The Submission of Written Interrogatories to the Jury

Wayne E. Stichter. †

Section 11420-17 of the General Code provides:

> When either party *requests* it, the court *shall* instruct the jurors, *if they render a general* verdict, specially to find upon *particular questions of fact,* to be stated in *writing,* and *shall direct* a written finding thereon. The verdict and finding must be entered on the journal and filed with the clerk. [Emphasis added.]

Section 11420-18 reads:

> When a special finding of facts is *inconsistent* with the general verdict, the *former* shall *control* the *latter,* and the court may give *judgment* accordingly. [Emphasis added.]

The use of interrogatories in the submission of a case to a jury has rescued many a lawyer and client from the consequences of an unfavorable verdict. On other occasions, interrogatories have spelled disaster to the lawyer employing them. It has become more or less commonplace to say that it is dangerous to use interrogatories. That is perhaps true. But is it not dangerous merely to *try* many cases to a jury? Dangerous battles may demand dangerous weapons. Of course, as in the use of any dangerous weapon, caution must be employed so as to minimize the likelihood of injury to one's self.

Because of the unfortunate consequences which may attend the unnecessary or ill-advised use of interrogatories, trial counsel, in every case in which he contemplates their use, should give thorough consideration to the probable advantages and disadvantages that may result — to weigh in the balance the benefit to inure from favorable findings and the harm and possible disaster that may follow unfavorable findings. This consideration should be undertaken early in the trial, — yes, even before the trial begins. Indeed, the trial lawyer will often find it advisable to plan in advance the use of interrogatories and to chart the trial strategy, tactics and evidence accordingly.

It must be remembered, however, that sudden or unexpected developments, favorable or unfavorable, may make it unwise to adhere to a premature decision regarding the use of interrogatories; consequently, no *final* decision respecting their use should be made until after the evidence is concluded and perhaps not even until after the final argument has been completed.

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† Member of The Ohio Bar and of the firm of Effler, Eastman, Stichter & Smith, Toledo, Ohio; President of International Association of Insurance Counsel.

Before making a final decision as to whether he shall employ interrogatories in any particular case, I think it would be quite helpful for counsel to ask himself a few searching questions regarding his case and then to answer such questions as honestly and objectively as possible, without indulging in any wishful thinking. To illustrate this point, I shall suggest several questions which counsel for a defendant might well propound to himself:

1. Does any one or more of the ultimate and determinative facts of the case preponderate strongly in my favor?
2. Do I honestly believe that, in view of the favorable evidence, the jury would likely answer my interrogatories favorably?
3. Will the sympathy or prejudice of the jurors operate in favor of the other party or his counsel?
4. Do I entertain a strong feeling or hunch that the verdict will be adverse, even though I honestly believe that the ultimate and determinative facts are in my favor? In other words, do I sense that the jury is "agin" me?
5. Is my defense of a technical nature which, while legally sound and amply supported by the evidence, is calculated to make little, if any, appeal to a jury in the rendition of a general verdict?
6. Is it important in this case that I employ interrogatories in order to prevent the application of the two-issue rule?

While I would not be so bold or rash as to imply that these suggested questions will enable counsel to come up with an *infallible* decision as to whether interrogatories shall be employed, I do feel that the special findings which these questions will elicit will be most helpful in making a decision. (The answer "Yes" to any of the foregoing questions is an indication — but nothing more — that it would be advantageous to employ interrogatories.)

In addition to the various considerations which I have mentioned, there may be other special circumstances which make it expedient to use interrogatories. I shall mention two special cases.

In suits involving liability for damages to persons and property it sometimes happens that the defendant's liability insurance coverage extends to a part only of the claims asserted by plaintiff. In the event of an adverse verdict, it may be very important for defendant and his insurer to know whether such verdict is based wholly or in part upon a claim which is covered by the insurance policy. The use of interrogatories should provide the necessary answer.

In an action charging defendant with liability for the negligence of another wrongdoer—for instance, an action against an employer charging him with responsibility for the acts of his agent or independent contractor, or an action against a retailer for the acts of a

wholesaler or manufacturer, and in other innumerable cases involving primary and secondary liability—it frequently happens that the defendant is charged with liability not only for the wrongful acts of another wrongdoer but also for his own *active* negligence. In the event of an adverse verdict, it will be very important for defendant to know whether such verdict is based *solely* upon defendant's liability for the acts of the other wrongdoer. Otherwise, defendant's right of indemnification against the wrongdoer primarily liable may be seriously endangered if not destroyed.

The proper preparation of interrogatories is not an easy task. Proper preparation involves three things: (1) a thorough knowledge of the requirements imposed by the statutes and court decisions with respect to the form and substance of the interrogatories and the time and manner of their submission; (2) a thorough analysis of the pleadings, issues, and evidence in the case; and (3) meticulous care in the phrasing of the interrogatories in order to elicit definite, positive and, if possible, favorable findings of ultimate and determinative facts.

Our supreme court has said that "The character of the questions which may be propounded is determined by the purpose for which they are authorized"[1] and that "The purpose * * * is to elicit from the jury such special findings on particular questions of fact as will test the correctness of the general verdict" [2], and "to give the parties an opportunity to ascertain whether the jury has understood and applied the law to the proven facts".[3] Consequently, the interrogatories must be such as call for answers which will establish ultimate and determinative facts rather than mere probative facts, or which will establish such probative facts as will permit an ultimate and determinative fact to be inferred as a matter of law. [4]

And just what is "an ultimate and determinative fact"? The phrase appears difficult of any practicable definition, and so far as my search has revealed, no satisfactory definition has yet been given by our supreme court. Our supreme court has said, however, that a "particular question of fact", as that term is used in Section 11420-17 of the Code, is "something different from, and less than, an issue."[5] A recent opinion of the Court of Appeals of Hamilton County has this to say on the subject:

Ultimate facts lie in the area between evidence and a con-

[1] Electric Railroad Co. v. Hawkins, 64 Ohio St. 391, 60 N.E. 558 (1901).

[2] Electric Railroad Co. v. Hawkins, 64 Ohio St. 391, 60 N.E. 558 (1901); Anderson, Admx., v. S.E. Johnson Co., 150 Ohio St. 169, 80 N.E. 2d 757 (1948).

[3] Elio v. The Akron Transportation Co., 147 Ohio St. 363, 71 N.E. 2d 707 (1947).

[4] Gale v. Priddy, 66 Ohio St. 400, 64 N.E. 437 (1902); Kennard v. Palmer, 143 Ohio St. 1, 53 N.E. 2d 908 (1944).

[5] Gale v. Priddy, 66 Ohio St. 400, 64 N.E. 437 (1902).

> clusion of law. They are the essential and determining facts on which the final conclusion of law is predicated. They are deduced by inference from evidentiary facts which can be directly established by testimony or evidence.
> Ultimate facts are those facts which may be pleaded establishing the existence of a legal right, the violation of a legal right, or a legal defense to a cause of action based thereon. Ultimate facts are the logical results of the proofs or evidence. They are the conclusions of facts, the final resulting effect of which is reached by the processes of logical reasoning from evidentiary facts. An ultimate fact may be and often is the result of an inference drawn from more than one evidentiary fact.[6]

Our Ohio appellate courts are not in agreement as to what constitutes an ultimate and determinative fact as distinguished from a fact of a purely probative character or as distinguished from a conclusion of law. Even if we concede that what may be an ultimate and determinative fact in one case may be a purely probative fact in another, we cannot escape the conclusion, I submit, that the decisions of our appellate courts on this subpect are in hopeless conflict. Indeed, it is difficult to reconcile some of the recent decisions of the Supreme Court of Ohio with the earlier decisions of that court; yet these earlier decisions have not been expressly overruled or modified.

It may be helpful to you to summarize briefly some of the interrogatories which have been held by our supreme court as properly calling for answers establishing directly or inferentially ultimate and determinative facts. These interrogatories made inquiry as follows:

1. (a) In what respect defendant failed to exercise that degree of care which an ordinarily reasonable and prudent person would have exercised under the same or similar circumstances.[7]
   (b) What act or acts of plaintiff or defendant was the cause or causes which directly produced the collision and without which it would not have occurred.[8]
   (c) Was the defendant negligent in one or more of the respects set forth in the petition; and, if so, was such negligence the sole proximate cause of the injuries to plaintiff.[9]
2. Was defendant guilty of any negligence; and, if so, what was the negligent act or acts of the defendant. (And without inquiry as to whether the negligent act was a proximate cause.)[10]
3. (a) Whether defendant corporation entered into a conspiracy with other defendants to prevent unioniza-

[6] Scott v. Cismadi, 80 Ohio App. 39, 74 N.E. 2d 563 (1947).

[7] Elio v. Akron Transportation Co., 147 Ohio St. 363, 71 N.E. 2d 707 (1947).

[8] *Ibid.*

[9] *Ibid.*

[10] Masters v. N. Y. C., 147 Ohio St. 293, 70 N.E. 2d 898 (1947).

tion or to end a strike by violence.[11]

(b) Whether attack upon pickets and strikers in which plaintiff was injured was a part of or in furtherance of a conspiracy by the defendants.[12]

(c) Whether such attack was *caused solely and proximately by a rebellion* by the workers themselves against the conduct of the pickets, strikers and sympathizers in stoning the autos of the workers.[13]

(The supreme court, however upheld the lower court in holding that the consolidation of the last two interrogatories was improper and in refusing to submit them while so combined.)

4. Was plaintiff guilty of any negligence which either directly caused, or directly contributed to cause, the collision.[14] (The supreme court did not *expressly* pass upon the propriety of this interrogatory.)

5. In an action by a pedestrian for injuries sustained when struck while crossing street, whether plaintiff looked to north after passing center line of street; also whether plaintiff's view (after reaching center of street) of defendant's car was obstructed.[15]

6. (a) In an action for wrongful death, whether decedent, had he looked as he approached the interurban railway tracks, would have seen the interurban car in time to stop his auto in a place of safety.[16]

(b) Whether decedent did look in the direction from which the interruban car was approaching when the decedent was far enough from the track to stop before reaching the crossing.[17]

7. In a negligence action where more than one specific act of negligence is relied upon, "Was the defendant negligent?" and "If your answer to No. 1 is yes, state of what that negligence consisted."[18]

8. In an action for injuries allegedly sustained by plaintiff while engaged in interstate commerce, whether acts of plaintiff were in connection with, or a part of, an interstate movement of cars.[19]

9. An itemization of the damages making up verdict allowed on second cause of action.[20] (Since jury expressly found no items of damage on second cause of action, verdict awarding plaintiff $200 plus interest on first cause of action and $900 on sec-

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[11] Solanics v. Republic Steel Corp., 142 Ohio St. 567, 53 N.E. 2d 815 (1944).

[12] *Ibid.*

[13] *Ibid.*

[14] Swoboda v. Brown, 129 Ohio St. 512, 196 N.E. 274 (1935).

[15] Horwitz v. Eurove, 129 Ohio St. 8, 193 N.E. 644 (1934).

[16] C. D. & M. Ry. v. O'Day, 123 Ohio St. 638, 176 N.E. 569 (1930).

[17] *Ibid.*

[18] Davison v. Flowers, 123 Ohio St. 89, 174 N.E. 137 (1930).

[19] Mellon v. Weber, 115 Ohio St. 91, 152 N.E. 753 (1926).

[20] Central Gas Co. v. Hope Oil, 113 Ohio St. 354, 149 N.E. 386 (1925).

ond, judgment was reduced to $200 plus interest thereon.)

10. In an action for damages due to an alleged defect in a bridge, "Was the bridge, at the time of the accident, in a *reasonably safe* condition for travel in the ordinary mode?"[21]

11. Whether the place that the motorman selected for plaintiff to alight was a reasonably safe place for her to alight with the assistance of the conductor.[22]

12. (a) In action against a city for injuries due to an alleged defective condition of a sidewalk, whether sidewalk at time of injury, aside from accumulation of snow and ice, was in good condition and repair.[23]

(b) Whether obstruction complained of was an unnatural and artificial accumulation of snow and ice, or a natural and ordinary one.[24]

(c) Whether plaintiff saw and knew the nature of obstruction before and at the time of passing over it, and whether knowing this he voluntarily passed over it.[25]

(d) Whether plaintiff could easily have avoided obstruction and nevertheless conveniently reached his destination.[26]

(In this case all the interrogatories were answered favorably to defendant and trial court granted defendant's motion for judgment on the special findings notwithstanding the verdict for plaintiff; and the supreme court upheld action of trial court. However, judgment could have been sustained on any one or all of last three special findings without regard to the propriety of the others.)

Those interrogatories which in the opinion of our supreme court do not call for ultimate and determinative facts comprise inquiries as follows:

1. In a case involving question of whether truck driver was servant of defendant or of independent contractor hired by defendant, interrogatories as to:

(a) Whether independent contractor had right to remove or discharge truck driver or to substitute another person in his stead.[27]

(b) Whether independent contractor had right to withdraw his truck and driver units from the service of defendant.[28]

(c) Whether truck driver was free so far as de-

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[21] City of Troy v. Brady, 67 Ohio St. 65, 65 N.E. 616 (1902).

[22] Electric Rd. Co. v. Hawkins, 64 Ohio St. 391, 60 N.E. 558 (1901).

[23] Schaefler v. Sandusky, 33 Ohio St. 246 (1877).

[24] *Ibid.*

[25] *Ibid.*

[26] *Ibid.*

[27] Anderson v. Johnson Co., 150 Ohio St. 169, 80 N.E. 2d 757 (1948).

[28] *Ibid.*

fendant was concerned to choose his route.[29]

(d) Whether defendant had right to separate truck driver from his truck or to substitute another person in his stead.[30]

(e) Whether *under contract between defendant and independent contractor,* truck driver was a servant or agent of defendant at time of collision.[31]

2. (a) In an action for death of a pedestrian, whether decedent was crossing at a point other than an intersection[32] (without any inquiry as to proximate or contributing effect of same).

(b) Whether decedent first stepped between two autos attempting to cross the street[33] (without any inquiry as to proximate or contributing result of same).

3. Whether defendent, *at or immediately before* the collision, was guilty of conduct manifesting a perversity of mind.[34] (Interrogatory was so restricted as to time and events that answer would not necessarily be dispositive of issue.)

4. (a) As to names of officers of defendant corporation who acted for defendant in entering into a conspiracy, if such conspiracy should be found by the jury.[35]

(b) As to names of persons with whom officers entered into conspiracy.[36]

(Other interrogatories in this case called for ultimate and determinative facts, although two of them were held to be improperly consolidated.)

5. An interrogatory which related only to certain items of damage and which had no reference to certain other items upon which jury may have based its verdict.[37]

6. Whether jury's verdict was based on issue of performance.[38] (Word "solely" was omitted from interrogatory; supreme court indicates that had word "solely" been included in the interrogatory, the interrogatory would have been required to be submitted to the jury.)

7. (a) Whether defendant gave "reasonable warnings" of danger from benzol tank.[39]

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[29] *Ibid.*

[30] *Ibid.*

[31] *Ibid.*

[32] Betras v. McKelvey Co., 148 Ohio St. 523, 76 N.E. 2d 280 (1947).

[33] *Ibid.*

[34] Kennard v. Palmer, 143 Ohio St. 1, 53 N.E. 2d 908 (1944).

[35] Solanics v. Republic Steel, 142 Ohio St. 567, 53 N.E. 2d 815 (1944).

[36] *Ibid.*

[37] Ohio Fuel Gas v. Ringler, 126 Ohio St. 409, 185 N.E. 553 (1933).

[38] Globe Indemnity v. Wassman, 120 Ohio St. 72, 165 N.E. 579 (1929).

[39] Mason Tire v. Lansinger, 108 Ohio St. 377, 140 N.E. 770 (1923).

(b) Whether plaintiff heard such warnings.[40] (But see Judge Jones' dissent.)

8. (a) Whether negligence of either one or both cranemen of defendant was the sole proximate cause of plaintiff's injuries.[41]
   (b) Whether plaintiff was "negligent in any degree directly and proximately contributing" to his injuries.[42]
9. (a) Whether plaintiff employee had the opportunity to ascertain, and endeavored to ascertain, the dangerous condition of an entry where he was injured.[43]
   (b) Whether the defect in the roof of such entry was obvious and noticeable to a person going in or out of such entry.[44]

Interrogatories should be couched in such simple, clear and concise language as to be readily understood by the jurors. Each question "should be limited to a single, direct and controverted issue of fact and should be so stated that the answer will necessarily be positive, direct and intelligible."[45] Whenever practicable, each question should be so framed as to permit a simple and categorical answer — preferably a "yes" or "no" answer.

The request of counsel that interrogatories be submitted to the jury should contain the condition that the interrogatories shall be answered in case a general verdict is rendered. Otherwise there is no mandatory duty on the part of the court to submit the requested interrogatories.[46] Requesting the court to instruct the jurors to answer the interrogatories only if a general verdict is rendered in favor of the plaintiff (or defendant) is not a sufficient compliance.

If several interrogatories are requested by counsel, his request should be made with respect to each interrogatory individually; otherwise the court might treat the several interrogatories as a series and refuse all because of a material defect in only one question. The following form of request is therefore suggested:

> Defendant (plaintiff) requests the court to instruct the jurors that, if they render a general verdict in this case, they shall make a special finding, in writing, upon each of the particular questions of fact referred to in the attached interrogatories, No. 1, 2, 3, etc., this request being made separately as to each such interrogatory.

It is the better practice, I think, to use a separate sheet of paper for each interrogatory. This will avoid complications that might

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[40] *Ibid.*

[41] Brier Hill Steel Co. v. Ianakis, 93 Ohio St. 300, 112 N.E. 1013 (1915).

[42] *Ibid.*

[43] Davis v. Turner, 69 Ohio St. 101, 68 N.E. 819 (1903).

[44] *Ibid.*

[45] Elio v. The Akron Transportation Co., 147 Ohio St. 363, 71 N.E. 2d 707 (1947).

[46] Gale v. Priddy, 66 Ohio St. 400, 64 N.E. 437 (1902).

otherwise result should the court grant the request as to some only of the interrogatories and refuse as to others. On each sheet there should be listed (1) the instruction of the court relative to the jury's duty to answer; (2) the interrogatory; (3) sufficient space for the answer to be written in; and (4) twelve lines or spaces for the signatures of the jurors.

The request for the submission of interrogatories should be made to the court *before* the *general* charge is begun; for it is to be borne in mind that our supreme court has held that an interrogatory which is not tendered "until after the general charge when the jury is about to retire for deliberation upon its verdict may be rejected by the trial court in the exercise of a sound discretion."[47] In my opinion the request should be made immediately following the completion of the final argument to the jury. A request at such time is certainly a timely one and cannot be properly rejected as "too late." On the other hand, an earlier request is, I think, unwise; for if the request is made before the arguments are completed, opposing counsel will be afforded an opportunity (which he should not have) to comment on the interrogatories in his argument to the jury, and even to advise or suggest how the jury should answer the interrogatories. In this connection, it should be added that it is highly improper for counsel for either party to give any such advice or suggestions to the jury.[48]

In its instructions to the jury relative to the interrogatories, the court should carefully refrain from making any suggestion or indication to the jury as to what its answer should be to any interrogatory or as to the legal effect of any answer which might be given, and the court should also avoid any instruction, explanation or suggestion to the jury which seeks to harmonize or reconcile the answer with the general verdict.[49] While the court should instruct the jurors that the answer to each interrogatory must be signed by nine or more members of the jury, it is improper to give an instruction that such answer must be signed by the same jurors as signed the general verdict.[50] In order to minimize the possibility of any prejudicial instructions by the court with respect to the interrogatories, it is good practice for counsel to prepare and to submit with the interrogatories the instructions which he desires the court to give.

If and when the jury renders a general verdict in a case in

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[47] Kennard v. Palmer, 143 Ohio St. 1, 53 N.E. 2d 908 (1944).

[48] Walsh v. Thomas, 91 Ohio St. 210, 110 N.E. 254 (1915); Elio v. The Akron Transportation Co., 147 Ohio St. 363, 71 N.E. 2d 707(1947).

[49] *Ibid.*

[50] Simpson v. Springer, 74 Ohio App. 142, 57 N.E. 2d 817 (1943); Maumee Railway and Light Co. v. Hannaway, 7 Ohio App. 99 (1915).

which interrogatories have been submitted to the jury, counsel for each party should carefully examine each interrogatory and ascertain whether it has been fully and definitely answered, and whether it has been signed by at least nine jurors; and if there be any material defect or omission in any answer, trial counsel should promptly call the court's attention to such defect or omission, and request the court to order the jurors to resume their deliberations and to correct such defect or omission. Failure to so object will ordinarily constitute a waiver of such defect or omission.[51]

If any answer to an interrogatory is, in the opinion of trial counsel, irreconcilable with an adverse verdict, counsel should, of course, promptly file a motion for judgment on the special findings. The overruling of a motion for judgment on the special findings constitutes a final order from which an appeal on questions of law may be taken.[52]

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[51] Board of Commissioners v. Deitsch, 94 Ohio St. 1, 113 N.E. 745 (1916).

[52] Central Gas Co. v. Hope Oil Co., 113 Ohio St. 354, 149 N.E. 386 (1925).

Editor's Note: The reader's attention is directed to the following supreme court decisions rendered since Mr. Stichter's address before the Columbus Bar Association: Klever v. Reid Brothers Express, Inc., et al, 151 Ohio St. 467, 86 N.E. 2d 608 (1949); Soltz, et al., v. Colony Recreation Center, et al, 151 Ohio St. 503, 87 N.E. 2d 167 (1949); Bobbitt v. Maher Beverage Co., et al, 152 Ohio St. 246, 89 N.E. 2d 583 (1949); McNees v. The Cincinnati Street Ry. Co., 152 Ohio St. 269, 89 N.E. 2d 138 (1949); Bradley v. Mansfield Rapid Transit Inc., 154 Ohio St. 154 (1950).