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# The Jury System and Special Verdicts.

Judge Ernest Guinn

# THE JURY SYSTEM AND SPECIAL VERDICTS

JUDGE ERNEST GUINN*

In my nearly 40 years as a general practitioner I had to deal with the Special Issues of Texas Procedure. It is only natural that one of the many enjoyments of serving as a United States District Judge is the freedom from the association with the Special Issues of the State Courts of Texas.

As stated by Chief Judge Brown of the Fifth Circuit:

> . . . In this day and time with advanced education and advocacy of such a highly developed and demonstrative state, it is little short of insulting to the jurors—more so to the lawyers and most of all to the judges who report such Shibboleths—to think that a juror will not have a good idea of the effect of his answer.[1]

Certainly on every jury there are some jurors who know the effect of their answers to the questions submitted and they can, and do, bring about the verdict which they desire, while the others, through inexperience and background, are deprived of that right.

It is most satisfying in charging a jury to explain fully and completely the legal principles involved in the case, the rights and the duties of the parties, and the facts that the jury must find from the evidence to reach a verdict for the plaintiff or the defendant. A jury is entitled to know what it is doing by its verdict. Those who hold to the contrary, in my opinion, do not trust jurors and, in fact, do not trust the jury system. The views of professors, lawyers and judges on this question and the reasoning for and against a full disclosure of the case to a jury are varied.

Judge Frank, who distrusted the jury and the jury system, wrote an exhaustive opinion on general verdicts and jurors in general in *Skidmore v. Baltimore & O.R. Co.*[2] His view in substance is that a jury suffers from human frailties in arriving at a verdict and a judge is never affected by such frailties:

> Undeniably, the verdict [in the case involved] affords no satisfactory information about the jury's findings. But almost every general verdict sheds similar or even greater darkness. Such verdicts account for much (not all) of the criticism of the civil jury. Some revaluation of the jury system seems not unjustified in the light of the fact that ours is the only country in the world where it is still highly prized.[3]

* Federal District Court, Western District of Texas.

1 Brown, *Federal Special Verdicts; The Doubt Eliminator*, 44 F.R.D. 338, 341 (1968).

2 167 F.2d 54 (2d Cir. 1948), *cert. denied*, 335 U.S. 816, 69 S. Ct. 34, 93 L. Ed. 371 (1948).

3 *Id.* at 56.

Judge Frank advocated the special or fact verdict as a device to mitigate the jury system's major defects.[4] The fact verdict also alleviates another crux of Judge Frank's argument against the jury system:

> Yet no amount of brave talk can do away with the fact that, when a jury returns an ordinary general verdict, it usually has the power utterly to ignore what the judge instructs it concerning the substantive legal rules, a power which, because generally it cannot be controlled, is indistinguishable for all practical purposes, from a "right." Practically, then, for all we may say about the jury's duty when it renders a verdict, we now do have the very conditions which we were warned would result if the jury had the right to decide legal propositions: cases are often decided "according to what the jury suppose the law is or ought to be"; the "law," when juries sit, is "as fluctuating and uncertain as the diverse opinion of different juries in regard to it"; and often jurors are "not only judges but legislatures as well." Indeed, some devotees of the jury system praise it precisely because, they say, juries, by means of general verdicts, can and often do nullify those substantive legal rules they dislike, thus becoming ad hoc ephemeral (un-elected) legislatures (a State of Affairs singularly neglected by most writers on jurisprudence, who would do well to modify their ideas by recognizing what might be called "juriesprudence").[5]

In opposition to Judge Frank, Wigmore advocates that a jury trial gives greater flexibility of legal rules. This flexibility is essential to satisfy popular demands and justice. Thus, popular contentment and public justice give the layman general confidence in the system. Wigmore's philosophy is illustrated by the following:

> Law and justice are from time to time inevitably in conflict. That is because law is a general rule (even the stated exceptions to the rules are general exceptions); while justice is the fairness of this precise case under all its circumstances. And as a rule of law only takes account of broadly typical conditions, and is aimed at average results, law and justice every so often do not coincide. Everybody knows this, and can supply instances. But the trouble is that Law cannot concede it. Law—the rule—must be enforced—the exact terms of the rule, justice or no justice. "All Persons Are Equal Before the Law"; this solemn injunction, in large letters, is painted on the wall over the judge's bench in every Italian Court. So that the judge must apply the law as he finds it alike for all. And not even the general exceptions that the law itself may concede will enable the judge to get down to the justice of the particular case,

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[4] *Id.*
[5] *Id.* at 57.

> in extreme instances. The whole bases of our general confidence in the judge rests on our experience that we can rely on him for the law as it is. But this being so, the repeated instances of hardship and injustice that are bound to occur in the judge's ruling will in the long run injure that same public confidence in justice, and bring odium on the law. We want justice, and we think we are going to get it through "the law," and when we do not, we blame "the law." Now this is where the jury comes in. The jury, in the privacy of its retirement, adjusts the general rule of law to the justice of the particular case. Thus the odium of inflexible rules of law is avoided, and popular satisfaction is preserved.[6]

In deciding *Skidmore*, Judge Frank acknowledged the difficulties and disrepute that had beset the common-law type of special verdict. However he noted that three states, North Carolina, Wisconsin and Texas, have adopted special-verdict practice in civil cases.[7] The special verdict practice in those states was modified to avoid the complications attributed to the common-law special verdict.[8] The Texas and Wisconsin civil procedures were recognized by Judge Frank as the model for Rule 49(a) of the Federal Civil Rules of Procedure, 28 U.S.C.A.[9] However, Rule 49(b) of the Federal Civil Rules of Procedure, 28 U.S.C.A., calls for a general verdict accompanied by written interrogatories. Under this rule the Federal district judge has full discretion; therefore, he may merely require a general verdict.[10] Judge Frank makes

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6 Wigmore, *A Program for the Trial of a Jury Trial*, 12 AM. JUD. SOC. 166 (1929). *See also*, Pound, Law in Books and Law in Action, 44 Am. L. Rev. 12 (1910).

7 Skidmore v. Baltimore & O. Ry. Co., 167 F.2d 54 (2d Cir. 1948), *cert. denied*, 335 U.S. 816, 69 S. Ct. 34, 93 L. Ed. 371 (1948).

8 *Id.*

9 *Id.*, FED. R. CIV. P., Rule 49. Special Verdicts and Interrogatories:

(a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

10 Skidmore v. Baltimore & O. Ry. Co., 167 F.2d 54 (2d Cir. 1948), *cert. denied*, 335 U.S. 816, 69 S. Ct. 34, 93 L. Ed. 371 (1948). FED. R. CIV. P. Rule 49. Special Verdicts and Interrogatories

(b) General Verdict Accompanied by Answer to Interrogatories. The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a

a plea in *Skidmore* to amend Rule 49 and make compulsory either special verdicts or written interrogatories in civil jury cases.[11]

However, extended use of the special verdict has not been the policy of the Federal district judges.[12] The primary reason for this slow development is that the special verdict requires time and work. These commodities are not always available to the district judge.

One of Judge Frank's arguments against the general verdict was the predetermination by the jury of who they wanted to win. But he admits this is not always avoided by the special verdict:

> The fact verdict will furnish no panacea. Among other things, as previously noted, it will still be true that, in a relatively simple case, the jury will still be able to foresee what answers to the questions will produce a judgment for the side it favors.[13]

Jurors are affected by their backgrounds, their training and their experiences. Would anyone deny that the decisions of the judges reflect their philosophy of law, construction of the constitution, interpretation of the statutes, their training and experiences? If this were not so, how could the Supreme Court of the United States during the sixties set aside so many constitutional interpretations of its predecessors and nullify so many precedents with such ease? The only difference between the verdict of the jury and the decision of the Supreme Court is that the jury disposes of only one case and the decision of the Supreme Court controls all future cases.[14]

Judge Frank condemns the general verdict because he states that it affords no satisfactory information about the jury findings and that such verdicts account for much of the criticism of the civil jury. Certainly

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general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the appropriate judgment upon the verdict and answers shall be entered pursuant to Rule 58. When the answers are consistent with each other but one or more is inconsistent with the general verdict, judgment may be entered pursuant to Rule 58 in accordance with the answers, notwithstanding the general verdict, or the court may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, judgment shall not be entered, but the court shall return the jury for further consideration of its answers and verdict or shall order a new trial.

As Amended Jan. 21, 1963, eff. July 1, 1963.

11 Skidmore v. Baltimore & O. Ry. Co., 167 F.2d 54 (2d Cir. 1948), *cert. denied*, 335 U.S. 816, 69 S. Ct. 34, 93 L. Ed. 371 (1948).

12 Driver, *A Consideration Of The More Extended Use Of The Special Verdict*, 25 WASH. L. REV. 43 (1950).

13 Skidmore v. Baltimore & O. Ry. Co., 167 F.2d 54, 67 (2d Cir. 1948), *cert. denied*, 335 U.S. 816, 69 S. Ct. 34, 93 L. Ed. 371 (1948).

14 *See also*, J. Denton, *Informing A Jury Of The Legal Effect Of Its Answers*, 2 ST. MARY'S L.J. 1 (1970). Green, *Blindfolding The Juries*, 33 TEX. L. REV. 273 (1955). McCormick, *Jury Verdicts Upon Special Questions In Civil Cases*, 2 F.R.D. 176 (1943).

the findings of the jury could not be clearer than in a jury verdict which plainly states that considering all the evidence and the law applicable to the case, the jury has found either for the plaintiff or the defendant. This is what the jury was supposed to pass on and the court need not know any more.

Judge Brown points out that a special verdict will eliminate the time consuming retrial. This is illustrated by *Cox v. Esso Shipping Co.*,[15] in which a general verdict with an award of a fixed sum obscured from appellate review questions of law and fact. This problem can be eliminated by the use of Rule 49(a), as Judge Brown states:

> Rule 49(a), . . . , if used with skill and resourcefulness melds the general *charge* (not verdict) with the special answers to specific controlling issues of fact or legal-fact. . . . that in an appropriate form and way the Judge gives a firm, detailed explanation of controlling principles specifically related to the case, almost as he would for a general verdict. The difference is that under the 49(a) technique the jury, applying these instructions, records its conclusions with precision, not in the conglomerate ambiguity of "for the Plaintiff," "for the Defendant," or the like.[16]

To me, the use of 49(b) is far more satisfactory, it accomplishes the same purpose as 49(a). Judge Brown indicates that time and money may be saved by the use of 49(a) in cases involving two or more theories of recovery, multi-party suits, multi-cross claims and compulsory joinder. In describing subsection 49(a) Judge Brown says:

> The remarkable thing about this remarkable instrument is the fluidity which it gives to both trial and appellate reviewing courts in directing a comprehensive, final disposition to the case without infringing in the slightest upon the inviolate nature of the jury trial and resolution.[17]

To me 49(b) is the rule to use when unsettled questions of law or questions of sufficiency of evidence on an issue or when various parties with cross complaints are involved. The great value of 49(b) is that, after giving a complete general charge and submitting a general verdict, the court can ask simple questions, not technically worded as required by the law of special issues in Texas. Professor Charles T. McCormick concluded:

> . . . Unfortunately, the prime function of the questions as a method

[15] 247 F.2d 629 (5th Cir. 1957).
[16] Brown, *Federal Special Verdicts; The Doubt Eleminator*, 44 F.R.D. 338, 340 (1968).
[17] *Id.* at 346.

> of putting the case to a jury of laymen in a simple and understandable way has been obscured in the Texas practice. Standards for formulating the questions, sensible and helpful as suggestions for particular cases, were crystallized into rules which were applied almost as rigidly and technically as the common law rules of special pleading, and the application of these rules so multiplied the questions as to result in the submission of forty or fifty "issues" in an ordinary negligence case.[18]

In appellate cases where questions are submitted, if the answer shows that the verdict depended on the disputed question of law or on the challenged sufficiency of evidence, the appellate court can dispose of the matter without a new trial or with a limited new trial. In all cases where there are no special circumstances, the general charge should be used. When there are exceptional circumstances the general charge and the general verdict should be supplemented with necessary questions and answers to avoid retrials, delays and expense. In every jury trial the jury should know what is involved, what conclusions it must reach for its verdict, and what it does by its verdict. In most jury trials that I have presided over, there are very few where my verdict differed from the jury's. I believe that this is the experience of most judges.

One of Judge Frank's objections to the jury general verdict is that jurors become not only judges but legislators as well, and become superior to the national legislature and its laws. However, we do not hear him condemning the decisions of judges who exercise this right; and while a jury legislates only in one case, the judges legislate in all future cases. It is obvious to everyone that the Supreme Court of the United States during the past decade has exercised the rights of a super legislative body in hoisting its philosophy and beliefs upon the people of this country. No one would deny that these Supreme Court decisions and changes were brought about by the philosophy of law and government held by the justices and acquired through their background, training and experience. In the same manner, jury verdicts are brought about by the juror's philosophy of government, training, background and experience.

In view of the philosophy of government expressed by Justice Black and Justice Douglas in their decisions interpreting the Constitution as it relates to criminal defendants, their acts and the acts of officers apprehending them, it is most surprising that they state their objections to Rule 49(a) and (b) to be that they "determine matters so substan-

[18] McCormick, *Jury Verdicts Upon Special Questions In Civil Cases*, 2 F.R.D. 176, 180 (1943).

tially affecting the rights of litigants and law suits that in practical effect they are equivalent of any legislature which in our judgment the Constitution requires to be initiated in and enacted by Congress and approved by the President."[19]

Everyone is now calling for elimination of delay in trials. Those states which do not have the general verdict, such as Texas, should examine the time lost in preparing and submitting special issues when trying and retrying cases for errors arising out of submission of special issues. In the average case, at least one-third to one-half of the time required in state courts for trial is saved in federal courts through the manner of submission of the case to the jury.

## CONCLUSION

Considering the totality of each case, the jury should be allowed to determine the rights of the parties. If the evidence presents no fact issue, the courts retain jurisdiction to dispose of the case. A jury verdict without supporting evidence will not stand. If the evidence supports the verdict, why should the jury give any reason why it accepted one part of the evidence as opposed to another? Our entire jury system rests on the credibility of witnesses and the weight to be given their testimony; and it is left in the jury's hand to determine that. It is far better for the jury to pass on these matters. The jury reflects the morals, the feelings and the standards of the community and should dispose of community issues. Of necessity, its verdict reflects the philosophy, the background, the training, the experience and the morals of each juror. However, these traits are just as influential in judges. Although they are better educated and trained, they are still influenced. As evidenced by the shelving of the many precedents dealing with criminals and criminal law in the sixties, it is obvious that not even members of the Supreme Court of the United States can separate themselves from these considerations.

[19] Order Amending Rules of Civil Procedure, 374 U.S. 865 (1963).