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Inconsistent Jury Verdicts in Civil Actions

The problem of inconsistent jury verdicts arises frequently, and, because the facts do not always follow any standard pattern, the courts do not always treat the problem in the same manner. Two particular phases of this problem, not properly within the scope of this article, are those presented when a jury brings in special findings or a special verdict which is inconsistent with a general verdict in the same case,[1] and the related problem involving quotient verdicts.[2] These are not inconsistent verdicts as discussed herein.

I. VICARIOUS LIABILITY OF CO-DEFENDANT

A. General Problem and Solution

The problem of inconsistency often arises when the jury returns an inconsistent verdict in a negligence action where one of the defendants is only liable vicariously, as in the principal-agent and the master-servant situations.[3] In Nebraska this may be seen

[1] For a discussion of this problem, see 35 Neb. L. Rev. 523 (1955); 5 Moore's Federal Practice, par. 49.04, p. 2209 (2d ed. 1951). As a general rule, in these situations, the special findings or verdict will control where they necessarily conflict with the general verdict, but the above citations provide a full discussion. Also, see Carl v. Wentz, 116 Neb. 880, 219 N.W. 390 (1928) (court sitting without a jury, same rule applied); Karr v. Brown, 112 Neb. 626, 200 N.W. 343 (1924); Story v. Sramek, 108 Neb. 440, 187 N.W. 881 (1922) (also stating that after the jury is discharged, the judge cannot set aside the conflicting special findings and render judgment on the general verdict). This rule is set forth in Neb. Rev. Stat. § 25-1120 (Reissue 1956).

[2] Generally, a quotient verdict, where the jury agrees before making the computation to be bound by the average of their several choices on the amount of damages, is not valid. Spreitzer v. State, 155 Neb. 70, 50 N.W.2d 516 (1951); McGuire v. Thompson, 152 Neb. 28, 40 N.W.2d 237 (1949); Glick v. Poska, 122 Neb. 102, 239 N.W. 626 (1931). There is a good brief discussion of quotient verdicts in 7 U. Fla. L. Rev. 206 (1954); also 39 Am. Jur., New Trial, § 123 (1942).

[3] Southern Ry. v. Garland, 47 S.E.2d 93 (Ga. Ct. App. 1948); Stefan v. Elgin, J. & E. Ry., 2 Ill.App.2d 300, 120 N.E.2d 52 (1954); Pittman-Rice Coal Co. v. Hansen, 117 Ind.App. 508, 72 N.E.2d 364 (1947); Barone v. Winebrenner, 189 Md. 142, 55 A.2d 505 (1947); Jakubiec v. Hasty, 337 Mich. 205, 59 N.W.2d 385 (1953); Grace v. Smith, 365 Mo. 147, 277 S.W.2d 503 (1955) *affirming* 270 S.W.2d 79 (Ct.App. 1954); Mansfield v. Farmers' State Bank, 112 Neb. 583, 200 N.W. 53 (1924); Forsha v. Nebraska Moline Plow Co., 94 Neb. 512, 143 N.W. 453 (1913), *modifying* 90 Neb. 736, 134 N.W. 522 (1912), *which reversed* 89 Neb. 770, 132 N.W. 384 (1911); Young v. Rohrbough, 86 Neb. 279, 125 N.W. 513 (1910), *reversing* 84 Neb. 448, 121 N.W. 585 (1909); Chicago, St. P., M. & O. Ry. v. McManegal, 73 Neb.

in the case of *Forsha v. Nebraska Moline Plow Co.*,[4] in which the action was for injuries resulting from a demonstration of machinery by an agent of the defendant corporation. The jury found for the agent and against the corporation, which was reversed for a new trial because the verdict was inconsistent. Another typical case is *Jakubiec v. Hasty*,[5] in which the jury originally found against the defendant cab company and for the defendant cab driver. The trial court sent the jury back for reconsideration of this verdict, which was held proper when appealed. As shown by these cases, the usual inconsistency is that the party against whom the jury finds liability cannot be liable unless the other defendant is first found liable, which the jury has not done. This type of verdict may be due to a desire by the jury to hold liable the party having the greatest apparent ability to pay the judgment, or may be due to the sympathy for the individual defendant as compared to the corporate defendant. The proper procedure for the trial court in these situations is to refuse to accept the jury's verdict, to tell them of this inconsistency, and to return them to the jury room for further

580, 107 N.W. 243 (1906), *modifying* 103 N.W. 305 (1905); Gerner v. Yates, 61 Neb. 100, 84 N.W. 596 (1900); Pangborn v. Buick Motor Co., 211 N.Y. 228, 105 N.E. 423 (1914); Carmona v. Padilla, 4 App.Div.2d 181, 163 N.Y.S.2d 741 (1957); Goines v. Penn. R.R., 3 App.Div.2d 307, 160 N.Y.S.2d 39 (1957) *reversing* 208 Misc. 103, 143 N.Y.S.2d 576 (Sup.Ct., Trial T. 1955); Becker v. Slingerland, 282 App.Div. 1106, 126 N.Y.S.2d 425 (1953); Thorsen v. Metzgar, 278 App.Div. 421, 105 N.Y.S.2nd 947 (1951); Dick v. Yanez, 55 S.W.2d 600 (Tex. Civ. App. 1932). There are some unusual results in Mississippi, as shown by Gulf Refining Co. v. Myrick, 220 Miss. 429, 71 So.2d 217 (1954), which follows a line of cases as: Rawlings v. Inglebritzen, 52 So. 2d 630 (Miss. 1951); Thomas v. Rounds, 137 So. 894 (Miss. 1931); St. Louis & San Francisco R.R. v. Sanderson, 54 So. 885 (Miss. 1911); Illinois Central Ry. v. Clark, 38 So. 97 (Miss. 1905); and Gulf, C. & S. F. R.R. v. James, 73 Tex. 12, 10 S.W. 744 (1889). The Mississippi court cites the above line of cases as authority for the proposition that an agent need not be held liable to hold the principal liable, even though the only liability of the principal is on the basis of respondeat superior. Actually, the cases cited do not seem to support this rule, since some of them may be based on a higher standard of care required of public carriers, thus almost making the carrier a joint tortfeasor with its agent, and other cases being simply joint tortfeasors, where the plaintiff does not even need to take action against all to hold any of them liable. Cf. Fabrizi v. Golub, 134 Conn. 89, 55 A.2d 625 (1947); Barone v. Winebrenner, 189 Md. 142, 55 A.2d 505 (1946), where the jury found for defendant woman, and the court directed a verdict for the co-defendant husband, saying that his only liability is under respondeat superior, so he must be released if his agent, the wife, is released.

[4] 94 Neb. 512, 143 N.W. 453 (1913), *modifying* 90 Neb. 736, 134 N.W. 522 (1912), *which reversed* 89 Neb. 770, 132 N.W. 384 (1911).

[5] 337 Mich. 205, 59 N.W.2d 385 (1953).

deliberation and reconciliation of this inconsistency.[6] The trial judge should not give any indication as to how to resolve this inconsistent verdict.[7] Giving instructions as to which finding the jury should make is probably reversible error, according to language used by some courts.[8]

If the trial court does not follow this procedure and the case is taken before an appellate court, there seem to be some differences in the methods used, depending somewhat on the jurisdiction. One view is represented by *Gulf Refining Co. v. Myrick*,[9] in which the driver of the truck was relieved of liability by the jury at the same time that they found the owner of the truck liable. This was affirmed, the court rejecting decisions from other jurisdictions and relying on other Mississippi decisions for support. No substantial reason other than precedent is given, the court stating that under its view of the prior decisions the plaintiff could have a verdict against either the owner or driver or both. The other view is represented by the case of *Jakubiec v. Hasty*,[10] supra, where this type of verdict was reversed and remanded for new trial. The various states are usually consistent in their treatment within their own court systems.[11]

[6] Mish v. Brockus, 97 Cal.App.2d 770, 218 P.2d 849 (1950) (contradictory verdicts in auto collision action); Jakubiec v. Hasty, 337 Mich. 205, 59 N.W. 2d 385 (1953); Blackman v. Botsch, 281 S.W.2d 532 (Mo. Ct. App. 1955) (inconsistency was in the jury finding for plaintiff on his claim and for the original defendant on his counterclaim); Ruina v. Nu Car Carriers, 2 App.Div.2d 779, 154 N.Y.S.2d 504 (1956); Thorsen v. Metzgar, 278 App. Div. 421, 105 N.Y.S.2d 947 (1951); Reilly v. Shapmar Realty Corp., 267 App.Div. 198, 45 N.Y.S.2d 356 (1943) (inconsistency was in granting relief for expenses to mother but not to injured infant for damages); Traders & General Ins. Co. v. Holtzclaw, 111 S.W.2d 759 (Tex. Civ. App. 1937) (workman's compensation action, jury finding partial and total incapacity at the same time); James A. Dick Co. v. Yanez, 55 S.W.2d 600 (Tex. Civ. App. 1932); Husting v. Dietzen, 224 Wis. 639, 272 N.W. 851 (1937) (inconsistency on comparative negligence as affecting amount of recovery).

[7] Blackman v. Botsch, 281 S.W.2d 532 (Mo. 1955); Traders & General Ins. Co. v. Holtzclaw, 111 S.W.2d 759 (Tex. Civ. App. 1937); Husting v. Dietzen, 224 Wis. 639, 272 N.W. 851 (1937).

[8] See note 5, supra.

[9] 220 Miss. 429, 71 So.2d 217 (1954).

[10] 337 Mich. 205, 59 N.W.2d 385 (1953).

[11] See for example in Illinois: Stefan v. Elgin, Joliet & Eastern R.R., 2 Ill. App.2d 300, 120 N.E.2d 52 (1954); Monken v. Baltimore & Ohio R.R., 342 Ill.App. 1, 95 N.E.2d 130 (1950); Siniarski v. Hudson, 338 Ill.App. 137, 87 N.E.2d 137 (1949); Inter Insurance Exchange of Chicago Motor Club v. Anderson, 331 Ill.App. 250, 73 N.E.2d 12 (1947), a person cannot use

B. JOINT TORTFEASORS AS DEFENDANTS

A slight variation of the above basic situation arises when the person apparently liable only vicariously could also be liable on other grounds.[12] This can be seen clearly in *Southern Ry. v. Garland,*[13] which was a wrongful death action against a railroad company and its engineer and fireman. Separate acts of negligence against the railroad were alleged besides the allegations of negli-

different views of the fact situation against different defendants in the same action, cannot hold the principal under respondeat superior unless the agent is also found liable, and courts should reconcile inconsistencies whenever possible. The *Monken* case is a little unusual, in that the husband is allowed to recover for damages to his car and loss of services of his wife, when his wife is barred from any recovery herself by contributory negligence, here negligence not being imputed to her husband due to no showing of agency or master-servant relationship between them. In Nebraska: Mansfield v. Farmers' State Bank, 112 Neb. 583, 200 N.W. 53 (1924); Forsha v. Nebraska Moline Plow Co., 94 Neb. 512, 143 N.W. 453 (1913), *modifying* 90 Neb. 736, 134 N.W. 522 (1912), *which reversed* 89 Neb. 770, 132 N.W. 384 (1911); Young v. Rohrbough, 86 Neb. 279, 125 N.W. 513 (1910), *reversing* 84 Neb. 448, 121 N.W. 585 (1909); Chicago, St. P., M. & O. Ry. v. McManegal, 73 Neb. 580, 107 N.W. 243 (1906), *modifying* 103 N.W. 305 (1905); Gerner v. Yates, 61 Neb. 100, 84 N.W. 596 (1900); which hold that the principal cannot be held liable under the theory of respondeat superior unless the agent is also held liable, that the jury cannot release one defendant and hold the other unless the liability is joint and several. In New York: Carmona v. Padilla, 4 App.Div.2d 181, 163 N.Y.S.2d 741 (1957); Witkin v. City of New York, 3 App.Div.2d 720, 159 N.Y.S.2d 497 (1957); Ruina v. Nu Car Carriers, 2 App.Div.2d 779, 154 N.Y.S.2d 504 (1956); Castanos v. Lansing, 152 N.Y.S.2d 946 (Sup.Ct.,Sp.T. 1956); Goines v. Penn. R.R., 3 App. Div. 2d 307, 160 N.Y.S.2d 39 (1957), *reversing* 208 Misc. 103, 143 N.Y.S.2d 13 (Sup.Ct.,Trial T. 1955); Pompilio v. McGeory, 282 App.Div. 826, 129 N.Y.S.2d 13 (1954); Becker v. Slingerland, 282 App.Div. 1106, 126 N.Y.S.2d 425 (1953); Thorsen v. Metzgar, 278 App.Div. 421, 105 N.Y.S.2d 947 (1951); Reilly v. Shapmar Realty Corp., 267 App.Div. 198, 45 N.Y.S.2d 356 (1943); Pangburn v. Buick Motor Co., 211 N.Y. 228, 105 N. E. 423 (1914); holding that inconsistent verdicts are not allowed to stand, the agent must be held liable in order to hold the principal liable when the only basis for liability of the principal is respondeat superior, that joint tortfeasors are not necessarily all found liable, and that appellate courts should reverse and remand for a new trial when trial court allows an inconsistent verdict from the jury.

[12] Griffin v. Ross, 93 Ga.App. 407, 91 S.E.2d 815 (1956); Southern Ry. v. Garland, 76 Ga.App. 729, 47 S.E.2d 93 (1948); Grace v. Smith, 365 Mo. 147, 277 S.W.2d 503 (1955), *affirming* 270 S.W.2d 79 (Ct. App. 1954).

[13] 76 Ga.App. 729, 47 S.E.2d 93 (1948). Cf. Hawkins v. Benton Rapid Express, Inc., 82 Ga.App. 819, 62 S.E.2d 612 (1950); Candage v. Belanger, 143 Me. 165, 57 A.2d 145 (1948); Hardwick v. Kansas City Gas Co., 355 Mo. 100, 195 S.W.2d 504 (1946).

gence by its employees, thereby showing actually a case of joint tortfeasors. The separate acts alleged against the railroad were in having neither an automatic signal nor a watchman at a crossing in a thickly populated area. The verdict against the railroad company and for the employees was affirmed on appeal. In these situations, however, there is actually no inconsistency in this type of verdict, as joint tortfeasors may be held jointly and severally liable, and the plaintiff does not even have to sue against all. Each one is liable for the total damage done by all; therefore, although courts may speak of inconsistencies in such situations or the appellant may raise the issue, it is not properly applicable to these cases.

C. Indemnity Cases

If the second defendant is an indemnitor, somewhat different problems may arise, although, in general, indemnity cases should be treated in the same manner as other civil cases.[14] The problem may become complex due to special defenses which may be available to the indemnitee but not to the indemnitor, who is only secondarily liable to the plaintiff. These may arise due to a non-resident principal,[15] contract not to sue,[16] or perhaps the statute of limitations has run against the principal debtor. Also, the terms of the indemnity contract may bring in many issues which are only collateral to the basic issue which the jury is to determine, that of liability to the plaintiff. The decision as to how far from the primary issue of liability the trial may digress without prejudicing the plaintiff's rights and still adequately determine the rights between the parties to the indemnity contract may become very difficult. Perhaps the best way to solve this problem of liability amongst the several parties is by the use of special verdicts, a recognized existing procedure which would be almost a necessity in these situations.[17]

D. The Comparative Negligence Doctrine

The doctrine of comparative negligence, as used in Wisconsin and Nebraska particularly, could also present some complex prob-

[14] See generally 42 C.J.S., Indemnity, § 36 (1950).

[15] See Fricks v. J. R. Watkins Co., 88 Ga.App. 276, 76 S.E.2d 518 (1953), where a resident surety was held not subject to liability when the principal was a non-resident and could not be sued.

[16] See on releases generally, Prosser, Torts, § 46, p.243 et seq. (2d ed. 1955).

[17] For the use of special verdict in this type of situation see Flusk v. Erie Ry., 110 F. Supp. 118 (D. N.J. 1953); also 42 C.J.S., Indemnity § 36 (1950) with annotations.

lems, as where the several defendants are negligent in differing degrees in relation to the plaintiff and the other defendant. However, this could be solved by the use of special verdicts and careful instructions by the trial judge. This would allow the jury to return separate findings as to the relative negligence and proportion of the total damages to be contributed by each defendant if liability is found. Another problem arises when the jury returns inconsistent findings in relation to the causation of the accident and the apportionment of damages.[18] This may be seen in *Wojan v. Igl*,[19] an action for damages resulting from an auto accident. The jury found that the defendant was negligent but not causally, yet apportioned the damages between the two parties under comparative negligence. This was corrected by granting a new trial.

II. DERIVATIVE CAUSES OF ACTION

A. General Problem and Solution

A fact situation which is very similar to that of vicarious liability is when there are two plaintiffs, the second suing for his expenses which are due to the injury caused to the first plaintiff, and the first plaintiff suing for these injuries. This often involves parent and child, or husband and wife. This sometimes results in one of the plaintiff's recovering, and the other not recovering. Occasionally, the one who recovers under the jury verdict is the party suing for expenses or loss of services of his spouse, and the injured party is not permitted to recover under the jury verdict.[20] A good illustration is *Yacabonis v. Gilvickas*,[21] in which the father received a jury verdict for his expenses due to injuries to his daughter, but the daughter received nothing for her disfigurement or pain and suffering. The trial court granted a new trial, and this order was affirmed on appeal. Some courts have stated that the trial

[18] Statz v. Pohl 266 Wis. 23, 62 N.W.2d 556 (1954), *rehearing denied*, 63 N.W.2d 711 (1954); Wojan v. Igl, 259 Wis. 511, 49 N.W.2d 420 (1951); Husting v. Dietzen, 224 Wis. 639, 272 N.W. 851 (1937).

[19] 259 Wis. 511, 49 N.W.2d 420 (1951).

[20] Baldwin v. Ewing, 69 Idaho 176, 204 P.2d 430 (1949); Brendel v. Public Service Electric & Gas Co., 28 N.J.Super. 500, 101 A.2d 56 (1953); Reilly v. Shapmar Realty Corp., 267 App.Div. 198, 45 N.Y.S.2d 356 (1943); Yacabonis v. Gilvickas, 276 Pa. 247, 101 A.2d 690 (1954); Gressel v. The Polish-American Association, 86 D.&C. 85 (Pa. Com. Pl. 1953). See Monken v. Baltimore & Ohio R.R., 342 Ill.App. 1, 95 N.E.2d 130 (1950), where the husband was permitted to recover for loss of services, although his wife was barred from recovering for her injuries due to her contributory negligence.

[21] 376 Pa. 247, 101 A.2d 690 (1954).

court should refuse the verdict,[22] as they do in the vicarious liability situations discussed earlier, but in other cases the appellate courts accept the verdict and affirm a judgment based on this inconsistent jury action.[23] The verdict and affirmance seem to be based either upon feelings of sympathy for the defendant or on a feeling that the actual damages of the injured party do not amount to a very large sum, so that the courts will not correct the erroneous verdict.[24] This should not be done. The courts should refuse to accept this type of verdict and should point out the inconsistency for the jury to reconsider and revise, without indicating which portion of the verdict to change. This is done in the cases involving inconsistent vicarious liability verdicts, supra, and the same procedure should apply to these situations. The same appellate court procedure should be followed for these cases as is followed for vicarious liability cases.

B. Power To Grant a New Trial

In addition to the problems presented in vicarious liability cases discussed above, other problems of the power to grant motions for new trial may be more important in these situations. In Nebraska, the statutory grounds for granting a new trial do not specifically cover inconsistent verdicts.[25] These situations, if the statute is to cover them at all, must be placed by interpretation under either parts (1) or (6) of the statute.[26] Apparently this problem has not been considered insurmountable, as the Nebraska Supreme Court has granted new trials for inconsistent verdicts without discussing

[22] Yacabonis v. Gilvickas, 376 Pa. 247, 101 A.2d 690 (1954); Reilly v. Shapmar Realty Corp., 267 App.Div. 198, 45 N.Y.S.2d 356 (1943).

[23] Brendel v. Public Service Electric & Gas Co., 28 N.J.Super. 500, 101 A.2d 56 (1953); Baldwin v. Ewing, 69 Idaho 176, 204 P.2d 430 (1949). Similar is Monken v. Baltimore & Ohio R.R., 342 Ill.App. 1, 95 N.E.2d 130 (1950), in which the injured wife could not recover due to her contributory negligence, but the husband was permitted to recover for his expenses and loss of services.

[24] See note 22, supra; the *Brendel* case seems to be on only nominal injuries to the children; the *Baldwin* case could be rationalized the same as the *Monken* case, with contributory negligence on the part of the injured minor.

[25] Neb. Rev. Stat. § 25-1142 (Reissue 1956). New trial may be granted for eight enumerated reasons.

[26] Ibid. ". . . (1) irregularity in the proceedings of the court, jury. . . . (6) that the verdict . . . is contrary to law. . . ." In the federal courts, Fed. R. Civ. P. 59(a)(1) seems broad enough to cover these situations, although not specifically covering them.

this power.[27] Other jurisdictions also seem to overcome the problem involved in the power to grant new trials.[28] This seems to be the best approach, as the situations clearly need this procedure, and the statutory grounds are broad enough to be interpreted to cover them. The problem of then getting before the appellate court if the trial court improperly refuses to grant the new trial is also solved in Nebraska by statute.[29]

C. Who May Complain of the Inconsistency

The problem which might arise in these cases, which would probably not arise in the cases involving vicariously liable defendants, is that of the proper party to object to the validity of the inconsistent verdict. The great majority of cases do not discuss this point. However, the party who brings the appeal is usually the party who suffers the inconsistency. Language indicates that a party who is not harmed by the inconsistency cannot complain of it. This is best shown in *Rich v. Central Electrotype Foundry Corp.*,[30] in which the father was not permitted to recover for his expenses incurred due to injuries to his child, while the child was permitted to recover for his injuries. The defendant appealed, alleging inconsistencies in the verdict, and the court said that the proper person to complain was one who was damaged by the inconsistency, not the one who benefited by being held liable for a smaller amount. This was not an actual inconsistency, so perhaps this language is dicta, but it seems to indicate the proper ruling for this situation.

[27] See Olson v. Shellington, 162 Neb. 325, 75 N.W.2d 709 (1956), where new trial was granted due to an inconsistency, the verdict being contrary to law. Also see Mansfield v. Farmers' State Bank of Craig, 112 Neb. 583, 200 N.W. 53 (1924); Forsha v. Nebraska Moline Plow Co., 94 Neb. 512, 143 N.W. 453 (1913), *modifying* 90 Neb. 736, 134 N.W. 522 (1912), *which reversed* 89 Neb. 770, 132 N.W. 384 (1911); Young v. Rohrbough, 86 Neb. 279, 125 N.W. 513 (1910), *reversing* 84 Neb. 448, 121 N.W. 585 (1909); Chicago, St. P., M. & O. Ry. v. McManegal, 73 Neb. 580, 107 N.W. 243 (1906), *modifying* 103 N.W. 305 (1905); Gerner v. Yates, 61 Neb. 100, 84 N.W. 596 (1900).

[28] See 39 Am. Jur., New Trial, § 126 (1942). Also generally, 39 Am.Jur., New Trial, §§ 121, 123, 128, 131, and 140 for other related issues which are grounds for new trial. Similarly, see 66 C.J.S., New Trial, §§ 66, 68, 75-77 (1950).

[29] Neb. Rev. Stat. § 25-1912 (Reissue 1956). This section permits appeals from either a final order or from the overruling of a motion for new trial. For this problem in the federal courts, see 3 Barron and Holtzoff, Federal Practice and Procedure § 1304, p. 236 (1950).

[30] 121 N.J.L. 481, 3 A.2d 584, 586 (1939).

III. SEPARATE CASES CONSOLIDATED FOR TRIAL

A. General Problem and Solution

In the several states there are different methods of handling the situation when there are several cases consolidated for trial to the same jury. Some states say that the verdicts in the several cases need not be consistent, based on the reasoning that if the cases were tried separately, there would be no requirement of consistency in the verdicts.[31] Other courts require the verdicts to be consistent, as if all were actually one action instead of several consolidated only for trial.[32] In the federal courts, an interesting situation arose in the two cases of *Eastern Air Lines v. Union Trust Co.*, and *United States v. Union Trust Co.*,[33] which were consolidated for trial. One of these was tried to the judge without a jury under the Federal Tort Claims Act,[34] and the other was tried to the jury. In the action without a jury, the court found as a fact that the airport tower operator had given instructions to the air line pilot which had caused him to swerve, thereby coming into the path of another plane and resulting in the accident. In the jury action, the jury found as a fact that the tower operator had not given these same instructions, but that the pilot had swerved without authorization, thereby making the air line liable. Thus the air line and the government were both held liable on completely irreconcilable findings of fact. On appeal, this was permitted to stand, although the judge writing the opinion of the Court of Appeals on the final hearing dissented to this phase of the case.[35] The plaintiff in both cases was the representative of some of the deceased passengers of the air liner which was destroyed as a result of the accident. An interesting sideline in these cases was that the jury completely released from li-

[31] Brown v. Parker, 217 Ark. 700, 233 S.W.2d 64 (1950); Marsero v. Public Service Interstate Transportation Co., 8 N.J.Super. 268, 74 A.2d 328 (1950); Paolercio v. Wright, 2 N.J. 412, 67 A.2d 168 (1949); Baldwin v. Ewing, 69 Idaho 176, 204 P.2d 430 (1949). Cf. Barron and Holtzoff, Federal Practice and Procedure § 1304, p. 236 (1950) implying the same rule.

[32] Castanos v. Lansing, 152 N.Y.S.2d 946 (Sup.Ct., Sp.T. 1956); Reilly v. Shapmar Realty Corp., 267 App.Div. 198, 45 N.Y.S.2d 356 (1943).

[33] 221 F.2d 62 (D.C. Cir. 1955), *affirmed against United States,* 350 U.S. 907 (1955), *reversed against Eastern Air Line,* 350 U.S. 907 (1955), *modified in* 350 U.S. 962 (1956), *to remand to the Circuit Court.* Circuit Court affirmed in 239 F.2d 25 (D.C. Cir. 1956), *certiorari denied* 353 U.S. 942 (1957).

[34] See 239 F.2d 25 (D.C. Cir. 1956).

[35] Ibid.

ability the pilot of the second plane, although on the witness stand he admitted that his negligence was at least one of the causes of the accident. This was also affirmed.[36]

B. The Right to a Jury Trial

This also raises the problem of the right to trial by a jury.[37] This right is a problem in cases similar to these *Eastern Air Lines* cases because one of the actions is specifically not subject to a jury trial by the statute giving the right to the action.[38] However, this fact has been held not to be a bar to a joinder of the two causes for trial.[39] The problem is analogous to that of asking for money damages in addition to equitable relief. Generally both may be tried to the court without a jury and the parties may not complain of the denial of the right to a jury trial.[40]

IV. OTHER RELATED FACT SITUATIONS

In other instances, a plaintiff will attempt to use two different versions of the fact situation in order to recover from different defendants, using a different version of the fact situation against each defendant,[41] similar to the plaintiff's actions in the *Eastern Air Lines* cases. The best procedure seems to be not to allow

[36] Ibid.

[37] U.S. Const., Art. III, § 2, cl. 3; U.S. Const. amend. VI, VII; Fed. R. Civ. P. 38; Neb. Const., Art. I, §§ 6, 11; Neb. Rev. Stat. § 25-1104 (Reissue 1956).

[38] Federal Tort Claims Act, 62 Stat. 971 (1948), 28 U.S.C. § 2402 (1952).

[39] Engelhardt v. United States, 69 F. Supp. 451 (D. Md. 1947). This result seems to be due to Rule 42, Fed. R. Civ. P.

[40] See 5 Moore's Federal Practice, § 38.05, p. 36 (2d ed. 1951) for a discussion of this problem. See also Conn v. Kohlemann, 2 F.R.D. 514 (E.D. Pa. 1942) generally, to the effect that the court may try the issue of money damages if this is asked in conjunction with equitable relief. In Nebraska, see discussion of this problem in Brchan v. Crete Mills, 155 Neb. 505, 52 N.W.2d 333 (1952); O'Shea v. O'Shea, 143 Neb. 843, 11 N.W.2d 540 (1943).

[41] Hemminghaus v. Ferguson, 358 Mo. 476, 215 S.W.2d 481 (1948). See also, Osborn v. Chandeysson Electric Co., 248 S.W.2d 657 (Mo. 1952) (action in two counts, one for conversion assuming an effective transfer of stock, the other count for breach of contract for failure to transfer the stock). Cf. Rothweiler v. St. Louis Public Service Co., 224 S.W.2d 569 (Mo. Ct. App. 1949) *reversed,* 234 S.W.2d 552 (Mo. 1950) on other grounds, where the plaintiff sued the driver of a private auto on specific negligence, and sued the bus company on the theory of res ipsa loquitur. This was permitted, plaintiff recovering against both defendants. See also Inter Ins. Exchange of Chicago Motor Club v. Anderson, 331 Ill. App. 250, 73 N.E.2d 12 (1947), the insurer suing the insured for giving a release, and suing the other party to the accident for property damage, not permitted. One count admits the validity of the release, the other claims it to be invalid.

recovery against both defendants in this type of situation, but perhaps, if the plaintiff shows honest uncertainty as to which version of the facts is true, he should be allowed to proceed on both lines.[42] This then might be analagous to the situations discussed under Part V., B., infra, where only one plaintiff and one defendant are involved. A similar case frequently arises involving a claim and counterclaim upon the same facts.[43] If the jury returns a verdict for both parties in these cases, the procedure should be to refuse to accept the verdict. The jury should then be returned to the jury room to reconsider and modify their verdict to remove the inconsistency.[44] This procedure should be used in all cases involving an inconsistency in the jury's findings of fact or application of law to the facts. There would then be a standard procedure to guide the courts in these anomalous situations, and to assist them in reaching a decision on how to correct the faulty findings without eliminating the jury system.

V. GENERAL COMMENTS ON INCONSISTENCIES

A. Reconciliation of Apparent Inconsistencies in the Verdicts

In almost all instances, if it is at all possible to reconcile the actions of the jury, the courts indicate that this should be done.[45]

[42] Cf. Jacobs v. Munez, 157 F. Supp. 120 (S.D. N.Y. 1957), where because the plaintiff positively asserted one of two alternative positions in one action, she was not permitted to assert the other position in another related action. Language indicates that if the two positions had both been offered in proof as well as pleadings as alternate hypotheses instead of unequivocally asserting one, perhaps this plaintiff would have been permitted to use both theories.

[43] Harrison Construction Co. v. Nissen, 119 Colo. 42, 199 P.2d 886 (1948) (action on contract, counterclaim for value of work done); Miller v. Scott, 117 N.E.2d 179 (Ohio Ct.App. 1952) (action on contract, cross-petition on different contract between the parties even though on the facts only one contract could exist); Blackman v. Botsch, 281 S.W.2d 532 (Mo. Ct. App. 1955) (two parties involved in auto accident with both suing for damages to their autos. The court does not let the jury allow both to recover); Trevathan v. Lynch, 21 Tenn.App. 549, 113 S.W.2d 416 (1938) (action for damage to car following accident, cross-action for damages to the other car, and the court does not permit the jury to return findings for both); Husting v. Dietzen, 224 Wis. 639, 272 N.W. 851 (1937) (verdict finds comparative degrees of negligence, yet says that one party was not causally negligent, and awards damages to plaintiff on his action and to defendant on his cross-action, not permitted).

[44] Blackman v. Botsch, 281 S.W.2d 532 (Mo. Ct. App. 1955); Husting v. Dietzen, 224 Wis. 639, 272 N.W. 851 (1937).

[45] For general statements concerning practice in the federal courts, see 5 Moore's Federal Practice, § 49.04, p. 2210 (2d ed. 1951). See this done in Siniarski v. Hudson, 338 Ill.App. 137, 87 N.E.2d 137 (1949).

As this is also the standard rule for special findings which apparently contradict a general verdict, this should be the rule to apply in other apparent inconsistency situations also. It provides a guide for courts and attorneys and gives a status to jury verdicts which could not be achieved if they could be lightly set aside. If we are not to discard the jury system altogether, this is the best policy. As it is not the purpose of this article to attack the validity or usefulness of the jury system, but only to explain how to use the results of the deliberations of a jury most effectively, the above rule reconciling apparent inconsistencies when possible stands as a good rule.

B. Validity of General Verdicts Based on Alternative Pleas

When two alternative versions of a fact situation are used by a plaintiff against a single defendant, a general verdict not indicating upon which theory the jury allowed recovery is not inconsistent and will not be set aside if the evidence supports either theory used. This is well illustrated in *Wells v. Brown*,[46] in which the plaintiff sued in two counts, one count alleging that the defendant ran over the plaintiff's dog and caused its death, and the other count alleging that the defendant shot and killed the dog. A general verdict for the plaintiff was affirmed, as the proofs supported the second count. This is usually a case of the plaintiff not being sure which of two theories can be proven, so he uses alternative pleading.

C. Verdicts Which Are Silent as to One Party Defendant

When the jury verdict is silent as to one of the co-defendants, the courts place different interpretations on this silence.[47] Some courts hold that this does not amount to a finding for or against the person omitted from the verdict, while other courts say that this amounts to a finding for the omitted person. If under this interpre-

[46] 97 Cal.App.2d 361, 217 P.2d 995 (1950).

[47] State Rubbish Collectors Ass'n. v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282 (1952) (no finding concerning one defendant, court states that this amounts to no finding either for or against the omitted party, in this case the agent, while the principal is held liable. Judgment is affirmed against the principal); Brokaw v. Black-Foxe Military Institute, 37 Cal. 2d 274, 231 P.2d 816 (1951) (omitted party in verdict, court says this is merely an incomplete verdict, not a finding for or against the omitted party, the agent of the principal who was found liable); Pittman-Rice Coal Co. v. Hansen, 117 Ind.App. 508, 72 N.E.2d 364 (1947) (silence concerning a party is interpreted to be a finding in favor of the omitted party, therefore a new trial is ordered, since this relieves the agent and leaves the principal liable).

tation, whichever is used, an inconsistency follows, the court then applies the method used by it for other inconsistency cases to resolve the problem.[48]

VI. CONCLUSION

Although many different situations result in inconsistent jury verdicts in civil actions, one procedure should be applied to all such situations to standardize practice and give status to the deliberations of a jury. This solution should be for the trial court to refuse to accept irreconcilable inconsistencies in a jury verdict, and to show the jury the inconsistency. This should be done without giving any instructions or directions as to how the conflict should be resolved, leaving free the deliberations of the jury on the reconciliation of their verdict. When this procedure is followed, the courts will not be destroying the value of the jury system, and yet will have verdicts which clearly show the decisions of the jury so that judgments may be rendered which will properly be based upon these decisions. This will avoid judgments which are based upon what the court thinks the jury may have meant in their ambiguous or inconsistent verdict. This method has been used by several courts with no apparent difficulties in application or results, and there should be no more trouble in the application of it in other jurisdictions. If such verdicts and the judgments rendered thereon should pass by the trial court, the appellate court should remand for retrial to another jury in order to obtain a comprehensive verdict upon which to render a judgment.

By following this procedure, the courts increase the value of the jury system, whereas now in the confusing variety of holdings in inconsistency situations the value of the jury system is somewhat decreased. The courts which permit judgments upon inconsistent and ambiguous verdicts are in effect giving no weight to the potential usefulness of a jury, because they are rendering a judgment on a jury verdict which is incomprehensible as accepted.

John C. McElhaney, '58

[48] Pittman-Rice Coal Co. v. Hansen, 117 Ind.App. 508, 72 N.E.2d 364 (1947).