

# Special Verdicts in Ohio

by JACK R. ALTON\*

The history of the special verdict in English and early American law has been adequately discussed in other articles and will not be considered here.<sup>1</sup> We are concerned with the present practice in Ohio, and the law as it now exists on the subject.

At the outset a distinction should be drawn between the special verdict and the interrogatory. Much of the difficulty in the use and evaluation of special verdicts arises from a failure to maintain this distinction. "A special verdict is one by which the jury finds facts only as established by the evidence; and it must so present such facts, but not the evidence to prove them, that nothing remains for the Court but to draw from the facts found conclusions of law."<sup>2</sup> Such a verdict is mandatory when requested by either party.<sup>3</sup> The statute on the interrogatory reads as follows: "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 . . ."<sup>4</sup> Both procedures require facts to be found. The basic difference is that the special interrogatory is used to test a general verdict, while a special verdict is the entire verdict of the jury.

## THE REQUEST, AND DRAFTING THE FORMS.

While the earlier cases required a prescribed form to be used in requesting a special verdict,<sup>5</sup> the present practice does not require any such formality.<sup>6</sup> Likewise there is no definite time at which the request must be made. It may even be made after special charges to the jury have been given.<sup>7</sup> However, it seems obvious that it should be made before the arguments begin since comments on questions of law would otherwise undoubtedly be made by counsel and would be improper. There is no requirement

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\* Of the firm of Robins, Metcalf and Alton, Columbus, Ohio

<sup>1</sup> Frank, *The Case for the Special Verdict*, 32 AM. JUD. SOC. 142 (1944); Sunderland, *Verdicts, General & Special*, 29 YALE L. J. 253 (1920); Comment, 11 OHIO ST. L. J. 394 (1950); Benoy, *Special Verdicts and Interrogatories*, 8 INS. COUNSEL J. 21 (1941); *Skidmore v. Baltimore & Ohio Ry.*, 167 F.2d 54 (2 Cir. 1948).

<sup>2</sup> OHIO GEN. CODE § 11420-14.

<sup>3</sup> OHIO GEN. CODE § 11420-16.

<sup>4</sup> OHIO GEN. CODE § 11420-17.

<sup>5</sup> *Gale v. Priddy*, 66 Ohio St. 400, 64 N. E. 437 (1902); *Cincinnati Street Ry. v. Blackburn*, 45 Ohio App. 153, 186 N. E. 826 (1933).

<sup>6</sup> *Sparks v. Sims*, 92 N.E. 2d 428 (1949). However, the request should clearly indicate that a special verdict is desired, and not an interrogatory. *Kautz v. McFerin*, 36 Ohio L. Abs. 237 (1942).

<sup>7</sup> *Hubbard v. C.C.C. Highways, Inc.*, 81 Ohio App. 445, 76 N.E. 2d 721 (1947).

that opposing counsel or the court be notified in advance of the request. However, propriety may require that counsel apprise the court so that the court's time will not be wasted preparing a general charge. As will be seen later, the charge is considerably shortened in the special verdict case. It may also be wise to advise opposing counsel sufficiently in advance of the request in order to allow a form to be prepared, since if this is not done the court will undoubtedly recess to allow time for preparations.

There is no requirement that written forms be presented when the request is made.<sup>8</sup> However, it is certainly the practice for the party making the request to have a form prepared. One of the defensive measures when a request is made by opposing counsel may be to allow the case to go to the jury on the proponent's form alone. In two recent unreported trials, the jury changed the proponent's form in one case, destroying its effect, and in the other case the judge submitted a form opposed to the proponent's form, which the jury signed.

The verdict may be in narrative or interrogatory form.<sup>9</sup> The interrogatory form has been preferred by some courts.<sup>10</sup> Recent practice is to use the narrative form, possibly because each form is a written argument in favor of the draftsman's side of the case, and if signed it will usually sustain a judgment. One court suggested an interrogatory on each issue in the case.<sup>11</sup> This, however, cuts down on the jury's opportunity to review the various arguments contained in narrative forms submitted by counsel. An eminent writer has suggested that the pleadings be so drafted that they may be sent to the jury room and signed by the jury as their special verdict.<sup>12</sup> This is not the practice here. The plaintiff drafting a special verdict in narrative form may include all the facts which he thinks have been proven in one form, or he may make up one special verdict based upon each specification of negligence. One method of the defendant is to state a few basic facts and conclude by saying that one party has not proved his case by a preponderance of the evidence.<sup>13</sup> A favorite of the defendant is to enumerate the conduct of both parties, the facts of which will justify a finding of negligence, and state that the conduct of both was the concurring or proximate cause, which will require the court to find for the defendant. Undoubtedly the narrative form is the preference of lawyers since it gives an advantage

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<sup>8</sup> *Ind. Comm. v. Weaver*, 15 Ohio L. Abs. 448 (1933).

<sup>9</sup> *Dowd-Feder v. Schreyer*, 124 Ohio St. 504, 179 N.E. 411 (1932).

<sup>10</sup> *Gendler v. Cleveland Ry. Co.*, 18 Ohio App. 48 (1923).

<sup>11</sup> *Gendler v. Cleveland Ry. Co.*, *supra*.

<sup>12</sup> *Sunderland, Verdicts, General & Special*, 29 YALE L. J. 253, 258 (1920).

<sup>13</sup> *Hubbard v. C.C.C. Highways, Inc.*, *supra*.

to the clever draftsman. The most important point in drafting special verdicts is to use facts only—never insert a conclusion of law.

#### THE COURT'S CHARGE

After the request has been made and the form prepared and presented to the court, the case is argued to the jury. Prior to argument, special charges may have been requested and made by the court. This does not preclude a party's right to a special verdict.<sup>14</sup> However, a requested special charge on the law of the case, followed by a request for special verdict, should give the court sufficient basis to refuse the special verdict. The court, in charging the jury, is to give "... only such instructions... as are necessary to enable the jury clearly to understand their duties relative to such special verdict."<sup>15</sup> The instructions should be given on the issues in the case, the rules for weighing the evidence, and the burden of proof. It is improper to instruct the jury upon legal principles.<sup>16</sup> The authorities cited above do not require a charge upon proximate cause. Recently considerable question has arisen among lawyers and trial judges as to whether the court should charge upon proximate cause. Certainly to sustain a judgment for the plaintiff there must be facts from which proximate cause may be found. However, in view of the fact that it is not always necessary to find upon the question of proximate cause,<sup>17</sup> it would seem that a charge giving the legal definition of proximate cause is not necessary. Furthermore, the jury need not use the exact words "proximate cause" so long as their intention is obvious.<sup>18</sup> However, whether proximate cause is defined or not, the court should still state that "the cause" is one of the issues in the case. If the court uses the term "proximate" cause in defining the issues, then the term should be defined.

The court should not charge upon negligence or other matters of substantive law.<sup>19</sup> To do so is to vitiate the very object of the special verdict, which is to allow the jury to find upon the issues of fact without being burdened by matters of law. Charges on negligence have been justified on the basis that it was done in the *Dowd-Feder* case and was excused in that case upon the basis that the charge was correct and not prejudicial. However, this is not the law of the *Dowd-Feder* case and is certainly contrary to the

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<sup>14</sup> *Hubbard v. C.C.C. Highways, Inc. supra.*

<sup>15</sup> *Dowd-Feder v. Schreyer, supra.*

<sup>16</sup> *Dowd-Feder v. Schreyer, supra; Gendler v. Cleveland Ry., supra.*

<sup>17</sup> *Hubbard v. C.C.C. Highways, Inc., supra; Looker v. Martin, 61 Ohio L. Abs. 373 (1952).*

<sup>18</sup> *Smith v. Dawson, No. 176380, Franklin Co. Common Pleas.*

<sup>19</sup> *Dowd-Feder v. Schreyer, supra; Gendler v. Cleveland Ry., supra.*

syllabus. Another reason given for charging upon the law is that counsel have put conclusions of law in their submitted forms. This is some justification since if legal matters are to be presented to the jury they should be defined. However, there is a better approach to the problem which will be discussed later.

Should the court charge upon ordinary care? The answer should hinge upon whether ordinary care is a matter of fact or a matter of law. There is authority for charging on the question and for allowing the term to remain in a special verdict.<sup>20</sup> However, the exact question was not raised in the cited case. The only case found upon this question is a well reasoned trial court decision which holds that "ordinary care" is a legal conclusion.<sup>21</sup> Therefore, the court should not charge on the question. The problem can be solved by the insertion in the special verdict form of the definition of ordinary care. Thus "the plaintiff used the same degree of care that average, reasonable, prudent persons would have used under the same or similar circumstances," should not require a charge by the court upon the question and should not be stricken from the verdict as a legal conclusion.<sup>22</sup>

#### SUBMITTING THE FORMS TO THE JURY

There is no limit on the number of forms of narrative verdict which may be submitted. In Franklin County as many as thirteen have been given to the jury. Likewise, there is no limit on the number of questions in the interrogatory form.<sup>23</sup> Some courts submit every form without examination. Others make it a practice to submit their own form in every case. One of the early cases suggested that trial courts carefully scrutinize the forms.<sup>24</sup> A very recent appellate court case has affirmed a trial judge's action in submitting the court's own form where one set of forms contained conclusions of law.<sup>25</sup> The judge also submitted the forms containing the legal conclusions.

#### CONTENTS NECESSARY TO SUSTAIN JUDGEMENT.

In order to sustain judgement, a jury must find facts constituting negligence, proximate cause, and damages.<sup>26</sup> The facts found should be based upon the allegations in the pleadings and the issues outlined in the court's charge. It is not necessary that the jury find upon all the issues in the case.<sup>27</sup> Thus if the facts found justify a

<sup>20</sup> Smith v. Pa. R. R., 59 Ohio L. Abs. 282, 99 N.E. 2d 501 (1950).

<sup>21</sup> Forbes v. Douglass, No. 179678, Franklin Co. Court of Common Pleas.

<sup>22</sup> Jackson v. Becker, 24 Ohio L. Abs. 397 (1937).

<sup>23</sup> Miller v. Jackson, 92 Ohio App. 199, 107 N.E. 2d 922 (1951).

<sup>24</sup> Gendler v. Cleveland Ry., *supra*.

<sup>25</sup> Klarman v. Snyder Trucking Co., No. 4844, Court of Appeals, Franklin Co., Ohio (1953).

<sup>26</sup> 29 O. JUR. 477.

<sup>27</sup> Nosedá v. Delmul, 123 Ohio St. 647, 176 N.E. 571 (1931).

judgment for the defendant, it is not necessary to find upon proximate cause, since such a finding is only necessary where the facts justify a judgment for the plaintiff.<sup>28</sup> Also, it is not necessary to find upon contributory negligence where the facts found require a judgment for plaintiff.<sup>29</sup> This is especially true where a form submitted by the losing party contained a finding on that issue favorable to him, which the jury rejected.<sup>30</sup> Conclusions of law in the special verdict are to be disregarded, and if sufficient facts are found omitting the conclusions, judgment will still be rendered upon the verdict.<sup>31</sup> If the jury finds upon proximate cause, it is probably not necessary that it use those exact words, but any words indicating a direct causal relationship are sufficient.<sup>32</sup> As was indicated above, the use of the term "ordinary care," without the facts upon which the term is based is a legal conclusion.<sup>33</sup> Any matters essential to judgment which have been stipulated or agreed to during the trial should be included in the special verdict, since the record cannot be examined.<sup>34</sup>

#### ENTRY OF JUDGMENT

Upon the jury's return the special verdict is read in the same manner as a general verdict. However, judgment must be rendered by the court. It may be done almost at once, or after submission of briefs. In order to preserve the record, counsel should move for judgment upon the verdict after it has been returned. The case is then in the court's hands. The court must look at the pleadings and the special verdict and render judgment. The evidence should not be considered since the jury has already made its findings based upon the evidence.<sup>35</sup> The question has been raised of the court's power to set aside a verdict upon the basis that it is against the weight of the evidence. A common pleas judge has recently done this and the case may go to the court of appeals. Since the court has this power when a general verdict is rendered, it can be argued that the same power should exist in a special verdict case. However, the Supreme Court has said that the trial judge should not consider the evidence in rendering judgment.<sup>36</sup> Therefore, it appears that a trial judge has no power under existing law to set aside a special verdict as being against the manifest weight of the

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<sup>28</sup> Hubbard v. C.C.C. Highways, Inc., *supra*.

<sup>29</sup> Mercurio v. Hughes & Looker, No. 267, Court of Appeals, Fayette Co., Ohio (1951).

<sup>30</sup> *Ibid*.

<sup>31</sup> Nosedo v. Delmul, *supra*.

<sup>32</sup> Smith v. Dawson, *supra*.

<sup>33</sup> Sparks v. Sims, *supra*; Forbes v. Douglass, *supra*.

<sup>34</sup> Pa. R. R. v. Vitti, 111 Ohio St. 670, 146 N.E. 94 (1925).

<sup>35</sup> *Ibid*; Dowd-Feder v. Schreyer, *supra*.

<sup>36</sup> *Ibid*.

evidence. What can be done under the present law is to carefully scrutinize each verdict before submission to the jury. It is at this point that the trial judge has the greatest power and discretion. After the verdict is returned, his function is narrowly limited. Therefore, the judge should not submit a form which does not fairly reflect the evidence presented by one side or which contains conclusions of law. If there is sufficient evidence to go to a jury on an issue, then that issue should appear in the special verdict forms. By this examination prior to submission, any form signed by the jury will sustain judgment and the trial court need not concern itself with whether the verdict is against the weight of the evidence.

The jury may refuse to sign any form submitted and draft its own verdict, as was done in the case of *Looker v. Martin*.<sup>37</sup> The jury found that "both parties were negligent" and that the plaintiff had not "conclusively proved" the facts basic to his case. The trial court rendered judgment for the defendant and the appellate court ordered a new trial because of the conclusion of law and the higher degree of proof required by the jury. This poses the problem of what the court should do when a jury returns its own verdict which is obviously defective. It can order a new trial at once or instruct the jury further and return them for deliberation. In order to expedite the disposition of cases, every effort should be made to obtain a special verdict which is legally sufficient before ordering a new trial.

Suppose the jury returns two special verdicts, one of which supports the plaintiff and the other the defendant. Suppose further that one verdict contains conclusions of law without sufficient additional facts to sustain judgment. Should a new trial be ordered, or should judgment be entered on the verdict which is legally sufficient? These questions may be answered in a pending appeal.<sup>38</sup>

Once the court has decided on its judgment, it is not necessary that it recite its legal conclusions in the entry of judgment. Merely entering the judgment for a party is a sufficient indication that the court has found the law to be in his favor.<sup>39</sup>

#### APPEAL

After judgment, a motion for new trial may be filed. The steps for appeal are the same as in all other cases. However, the record need not be printed if the only question concerns the sufficiency of the special verdict and the judgment entered thereon.<sup>40</sup> If a motion

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<sup>37</sup> 61 Ohio L. Abs. 373, 104 N.E. 2d 698 (1951).

<sup>38</sup> *Burchett v. Cussins & Fearn*, Court of Appeals, Muskingum Co.

<sup>39</sup> *Mercurio v. Hughes & Looker*, *supra*.

<sup>40</sup> *Dowd-Feder v. Schreyer*, *supra*.

for new trial has been sustained before or after rendering judgment, then the only basis for appeal is that the court's action was an abuse of discretion.<sup>41</sup> However, there is authority that refusing to render judgment when the special verdict requires it is an abuse of discretion.<sup>42</sup>

#### CONCLUSION

The foregoing may have indicated that a great deal of doubt pervades the field of special verdicts. According to the better reasoned authorities the present law is:

1. A special verdict is mandatory when requested by either side.<sup>43</sup>
2. The forms presented may be narrative or interrogatory.<sup>44</sup>
3. The trial court should carefully scrutinize the forms presented and should reject any which will not sustain judgment or which contain conclusions of law.<sup>45</sup>
4. The court should charge only on such matters as are necessary to enable the jury clearly to understand their duties relative to the special verdict.<sup>46</sup>
5. The court should render judgment upon the pleadings and special verdict without referring to the evidence in the record, disregarding any legal conclusions contained in the verdict.<sup>47</sup>

In spite of the foregoing authorities, the practice has deviated considerably. Forms have been sent to the jury indiscriminately without examination. Charges upon the law, both general and special, have been given in special verdict cases. The evidence during the trial has been re-examined to determine the validity of a special verdict. Forms presented by each side have been rejected for no reason, and the court has sent its own special verdict in interrogatory form to the jury. All of this indicates the need for clarification upon the subject. There is a case in the Supreme Court for decision upon the merits which may answer some of the problems concerning special verdicts.<sup>48</sup> The trial court had entered judgment upon a special verdict which contained the following statements:

1. "Defendant could and should, in the exercise of ordinary

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<sup>41</sup> *Globe Indemnity Co. v. Schmitt*, 77 Ohio App. 413, 68 N.E. 2d 130 (1946).

<sup>42</sup> *Ibid.*

<sup>43</sup> OHIO GEN. CODE § 11420-16.

<sup>44</sup> *Dowd-Feder v. Schreyer*, *supra*.

<sup>45</sup> *Gendler v. Cleveland Ry.*, *supra*.

<sup>46</sup> *Dowd-Feder v. Schreyer*, *supra*.

<sup>47</sup> *Ibid.*

<sup>48</sup> *Landon v. Lee Motors*, No. 33478, certified by the Court of Appeals for Lucas Co., Ohio.

care, have ascertained that said kingpin was broken and should have repaired the same."

2. "Defendant failed to exercise reasonable care in said particulars."
3. "Each of the foregoing acts and omissions of the defendant constituted negligence."
4. "Plaintiff himself was not negligent."

The court of appeals reversed the trial court on these grounds:

1. Erroneous charges on the subject of damages.
2. Failing to charge on the liability of defendant.
3. Submitting the plaintiff's special verdict form to the jury.

The first finding of error was based on the fact that the trial court started his charge on damages with the words "when you compute damages . . .," rather than the usual "if you find in favor of the plaintiff you may then proceed, . . . etc." The second ground is based upon the reasoning that since the court charged upon the subject of negligence it should have proceeded to charge fully on the the substantive law regarding the liability of the defendant. The reasoning here is similar to that in the *Klarman*<sup>49</sup> case. Both cases excuse charging upon the law by blaming it on the party who inserted the conclusions of law in his special verdict forms. The simpler procedure would be to require counsel to delete the objectionable material from the verdict prior to submission, thus obviating the need for charging upon the law. The third ground asserts the novel proposition that no special verdict should be submitted to the jury which contains conclusions of law. This reasoning is based upon the statute which states that the jury shall find the "facts only" (emphasis added), and the *Gendler* case. This is a new thought in special verdicts because ever since *Noseda v. Demul* the practice has been to disregard conclusions of law if sufficient other facts are found to sustain judgment.

The *Landon* case was certified as being in conflict with *Wills v. Anchor Cartage and Storage Co.*<sup>50</sup> The *Wills* case held that a special verdict which failed to find upon the issues of negligence and proximate cause was insufficient. It is believed that the result reached by the court of appeals in the *Landon* case is supported by the better authorities and that the court of appeals should be affirmed, and *Wills v. Anchor Cartage and Storage* disapproved.

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<sup>49</sup> *Klarman v. Snyder Trucking Co.*, *supra*.

<sup>50</sup> *Wills v. Anchor Cartage & Storage Co.*, 38 Ohio App. 358, 176 N.E. 680 (1931).