causation in one question termed "fault."

166. Gay v. Milwaukee Elec. Ry. & Light Co., 138 Wis. 348, 120 N.W. 283 (1909); Goesel v. Davis, 100 Wis. 678, 76 N.W. 768 (1898); Jewell v. Chicago, St. P. & M. Ry., 54 Wis. 610, 617, 12 N.W. 83, 85 (1882).

167. *See* text, Part III, sec. B *infra.*

168. Hoffman v. Regling, 217 Wis. 66, 258 N.W. 347 (1935).

169. Thoresen v. Grything, 264 Wis. 487, 492, 59 N.W.2d 682, 684 (1953); Liberty Tea Co. v. LaSalle Fire Ins. Co., 206 Wis. 639, 643, 238 N.W. 399, 401 (1932); Jewell v. Chicago, St. P. & M. Ry., 54 Wis. 610, 12 N.W. 83 (1882).

170. Carle v. Nelson, 145 Wis. 593, 597, 130 N.W. 467, 468 (1911).

171. Honore v. Ludwig, 211 Wis. 354, 356, 247 N.W. 335, 336 (1933); *see* text accompanying notes 178, 179 & 180 *infra.*

issuable fact, not the conclusion therefrom, should be inquired about, for a conclusion does not disclose the factual basis underlying the conclusion. However, one must remember that the special verdict statute[172] specifically provides that the trial court need not separately submit questions on the specific ways in which a party was negligent.

B. A Double Question, Whether Phrased Conjunctively or Disjunctively, Hazards Reversible Error.

Part III, section A above, emphasizes the "single, direct and controverted ultimate fact" to which a question should be directed. When a question is double, it must be phrased conjunctively or disjunctively. If double or multiple, it is not possible to determine compliance with the five-sixths verdict statute.[173] If inquiry is made about the negligence of the defendant, using the conjunctive phrase "with respect to speed and lookout," and the jury answers "yes," there is no problem. But if the jury's answer is "no," no analysis can be made by a reviewing court to assure that the vote was not six negatives on speed and six negatives on lookout with no recorded dissents because every juror had voted "no" to part of the question. Therefore, compliance with the five-sixths verdict statute is not assured. Nevertheless' such conjunctive phraseology may be sustained if the evidence would not sustain one aspect of the double question.[174]

When a double question is disjunctively phrased such as "with respect to speed or lookout," and the jury answers "yes," the same problem is presented.[175] Because the error is one of substance rather than form, the absence of objection to the verdict form will not preclude an attack upon its validity.[176]

Questions framed in the alternative or disjunctive also invite uncertainty in the results. When it is necessary to inquire about more than one specific issue, it is better to break up the

172. WIS. STAT. § 805.12(1) (1973).

173. WIS. STAT. § 805.09(2) (1973): "VERDICT. A verdict agreed to by five-sixths of the jurors shall be the verdict of the jury. If more than one question must be answered to arrive at a verdict on the same claim, the same five-sixths of the jurors must agree on all the questions."

174. Petoskey v. Schmidt, 21 Wis. 2d 323, 124 N.W.2d 1 (1963); Geisinger v. Beyl, 80 Wis. 443, 50 N.W. 501 (1891).

175. Martin v. Ebert, 245 Wis. 341, 13 N.W.2d 907 (1945).

176. Vlasak v. Gifford, 248 Wis. 328, 21 N.W.2d 648 (1946).

question with subdivisions.[177] However, when the alternative or disjunctive words are synonyms for the same physical phenomenon ("flash or explosion") and are used interchangeably to denominate a single event, and are so understood by the jury, the question is not subject to condemnation.[178]

C. *When the Claim Is Grounded in Negligence, the Preferable Special Verdict Question Is in Terms of Negligence.*

Negligence is conduct that fails to meet a prescribed standard of ordinary care. When the conduct complained of is that of a professional person (nurse, physician, surgeon, psychiatrist, dentist, pharmacist, attorney, architect, engineer, accountant) or a technician or member of a skilled occupation (X-ray operator, optometrist, insurance agent, *etc.*) the standard of ordinary care is equated to a requisite standard of special knowledge, care and skill for that profession or occupation. Failure to meet the prescribed standard of care is negligent conduct.

Although the Wisconsin Supreme Court has extended great latitude to trial courts in framing negligence special verdicts in terms of whether the defendant performed medical or hospital services according to a standard of "care and skill," the better way is to frame the inquiry in terms of negligence because it enables the jury to answer more easily the comparison question which uses the term "negligence."

A medical malpractice case in Wisconsin is now grounded in negligence and usually premised upon the failure to exercise the required professional standard of care[179] or a specific duty to inform.[180] Although the court has approved a special verdict inquiry framed to inquire with respect to "[failure] to exercise that degree of care and skill which is exercised by the average practitioner in the class to which he belongs, acting in the same or similar circumstances,"[181] such a formulation is not pre-

177. Geisinger v. Beyl, 80 Wis. 443, 50 N.W. 501 (1891); Gunther v. Ullrich, 82 Wis. 222, 52 N.W. 88 (1892).

178. Bell v. Milwaukee Elec. Ry. & Light Co., 169 Wis. 408, 417, 172 N.W. 791, 795 (1919).

179. Fehrman v. Smirl, 20 Wis. 2d 1, 121 N.W.2d 255 (1963), 25 Wis. 2d 645, 131 N.W.2d 314 (1964).

180. Scaria v. St. Paul Fire & Marine Ins. Co., 68 Wis. 2d 1, 227 N.W.2d 647 (1975); Trogun v. Fruchtman, 58 Wis. 2d 569, 207 N.W.2d 297 (1973).

181. Shier v. Freedman, 58 Wis. 2d 269, 283-84, 206 N.W.2d 166, 172 (1973).

ferred. In *Carson v. City of Beloit*[182] the verdict was couched in terms of negligence and received the court's approval. The question may be phrased, "In rendering medical (and surgical) services to the plaintiff, was the defendant negligent with respect to exercising [the physician's standard of care]." In the instance of an informed consent case, the question could be, "In rendering medical (and surgical) services to the plaintiff, was the defendant negligent with respect to reasonably disclosing all significant facts under the circumstances of the situation necessary to form the basis of an intelligent and informed consent of the plaintiff to the treatment (and operation)?"

Probably the question should be stated more simply: "In rendering medical (and surgical) services to the plaintiff, was the defendant negligent with respect to sufficient disclosure to enable the plaintiff to make an informed consent to treatment?" However, the informed consent doctrine is of recent and evolving origin. A study of old cases demonstrates that as the law achieves greater clarity, the special verdict questions become more simple with the omission of standards from the special verdict question, and reliance is placed solely upon the jury instructions to acquaint the jury with the requisite standards; for example, "Did the defendant Dr. ____, reasonably and adequately inform the plaintiff ____, to enable an intelligent and informed consent by him to the treatment (and operation) in question?" Each of these forms leaves to the jury instructions the standard, *i.e.*, duty to disclose "all significant facts under the circumstances of the situation necessary" to give informed consent.

If a medical negligence case involves both negligent treatment and lack of informed consent, the question will be framed only in negligence. The court should submit to the jury either specific issues of negligent treatment and lack of informed consent, or an ultimate fact negligence question with instructions containing charges as to the specific issues.

The jury instructions relating to professional standards of care[183] would benefit from an addition which advises the jury that a failure to exercise the described degree of care, skill and judgment, constitutes negligence. In *Carson* the trial court may have been concerned about the absence of a characterization

182. 32 Wis. 2d 282, 287, 145 N.W.2d 112, 114 (1966).
183. WIS. J.I.—CIVIL Nos. 1023, 1023.5 and 1023.7.

of a breach of the standard of care, skill and judgment in the patterned medical malpractice jury instruction[184] as negligence, and supplemented the instruction with the *Osborne v. Montgomery*[185] negligence definition found in Wisconsin Jury Instruction—Civil Number 1005. The supreme court found the definition of negligence unnecessary but not prejudicial.

In Wisconsin, safe place, dog owner, and products liability cases present the same problem. A failure to comply with the higher safe-place standard of care constitutes negligence. In *Krause v. Veterans of Foreign Wars Post 6498*[186] it was recommended that the verdict inquiry employ the word "negligent" and suggested the following form: "At the time and place in question [or at the time and place of Lora Krause's injury] was the defendant negligent with respect to maintaining the dance hall as safe as the nature of the place reasonably permitted?"[187]

Although products liability cases in Wisconsin are grounded in negligence[188] (unless express or implied warranty is the basis of the claim), the formulation of the special verdict does not lend itself to use of the word "negligence." Because section 402 A of the *Second Restatement of Torts* simplifies the method of proof of liability, the ultimate facts that must co-exist are: (1) a defective product, and (2) a product unreasonably dangerous to a user or consumer when it left the possession of the seller.[189] The suggested special verdict form accomplishes the translation of the "conduct" inquiry into negligence in the preface to the comparative negligence question:

> Question No. 5: If you have answered Questions 1 and 2 "yes," then such conduct on the part of the seller constitutes negligence and requires, if you have also answered Questions 3 and 4 "yes," that you answer the following questions on comparative negligence: Assuming the total negligence that caused plaintiff's injuries to be 100%, what percentage

184. WIS. J.I.—CIVIL No. 1023.

185. 203 Wis. 223, 234 N.W. 372 (1931).

186. 9 Wis. 2d 547, 101 N.W.2d 645 (1960).

187. *Id.* at 554, 101 N.W.2d at 649.

188. That form of per se negligence grounded on RESTATEMENT (SECOND) OF TORTS § 402 A (1965) will hereinafter be referred to as "402 A negligence."

189. WIS. J.I.—CIVIL No. 3290. Other elements must be proven but the proof in those areas will usually be uncontroverted. *See* comment to the verdict form.

thereof do you attribute to: (a) the Product?[190] (b) the Plaintiff?

Although liability of a dog owner for a dog bite is grounded in negligence, the effect of statutory liability is to eliminate the need to prove scienter.[191] If liability is sought to be imposed merely because the dog was mischievous, then the special verdict question will not be framed in terms of negligence and will require some translation to negligence in the instructions or a prefatory statement to the comparative negligence questions.[192] However, if the liability is based upon the conduct of the dog owner with respect to maintaining control and restraint of the dog, then such translation is not required because the special verdict question is easily framed in terms of negligence.[193]

D. A Question Directed to Conduct of One of the Parties Should Be Related in Time and Space to the Event Which Is the Basis of the Litigation.

A broad definition of relevancy[194] is appropriate to afford a party a reasonable opportunity to prove his case. Certain evidence, although relevant, may nevertheless not be close enough to the mark nor in sufficient quantity to support a finding by the trier of the fact. When formulating a special verdict question, one should attempt to direct the jury's attention to the concept of time and space to assure that it will focus upon conduct probably related to the occurrence or event. An opening phrase of the special verdict inquiry can achieve that goal if it serves to reasonably focus upon conduct that approximates an injury or event. The most frequent phraseology is "at and just prior to" or "at and just before." This phrasing avoids what may be overly broad, "at and before" or what may be too

190. Beware of this form of inquiry if more than one person's conduct contributed to liability with or without issues of contribution between them. *See* Part I, sec. B *supra;* City of Franklin v. Badger Ford Truck Sales, 58 Wis. 2d 641, 207 N.W.2d 866 (1973); and text accompanying notes 211 and 212 *infra.*

191. Wurtzler v. Miller, 31 Wis. 2d 310, 318, 143 N.W.2d 27, 30-31 (1966); Nelson v. Hansen, 10 Wis. 2d 107, 119, 102 N.W.2d 251, 258 (1960). The *Nelson* case foreshadowed the comparable theory applied with respect to liability under RESTATEMENT (SECOND) OF TORTS § 402 A (1965) in Dippel v. Sciano, 37 Wis. 2d 443, 155 N.W.2d 55 (1967).

192. *See* comment to WIS. J.I.—CIVIL No. 1390.

193. WIS. J.I.—CIVIL No. 1391.

194. WIS. STAT. § 904.01 (1973).

narrow, "immediately before." Another approved form is "at the time and place."[195]

In the first instance, a properly formulated inquiry confines the search of the evidence to a time relevant to the status of the plaintiff. His status as a trespasser, licensee-invitee or frequenter may be determinative of the standard of care owed to him by the defendant.[196] *Terpstra v. Soiltest, Inc.*[197] involved a person injured in the collapse of a partly constructed building. Terpstra had entered the premises as a trespasser and thereafter allegedly received permission to remain, thus converting his status to a licensee. Special verdict questions which inquired with respect to his status as a trespasser, licensee or invitee "on the day in question" and "at the time he came upon the premises" should properly have inquired of his status "at the time and place of his injury" in order that the pertinent time and space could be considered. Similarly, a plaintiff who seeks recovery under the safe-place statute[198] must have his status as a frequenter or trespasser related to the time of his injury.

The context of the evidence and the theory of recovery always must be considered in determining the scope of time and space appropriate to an injury. In *Petoskey v. Schmidt*[199] the plaintiff's contention was not that the defendant had failed to shovel snow at all, but that he had failed to continue to clear a walk later in the evening after it had been indisputably cleared earlier. In that instance the phraseology "at the time and place of the injury to the plaintiff" was approved and a requested "at and prior to the time of injury to the plaintiff" was disapproved because "it would have permitted the jury to have explored the conduct of the defendants for periods far in advance of the time of the injury."[200]

A reverse circumstance was present in *Behning v. Star Fire-*

195. Krause v. Veterans of Foreign Wars Post 6498, 9 Wis. 2d 547, 101 N.W.2d 645 (1960).

196. Antoniewicz v. Reszcynski, 70 Wis. 2d 836, 236 N.W.2d 1 (1975); Terpstra v. Soiltest, Inc., 63 Wis. 2d 585, 218 N.W.2d 129 (1974); McNally v. Goodenough, 5 Wis. 2d 293, 92 N.W.2d 890 (1958).

197. 63 Wis. 2d 585, 218 N.W.2d 129 (1974).

198. WIS. STAT. § 101.11 (1973).

199. 21 Wis. 2d 323, 125 N.W.2d 1 (1963).

200. *Id.* at 329, 124 N.W.2d at 4-5. *See also* Stevens v. Farmers Mut. Auto Ins. Co., 268 Wis. 25, 66 N.W.2d 668 (1954).

works Manufacturing Co.,[201] because liability was predicated upon a three-hour period of exclusive control by the defendant's agent before the accident. The verdict question was phrased "at and immediately prior to the time of the accident in question." After the jury had found no negligence on the part of the defendant, the trial court granted a new trial on liability, expressing the view that the phraseology "at and immediately prior to" was misleading to the jury. The supreme court affirmed, stating:

> The trial judge specifically pointed out the portion of the verdict he felt to be misleading. It is apparent that he thought the question placed inordinate focus on the events that had occurred just prior to the occurrence of the misfire. Since the *res ipsa* instruction given was based on plaintiff's contention that defendant's agents had exclusive control of the explosives for some three hours prior to the accident, the question could have caused the jury to exclude a possible *res ipsa* inference arising from the defendant's three-hour control of the explosives.[202]

E. In a Personal Injury Case, When More than One Event or Occurrence Is the Subject of Litigation, Care Must Be Exercised in Phrasing the Negligence and Causation Questions with Respect to "The Accident," "The Collision," "The Plaintiff's Injury" or "The Defendant's Injury."

In a property damage case, in the typical slip, trip or fall personal injury case, or in an automobile personal injury case such as passenger against driver in a one-car accident, or driver against driver in a two-car accident (with no seat belt contributory negligence or any other "passive" negligence), the fact is seldom controverted that the injury resulted from the "accident" or "collision." The parties simply contest the claim of negligence or the fact or extent of injury or property damage. In that context, the use of the term "accident" or "collision" in the negligence, causation and contribution questions is the preferred inquiry because it serves to focus the jury's survey and evaluation of the pertinent evidence upon the conduct approximate to the basic event, the accident or collision.

When the evidence in a personal injury action presents the

201. 57 Wis. 2d 183, 203 N.W.2d 655 (1973).
202. *Id.* at 188-89, 203 N.W.2d at 659.

dual prospects of active and passive negligence,[203] or where the parties and claims are multiple, the negligence, causation and contribution questions should relate to the "injury" for which recovery is sought.[204] In some instances, further complication results because the special verdict inquiries may resort to a combination of reference to "injury," "accident," or "collision."

Use of the phrase "the accident" in verdict questions which inquire as to causal negligence is apt to be misleading where "the accident" embraces a series of near-misses or collisions for which not all of the parties are causally negligent.[205] An obvious illustration is the chain collision where a considerable amount of time elapses between impacts.[206] Another illustration is a situation in which injury is claimed due to a "second collision," *i.e.*, the collision of an occupant with parts of the interior of the automobile because of insufficient restraint or negligent design of the vehicle. Reference to "the accident" can also cause error in the damage liability instruction where injuries occur partly in one collision and partly in another.[207]

"Accident" or "collision" should not be the subject of the negligence, causation or contribution questions where, from the evidence, the event does not necessarily embrace the injury for which the plaintiff seeks recovery. In *Schrank v. Allstate Insurance Co.*[208] a child pedestrian claimed that the driver of the striking automobile was negligent both as to lookout for not seeing the pedestrian earlier, and as to management and con-

203. "Passive negligence" is negligence which in whole or part causes the injury for which recovery is sought. It is distinguished from "active negligence" which causes the event, that is, the accident or collision, from which injury in whole or part results. *See, e.g.*, Vroman v. Kempke, 34 Wis. 2d 680, 150 N.W.2d 423 (1967); Theisen v. Milwaukee Auto. Mut. Ins. Co., 18 Wis. 2d 91, 118 N.W.2d 140 (1962).

204. In Brown v. Milwaukee Elec. Ry. & Light Co., 148 Wis. 98, 138 N.W. 589 (1912), a causation question inquiring whether the plaintiff's negligence was a cause of his "damages" was said to be faulty because the question should relate to his injury, not damages. However, the court did not explain why the question was faulty. Possibly it was because in the sequence of the questions, damages are not ascertained until after negligence, causation and comparison are determined and thus it was unwise to have the jury focus on any more than "injury" at that point. Some damages may flow from an injury and some from an antecedent or subsequent event but that is best determined in answer to the damage question rather than creating an admixture of causation of damages and causation of injury.

205. *See* Bode v. Buchman, 68 Wis. 2d 276, 285, 228 N.W.2d 718, 723 (1975).

206. *E.g.*, Johnson v. Heintz, 61 Wis. 2d 585, 213 N.W.2d 85 (1973).

207. *Id.* at 585, 213 N.W.2d 85 (1973), 73 Wis. 2d 286, 301, 243 N.W.2d 815 (1976).

208. 50 Wis. 2d 247, 184 N.W.2d 127 (1971).

trol for dragging the child 100 feet after impact. The negligence question inquired generally with respect to the operation of the motor vehicle. The causation question inquired with respect to the cause of the "accident." The jury found negligence but also found it not causal. The child's injury arguably was caused by being dragged and the plaintiff contended that lookout caused the "accident" but management and control caused the "injury," and thus claimed that the cause question was improperly phrased. Although clearly "injury" was the proper subject of the inquiry, error was averted because the trial court in its instructions had admonished the jury to "consider the accident as including all the portions of the incident that resulted in injury."[209] The special verdict questions directed to negligence, causation and comparison should inquire about the claimant's "injury" wherever the evidence places in issue whether: (1) the claimant was in fact injured by reason of the event; (2) an injury to the claimant existed prior to the event; (3) a claimant's pre-existing injury was aggravated or activated; (4) the injury resulted from separate events for which the defendants are not jointly liable; (5) multiple claims arose from more than a single causal event; (6) the claim was caused by active and passive negligence; or (7) injury symptomology was so remote from the event that causation is substantially in dispute. Preference in all cases for an "injury" inquiry is a recommended precaution until it becomes apparent that "accident" or "collision" is an appropriate inquiry.

Indiscriminate choice between the ordinary alternatives (accident, collision, injury) not only obscures the cause and effect relationship between conduct and damages, it also leads to an erroneous causal negligence comparison. Two one-car accident cases provide illustrations.

In *Theisen v. Milwaukee Automobile Mutual Insurance Co.*[210] the driver fell asleep at the wheel and left the road, causing the plaintiff passenger's injuries. Early in the evening, the passenger and the driver participated in a performance of a high school play followed by a party and a hayride that terminated about 3:00 a.m. The accident occurred on the way home. The plaintiff was asleeep or dozing. Other passengers testified to the driver's conduct and the jury found him causally negli-

209. *Id.* at 260, 184 N.W.2d at 134.
210. 18 Wis. 2d 91, 118 N.W.2d 140 (1962).

gent with respect to management and control. Plaintiff's alleged negligence related to entering and riding in the car and lookout. She was found negligent in both respects, but only her lookout negligence was found to be causal.

Both cause questions, one as to the driver's negligence, the other as to the passenger's negligence, inquired whether the negligence was a "cause of the accident and resulting injuries to the plaintiff." Such an inquiry with respect to causal negligence of the driver was appropriate because the evidence did not dispute that his negligence caused both the accident and the injury.[211] The causation inquiry about the passenger was erroneous because her negligence was passive, *i.e.*, it only could be a cause of her injuries, not a cause of the accident. The causation inquiry with respect to the passenger should have been limited to her "injury." Similarly, a claimant's contributory (seat-belt) negligence inquiry should relate to the claimant's injury alone.[212]

There is no reason in the *Theisen* case why the inquiry with respect to both the passenger's and the driver's negligence could not have been directed solely to the passenger's injury. Because the causation questions referred to "accident and injury," the comparative negligence question would require the same phraseology and would result in an improper comparison of causal negligence.

The prospect of error in the formulation of the special verdict questions decreases greatly when there is uniformity in the nature of the inquiry (accident-collision-injury) in the questions dealing with negligence, causation and comparison. However, another one-car accident case demonstrates that uniformity of phraseology will not invariably avoid error.

In *Vroman v. Kempke*[213] the car slid off a slippery road, injuring two passengers. Driver negligence (in the operation of the automobile) and passenger negligence (proceeding to travel under the hazardous weather and road conditions) were claimed. All of the questions were phrased in terms of injuries, but the comparison question nevertheless provided the error by asking the jury to apportion the negligence between the two

211. Note that the special verdict question connected the accident to the injuries, while in Shrank v. Allstate Ins. Co., 50 Wis. 2d 247, 184 N.W.2d 127 (1971), the court's instructions connected the accident to the injuries.

212. Bentzler v. Braun, 34 Wis. 2d 362, 383, 149 N.W.2d 626, 638 (1967).

213. 34 Wis. 2d 680, 150 N.W.2d 423 (1967).

passengers and the driver. Since each passenger's negligence was passive it could only have contributed to her own injury and not that of her fellow passenger. Two comparison questions were required, each comparing the negligence of one passenger with the driver's negligence. Most passenger negligence is passive and is causal only of the passenger's own injuries, although in rare cases passenger negligence that interferes with the operation of a vehicle may be active negligence. The active-passive negligence trap is most easily avoided by inquiring with reference to the plaintiff's injury.

A slip-trip-fall case will frequently involve evidence that disputes whether a fall occurred, or more often, evidence that the fall was unrelated to conduct of the defendant. Ambulation lends itself to self-induced error and thus, whether the plaintiff slipped, tripped or fell, irrespective of negligence on the part of the defendant, is most often the focus of the case. Inquiry with respect to the plaintiff's injury rather than the accident seems to be a more sharply focused inquiry.

As the event from which the claims arose becomes more complex, the prospect of error in the special verdict formulation becomes more likely. An illustration is found in Wisconsin Jury Instructions-Civil Number 1592,[214] which suggests a verdict form in an action in which three drivers and two guests are claimants for personal injuries. Since the guests' negligence is passive and the drivers' negligence is active, the comparison questions are three in number. The first compares the drivers' negligence (active) causing the "accident," the second and third compare the driver negligence (active) to the negligence (passive) of passengers One and Two, and relate to the "injury" of the person inquired about. Use of the answers to the three comparison questions enables the ultimate mathematical computation by the court to apply the apportionment to the damage award in compliance with the comparative negligence statute.[215] The verdict form illustrated becomes more complicated if the evidence establishes causal passive negligence on the part of one or more of the drivers.

Special caution is required where the occurrence or event inquired about (injury-accident-collision) is itself a controv-

214. The accompanying jury instructions are WIS. J.I.— CIVIL No. 1591, which explain to the jury the active-passsive dichotomy.

215. *See* comment to WIS. J. I.—CIVIL No. 1591.

erted fact. The defense may contend and offer evidence supporting the contention that the claimant was not injured or that the accident or collision did not occur. Injuries that overlay a pre-existing injury or condition, injuries supported only by subjective complaints, the involvement of a "phantom car" or near-miss, and noncontact accidents and collisions illustrate the most frequent no-injury, no-accident, no-collision contentions.[216] If inquiry is made with respect to controverted occurrences, an assumption of a controverted fact is improperly made.[217] Probably the easiest and most effective way to solve the problem is to add the phrase "if any" in the verdict question after the injury-accident-collision reference.

When the question is phrased "at the time and place [of the plaintiff's injury-accident-collision]" or "at and just before [the plaintiff's injury-accident-collision]" a time, location[218] and event are established as a reference point for the jury's judgment of conduct. Sometimes the evidence contests only whether the challenged conduct was negligent, and not the relationship of the challenged conduct to the time, location or event. In such a circumstance, the phrase "at the time and place in question" may sufficiently direct the jury's attention to the reference point.

F. A Question Should Not Assume nor Imply a Controverted Fact

A question assuming a controverted fact not established as a matter of law, is faulty in form.[219] Such a question may be understood by the jury as a determination or suggestion by the trial judge. The most frequent error in this respect arises from prefacing the category of negligent conduct inquired about with the preposition "in." The following question illustrates:

> Question 3. Immediately preceding, and at the time of the accident involved here, was the defendant Charles Mueller negligent in respect to:

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216. In the writers' opinion, mere cross-examination of the claimant or his physician witness with respect to the existence of subjective symptoms or asking the investigating traffic officer whether the claimant said at the scene that he was not hurt is insufficient to elevate the existence of an injury to a controverted fact. (This of course assumes that the physician continues in his opinion that the claimant was injured.)

217. *See* Part III, sec. F. *infra.*

218. Location is seldom disputed.

219. Fidelity Trust Co. v. Wisconsin Iron & Wire Works, 145 Wis. 385, 129 N.W. 615 (1911).

A. . . .
B. In stopping on the highway in the place he did without placing burning fusees or flares upon the road near his standing truck?
C. In failing to have clearance lights burning upon the truck?[220]

By use of "In" the questions assume that Mueller did not "burn" the warning or the clearance lights. Simple deletion of "In" would have reduced the inquiries to appropriate categories of claimed negligence,[221] although the remaining phraseology merits further refinements and improvements.[222]

Where a question standing by itself might be construed to assume a controverted fact, but in the context of the other questions propounded in the special verdict it does not, no error occurs.[223] Also, a question which assumes a controverted fact is not error if the jury instructions clearly direct the jury to rely upon the evidence as they find it in making answer to the question.[224] In that fashion, it is made clear to the jury that they are not to accept any assumption implicit in the question unless it is found by them from the evidence.

When descriptive phrases are used to modify the events or conduct inquired about, an assumption of fact can arguably occur. This question illustrates the problem: "Did the fire *which destroyed the plaintiff's property* on the morning of December 5, 1930, result from a gas explosion *which occurred shortly preceding the fire?*"[225] The first italicized phrase assumes the destruction of the plaintiff's property. If the evidence had contested the extent of damage as distinguished from the dollar value of damage, the question would have been

220. Foemell v. Mueller, 255 Wis. 277, 283-84, 38 N.W.2d 510, 513 (1949).

221. *Id.* at 284, 38 N.W.2d at 513. *See also* Odya v. Quade, 4 Wis. 2d 63, 90 N.W.2d 96 (1958); Hoffman v. Reinke, 268 Wis. 489, 67 N.W.2d 871 (1955); Para v. Douglas, 253 Wis. 311, 34 N.W.2d 229 (1948); Maas v. W. R. Arthur & Co., 239 Wis. 581, 2 N.W.2d 238 (1942).

222. A more simple phraseology could be: "At and just before the accident was the defendant Charles Mueller negligent with respect to: (a) Burning fusees or flares? (b) Lighted clearance lights?" The inquiries in subdivisions (a) and (b) could be further simplified to: "(a) Fusees or flares? (b) Clearance lights?" An explanation of the conduct required by the motor vehicle statutes is provided by the jury instructions.

223. Mayer v. Milwaukee St. Ry., 90 Wis. 522, 526, 63 N.W. 1048, 1049 (1895).

224. Lisowski v. Chenenoff, 37 Wis. 2d 610, 155 N.W.2d 619 (1968); Nechodomu v. Lindstrom, 273 Wis. 313, 321, 77 N.W.2d 707 (1956).

225. E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis. 158, 168-69, 247 N.W. 861, 865 (1933) (emphasis added).

faulty. The second italicized phrase lends itself to the assumption or inference that a gas explosion occurred. Whether the explosion resulted from gas was a controverted fact. The phrase was unnecessary. The question could have been worded: "Did the December 5, 1930 fire at the plaintiff's property result from a gas explosion?" If the second italicized phrase in the original question was intended to describe the gas explosion as occurring before the fire, the suggested question would retain the intention by inquiring about the result. When the propriety of the verdict form was reviewed by the supreme court, the objection was characterized as "trivial and insubstantial."[226] It is apparent, however, that the court construed that question as a special question of preliminary or additional fact, and believed that the thrust of the litigation with respect to the cause of the explosion was such that the jury was not led to assume a fact. A new trial was granted on other grounds.

In the second trial in the more recent case of *Fehrmann v. Smirl,*[227] a special verdict question was submitted in a form suggested by the supreme court in its opinion in the first appeal of the case.[228] The question read: "Was Oscar A. Fehrmann's external sphincter injured in the course of the first operation or the second operation or in the course of the treatment administered between the two operations?" The defendant's theory was that there was no sphincter damage, or if damaged, the cause was disease. Defendant complained that the question assumed sphicter damage, and therefore liability, and left to the jury only an inconsequential determination of which surgical procedure or treatment caused the injury. The court upon review held that the inquiry did not assume injury but "fairly makes inquiry into a time interval during which the injury, if any,[229] may have occurred."[230] The court might have added that in view of the jury's yes answer to the question, it was clear that they did not read the question as assuming injury. Otherwise, the answer would be an unintelligible response. Had the question in the jury's mind assumed injury, an answer stating one or more of the operations or treatment as the cause of the injury

226. *Id.* at 169, 247 N.W. at 865.

227. 25 Wis. 2d 645, 131 N.W.2d 314 (1964).

228. 20 Wis. 2d 1, 28, 121 N.W.2d 255, 122 N.W.2d 439 (1963).

229. The court's construction supplied the missing words. *See* text accompanying note 217 *supra*, and Part III, sec. H *infra*.

230. 25 Wis. 2d 645, 650, 131 N.W.2d 314, 317 (1964).

would have been required.

Although it is repeatedly suggested that a special verdict question which assumes or implies facts which are disputed in the evidence is improper,[231] not often has such an assumption or implication been found prejudicial.[232] In most of the cases either the evidence justifies the assumed fact because it is not truly in dispute, or the assumption or implication is cured by prefatory instructions to the special verdict questions or by instructions which make no assumptions and prescribe the issues of fact that must be found by the jury in answering the question.[233]

Because negligence is shorthand for "failure for exercise ordinary care," one quite naturally formulates the special verdict question in the context of "failure," whether the inquiry relates to common law or statutory duties. Thus, "failure to sound horn," "failure to yield the right of way," "failing to stop for a stop sign," "failing to signal a left turn," are frequently employed. The weakness in these formulations is their susceptibility to the charge that the question implies a view by the trial court that the person inquired about was negligent in that respect.

In two cases it has been suggested that where liability is predicated upon a statutoy duty, the language of the statute ought to be used in the special verdict question. Thus, "insufficiency or want of repairs" should be incorporated in the question where liability against a municipality for a highway defect is sought.[234] When liability of an automobile driver is premised

231. Froemmel v. Mueller, 255 Wis. 277, 38 N.W.2d 510 (1949); Maas v. W. R. Arthur & Co., 239 Wis. 581, 2 N.W.2d 238 (1942).

232. In one "wrong side of the road" case, the court justified the erroneous question on the ground that it had been posed in the special verdict with respect to both drivers. Leonard v. Bottomley, 210 Wis. 411, 245 N.W. 849 (1933). "We go right enough, darling, if we go wrong together," G. SANTAYANA, PERSONS AND PLACES: MY HOST THE WORLD 2 (1953).

233. Lisowski v. Chenenoff, 37 Wis. 2d 610, 155 N.W.2d 619 (1968); Fehrman v. Smirl, 25 Wis. 2d 645, 131 N.W.2d 314 (1964); Sharp v. Milwaukee & Suburban Transp. Corp., 15 Wis. 2d 268, 112 N.W.2d 597 (1961); Affett v. Milwaukee & Surburban Transp. Corp., 11 Wis. 2d 604, 106 N.W.2d 274 (1960); Huffman v. Reinke, 268 Wis. 489, 67 N.W.2d 871 (1955); Parr v. Douglas, 253 Wis. 311, 34 N.W.2d 229 (1948); E. L. Chester Co. v. Wisconsin Power & Light Co., 211 Wis. 158, 247 N.W. 861 (1933); Marsh Wood Products Co. v. Babcock & Wilcox Co., 207 Wis. 209, 240 N.W. 392 (1932); Dolphin & Peacock Mining Co., 155 Wis. 439, 144 N.W. 1112 (1914); Mayer v. Milwaukee St. Ry., 90 Wis. 522, 63 N.W. 1048 (1895).

234. Morley v. Reedsburg, 211 Wis. 504, 248 N.W. 431 (1933).

upon a violation of a right-of-way statute, the inquiry should refer to "yielding right of way,"[235] or even more simply, "right of way." Nevertheless, there has been a refusal to consider a "failure" or "failing" phraseology as error *per se.*[236] The view has been that there is no error in the question phraseology where the jury instructions contain an explication that it is the duty of the jury to determine such an "assumed" or "implied" issue.[237]

One should acquire a habit of phraseology that refers to categories of negligence, *e.g.*, "lookout," "right of way," "sounding horn," "manner of turning," "deviation of his motor vehicle," "stopping." Using such phrases avoid assuming or implying a controverted fact and eliminate the need to caution the jury that they are to determine the issue. It also simplifies the use of the pattern jury instructions without the need for a preface to each instruction that fulfills the caution to the jury. Instead, one can merely preface the instruction with "In connection with Question 1, you are instructed that . . . ." Such a preface is required to relate the instruction to the appropriate question or questions.

G. Questions Should Avoid Duplicity.

> Duplicity, as that term is used by the Supreme Court, means the presence of two or more distinct findings in the verdict where one or more of the findings is unwarranted.[238]

Duplicity was more identifiably present when former section 270.27 of the Wisconsin Statutes required separate inquiries of specific issues of negligence, for example: "At and just before the accident in question was the defendant negligent in the operation of his motor vehicle with respect to: (a) Lookout? (b) Management and control? (c) Speed?" In 1961, the statute was amended[239] to permit a general negligence inquiry, for example: "At and just before the accident in question, was the defendant negligent in the operation of his motor vehicle?" In the latter instance the specific issues of negligence are pre-

235. Smith v. Superior & Duluth Transfer Co., 243 Wis. 292, 10 N.W.2d 153 (1943).

236. Kiggings v. Mackyol, 40 Wis. 2d 128, 161 N.W.2d 261 (1968).

237. Rensink v. Wallenfang, 8 Wis. 2d 206, 99 N.W.2d 196 (1959).

238. Doar & Doar, *Avoiding Duplicity in Special Verdicts,* 29 WIS. B. BULL. 13, 13 (Dec. 1956).

239. Supreme Court Order, 11 Wis. 2d v (effective June 1, 1961).

sented to the jury solely through the specific negligence instructions incorporated in the jury charge.

The statutory amendment does not require a general submission; therefore, a "specific issue" submission is still permitted. In instances where the trial court is uncertain whether the evidence is sufficient to support an affirmative finding on one of the issues of negligence presented or is uncertain whether as a matter of law the conduct constitutes actionable negligence, it may be desirable to submit a specific issues question to the jury in order to ascertain its veiw of the specific issues. Thus, duplicity, although not as pervasive as before 1961, continues as a hazard to be avoided.

Miller v. Kujak[240] provides a simple illustration of duplicity. Whether the accident occurred on the concrete roadway or on the shoulder was the central dispute. The special verdict question asked:

> [W]as. . .Miller negligent in the operation of his automobile in any of the following respects:
> (a) With respect to lookout?. . .
> (b) With respect to management and control?. . .
> (c) With respect to swerving to the left from the shoulder to the concrete?"[241]

The jury found causal negligence only with respect to management and control, found the defendant negligent, and apportioned negligence 75 percent to the defendant and 25 percent to Miller.

Issues (b) and (c) are duplicitous because (c) is merely a specific form of management and control and the evidence only supported the specific form. The jury could not answer "yes" to management and control and "no" to swerving because the evidence could only support swerving. If the jury answered "yes" to (b) and (c), then the answers would have been consistent but there would be no support in the evidence for the "management and control" finding except the "swerving" aspect. The vice of that circumstance is that the jury, in making two such findings where only one was supported, might have made a faulty comparison of negligence.

> [W]here a special verdict permits the jury . . . to find the operator of a motor vehicle causally negligent in several sepa-

240. 274 Wis. 370, 80 N.W.2d 459 (1957).
241. *Id.* at 372-73, 80 N.W.2d at 460.

> rate specified respects and the jury does so find, when actually the operator was causally negligent in only one of such respects, there is a duplication of findings of negligence which renders the comparison of negligence by the jury inaccurate.[242]

The verdict comparison becomes suspect because the assumption is made that the jury, having inaccurately found causal negligence, must have given weight to the erroneous finding in making the comparison of negligence, thus importing and compounding the error. A new trial may be required because of the current doctrine that the jury's comparison is unalterable.[243]

Sometimes reference to the instructions will enable the court to resolve a problem of potential duplicity in a special verdict question. When the thrust of the instructions makes clear that in answering specific issues of negligence, the jury is not to duplicate the finding and is to consider the evidence in a fashion that prevents overlap, the supreme court considers the error in question formulation to be cured by the instructions,[244] if, of course, there is evidence in the record to support more than one finding.

Another error in the special verdict formulation of the *Miller* case which inquired "with respect to swerving to the left from the shoulder to the concrete" was that it did not permit only one conclusion from a single direct answer by the jury. The question was answered "no" by the jury, but one cannot ascertain whether the jury meant "No, he did not swerve," or "No, he was not negligent for swerving." Thus the answer was a negative pregnant.[245]

As instructions may eliminate the potential for duplicity in the special verdict question, so do they create a potential for duplicity by instructing on an issue of negligence not capable of support by the evidence. Duplicity in the instructions ought to be avoided just as much as duplicity in the verdict. Never-

242. Dahl v. Harwood, 263 Wis. 1, 6, 56 N.W.2d 557, 559 (1953).

243. DeGroff v. Schmude, 71 Wis. 2d 554, 238 N.W.2d 730 (1976); Krauth v. Quinn, 69 Wis. 2d 280, 230 N.W.2d 839 (1975); Britton v. Hoyt, 63 Wis. 2d 688, 218 N.W.2d 274 (1974).

244. Zartner v. Scopp, 28 Wis. 2d 205, 137 N.W.2d 107 (1965).

245. The negative pregnant here is analogous to the negative pregnant in pleading which "exists when the wording of a denial is such that, if taken literally, it does not unequivocally deny the allegation but is pregnant with an admission . . . ." 2A MOORE'S FEDERAL PRACTICE § 8.24 (2d ed. 1975) (footnote omitted).

theless, the Wisconsin Supreme Court is more tolerant of duplicity in instructions than in the verdict, and has refused to extend the concept to instructions with this explanation:

> We deem it inadvisable to extend the concept of duplicity to the area of the instructions to the jury. One of the considerations which prompted this court to amend sec. 270.27 Stats., in 1961 under its rule-making power, so as to permit questions in a special verdict to be framed in terms of ultimate fact, was that this would tend to eliminate duplicitous verdicts. Duplicitous verdicts which find overlapping elements of negligence are bad because of their likely effect on the jury in answering the comparative-negligence question. Where a single negligence question framed in terms of ultimate fact is submitted, we deem it unlikely that the jury will segregate particular elements of negligence and assign to each element a certain percentage in answering the comparative-negligence question. Rather we think juries will tend to take an overall view of the negligence of each participant in apportioning percentage of fault. Therefore, even though a trial court instructs on overlapping elements of negligence, this in itself does not constitute error.[246]

Thus, when the special verdict question is an ultimate fact form of submission, the court is unwilling to assume that the unnecessary instruction affected the jury comparison of negligence. Nevertheless it is error to instruct on an issue of negligence that is unsupported by the evidence, but such error will not result in reversal unless it is prejudicial.[247] Where duplicity of the instructions is the sole objection, the error is not prejudicial.[248]

In any event, it is not possible to ignore the prospect of prejudice resulting from duplicity in ultimate fact verdict instructions. If specific issues of negligence were submitted in a special verdict inquiry, the verdict and the instructions would continue to be subject to attack under the concept of duplicity. Only if the instructions for an ultimate fact special verdict are prejudicial will the court reverse. "Prejudice" appears to em-

246. Merlino v. Mut. Serv. Cas. Co., 23 Wis. 2d 571, 584, 127 N.W.2d 741, 748-49 (1964). *See also* Milwaukee Auto. Mut. Ins. Co. v. National Farmers Union Prop. & Cas. Co., 23 Wis. 2d 662, 667, 128 N.W.2d 12, 15 (1964).

247. Gilbert v. United States Fire Ins. Co., 49 Wis. 2d 195, 206, 181 N.W.2d 527, 535 (1970).

248. Schueler v. Madison, 49 Wis. 2d 695, 715, 183 N.W.2d 116 (1971).

brace the same concept as "duplicity," but when applied to the ultimate fact negligence verdict the error must demonstrably affect the comparison of negligence. This is so because the Wisconsin Supreme Court will not assume an erroneous comparison as in the case of a duplicitous special verdict question.[249]

Management and control as a negligence issue is a focal point of duplicity because of its generic nature. When lookout, speed and specific statutory traffic violations are instructed upon together with management and control, the danger of overlap between the specific categories of negligence and the generic management and control presents an increased hazard of duplicity.[250] If, for example, a driver simply did not see until too late to perform any evasive maneuver, only a lookout instruction should be requested. Frequently, a driver will protest that he did not see until it was too late, but if there is contrary evidence that he had time to take some evasive action, a management and control instruction may be included. Duplicity will be prevented by the last paragraph of the management and control instruction[251] which apprises the jury that management and control is applicable only if the driver had time to evade.

When the sole issue of negligence presented by the evidence is the rate of speed, a management and control instruction should not be given.[252] Management and control, insofar as it embraces speed, relates to a reduction in speed.[253] It should be noted that the common law duty to sound a horn[254] is not considered duplicitous to management and control.[255]

Specific statutory traffic violations should be instructed upon separately[256] because they are not included within management and control.[257] Such specific instructions will in most situations eliminate the potential for prejudice (duplicity) but

249. Authorities cited *supra* note 246.

250. *See* text accompanying note 240 *supra.*

251. "If a driver does not see or become aware of danger in time for him to take proper means to avoid the accident, he is not negligent as to management and control." WIS. J.I.—CIVIL No. 1105.

252. Roeske v. Schmitt, 266 Wis. 557, 64 N.W.2d 394 (1953); Schroeder v. Kuntz, 263 Wis. 590, 58 N.W.2d 445 (1952); Culver v. Webb, 244 Wis. 478, 12 N.W.2d 731 (1944).

253. Schroeder v. Kuntz, 263 Wis. 590, 58 N.W.2d 445 (1952).

254. WIS. J.I.—CIVIL No. 1096.

255. Cook v. Wisconsin Tel. Co., 263 Wis. 56, 56 N.W.2d 494 (1953).

256. Burkhalter v. Hartford Acc. & Indem. Co., 268 Wis. 385, 68 N.W. 2d 2 (1955).

257. Thoreson v. Grything, 264 Wis. 487, 59 N.W.2d 682 (1955).

one must be careful not to use one general instruction on turning, passing, deviation, parking or warnings if the evidence postulates several possible violations.[258]

An objective view of the evidence rather than enthusiastic advocacy serves a trial lawyer best in avoiding duplicity. Eagerness to afford the jury many opportunities to find an opponent negligent leads to the excesses that result in duplicity.

Volition of the plaintiff in exposing himself to danger was formerly a bar to recovery in a negligence case. The abolition of the doctrine of assumption of risk in *McConville v. State Farm Mutual Automobile Insurance Co.*[259] makes the voluntary conduct of the plaintiff a matter of contributory negligence. Thus negligence of the plaintiff is now the proper inquiry, not, "Did [the plaintiff] willingly expose herself to the risk of injury by entering and riding in the automobile. . .?"[260]

Similarly, Wisconsin's abolition of the doctrine of gross negligence[261] has made that inquiry and the parallel instruction obsolete. Again, the matter is one of negligence and comparison.

H. The Jury Instructions May Be Considered in Determining the Propriety of the Special Verdict Question

The trial court's exercise of discretion in formulating the special verdict inquiry will not be upset upon appellate review unless the question, taken with the applicable jury instruction, does not fairly present the issue of fact to the jury.[262] Although enlargement of the scope of a question by the jury instruction is permissible,[263] such latitude is not extended where the question is narrow, restrictive and excludes the import of the instructions.[264]

I. The Form of the Causation Question

In a negligence case, causation is a specific element that

258. Grana v. Summerford, 12 Wis. 2d 517, 107 N.W.2d 463 (1961).

259. 15 Wis. 2d 374, 113 N.W.2d 14 (1962); *see also* Polsky v. Levine, 73 Wis. 2d 547, 243 N.W.2d 503 (1976).

260. Theisen v. Milwaukee Mut. Ins. Co., 18 Wis. 2d 91, 102, 118 N.W.2d 140, 145 (1962).

261. Bielski v. Schulze, 16 Wis. 2d 1, 114 N.W.2d 105 (1962).

262. Carson v. City of Beloit, 32 Wis. 282, 145 N.W.2d 112 (1966).

263. Murray v. Paine Lumber Co., 155 Wis. 409, 144 N.W. 982 (1914); Guse v. Power & Mining Mach. Co., 151 Wis. 400, 139 N.W. 195 (1912) Jones v. Milwaukee Elec. Ry. & Light Co., 147 Wis. 427, 133 N.W. 636 (1911).

264. Kiggins v. Mackyol, 40 Wis. 2d 128, 161 N.W.2d 261 (1968).

must be proven to establish the defendant's liability or effectuate a diminished recovery under the comparative negligence statute because of the plaintiff's contributory negligence. Because the phrases "proximate cause" and "legal cause" are largely obsolete and are discouraged because of the likelihood of jury confusion by such ambiguous terms, the Wisconsin Supreme Court in 1952 adopted the substantial factor concept of legal cause.[265] The most usual form of the special verdict question refers to "a cause" or "a substantial factor." The pattern jury instruction favors "a cause."[266] The definition of "a cause" in an instruction apprises the jury that there may be more than one cause of an event and further advises that "it must appear that the negligence under consideration was a substantial factor in producing" the event.[267] Whether one inquires about negligence as causation for the "accident" or "collision" or "plaintiff's injury" or "defendant's injury,"[268] the question should refer to "a cause," never "the cause," because the negligence of several parties may jointly cause the event. To inquire about "the cause" is to contradict the definition of causation. Note in addition that causation inquiries should be in reference to the injury—accident—collision, never to the plaintiff's or defendant's "damages."[269]

If the negligence question is divided into specific issues of negligence rather than an ultimate fact submission, the causa-

265. Pfeiffer v. Standard Gateway Theater, Inc., 262 Wis. 229, 55 N.W.2d 29 (1952). *See also* Miles v. Ace Van Lines & Movers, Inc., 72 Wis. 2d 538, 241 N.W.2d 186 (1976); Sampson v. Laskin, 66 Wis. 2d 318, 224 N.W.2d 594 (1975).

266. WIS. J.I.—CIVIL No. 1500.

267. The causation inquired about must nevertheless be a legal cause and not only a cause-in-fact of the plaintiff's injury. The distinction was demonstrated in Perry Creek Cranberry Corp. v. Hopkins Agricultural Chem. Co., 29 Wis. 2d 429, 139 N.W.2d 96 (1966), a case in which the plaintiff's cranberry crop failed following application of the defendant's insecticide. The plaintiff's first cause of action was based upon violation of a state safety statute, the Wisconsin Economic Poisons Act, WIS. STAT. § 94.676 (1961). The defendant's mislabeling of the insecticide was held to be a violation of the statute and hence constituted negligence per se. The jury further found that it was the defendant's product which caused the destruction of the plaintiff's crop. In a misrepresentation action, however, the causal connection between wrongful conduct and resulting damage lies in the inducement of the plaintiff to act to his detriment. *See* W. PROSSER, HANDBOOK OF THE LAW OF TORTS 714 *et seq.* (4th ed. 1971). A special verdict question directed to this issue was held to be unnecessary in view of the defendant's failure to controvert the allegation in the complaint that the plaintiff had relied on the misbranding.

268. *See* Part III, sec. E *supra.*

269. *See* note 204 *supra.*

tion question must also be subdivided to inquire specifically about cause. Failure to do so is error.[270]

J. The Form of the Comparative Negligence Question.

The substance of the comparative negligence question is:

> Taking the combined negligence which caused the injury[271] to the plaintiff John Smith as 100 percent, what percentage of such negligence is attributable to:
>
> (a) the defendant James Jones? Answer ____%
> (b) the plaintiff John Smith? Answer ____%
> Total: 100%

Insertion of "Total: 100%" is designed to remind the jury that the sum of the negligence apportioned must be that amount. Frequently, simple arithmetical errors by the jury require rejection of the verdict and a direction to retire to further deliberations.[272] By inserting the total, the prospect of jury arithmetical error is reduced.

A simpler form of substance is:

> What percentage of all the causal negligence which caused the injury to the plaintiff John Smith do you attribute to:
>
> (a) the defendant Frank Jones? Answer ____%
> (b) the plaintiff John Smith? Answer ____%
> Total: 100%

The writers prefer the longer form because it has the effect of twice telling the jury that the causal negligence must total 100%.

When multiple claims and parties involve active and passive negligence as earlier discussed,[273] more than one comparison question is required. By submission of one comparison question inquiring about the negligence causal of "the accident-collision" and the necessary additional comparison questions inquiring about the negligence causal of the "injury" to each of the persons who are passively negligent, the proper comparisons of causal negligence are obtained and the award

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270. Reserve Supply Co. v. Viner, 9 Wis. 2d 530, 101 N.W.2d 663 (1960); Fontaine v. Fontaine, 205 Wis. 570, 238 N.W. 410 (1931).

271. The phraseology is fraught with the same occurrence or event reference (injury—accident—collision) discussed in connection with the formulation of the negligence and causation questions. *See* Part III, sec. E *supra.*

272. *See* Part VII *infra.*

273. *See* text accompanying notes 212-215 *supra.*

of judgment is merely a mathematical computation.[274]

Only causal negligence is to be compared.[275] To avoid jury error in that regard, the comparative negligence question should contain a prefatory instruction[276] directing the jury to answer the comparative negligence question only if it has answered two or more cause questions, specified by number. Unless two or more cause questions are answered, there is no need to compare the negligence of the parties. In its entirety the comparison question could then read:

> If you have answered Questions 2 and 4 "yes", then and only then answer this question: Taking the combined negligence which caused the injury to the plaintiff John Smith as 100%, what percentage of such negligence is attributable to:
>
> (a) the defendant James Jones? Answer ____%
> (b) the plaintiff John Smith? Answer ____%
> Total: 100%

The prefatory instruction avoids inconsistency in the verdict by directing the jury to make a comparison only if two or more parties are causally negligent.

One should note that the above forms of the comparative negligence question are appropriate only if the ultimate fact form of negligence submission is made. If the negligence question is broken down into a specific issue form the cause question must be in comparable form. This form is suggested:

> If you have answered any subdivision of Question 2 "yes" and if you have answered any subdivision of Question 4 "yes", then and only then answer this question: Taking the combined negligence which caused the injury to the plaintiff John Smith as 100%, what percentage of such negligence is attributable to:
>
> (a) the defendant James Jones? Answer ____%
> (b) the plaintiff John Smith? Answer ____%
> Total: 100%

Another form contains a more explicit prefatory instruction regarding the need to find negligence and causation of two or more parties, but is unwieldy and handicapped by complexity:

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274. WIS. J.I.—CIVIL No. 1592 and comment.

275. Walker v. Kroger Grocery & Baking Co., 214 Wis. 519, 252 N.W. 721 (1934) (comparative negligence statute so construed).

276. *See* Part IV, sec. B *infra.*

> If you find by your answers to any subdivisions of Questions No. 1 and 3 that both the defendant James Jones and the plaintiff John Smith were negligent, and if you further find by your answers to any subdivisions of Questions No. 2 and 4, that the negligence of each was a cause of the injury to the plaintiff John Smith, then and only then answer this question: Taking the combined negligence which caused the injury to the plaintiff John Smith as 100%, what percentage of such negligence is attributable to:
>
> (a) the defendant James Jones? Answer ____%
>
> (b) the plaintiff John Smith? Answer ____%
>
> Total: 100%

In a products liability case involving multiple defendants, although all are liable to the plaintiff as a matter of law as assembler, part manufacturer and distributor of the defective article,[277] the special verdict is incomplete without a comparison question to resolve the issues of contribution between the defendants.[278] The negligence, causation and comparison of all parties whose conduct contributed to the occurrence or event litigated (injury-accident-collision) must be inquired about in the verdict.[279]

IV. THE MECHANICS OF SPECIAL VERDICT PREPARATION

A. Provision Must Be Made for Dissenting Jurors.

Historically, the special verdict form usually incorporated a provision for two dissenting jurors on typed lines following each verdict question. That practice was thought by many trial judges to invite dissent and discourage jurors from their duty to deliberate for the purpose of achieving at least five-sixths agreement if possible.[280] A special verdict was therefore devised, containing but two typed lines for dissenting jurors at the foot of the verdict with additional blank space below the two lines. The additional blank space was necessary to avoid the prospect that the verdict form coerced the jurors to five-sixths agreement by denying more than two jurors the space to

277. Howes v. Hansen, 56 Wis. 2d 247, 201 N.W.2d 825 (1972).

278. City of Franklin v. Badger Ford Truck Sales, 58 Wis. 2d 641, 207 N.W.2d 866 (1973). If contribution issues are not present, one must nevertheless inquire about all parties whose conduct constitutes negligence. *See* Part I, sec. B *supra.*

279. *See* Part I, sec. A *supra.*

280. In a civil case a 5/6 verdict is permitted. WIS. STAT. § 805.09 (1973).

add their names. The latter practice was challenged in *Kowalke v. Farmers Mutual Automobile Insurance Co.*,[281] where the court discussed both special verdict dissent forms:

> It seems to us that both methods furnish adequate opportunity for expression of dissent, and that they afford clear indication to dissenting jurors as to where they are to place their names. Since there is no statutory authority or rule of this court prohibiting the method as employed in this instance, it cannot be held that it was error to use such method. Nor can we find prejudice with reference to the claimed error respecting the provision of but two lines for names of dissenting jurors. It is recommended, however, that when but two lines and additional space is provided, the court in its instructions advise the jurors that dissenters may place their names on the lines or in the additional space. The instructions in the instant matter in nowise limited the number of jurors who were privileged to dissent, and it is assumed, that had there been more than two jurors who wished to do so, they would have utilized the space below the lines provided, in the event that the lines had already been filled. We find no error . . . .[282]

Wisconsin Jury Instructions—Civil Number 180 contains the suggested direction to the jury that the space below the blank lines may be used by dissenting jurors. It is important that the blank spaces below the lines for dissenting jurors be at least several inches in order to avoid a challenge to the verdict form as coercing the agreement of ten jurors or denying the opportunity to dissent to more than two jurors. Each of the methods of providing for dissents is proper and the discretion rests with the trial court.[283] Most trial judges seem to prefer the form with dissents at the foot of the verdict.

Because the jury of twelve may be reduced to any number less than twelve by stipulation of the parties.[284] A seven-to-twelve person jury special verdict form must provide at least two lines and some additional space for dissenting jurors if there be any. One line and additional space must be provided for a jury of six or less.

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281. 3 Wis. 2d 389, 88 N.W.2d 747 (1958).
282. *Id.* at 403, 88 N.W.2d at 754-55.
283. Krueger v. Winters, 37 Wis. 2d 204, 213, 155 N.W.2d 1, 6 (1967).
284. WIS. STAT. § 805.09 (1973).

B. *Prefatory Instructions to Special Verdict Questions Should Be Included*

A preface to a special verdict question instructing the jury not to answer the question unless it has answered a prior question in a particular fashion, does not violate the rule against informing the jury of the effect of its answers.[285] A carefully framed preface to a question can help the jury avoid inconsistency in its verdict. One such error by a jury is the inconsistency of a finding of no negligence on one party, or negligence but no causation, followed by a comparative negligence answer that assesses a percentage of causal negligence to the exculpated party. Early cases supplied a simple solution. A question that was improperly answered because the preface had been disregarded by the jury, was held to be not in fact submitted to the jury because the conditions in the preface had not been fulfilled. Thus, the Wisconsin court held in *McGeehan v. Garr, Scott & Co.*,[286] that the erroneously answered question was properly disregarded by the trial court in entering judgment. A variation of the same rule was developed in *Parmentier v. McGinnis*,[287] where the jury awarded no damages for an alleged wrongful death, and the jury found by answers to prior questions that the death was not wrongful. The failure to answer the damage question was disregarded.[288] Both rules were applied in *Goelz v. Knoblauch*[289] but in *Bodden v. John H. Detter Coffee Co.*[290] the *McGeehan* case was not followed. The *Bodden* case did not disregard the later answer because it was contrary to an earlier answer, but changed the earlier answer because the plaintiff was causally negligent as a matter of law, and permitted the later answer to stand as the appropriate comparison.

In *Forbes v. Forbes*[291] the *McGeehan* rule was applied to a verdict which assessed twenty percent of the causal negligence to the plaintiff although by a prior answer to a verdict question the jury had found the plaintiff free from negligence.

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285. Papenfus v. Shell Oil Co., 254 Wis. 233, 238, 35 N.W.2d 920, 923 (1949); Chopin v. Badger Paper Co., 83 Wis. 192, 198, 53 N.W. 452, 454 (1892).

286. 122 Wis. 630, 634, 100 N.W. 1072, 1074 (1904).

287. 157 Wis. 596, 600, 147 N.W. 1007, 1008 (1914); *see also* Wagner v. Peiffer, 259 Wis. 566, 579, 49 N.W.2d 739, 746 (1951).

288. *See* Part V, sec. A *infra*.

289. 242 Wis. 186, 7 N.W.2d 420 (1943).

290. 218 Wis. 451, 261 N.W. 209 (1935).

291. 226 Wis. 477, 277 N.W. 112 (1938).

Partial reversal of the *McGeehan* rule first appeared in *Mahoney v. Thill,*[292] where the Wisconsin Supreme Court for the first time expressed doubt about permitting an improperly arrived at comparison to stand after the jury's answer to a negligence question was changed by the court as a matter of law:

> With that finding set aside, then and not until then did occasion exist for a comparison of negligence. Under the rule the jury legally left the verdict in such a state that the finding on comparison amounted to nothing, and that condition as it related to the comparison question cannot now be changed. When the court directed the finding of negligence on respondent's part, a different set of facts was presented. But the jury was no longer at hand and a ruling by the court that gave vigor to a lifeless finding would result in the trial of that question by the court without a jury. As a practical matter, who can say what the answer to the comparison question would have been had the jury been advised of the existence of causal negligence on respondent's part. In this state of the case we cannot consider that the jury passed upon the facts and made findings warranting judgment.[293]

Although the *Goelz* case followed the *Mahoney* case by several months, *Goelz* did not involve contributory negligence by the plaintiff and a comparison was not required.

Mitchell v. Williams[294] and *Wojan v. Igl*[295] followed and applied without citation the doctrine expressed in *Mahoney*. The reckoning for the sub silento overrulings arrived in *Statz v. Pohl*[296] where the court frankly acknowledged its inability to reconcile the earlier decisions. The court held to the new rule that it had developed and restated it:

> (1) If the issue of causal negligence is for the jury and the party inquired about is exonerated but the jury in its comparison of negligence erroneously attributes to such party some degree of causal negligence, the verdict is inconsistent, and a new trial must be granted;
> (2) If it be determined that the party inquired about is free from causal negligence as a matter of law and the jury has

292. 241 Wis. 359, 6 N.W.2d 239 (1942).
293. *Id.* at 362, 6 N.W.2d at 240.
294. 258 Wis. 351, 46 N.W.2d 325 (1951).
295. 259 Wis. 511, 49 N.W.2d 420 (1951).
296. 266 Wis. 23, 62 N.W.2d 556 (1954).

> exonerated him but has also attributed to him some degree of causal negligence, then the court should strike the answer to the question on comparison as surplusage and grant judgment accordingly;
> (3) If but one element of negligence is submitted to the jury and the court can find as a matter of law that the party inquired about in the question is guilty of causal negligence and the jury finds that he is not, and in answer to the question on comparative negligence attributes to him some degree of causal negligence, the court should change the answer to the question which inquires as to his conduct from "No" to "Yes" and permit the jury's comparison to stand with judgment accordingly.[297]

It appears reasonable to assume that the adoption of the comparative negligence statute and the inviolability of the jury's comparison were the basis for the rule change. However, the *McGeehan* rule has not been entirely abandoned. If no comparison question is involved, the *McGeehan* rule permits the trial court to disregard an improperly answered question as never submitted to the jury.

Recently in the review of the retrial of *Johnson v. Heintz*[298] the supreme court considered an inconsistent verdict that attributed negligence causal to the plaintiff's injury to the driver of the second-impact car. However, the jury failed to answer a damage question that inquired with respect to the extent of damage attributable to the second impact. The court acknowledged that it could not determine which finding was surplusage or immaterial, but noted that the most favorable finding in the view of the appealing defendant was that no injury had been sustained in the second impact. Because the appealing defendant was the insurer of the driver in the first impact, its liability was unchanged and unaffected. The court further noted that the rule of *Statz v. Pohl*[299] had been amended to permit a plaintiff to accept judgment where the inconsistencies were resolved against him:

> On the state of the record, a ruling could not be made either way. The rule of *Statz* that fatally inconsistent verdicts require retrial has been modified, however, in *Erdmann v.*

297. *Id.* at 29, 32a, 62 N.W.2d at 559, 63 N.W.2d at 712. *See also* Hillstead v. Shaw, 34 Wis. 2d 643, 150 N.W.2d 313 (1967).

298. 73 Wis. 2d 286, 243 N.W.2d 815 (1976).

299. 266 Wis. 23, 62 N.W.2d 556 (1954).

Wolfe (1960), 9 Wis.2d 307, 101 N.W.2d 44. See also: *Jahnke v. Smith* (1973), 56 Wis. 2d 642, 203 N.W.2d 67. *Erdmann* held that the plaintiff may accept a judgment which is supported by a verdict in which the inconsistencies are resolved against him. Thus in this case, the verdict would be read, as acceptable to the plaintiff, that definite injuries had been proven to a reasonable degree of certainty as having been caused in only the first collision and that no compensable injury had been proven as resulting from the second impact. The evidence in the record supports this result.[300]

The upshot of the case was that the verdict although uncorrectably inconsistent, nevertheless provided no economic benefit to the appealing defendant who was liable irrespective of the inconsistencies resolved in his favor. The judgment was therefore affirmed.[301]

An interesting application of a prefatory instruction is found in a special verdict involving multiple comparison questions:

1592 Comparative Negligence: Recommended Questions, Multiple Driver-Multiple Guest Comparison

Question 11:

If you answered "Yes" to only one of Questions 2, 4, and 6, you will then insert the figure 100 in the blank space in Question 11 which follows the name of the driver set forth in that one of Questions 2, 4, and 6, which you have answered "yes."

If you have answered two or all three of Questions 2, 4, and 6 "Yes," thereby finding that such two or all three of the drivers named in such questions were negligent and that the respective negligence of each of such drivers was a cause of the accident of (date), then answer this:

What percentage of all the causal negligence involved which produced the accident of (date) do you attribute to:

(a) Driver (A) (If you did not answer Question 2, or answered such question "No," insert zero) ____%

(b) Driver (B) (If you did not answer Question 4, or answered such question "No," insert zero) ____%

(c) Driver (C) (If you did not answer Question 6, or answered such question "No," insert zero) ____%

100%

300. Johnson v. Heintz, 73 Wis. 2d 286, 308, 243 N.W.2d 815 (1976).

301. Bush v. Maxwell, 79 Wis. 114, 48 N.W. 250 (1891).

Question 12:

If you answer "Yes" to one or more of Questions 2, 4, and 6, and also have answered "Yes" to Question 8, thereby finding that one or more of the drivers, (A), (B), and (C) was negligent, that the guest (X) also was negligent, and that the negligence of such driver or drivers and of (X) was a cause of the injuries sustained by (X), then answer this:

What percentage of all the causal negligence involved in the accident of (date) which produced the injuries to (X) do you attribute to:

(a) The combined causal negligence of Driver (A), Driver (B), and Driver (C) ____%
(b) The causal negligence of Guest (X) ____%

Question 13:

Question 13 is identical with Question 12, except the Guest (Y) is substituted for Guest (X).[302]

In order to avoid inconsistency of a comparison finding with a causal negligence finding, the jury is instructed to insert "zero" in answer to a comparison inquiry with respect to one party if it answered "no" to the cause question with respect to that party. The cause question itself contains a prefatory instruction that it should not be answered unless the negligence question with respect to that party has been answered "yes." Further, the comparison question bears the usual caution[303] that it should not be answered unless the jury has answered "yes" to at least two cause questions. To preclude any doubt in the matter there is, in addition to the cautionary jury instructions on comparative negligence, a general instruction cautioning the jury to read and follow the prefatory instructions to all special verdict questions.[304]

Another interesting prefatory instruction is found in the comparison question in a products liability case.[305] It enables the Wisconsin jury to make the transition from strict liability under section 402 A of the *Second Restatement of Torts* to negligence for the purpose of comparison.[306]

302. WIS. J.I.-CIVIL No. 1592.
303. *Id. See also* WIS. J.I.—CIVIL Nos. 1575, 1585, 1590, 1591.
304. WIS. J.I.—CIVIL No. 145.
305. WIS. J.I.—CIVIL No. 3290.
306. *See* Part III, sec. F *supra.*

V. DAMAGE QUESTIONS

A. Damage Questions Should Always Be Included In The Verdict If In Issue And The Trial Court Should Insist That The Jury Answer The Damage Questions.

The function of the special verdict is to procure from the jury its findings on controverted facts. Damage and the amount thereof is one of such findings unless agreed to by the parties or answered by the court as a matter of law. Usually only items of special damage are agreed to or capable of being answered by the trial court as a matter of law and thus a damage question is almost always required.

"It is better practice for the trial court to insist that the jury answer the question as to damages."[307] The pattern Wisconsin jury instruction instructs the jury that it must answer the damage question no matter how it has answered any other question in the special verdict.[308] By requiring an answer to the damage question, the trial court on motions after verdict, and the appellate court on review, are more likely to be able to make a final disposition of the case. Either court may be able to alter nonliability findings and apply the jury's damage finding in the event liability questions are improperly answered by the jury. Therefore, damage questions should lack prefatory instructions to answer the question only in the event other questions dealing with liability have been answered in a certain fashion. In addition, such prefatory instructions are likely to inform the jury of the effect of their answers to liability questions contrary to a major goal of a special verdict. In Wisconsin the sole purpose of a special verdict is to obtain the jury's findings regardless of the effect of the answer upon a party's right to recover,[309] and it is reversible error to inform the jury of the effect of its answers.[310] If, however, the jury has not answered the damage question, or has answered it "none" or "not any" and has exonerated the defendant of liability, the neglect of the trial court to require the jury to make a dollar award is not reversible error.[311]

307. Frings v. Donovan, 266 Wis. 277, 281, 63 N.W.2d 105, 107 (1954).

308. WIS. J.I.—CIVIL No. 1700(b).

309. Anderson v. Seelow, 224 Wis. 230, 234, 271 N.W. 844, 846 (1937).

310. Kobelinski v. Milwaukee & Suburban Transp. Corp., 56 Wis. 2d 504, 520, 202 N.W.2d 415, 425 (1972).

311. Frings v. Donovan, 266 Wis. 277, 281, 63 N.W.2d 105, 107 (1954); Goelz v. Knoblauch, 242 Wis. 186, 7 N.W.2d 420 (1943); Parmentier v. McGinnis, 157 Wis. 596,

In an eminent domain case where the verdict questions relating to damages require the jury to determine the before and after value of the property, the instructions may not advise the jury that the difference between the two figures constitutes the plaintiff's damages.[312] Neither the special verdict, the jury instructions nor the comments of counsel with reference to liability or damages may inform the jury of the effect of its answers.

B. Submitting A Damage Question Does Not Assume Nor Imply The Existence Of Damage.

As discussed above, it is possible for a special verdict question to be framed in such a manner as to imply an answer or assume a controverted fact.[313] Failure to append the phrase "if any" to the injury-accident-collision reference in a liability question may constitute the assumption of a controverted fact when the fact of injury or accident or collision is truly disputed.[314] Nevertheless, incorporation of a damage question in a special verdict does not imply or suggest an award of damages, even though the fact of injury or actual damage resulting therefrom is controverted. This is so because the damage question can be answered directly or negatively with "zero" or "0."[315] Accordingly, it is unnecessary . to incorporate the phrase "if any" in the damage question. However, an additional safeguard is provided by accompanying the damage question with a special instruction[316] with regard to the burden of proving damages.

Although the phrase "if any" in the damage question is unnecessary, it is not necessarily error to include it in the question or the instructions if the fact of any injury at all is in

147 N.W. 1007 (1914). *See also* Johnson v. Heintz, 73 Wis. 2d 286, 306, 243 N.W.2d 815 (1976).

312. Zombkowski v. Wisconsin River Power Co., 267 Wis. 77, 81, 64 N.W.2d 236, 239 (1954). In this case the court seems to have exalted form over substance. The "special" verdict questions all deal with items of damage and do not involve liability. Thus the verdict was no more than a general verdict with special interrogatories. McDougall v. Ashland Sulphite-Fibre Co., 97 Wis. 382, 73 N.W. 327 (1897). All of the cases cited by appellant's brief which admonish the court not to permit the jury to know the effect of their answers deal with "true" special verdicts containing questions of liability and damages.

313. *See* Part III, sec. F *supra*.

314. *See* text accompanying note 217 *surpa,* and Bredlau v. York, 115 Wis. 554, 92 N.W. 261 (1902).

315. *See* Plummer v. Leonhard, 44 Wis. 2d 686, 695, 172 N.W.2d 1, 6 (1969).

316. WIS. J.I.—CIVIL No. 1705.

dispute.[317] In most personal injury trials some injury is undisputed but the extent of the injury is contested. To use the phrase "if any" in either the damage special verdict question or the damage instructions is very risky and only a study of the context of its use will enable one to avoid the prospect of prejudice.

If the special verdict question is itemized as to special and general damages, the phrase "if any" should not be incorporated in subdivisions of the question because it may be become unclear whether the jury overlapped an award in another section of the question and thus made a double damage award.[318] If the phrase "if any" is incorporated in a general damage question, an error occurs where the evidence is undisputed as to some slight injury, although in a case where a substantial award was made the court held that its use was not prejudicial.[319] If the phrase has any utility at all, it should be incorporated in the body of the question: "What sum of money, if any, will fairly and reasonably compensate the plaintiff with respect to: (a), (b), (c), etc?"

A form of the damage question in vogue some years ago, "If the plaintiff is entitled to recover, what sum of money will fairly and reasonably compensate him with respect to: (a), (b), (c), etc?" seems to be far more appropriate if there is a challenge to any or all of the claimed injuries and the damage resulting therefrom.[320] If the question is framed in that fashion, an alteration to the introductory paragraph of the appropriate general compensatory damage pattern instructions[321] and some of the special damage instructions will be necessary.[322]

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317. In a suit against a union for legal fees where the defense contended that certain persons had no authority to contract for the union, a damage question that inquired about the value of legal services "he rendered" to the union assumed a fact in issue. Sigman v. General Drivers Local 563, 5 Wis. 2d 6, 92 N.W.2d 219 (1958).

318. Kalish v. Milwaukee & Suburban Transp. Co., 268 Wis. 492, 497, 67 N.W.2d 868, 870-71 (1955).

319. Cohen v. Bridges, 255 Wis. 535, 39 N.W.2d 373 (1949).

320. Braun v. Minneapolis, St.P. & S. Ste. M. Ry., 170 Wis. 10, 172 N.W. 743 (1919); Bredlau v. York, 115 Wis. 554, 92 N.W. 261 (1902). Although the pattern Wisconsin jury instructions advise the jury indirectly that they are not deciding the case nor making an award of damages (WIS. J.I.—CIVIL Nos. 100, 1700, 1705, 1750), the authors have substantial doubt that juries are truly aware from the instructions of the difference between determining the amount of damage (*i.e.*, "pricing the claim") and awarding damages. A special verdict determines the fact of damage in terms of dollars; only a general verdict awards damages as the end result of the application of the law to the facts.

321. WIS. J.I.—CIVIL Nos. 1750, 1753, 1754, 1755.

322. WIS. J.I.—CIVIL Nos. 1765, 1803, 1804, 1805, 1810, 1825, 1830, 1840, 1845.

C. A Special Fact Causation Question Directed To Whether The Claimed Damages Arose From The Occurrence Or Event Litigated May Be Appropriate.

We have discussed the problem of framing the damage question to avoid assuming or implying the existence of damage. An addition to the alternative choices in formulating the damage question is the use of a special question of fact where it will be helpful to determine whether the claimed damages arose from an occurrence for which the defendant has liability. The Wisconsin Supreme Court has approved such a practice and rejected the contention that it is improper cross-examination of the jury:

> The basis for his objections to this question is that it constitutes an improper cross-examination of the jury. Nevertheless, the issue of whether the accident of March 16, 1959, caused the amputation of plaintiff's leg was in no sense evidentiary but rather one of ultimate fact. Aside from the questions of negligence, it was the single critical issue in the case. All of the medical expert opinion evidence was directed to it. In such a situation it was proper for such a question to be included in the special verdict.[323]

Although the jury is required to answer the damage question only in terms of damages that are reasonably contemplated or the natural and probable result of the occurrence litigated,[324] one must not overlook the fact that the evidence may establish an "aggravation" of a preexisting disease or condition for which the defendant has liability.[325] Thus the special causation question should be framed in terms of "a cause," not the natural and probable result of his injuries—accident—collision,[326] to avoid the prospect that the causation of the damages in the inquiry is too restrictive.

D. The Damage Inquiry Can Be Formulated In A General Question Of Damages Or In An Itemized Question Of General And Special Damages.

Whether the damage question should inquire as to one lump

323. Chapnitsky v. McClone, 20 Wis. 2d 453, 463, 122 N.W.2d 400, 405-06 (1963). The use of a cause question with respect to damages was not approved for "mine-run" personal injury actions.

324. WIS. J.I.—CIVIL No. 1705; *see also* WIS. J.I.—CIVIL No. 1750.

325. WIS. J.I.—CIVIL Nos. 1710, 1715, 1720.

326. Crouse v. Chicago & N.W. Ry., 104 Wis. 473, 483, 80 N.W. 752, 755 (1899).

sum or whether it should be subdivided in inquiries with respect to special and general damages is left to the trial court where the damages are unliquidated.[327] The submissions are explicated in the Wisconsin pattern jury instructions.[328]

The writers favor subdivided damage questions because they provide greater insight into the jury's findings and because of that insight, greater opportunity to the trial court to correct jury error without retrial.[329] By subdividing the damage question, the jury is compelled to weigh the evidence and respond specifically to such contested damage issues as permanency of injury, future loss of earning capacity, future medical, hospital and nursing expenses, the extent of the personal injury damages to date as well as medical, hospital, nursing expenses to date and loss of earning capacity to date. With subdivision of the damage question, just how the jury weighed the evidence with respect to the subsidiary damage issues may be apparent. A lump sum submission tends to obscure rather than clarify the end result.[330]

In specifiying items of damage, one must be careful to limit itemized inquiries to matters of damage that are recoverable in their entirety as separate entities. For instance, in an eminent domain action the "fair market value" of the property taken may be arrived at by expert witnesses who engage in arithmetical calculations of the value of land and improvements or several parcels of assembled land or several improvements. Nevertheless, the jury is admonished to find the value of the whole entity taken and not merely to total the sum of the components,[331] although it may be asked by two questions to determine the "before" and "after" value in the case of severance damages.[332]

When the trial court is in doubt about the sufficiency of the evidence to sustain an item of damage,[333] a subdivided question

327. Lisowski v. Chenenoff, 37 Wis. 2d 610, 623, 155 N.W.2d 619, 626 (1968); Johnson v. St. Paul & W. Coal Co., 131 Wis. 627, 630, 111 N.W. 722, 723 (1907).

328. WIS. J.I.—CIVIL No. 1750 (lump sum); WIS. J.I.—CIVIL No. 1754 (subdivided).

329. *See* Alk, *The Submission of the Questions of Damages in Personal Injury Cases,* 1939 WIS. L. REV. 399.

330. Spleas v. Milwaukee & Suburban Transp. Co., 21 Wis. 2d 636, 124 N.W.2d 593 (1963); Behringer v. State Farm Mut. Auto. Ins. Co., 6 Wis. 2d 595, 95 N.W.2d 249 (1959); Smith v. Chicago & N.W. Ry., 107 Wis. 35, 82 N.W. 193 (1900).

331. WIS. J.I.—CIVIL No. 8135.

332. WIS. J.I.—CIVIL No. 8100.

333. The deficiency in the evidence may relate to the lack of weight of the evidence

enables the court to avoid the risk of retrial by correcting the verdict in that respect after it has been returned. In the event of reversal upon review, the appellate court can reinstate the jury's finding without retrial. Use of the subdivided question parallels the accepted practice of deferring a doubtful motion for a directed verdict.[334]

Sometimes a subdivided question does not separate all of the subsidiary issues of damages. In *Sawdey v. Schwenk*[335] the trial court lumped past and future general damages in one subdivision but isolated the other damage issues in separate subdivisions. Although this defeats the value of itemized submission, it is valid. The same is true if one combines future loss of earning capacity with permanent disability.[336]

All instructions, including those pertaining to damage questions, must be specially correlated to the question or questions to which they relate. When the ordinary submission of an auto negligence case was in terms of specific issues, the instructions had to be cued to the appropriate subdivision of the question.[337] A general negligence question eliminates subdivision correlation with instructions, because there are none. However, as damage submissions have turned more frequently to itemization, the damage instructions must be correlated to the appropriate subdivisions.[338] Failure to do so requires a new trial because it is impossible to determine whether the jury damage determinations overlapped, thereby assessing double damages.

E. Phrasing The Itemized Damage Inquiries.

In a personal injury action, the term "personal injury" can cover the entire submission of all damage issues (except property damage) simply by incorporating all of the appropriate instructions for general and special damages. If the case involves past and future damages, one cannot convert that to "past personal injury" and "future personal injury." "Past personal injury" is probably an appropriate phrase if the instruc-

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or the absence of expert testimony where it is required. *See* Part I, secs. D & E *supra*.

334. Davis v. Skille, 12 Wis. 2d 482, 490, 107 N.W.2d 458, 462 (1961).

335. 2 Wis. 2d 532, 87 N.W.2d 500 (1958).

336. Puhl v. Milwaukee Auto. Ins. Co., 8 Wis. 2d 343, 99 N.W.2d 163 (1959).

337. *See* Olson v. Milwaukee Auto. Ins. Co., 266 Wis. 106, 62 N.W.2d 549, 63 N.W.2d 740 (1954).

338. Dunham v. Wisconsin Gas & Elec. Co., 228 Wis. 250, 259, 280 N.W. 291, 294 (1938).

tions limit the damages to those occurring to the date of the trial, but "future personal injury" suggests a future event rather than future damage from a past event, and thus is confusing to the jury.[339] The writers prefer the submission "personal injury to date" because it better emphasizes the cut-off date for the determination than does "past personal injury." For future damages or permanent injury, if the submission is warranted by the evidence, the writers prefer "future physical disability" because of the emphasis on the future.[340] The standard jury instruction for such an inquiry[341] speaks of "humiliation, embarrassment, worry and mental distress" which, of course, are states of mind but relate directly to physical ability and do not seem confusing or contradictory. If one prefers, that contention can be resolved by contraction to "future disability." The latter form is patently more appropriate if there is evidence of traumatic neurosis or psychosis.[342]

In a wrongful death case where the special verdict was itemized, the phrase "personal injury" was not erroneous in the light of the jury instructions, although the more appropriate submission was "conscious pain and suffering" because that was the only appropriate damage to consider.[343]

Past and future medical, hospital and nursing expenses, past and future loss of services, society and companionship, damage to automobile, etc., require no special thought for itemization provided the evidence justifies the submission. However, past or future "wage loss" is an improper form of submission: "In fact, an instruction for damages in a personal injury suit couched in terms of 'loss of wages' is always incorrect. It may not, of course, thereby be unfairly prejudicial, for in many cases the wage is an accurate gauge of loss of earning capacity."[344]

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339. An interesting submission is found in Smith v. Chicago & N.W. Ry., 107 Wis. 35, 82 N.W. 193 (1900). Only damages were disputed and then only with respect to some injuries to certain parts of the body. The special verdict inquired as to the fact of injury to various parts of the body and inquired with respect to damages to each of those parts.

340. Alk, *The Submission of the Questions of Damages in Personal Injury Cases,* 1939 WIS. L. REV. 399.

341. An appropriate modification must be made to WIS. J.I.—CIVIL No. 1750 to apply only to future damages.

342. *See, e.g.,* Piorkowski v. Liberty Mut. Ins. Co., 68 Wis. 2d 455, 228 N.W.2d 695 (1975).

343. Blaisdell v. Allstate Ins. Co., 1 Wis. 2d 19, 24, 82 N.W.2d 886, 889 (1957).

344. Carlson v. Drews, Inc., 48 Wis. 2d 408, 417, 1380 N.W.2d 546, 551 (1970). *See*

When the only evidence of loss of earning capacity is loss of wages, it is not prejudicial error to phrase the inquiry in terms of loss of wages; however, the vice of a "loss of wages" inquiry is that it is inapplicable to the person who cannot prove loss of wages but has evidence of inability to perform for gain services of the type for which he is equipped. Use of the phrase "loss of earning capacity to date" or "loss of future earning capacity" is invariably correct and will coordinate with the pattern jury instructions.[345] Where the evidence relates to loss of business or professional earnings, the pattern instructions are different, but the inquiry phraseology remains appropriate.[346]

Whenever a question inquires about or includes compensation for a future loss or future expense, a present value instruction[347] is appropriate, but failure to give the instruction is not prejudicial error unless counsel has requested it.[348]

F. An Inquiry With Respect To Exemplary Damages Cannot Be Made Unless The Evidence Justifies Submitting An Inquiry For Compensatory Damages.

Wisconsin has long held that an award of punitive damages is dependent upon a finding of compensatory damage.[349] If the evidence does not support the submission of compensatory damages to the jury, the issue of punitive damages likewise may not be submitted.

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also Bourassa v. Gateway Erectors, Inc., 54 Wis. 2d 176, 194 N.W.2d 602 (1972); Ballard v. Lumbermens Mut. Cas. Co., 33 Wis. 2d 601, 148 N.W.2d 65 (1967); Ketterer v. Moerker, 28 Wis. 2d 463, 137 N.W.2d 385 (1965).

345. WIS. J.I.—CIVIL Nos. 1775, 1753, or in the event of no wage loss evidence, No. 1750; Featherly v. Continental Ins. Co., 73 Wis. 2d 273, 276, 243 N.W.2d 806 (1976).

346. WIS. J.I.—CIVIL Nos. 1750, 1753, 1754, 1780, 1785; Featherly v. Continental Ins. Co., 73 Wis. 2d 273, 277, 243 N.W.2d 806 (1976).

347. WIS. J.I.—CIVIL No. 1796:

> In determining the amount of any award to be made, you are instructed that a sum allowed at this time to compensate for a loss or an expense which will be incurred in the future must be reduced by you to its present value.
>
> By "present value" is meant such sum which if invested at this time at the current rate of interest, will produce in principal and interest the amount necessary to fairly and reasonably compensate the injured party for such loss or expense, if any, as you find he will sustain at a particular time or times in the future.

348. Bourassa v. Gateway Erectors, Inc., 54 Wis. 2d 176, 194 N.W.2d 602 (1972); Walker v. Baker, 13 Wis. 2d 637, 109 N.W.2d 499 (1961).

349. D.R.W. Corp. v. Cordes, 65 Wis. 2d 303, 222 N.W.2d 671 (1974); Hanson v. Valdivia, 51 Wis. 2d 466, 187 N.W.2d 151 (1971); Widemshek v. Fale, 17 Wis. 2d 337, 117 N.W.2d 275 (1962). WIS. J.I. CIVIL No. 1707.

VI. The Role of Counsel in the Instruction and Special Verdict Conference

An attorney's role in special verdict formulation has been summarized by the Wisconsin Supreme Court:

> Counsel for the parties have a distinct obligation to aid in the preparation of special verdicts and to voice objection to the form of questions, if such questions are objectionable, when it will afford an opportunity to the trial court to correct them. Counsel may not accept the language of the trial court as used in the special verdict without objection, wait and see whether the answers of the jury are satisfactory, and, if not, then for the first time complain about the phraseology upon appeal.[350]

The advocate's duty is best served by a proposed or requested form of special verdict submitted to the court no later than the special verdict and instruction conference provided by the Wisconsin Rules of Civil Procedure.[351]

Failure to request an instruction waives the right to object to its absence.[352] Where the trial court's ruling as a matter of law precludes a question, no request is necessary.[353] Upon appeal the appellate court may deal only with the issues submitted by the verdict and may not deal with issues not submitted where there was no request and no objection.[354] In addition, an objection to a duplicitous question in the verdict is waived by failure to object.[355] Consent to the form of verdict also waives the right to object.[356]

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350. Nimitz v. Motor Transp. Co., 253 Wis. 362, 364, 34 N.W.2d 116, 118 (1948).

351. Wis. Stat. § 805.13(3) (1973).

352. Sheldon v. Singer, 61 Wis. 2d 443, 213 N.W.2d 5 (1973); Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962); Scalzo v. Marsh, 13 Wis. 2d 126, 108 N.W.2d 163 (1961); Bauman v. Gilbertson, 11 Wis. 2d 627, 106 N.W.2d 298 (1961); Becker v. City of Milwaukee, 8 Wis. 2d 456, 99 N.W.2d 804 (1960); Leiske v. Baudhuin Yacht Harbor, 4 Wis. 2d 188, 89 N.W.2d 794 (1958); Kanzenbach v. S. C. Johnson & Son, Inc., 273 Wis. 621, 79 N.W.2d 249 (1956); Youngerman v. Thiede, 271 Wis. 367, 73 N.W.2d 494 (1956); Szymon v. Johnson, 269 Wis. 153, 70 N.W.2d 5 (1955); Lind v. Lund, 266 Wis. 232, 63 N.W.2d 313 (1954). *See* Part II, Sec. F *supra*.

353. Martin v. Outboard Marine Corp., 15 Wis. 2d 452, 113 N.W.2d 135 (1962).

354. Walsh v. Wild Masonry Co., 72 Wis. 2d 447, 455, 241 N.W.2d 416 (1976); DeWitz v. Northern States Power Co., 269 Wis. 548, 69 N.W.2d 431 (1955).

355. Bassil v. Fay, 267 Wis. 265, 64 N.W.2d 826 (1954); Swanson v. Maryland Cas. Co., 266 Wis. 357, 63 N.W.2d 743 (1954).

356. Chapnitsky v. McClone, 20 Wis. 2d 453, 122 N.W.2d 400 (1963); Kuentzel v. State Farm Mut. Auto. Ins. Co., 12 Wis. 2d 72, 106 N.W.2d 324 (1961); Schulze v. Kleeber, 10 Wis. 2d 540, 103 N.W.2d 560 (1960); Bensend v. Harper, 2 Wis. 2d 474, 87 N.W.2d 258 (1958); Pedek v. Wegemann, 275 Wis. 57, 81 N.W.2d 49 (1957).

An objection to the form of the questions or the phraseology employed must be made specifically[357] and timely.[358] The trial court may call for such objections from counsel before submitting the special verdict to the jury.[359] An attempted oral amendment of a requested special verdict made just minutes before closing arguments and submission of the case to the jury comes too late to afford the trial court an opportunity to consider such a request.[360] However, if a verdict can be corrected by the trial or appellate court by treating some of the questions and answers in the special verdict as surplusage, the absence of timely objection will not preclude such action.[361]

The Wisconsin Rules of Civil Procedure have formalized the time at which counsel must request the form of the verdict and questions therein with the appropriate instructions. The conference between counsel and the trial court prescribed by Wisconsin Statutes section 805.13(3) occurs between the close of the evidence and the commencement of argument. At the conference and on the record, the trial court is required to dispose of counsels' motions and their instruction and verdict requests. At that time counsel may object on the record[362] to the instructions and verdict, stating the grounds with particularity. Failure to object at that point constitutes a waiver of error in the instructions or verdict. Such a practice is in conformity with the earlier case law cited above.

In order to be preserved for review by the appellate court, objections to errors in special verdicts require not only a timely objection at the instruction and verdict conference, but also assignment of error objected to as a basis for a new trial in the

357. Bartz v. Braun, 14 Wis. 2d 425, 111 N.W.2d 431 (1961).

358. Strong v. Herman Mut. Ins. Co., 11 Wis. 2d 214, 105 N.W.2d 268 (1960); Leiske v. Baudhuin Yacht Harbor, 4 Wis. 2d 188, 89 N.W.2d 794 (1958); Swanson v. Maryland Cas. Co., 266 Wis. 357, 63 N.W.2d 743 (1954); Briggs Transfer Co. v. Farmers Mut. Auto. Ins. Co., 265 Wis. 369, 61 N.W.2d 305 (1953).

359. Tabak v. Milwaukee Elec. Ry. & Light Co., 161 Wis. 422, 154 N.W. 694 (1915).

360. Dutcher v. Phoenix Ins. Co., 37 Wis. 2d 591, 155 N.W.2d 609 (1968).

361. Roach v. Keane, 73 Wis. 2d 524, 536, 243 N.W.2d 508, 515 (1976); Schulze v. Kleeber, 10 Wis. 2d 540, 103 N.W.2d 560 (1960); Thomas v. Tesch, 268 Wis. 338, 67 N.W.2d 367 (1954).

362. Failure to preserve an objection to a special verdict through the record waives the error. Kanzenbach v. S.C. Johnson & Son, Inc., 273 Wis. 621, 79 N.W.2d 249 (1956). It now seems necessary that the trial court specifically announce upon the record the opportunity to counsel to object in order to comply with WIS. STAT. § 805.13(3) (1973).

trial court motions after verdict.[363] In accord with the early case law, the instruction and verdict conference implicitly requires the formulation of the special verdict before counsels' arguments to the jury.[364] "[T]he right of . . . counsel to seek and secure a form of verdict more precisely tailored . . . was to be asserted when the special verdict questions were framed."[365] Ordinarily, questions should not be added to the verdict either after argument or after the jury charge, although it may be done in some circumstances where the parties agree, or where the additional submission is not prejudicial.[366] When the need for additional questions becomes apparent and they are formulated, the added questions ought to be submitted immediately without waiting for the jury to return the original verdict,[367] but not in the absence of counsel.[368] Unnecessary and improper questions, however, may be withdrawn from the special verdict, even after closing argument.[369]

VII. TRIAL COURT SUPERVISION OVER THE RETURN OF THE JURY'S SPECIAL VERDICT

Juries on occasion do fail to follow instructions and thus err in the answers to the special verdict. Sometimes prefatory instructions to special verdict questions are overlooked or disregarded. When that occurs, the prospect of inconsistency in the verdict greatly increases. Cause questions may thus be answered affirmatively when the negligence question is answered negatively or a comparison of negligence is made attributing a percentage of total causal negligence to a person who has not been found causally negligent in earlier questions. Sometimes the sum of the apportioned negligence does not total 100%. Occasionally damage questions are not anwered or are answered "one day's wages" in response to a loss of earnings inquiry, despite the dollar sign preface to the blank line for answer.

363. Chapnitsky v. McClone, 20 Wis. 2d 453, 122 N.W.2d 400 (1963); Bartz v. Braun, 14 Wis. 2d 425, 111 N.W.2d 431 (1961).

364. Pool v. Chicago, M. & St. P. Ry., 56 Wis. 227, 14 N.W. 46 (1882).

365. Mariuzza v. Kenower, 68 Wis. 2d 321, 331-32, 228 N.W.2d 702, 708 (1975).

366. Lisowski v. Chenenoff, 37 Wis. 2d 610, 155 N.W.2d 619 (1968); New Home Sewing Mach. Co. v. Simon, 104 Wis. 120, 80 N.W. 71 (1899).

367. Lisowski v. Chenenoff, 37 Wis. 2d 610, 155 N.W.2d 619 (1968).

368. Johnson v. Lewis, 151 Wis. 615, 139 N.W. 377 (1913).

369. Matthews v. Town of Sigel, 152 Wis. 123, 139 N.W. 721 (1913).

Dissents may proliferate because the five-sixths instruction is disregarded or is simply misunderstood. Frequently, the trial and appellate courts are confused in the application of the five-sixths rule and the need for agreement of ten jurors on all aspects of recovery;[370] there is thus no persuasive reason why the jury should understand it from the abbreviated instruction given. The courts have done little to improve the situation. Submitting the court's instructions to the jury in writing as well as delivering them orally tends to reduce the prospect that the jury will disregard, overlook or misapply an instruction.

If the expenditure of effort in formulating and presenting the special verdict and instructions is unsuccessful, there remains in the trial court supervisory power to be exercised in connection with the return of the verdict. When a jury returns a verdict containing errors, inconsistencies or lack of compliance with the directions of the special verdict and instructions, the trial court may direct the jury's attention generally to the prospective error and require it to deliberate further to correct any errors that may exist.[371] In doing so, the trial court must cautiously avoid suggesting which of the inconsistent answers is the error and must avoid dominating or dictating how an error or inconsistency is to be corrected.[372]

When excessive dissents are involved, the court must avoid any hint of coercing any dissenter. Probably the safest approach is to direct the jury's attention generally to the prospective error and reread the five-sixths instruction.

The trial court has a duty to inspect the special verdict and direct the jury to complete its answers.[373] Exercise of the authority to direct the jury to retire for further deliberations to

370. WIS. CONST. art. 1, § 5; WIS. STAT. § 805.09 (1973); United States Fidelity & Guar. Co. v. Milwaukee & Suburban Transp. Co., 18 Wis. 2d 1, 117 N.W.2d 708 (1962); Fleischacker v. State Farm Mut. Auto. Ins. Co., 274 Wis. 215, 79 N.W.2d 817 (1956); McCauley v. International Trading Co., 268 Wis. 62, 66 N.W.2d 633 (1954); Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 199 (1948). However, note the almost imperceptible shift in Lorbecki v. King, 49 Wis. 2d 463, 182 N.W.2d 226 (1971); Krueger v. Winters, 37 Wis. 2d 204, 155 N.W.2d 1 (1967); and Vogt v. Chicago, M., St. P. & Pac. R.R., 35 Wis. 2d 716, 151 N.W.2d 713 (1967).

371. Husting v. Dietzen, 224 Wis. 639, 272 N.W. 851 (1937); Jackson v. Robert L. Reisinger & Co., 219 Wis. 535, 263 N.W. 641 (1935).

372. Topham v. Casey, 262 Wis. 580, 55 N.W.2d 892 (1953); Sherman v. Menominee River Lumber Co., 77 Wis. 14, 45 N.W. 1079 (1890); Wrightman v. Chicago & N.W. Ry., 73 Wis. 169, 40 N.W. 689 (1888).

373. Heimlich v. Kees Appliance Co., 256 Wis. 356, 41 N.W.2d 359 (1950); Scipior v. Shea, 252 Wis. 185, 31 N.W.2d 199 (1948).

correct inconsistencies or errors will usually result in a special verdict correction that avoids a new trial. Inspection of the special verdict before it is received and the jury discharged or disbanded,[374] or when returning a sealed verdict,[375] will enable one to identify at least the obvious errors, inconsistencies[376] or ambiguities[377] and provide an opportunity for correction. In a multiple party-multiple claim special verdict, the inspection will require more than a casual glance and a conference with counsel is helpful. If errors or inconsistencies are discovered, the special verdict answers should be incorporated in the record in the jury's absence before being corrected so that the rights of the parties are preserved. Waiver of a portion of claimed damages may eliminate dissents or otherwise rectify an inconsistency.[378]

VIII. The Election-of-Theories Problem

Wisconsin Statutes section 803.04(1) and 802.02(5)(b) permit widespread alternative joinder of parties, alternative claims and alternative defenses. If the doctrine of election of remedies survives in a modern code of civil procedure, it will not require the election of alternative theories of recovery until the close of the evidence at trial.[379] When the evidence is closed, it is the function of either the judge or the jury to make the election, unless the parties by consenting to the form of the verdict or by failure to object determine the theory of submission. If the evidence is insufficient to carry any theory to the jury, the judge may refuse to submit such a theory in the special verdict.[380] However, when the evidence adduced by the plaintiff supports more than one theory of recovery, the plaintiff is entitled to have all theories of recovery submitted[381] unless (1) the theories are inconsistent,[382] or (2) the submission of

374. Junion v. Snavely Motor Co., 186 Wis. 298, 202 N.W. 674 (1925); Victor Sewing Mach. Co. v. Heller, 44 Wis. 265 (1878).

375. Olwell v. Milwaukee St. Ry., 92 Wis. 330, 66 N.W. 362 (1896).

376. A special verdict is not inconsistent because it allows damages for medical expenses but allows no damages for personal injuries or pain and suffering. Jahnke v. Smith, 56 Wis. 2d 642, 653, 203 N.W.2d 67, 73 (1973).

377. Coats v. Town of Stanton, 90 Wis. 130, 62 N.W. 619 (1895).

378. Krueger v. Winters, 37 Wis. 2d 204, 155 N.W.2d 1 (1967).

379. 61 Am. Jur. 2d *Pleading* §§ 116-18, 222 (1972).

380. Wills v. Regen, 58 Wis. 2d 328, 206 N.W.2d 398 (1973).

381. Krudwig v. Koepke, 223 Wis. 244, 270 N.W. 79 (1936).

382. *See* text accompanying note 387 *infra* when the evidence of the plaintiff and

one theory as a matter of law encompasses another lesser theory.[383]

At a time in the development of Wisconsin law when gross negligence and ordinary negligence were different theories of recovery, if the evidence supported either theory of recovery, the special verdict contained inquiries about gross and ordinary negligence.[384] However, gross negligence was to be inquired about first and the jury was to be instructed (preferably by a question preface) that the ordinary negligence question was not to be answered if gross negligence was found by it.[385] If both inquiries were answered, the verdict would be inconsistent.

When safe place statute[386] negligence and common law negligence are alleged, at the close of the evidence the court must determine whether as a matter of law the plaintiff is within the safe place statute.[387] If so, then only safe place negligence need be submitted because the standard of care applied to the defendant's conduct is higher. Thus, if there is no breach of a higher standard of care, there can be no breach of the lesser standard of ordinary care. Where the evidence as a matter of law does not bring the plaintiff within the safe place statute, only ordinary negligence need be submitted.[388] When the evidence is in dispute with respect to applicability of the safe place statute, and if the plaintiff makes proper demand, the special verdict must submit safe place and ordinary negligence to the jury because those theories of recovery are merely gradations of negligence and not inconsistent.[389] Of course, the inquiry about common law negligence should contain a preface instructing the jury to answer the question only if it has answered the inquiry about safe place negligence negatively. Answering both questions might confuse the jury and result in an improper

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defendant is in conflict and inconsistent theories on the cause of the event are advanced.

383. Wills v. Regen, 58 Wis. 2d 328, 206 N.W.2d 398 (1973).

384. Wedel v. Klein, 229 Wis. 419, 282 N.W. 606 (1938).

385. Ayala v. Farmers Mut. Auto. Ins. Co., 272 Wis. 629, 638-41, 76 N.W.2d 563, 568-71 (1956); Wedel v. Klein, 229 Wis. 419, 424, 282 N.W. 606, 608-09 (1938).

386. WIS. STAT. § 101.11 (1973).

387. *See* Haefner v. Batz Seed Farms, Inc., 255 Wis. 438, 39 N.W.2d 386 (1949).

388. Metcalf v. Consolidated Badger Co-op., 28 Wis. 2d 552, 137 N.W. 2d 457 (1965).

389. *See* Carr v. Amusements, Inc., 47 Wis. 2d 368, 177 N.W.2d 388 (1970); Petosky v. Schmidt, 21 Wis. 2d 323, 124 N.W.2d 1 (1963).

comparison of negligence.

The foregoing submission on varying theories of recovery are easily justifiable. In the safe place—ordinary negligence case, safe place negligence is the greater responsibility of the defendant. If he has failed to meet the greater standard of care, there is no need to inquire about the lesser standard. In the gross negligence-ordinary negligence situations, as the theories formerly existed, gross negligence was a form of intentional conduct exempting the plaintiff from a diminished recovery because of his contributory negligence. Thus, it was unnecessary to consider the prospect of lesser recovery under ordinary negligence and the possibility of inconsistency in the verdict was eliminated.

When the plaintiff at trial offers evidence in support of liability because of 402 A negligence[390] (negligence per se in Wisconsin) and also because of ordinary negligence, the need to submit both theories of negligence recovery exists for the reasons stated above.[391] In *Howe v. Deere & Co.*[392] the Wisconsin Supreme Court declined to determine whether an inquiry regarding ordinary negligence should precede an inquiry concerning 402 A negligence or whether only one question of negligence should be submitted with appropriate instructions on both negligence theories. The matter was consigned to the discretion of the trial court.

If separate inquiries are made with respect to 402 A negligence per se and ordinary negligence, the special verdict may require two cause questions, two comparison questions, a third question in the event of issues of ordinary negligence of defendants and contribution between defendants that may be liable under 402 A or ordinary negligence, and the necessary damage questions. It would seem preferable to submit the inquiry with respect to 402 A negligence first because of the relative ease of proof, although some attorneys are fearful that recovery on that theory is more difficult than had been expected because the jury must find the defective product to be "unreasonably dangerous." It seems to the writers that other attorneys will complain that the jury's determination of negligence is obscured by inquiring about ordinary negligence first, because the issue of

390. *See* note 188 *supra.*

391. *See also* Howes v. Deere & Co., 71 Wis. 2d 268, 238 N.W.2d 76 (1976).

392. *Id.*

402 A negligence would not then be apparent. This is so because the jury would not be required to answer 402 A inquiries if the ordinary negligence question was answered affirmatively.

A special verdict form experimenting in separate inquiries with respect to 402 A negligence and ordinary negligence is set forth as Appendix VI. The fact situation assumed is as follows:

P, an invitee, was injured at an automobile repair shop when an automobile transmission was being unloaded from a common carrier delivery truck. A portable crane being used by a mechanic (*M*) and the truck driver (*TD*) to unload the truck tipped and the load struck and injured *P*.

P sues the auto repair shop, the common carrier, the crane manufacturer (*CM*) and the crane distributor (*CD*). The pleadings and the evidence put in issue the negligence of *M* and *TD* in the unloading process, and negligence of *CM* in manufacturing the crane and *CD* in assembling the crane. Also in issue is the strict liability of *CM* for a design defect and the strict liability of *CD* for misassembly. All of the defendants have cross-claimed for contribution.

Special verdict inquiries with respect to common law negligence of *M*, *TD* and *P* are included. Inquiries with respect to strict liability and common law negligence of *CM* and *CD* are also included.

The first comparison question is invoked to compare the negligence if strict liability is applicable and the plaintiff and other defendants are possibly causally negligent at common law. To aid the jury in eliminating from the comparison those persons not found strictly liable or causally negligent, the instruction with reference to a "zero" answer is inserted in each subdivision.[393]

The second comparison question determines the contribution rights between the crane manufacturer and the crane distributor. The third comparison question compares the negligence of the respective persons or parties in the event that strict liability is not applicable.

The last question is an alternate to the damage question if the action is brought for indemnification or contribution when settlement has been made with the injured party by one or more of the persons or parties who are allegedly at fault. The

393. The format is the same as in WIS. J.I.—CIVIL No. 1592.

strict liability, negligence, cause and comparison questions would be the same.

Wisconsin Jury Instruction—Civil Number 3290 recommends incorporating in a products special verdict, comparisons of "product" and other person's negligence as well as comparison of the negligence of the strictly liable defendants to each other. Four results are grounded in the two comparisons:

(1) The percentage of causal negligence of all persons (including the plaintiff's contributory negligence) is obtained.[394]

(2) The persons whose conduct contributed to the "product negligence" have their conduct compared to each other.[395]

(3) A comparison of "product negligence" to other negligence.[396]

(4) The determination of joint liability if it is disputed in the evidence.[397]

When the pleadings allege negligence and strict liability in tort and the evidence supports both theories, product negligence comparisons seem to make formulation of a special verdict complicated and lengthy. By eliminating the product negligence comparison in Appendix VI through the use of alternate Question 15, the authors believe the jury is denied the opprotunity for internal inconsistency except in one respect. It is possible for a "person" in the chain of supply nearer to the buyer to be exculpated by the jury although "he" incorporated into the end product a defective component supplied to him. However, that happenstance is only legally inconsistent, not factually inconsistent, and thus the court upon ordering judgment may merely modify the verdict to conform with the law that those in the chain of supply are jointly liable. If there is a factual issue, it may be resolved by the jury in inquiries about the "business of selling" and "substantially the same condition."

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394. The same result, however, can as easily be obtained in a one-comparison question inquiring about all of the parties whose conduct contributed to the "injury."

395. This is simply an intermediate mathematical step that is unnecessary and can be eliminated by a single comparison which contains inquiries with respect to comparing all relevant conduct.

396. This is merely a reminder that those in the chain of supply of a defective and unreasonably dangerous product are strictly liable to the consumer. There is no need for the jury to remind the lawyers and the judge of the law.

397. In that event, additional questions relating to "the business of selling" and "substantially the same condition" are factual determinants to be resolved by the jury.

The present forms of special verdict and instructions are easily adaptable to a single-question submission of 402 A negligence and ordinary negligence. A single-question submission of 402 A and ordinary negligence requires combination of the strict liability and ordinary negligence instructions in application to an inquiry about negligence. The causation question can inquire whether "such defective condition or negligence" was a cause of the "injury." The comparative negligence question and damage question can be in the usual form. A simple one sentence paragraph may be added to the definition of negligence: "In addition to this general definition of negligence, there are laws governing the business of selling a defective product in an unreasonably dangerous condition, a violation of which is negligence as that term is used in the special verdict and these instructions."

The determination of the joint liability of the defendants can be made by the court as a matter of law unless the evidence is in dispute. That dispute would be in the form of evidence that some or all of the defendants were not in the business of selling the products or its components or that the product or its components did not reach the consumer in substantially the same condition. In that case, inquiries with respect to the "business of selling" and acquisition by the consumer in "substantially the same condition" can be keyed to the individual negligence inquiries. The questions appear as numbers 4 and 5 in the comment to Wisconsin Jury Instruction—Civil Number 3290. The answers to those questions will then determine joint strict liability.

Such a special verdict form would differ from the usual negligence form of submission as we now know it, only in the prospect of the additional questions with respect to the "business of selling" and "substantially the same condition." The special verdict form is thus greatly simplified.

However, whether 402 A negligence, as opposed to common law negligence, was found by the jury will not be ascertainable. This will result in obscuring the product liability of the person who placed the product into the stream of commerce for the defects attributable to component suppliers or assemblers.

The liability to the injured person of a defendant, whether a seller, distributor, manufacturer or component supplier, is arrived at by different routes in negligence and strict liability for torts, with "foreseeability of harm" being the route in the

first instance and "sale of a product in substantially the same condition" in the second instance. Whether the liability of persons in the chain of supply is to become joint is dependent on the question whether each defendant is in the business of selling the product and whether it reached the consumer in substantially the same condition. In the ordinary case that will be without dispute and thus there is no reason why the "negligence" of the defendants cannot be determined as a matter of law to be joint. However, if the evidence is in dispute with respect to whether a defendant is in the chain of supply, and that defendant is not found causally negligent, the verdict will not determine whether he is in the chain of supply and jointly liable. In such a case a special inquiry of fact is required.

The ultimate fact "fault" verdict and instructions found in Wisconsin Jury Instruction—Civil Number 1001 are readily adaptable. A "fault" special verdict involving issues of 402 A and ordinary negligence has been experimented with; it appears as Appendix VII and assumes the same facts as Appendix VI.

APPENDICES

The appendices which follow are an attempt to summarize and to illustrate some of the positive rather than negative principles of special verdict formulation. The italicized and parenthetical material identifies the alternatives that may be chosen to fit the specific situation posed by the evidence. Not all of the alternatives can be suggested because of the infinite variations in case types and the variety of evidentiary circumstances. At best only some of the more frequently encountered problems of special verdict formulation are illustrated.

APPENDIX I

Special Verdict Worksheet — Ultimate Fact Negligence

Question No. 1
(At and just before) *(At and before)* *(At the time and place in question)* *(At the time and place of)*
the
(fall of the plaintiff _____)
(injury to the plaintiff _____) *(if any)*
(accident) *(collision)*
was the defendant _____ negligent with respect to
(the operation of his motor vehicle?)
(signalling a turn?) *(signalling?)*
(maintaining the loading platform as safe as the nature of the place reasonably permitted?)
(maintenance of his premises?)
(administering a permanent wave to the plaintiff?)
(her duties as a physical education teacher?)
(the care and maintenance of the chair in question?)
(the maintenance and manner of repair of the stair tread of the second step?)
(marking the cable gate so as to warn snowmobilers of its existence?)

Answer:_____

Question No. 2
If you answer Question (1) "yes," then answer this question:
Was such negligence of the defendant _____ a cause of the *(fall of the plaintiff _____)* *(injury to the plaintiff _____)* *(if any)* *(accident)* *(collision)?*

Answer:_____

Question No. 3
(At and just before) (At and before) (At the time and place in question) (At the time and place of)
the
(fall of the plaintiff _____)
(injury to the plaintiff _____) (if any)
(accident) (collision)
was the plaintiff _____ negligent with respect to
(operation of his motor vehicle?)
(signalling?) (signalling a [left] [right] turn?)
(caring for his own safety?)
(care and protection for his own safety?)
(operation of his snowmobile?)

Answer:_____

Question No. 4
If you answer Question (3) "yes," then answer this question: Was such negligence of the plaintiff _____, a cause of the *(fall of the plaintiff _____) (injury to the plaintiff _____) (if any) (accident) (collision)*?

Answer: _____

Question No. 5
If you have answered Questions (2) and (4) "yes," then and only then answer this question: Taking the combined negligence which caused the *(fall of the plaintiff _____)*
(injury to the plaintiff _____) (if any)
(accident) (collision) as 100 %, what percentage of such negligence is attributable to:

(a) the defendant _____? Answer:_____%
(b) the plaintiff _____? Answer:_____%
Total: 100%

Question No. 6
If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonably compensate (him) (her) with respect to:

(a) personal injuries to date? Answer: $_____
(b) future personal disability? Answer: $_____
(c) medical (*and hospital*) (*and drug expenses*) to date? Answer: $_____
(d) future medical (*and hospital*) (*and drug*) expenses? Answer: $_____
(e) loss of earning capacity to date? Answer: $_____

(f) future loss of earning capacity? Answer: $_____
(g) damage to _____? Answer: $_____

Question No. 7
If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonably compensate *(him) (her)* with respect to:

(a) loss of services, society and companionship of (*his*) (*her*) (*wife,* _____) (*husband* _____)?
Answer: $_____

(b) medical (*and hospital) (and drug)* expenses to date?
Answer: $_____

(c) future medical *(and hospital) (and drug)* expenses?
Answer: $_____

Dated at _____, Wisconsin this _____ day of _____, 19____.

_____
(Forelady) (foreman)

Dissenting Jurors	as to	Question or Subdivision No.
_____		_____
_____		_____

APPENDIX II

Special Verdict Worksheet — Specific Issues Negligence

Question No. 1
(At and just before) (At and before) (At the time and place in question) (At the time and place of)
the
(fall of the plaintiff _____)
(injury to the plaintiff _____) (if any)
(accident) (collision)
was the defendant _____, negligent with respect to:

[(a) Repairing the stairway? Answer: _____]
[(b) (installing) (maintaining) (repairing) (affixing) the floor covering? Answer: _____]
[(c) (Mopping) (waxing) (polishing) the floor?
[(d) Lookout? Answer: _____]
[(e) Speed? Answer: _____]
[(f) Right of way? Answer: _____]

[(g) Manner of making his turn? *Answer: _____]*
[(h) Signalling? *Answer: _____]*

Question No. 2
If you answer any subdivision of Question (1) "yes," then answer the corresponding subdivision of this question: Was such negligence of the defendant _____, a cause of the
(fall of the plaintiff _____)
(injury to the plaintiff _____) (if any)
(accident) (collision) with respect to:
[(a) Repairing the stairway? *Answer: _____]*
[(b) (Installing) (maintaining) (repairing) (affixing) the floor covering? *Answer: _____]*
[(c) (Mopping) (waxing) (polishing) the floor? *Answer: _____]*
[(d) Lookout? *Answer: _____]*

[(e) Speed? *Answer: _____]*
[(f) Right of way? *Answer: _____]*
[(g) Manner of making his turn? *Answer: _____]*
[(h) Signalling? *Answer: _____]*

Question No. 3
(At and just before) (At and before) (At the time and place in question) (At the time and place of)
the
(fall of the plaintiff _____)
(injury to the plaintiff _____) (if any)
(accident) (collision)
was the plaintiff _____ negligent with respect to:
[(a) Disregarding a warning? *Answer: _____]*
[(b) Grasping a hand rail? *Answer: _____]*
[(c) Choosing his path of travel? *Answer: _____]*
[(d) Lookout? *Answer: _____]*
[(e) Speed? *Answer: _____]*
[(f) Right of way? *Answer: _____]*

Question No. 4
If you answer any subdivision of Question (3) "yes," then answer the corresponding subdivision of this question: Was such negligence of the plaintiff _____ a cause of the

(fall of the plaintiff _____)
(injury to the plaintiff _____) (if any)
(accident) (collision) with respect to:

[*(a) Disregarding a warning?* *Answer:* _____]
[*(b) Grasping a hand rail?* *Answer:* _____]
[*(c) Choosing his path of travel?* *Answer:* _____]
[*(d) Lookout?* *Answer:* _____]
[*(e) Speed?* *Answer:* _____]
[*(f) Right of way?* *Answer:* _____]

Question No. 5

If you have answered any subdivision of Question (2) "yes," and if you have answered any subdivision of Question (4) "yes," then and only then answer this question: Taking the combined negligence which caused the
(fall of the plaintiff _____)
(injury to the plaintiff _____) (if any)
(accident) (collision) as 100%, what percentage of such negligence is attributable to:

(a) the defendant _____? Answer: _____%
(b) the plaintiff _____? Answer: _____%
Total: 100%

Question No. 6

If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonably compensate *(him) (her)* with respect to:

(a) personal injuries to date? Answer: $_____
(b) future personal disability? Answer: $_____
(c) medical *(and hospital) (and drug)* expenses to date? Answer: $_____
(d) future medical *(and hospital) (and drug)* expenses? Answer: $_____
(e) loss of earning capacity to date? Answer: $_____
(f) future loss of earning capacity? Answer: $_____
(g) damage to _____? Answer: $_____

Question No. 7

If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonable compensate *(him) (her)* with respect to:

(a) loss of services, society and companionship of *(his) (her) (wife _____)*
(husband _____)? Answer: $_____

(b) medical *(and hospital) (and drug)* expenses to date? Answer: $_____

(c) future medical *(and hospital) (and drug)* expenses? Answer: $_____

Dated at _____, Wisconsin this _____ day of _____, 19____.

_____

(Forelady) (Foreman)

Dissenting Jurors as to _____ Question or Subdivision No. _____ No. _____

_____ _____

APPENDIX III

Special Verdict Worksheet — 402 A Negligence

Question No. 1

Was *(name of product),* when it left the possession of the seller, in such defective condition as to be unreasonably dangerous to a prospective *(user) (consumer)?* Answer: _____

Question No. 2

If you answer Question No. 1 "yes," then answer this question: Was such defective condition a cause of plaintiff's injuries?

Answer: _____

Question No. 3

Was the plaintiff negligent with respect to his own safety?

Answer: _____

Question No. 4

If you answer Question No. 3 "yes," then answer this question: Was such negligence a cause of his injuries?

Answer: _____

Question No. 5

If you have answered Questions No. 1 and 2 "yes," then such conduct on the part of the seller constitutes negligence and requires, if you have also answered Questions No. 3 and 4 "yes," that you answer the following questions on comparative negligence:

Assuming the total negligence that caused plaintiff's injuries to be 100%, what percentage thereof do you attribute to:

(a) The Product? Answer: _____%

(b) The Plaintiff? Answer: _____%

Total: 100%

Question No. 6

If you have answered Questions No. 1 and 2 "yes," then such

conduct on the part of the seller, manufacturer, assembler and distributor *(jobber, manufacturer's agent, dealer, etc.)* is negligence and requires you to answer this question:
Assuming the total negligence of the product to be 100%, what percentage of negligence, if any, do you attribute to:

(a) the manufacturer?	Answer: _____	%
(b) the assembler?	Answer: _____	%
(c) the dealer?	Answer: _____	%
(d) the seller?	Answer: _____	%
	Total:	100%

Question No. 7
If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonably compensate *(him) (her)* with respect to:

(a) personal injuries to date?	Answer: $_____
(b) future personal disability?	Answer: $_____
(c) medical *(and hospital) (and drug)* expenses to date?	Answer: $_____
(d) future medical *(and hospital) (and drug)* expenses?	Answer: $_____
(e) loss of earning capacity to date?	Answer: $_____
(f) future loss of earning capacity?	Answer: $_____
(g) damage to _____?	Answer: $_____

Question No. 8
If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonably compensate *(him) (her)* with respect to:

(a) loss of services, society and companionship of *(his) (her) (wife, _____) (husband, _____)*?	Answer: $_____
(b) medical *(and hospital) (and drug)* expenses to date?	Answer: $_____
(c) future medical *(and hospital) (and drug)* expenses?	Answer: $_____

Dated at _____, Wisconsin, this _____ day of _____, 19____.

_____
(Forelady) (Foreman)

Dissenting Jurors as to Question or Subdivision No.

_____ _____

_____ _____

APPENDIX IV

Special Verdict Worksheet — Specific Issues 402 A Negligence

Question No. 1
Was the crane, when it left the possession of the seller in such defective condition as to be unreasonably dangerous to a prospective user with respect to:

[*(a) structural strength of the boom?* *Answer:* _____]
[*(b) over-rating the lifting capacity of the crane?* *Answer:* _____]
[*(c) adequate operational warning devices?* *Answer:* _____]
[*(d) adequate side-load and level-operation warnings?* *Answer:* _____]

Question No. 2
If you answer any subdivision of Question No. 1 "yes," then answer the corresponding subdivision of this question:
Was such defective condition a cause of the crane boom buckling with respect to:

[*(a) structural strength of the boom?* *Answer:* _____]
[*(b) over-rating the lifting capacity of the crane?* *Answer:* _____]
[*(c) adequate operational warning devices?* *Answer:* _____]
[*(d) adequate side-load and level-operation warnings?* *Answer:* _____]

Question No. 3
Was the Brown Engineering Company negligent with respect to maintaining the construction site and the crane which was used thereon as safe as the nature of the place would reasonably permit with respect to:

(a) the manner of operation of the crane by William Jones?
Answer: _____

(b) the supervision and direction of Walter Smith?
Answer: _____

Question No. 4
If you answer any subdivision of Question No. 3 "yes," then answer the corresponding subdivision of this question: Was

such negligence a cause of the crane boom buckling with respect to:

(a) the manner of operation of the crane by William Jones?
Answer: _____

(b) the supervision and direction of Walter Smith?
Answer: _____

Question No. 5

If you have answered any subdivision of Question No. 2 "yes," then such conduct on the part of the seller constitutes causal negligence and requires, if you have also answered any subdivision of Question No. 4 "yes," that you answer the following questions on comparative negligence: Assuming the total negligence that caused the accident to be 100%, what percentage thereof do you attribute to:

(a) the defendant crane company? Answer: _____%

(b) the Brown Engineering Company?
Answer: _____%

Total: 100%

Question No. 6

If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonably compensate *(him) (her)* with respect to:

(a) personal injuries to date? Answer: $_____

(b) future personal disability? Answer: $_____

(c) medical *(and hospital) (and drug)* expenses to date? Answer: $_____

(d) future medical *(and hospital) (and drug)* expenses? Answer: $_____

(e) loss of earning capacity to date? Answer: $_____

(f) future loss of earning capacity? Answer: $_____

Question No. 7

If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonably compensate *(him) (her)* with respect to:

(a) loss of services, society and companionship of *(his) (her) (wife, _____) (husband, _____)*? Answer: $_____

(b) future loss of services, society and companionship of *(his) (her) (wife, _____) (husband, _____)*? Answer: $_____

(c) nursing care and services furnished to *(his) (her) (wife _____) (husband _____)* to date? Answer: $_____

(d) future nursing care and services furnished to *(his) (her) (wife _____) (husband _____)?* Answer: $_____

Dated at _____, Wisconsin this _____ day of _____, 19____.

_____
(Foreman)

Dissenting Jurors	(Forelady) as to	Question or Subdivision No.
_____		_____
_____		_____

APPENDIX V

"Fault" Verdict Worksheet.

Question No. 1

In what percentage, if any, do you find the defendant _____ at fault? Answer: _____%

Question No. 2

In what percentage, if any, do you find the plaintiff _____ at fault? Answer: _____%

Question No. 3

If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonably compensate *(him) (her)* with respect to:

(a) personal injuries to date? Answer: $_____
(b) future personal disability? Answer: $_____
(c) medical *(and hospital) (and drug)* expenses to date? Answer: $_____
(d) future medical *(and hospital) (and drug)* expenses? Answer: $_____
(e) loss of earning capacity to date? Answer: $_____
(f) future loss of earning capacity? Answer: $_____
(g) damage to _____? Answer: $_____

Question No. 4

If the plaintiff _____ is entitled to recover, what sum of money will fairly and reasonable compensate *(him) (her)* with respect to:

(a) loss of services, society and companionship of *(his) (her) (wife, _____) (husband, _____)*?
Answer: $_____

(b) medical *(and hospital) (and drug)* expenses to date? Answer: $_____

(c) future medical *(and hospital) (and drug)* expenses? Answer: $_____

Dated at _____, Wisconsin this _____ day of _____, 19____.

_____
(Forelady) (Foreman)

Dissenting Jurors as to Question or Subdivision No. _____ No. _____

_____ _____

APPENDIX VI

Special Verdict Worksheet — 402 A and Ordinary Negligence

Question No. 1

Was the crane when it left the possession of CM in such defective condition as to be unreasonably dangerous to a prospective *(user) (consumer) (bystander)*? Answer: _____

Question No. 2

If you answer Question No. 1 "yes," then answer this question: Was such defective condition a cause of P's injury?
Answer: _____

Question No. 3

Was the crane when it left the possession of CD in such defective condition as to be unreasonably dangerous to a prospective *(user) (consumer) (bystander)*? Answer: _____

Question No. 4

If you answer Question No. 3 "yes," then answer this question: Was such defective condition a cause of P's injury?
Answer: _____

Question No. 5

If you answer Question No. 2 "no," or do not answer it, then answer this question: Was the defendant CM negligent with respect to manufacturing the crane in question?
Answer: _____

Question No. 6

If you answer Question No. 5 "yes," then answer this question: Was such negligence of the defendant CM a cause of P's injury?

Answer: _____

Question No. 7

If you answer Question No. 4 "no," or do not answer it, then answer this question: Was the defendant CD negligent with respect to assembling the crane in question?

Answer: _____

Question No. 8

If you answer Question No. 7 "yes," then answer this question: Was such negligence of the defendant CD a cause of P's injury?

Answer: _____

Question No. 9

At and just before *(the accident) (P's injury)* was M negligent with respect to the manner of unloading the automobile transmission?

Answer: _____

Question No. 10

If you answer Question No. 9 "yes," then answer this question: Was such negligence of M a cause of *(the accident) (P's injury)?*

Answer: _____

Question No. 11

At and just before *(the accident) (P's injury)* was TD negligent with respect to the manner of unloading the automobile transmission?

Answer: _____

Question No. 12

If you answer Question No. 11 "yes," then answer this question: Was such negligence of TD a cause of *(the accident) (P's injury)?*

Answer: _____

Question No. 13

At and just before *(the accident) (P's injury)* was P negligent with respect to care for his own safety?

Answer: _____

Question No. 14

If you answer Question No. 13 "yes," then answer this question: Was such negligence of P a cause of *(the accident) (his injury)?*

Answer: _____

Question No. 15

If you have answered either Questions No. 2 or 4 "yes," then such conduct on the part of CM, or CD, or both, constitutes negligence and requires, if you have answered any of Questions No. 10, 12, or 14 "yes," that you answer the following questions of comparative negligence: Assuming the total negligence that caused the *(accident) (injury to P)* to be 100 percent, what percentage thereof do you attribute to:

(a) The Crane? Answer: _____%

(b) CM? Answer: _____%

[If you have answered Question No. 2 "yes," or have answered Question No. 6 "no," or have not answered it, insert "zero" in answer to this subdivision.]

(c) CD? Answer: _____%

[If you have answered Question No. 4 "yes," or have answered Question No. 8 "no," or have not answered it, insert "zero" in answer to this subdivision.]

(d) M? Answer: _____%

[If you have answered Question No. 10 "no," or have not answered it, insert "zero" in answer to this subdivision.]

(e) TD? Answer: _____%

[If you have answered Question No. 12 "no," or have not answered it, insert "zero" in answer to this subdivision.]

(f) P? Answer: _____%

[If you have answered Question No. 14 "no," or have not answered it, insert "zero" in answer to this subdivision.]

Total: 100%

Question No. 16

If you have answered Question No. 15(a) other than "zero," then answer this question: Assuming the total negligence of the crane to be 100%, what percentage of negligence do you attribute to:

(a) CM? Answer: _____%

[If you have answered Question No. 2 "no," or have not answered it, insert "zero" as your answer.]

(b) CD? Answer: _____%

[If you have answered Question No. 4 "no," or have not answered it, insert "zero" as your answer.]

Total: 100%

Question No. 17

If you have answered Question No. 15, do not answer this question. If you have not answered Question No. 15 and you have answered two or more of questions Nos. 6, 8, 10, 12 and 14 "yes," then answer this question: Assuming the total negligence that caused the *(accident) (injury to P)* to be 100%, what percentage thereof do you attribute to:

(a) CM? Answer: _____%

[If you have answered Question No. 6 "no," or have not answered it, insert "zero" in answer to this subdivision.]

(b) CD? Answer: _____%

[If you have answered Question No. 8 "no," or have not answered it, insert "zero" in answer to this subdivision.]

(c) M? Answer: _____%

[If you have answered Question No. 10 "no," or have not answered it, insert "zero" in answer to this subdivision.]

(d) TD? Answer: _____%

[If you have answered Question No. 12 "no," or have not answered it, insert "zero" in answer to this subdivision.]

(e) P? Answer: _____%

[If you have answered Question No. 14 "no," or have not answered it, insert "zero" in answer to this subdivision.]

Total: 100%

Alternate to prior Questions 15, 16 and 17.

Question No. 15

If you have answered two or more of Questions 2, 4, 6, 8, 10, 12 and 14 "yes," (a "yes" answer to any of Questions 2 or 6 is conduct on the part of the defendant inquired about which constitutes negligence) then answer this question of comparative negligence.

Assuming the total negligence that caused the injury to the plaintiff to be 100 percent, what percentage do you attribute to:

(a) CM? Answer: _____%

[Unless you have answered either Questions 2 or 6 "yes," insert "zero" as your answer to this subdivision.]

(b) CD? Answer: _____%

[Unless you have answered either Questions 4 or 8 "yes," insert "zero" as your answer to this subdivision.]

(c) M? Answer: _____%

[Unless you have answered Question 10 "yes," insert "zero" as your answer to this subdivision.]

(d) TD? Answer: _____%

[Unless you have answered Question 12 "yes," insert "zero" as your answer to this subdivision.]

(e) P? Answer: _____%

[Unless you have answered Question 14 "yes," insert "zero" as your answer to this subdivision.]

Total: 100%

Question No. 18

[See damage question No. 6 in Appendix IV.]

Question No. 19

Regardless of your answers to previous questions, you must answer this question: Was the amount of $_____ paid by _____ to P, reasonable? Answer: _____

[This question and Question No. 20 are alternates to Question 18, if the action is alternatively for indemnification or contribution.]

Question No. 20

If your answer to Question No. 19 is "no," then answer this question: What sum of money would reasonably compensate P for his injury and damages sustained in the accident?

Answer: $_____

APPENDIX VII

"Fault" Special Verdict Worksheet — 402 A and Ordinary Negligence

Question No. 1

If in your deliberations you have found that the crane was in such defective condition when it left the possession of CM or CD, as to be unreasonably dangerous to a prospective *(user) (consumer) (bystander)* and have further found that such defective condition was a cause of P's injury, but you have further found that neither CM or CD was causally negligent in other respects with respect to P's injury, then answer this question:

(a) In what percentage do you find the product *(crane)* at fault? Answer: _____%
(b) In what percentage, if any, do you find M at fault? Answer: _____%
(c) In what percentage, if any, do you find TD at fault? Answer: _____%
(d) In what percentage, if any, do you find P at fault? Answer: _____%
Total: 100%

Question No. 2

If you answer Question No. 1, then answer this question: Assuming the defective condition that you found to be a cause of P's injury to be 100%, what percentage thereof do you attribute to:

(a) CM? Answer: _____%
(b) CD? Answer: _____%
Total: 100%

Question No. 3

If you have answered Question No. 1 and in your deliberations have found that either CM or CD or both were causally negligent with respect to P's injury in addition to an unreasonably dangerous defective condition that was a cause of P's injury, then answer this question:

(a) In what percentage do you find CM at fault? Answer: _____%
(b) In what percentage do you find CD at fault? Answer: _____%
(c) In what percentage, if any, do you find M at fault? Answer: _____%
(d) In what percentage, if any, do you find TD at fault? Answer: _____%
(e) In what percentage, if any, do you find P at fault? Answer: _____%
Total: 100%

Question No. 4

[See appendix V, Question No. 3.]