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Orville C. Walker

SURVEY OF SPECIAL ISSUE SUBMISSION IN TEXAS SINCE AMENDED RULE 277

INTRODUCTION

ORVILLE C. WALKER*

The law of special issues in Texas has not enjoyed a placid history. In 1922 our supreme court held it was error for the trial court to intermingle in one question more than one specific act of negligence.[1] The wisdom of such a requirement was revisited in 1953 with the supreme court steadfastly adhering to the doctrine in negligence cases but allowing the trial court to have the option in non-negligence cases to submit special issues either specifically or broadly.[2] From that time on, the lower courts began to place all special issues under a microscope. The requirement of specificity of each act of negligence made it imperative that each item of defectiveness in an instrumentality be submitted separately even though there was involved only one act of negligence. The rule was scrupulously followed to untenable extremes. Reversals inevitably followed that were difficult to defend. The soundness of the rule that each act of negligence or defect be particularized came under attack. Ultimately, the supreme court decided that Rule 277 should be amended. Effective September 1, 1973, the new rule overruled countless cases. It condones broad special issues. The trial courts must now blaze a new trail in the submission of special issues.

The inquiry today is not so much what are the changes but rather the extent of the changes. The new rule now allows the trial judge the discretion "whether to submit separate questions with respect to each element of a case or to submit issues broadly."[3] It should be remembered that the old practice has not been abolished. The rule now states, "It shall not be objection-

* B.A., Howard Payne College; J.D., University of Texas; Professor of Law, St. Mary's University.

1. Fox v. Dallas Hotel Co., 111 Tex. 461, 475-76, 240 S.W. 517, 522 (1922).
2. Roosth & Genecov Prod. Co. v. White, 152 Tex. 619, 627-28, 262 S.W.2d 99, 104 (1953).
3. TEX. R. CIV. P. 277.

able that a question is general or includes a combination of elements or issues."[4] Quite obviously the underlying purpose of this sentence is to drastically reduce the number of reversals if the trial court elects to submit a negligence case under the old practice and a special issue is inadvertently worded globally.

It remains to be seen how trial judges react to the new rule. It is my view that the change of the old rule should not be taken as a mandate to go to the other extreme and globally submit all negligence cases. The initial justification for *Fox v. Dallas Hotel Co.*[5]—that each party is entitled to a separate submission of each act of negligence—is still sound and should not be cast into oblivion.

The virtue of special issue practice in Texas is in allowing the jury to determine the existence or nonexistence of each element of a party's ground of recovery or defense. In this way it is superior to the general verdict. I reject the notion that in the interest of simplification it is now preferable to simply ask the jury whether or not a party is negligent, although the new rule now permits such a global submission. The destiny of special issue submissions is now under the control of trial judges. Whether the trend will be to follow the old practice or to submit issues broadly remains to be seen; it is my hope that the new rule will not herald the demise of specificity in special issue submissions.

The wholesome purpose of the new rule is to diminish the number of reversals. Its purpose is not an assault upon the exemplary principles announced in the *Fox* case. Only time will answer the question as to the direction the courts will take, whether they will follow past tradition, or go to the opposite extreme and adopt a practice of submitting special issues broadly. It is my hope they will rely on the former practice. A choice of the other alternative could result in a return to the general verdict. The new rule specifically providing that the charge shall not be subject to the objection that it is a general charge may result in built-in infirmatives presently unforeseeable.

In 1920 the late Professor Sunderland wrote:

> As to the first element in the general charge, the finding of *facts*, it is much better done by means of the special verdict. Every advantage which the jury is popularly supposed to have over the court as a trier of facts, is retained, with the very great additional advantage that the analysis and separation of the facts in the case which the court and the attorneys must necessarily effect in employing the special verdict, materially reduces the chance of error. It is easy to make mistakes in dealing at large with aggregates of facts. The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury really has done.[6]

4. *Id.*
5. 111 Tex. 461, 240 S.W. 517 (1922).
6. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 258-59 (1920).