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Carlos C. Cadena

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COMPARATIVE NEGLIGENCE AND THE SPECIAL VERDICT

CARLOS C. CADENA*

There are two reasons why a study of the special verdict scheme is desirable in connection with a discussion of the changes wrought by the Texas Legislature in abolishing the ancient common law doctrine of contributory negligence and substituting a doctrine of modified comparative negligence which permits the contributorily negligent plaintiff to recover if his causative negligence does not exceed the combined quantum of negligence of those against whom he seeks to recover.¹ In the first place, the change in the substantive law necessarily requires the submission of additional issues which will form the basis for the comparison of the degree of causal negligence of the parties involved. Obviously, without findings relating to the percentage of negligence of the parties, there is no basis for the application of the doctrine. Thus, even without a change in the rules governing the submission of special issues, the adoption of the comparative negligence doctrine requires consideration of the manner of submitting those special issues designed to establish the facts necessary to enable the court to apply the doctrine. Secondly, the Supreme Court of Texas, on May 25, 1973, exercised its rule-making power to amend Rules 271, 272 and 277 of the Texas Rules of Civil Procedure, effective September 1, 1973. These changes obviously were intended to simplify the manner of submitting special issues in negligence cases.² As a result of these amendments by the supreme court, we cannot limit our inquiry to the manner of submitting just those issues required for a comparison of the degrees of causative negligence of the parties. We must also consider the form of the issues relating to primary and contributory negligence.³ Thus,

* Associate Justice of the Fourth Court of Civil Appeals of Texas; J.D., University of Texas.

1. TEX. REV. CIV. STAT. ANN. art. 2212a (Supp. 1974).

2. The legislation for the reform of tort law recommended by the Board of Directors of the State Bar of Texas included a proposal for the simplification of special issues. This portion of the recommended legislation was deleted because of the adoption by the Texas Supreme Court, on May 25, 1973, of amendments to the Texas Rules of Civil Procedure, including the amendment of the rules relating to special issue submission.

3. Although the comparative negligence statute does not speak in terms of proximate cause, it is assumed that our courts, in determining whether and to what extent the amount of damages will be diminished because of plaintiff's negligence, will con-

we are initially concerned with the effect of the amendment to Rule 277.

THE CHANGES IN RULE 277

Rule 277, as most recently amended by the supreme court, reads as follows:

In all jury cases the court may submit said cause upon special issues . . . controlling the disposition of the case that are raised by the written pleadings and the evidence in the case

It shall be discretionary with the court whether to submit separate questions with respect to each element of a case or to submit such issues broadly. It shall not be objectionable that a question is general or includes a combination of elements of issues. Inferential rebuttal issues shall not be submitted. The placing of the burden of proof may be accomplished by instructions rather than by inclusion in the question.

The court may submit special issues in a negligence case in a manner that allows a listing of the claimed acts or omissions of any party to an accident, event or occurrence that are raised by the pleadings and the evidence with appropriate spaces for answers as to each act or omission which is listed. The court may submit a single question, which may be conditioned upon an answer that an act or omission occurred, inquiring whether a party was negligent, with a listing of the several acts or omissions corresponding to those listed in the preceding questions and with appropriate spaces for each answer. Conditioned upon an affirmative finding of negligence as to one or more acts or omissions, a further question may inquire whether the corresponding specific acts or omissions (listing them) inquired about in the preceding questions were proximate causes of the accident, event, or occurrence that is the basis of the suit. Similar forms of questions may be used in other cases.

In any case in which issues are raised concerning the negligence of more than one party, the court shall submit an issue inquiring what percentage, if any, of the negligence that caused the occurrence in question is attributable to each of the parties found to have been negligent, and shall instruct the jury to answer the damage issues without any reduction because of negligence, if any, of the party injured.

The court may submit an issue disjunctively where it is apparent from the evidence that one or the other of the conditions or facts inquired about necessarily exists

tinue to require a showing that his negligence was a proximate cause of the occurrence in question.

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

Prior to the 1973 amendment, Rule 277 required the submission of the special issues "raised by the written pleadings and the evidence in the case."⁴ The 1973 amendment requires the submission of the special issues "*controlling the disposition of the case* that are raised by the written pleadings and the evidence in the case."⁵ The difference in the language is obvious, but it is doubtful whether the addition of the words "controlling the disposition of the case" is significant. Even under the old rule, it was well settled that only those "controlling issues" tending to establish a theory of recovery or defense and those raised by the pleadings and the evidence were required to be submitted.⁶ Unfortunately, the decisions furnish little guidance in determining what is a "controlling issue."⁷

The 1973 amendment does make it clear, however, that the term "controlling issues" no longer has one meaning in negligence cases and a different meaning in cases where the cause of action is not based on negligence. Where plaintiff's claim was not based on negligence, our courts generally upheld the submission of broad, general, global or multifarious issues.⁸ In negligence cases, on the other hand, because of *Fox v. Dallas Hotel Co.*,⁹ our courts, with some exceptions, condemned the submission of such broad issues and required that each act, omission or condition, which was alleged to constitute negligence, be submitted separately.¹⁰ Since the requirement of Rule 279 that "controlling issues" be submitted makes no distinction between negligence and non-negligence cases, the dichotomy in the Texas decisions

4. Tex. R. Civ. P. 277 (1967).

5. Tex. R. Civ. P. 277 (emphasis added).

6. Tex. R. Civ. P. 279; *Northeast Texas Motor Lines, Inc. v. Hodges*, 138 Tex. 280, 284, 158 S.W.2d 487, 489 (1942); *Villanueva v. Rodriguez*, 300 S.W.2d 668 (Tex. Civ. App.—San Antonio 1957, writ ref'd n.r.e.).

7. Attempts to define "controlling issues" have bogged down in abstractions which largely beg the question and do not solve the problem in close cases. 3 R. McDONALD, TEXAS CIVIL PRACTICE § 12.06.1, at 284-85 (1970).

8. See, e.g., *City of Houston v. Lurie*, 148 Tex. 391, 399, 224 S.W.2d 871, 876 (1949). See also 3 R. McDONALD, TEXAS CIVIL PRACTICE § 12.06.2, at 286-87 (1970).

9. 111 Tex. 461, 240 S.W. 517 (1920).

10. See 3 R. McDONALD, TEXAS CIVIL PRACTICE § 12.06.2, at 287-89 (1970). See also G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 35 (1959).

appears to rest on no defensible foundation.¹¹ Furthermore, our courts have made no effort to justify the distinction but have rested their continued acceptance of it solely on a reluctance to overturn prior decisions.¹²

The 1973 amendment clearly deprives the decisions *requiring* a proliferation of issues in negligence cases of all precedential value. The amendment deletes the requirement that each issue “be submitted distinctly and separately” and instead, expressly vests the trial court with discretion to submit the issues “broadly.” The intention of the new language is made clear by providing “it shall not be objectionable that a question is general or includes a combination of elements or issues.” Under the amended rule, then, an issue simply inquiring whether a party was negligent, without specifically inquiring as to whether he was guilty of a specific act or omission, is proper.¹³

SUBMITTING THE NEGLIGENCE ISSUES

Irrespective of the number of specific acts or omissions relied on as constituting negligence, the court may simply submit a single issue inquiring whether the jury finds from a preponderance of the evidence that a party was negligent. Thus, the court may now choose to inquire into the negligence of the parties generally, rather than with reference to specific acts or omissions.

This general method of submission would clearly decrease the number of cases in which the jury “hangs.” Five jurors might be convinced that the party was negligent as to speed, but was not driving with faulty brakes, while five other jurors might be convinced that the

11. See Note, 34 TEXAS L. REV. 138 (1955).

12. As the court in *Roosth & Genecov Prod. Co. v. White*, 152 Tex. 619, 262 S.W.2d 99 (1953) stated:

It may appear somewhat metaphysical to say, on the one hand, that allegations of specific facts or defects resulting in a “fire hazard” [*City of Houston v. Lurie*, 148 Tex. 391, 224 S.W.2d 871 (1949)] or “cruel treatment” [*Howell v. Howell*, 147 Tex. 14, 210 S.W.2d 978 (1948)] are no obstacle to submitting the general issue of “fire hazard” or “cruel treatment” as one jury issue and, on the other hand, that similar allegations as to conduct resulting in negligence require each such allegation to be made the subject of a separate issue. . . . It is noteworthy that the late decisions which seem to reverse the older practice are not negligence cases. In the latter we understand the almost universal practice at the bar of this state to be that of specific issues. To change it drastically by judicial decision would in our judgment cause undue confusion.

Id. at 627-28, 262 S.W.2d at 103-04.

13. In addition to simplifying special issues there is a new provision concerning the placing of the burden of proof. There is no apparent basis for holding that the mere rewriting of the provision has brought about any change as the provision appears to do no more than simplify the old Rule.

party was driving with defective brakes, but was not speeding. If all 10 jurors are required to be in agreement as to speed or defective brakes, obviously, in the assumed situation there would be disagreement, resulting in a hung jury.¹⁴ But if the grounds of negligence are not specified, all 10 jurors would be in agreement that the party was negligent.

This type of verdict has some appeal for trial judges, since it avoids the refinements of specific submission and is, therefore, less likely to be reversed. However, in view of the long established practice in the submission of negligence cases in Texas, there is reason to doubt that the Texas trial courts will abandon the tradition of asking the jury to make findings as to specific acts or omissions.¹⁵ If the trial court opts to utilize the more specific form of verdict, it may simply submit the case in the manner in which negligence cases have been submitted in the past. The court will inquire by means of separate issues as to the existence of each act or omission and inquire, again in separate issues, as to the negligent character of each found act or omission.

Under the new Rule 277, a "listing" form of issue is expressly permitted. If the court decides upon this method of submission, it would seek to elicit an answer concerning each claimed act of negligence by first submitting a single question listing the alleged acts or omissions of the party whose conduct is the subject of the issue, with appropriate spaces for answers as to each act or omission listed. The second issue, conditioned upon an answer in the first question that "an act or omission occurred," would inquire whether that party was negligent. This would include a listing of the several acts or omissions corresponding

14. TEX. R. CIV. P. 292 was amended, effective February 1, 1973, to permit rendition of a verdict by the concurrence, as to each and all answers made, of the same 10 members of an original jury of 12 or of the same five members of an original jury of six.

15. The fact that the general form of the Texas comparative negligence statute was borrowed from the State of Wisconsin does not, of course, require that Texas follow the Wisconsin practice relating to submission of special issues. Yet it is interesting to note that, although the Wisconsin statute regulating the submission of special issues (WIS. STAT. ANN. § 270.27 (Supp. 1973)) also allows trial judges to determine the form of submission of special issues, the Wisconsin courts prefer to submit questions inquiring about specific acts of negligence. HEFT & HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 8.30 (1971).

In Wisconsin, what is referred to as the "fault" type of special verdict has been recognized as possible in the absence of objection. In a comparative negligence case, this type of verdict combines negligence, causation and apportionment in a single issue by merely inquiring, "[I]n what percentage, if any, do you find the defendant at fault?" But this abbreviated form of verdict will not be used if there is objection. *Fink v. Reitz*, 137 N.W.2d 21, 24 (Wis. 1965).

to those listed in the first issue and with appropriate spaces for answers as to each listed act or omission.

It would also appear that it would now be proper to elicit a finding of negligence as to each of several alleged acts or omissions by the use of but a single issue. Thus, in a collision case, admittedly oversimplified, plaintiff might claim that defendant was negligent in driving with defective brakes and in failing to turn to the left in order to avoid the collision. The single issue as to defendant's negligence might take the following form:¹⁶

At the time and place in question, was the defendant negligent in any of the following respects:

(a) As to driving with defective brakes, if you have found that he was driving with defective brakes?

Answer:_____

(b) As to his failure to turn to the left in order to avoid the collision, if you have found that he did fail to turn to the left?

Answer:_____

This form of inquiry as to the negligent character of each alleged act or omission is based on the provision in amended Rule 277 that it "shall not be objectionable that a question is general or includes a combination of elements or issues." The suggested issue is certainly no broader and contains no greater combination of elements or issues than does the single issue which merely inquires whether defendant was negligent, without reference to any specific act or omission. The qualifying words "if you have found" have been included in order to avoid the objection that the issue contains a comment on the weight of the evidence by assuming that defendant was driving with defective brakes or that he failed to turn to the left. The same rules, of course, would be applicable to the submission of issues inquiring into the negligence of all other parties to the suit. Along with removal of narrow special issues was the deletion of the requirement that the issues be submitted "in plain and simple language." It is hoped that this deletion will not be interpreted by trial judges as requiring that the issues be submitted in obscure and complicated language.

16. The traditional method of submission, believed by Texas judges and lawyers to be of value in properly placing the burden of proof as to each issue, is to begin each issue with "Do you find from a preponderance of the evidence . . ." This introductory clause has been omitted for the sake of brevity in the suggested issue and in all subsequent suggested issues. The necessity for the use of the clause is eliminated under amended Rule 277. Its elimination by use of a separate instruction relating to burden of proof was also possible under the old Rule but seldom, if ever, done. See G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 31 (1959).

PROXIMATE CAUSE

If the trial judge decides to frame the charge by resorting to the familiar cluster of three issues as to each claimed act or omission, he may do so under the new rule, in which case the framing of the proximate cause issue in each cluster will present no problem. If he has chosen to resort to the listing procedure, he will submit a single proximate cause issue. This will be conditioned upon an affirmative finding of negligence as to one or more acts or omissions and will inquire whether the corresponding acts or omissions listed were proximate causes of the occurrence in question. In such a case, the proximate cause issue, again oversimplified, might take the following form (assume that Question 2 is the negligence issue):

If you answered "yes" to any subdivision of Question 2, then answer the corresponding subdivisions of this question:

Was such negligence on the part of the defendant a proximate cause of the occurrence in question:

(a) As to the driving with defective brakes?

Answer:_____

(b) As to failure to turn left?

Answer:_____

One can only contemplate in awe the possibility that some iconoclastic trial judge will dare to submit an issue which includes a combination of three elements or issues, simply inquiring whether the party whose conduct is in question "was guilty of negligence which was a proximate cause of the occurrence in question." There is, of course, an easily recognizable distinction between awestruck contemplation and expectation.

INFERENTIAL REBUTTAL ISSUES

Over the years, numerous decisions established the requirement that a particular type of issue, generally identified as an inferential rebuttal issue, be submitted if raised by the pleadings and the evidence. Stated differently, the court was obligated to inquire concerning the existence of facts which would establish the non-existence of some factual element of plaintiff's cause of action or of defendant's contentions in the nature of confession and avoidance. Such issues were, in effect, argumentative denials; however, a favorable answer to an inferential rebuttal issue could not, standing alone, support a judgment. It could only produce an irreconcilable conflict with the answer to the issue which it

was designed to inferentially rebut.¹⁷

The new Rule 277, however, specifically proscribes the submission of inferential rebuttal issues. This blanket prohibition of the submission of such issues is not as revolutionary as it appears to be. Prior to the 1973 amendment of Rule 277, the Texas Supreme Court had already begun to cast such issues into exterior darkness by holding that if such issues are raised by the pleadings and the evidence, explanatory instructions which fairly present the theory to the jury will be used instead.¹⁸

COMMENTS ON THE WEIGHT OF EVIDENCE

Prior to September 1, 1973, Rule 272 required the trial judge to "so frame his charge as to . . . not therein comment on the weight of the evidence" ¹⁹ This provision was deleted by the 1973 amendment to Rule 272, and the proposition is now found in the new Rule 277. However, the new Rule provides that the court shall not in its charge "comment *directly* on the weight of the evidence."²⁰ Additionally, Rule 277 further requires that the court's charge "shall not be objectionable on the ground that it *incidentally* constitutes a comment on the weight of the evidence . . . where it is properly a part of an explanatory instruction or definition."²¹ The change clearly allows *indirect* comments on the weight of the evidence, and *incidental* comments are made unobjectionable so long as they are "properly" a part of an explanatory instruction or definition. The same rules apply to complaints that the court in its charge has advised the jury of the effect of their answers. If the portion of the charge challenged "indirectly" advises the jury of the effect of their answers or if it is "properly" a part of an explanatory instruction or definition, the complaint will fall on a deaf judicial ear.

17. See G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 31 (1959). For a criticism of the practice of submitting inferential rebuttal issues, see *Smith v. Red Arrow Freight Lines, Inc.*, 460 S.W.2d 257, 259 (Tex. Civ. App.—San Antonio 1970, writ ref'd n.r.e.). See also Note, 9 HOUS. L. REV. 168 (1971).

18. In 1971, the supreme court substituted explanatory instruction for the sudden emergency and unavoidable accident issues. *Yarbrough v. Berner*, 467 S.W.2d 188, 191 (Tex. Sup. 1971). In addition see *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452 (Tex. Sup. 1972) (eliminating issues relating to "no-duty," open and obvious and discovered peril); *Moulton v. Alamo Ambulance Serv., Inc.*, 414 S.W.2d 444, 448 (Tex. Sup. 1967) (eliminating issues which included, excluded or mitigated damages); *Dallas Ry. & Terminal Co. v. Bailey*, 151 Tex. 359, 368, 250 S.W.2d 379, 383-84 (1952) (eliminating the new and independent cause issue).

19. TEX. R. CIV. P. 272 (1967).

20. TEX. R. CIV. P. 277 (emphasis added).

21. *Id.* (emphasis added).

Where a case is submitted on special issues, the error of commenting on the weight of the evidence most often appears in a definition or explanatory instruction, or in a special issue wherein the judge inadvertently assumes the existence of a material, controverted fact.²² Frequently, a ground of recovery or defense depends on proof of the existence of several factual elements which, while related, were required, under the old practice, to be submitted separately. When inquiring about one of the factual elements, it was sometimes necessary to mention one of the others for often two related factual issues were controverted and one had to be mentioned in inquiring about the other. In such instances, the error of commenting upon the weight of the evidence by assuming the existence of a controverted fact, could be avoided by use of "if any" or some phrase of equivalent import, or by conditional submission of issues. This, of course, has been the established practice.

Perhaps the portion of the new Rule which permits incidental comments on the weight of the evidence, or incidentally advising the jury of the effect of their answers, will have the effect of bringing about a change when it is considered in connection with the new provision in Rule 277. This provision requires the court to submit such explanatory instructions and definitions "as shall be *proper* to enable the jury to return a verdict."²³ Prior to the 1973 amendment, Rule 277 required only the submission of such explanatory instructions and definitions as were *necessary* to enable the jury to pass on and render a verdict on the issues submitted.²⁴ Since an explanation or definition may be proper, even if it is not necessary, the new rule may reduce the number of reversals.²⁵

DAMAGES

The amendment to Rule 277 creates no problems in connection with the submission of the damage issue. The trial court may, as has been the general practice, submit a single issue inquiring as to the amount of damages suffered by plaintiff, accompanied by an instruction limiting

22. See 3 R. McDONALD, TEXAS CIVIL PRACTICE § 12.03.2 (1970).

23. TEX. R. CIV. P. 277 (emphasis added).

24. TEX. R. CIV. P. 277 (1967).

25. See *Boaz v. White Auto Stores*, 141 Tex. 366, 142 S.W.2d 481 (1943); *Pittsburg Coca-Cola Bottling Works v. Ponder*, 443 S.W.2d 546 (Tex. Sup. 1969). During his presentation of a paper (apparently not yet published) at the annual conference of the Judicial Section of the State Bar of Texas in Amarillo, Texas, on September 28, 1973, the Honorable Jack Pope, Associate Justice of the Supreme Court of Texas, described the *Ponder* opinion as one "which you will need to study, not just read."

the jurors to consideration of the elements included in the applicable measure of damages. The trial court may decide, however, as some trial judges did before the amendment of Rule 277, in favor of a separate submission of each element of damages—either by submission of a single issue listing the various elements, with appropriate spaces for answers as to each element, or by submitting separate issues as to each element. The separate submission of each element is preferable, since such a practice would enable rendition of judgment on the verdict even if the trial or appellate court determined that an improper element of damages was submitted, or that one or more of the items submitted is without support in the evidence.²⁶

It must be borne in mind that in any case involving the application of the comparative negligence doctrine, it is the duty of the jury to determine the full amount of all damages *sustained* by the injured parties. That is, the jury does not determine the amount which any injured party will *receive*. For this reason, the amendment to Rule 277 requires that in any case where there are issues raised concerning the negligence of more than one party “the court shall instruct the jury to answer the damage issues without any reduction because of negligence, if any, of the party injured.”

APPORTIONMENT ISSUES

In any case involving the negligence of more than one party, Rule 277 now requires the submission of “an issue ” inquiring what percentage, if any, of the negligence that caused the occurrence in question is attributable to each of the parties found to have been negligent. Although the requirement that the court, in such cases, shall submit an issue of this nature makes it clear that the submission of but a single apportionment issue is contemplated, there would appear to be no valid objection to the submission of a separate issue as to each party who has been found negligent. However, since the percentages found by the jury must total 100 percent, the submission in a single issue appears preferable because this would facilitate addition. It would also seem desirable to accompany the issue with an explanatory instruction pointing out to the jury that the total of the percentages of fault which they attribute to each party must amount to 100 percent.

The special issue set out below would be applicable to a case where

26. *See El Paso City Lines, Inc. v. Benjamin*, 451 S.W.2d 257, 259 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.).

a single plaintiff, P, is seeking recovery from three defendants, 1, 2 and 3. The term "Question 1" refers to the issue or issues relating to the causal negligence of defendant 1. The terms "Question 2" and "Question 3" relate to the issue or issues concerning the causal negligence of defendants 2 and 3, respectively, and the term "Question 4" refers to the issue or issues inquiring into the causal negligence of P. With these assumptions in mind, the following form of special issue is suggested:

If you have answered "yes" to one or more of Questions 1, 2, 3 and 4, then answer the following question:

Taking the combined negligence which proximately caused the occurrence in question as aggregating 100 percent, what percentage of such negligence do you attribute to:

(a) Defendant 1 (you will answer this subdivision of this question only if you answered "yes" to Question 1)

Answer: _____%

(b) Defendant 2 (you will answer this subdivision only if you answered "yes" to Question 2)

Answer: _____%

(c) Defendant 3 (you will answer this subdivision only if you answered "yes" to Question 3)

Answer: _____%

(d) Plaintiff P (you will answer this subdivision only if you answered "yes" to Question 4)

Answer: _____%

The total of your answers to subdivisions (a), (b), (c) and (d) of this question must be 100 percent.

Assume that, in answer to the damages issue, the jury found that plaintiff's total damages were \$10,000 and that the answers to the apportionment issue establish that plaintiff was 20 percent at fault, defendant 1 was 10 percent at fault, defendant 2 was 40 percent at fault, and defendant 3 was 30 percent at fault. Since plaintiff's damages total \$10,000, he will be entitled to recover \$8,000 because, under section 1 of the comparative negligence statute, the amount of damages found by the jury must "be diminished in proportion to the amount of negligence attributable to the person injured."²⁷

If plaintiff's negligence does not exceed the total negligence of all defendants and if the negligence of *each* defendant is greater than that of plaintiff, each defendant is jointly and severally liable to plaintiff, under section 2(c), for the entire \$8,000. In such a situation section

27. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Supp. 1974).

2(b) provides that contribution to the damages awarded to plaintiff shall be in proportion to the percentage of negligence attributable to each defendant. In our example, however, one of the defendants was found to be less at fault than the plaintiff. The plaintiff would still be entitled to recover the sum of \$8,000, even though his percentage of fault is greater than defendant 1's, since plaintiff's fault does not exceed the total negligence of all the defendants. But since section 2(c) of the statute provides that where plaintiff is at fault to a greater degree than a particular defendant against whom he is entitled to recover, such defendant is liable to plaintiff only for an amount which represents the percentage of negligence attributable to such defendant. P, in the event of defendants' 2 and 3 insolvency, would be able to collect only \$800 from defendant 1. In the event that defendant 1 is insolvent, plaintiff would be entitled to recover the entire \$8,000 from defendants 2 and 3, since the judgment against defendants 1, 2 and 3 is a joint and several one and defendants 2 and 3 find no protection in section 2(c) because their negligence is not less than plaintiff's.²⁸

CROSS-ACTIONS

In dealing with cross-actions in a comparative negligence situation, the set-off provisions of section 2(f) of the statute come into play. Under this provision, if the verdict results in two claimants being liable to each other, the claimant who is liable for the greater amount is entitled to a credit toward his liability in the amount of damages owed him by the other claimant.

We will assume the simple case involving but one plaintiff and one defendant, where both parties seek to recover damages flowing from the alleged negligent conduct of the other. The special issues should present no great problem. Issues would be submitted relating to the causal negligence of each party, and separate inquiry would be made into the total loss suffered by each party. These would then be followed by the apportionment issue.

If the jury found that plaintiff suffered loss in the amount of \$10,000, that defendant's losses amounted to \$5,000, and that each party was 50 percent at fault, plaintiff would be entitled to recover \$5,000 from defendant, while defendant would be entitled to recover \$2,500

28. This and following specific examples used to illustrate the manner in which the jury's answers are translated into a judgment are taken from Fisher, Nugent & Lewis, *Comparative Negligence: An Exercise in Applied Justice*, found at page 655 of this Journal.

from plaintiff. The net result would be that plaintiff would recover \$2,500.

CONCLUSION

Admittedly, the factual situations assumed in connection with the suggested forms of special issues dealing with a comparative negligence case have been deliberately kept rather simple. Further, it is not anticipated that the suggested issues will actually be submitted in the language in which they have been couched in this discussion. Judges and attorneys, no doubt, will frame the issues in language which is less in-artistic and better calculated to focus the attention of the jury more precisely on the factual issue which is the subject of inquiry. It is only hoped that in doing so our trial judges and lawyers will bear in mind the purposes of these amendments to the Rules of Civil Procedure which were to provide for a less complicated form of special verdict and to provide our trial judges with an opportunity to reduce the number of issues which a jury must answer in order to give the court a factual basis for rendering judgment.

Irrespective of whether the general forms of issues suggested here find favor with the bench and bar, it is hoped that the amendments to the Rules will achieve the desired results of significantly decreasing the complaints with which we are all painfully familiar and eliminating a form of submission which, in the opinion of many, frustrates the intelligent and effective use of the jury. The Texas Supreme Court has heeded the outcry and has given us the tools necessary to make the required improvements. The result will depend on whether, and how, we decide to use such tools.