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THE STATE OF THE SPECIAL VERDICT—1979

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Approximately six years ago, effective September 1, 1973, the Texas Supreme Court, by its revision of rule 277 of the Texas Rules of Civil Procedure,¹ substantially revised the Texas system for submission of a case to the jury in civil trials.² The new rule eliminated the earlier requirement that issues must be submitted distinctly and separately. Instead, the trial judge was given discretion to determine whether to submit issues broadly. It would no longer "be objectionable that a question is general or includes a combination of elements or issues."³ In addition, inferential rebuttal issues would no longer be proper questions to propound to jurors. The trial judge was authorized to submit such explanatory instructions as shall be "proper," rather than those that were deemed "necessary."⁴ The new rule had been promulgated so that its effective date would coincide with Texas' adoption of comparative negligence.⁵ The revisions were designed to correct many of the trial and jury problems⁶

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1. TEX. R. CIV. P. 277.

2. See *Gonzales v. Missouri Pac. R.R.*, 511 F.2d 629, 632 (5th Cir. 1975). See generally Cadena, *Comparative Negligence and the Special Verdict*, 5 ST. MARY'S L.J. 688 (1974); Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 28 SW. L.J. 248, 258-61 (1974); Pope, *A New Start on the Special Verdict*, 37 TEX. B.J. 335 (1974); Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577 (1973).

3. TEX. R. CIV. P. 277. See generally Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577, 580-82 (1973).

4. TEX. R. CIV. P. 277; see Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 28 SW. L.J. 248, 259 (1974). Compare TEX. R. CIV. P. 277 with TEX. R. CIV. P. 277 (1969).

5. See generally TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978).

6. In December 1969, the Texas State Bar Committee on Substantive Law and Advancements conducted a poll of Texas district judges inquiring into certain areas of tort law. A large number of those judges responding took time to comment on their dissatisfaction with the

that had accompanied the fragmentation of jury issues⁷—conflicts, confusion, delays, waste of trial and appellate time, reversals, meta-physics,⁸ and the unique system that had developed for trial of personal injury suits.⁹ The rule was a new beginning and an effort to establish a jury system that would operate in the same way in negligence cases as it successfully had served in all other kinds of cases.¹⁰ The former rule was unique to Texas.¹¹ It is now time to

special issue system as it was being practiced at the time. Of great concern was the large number of issues which were required to be submitted to the jury. See McElhaney, *Texas Civil Procedure, Annual Survey of Texas Law*, 24 Sw. L.J. 179, 188 (1970). For example, the trial court had submitted fifty-three special issues, some with sub-parts, in the case of *Metal Structures Corp. v. Plains Textiles, Inc.*, 470 S.W.2d 93, 97 (Tex. Civ. App.—Amarillo 1971, writ ref'd n.r.e.), a case against a steel manufacturer for damages resulting from the collapse of a roof. In addition, the trial judge refused to submit sixty-five issues requested by the defendant. *Id.* at 100.

In an attempt to simplify the submission of a civil case to the jury, the Texas Legislature, in 1971, passed H.B. 556 which would have adopted comparative negligence and abolished the need for many special issues. On May 6, 1971, however, Governor Preston Smith vetoed the proposed legislation, stating in his veto proclamation:

This Bill fails to meet two simple criteria of intelligibility and candor. The Bill is both ambiguous and confusing, lacking the definition and provisions desirable in so important a measure.

The constitutionality of this Bill can be questioned as being in violation of Article 3, Section 35, of the Texas Constitution. It is imprudent to change the court law everywhere in one giant single step.

The other sections of the Bill [other than comparative negligence] relating to procedural changes involving 10-2 jury verdict and the elimination of special issues threaten to usurp the power of the Supreme Court in that it mandates the Supreme Court to make these specific changes in our existing civil procedures.

These two major changes, the 10-2 jury verdict and the elimination of special issues, are a radical departure from our present proven system of civil procedure. The Bill mandates the Supreme Court without regard to its knowledge, expertise, and will. The Legislature in 1939 adopted what is now Article 1731a of the Revised Civil Statutes of Texas giving to the Supreme Court rule-making power in matters of procedure. This is a good law, and certainly the Supreme Court, in its wisdom, and not the Legislature, is in a better position in the administration of justice to provide the rules of procedure. Message from Governor Smith, *TEX. H.R.J.* 2958 (1971).

7. In 1922 the Supreme Court of Texas, in the case of *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922), set forth the meaning of submitting issues "distinctly and separately." *Id.* at 475, 240 S.W. at 521-22. The rule of *Fox* was followed until the revision of rule 277 on September 1, 1973. See Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577, 582-83 (1973).

8. See *Roosth & Genecov Prod. Co. v. White*, 152 Tex. 619, 626-27, 262 S.W.2d 99, 103 (1953); *Jack Cane Corp. v. Gonzales*, 410 S.W.2d 953, 954 (Tex. Civ. App.—San Antonio, 1967, no writ).

9. See *Roosth & Genecov Prod. Co. v. White*, 152 Tex. 619, 628-29, 262 S.W.2d 99, 104 (1953).

10. See G. HODGES, *SPECIAL ISSUE SUBMISSION IN TEXAS* § 35, at 71 (Supp. 1969); 3 R.

examine the changes that have occurred in Texas jury submission since the revision of rule 277.

What is an issue? When we wrote in 1973 and posed that question,¹² we were asking the same question that Justice Sharp had unsuccessfully tried to resolve thirty-three years earlier in *Wichita Falls & Oklahoma Ry. v. Pepper*.¹³ Confusion has surrounded the drafting of issues for more than fifty years.¹⁴ The answer to the question is now more apparent. The revised rule, at least, has established that an issue is no longer objectionable merely because it "is general or includes a combination of elements,"¹⁵ thereby greatly limiting the danger of reversals based upon rulings that an issue is broad, global, or multifarious. Under the present rule, issues for the jury may, and ought to be, asked broadly. Revised rule 277 has rightfully brought personal injury litigation into the same system that has always existed in land litigation, will contests, estate problems, oil and mineral disputes, and every other kind of litigation.¹⁶

BROAD ISSUES ARE SUBMITTED IN GENERAL LITIGATION

Apparently, the atomization of special issues has never been seriously urged for civil trials in Texas other than in death and injury cases,¹⁷ not even in cases of intentional torts.¹⁸ On another occasion,

McDONALD, TEXAS CIVIL PRACTICE § 12.06.2 (rev. 1970); Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577, 583-86 (1973); cf. Pope, *Broad and Narrow Issues*, 26 TEX. B.J. 921, 921-22, 978 (1963) (rule 279). See generally Masterson, *Preparation and Submission of Special Issues in Texas*, 6 SW. L.J. 163 (1952); see also Comment, *Ultimate or Controlling Issues in Texas: Special Issue Submissions*, 25 TEXAS L. REV. 391 (1947).

11. See *Page v. St. Louis S.W. Ry.*, 349 F.2d 820, 826-27 (5th Cir. 1965). In *Page* Chief Judge John R. Brown observed, "All of these collateral devices so dear to the heart of Texas bred and Texas trained lawyers immersed in its complex system of special issue submission . . . leads only to confusion and a proliferation of metaphysical terms scarcely understandable to the most astute scholar." *Id.* at 826-27.

12. See Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577, 580-82 (1973).

13. 134 Tex. 360, 368, 135 S.W.2d 79, 83 (1940).

14. See *Jack Cane Corp. v. Gonzales*, 410 S.W.2d 953, 954 (Tex. Civ. App.—San Antonio 1967, no writ); G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 35 (1959); 3 R. McDONALD, TEXAS CIVIL PRACTICE § 12.06.1 (rev. 1970); Green, *Identification of Issues in Negligence Cases*, 26 SW. L.J. 811, 811 (1972); 10 TEXAS L. REV. 217, 220-21 (1932) (listing four different views about what constitutes a single issue). See generally Comment, *Ultimate or Controlling Issues in Texas: Special Issue Submissions*, 25 TEXAS L. REV. 391 (1947).

15. TEX. R. CIV. P. 277.

16. Some of the non-negligence precedents are discussed in Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 SW. L.J. 577, 583-86 (1973).

17. See Address by W. James Kronzer, 1978 Judicial Section Conf. (Sept. 27, 1978):

examples of broad submissions of jury questions were catalogued in such wide-ranging actions as those involving common law marriage, child custody, condemnation, wrongful collection efforts, divorce, violation of city ordinances, adverse possession, and intentional torts.¹⁸

A number of recent decisions confirm the long-standing practice in non-negligence cases that respects the discretion of trial judges to submit broad questions. Typical of the decisions handed down shortly before the revision of rule 277 are *Haas Drilling Co. v. First National Bank*²⁰ and *Scott v. Ingle Brothers Pacific, Inc.*²¹ In *Haas Drilling*, First National Bank in Dallas was sued upon the bank's alleged oral promise, through its officer, to assume as its own debt and pay the note and account of B & B Gas & Petroleum, Inc. The court of civil appeals reversed a judgment for the plaintiff because it regarded an issue as multifarious.²² In rejecting the holding that the issue was multifarious, the supreme court recognized that more latitude is permitted in non-negligence cases than in negligence cases and pointed out that the intermediate court had relied upon negligence cases only.²³ The court compared negligence precedents that compelled narrow submissions with the non-negligence cases that accorded latitude in questions to the jury and noted, as an example, that the limitations issues in land cases are ordinarily multifariously submitted.²⁴ In *Scott v. Ingle Brothers Pacific, Inc.*,²⁵ a suit for breach of an employment contract, the supreme court

"[I]t nonetheless appears that most of the 'hassle' centers about those [death and injury] cases."

18. See *Grieger v. Vega*, 153 Tex. 498, 504, 271 S.W.2d 85, 88 (1954); *Fulmer v. Thompson*, 573 S.W.2d 256, 258-59 (Tex. Civ. App.—Tyler 1978, writ ref'd n.r.e.).

19. *Pope & Lowerre, Revised Rule 277—A Better Special Verdict for Texas*, 27 Sw. L.J. 577, 583-86 (1973); see *Great Am. Ins. Co. v. Sharpstown State Bank*, 460 S.W.2d 117, 121 (Tex. 1970) (agent's apparent authority); *Brown v. Payne-Ladewig, Inc.*, 568 S.W.2d 159, 160 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.) (breach of contract).

20. 456 S.W.2d 886 (Tex. 1970).

21. 489 S.W.2d 554 (Tex. 1972).

22. *First Nat'l Bank v. Haas Drilling Co.*, 446 S.W.2d 29, 35 (Tex. Civ. App.—Dallas 1969), *rev'd*, 456 S.W.2d 886 (Tex. 1970). The issue was, "Do you find . . . that on or about March 1, 1966, the Defendant, First National Bank in Dallas, by and through its vice-president, H.M. Meredith, agreed to assume payment as its own debt the indebtedness then owing to Haas Drilling Co., Inc. by B & B Gas & Petroleum, Inc.?" *Haas Drilling Co. v. First Nat'l Bank*, 456 S.W.2d 886, 888 (Tex. 1970).

23. *Haas Drilling Co. v. First Nat'l Bank*, 456 S.W.2d 886, 889 (Tex. 1970); see *Blevins v. Baker*, 511 S.W.2d 375, 378 (Tex. Civ. App.—Austin 1974, no writ) (more liberal grouping of facts into single issue).

24. *Haas Drilling Co. v. First Nat'l Bank*, 456 S.W.2d 886, 889 (Tex., 1970).

25. 489 S.W.2d 554 (Tex. 1972).

approved the following issue against the objection that it was global: "Do you find . . . that H. L. Scott was discharged by the Defendant without good cause?"²⁶ There was an accompanying definition of "good cause for discharge." The court, relying upon *Haas Drilling*, held that the requested issues inquiring into specific acts that were relevant to Scott's firing need not be submitted.²⁷

With such cases as *Haas Drilling* and *Ingle Brothers* appearing so close to the effective date of the revisions to rule 277, the non-negligence charges have undergone little change since September 1, 1973. Typical of the cases approving broad issues in post-September 1, 1973, non-negligence cases is *Jon-T Farms, Inc. v. Goodpasture, Inc.*²⁸ in which the court of civil appeals upheld the submission of the following as the controlling issue: "Did Jon-T Farms, Inc., breach and/or repudiate Contract No. 16,811 (\$2.70)?"²⁹ In another case, concerning a libel action, the trial court, instead of asking a question about each particular writing, asked: "Do you find . . . that the Defendant Railroad stated in writing that Joe Wherry was a narcotic user in violation of Railroad Rule G?"³⁰ The issue was approved by virtue of revised rule 277.³¹ The submission of all elements of fraud in a single issue was approved in *Shasteen v. Mid-Continent Refrigerator Co.*³² The court, relying upon revised rule 277, wrote that "generality or 'multifariousness' alone is no longer a ground for reversal."³³ A nuisance action against the city of Lubbock complaining of its operation of a sanitary landfill near plaintiff's property was submitted, with approval, in a single issue with an accompanying definition of the term "nuisance."³⁴ *Texas Gulf*

26. *Id.* at 557.

27. *Id.* at 557.

28. 554 S.W.2d 743 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.); see *Lambert v. H. Molsen & Co., Inc.*, 551 S.W.2d 151, 153-54 (Tex. Civ. App.—Waco 1977, writ ref'd n.r.e.) (no error in refusing to submit two specific issues concerning custom and usage of trade rather than one broad issue).

29. *Jon-T Farms, Inc. v. Goodpasture, Inc.*, 554 S.W.2d 743, 750 (Tex. Civ. App.—Amarillo 1977, writ ref'd n.r.e.).

30. *Houston B. & T. Ry. v. Wherry*, 548 S.W.2d 743, 749 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.).

31. *Id.* at 750; cf. *Fitzjarrald v. Panhandle Publishing Co.*, 149 Tex. 87, 92, 228 S.W.2d 499, 502 (1950) ("Was the newspaper article . . . published and circulated by defendant . . . with 'actual malice' toward plaintiff . . . ?")

32. 517 S.W.2d 437, 439 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

33. *Id.* at 439.

34. See *City of Lubbock v. Tice*, 517 S.W.2d 428, 429-30, 431 (Tex. Civ. App.—Amarillo 1974, no writ). The issue was, "Do you find . . . that the City of Lubbock in its operation of

*Sulphur Co. v. Gladys City Co.*³⁵ was a suit against Texas Gulf Sulphur for its alleged failure to perform its obligation to use due diligence in developing sulphur production. Against the attack that the issue submitted by the trial court was global, overbroad, and a general charge, the court recognized as the controlling issue: "[D]o you find that the Defendant failed to conduct its sulphur mining operations on Gladys City Tract 41 with due diligence?"³⁶ Justice Keith for the court of civil appeals reviewed the supreme court precedents and again called attention to the divergent rules that the supreme court had adopted, saying: "The so-called 'broad form' of submission in the non-negligence field has been widely used and specifically approved by our Supreme Court."³⁷

The supreme court's most recent approval of the broad submission is its recommendation in *Baker v. Goldsmith*³⁸ that two issues be joined as one issue in a bill of review case. The earlier case of *Alexander v. Hagedorn*,³⁹ had listed the issues for a bill of review trial as (1) a meritorious defense, (2) that the party was prevented from making by the fraud, accident, or wrongful act of the opposite party, (3) unmixed with any fault or negligence of his own.⁴⁰ The court in *Baker*, suggesting the procedures on remand, stated that the second and third items "may be submitted in one broad issue under Rule 277."⁴¹

As these examples illustrate, courts had few problems in submitting what was then characterized as "broad" issues in non-negligence cases prior to September 1, 1973; and, as was expected, the revision of rule 277 brought little or no change in that practice. This article now turns to the submission of the charge in the negligence case in an attempt to determine if the revision has accomplished the expected changes.

the landfill in question constitutes a nuisance, as that term is herein below defined, to Lloyd (sic) Tice's property?" *Id.* at 429.

35. 506 S.W.2d 281 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

36. *Id.* at 288.

37. *Id.* at 289; see *City of Houston v. Lurie*, 148 Tex. 391, 398-99, 224 S.W.2d 871, 876 (1949) (building being a fire hazard); *Howell v. Howell*, 147 Tex. 14, 17, 210 S.W.2d 978, 980 (1948) (divorce grounded on cruel treatment); *Air Force Village Foundation, Inc. v. Northside Independent School Dist.*, 561 S.W.2d 905, 908, 909-10 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.) (tax exemption as public charity).

38. 582 S.W.2d 404 (Tex. 1979).

39. 148 Tex. 565, 226 S.W.2d 996 (1950).

40. *Id.* at 568-69, 226 S.W.2d at 998.

41. *Baker v. Goldsmith*, 582 S.W.2d 404, 409 (Tex. 1979).

BROAD ISSUES MAY BE USED IN NEGLIGENCE ACTIONS

The charge in today's negligence action should be a relatively simple document. Only three months after the effective date of the revisions to rule 277, the Texas Supreme Court, in *Mobil Chemical Co. v. Bell*,⁴² actually articulated a recommended form for the broad submission of a negligence case.⁴³ There were two plaintiffs; yet, the supreme court's example for the charge on remand included only seven issues.⁴⁴ Although the case was not tried as a comparative negligence case, the court's opinion still shows the simplicity of a negligence charge. The issues that the court suggested were:

42. 517 S.W.2d 245 (Tex. 1974).

43. *Id.* at 256-57. Other recent cases approving the use of broad issues in personal injury cases include:

Federal Employers Liability Act: Do you find that the railroad was negligent "in failing to provide plaintiff with a reasonably safe place in which to do his work?" *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 281 (Tex. 1978) (on motion for rehearing).

Intersection Collision: "Do you find . . . that the traffic signal at Avenue C and 7th Street in Bay City, Texas, was in a malfunctioning condition on the occasion in question?" *State v. Norris*, 550 S.W.2d 386, 387 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.).

Negligence: "Do you find . . . that on the occasion in question an agent, servant or employee of Southern Steel Company failed to properly latch the tailgate as would have been done by a person of ordinary prudence in the exercise of ordinary care under the same or similar circumstances?" *Southern Steel Co. v. Manning*, 513 S.W.2d 273, 276 (Tex. Civ. App.—Waco 1974, no writ); see *Allright, Inc. v. McGee*, 506 S.W.2d 339, 340 (Tex. Civ. App.—Houston [1st Dist.] 1974, writ ref'd n.r.e.) (proper care of property by bailee).

Medical Malpractice: "Do you find . . . that Dr. Billy H. Lee was negligent in his diagnosis and/or medical care and treatment of Joe Bert Andrews, Jr., deceased, after the operation in question?" *Lee v. Andrews*, 545 S.W.2d 238, 247 (Tex. Civ. App.—Amarillo 1977, writ dismissed). The application for writ of error was originally granted in this case. It was subsequently dismissed as moot.

Product Design: "Do you find . . . that the Model 3030 IN Range manufactured by Magic Chef, Inc. was defectively designed at the time it was sold to Park North Village?" *Magic Chef, Inc. v. Sibley*, 546 S.W.2d 851, 855 n.2 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.). The objection was that the question should have been whether or not the valve, rather than the whole range, was defectively designed. *Id.* at 855.

In *Turner v. General Motors Corp.*, 584 S.W.2d 844, 847 n.1 (Tex. 1979), the court stated that the correct issue and instruction in design cases are:

Do you find from a preponderance of the evidence that at the time the [product] in question was manufactured by [the manufacturer] the [product] was defectively designed?

By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.

Answer: "We do" or "We do not."

Id. at 847, n.1.

Slip and Fall: "Do you find . . . that on the occasion in question an employee of defendant had created a slippery condition on the hospital kitchen floor where plaintiff fell?" *Red Top, Inc. v. McNiel*, 458 S.W.2d 826, 827 (Tex. Civ. App.—Ft. Worth 1970, no writ).

44. See *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 248, 256-57 (Tex. 1974).

1. Did Edward Bell sustain an injury while on the premises of the defendant on or about April 5, 1966?
2. Did J. A. Hurley sustain an injury while on the premises of the defendant on or about April 5, 1966?
3. Was the escape of the acetic acid on the occasion in question due to the negligence of defendant, its agents, servants, or employees?
4. Was such negligence, if you have so found, a proximate cause of the injuries, if any, to Edward Bell?
5. Was such negligence, if you have so found, a proximate cause of the injuries, if any, to J. A. Hurley?
6. Damages as to Edward Bell?
7. Damages as to J. A. Hurley?⁴⁵

The sample suggested by the court included broad issues concerning each plaintiff asking if he had sustained the injury, whether there was negligence, if the negligence was a proximate cause, and whether he sustained damages. Of course, the defendant also is entitled to issues inquiring about the plaintiff's contributory negligence and proximate cause; and, in a comparative negligence case, the negligence must be compared. The significance of *Mobil Chemical* is that it removed the uncertainty regarding broad submission of the negligence issue as the controlling issue and stated that it is not necessary to break that question into its many specific grounds.⁴⁶ The decision was a departure from and a rejection of the rule in negligence cases that had compelled a granulation of the special issues. It was the death knell for the system of issue submission that began with *Fox v. Dallas Hotel Co.*⁴⁷ The supreme court probably should have listed its own restrictive decisions that were no longer binding or helpful as rules of procedure in the submission of negligence cases.⁴⁸

45. *Id.* at 256-57. The words "due to," found in issue 3, could be improved upon because they suggest the causation which is asked about in issue 4.

46. *See id.* at 252, 255.

47. 111 Tex. 461, 240 S.W. 517 (1922). Compare *id.* at 475-76, 240 S.W. at 521-22 with *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 252 (Tex. 1974).

48. Among those cases that appear to have been buried are: *Barclay v. C.C. Pitts Sand & Gravel Co.*, 387 S.W.2d 644 (Tex. 1965); *Kainer v. Walker*, 377 S.W.2d 613 (Tex. 1964); *Agnew v. Coleman Elec. Coop., Inc.* 153 Tex. 587, 272 S.W.2d 877 (1954); *Roosth & Genecov Prod. Co., Inc. v. White*, 152 Tex. 619, 262 S.W.2d 99 (1953); *Solgaard v. Texas & N.O.R.R.*, 149 Tex. 181, 229 S.W.2d 777 (1950); *City of Fort Worth v. Lee*, 143 Tex. 551, 186 S.W.2d 954 (1945); *Walgreen-Texas Co. v. Shivers*, 137 Tex. 493, 154 S.W.2d 625 (1941); *Wichita Falls & O. Ry. v. Pepper*, 134 Tex. 360, 135 S.W.2d 79 (1940); *Fox v. Dallas Hotel Co.*, 111 Tex. 461, 240 S.W. 517 (1922); *Coleman v. Texas & Pac. Ry.*, 241 S.W.2d 308 (Tex. Civ. App.—Dallas 1951, writ ref'd); *Weidmer v. Stott*, 48 S.W.2d 389 (Tex. Civ. App.—Fort Worth 1932, writ ref'd). *See generally* 42 TEXAS L. REV. 931 (1964); 8 S. TEX. L.J. 142 (1966).

The court went out of its way in *Mobil Chemical* to advise Texas practitioners that rule 277 had revised the charge in negligence cases when it stated,

The rule means that in an ordinary negligence case, where several specific acts of negligence are alleged and evidence as to each is introduced, the submission of a broad issue inquiring generally whether the defendant was negligent is not error and is not subject to the objection that the single issue inquires about several elements or issues.⁴⁹

The bench and bar, however, were slow to accept what the court had stated. One writer's comment was, "If this case really means what it says, we may be headed toward global submission of negligence issues" ⁵⁰ The point, of course, is exactly that; global submission is now an accepted practice by virtue of rule 277.

Attorneys who interpret *Mobil Chemical* as applying only to cases of *res ipsa loquitur* are misconstruing the opinion. The court did indeed write about *res ipsa loquitur* in *Mobil Chemical*, but not exclusively so. The opinion closed with a section titled "On Remand" in which guidelines were set forth for a proper retrial of the case.⁵¹ The court's recommended charge included the broad negligence issue; it was not a recommended charge on *res ipsa* alone. The opinion stated that the broad issue was proper even when specific acts are alleged and the evidence supports each of them.⁵² The court merely restated in its opinion the precept of rule 277 that "[i]t shall not be objectionable that a question is general or includes a combination of elements or issues."⁵³

How broadly a judge may submit a question to the jury was put to a severe test by the charge in *Members Mutual Insurance Co. v. Muckelroy*.⁵⁴ The charge used in *Muckelroy* has been called a Sto-

49. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974).

50. Morris, *Special Issues and Instructions—Current Problems*, in 1 STATE BAR OF TEXAS ADVANCED CIVIL TRIAL COURSE A-23 (Jan. 1978).

51. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 254-56 (Tex. 1974).

52. *Id.* at 255.

53. TEX. R. CIV. P. 277; see *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974).

54. 523 S.W.2d 77 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). The first issue of the charge was:

SPECIAL ISSUE No. 1

Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the collision made the basis of this suit:

ANSWER: (a) The defendant, Verdie Webber.

vall charge after Judge Tom Stovall who had used the form in more than one hundred cases before it was tested in *Muckelroy*.⁵⁵ The objection to the *Muckelroy* charge was that the question was global.

The negligence special issue found in *Muckelroy*⁵⁶ went beyond *Mobil Chemical's* suggested broad charge because, in a single issue, the court inquired about both negligence and proximate cause. Justice Evans, for the court of civil appeals, reviewed the strict rule prior to the 1973 revision and quoted the supreme court's statement in *Mobil Chemical* that a court may ask a broad issue inquiring generally whether the defendant was negligent when several specific acts of negligence are alleged and evidence is introduced on each.⁵⁷ The court went on to hold that "the trial court is not precluded from submitting issues broadly under Rule 277 even though specific acts or omissions comprising the elements of such issue have been specifically plead."⁵⁸ On motion for rehearing, the court addressed the

(b) The plaintiff, Jasper Muckelroy.

(c) Both.

"(a)"

Id. at 79. Other charges similar to that found in *Muckelroy* have reached the supreme court for review. See *Pate v. Southern Pac. Transp. Co.*, 567 S.W.2d 805, 809 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref'd n.r.e.); *Herrera v. Balmorhea Feeders, Inc.*, 539 S.W.2d 84, 85 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

55. Some judges add to the first issue of the Stovall charge an additional alternative answer, designated as "Neither" or "No one." Judges who omit that option reason that it is a prohibited alternative under *Yarborough v. Berner*, 467 S.W.2d 188, 192-93 (Tex. 1971), which eliminated an issue on unavoidable accident. They reason further that both the plaintiff and defendant are free to argue, and do argue, that their respective clients were not negligent. Jurors who are unable to find any negligence on the part of any party, will leave the answer space blank. There is no compulsion that jurors make a finding of negligence, and a verdict that is otherwise complete, in which jurors fail to find negligence by anybody, may be received and may be the basis for a judgment denying any recovery.

Muckelroy was not tried under article 2212a, but in a comparative negligence case, the next issue would be along this line:

If your answer to Special Issue No. 1 is "c," and only in that event, then answer:

SPECIAL ISSUE NO. 2

What percentage of the negligence that caused the occurrence in question do you find from a preponderance of the evidence attributable to each of the parties found by you to have been negligent? Answer by stating the percentage, if any, opposite each name:

Defendant,	_____	___%
Plaintiff,	_____	___%
	Total	100%

56. *Members Mutual Ins. Co. v. Muckelroy*, 523 S.W.2d 77, 79 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

57. *Id.* at 81; see *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974).

58. *Members Mutual Ins. Co. v. Muckelroy*, 523 S.W.2d 77, 82 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.).

situation in which a party pleads specific acts of negligence and introduces evidence of other possible acts not pleaded. The court concluded that “an instruction limiting the jury’s consideration to only those acts of negligence pleaded might properly be given by the trial court in a appropriate situation.”⁵⁹ The significance of *Muckelroy* is that it confirmed the dicta in *Mobil Chemical* that rule 277 meant what it said; the supreme court refused the writ of error indicating “no reversible error.” The *Mobil Chemical* and *Muckelroy* charges are important because they reflect a renewed judicial tolerance by trial and appellate courts for broad issues in negligence cases akin to that long seen in the non-negligence cases.⁶⁰

In *Scott v. Atchison, Topeka & Santa Fe Ry.*⁶¹ the supreme court again considered the breadth of special issues in personal injury cases. Allen Scott, a brakeman for the defendant railroad, sued for injuries he had sustained when a freight train on which he was riding derailed. Scott testified that he was thrown around inside the engine and a door beat upon his back because of a defective latch that would not hold it closed. The trial court submitted only two negligence issues, each of which was followed by an inquiry into proximate cause. Special Issue No. 1 broadly asked whether “‘on the occasion in question the railroad was negligent.’”⁶² Special Issue No. 3 specifically asked whether “‘the door latch on the locomotive . . . was not in proper and safe condition on the occasion in question.’”⁶³ Upon an affirmative answer to the broad issue and a

59. *Id.* at 83.

60. A more recent example of a broad negligence charge is found in *Pate v. Southern Pac. Transp. Co.*, 567 S.W.2d 805 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref’d n.r.e.):

Whose negligence, if any, do you find from a preponderance of the evidence proximately caused the death of Carl Pate on the occasion in question?

Answer by stating one of the following choices, writing out your choice in the blank below:

- a. Southern Pacific Transportation Company,
- or
- b. Theobald Trucking Company,
- or
- c. Carl Pate,
- or
- d. Any combination of Southern Pacific Transportation Company, Theobald Trucking Company, and Carl Pate,
- or
- e. No one.

Id. at 809; see *Herrera v. Balmorhea Feeders, Inc.*, 539 S.W.2d 84, 85 (Tex. Civ. App.—El Paso 1976, writ ref’d n.r.e.).

61. 572 S.W.2d 273 (Tex. 1978).

62. *Id.* at 276 n.2.

63. *Id.* at 276 n.2.

negative finding to the narrow one, the trial court rendered judgment for the plaintiff. The court of civil appeals reversed the judgment and remanded the cause to the trial court, and the supreme court affirmed.⁶⁴

The supreme court's opinion quickly generated a number of professional articles and discussions posing significant questions. Did the opinion in *Scott* take back what the supreme court had stated in *Mobil Chemical* and had permitted under the broader *Muckelroy* charge?⁶⁵ Did the opinion throw the practice back to the narrow issues required by *Fox v. Dallas Hotel Co.*⁶⁶ by resurrecting the pre-1973 "distinctly and separately" requirement of rule 277 in a limiting instruction appended to a broad negligence issue? Is harm presumed if the limiting instruction omits *any* pleaded fact that has no proof or omits some unpleaded fact about which there is some proof? In our opinion, the supreme court's opinion stands for a negative answer to each of the questions.

The pleadings, proof at trial, objections to the charge, and the court's charge in *Scott* undergird the court's reasons for affirming the court of civil appeal's reversal while still expressly reaffirming its commitment to *Mobil Chemical*. *Scott* had alleged that: (A) the defendant railroad failed to provide a reasonably safe place in which to do his work; (B) the track and supporting bed and ties were faulty in construction, materials, and maintenance; (C) the defendant violated article 6328⁶⁷ by failing to construct a roadbed with the necessary culverts or sluices to drain the land; and (D) the defendant violated the Boiler Inspection Act⁶⁸ because the engine was not safe.⁶⁹ In addition to those acts or omissions alleged, one who examines the whole record in *Scott* discovers that the plaintiff developed some evidence, certainly more than a scintilla, from his own witnesses and the cross-examination of defendant's witnesses that: (E) the defendant's track inspector did not ride ahead of the train to inspect the tracks after the rain; (F) the defendant did not obtain

64. *Atchison, T. & S.F. Ry. v. Scott*, 551 S.W.2d 740, 743 (Tex. Civ. App.—Beaumont 1977), *aff'd*, 572 S.W.2d 273 (Tex. 1978).

65. It should be remembered that the writ of error in *Muckelroy* was refused with the designation "n.r.e." For a discussion of eight possible explanations for the "writ ref'd n.r.e." designation, see Wilson, *Hints on Precedent Evaluation*, 24 TEX. B.J. 1037 (1961).

66. 111 Tex. 461, 240 S.W. 517 (1922).

67. TEX. REV. CIV. STAT. ANN. art. 6328 (Vernon 1926).

68. 45 U.S.C. § 23 (1970).

69. *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 275 (Tex. 1978).

radar or other storm information; (G) the defendant did not heed the storm warnings it had received; (H) the defendant did not give radio warnings to the engineer in time to stop at the washout; (I) the train was going too fast; (J) the elevation of the tracks was so low that the flood waters flowed over the tracks and washed away the soil; and (K) the engineer delayed in braking the train.

The railroad defended on the ground that on the evening of the accident a locally unprecedented rainstorm had occurred between 5:00 and 7:30 P.M. when more than six inches of rain fell, with more than half of that amount falling in a period of thirty minutes. The accident occurred about 9:00 P.M. The defendant railroad had pleaded the defense of Act of God and produced considerable evidence from several witnesses concerning the storm.⁷⁰

The defendant railroad made two objections to plaintiff's broad issue that asked whether or not the railroad was negligent on the occasion in question. The objections were first, that Scott had not pleaded a number of acts and omissions about which there was some evidence; and second, that there was no evidence to support some of the facts that the plaintiff had alleged.⁷¹ The supreme court's opinion quoted only the conclusory statements of the objections, but the transcript shows that the defendant's objections actually specified the allegations that the plaintiff had pleaded but failed to prove. The objection also asked that the issue be limited to acts or omissions about which there was some proof. The objections, however, did not specifically point to the unpleaded acts. At that stage of the trial, Scott's case, as pleaded, was in a state of shambles. He neither requested nor did the trial court submit, issues pertaining to allegations (A), (B), or (C) as outlined above. The court did submit a narrow issue pertaining to allegation (D), which the jury refused to answer favorably for the plaintiff. The court, however, by the submission of the broad negligence issue, permitted the jury to make an affirmative finding for the plaintiff upon the basis of any or all of allegations (A), (B), and (C), as well as upon any or all of facts (E), (F), (G), (H), (I), (J), and (K), not one of which the plaintiff Scott had alleged.

The supreme court affirmed the reversal of the judgment for the plaintiff because of what it called "the wide variance between the pleadings and unpled facts and circumstances from which the jury

70. *Id.* at 279.

71. *Id.* at 276-77.

could have inferred that the railroad was negligent."⁷² The court found error in the variance and relied upon the provisions of rules 277⁷³ and 279.⁷⁴ In that posture, the court suggested that the way to submit a case when the pleadings lag behind or greatly outdistance a party's evidence is to include the relevant acts and omissions within the actual words of the issue or to submit the broad negligence issue accompanied by an instruction limiting the jury's consideration to the listed acts or omissions.⁷⁵ A similar suggestion had been made in *Muckelroy*.⁷⁶ In his motion for rehearing, plaintiff Scott complained that the court, by requiring the limiting instruction to accompany the broad issue, was departing from its previous approval of the use of broad issues. The court responded:

On the contrary, we recognized that Rule 277 gives the trial court discretion "to submit separate questions with respect to each element of a case or to submit issues broadly."

[T]he court said in *Mobil*, and we reaffirm, that:

The rule (Rule 277) means that in an ordinary negligence case, where several specific acts of negligence are alleged and evidence as to each is introduced, the submission of a broad issue inquiring generally whether the defendant was negligent is not error and is not subject to the objection that the single issue inquires about several elements of issues.⁷⁷

In approving the broad form of the issue, the court also called attention to the broad issue common to F.E.L.A. cases, an issue that asks whether a railroad failed to provide the plaintiff with a reasonably safe place in which to do his work, and stated that this broad issue

72. *Id.* at 277.

73. TEX. R. CIV. P. 277. The rule states, in pertinent part, "In all jury cases the court . . . shall submit the cause upon the special issues . . . that are raised by the written pleadings and the evidence in the case"

74. *Id.* 279. The rule states, in pertinent part, "When the court submits a case upon special issues, he shall submit the controlling issues made by the written pleadings and the evidence"

75. *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 277-78 (Tex. 1978). The supreme court suggested the following form of limiting instruction upon retrial of the case:

In your determination of the above question you shall consider only whether the railroad company was negligent in failing to have necessary culverts or sluices at or near Bridge 46.3, or [here listing any other acts or omissions raised by the pleadings and the evidence upon the new trial].

Id. at 278.

76. *See Members Mutual Ins. Co. v. Muckelroy*, 523 S.W.2d 77, 83 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.) (on motion for rehearing).

77. *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 282 (Tex. 1978) (on motion for rehearing); *see Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 255 (Tex. 1974).

would have been approved had it been requested.⁷⁸

A variance of the proof from the pleadings has not been a frequent basis for reversals because of the necessity to prove harmful error. To be fatal, a variance must be substantial, misleading, and a prejudicial departure from the pleadings.⁷⁹ *Scott* was not an instance of casual, slight, and immaterial matter that could be sifted from a post-trial examination of the statement of facts to show that the proof was different from the pleadings. The “wide variance” in *Scott* was substantial and grievous. By his petition, Scott had placed the defendant on notice of three pleaded matters that he either did not prove or on which he had failed to request an issue; he had failed to get a jury finding on his fourth and only other pleaded matter; and he had given no pleading notice of seven other matters about which he had introduced evidence. Therefore, the jury’s finding of broad negligence most likely was grounded upon either unpleaded or unproved facts. Harm will not be presumed by reason of a minor pleading defect, but the harm in *Scott* was not a minor defect when one views the nature of the error, the degree of the vice, and the record as a whole.⁸⁰

Pate v. Southern Pacific Transportation Co.,⁸¹ decided just before the supreme court handed down its opinion in *Scott*, approved a broad issue without a limiting instruction.⁸² Carl Pate, forced to stop his car on a railroad track when defendant Theobald Trucking Company’s driver failed to stop at a stop sign, died from injuries resulting from Southern Pacific’s train pushing his car into him as he was running away. The trial court submitted a broad Stovall-type charge in which the jury was given five choices for determining the outcome of the case. The defendant’s objections that the issue was overbroad, indefinite, confusing, and invited speculation were overruled. Subsequently, the trial court rendered judgment for the plaintiffs. The court of civil appeals, however, reversed and rendered judgment against Southern Pacific.⁸³ Defendant Southern Pacific, on motion for rehearing, called the court’s attention to the

78. *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 281 (Tex. 1978) (on motion for rehearing).

79. *Stone v. Lawyers Title Ins. Corp.*, 554 S.W.2d 183, 187 (Tex. 1977).

80. See *Standard Fire Ins. Co. v. Reese*, 584 S.W.2d 835, 839-41 (Tex. 1979); *Ford v. Carpenter*, 147 Tex. 447, 451-52, 216 S.W.2d 558, 560-61 (1949).

81. 567 S.W.2d 805 (Tex. Civ. App.—Houston [14th Dist.] 1977, writ ref’d n.r.e.).

82. *Id.* at 809.

83. *Id.* at 809.

recent *Scott* opinion and asked for a reversal on the ground that the jury had received no limiting instruction. The court of civil appeals wrote on rehearing and acknowledged that the plaintiffs had alleged a number of specific acts of negligence without producing proof on some of them.⁸⁴ The court held, however, that although the defendant had objected to the broad issue, the failure to give a charge that limited the negligence considerations to the facts pleaded was harmless error without proof that the jurors knew what was in the pleadings.⁸⁵ The court concluded that there was no showing that anything had been injected into the case beyond the proof that the jurors had heard and upheld the judgment.⁸⁶ Upon application, the supreme court refused the writ of error, no reversible error.

Care at the charge stage, but before submission of the case to the jury, can often avoid any need for a limiting instruction appended to a broad issue, even if there is a substantial variance between pleadings and proof. The rules of civil procedure prescribe a manner for curing the variance. Rule 66⁸⁷ permits a trial judge to grant leave to amend pleadings even when there is no trial by consent, as when evidence is admitted over objection of counsel. The permission to file the amendment is, of course, addressed to the discretion of the trial judge.⁸⁸ Rule 67,⁸⁹ on the other hand, permits a trial amend-

84. *Id.* at 809 (on motion for rehearing).

85. *Id.* at 809-10 (on motion for rehearing).

86. *See id.* at 809-10 (on motion for rehearing).

87. TEX. R. CIV. P. 66. The rule states:

If evidence is objected to at the trial on the ground that it is not within the issues made by the pleading, or if during the trial any defect, fault or omission in a pleading, either of form or substance, is called to the attention of the court, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that the allowance of such amendment would prejudice him in maintaining his action or defense upon the merits. The court may grant a postponement to enable the objecting party to meet such evidence.

Id.

88. *Westinghouse Elec. Corp. v. Pierce*, 153 Tex. 527, 531-32, 271 S.W.2d 422, 424-25 (1951); *Vermillion v. Haynes*, 147 Tex. 359, 365-66, 215 S.W.2d 605, 609 (1948); 2 R. McDONALD, TEXAS CIVIL PRACTICE § 8.04 (1970).

89. TEX. R. CIV. P. 67. The rule states:

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. In such case such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made by leave of court upon motion of any party at any time up to the submission of the case to the Court or jury, but failure so to amend shall not affect the result of the trial of these issues; provided that written pleadings, before the time of submission, shall be necessary to the submission of special issues, as is provided in Rules 277 and 279.

Id.

ment to conform the pleadings to the issues that are tried without objection. The unpleaded evidence in *Scott* had been introduced without objection. Had *Scott's* attorney moved the court to permit the filing of an amended pleading, the variance between pleading and proof may have been avoided. When *Scott* did not pursue that course, however, the defendant railway avoided a trial by consent by its objections to the charge.⁹⁰

Trial judges who insist upon and carefully apply rule 274 can eliminate most errors with respect to the scope of a *Scott*-type limiting instruction that accompanies a broad issue, whether it be that of the plaintiff or the defendant. That rule says that “[a] party objecting to a charge must point out *distinctly* the matter to which he objects and the grounds of his objection” and also that “[a]ny complaint as to an instruction, issue, definition or explanatory instruction, on account of any defect, omission, or fault in pleading, shall be deemed waived unless *specifically* included in the objections.”⁹¹ It is distinct objections at that stage of the trial that should disclose any variances so that the judge can either permit or deny amendments to the pleadings and also formulate the limiting instruction to the broad issue upon the basis of the objections. Neither trial nor appellate judges should countenance broad and obscure objections to an issue that hide or cover an unpleaded matter or a pleaded but unproved matter. Objections to a broad issue should list each act or omission that is outside of the pleadings or is unproved. The objector’s failure to comply with the demands of rule 274 will waive his objection. Insistence by trial and appellate judges upon compliance with rule 274 will resolve the problems a trial judge might have in conforming the limiting instruction to include the items listed in the objections that were not tried by consent and not included in a trial amendment. In this context, a limiting *Scott*-type instruction in a personal injury action is no more onerous nor fraught with danger of reversible error than any other trial problem that has its genesis in a variance of the proof from the pleadings.

A trial judge invites unnecessary problems by submitting either

90. See *Harkey v. Texas Employers' Ins. Ass'n*, 146 Tex. 504, 508-09, 208 S.W.2d 919, 922 (1948); *Travelers Ins. Co. v. Sides*, 403 S.W.2d 519, 521 (Tex. Civ. App.—Dallas 1966, writ ref'd n.r.e.); *Missouri-K. T. R.R. v. Franks*, 379 S.W.2d 415, 416 (Tex. Civ. App.—Eastland 1964, writ ref'd n.r.e.); *United Benefit Fire Ins. Co. v. Stock*, 344 S.W.2d 941, 943 (Tex. Civ. App.—Houston 1961, no writ); 2 R. McDONALD, TEXAS CIVIL PRACTICE § 5.18 (1970).

91. TEX. R. CIV. P. 274 (emphasis added); see *Davis v. Campbell*, 572 S.W.2d 660, 663 (Tex. 1978); 2 R. McDONALD, TEXAS CIVIL PRACTICE § 5.18 (1970).

the plaintiff's or defendant's case both broadly and narrowly as happened in *Scott*. Logically, the broad negligence issue includes all of its narrow parts. The submission of the case by both methods is not only an unfair double submission; it also invites the danger of conflicting answers. In *Scott*, the defendant railroad made the double submission argument in its brief to the court of civil appeals.⁹²

A party is not entitled to the best of both worlds, but there may be exceptions even to this rule. For example, one who relies upon negligence per se either as a plaintiff or a defendant may be entitled to the specific issue about the asserted violation of the law. That party also may have other distinct claims that he wants submitted in a broad issue. The broad negligence issue may embrace the facts of the negligence per se claim. While that problem has not yet been presented, it seems that the negligence per se issue could be submitted as well as the broad negligence issue, but the instruction on the broad issue in that case would be one that *excludes* the specific negligence per se fact.

A lesson that all trial judges and lawyers should learn from *Scott* is that routinely and as a standard part of a trial, careful judgments must be made just prior to the submission of the issues to a jury so that the pleadings may be coordinated with the evidence produced at trial. Trial judges should insist upon "distinct" objections to broad issues, specifying any variances in pleadings and proof. Upon disclosure of distinct variances, judges should either make judgments about curative trial amendments or carefully word the limiting instruction. The luxury that one might enjoy in a post-trial search of a statement of facts to locate variances will be avoided when it is recognized that it is the burden of the objector to an issue to locate the variances before submission to the jury.

One important distinction between the practice permitted under *Scott* and that required by *Fox v. Dallas Hotel Co.* is that a single answer to a single broad negligence issue is approved by the decision in *Scott*. Different jurors may for different reasons arrive at the finding, *vel non*, of negligence. Under *Fox* the separate facets of negligence had to be submitted separately and distinctly and all jurors had to agree upon the specific reason for the negligence. Additionally, since the revision of rule 277 in 1973, a number of specific defenses have been abolished as inferential rebuttal issues, as duplications of other concepts, or for other reasons. Simplification of

92. See Brief for Appellant, *Atchison, T. & S.F. Ry. v. Scott*, 551 S.W.2d 740 (Tex. Civ. App.—Beaumont 1977), *aff'd*, 572 S.W.2d 273 (Tex. 1978).

issues has been in part accomplished; but, according to *Scott*, this goal is not achieved at the cost of obliterating the rules concerning fair notice by pleadings. The rules about pleadings are not and ought not to be any different in the highly visible personal injury fields of the law than in the hundreds of other classes of lawsuits that apply rules 277 and 279. *Scott*, viewed in perspective with trial practice generally, is more a lesson about harmful error resulting from variances in pleadings and proof than a lesson about personal injury charges. Under the holding in *Scott*, rule 277 is a fair rule permitting a single issue that is within the pleadings and the proof.

With the revision of rule 277, the trial judge is no longer shackled to one form of submission of the negligence case to the jury. He may now submit issues to the jury in several different ways.⁹³ First, the single broad negligence issue and the single proximate cause issue in the pattern of the supreme court's suggestions found in *Mobil Chemical* may be submitted.⁹⁴ If the proof follows the pleadings, there is no need for a limiting instruction. If the proof substantially exceeds or falls short of the notice given by the pleadings, the limiting instruction should be given on request.⁹⁵ Second, the even broader *Stovall* charge may be given, but it too would need a limiting instruction if there are problems with the identity of proof and pleadings.⁹⁶ Third, a checklist may be given since this form is authorized by paragraph four of rule 277.⁹⁷ Finally, the form of submis-

93. See TEX. R. CIV. P. 277. Comparative negligence was first introduced in Wisconsin. Under a comparative negligence system, cases can be submitted in several different ways: (1) the ultimate fact, which merely asks the jury to determine the ultimate degrees of liability of each party; (2) the specific special verdict, which inquires about specific acts of negligence; or (3) the fault verdict, which states only the percentage that the defendant was negligent. See generally C. HEFT & C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* §§ 8.20 to .50 (rev. 1978).

94. See *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 278, 282 (Tex. 1978); *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256-57 (Tex. 1974).

95. See *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 278 (Tex. 1978).

96. See *id.* at 276, 277-78; *Members Mutual Ins. Co. v. Muckelroy*, 523 S.W.2d 77, 81-82 (Tex. Civ. App.—Houston [1st Dist.] 1975, writ ref'd n.r.e.). See notes 54-60 *supra* and accompanying text.

97. Paragraph four of rule 277 states:

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 question 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

sion used prior to the revision of rule 277, with a separate question for each separate ground relied upon, may be used.⁹⁸ The supreme court has approved all four methods,⁹⁹ and by its approval has given a wider freedom to the trial court to submit issues broadly. The trial judge, however, should not mix the methods in the same charge.

SATELLITE ISSUES HAVE BEEN ELIMINATED IN NEGLIGENCE CASES

The study and practice of law, in large measure, requires the capacity to handle and think in terms of a special professional vocabulary. But a trial system involving jurors as the conscience of a community requires lawyers to communicate law words to the lay fact finders in terms that they can understand. Most professions need not confront this dilemma. They use their loaded words and perform their ministry without the necessity of communicating with a committee of six or twelve individuals who must make ultimate fact decisions. A workable system of trials, however, must be comprehensible to jurors.

Many legal doctrines begin as good argument conceived by some ingenious attorney for the purpose of forcefully driving home a point to a court or jury. As the idea becomes clear, it crystallizes into a phrase, usually of two to three words, such as unavoidable accident, sudden emergency, imminent peril, last clear chance, negligence per se, voluntary assumption of risk, open and obvious, sole proximate cause, or but-for cause. Latin is also helpful, as witnessed by *res ipsa loquitur*, *volenti non fit injuria*, and *damnum absque injuria*. Precedents then begin to build around the phrase to the point that it gains stature beyond mere argument. The special facts of each new precedent become the subject of analysis, notes, comments, and lectures. After a period of professional attention, a definition evolves. The definition will ordinarily contain more than one part, and thus, a new doctrine is born. The argument may mature enough to warrant black letter print and perhaps even claim a little space

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.

TEX. R. CIV. P. 277; see *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 278, 282 (Tex. 1978). A sample checklist also was included in Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577, 591 (1973). See generally 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES, *Sample Charge A*, at 11-12 (Supp. 1973).

98. TEX. R. CIV. P. 277 (court may "submit separate questions with respect to each element of a case"); see *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 245, 277-78 (Tex. 1978).

99. See *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 245, 276, 277-78, 282 (Tex. 1978).

in the Restatement. A surprising number of negligence doctrines began in a like manner; that is, as good legal arguments pertaining to whether negligence did or did not exist. Subsequently, they developed into independent excuses or defenses to the central negligence issue. These doctrines are called satellite issues.

Advocates are creative. They constitute the strength of a system that must adapt to settled tenets that are constantly changing. In an all-or-nothing system pitting negligence against contributory negligence, the purpose of many good jury arguments, and the resulting satellite issues, is to mitigate the harshness of total victory or total defeat. In a system of negligence law that compares the negligence of the actors and apportions the damages accordingly, however, those satellite issues lose their purpose. They are returned to their original rightful status as arguments—good arguments, but arguments nonetheless.

The true advocate is also aggressive, as he ought to be. He insists upon the full right to argue his cause, but he also wants the judge, to the extent that the judge will yield, to help him by telling the jurors just a few things that might nudge them toward his side of the case. It is a strong judge who can stand against the importunities of expert lawyers and stick to questions that comport with Ockham's razor. In evaluating the present status of submission of satellite issues, a bold and general statement is that they have no status. Since the decision in *Yarborough v. Berner*¹⁰⁰ in 1971, the adoption of comparative negligence, and the revision of rule 277, all of the satellite issues have been abolished in negligence cases. Let us call the roll.

Unavoidable Accident. In 1971 in *Yarborough* a unanimous court held that an instruction, rather than a separate question to the jurors, was the correct way to handle unavoidable accident.¹⁰¹ Surprisingly, it had taken thirty years for the supreme court to take this affirmative action after it had held in 1941, in *Wheeler v. Glazer*,¹⁰² that all that was necessary for a fair trial involving unavoidable accident was for the court to tell the jurors that they need not necessarily find that one or the other of the parties to the suit was to blame for the occurrence.¹⁰³ In *Yarborough* the court finally gave force to this conclusion.¹⁰⁴ If the real purpose of the unavoidable

100. 467 S.W.2d 188 (Tex. 1971).

101. *Id.* at 193.

102. 137 Tex. 341, 153 S.W.2d 449 (1941).

103. *Id.* at 347, 153 S.W.2d at 452.

104. See *Yarborough v. Berner*, 467 S.W.2d 188, 192-93 (Tex. 1971).

accident issue was to make sure that the jury was advised of the possibility that neither party might be at fault, that purpose would be served better by an explanatory charge or a definition instead of an issue. The court, in abolishing the issue, condemned it as a trap for the jury,¹⁰⁵ as an instrument for raising conflicts in jury issues that would defeat a verdict and a trial,¹⁰⁶ as a complicating factor in a charge,¹⁰⁷ and as an issue smothering what otherwise would be a simple submission of a negligence case.¹⁰⁸

Sudden Emergency. Sudden emergency is another doctrine that was abolished as a separate issue by the decision in *Yarborough*.¹⁰⁹ That concept, and the elusive doctrine of imminent peril, have produced much confusion with the bench as well as the bar.¹¹⁰ The dilemma, however, has now been resolved. Although sudden emergency should still be defined or explained to the jury,¹¹¹ the doctrine of imminent peril has recently been discarded by the supreme court, both as an issue and as an instruction.¹¹²

Voluntary Assumption of Risk. In negligence actions voluntary assumption of risk has been subsumed under the contributory negligence issue. The supreme court in *Farley v. M M Cattle Co.*¹¹³ stated that, in the absence of a knowing and express oral or written consent to the dangerous activity or condition, "the reasonableness of an actor's conduct in confronting a risk will be determined under principles of contributory negligence."¹¹⁴ The demise of voluntary assumption of risk, however, was not sudden. Misgivings about its validity had been raised by the supreme court in *Adam Dante Corp. v. Sharpe*.¹¹⁵ Prior to *Adam Dante* many excellent opinions and

105. *Id.* at 192; see Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 273, 277-78 (1955).

106. *Yarborough v. Berner*, 467 S.W.2d 188, 192 (Tex. 1971); see Bradford v. Arhelger, 161 Tex. 427, 429, 340 S.W.2d 772, 773 (1960).

107. *Yarborough v. Berner*, 467 S.W.2d 188, 193 (Tex. 1971).

108. *Id.* at 193.

109. *Id.* at 192-93.

110. Our highest court has not always been able to separate the doctrines of sudden emergency and imminent peril. See *Davila v. Sanders*, 557 S.W.2d 770, 770-71 (Tex. 1977). Compare *Goolsbee v. Texas & N.O. R.R.*, 150 Tex. 528, 531, 243 S.W.2d 386, 387-88 (1951) and *Yarborough v. Berner*, 467 S.W.2d 188, 191-92 (Tex. 1971) with *Del Bosque v. Heitmann Bering-Cortes Co.*, 474 S.W.2d 450, 452-53 (Tex. 1971). See generally Thode, *Imminent Peril and Emergency in Texas*, 40 TEXAS L. REV. 441 (1962).

111. See *McDonald Transit, Inc. v. Moore*, 565 S.W.2d 43, 45 (Tex. 1978); *Davila v. Sanders*, 557 S.W.2d 770, 771 (Tex. 1977); *Del Bosque v. Heitmann Bering-Cortes Co.*, 474 S.W.2d 450, 453 (Tex. 1971).

112. See *Davila v. Sanders*, 557 S.W.2d 770, 771 (Tex. 1977).

113. 529 S.W.2d 751 (Tex. 1975).

114. *Id.* at 758.

115. 483 S.W.2d 452, 458-59 (Tex. 1972).

learned articles had given the doctrine a fair chance for survival, but it was doomed in negligence cases because it was inextricably mixed with and duplicated other related concepts. Judges and lawyers alike walked insecurely through the jungle of abstractions. The supreme court often had no sure ground, at first seeking to apply the doctrine restrictively¹¹⁶ but finally applying it to almost any negligence case.¹¹⁷

In *Adam Dante* the supreme court analyzed the several overlapping concepts that the trial judge and practitioners faced with the rather simple facts of a lady slipping on a foamy substance on the floor of a health spa.¹¹⁸ Untangling the three elements of voluntary assumption of risk first required the recognition that the doctrines known as *volenti non fit injuria* and voluntary assumption of risk are, in truth, the same thing.¹¹⁹ Second, voluntary assumption of risk had to be unsnarled from the spurious "open and obvious" issue.¹²⁰ And, finally, the doctrine had to be exposed as an affirmative defense to a plaintiff's burden to negate substantially the same issues; i.e., the "no-duty" issues.¹²¹ Under prior practice, there had existed a triple submission of the same issue, each disguised by name only. The court in *Adam Dante*, however, did not abolish voluntary assumption of risk. Instead, it held that the three separate special issues should be gathered into a single issue and should be asked with an accompanying definition of the term.¹²² The court then suggested a form of the issue and an accompanying explanation that should be employed on retrial.¹²³ Thus, the first step was

116. See *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 377 (Tex. 1963).

117. See *Coleman v. Hudson Gas & Oil Corp.*, 455 S.W.2d 701, 702 (Tex. 1970).

118. *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 453 (Tex. 1972).

119. *Id.* at 458; see *Wood v. Kane Boiler Works, Inc.*, 150 Tex. 191, 195-96, 238 S.W.2d 172, 174-75 (1951). See generally 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 27.13 (1956); W. PROSSER, *LAW OF TORTS* § 68 (4th ed. 1971).

120. See *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 457 (Tex. 1972).

121. See *id.* at 458.

122. See *id.* at 459.

123. See *id.* at 458 n.2.

Defendant's Issues
(Assumption of Risk)

Did plaintiff voluntarily assume the risk of (stating it)? (Subjective Test)

You are instructed that in order for the plaintiff (naming), to assume the risk, she must have actually known of the condition which caused her injury and she also must have actually and fully appreciated the nature and extent of the danger involved in encountering the condition, and she must have voluntarily and of her own free will encountered the danger of the condition causing her injuries, if any.

Id. at 458 n.2.

taken toward deleting the doctrine of voluntary assumption of risk as an issue in negligence cases.

The next attack upon voluntary assumption of risk came in the case of *Rosas v. Buddies Food Store*.¹²⁴ The case did not abolish the doctrine as a defense in negligence cases because a majority of the court believed that the defense had not been preserved by either pleading or proof.¹²⁵ The dicta, however, seriously battered the doctrine.¹²⁶

The blow that ended the defense of voluntary assumption of risk was the passage of article 2212a,¹²⁷ which adopted a system for comparing negligence and apportioning damages according to the percent of the plaintiff's and defendant's respective negligence. Voluntary assumption of risk, which operates as a complete and total bar to recovery, cannot coexist with comparative negligence.¹²⁸ In *Farley*, unlike *Rosas*, voluntary assumption of risk was asserted as a defense.¹²⁹ The court called attention to the compelling reasons that *Rosas* had already marshalled, particularly the adoption of the comparative negligence statute, and then abolished the doctrine in negligence cases.¹³⁰ Voluntary assumption of risk, however, has been abolished in negligence cases only; it is still a valid defense in a product liability case,¹³¹ as well as in a strict liability case,¹³² such as a suit for damages caused by a vicious animal.¹³³

Open and Obvious. The spurious "open and obvious" concept was the next to go. It was exposed in *Adam Dante*,¹³⁴ but abolished as both a special issue and as a separate concept in *Massman-Johnson v. Gundolf*.¹³⁵ Judges and lawyers, after decades of scholarly effort,

124. 518 S.W.2d 534, 538-39 (Tex. 1975).

125. *Id.* at 540 (Walker, J., concurring); see *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975).

126. See *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 538-39 (Tex. 1975).

127. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978).

128. See Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577, 588 (1973).

129. Compare *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975) with *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 540 (Tex. 1975) (Walker, J., concurring).

130. *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975); see *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 538-39 (Tex. 1975).

131. See *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 90-91 (Tex. 1974).

132. See *Farley v. M.M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 90 (Tex. 1974). See generally Keeton, *Torts, Annual Survey of Texas Law*, 30 Sw. L.J. 2, 2-6 (1976).

133. See *Marshall v. Ranne*, 511 S.W.2d 255, 261 (Tex. 1974).

134. See *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 457 (Tex. 1972).

135. 484 S.W.2d 555, 556-57 (Tex. 1972).

had never been able to agree upon the proper role for “open and obvious” in the trial of a negligence case. One branch of experts treated “open and obvious” as a separate and distinct fact issue that should be submitted to the jury.¹³⁶ On the other hand, an equally proficient group of scholars viewed the term as a state of the proof that, when found, demonstrated as a matter of law that the plaintiff knew and appreciated a specific danger. The doctrine, according to them, did not present a question of fact.¹³⁷

The phrase has now been exposed as a shorthand way for the court to conclude that the plaintiff's knowledge and appreciation of both the nature and extent of a danger had been established as a matter of law.¹³⁸ The supreme court held in *Massman-Johnson* that an issue inquiring whether or not a condition is open and obvious should not be submitted.¹³⁹ Furthermore, an instruction of the term should not be given to the jury.

With the passage of the comparative negligence statute, negligence established even as a matter of law does not amount to a total victory or defeat. The negligence existing as a matter of law still must be compared to the negligence, if any, of the other parties. As the supreme court stated in *Parker v. Highland Park, Inc.*:¹⁴⁰

Knowledge and appreciation, though proved as a matter of law, do not necessarily establish contributory negligence as a matter of law. In a case that is controlled by the comparative negligence statute, a plaintiff's contributory negligence that is established as a matter of fact or as a matter of law must then be compared with the negligence of the other parties, assuming that there is a finding of proximate cause in each instance.¹⁴¹

136. See *Goodson v. Southland Corp.*, 454 S.W.2d 823, 826 (Tex. Civ. App.—El Paso 1970, writ ref'd n.r.e.); *El Rancho Restaurants, Inc. v. Garfield*, 440 S.W.2d 873, 877 (Tex. Civ. App.—San Antonio, 1969, writ ref'd n.r.e.); *Crowell-Gifford Furniture Co. v. Cloutman*, 276 S.W.2d 539, 544 (Tex. Civ. App.—Beaumont 1955, writ ref'd n.r.e.); 9 R. STAYTON, STAYTON TEXAS FORMS § 5041, at 483 (1961); Keeton, *Personal Injuries Resulting From Open and Obvious Conditions—Special Issue Submission in Texas*, 33 TEXAS L. REV. 1, 11 (1954).

137. See *Scott v. Liebman*, 404 S.W.2d 288, 290 (Tex. 1966); *Wesson v. Gillespie*, 382 S.W.2d 921, 925-26 (Tex. 1964); *Schiller v. Rice*, 151 Tex. 116, 121, 246 S.W.2d 607, 611 (1952); *Houston Nat'l Bank v. Adair*, 146 Tex. 387, 390, 207 S.W.2d 374, 376 (1948); *Houston Sports Ass'n, Inc. v. Russell*, 450 S.W.2d 741, 746 (Tex. Civ. App.—Houston [14th Dist.] 1970, writ ref'd n.r.e.); *A.C. Burton Co. v. Stasny*, 223 S.W.2d 310, 312-13 (Tex. Civ. App.—Galveston 1949, writ ref'd). See generally *Greenhill, Assumption of Risk*, 16 BAYLOR L. REV. 111, 114-18 (1964).

138. See *Massman-Johnson v. Gundolf*, 484 S.W.2d 555, 556 (Tex. 1972).

139. *Id.* at 556-57.

140. 565 S.W.2d 512 (Tex. 1978).

141. *Id.* at 521; see *Hendrix v. Jones-Lake Constr. Co.*, 570 S.W.2d 546, 551 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

The court in *Parker*, borrowing language from a court of civil appeals decision that had been written twenty-six years before,¹⁴² also explained that the use of the "open and obvious" concept as a separate defense was misleading because there are open and obvious conditions of danger that do not preclude recovery.¹⁴³ Danger is relative, and persons may incur some hazards in the exercise of ordinary care.¹⁴⁴

No-Duty. Jury confusion reached its zenith in the practice that required answers in premises cases to the so-called "no-duty" issues. Certainly jurors should not be expected to understand terms that judges and advocates cannot explain. In order for the plaintiff to recover in a premises case he had to obtain jury findings that he did not have actual knowledge of the dangerous condition and that he did not fully appreciate the nature and extent of the danger.¹⁴⁵ Connected with those issues was the concept of "open and obvious" dangers discussed previously. The openness and obviousness of the danger served to excuse the defendant because he was then charged with no duty to warn, to make safe, or to do that which was unnecessary.¹⁴⁶ Even if a plaintiff/invitee secured findings negating the "no-duty" issues of knowledge and appreciation, the defendant, under the practice of duplicating issues, still had the opportunity to eliminate his own duty to the plaintiff by obtaining findings that the plaintiff had voluntarily assumed the risk.¹⁴⁷ With the burden on the defendant, the same two "no-duty" issues were again submitted along with an additional one that asked whether the plaintiff had voluntarily encountered the danger.¹⁴⁸ The presence of a duty depended not only upon the conduct of the defendant, but also on the conduct of the plaintiff/invitee.¹⁴⁹ The plaintiff/invitee had the bur-

142. See *Camp v. J.H. Kirkpatrick Co.*, 250 S.W.2d 413, 417-18 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

143. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 520-21 (Tex. 1978).

144. See *Lang v. Henderson*, 147 Tex. 353, 357-58, 215 S.W.2d 585, 587 (1948); *McAfee v. Travis Gas Corp.*, 137 Tex. 314, 320-21, 153 S.W.2d 442, 447 (1941); *Henwood v. Gilliam*, 207 S.W.2d 904, 906 (Tex. Civ. App.—Dallas 1947, writ ref'd); *Texas & N.O.R.R. v. Blake*, 175 S.W. 2d 683, 685 (Tex. Civ. App.—Fort Worth 1943, writ ref'd); *San Angelo Water, Light & Power Co. v. Anderson*, 244 S.W. 571, 572 (Tex. Civ. App.—Austin 1922, writ disp'd).

145. See *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 516-17 (Tex. 1978); *Adam Dante Corp v. Sharpe*, 483 S.W.2d 452, 455, 457 (Tex. 1972); *Halespeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378-79 (Tex. 1963); *Hendrix v. Jones-Lake Constr. Co.*, 570 S.W.2d 546, 549 (Tex. Civ. App.—Corpus Christi 1978, writ ref'd n.r.e.).

146. See *Halespeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378 (Tex. 1963).

147. See *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 457-58 (Tex. 1972).

148. See *id.* at 455 n.1.

149. See *Halespeska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 378-79 (Tex. 1963).

den to prove the defendant's breach of duty and to negate the confusing "no-duty" issues.¹⁵⁰ The invitee's conduct was measured by a subjective test; the defendant's conduct was measured by an objective test.¹⁵¹ Premises cases were being tried with a double and obscured submission of the same granulated issues. This state of confusion and duplication of issues, first with the burden to negate on the plaintiff/invitee, and then with the burden to prove on the defendant, was condemned by the supreme court in *Adam Dante*.¹⁵²

Only recently, however, has the supreme court, in *Parker*, finally abolished the "no-duty" concept in actions based upon negligence and returned Texas practice in premises cases to the simple questions directing the attention of the jury to concepts of negligence and causation.¹⁵³ Consideration by the jury of other mitigating factors depends upon advocacy—argument. The issues of "no-duty," "open and obvious," and "voluntary assumption of risk" have no place in current Texas practice. They have all been abolished, so that now the reasonableness of an actor's conduct under the circumstances is determined under the principles of contributory negligence in order that the negligence of the parties may then be compared.¹⁵⁴

Last Clear Chance. Last clear chance was an attractive doctrine that ameliorated the harshness of total defeat under a finding of contributory negligence. As with the other satellite issues, it illustrates how a good jury argument can mature into a separate doctrine. In 1842 a plaintiff sued for damages to his mule.¹⁵⁵ Apparently, the plaintiff had tied up his mule in the middle of a highway, and the defendant had driven into it. The defendant was negligent, but the plaintiff was contributorily negligent. The argument was that the least clear chance to avoid the accident and the resulting injuries had been with the defendant, but that he had failed to do so. Therefore, despite the plaintiff's contributory negligence, the defendant was held liable.¹⁵⁶ The humble facts of the original case

150. See *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 455 (Tex. 1972); *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 379 (Tex. 1963).

151. See *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 456 (Tex. 1972); *Haleska v. Callihan Interests, Inc.*, 371 S.W.2d 368, 379 (Tex. 1963).

152. *Adam Dante Corp. v. Sharpe*, 483 S.W.2d 452, 458-59 (Tex. 1972); see *Camp v. J.H. Kirkpatrick Co.*, 250 S.W.2d 413, 416-17 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.).

153. *Parker v. Highland Park, Inc.*, 565 S.W.2d 512, 517 (Tex. 1978).

154. See *id.* at 517.

155. *Davies v. Mann*, 152 Eng. Rep. 588, 588 (1842).

156. *Id.* at 589.

caused the doctrine to be dubbed the "jackass doctrine."¹⁵⁷

When Texas embraced the doctrine in 1879, the supreme court had the vision to state that a system of comparing negligence would make its purpose unnecessary.¹⁵⁸ Similar attacks were leveled upon the continued use of the doctrine in the concurring opinion found in *Abalos v. Oil Development Co.*,¹⁵⁹ but the majority of the court in that case rendered its decision without reaching the issue whether last clear chance was still a viable doctrine in Texas. In *French v. Grigsby*,¹⁶⁰ however, the issue was reached, and the court tersely stated, "The doctrine of last clear chance or discovered peril . . . is abolished as an issue or instruction."¹⁶¹

Act of God. The inferential rebuttal issue known as Act of God is no longer a proper separate issue. In *Scott v. Atchison, Topeka & Santa Fe Ry.* the defense was treated as an inferential rebuttal issue, which is prohibited by revised rule 277.¹⁶² Like unavoidable accident, however, the requesting party is entitled to a correct definition or instruction.¹⁶³

Excuse for Breach of a Statutory Duty. A number of statutory violations may constitute negligence per se, in which proof that one violated the statute amounts to a fact finding of negligence.¹⁶⁴ When this is the case, a separate finding of negligence is unnecessary.¹⁶⁵ The need for a separate finding of negligence reappears, however, when the violator produces evidence that he had a permissible excuse for his actions.¹⁶⁶ But to constitute an excuse for a violation,

157. W. PROSSER, LAW OF TORTS § 66, at 427 n.3 (4th ed. 1971).

158. *Houston & T.C.R.R. v. Smith*, 52 Tex. 178, 183-84 (1879).

159. 544 S.W.2d 627, 633-34 (Tex. 1976) (Pope, J., concurring).

160. 571 S.W.2d 867 (Tex. 1978).

161. *Id.* at 867.

162. *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 279 (Tex. 1978).

163. *Id.* at 279.

164. For example, see the various traffic regulations in TEX. REV. CIV. STAT. ANN. art. 6701d (Vernon 1977).

165. See *Carter v. William Sommerville & Son, Inc.*, 584 S.W.2d 274, 278 (Tex. 1979); *Moughon v. Wolf*, 576 S.W.2d 603, 606 (Tex. 1978); *Missouri Pac. R.R. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977); *L.M.B. Corp. v. Gurecky*, 501 S.W.2d 300, 303 (Tex. 1973); *Southern Pac. Co. v. Castro*, 493 S.W.2d 491, 497-98 (Tex. 1973); *Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 696-97 (Tex. 1972); *Parrott v. Garcia*, 436 S.W.2d 897, 900 (Tex. 1969); *Hammer v. Dallas Transit Co.*, 400 S.W.2d 885, 887-88 (Tex. 1966); *Mundy v. Pirie-Slaughter Motor Co.*, 146 Tex. 314, 320, 206 S.W.2d 587, 590 (1947); *Alpine Tel. Corp. v. McCall*, 143 Tex. 335, 340-41, 184 S.W.2d 830, 833-34 (1944); *Phoenix Ref. Co. v. Powell*, 251 S.W.2d 892, 896-97 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.). See generally 1 STATE BAR OF TEXAS, PATTERN JURY CHARGES §§ 5.06-.07, 5.09-.11, 5.14, 5.17, 5.22-.24, 5.28-.31, 5.34 (1969 & Supp. 1973).

166. See *Moughon v. Wolf*, 576 S.W.2d 603, 604-05 (Tex. 1978); *Missouri Pac. R.R. v.*

proof of a legally substantial excuse or justification must be introduced; "ordinary care does not necessarily constitute one of the excuses ingrafted by the courts to the legislative standard."¹⁶⁷ The supreme court, in *Impson v. Structural Metals, Inc.*,¹⁶⁸ adopted the five basic categories of excuses or justification for violating the law listed in the *Restatement (Second) of Torts*.¹⁶⁹ A violation is excused when:

- (a) the violation is reasonable because of the actor's incapacity;
- (b) he neither knows nor should know of the occasion for compliance;
- (c) he is unable after reasonable diligence or care to comply;
- (d) he is confronted by an emergency not due to his own misconduct;
- (e) compliance would involve a greater risk of harm to the actor or to others.¹⁷⁰

Confusion existed prior to 1973 about the manner of submitting a case of negligence per se in which the violator of a statutory standard defended upon the basis of some excuse for the violation. In *Hammer v. Dallas Transit Co.*¹⁷¹ the supreme court had held that it was not necessary for the violator to submit an excuse issue to the jury as long as there was some evidence that showed that the violation was arguably excused.¹⁷² Subsequently, in *Christy v. Blades*¹⁷³ the court, without overruling *Hammer*, required the violator to obtain a jury finding that the violation was excused.¹⁷⁴ This conflict was resolved in 1973 when in *Southern Pacific Co. v. Castro*¹⁷⁵ the supreme court expressly overruled *Christy* and adopted the rule of

American Statesman, 552 S.W.2d 99, 103 (Tex. 1977); *L.M.B. Corp. v. Gurecky*, 501 S.W.2d 300, 303 (Tex. 1973); *Southern Pac. Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973); *Parrott v. Garcia*, 436 S.W.2d 897, 900 n.1 (Tex. 1969); *Missouri-K.-T. R.R. v. McFerrin*, 156 Tex. 69, 81, 291 S.W.2d 931, 939 (1956); *Antee v. Sims*, 494 S.W.2d 215, 217-18 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.); *Phoenix Ref. Co. v. Powell*, 251 S.W.2d 892, 896 (Tex. Civ. App.—San Antonio 1952, writ ref'd n.r.e.); *RESTATEMENT (SECOND) OF TORTS* § 288B (1965).

167. Keeton, *Torts, Annual Survey of Texas Law*, 24 Sw. L.J. 3, 18 (1970).

168. 487 S.W.2d 694 (Tex. 1972).

169. *Id.* at 696; see *RESTATEMENT (SECOND) OF TORTS* § 288A (1965).

170. *RESTATEMENT (SECOND) OF TORTS* § 288A (1965).

171. 400 S.W.2d 885 (Tex. 1966).

172. *Id.* at 887.

173. 448 S.W.2d 107 (Tex. 1969).

174. *Id.* at 111; see *Rash v. Ross*, 371 S.W.2d 109, 113-14 (Tex. Civ. App.—San Antonio 1963, writ ref'd n.r.e.).

175. 493 S.W.2d 491 (Tex. 1973).

Hammer.¹⁷⁶ The court held that once the violator had introduced some evidence that his violation was excused by reason of one of the five permissible excuse categories found in *Impson*, the burden shifted to the party who asserts that his adversary has been negligent per se to obtain a fact finding that the violator was negligent.¹⁷⁷ Along with the negligence issue, the party asserting negligence per se would be allowed to submit an instruction regarding the establishment by the legislature of standards of safe conduct.¹⁷⁸

The next case that treated the submission of the negligence per se issues was *L.M.B. Corp. v. Gurecky*.¹⁷⁹ Among other things, the defendant complained that the violator, Gonzales, had failed to obtain a jury finding of the existence of an *Impson*-type excuse. Repeating what it had earlier said in *Castro* regarding the submission of a contributory negligence issue with instructions, the supreme court held that a separate issue about excuse was unnecessary.¹⁸⁰

The supreme court handed down its decision in *Castro* in January, 1973. While its explanation of the practice for omitting an issue on excuse was consistent with *Hammer* and has been the rule of later cases, there was a sentence in the opinion stating that "[f]or one to prove negligence per se, therefore, he must prove (1) a violation of the penal standard, (2) which is unexcused."¹⁸¹ The statement was written before the amendment of rule 277 that abolished inferential rebuttal issues, and it is subject to misunderstanding. In *Moughon v. Wolf*¹⁸² the court corrected the sentence. For the same reason that it is no longer necessary for one to prove and obtain a finding that an incident was not an unavoidable accident, a party, while required to prove and obtain a finding that his adversary violated a penal standard, is not required to obtain a finding that his adversary's violation was not excused. The excuse issue should not be submitted and the burden is upon the violator of the law to present any evidence excusing the violation. *Moughon v. Wolf* stated:

176. *Id.* at 497-98; see *Hammer v. Dallas Transit Co.*, 400 S.W.2d 885, 887 (Tex. 1966).

177. *Southern Pac. Co. v. Castro*, 493 S.W.2d 491, 498 (Tex. 1973); see *Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 696 (Tex. 1972).

178. *Southern Pac. Co. v. Castro*, 493 S.W.2d 491, 498 (Tex. 1973).

179. 501 S.W.2d 300 (Tex. 1973).

180. *Id.* at 303; see *Southern Pac. Co. v. Castro*, 493 S.W.2d 491, 498 (Tex. 1973).

181. *Southern Pac. Co. v. Castro*, 493 S.W.2d 491, 497 (Tex. 1973).

182. 576 S.W.2d 603 (Tex. 1978).

Generally, the litigant alleging negligence per se as a ground of recovery must assume the burden of proving a statutory violation. [Citations omitted.] The typical submission of such a case includes an issue inquiring whether the party charged is actually guilty of legislatively proscribed conduct along with an issue inquiring whether the violative conduct was the proximate cause of the accident. The violator may excuse his conduct, but he must produce some evidence of a legally acceptable excuse. If some evidence of a legally acceptable excuse such as emergency, incapacity or impossibility is present in the case, the litigant charging statutory violation must assume a further burden. That burden entails requesting an issue which inquires whether the litigant charged is guilty of negligence as measured by the common law or reasonable person standard.¹⁸³

DEFINITIONS AND INSTRUCTIONS HAVE REPLACED MANY ISSUES

Rule 277 now states that the court shall submit such explanatory instructions and definitions as shall be proper to enable the jury to render a verdict, with the limitation that such instructions and definitions shall not comment directly on the weight of the evidence

183. *Id.* at 604-05 (footnote omitted). The court further set forth a sample charge consisting of three issues:

ISSUE NO. 1

Do you find from a preponderance of the evidence that on the occasion in question [name of litigant charged with statutory violation] failed to keep [his or her] vehicle completely within the right half of the roadway?

ANSWER "We do" or "We do not."

Answer: _____

If you have answered Issue No. 1 "We do" then answer Issue No. 2; otherwise do not answer Issue No. 2.

ISSUE NO. 2

Do you find from a preponderance of the evidence that such failure was a proximate cause of the occurrence in question?

ANSWER "We do" or "We do not."

Answer: _____

Id. at 604 n.3. If the trial court believes that some evidence of a legally permissible excuse has been presented, then an additional issue should be submitted conditioned on an affirmative finding to Issue No. 1:

ISSUE NO. 3

Do you find from a preponderance of the evidence that such failure was negligence?

ANSWER "We do" or "We do not."

Answer: _____

Id. at 605 n.4. Finally, the court stated, "In conjunction with this common law negligence submission and upon proper request, certain explanatory instructions may be submitted that inform the jury of such matters as statutory standard of conduct and any legally acceptable excuses that are supported by some evidence." *Id.* at 605 n.4.; see 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 5.11 (1969 & Supp. 1973) (example of instruction).

or advise the jury of the effect of their answers. Before September 1, 1973, a large number of correct definitions and explanations had developed in Texas. Those that relate to personal injury cases are collected in the State Bar's *Texas Pattern Jury Charges*,¹⁸⁴ but there are others that relate to other kinds of significant litigation. Some practitioners mistakenly think that the elimination of a special issue has justified changes in and the addition of words to definitions or instructions that are rather standardized. Other practitioners seek to add words that are designed to push the jury one way or the other. The changing of settled definitions and explanations tends to create unnecessary problems. Revised rule 277 does not suggest such an overhaul, and none is needed.

The Proper Use of Definitions and Instructions is Found in Many Non-Negligence Cases

A long list of examples is available from almost any area of the law to show the proper use of definitions or explanations that assist the jury. These non-negligence cases have presented no significant problem to the bench or trial bar. They tersely define or explain a word or term but do not tell the jury what to do. Hundreds of eminent domain cases have been tried since World War II with few procedural problems by the use of broad issues and a few instructions and definitions. Market value¹⁸⁵ has needed a definition, and the nature of the estate taken needs to be explained so the jury will not assume that too much or too little is being taken.¹⁸⁶ Charges have been approved in wide-ranging fields of the law that have included instructions or definitions for such terms as "serious fire hazard,"¹⁸⁷ "cruel treatment,"¹⁸⁸ "peaceable, adverse and continuous possession,"¹⁸⁹ "domicile,"¹⁹⁰ "wrongful killing,"¹⁹¹ "common law

184. 1 STATE BAR OF TEXAS, *TEXAS PATTERN JURY CHARGES* (1969 & Supp. 1973).

185. See *State v. Carpenter*, 126 Tex. 604, 611-12, 89 S.W.2d 194, 198 (1936).

186. See *Gleghorn v. City of Wichita Falls*, 545 S.W.2d 446, 447-48 (Tex. 1976); *Texas Power & Light Co. v. Cole*, 158 Tex. 495, 501-02, 313 S.W.2d 524, 529 (1958); *City of Dallas v. Anderson*, 570 S.W.2d 62, 64 (Tex. Civ. App.—Dallas 1978, writ ref'd n.r.e.); *Texas Power & Light Co. v. Lovinggood*, 389 S.W.2d 712, 715-16 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.).

187. See *City of Houston v. Lurie*, 148 Tex. 391, 399, 224 S.W.2d 871, 876 (1949).

188. See *Howell v. Howell*, 147 Tex. 14, 17, 210 S.W.2d 978, 980 (1948).

189. See *Pearson v. Doherty*, 143 Tex. 64, 71, 183 S.W.2d 453, 456 (1944).

190. See *Hough v. Grapotte*, 127 Tex. 144, 145-46, 90 S.W.2d 1090, 1091 (1936).

191. See *Bounds v. Caudle*, 560 S.W.2d 925, 929-30 (Tex. 1977); *Grieger v. Vega*, 153 Tex. 498, 503-04, 271 S.W.2d 85, 88 (1954).

marriage,"¹⁹² "good cause for discharge,"¹⁹³ "fraud,"¹⁹⁴ "nuisance,"¹⁹⁵ and "due diligence."¹⁹⁶ It has been the extra words that have been added to settled definitions that have created the problems. For example, in a condemnation of a ten-acre site for a sewer plant, with the evidence conflicting about the extent and nature of the site's use, the court erred by adding to an otherwise correct instruction that the jury should "'presume that the City of Pearland will exercise its rights and use and enjoy this property to the full extent for such a sewerage disposal plant.'"¹⁹⁷

Standard Definitions and Explanations in Personal Injury Suits Were Not Changed by Revised Rule 277

Twenty-one years before the revision of rule 277, the supreme court laid to rest, in *Dallas Railway & Terminal Co. v. Bailey*,¹⁹⁸ the contention that new and independent cause was a separate and distinct affirmative defense.¹⁹⁹ The defendant had asserted that it was entitled to a special issue as well as a definition or explanation of the term. The court held that the defendant was not entitled to an issue but that the definition of new and independent cause should be included as a part of the definition of proximate cause.²⁰⁰ The case is instructive since it, along with a line of prior cases,²⁰¹ exemplifies the correct way to substitute a definition or explanation for a special issue. Neither the definition of new and independent cause nor the practice in which the definition was substituted for a special issue has presented any apparent problem for the trial prac-

192. See *Brown v. Brown*, 256 S.W.2d 143, 151 (Tex. Civ. App.—Beaumont 1953, writ ref'd n.r.e.).

193. See *Scott v. Ingle Bros. Pac., Inc.*, 489 S.W.2d 554, 557 (Tex. 1972).

194. See *Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437, 438-39 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

195. See *City of Lubbock v. Tice*, 517 S.W.2d 428, 431 (Tex. Civ. App.—Amarillo 1974, no writ).

196. See *Texas Gulf Sulphur Co. v. Gladys City Co.*, 506 S.W.2d 281, 288-89 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

197. *City of Pearland v. Alexander*, 483 S.W.2d 244, 249 (Tex. 1972).

198. 151 Tex. 359, 250 S.W.2d 379 (1952).

199. *Id.* at 367-68, 250 S.W.2d at 383-84.

200. *Id.* at 368, 250 S.W.2d at 384.

201. See *Jackson v. Edmondson*, 136 Tex. 405, 407, 151 S.W.2d 794, 794 (1941); *Texas Motor Coaches v. Palmer*, 132 Tex. 77, 78-79, 121 S.W.2d 323, 323-24 (1938); *Tarry Warehouse & Storage Co. v. Duvall*, 131 Tex. 466, 472-73, 115 S.W.2d 401, 404-05 (1938); *Young v. Massey*, 128 Tex. 638, 640-41, 101 S.W.2d 809, 810 (1937); *Southern Ice & Utils. Co. v. Richardson*, 128 Tex. 82, 84, 95 S.W.2d 956, 957 (1936); *Phoenix Ref. Co. v. Tips.*, 125 Tex. 69, 73-74, 81 S.W.2d 60, 61-62 (1935).

titioner. As stated in *Texas Pattern Jury Charges*, the definition for new and independent cause is "the act or omission of a separate and independent agency, not reasonably foreseeable, which destroys the causal connection, if any, between the act or omission inquired about and the occurrence in question, and thereby becomes the immediate cause of such occurrence."²⁰²

Another example of the supreme court's substitution of an explanation for a separate issue is found in the decision of *Moulton v. Alamo Ambulance Service, Inc.*²⁰³ The defendant, Alamo Ambulance, requested special issues inquiring whether Moulton, the plaintiff, had failed to mitigate his personal injuries by following his physician's advice. The supreme court held that mitigation of damages was not an affirmative defense entitling a party to a separate issue, but that the defendant was entitled to an instruction.²⁰⁴ The court then suggested the wording for the instruction.²⁰⁵

Unavoidable accident was eliminated as a separate special issue in *Yarborough*.²⁰⁶ The court pointed out that the only real purpose for submitting it as a definition was to call the matter to the attention of the jurors so that they would not overlook it as an alternative.²⁰⁷ The jury would thereby understand that it is not necessary to find that one or the other of the parties was negligent. In *Wheeler v. Glazer*²⁰⁸ Chief Justice Alexander had written: "This purpose is fully accomplished when the jury is told that the occurrence in question was an unavoidable accident if it happened without the negligence of either of the parties to the suit."²⁰⁹ The wording of the definition recommended in *Wheeler* is significant more for the words

202. 1 STATE BAR OF TEXAS, TEXAS PATTERN JURY CHARGES § 2.03, at 47 (1969).

203. 414 S.W.2d 444, 450 (Tex. 1967).

204. *Id.* at 450.

205. *Id.* at 450.

[T]he better practice generally would be to instruct the jury that in arriving at its answer to the [damage] issue it should not include any sum for physical and mental pain and suffering, loss of earnings, etc., if any, proximately caused by failure of an injured person to care for and treat his injuries, if any, as a reasonable prudent person would in the exercise of ordinary care under the same or similar circumstances.

Id. at 450.

206. *Yarborough v. Berner*, 467 S.W.2d 188, 192-93 (Tex. 1971).

207. *Id.* at 192.

208. 137 Tex. 341, 153 S.W.2d 449 (1941).

209. *Id.* at 347, 153 S.W.2d at 452. An analogous problem was raised in *Select Ins. Co. v. Boucher*, 561 S.W.2d 474 (Tex. 1978). *Boucher* sued for total incapacity and the insurer requested issues inquiring about partial incapacity. The court held that the issue was prohibited as an inferential rebuttal issue but the insurer was entitled to a correct definition. *Id.* at 476-77; see *Dallas County v. Romans*, 563 S.W.2d 827, 830 (Tex. Civ. App.—Tyler 1978, no writ).

that were omitted than for what was included.²¹⁰ The court believed that the jury was sufficiently instructed by the usual explanation of the term.

Res ipsa loquitur also may be submitted by an instruction. In *Mobil Chemical* the supreme court set forth an example for the submission of *res ipsa*, when the plaintiff has pleaded and introduced some evidence of both *res ipsa* and negligence, in a manner that displaced three separate issues in order to determine whether or not negligence exists.²¹¹ The instruction, without telling the jury which side will win or lose, simply instructs,

You are instructed that you may infer negligence by a party but are not compelled to do so, if you find that the character of the accident is such that it would ordinarily not happen in the absence of negligence and if you find that the instrumentality causing the accident was under the management and control of the party at the time the negligence, if any, causing the accident probably occurred.²¹²

The most recent guidance from the supreme court about the wording of an instruction comes from *Scott v. Atchison, Topeka & Santa Fe Ry.*²¹³ The defendant railroad had pleaded that the plaintiff had suffered his injuries in the train's derailment because an unprecedented rainstorm and flash flood had caused the washout of a portion of the roadbed. It insisted that "Act of God" was an affirmative defense that entitled the railroad to a special issue. Although holding that the railroad was not entitled to the issue, the court held that it was entitled to an instruction.²¹⁴ The court suggested that the following explanatory instruction relating to "Act of God" be given "after the definitions of 'negligence' and 'cause in whole or part.' "

In connection with the above definitions and any special issue using either term, you are instructed that an occurrence is not caused in whole or in part by the negligence of any party if it is due solely to an "Act of God."²¹⁵

The term "Act of God" would then be defined as follows:

You are instructed that by the term "Act of God" as used in this

210. The *Wheeler* trial court defined unavoidable as follows: "By the term 'unavoidable accident' as that term is used in this charge is meant an occurrence that happens without negligence on the part of the operator of the street-car in question or the driver of the truck in question." *Wheeler v. Glazer*, 137 Tex. 341, 346, 153 S.W.2d 449, 452 (1941).

211. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 254-57 (Tex. 1975).

212. *Id.* at 257.

213. 572 S.W.2d 273 (Tex. 1978).

214. *Id.* at 279.

215. *Id.* at 280; *see id.* at 280 n.10.

Charge is meant an accident that is due directly and exclusively to natural causes without human intervention and which no amount of foresight or care reasonably exercised could have prevented. The accident must be one occasioned by the violence of nature, and all human agency is to be excluded from creating or entering into the cause. The term implies [sic] the intervention of some cause not of human origin and not controlled by human power. If the derailment resulted in whole or in part from human negligence it was not an "Act of God."²¹⁶

QUALITIES OF A CORRECT INSTRUCTION OR DEFINITION

An Instruction or Definition May Be General

Rule 277 relaxes the former practice of limiting the use of instructions, and thereby gives trial judges more discretion in the use of instructions, by stating that an explanatory instruction or definition that properly enables the jury to render a verdict does not constitute a general charge.²¹⁷ It is noteworthy that the supreme court in *Mobil Chemical* called its recommended definition of *res ipsa loquitur* a "general instruction,"²¹⁸ especially in light of *Pittsburg Coca-Cola Bottling Works v. Ponder*,²¹⁹ a case decided before the revision of rule 277, in which the supreme court had condemned a *res ipsa loquitur* charge for being general.²²⁰ The instruction in *Mobil*

216. *Id.* at 279 n.9.

217. Tex. R. Civ. P. 277; see *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974); *Forney v. Memorial Hosp.*, 543 S.W.2d 705, 708 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); *Zacek v. Automated Syss. Corp.*, 541 S.W.2d 516, 521 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); *Union Oil Co. v. Richard*, 536 S.W.2d 955, 957 (Tex. Civ. App.—Beaumont 1975, no writ). See generally Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577, 587-88 (1973).

218. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 257 (Tex. 1974).

219. 443 S.W.2d 546 (Tex. 1969).

220. *Id.* at 551. The instruction given in *Pittsburg Coca-Cola* was:

In connection with the foregoing Special Issues No. 3 and 4, you are instructed that if the explosion, if any, was part of an occurrence as would not ordinarily happen without fault on the part of the Defendant prior to and at the time of the delivery of the Coca Cola bottle and its contents in question to the Plaintiff, and that the Coca Cola bottle and its contents was handled with due care after such delivery, and that the Coca Cola bottle and its contents was not altered or changed in any way after such delivery and up to the time of any explosion, then you may find that the explosion, if any, was caused by negligence, if any, of the Defendant under the doctrine of "res ipsa loquitur" or "the event or thing speaks for itself." Furthermore, this doctrine of "res ipsa loquitur" rests upon the proposition that such an explosion, if any, must be such as in the ordinary course of events and things does not happen without negligence, if any, on the part of the one having the exclusive management or control of the bottling and delivery process.

Id. at 451.

Chemical, however, is distinguishable from the one in *Pittsburg Coca-Cola* because in *Pittsburg Coca-Cola* the instruction arrayed the evidence and informed the jury of the effect of its answer.²²¹ Because of these errors, the instruction found in *Pittsburg Coca-Cola* remains improper under revised rule 277. A proper instruction about *res ipsa*, however, would not be error merely because of its generality.²²²

Even before the revision of rule 277, the supreme court in *Southern Pacific Co. v. Castro*²²³ had already authorized a very broad and general definition or instruction on statutory standards and excuse.²²⁴ The court made it clear that it was prepared to broaden the scope of definitions used in negligence cases when it concluded the *Castro* opinion by stating,

[U]pon proper request, Southern Pacific will be entitled to a definition or instruction which informs the jury the Legislature has established a uniform standard of safe conduct for those who approach and cross railroad crossings. The court may state the provisions of section 86, article 6701d. . . . The court may further instruct the jury that *Castro*, as well as the whole public, was charged in law with knowledge of those safety provisions. The court may also give an appropriate definition or instruction concerning any excuse which is supported by some evidence and qualifies under the *Impson* rule.²²⁵

An Instruction or Definition Should Be Proper

Formerly, rule 277 permitted explanatory instructions or definitions that were necessary to enable the jury to render a verdict.²²⁶ The revision changed the word "necessary" to "proper."²²⁷ While it is no longer required that the court submit instructions and definitions that are "necessary" to enable the jury to pass on the issues, a "proper" charge should at least be a legally correct one.²²⁸ Clearly,

221. Compare *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974) with *Pittsburg Coca-Cola Bottling Works v. Ponder*, 443 S.W.2d 546, 551 (Tex. 1969).

222. See *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 257 (Tex. 1974).

223. 493 S.W.2d 491 (Tex. 1973).

224. See *id.* at 494.

225. *Id.* at 498.

226. Tex. R. Civ. P. 277 (1969); see *Boaz v. White's Auto Stores*, 141 Tex. 366, 370, 172 S.W.2d 481, 484 (1943).

227. Compare Tex. R. Civ. P. 277 ("explanatory instructions and definitions as shall be proper to enable the jury to render a verdict") with Tex. R. Civ. P. 277 (1969) ("explanatory instructions and such definitions of legal terms as shall be necessary to enable the jury to properly pass upon and render a verdict").

228. See *Gulf Coast State Bank v. Emenhiser*, 562 S.W.2d 449, 453 (Tex. 1978); *Irick v.*

definitions and instructions must be correct even if the "necessary" requirement has been omitted. As an example, causation in a suit brought under the Federal Employers' Liability Act²²⁹ should not be submitted in terms of "proximate cause" because it imposes a greater burden upon the plaintiff than the law permits, thereby affecting the plaintiff's guaranteed federal substantive rights.²³⁰ In addition, an instruction that misstates the law cannot be expected to produce a correct verdict. For example, in the submission of a negligence per se case, the judge may instruct the jury about the statutory law²³¹ as long as the instruction is a correct statement of the law.²³² In *Jackson v. Fontaine's Clinics, Inc.*,²³³ a case in which the plaintiff charged defendants with conspiring to damage the plaintiff's business and reputation, a damage issue was followed by a meaningless instruction that "damages" meant "the loss of monetary reward."²³⁴ Holding that the instruction permitted speculation about losses outside the pleadings and evidence, the supreme court reversed the judgment because the instruction neither correctly nor properly described "net profits," thereby failing to give the jury any guidance regarding a proper legal measure of damages.²³⁵ Finally, the revised rule did not change the law that an instruction about a

Andrew, 545 S.W.2d 557, 559 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.); Forney v. Memorial Hosp., 543 S.W.2d 705, 708 (Tex. Civ. App.—Beaumont 1976, writ ref'd n.r.e.); First State Bank & Trust Co. v. George, 519 S.W.2d 198, 207 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); cf. Wichita Valley Ry. v. Williams, 116 Tex. 253, 263, 288 S.W. 425, 428 (1926) (decided before amendment to rule 277).

In a deceptive trade practices suit, the jury need not be instructed that acts or practices listed in the Consumer Protection Act are false, misleading, or deceptive. The only inquiry is whether the acts or practices occurred; the statute declares and makes them false, misleading, or deceptive. See *Spradling v. Williams*, 566 S.W.2d 561, 562-64 (Tex. 1978).

In *Dutton v. Southern Pac. Transp.*, 576 S.W.2d 782 (Tex. 1978), a Texas common law definition of proximate cause was rejected in a F.E.L.A. case because it placed a greater burden upon the plaintiff than federal law permits; it included the elements of "foreseeability" and "new and independent cause." The correct definition was held to be: "'Proximate Cause' means a cause which played any part, no matter how small, in actually bringing about or causing the injury." See *id.* at 783, 786.

229. 45 U.S.C. §§ 51-60 (1970).

230. See *Arnold v. Panhandle & S.F. Ry.*, 353 U.S. 360, 361 (1957); *Rogers v. Missouri Pac. R.R.*, 352 U.S. 500, 507-08 (1957); *Brown v. Western Ry.*, 338 U.S. 294, 298-99 (1949); *Dutton v. Southern Pac. Transp.*, 561 S.W.2d 892, 894 (Tex. 1978); *Texas & Pac. Ry. v. Younger*, 262 S.W.2d 557, 560-61 (Tex. Civ. App.—Fort Worth 1953, writ ref'd n.r.e.). See generally Annot., 79 A.L.R.2d 553, 559 (1961).

231. *Southern Pac. Co. v. Castro*, 493 S.W.2d 491, 498 (Tex. 1973).

232. *Id.* at 498.

233. 499 S.W.2d 87 (Tex. 1973).

234. *Id.* at 89.

235. *Id.* at 90.

statutory presumption only fixes the burden of producing evidence and that it is not proper to explain the presumption to the jury.²³⁶

An Instruction or Definition Should Enable the Jury To Render a Verdict

Although the submission of instructions has been expanded to give the trial judge more discretion in his use of instructions, this discretion is not unfettered. Instructions are limited to those that should enable the jury to render its verdict. The trial judge must keep his eye upon the issue and the terms used in it, remembering that it is the issue—not the result—about which the jury needs assistance. For example, in *Pittsburg Coca-Cola Bottling Works v. Ponder*,²³⁷ a strict liability action for damages resulting from an exploding bottle, the court submitted an issue asking whether the Coca-Cola bottle that exploded was unfit for the purposes for which it was intended. The first special issue asked about the fitness of the bottle and its contents, but the court gave the unnecessary instruction that a bottler of a product for human consumption impliedly warrants that the product is reasonably fit for use. The instruction also stated that “one who puts out as his own product and assembles components thereof that may be manufactured by others may yet be liable for defects” in the product.²³⁸ It is apparent that the instructions did not assist the jury in arriving at an answer to the special issue asked; *i.e.* the fitness of the product. The court had no occasion to instruct the jury about the general state of the law regarding who is or who is not liable under product liability law. The instruction aimed the jurors toward a result. The disapproved charge was immaterial to the question that inquired about the existence of the defect and did not assist the jury in answering that question.

The supreme court in a series of cases²³⁹ has recognized actions

236. See *Hailes v. Gentry*, 520 S.W.2d 555, 558-59 (Tex. Civ. App.—El Paso 1975, no writ); *Armstrong v. West Tex. Rig Co.*, 339 S.W.2d 69, 74 (Tex. Civ. App.—El Paso 1960, writ ref'd n.r.e.).

237. 443 S.W.2d 546 (Tex. 1969). Other similar examples are found in *Union Oil Co. v. Richard*, 536 S.W.2d 955, 957-58 (Tex. Civ. App.—Beaumont 1975, no writ); *Colinburg v. George*, 519 S.W.2d 198, 207 (Tex. Civ. App.—Corpus Christi 1974, writ ref'd n.r.e.); *DeViney v. McLendon*, 496 S.W.2d 161, 166 (Tex. Civ. App.—Beaumont 1973, writ ref'd n.r.e.); *Levermann v. Cartall*, 393 S.W.2d 931, 935 (Tex. Civ. App.—San Antonio 1965, writ ref'd n.r.e.).

238. *Pittsburg Coca-Cola Bottling Works v. Ponder*, 443 S.W.2d 546, 550 (Tex. 1969).

239. *Turner v. General Motors Corp.*, 584 S.W.2d 844 (Tex. 1979); *General Motors Corp. v. Hopkins*, 548 S.W.2d 344 (Tex. 1977); *Henderson v. Ford Motor Co.*, 519 S.W.2d

grounded upon defective design as a form of product liability, but has had difficulty in arriving at an instruction of the term defective design that it considers helpful to a jury. In *General Motors Corp. v. Hopkins*²⁴⁰ the court said that unreasonable risk of harm as applied to the design of a product meant

that the product, as manufactured according to such design, threatens harm to persons using the product to the extent that any product so designed would not be placed in the channels of commerce by a prudent manufacturer aware of the risks involved in its use, and to the extent that the product so manufactured would not meet the reasonable expectations of the ordinary consumer as to safety.²⁴¹

The test was a bifurcated one that looked to either of the stated alternatives. The court was then confronted in *Turner v. General Motors Corp.*²⁴² with an instruction that omitted any mention of the alternative about a prudent manufacturer, aware of the risks, placing the automobile in the channels of commerce. In *Turner* the trial court had defined "unreasonably dangerous" by use of only one part of the bifurcated test, that is, the term meant "dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics." The supreme court approved the instruction because it was consistent with what the court stated in *Hopkins*, but stated that in future design defect cases the *Hopkins* instruction would no longer be applicable.²⁴³ In future cases, the instruction would be:

By the term "defectively designed" as used in this issue is meant a product that is unreasonably dangerous as designed, taking into consideration the utility of the product and the risk involved in its use.²⁴⁴

This short instruction about defective design permits the jury to balance the risk and utility of the product. The significance of the holding, however, is accented by the court's rejection of the more elaborate set of instructions suggested by the court of civil appeals that required the jurors to balance the following factors:

87 (Tex. 1974).

240. 548 S.W.2d 344 (Tex. 1977).

241. *Id.* at 347 n.1.

242. 584 S.W.2d 844 (Tex. 1979).

243. *Id.* at 847, 851.

244. *Id.* at 847 n.1.

- (1) the utility of the product to the user and to the public as a whole weighed against the gravity and likelihood of injury from its use;
- (2) the availability of a substitute product which would meet the same need and not be unsafe or unreasonably expensive;
- (3) the manufacturer's ability to eliminate the unsafe character of the product without seriously impairing its usefulness or significantly increasing its costs;
- (4) the user's anticipated awareness of the dangers inherent in the product and their avoidability because of general public knowledge of the obvious condition of the product, or of the existence of suitable warnings or instructions.²⁴⁵

Another example of instructions that did not assist the jury in answering the issue is found in *Union Oil Co. v. Richard*,²⁴⁶ a case in which a seaman sued his employer pursuant to the Jones Act.²⁴⁷ The broad issues submitted to the jury asked whether the plaintiff was injured, if the defendant failed to provide plaintiff a reasonably safe place to work, whether that failure was a producing cause of the injuries, and whether the deck on which plaintiff slipped was reasonably fit for its intended use. The trial court correctly refused to give a number of collateral instructions that had been requested by the defendant.²⁴⁸

In *DeViney v. McLendon*²⁴⁹ an instruction about sudden emergency was held to be of no assistance to a jury and actually counter-productive since there was no evidence of any sudden emergency.²⁵⁰ An instruction about a matter, however interesting, that is irrele-

245. *General Motors Corp. v. Turner*, 567 S.W.2d 812, 818 (Tex. Civ. App.—Beaumont 1978), *rev'd*, 584 S.W.2d 844 (Tex. 1979).

246. 536 S.W.2d 955 (Tex. Civ. App.—Beaumont 1975, no writ).

247. 46 U.S.C. § 688 (1970).

248. *See Union Oil Co. v. Richard*, 536 S.W.2d 955, 958 (Tex. Civ. App.—Beaumont 1975, no writ) (must exclude anything, no matter how relevant, that does not aid jury in answering issues). The refused instructions were:

[D]efendant is not obligated to provide an accident-proof ship; the mere occurrence of an accident does not raise any inference or presumption of negligence or unseaworthiness; defendant's obligation was only to furnish a vessel and equipment reasonably fit for its intended use; an undiscoverable amount of oil on a grating would not automatically create an unseaworthy condition if such was normal and necessary; that it is a fact of common knowledge that in almost every occupation aboard ship there is some inherent and unavoidable risk; that a corporation is entitled to a fair trial on the same basis as a private individual; and that plaintiff must prove the causal relationship between the incidents of February 4 and February 7, 1971, and his present complaints, concerning which the evidence must be more than speculation or conjecture.

Id. at 957.

249. 496 S.W.2d 161 (Tex. Civ. App.—Beaumont 1973, writ *ref'd n.r.e.*).

250. *Id.* at 166.

vant to the issue put to a jury has never been regarded as an aid to the jury.²⁵¹ On the other hand, courts have recently ruled that juries are assisted by proper definitions or instructions explaining terms used in the charge. Terms that recently have received explanation include self-defense,²⁵² good cause,²⁵³ due diligence,²⁵⁴ fraud,²⁵⁵ nuisance,²⁵⁶ Act of God,²⁵⁷ *res ipsa loquitur*,²⁵⁸ employee,²⁵⁹ attorney fees,²⁶⁰ "horseplay" in a worker compensation case,²⁶¹ injury,²⁶² and occupational disease.²⁶³

An Instruction or Definition Should Not Directly Advise the Jury of the Effect of Their Answers

Revised rule 277 retained the prohibition against telling jurors the effect of their answers but relaxed the rule by permitting incidental comments as distinguished from direct comments. An incidental comment is permissible when it is a proper part of an instruction or definition. A decision whether or not the instruction or definition is permissible, of course, pertains to judicial discretion, and the courts, including the supreme court, properly accord trial courts a reasonable discretion concerning comments.²⁶⁴ The court, however,

251. See G. HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS § 8 (1959).

In *Turner v. General Motors Corp.*, 584 S.W.2d 844, 853 (Tex. 1979), the supreme court disapproved an instruction that an award of damages to a plaintiff was exempt from federal income taxation as improper saying it introduced a collateral matter into the damage issue.

252. *Bounds v. Caudle*, 560 S.W.2d 925, 929-30 (Tex. 1977); see *Grieger v. Vega*, 153 Tex. 498, 504, 271 S.W.2d 85, 88-89 (1954).

253. *Scott v. Ingle Bros. Pac., Inc.*, 489 S.W.2d 554, 557 (Tex. 1972).

254. *Texas Gulf Sulphur Co. v. Gladys City Co.*, 506 S.W.2d 281, 288-89 (Tex. Civ. App.—Beaumont 1974, writ ref'd n.r.e.).

255. *Shasteen v. Mid-Continent Refrigerator Co.*, 517 S.W.2d 437, 438-39 (Tex. Civ. App.—Dallas 1974, writ ref'd n.r.e.).

256. *City of Lubbock v. Tice*, 517 S.W.2d 428, 431 (Tex. Civ. App.—Amarillo 1974, no writ).

257. *Scott v. Atchison, T. & S.F. Ry. Co.*, 572 S.W.2d 273, 279 (Tex. 1978).

258. *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256-57 (Tex. 1974).

259. *Mutual Life Ins. Co. v. Steele*, 570 S.W.2d 213, 216-17 (Tex. Civ. App.—Houston [14th Dist.] 1978, writ ref'd n.r.e.).

260. *Fox v. Boese*, 566 S.W.2d 682, 686 (Tex. Civ. App.—Houston [1st Dist.] 1978, writ ref'd n.r.e.).

261. *Mejia v. Liberty Mut. Ins. Co.*, 544 S.W.2d 690, 692 (Tex. Civ. App.—Houston [14th Dist.] 1976, no writ).

262. *Teague v. Charter Oak Fire Ins. Co.*, 548 S.W.2d 957, 959 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

263. *Transportation Ins. Co. v. Maksyn*, 580 S.W.2d 334, 337 (Tex. 1979).

264. See *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974); *Herrera v. Balmorhea Feeders, Inc.*, 539 S.W.2d 84, 87 (Tex. Civ. App.—El Paso 1976, writ ref'd n.r.e.).

must be careful not to give a direct instruction about the effect of an answer.

Advocates have increasingly urged trial judges to add words to standard and settled instructions as a means for telling jurors the effect of their answers. The argument advanced for the additional instructions is that it makes the definition or instruction meaningful; otherwise, it is urged, nothing is submitted to the jury that is helpful. Faced with these arguments, a trial court is nevertheless still prohibited from directly informing the jury of the effect of their answer. Although there is precedent among pre-1973 cases outside the field of negligence law, which moderately tolerates this practice,²⁶⁵ and although under the present rule the trial court has discretion concerning the form and content of instructions, a direct instruction about the effect of an answer remains impermissible.²⁶⁶

In *Scott v. Atchison, Topeka & Santa Fe Ry.*²⁶⁷ the trial court had submitted, among others, the instruction that “[a]n occurrence may be an ‘Act of God’, that is, an event not caused in whole or in part by the negligence of any party.”²⁶⁸ Counsel for the defendant railroad argued that the instruction was meaningless since it failed to advise the jury “what the effect would be of a determination by them that Scott’s injuries were caused by the ‘Act of God’.”²⁶⁹ Although the supreme court did not specifically address the stated objection, the objection is invalid because it violates the prohibition found in rule 277 against telling jurors the effect of their answers.²⁷⁰

265. See *Grieger v. Vega*, 153 Tex. 498, 502-03, 271 S.W.2d 85, 87 (1954) (wrongful killing and self-defense); *Pearson v. Doherty*, 143 Tex. 64, 70-71, 183 S.W.2d 453, 456 (1944) (adverse possession); *Viduarri v. Bruni*, 179 S.W.2d 818, 823-24 (Tex. Civ. App.—San Antonio 1944, writ ref’d w.o.m.) (trespass to try title and adverse possession).

266. TEX. R. CIV. P. 277; see *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 280 (Tex. 1978); *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974); cf. *Pittsburg Coca-Cola Bottling Works v. Ponder*, 443 S.W.2d 546, 550 (Tex. 1969) (decided before revision of rule 277). See generally Figari, *Texas Civil Procedure, Annual Survey of Texas Law*, 28 Sw. L.J. 248, 259-60 (1974); Pope & Lowerre, *Revised Rule 277—A Better Special Verdict System for Texas*, 27 Sw. L.J. 577, 588-89 (1973).

267. 572 S.W.2d 273 (Tex. 1978).

268. *Id.* at 279.

269. *Atchison, T. & S.F. Ry. v. Scott*, 551 S.W.2d 740, 743 (Tex. Civ. App.—Beaumont 1977), *aff’d*, 572 S.W.2d 273 (Tex. 1978).

270. See *McLeroy v. Stocker*, 505 S.W.2d 615, 618-19 (Tex. Civ. App.—Houston [1st Dist.] 1974, no writ). In *McLeroy* the court of civil appeals disapproved of a statement that had been added by the trial court to its instruction. In its instruction the trial court told the jury: “Thus, if in your deliberation you determine that the occurrence in question was not proximately caused by negligence of any party to the event, you shall answer all of the issues of this charge inquiring about ‘negligence or negligent acts’ of the plaintiff and the defendant ‘we do not’.” *Id.* at 617.

Nevertheless, the court did strike down the instruction because it actually describes "unavoidable accident" rather than "Act of God."²⁷¹ In suggesting to the bench and bar a manner in which "Act of God" might be submitted to the jury, the court included the following instruction at the end of its explanation of an "Act of God:"

[Y]ou are instructed that an occurrence is not caused in whole or in part by the negligence of any party if it is due solely to an 'Act of God.'²⁷²

Arguably, even that instruction suggests to a jury the effect of its answers, but this advice is considered incidental rather than direct.

Instructions that array the evidence should also be avoided. The discredited statutory rule that required separate and distinct issues was a response to the frequent reversals attributed to trial courts' efforts to marshal or array the evidence in charging jurors. Under this former practice, the court would summarize the evidence and then instruct the jurors that if they believed the stated set of facts to be true, they must find for a certain party.²⁷³ The charge under this practice was given in substantially this form: If you believe (fact 1) and (fact 2) and (fact 3), then you will answer the special issues "We do not" or "For the defendant." The courts using that charge were reversed many times because of omissions, inclusions, and misstatements of the facts and law. In response to these numerous reversals the legislature passed article 1984a in 1913, which required issues to be submitted "distinctly and separately."²⁷⁴ Recently, this abandoned practice of marshalling the facts reappeared and by dictum was expressly disapproved by the supreme court in *Gulf Coast State Bank v. Emenhiser*²⁷⁵ because the charge was a comment on the evidence and advised the jurors of the effect of their answers.²⁷⁶

271. *Scott v. Atchison, T. & S.F. Ry.*, 572 S.W.2d 273, 280 (Tex. 1978).

272. *Id.* at 280 (footnote omitted).

273. See *Missouri, K. & T. Ry. v. Rogers*, 91 Tex. 52, 55-56, 40 S.W. 956, 957-58 (1897); *Missouri, K. & T. Ry. v. McGlamory*, 89 Tex. 635, 638-39, 35 S.W. 1058, 1059 (1896); *Western Union Tel. Co. v. Jeanes*, 88 Tex. 230, 232, 31 S.W. 186, 187 (1895); *Houston, E. & W.T. Ry. v. Lynch*, 208 S.W. 714, 723 (Tex. Civ. App.—Beaumont 1919, no writ); *Gulf, C. & S.F. Ry. v. Hamilton*, 28 S.W. 906, 907-08 (Tex. Civ. App. 1894, no writ). See generally *Pope & Lowerre, Revised Rule 277—A Better Special Verdict System For Texas*, 27 Sw. L.J. 577, 588-89 (1973).

274. 1913 Tex. Gen. Laws, ch. 59, § 1, at 113.

275. 562 S.W.2d 449 (Tex. 1978).

276. See *id.* at 453. The defective charge, in pertinent part, stated:

The Court Should Not Directly Comment on the Weight of the Evidence

The trial court, whether by an issue, definition, or instruction, should not directly include a comment on the evidence, but the court may do so incidentally.²⁷⁷ In *City of Pearland v. Alexander*,²⁷⁸ an eminent domain case, the trial court improperly commented on the disputed evidence when it instructed the jury that the condemning municipality “will exercise its rights” to the fullest extent permissible.²⁷⁹ *City of Pearland* was decided before the revision of rule 277, but the instruction is also defective under the revised rule.²⁸⁰ A similar error was committed in another condemnation case, *Gleghorn v. City of Wichita Falls*.²⁸¹ The condemnors had taken a flowage easement over a part of Gleghorn’s land. The evidence showed, however, that flooding would occur only infrequently. The supreme court upheld the reversal by the court of civil appeals because the trial court had submitted an instruction that the land “is to be used for the purpose of being submerged by water.”²⁸² The instruction was a comment on the weight of the evidence.

DEVELOPING SUBSTANTIVE LAW LEAVES PROCEDURES UNCERTAIN

The procedures employed during trials necessarily depend upon the rights, defenses, and standards established by the substantive law.²⁸³ Consequently, many of the present procedural problems may be traced to the expanding new fields of substantive law. Both the Texas Legislature and the courts have been active in the creation of new rights. Recent significant legislation includes such topics as comparative negligence,²⁸⁴ consumer protection in all of its varied

If you should find that had the Gulf Coast State Bank at Winnie mailed the draft in question direct [*sic*] to Louisiana Bank and Trust Company, Crowley, Louisiana, for presentment and such would have been presented at a time when the draft would have been paid or would have been held by the Louisiana Bank for more than twenty-four (24) hours after presentment, then you will find for the Doornbos Defendants and the Emenhiser Defendants in this case.

Id. at 453.

277. TEX. R. CIV. P. 277; see *Briseno v. Martin*, 561 S.W.2d 794, 796-97 (Tex. 1977).

278. 483 S.W.2d 244 (Tex. 1972).

279. *Id.* at 248-49 (emphasis added).

280. See *Gleghorn v. City of Wichita Falls*, 545 S.W.2d 446, 447 (Tex. 1976).

281. *Id.* at 447-48.

282. *Id.* at 447-48.

283. See Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEXAS L. REV. 1185, 1187 (1976).

284. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979).

facets,²⁸⁵ medical malpractice,²⁸⁶ the Texas Tort Claims Act,²⁸⁷ and the Equal Rights Amendment to the Texas Constitution.²⁸⁸ Opinions of the Texas appellate courts also have recognized new rights that are worthy of protection. In 1967, the supreme court embraced product liability law by its acceptance of section 402A of the *Restatement (Second) of Torts*.²⁸⁹ The court at first eroded²⁹⁰ and then repudiated the doctrine of charitable immunity.²⁹¹ Recent decisions have approved actions based on the right of privacy,²⁹² the loss of consortium,²⁹³ suits for criminal conversation,²⁹⁴ and the protection of an implied warranty of habitability by a landlord.²⁹⁵ The court also has abolished the doctrine of interspousal tort immunity for willful or intentional torts.²⁹⁶ These changes in the substantive law will have a significant impact on courthouse procedures in general and jury charges in particular. The impact of these changes and the effect they may have on the jury charge can best be recognized through consideration of a few examples.

Comparative Negligence

The comparative negligence statute,²⁹⁷ while simplifying trials of

285. See TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978-1979) (Deceptive Trade Practices—Consumer Protection Act); TEX. REV. CIV. STAT. ANN. art. 5069-2.01 to 8.06 (Vernon 1971 & Supp. 1978-1979) (Consumer Credit Code); *id.* art. 5069-11.01 to 11.11 (Vernon Supp. 1978-1979) (debt collection practices); *id.* art. 5069-13.01 to 13.06 (Vernon Supp. 1978-1979) (home solicitation transactions); *id.* art. 5069-14.01 to 14.28 (Vernon Supp. 1978-1979) (consumer credit disclosure requirements); TEX. INS. CODE ANN. arts. 20A.14 & 20A.20 (Vernon Supp. 1963-1978) (prohibited practices and suspension of certificate of authority under the Texas Health Maintenance Organization Act); *id.* art. 21.21-2 (Vernon Supp. 1963-1978) (unfair claim settlement practices under the Unfair Claims Settlement Practice Act). See generally *Consumer Law Symposium*, 8 ST. MARY'S L.J. 609 (1977).

286. TEX. REV. CIV. STAT. ANN. art. 4590i (Vernon Supp. 1978-1979) (Medical Liability and Insurance Improvement Act of Texas).

287. *Id.* art. 6252-19 (Vernon 1970).

288. TEX. CONST. art. I, § 3a. For a review of Texas appellate court decisions through 1977 interpreting the Texas Equal Rights Amendment, see Schoen, *The Texas Equal Rights Amendment in the Courts — 1972-1977: A Review and Proposed Principles of Interpretation*, 15 HOUS. L. REV. 537 (1978).

289. See *McKisson v. Sales Affiliates, Inc.*, 416 S.W.2d 787, 789 (Tex. 1967); RESTATEMENT (SECOND) OF TORTS § 402A (1965).

290. See *Watkins v. Southcrest Baptist Church*, 399 S.W.2d 530, 534-35 (Tex. 1966).

291. See *Howle v. Camp Amon Carter*, 470 S.W.2d 629, 630 (Tex. 1971).

292. See *Billings v. Atkinson*, 489 S.W.2d 858, 859-60 (Tex. 1973).

293. See *Whittlesey v. Miller*, 572 S.W.2d 665, 668 (Tex. 1978).

294. See *Felsenthal v. McMillan*, 493 S.W.2d 729, 730 (Tex. 1973).

295. See *Kamarath v. Bennett*, 568 S.W.2d 658, 660-61 (Tex. 1978).

296. See *Bounds v. Caudle*, 560 S.W.2d 925, 927 (Tex. 1977).

297. TEX. REV. CIV. STAT. ANN. art. 2212a, § 1 (Vernon Supp. 1978-1979).

negligence cases, has added procedural complexities to product liability cases that are yet to be resolved. Article 2212a authorizes a comparison of the negligence of the participants; but, since no negligence issue is present in a product liability case, there can be no apportionment pursuant to the statute when a codefendant is found to be strictly liable. The supreme court by its decision in *General Motors Corp. v. Hopkins*²⁹⁸ recognized a supplier's liability for supplying a defective product that was a producing cause of an injury.²⁹⁹ The plaintiff's misuse or alteration of the product, however, can be a concurring cause with the defect.³⁰⁰ In *Hopkins* the court fashioned a rather awkward method for pure comparison of the effect of the product's defect with the effect of the plaintiff's misuse or alteration—comparative causation.³⁰¹ To achieve apportionment between the plaintiff and defendant the product defect must be a producing cause, but the consumer's misuse or alteration must be a concurring proximate cause.³⁰² The procedural problems

298. 548 S.W.2d 344 (Tex. 1977).

299. *Id.* at 351.

300. *Id.* at 349.

301. *Id.* at 352. The court summarized the comparison test as follows:

To recapitulate, if the product is found to have been unreasonably dangerous when the defendant placed it in the stream of commerce, and if that defect is found to have been a producing cause of the damaging event, and if the plaintiff has misused the product in the sense as defined by the trial court in its charge in the present case, and if that misuse is a proximate cause of the damaging event, the trier of fact must then determine the respective percentages (totalling 100%) by which these two concurring causes contributed to bring about the event. This comparison and division of causes is not to be confused with the statutory scheme of modified comparative negligence which bars all recovery to the plaintiff if his negligence is greater than the negligence of the parties against whom recovery is sought. [Citation omitted.] The defense in a products liability case, where both defect and misuse contribute to cause the damaging event, will limit the plaintiff's recovery to that portion of his damages equal to the percentage of the cause contributed by the product defect.

Id. at 352. Messrs. Heft and Heft, in their manual on comparative negligence, recognized the distinction between "pure" and "modified" comparative negligence when they concluded that, of those states that have adopted a form of comparative negligence, either by legislative or judicial action, the doctrine usually has emerged in one of three forms, either in its "pure" form or one of the two modified forms. See C. HEFT & C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL*, Appendix II (rev. 1978). The pure form of comparative negligence allows recovery by a plaintiff as long as the defendant is found to be guilty of some percentage of negligence, no matter how small. The plaintiff's recovery will, of course, be diminished by his degree of contributory negligence. *Id.* at § 1.50. Of the two modified forms, the first permits a plaintiff to recover as long as his negligence is less than 50% of the total negligence. The second form, and the one adopted by Texas, permits recovery for the plaintiff as long as his negligence is not in excess of 50% of the total negligence. *Id.* at § 1.40; see Comment, *Multiple Party Litigation in Comparative Negligence: Incomplete Resolution of Joinder and Settlement Problems*, 32 Sw. L.J. 669, 669 n.3 (1978).

302. *General Motors Corp. v. Hopkins*, 548 S.W.2d 344, 351 (Tex. 1977).

generated by this state of the substantive law are apparent. Under the rule announced in *Hopkins*, the plaintiff who has misused or altered the product may recover against the supplier for the percent of injury caused by the product defect, no matter how small; however, article 2212a, which applies only to negligence cases, does not permit apportionment between a negligent defendant and a strictly liable defendant. Thus, comparing negligence under article 2212a and comparing causation in product liability cases creates an unfortunate complexity of issues.

Another complicating factor is that section 2 of article 2212a expressly authorizes contribution among negligent tortfeasors but fails to allocate damages when one of the defendants is found to be strictly liable.³⁰³ The statute affords no mechanism for comparing the causative fault of a strictly liable manufacturer with the negligent conduct of a negligent codefendant.³⁰⁴ The supreme court invited the legislature's attention to these problems in *General Motors Corp. v. Simmons*.³⁰⁵

The Sixty-Sixth Legislature, however, defeated legislation that would have provided for comparative fault in product liability suits. House Bill 1161, as originally introduced, incorporated most of the proposals of the House Joint Study Committee.³⁰⁶ It prohibited actions in strict liability based upon a defectively designed product and provided for comparative fault that permitted a claimant to

303. See TEX. REV. CIV. STAT. ANN. art. 2212a, § 2 (Vernon Supp. 1978-1979).

304. See *id.* This result is to be compared with the result in causes of action arising before the effective date of the comparative negligence statute. In these earlier cases the division of damages was controlled by TEX. REV. CIV. STAT. ANN. art. 2212 (1971), as interpreted in *Palestine Contractors, Inc. v. Perkins*, 386 S.W.2d 764, 767-68 (Tex. 1964). See *General Motors Corp. v. Simmons*, 558 S.W.2d 855, 862 (Tex. 1977).

305. 558 S.W.2d 855, 863 (Tex. 1977). The legislature responded by including the subject in its interim study and report concerning the subject of product liability. See HOUSE JOINT STUDY COMM. ON PRODUCTS LIABILITY, 65TH LEGISLATURE OF TEXAS, INTERIM REPORT ON PRODUCTS LIABILITY 70 (1978). The report's recommendation was to compare fault. *Id.* at 80. Senate Bill 135, introduced in the 66th Legislature, was derived from sample legislation suggested by the report. The suggested legislation broadly defines fault and then provides:

(b) Except for a suit based on intentional tort, liability in a products liability suit shall be determined by comparing the fault chargeable to the claimant with the fault chargeable to all others contributing to cause the harm whether or not they are parties to the suit, and except as otherwise specifically provided in this section, each defendant in the suit, on a decision in favor of the claimant, is liable for damages in proportion to the percentage of fault attributed to that defendant.

Id. at 87.

306. See H.B. 1161, 66th Legislature of Texas, Regular Sess. (1979). House Bill 1161 had its first reading in the House on February 21, 1979, and was referred to the Committee on State Affairs. House Bills on First Reading, TEX. H.R.J. 442 (1979).

recover unless his fault was greater in degree than the fault of all defendants. Under that original proposal, misuse, alteration or modification, and conformity with the state of the art, as defined in the bill, were absolute defenses. Punitive damages were prohibited in product liability suits.

The House Committee Substitute for House Bill 1161 was the product of the give and take of the strong forces that were seeking strict liability legislation.³⁰⁷ The substitute bill broadly defined fault to include strict liability, negligence, and breach of express or implied warranty. It provided for contribution in proportion to the percentage of fault attributable to each defendant, provided the claimant's fault did not exceed the total fault of all defendants. The committee substitute eliminated the provisions for total defenses, except the defense of state of the art.

Several floor amendments were adopted by the House,³⁰⁸ including one that permitted recovery of damages as diminished by the amount of fault attributed to the claimant, even though the claimant's fault may be greater than the fault of the defendants. The House Committee Substitute, as amended and sent to the Senate, provided that a finding that the elimination of the defect upon which recovery was sought was beyond the state of the art at the time of the manufacture, design, or marketing would be conclusive that the product, design, warning, or instruction was not defective. The bill also included extensive provisions concerning product liability insurance.

The Senate Committee Substitute for House Bill 1161 stripped back the House version to the original broadly defined comparative fault.³⁰⁹ The state of the art proposal, as a total and conclusive defense, was retained by the Senate Committee. The Senate substitute permitted recovery only if the fault of the claimant was not greater than the fault of the defendants. The Senate, however, refused by a vote of 19-12 (two votes short) to suspend the regular

307. The substitute bill was reported out of committee on May 4, 1979. Standing Committee Reports, TEX. H.R.J. 2417 (1979). The complete text of the Committee Substitute for H.B. 1161 is reported at H.B. 1161 on Second Reading, TEX. H.R.J. 2551-52 (1979).

308. See H.B. 1161 on Second Reading, TEX. H.R.J. 2557-58 (1979). House Bill 1161 was passed as amended on third reading. See H.B. 1161 on Third Reading, TEX. H.R.J. 2671-72 (1979).

309. See Senate Comm. Substitute for H.B. 1161, 66th Legislature of Texas, Regular Sess. (1979). The bill had its first reading in the Senate on May 11, 1979, and was referred to the Committee on Economic Development. House Bills on First Reading, TEX. S.J. 1146 (1979). It was reported out of committee on May 17, 1979. Reports of Standing Committees, TEX. S.J. 1328 (1979).

order of business to consider the bill in the closing hours of the Sixty-Sixth Legislature.³¹⁰ The legislative story portrays a serious policy struggle and, despite the failure to produce a product, it manifests the broad range of policy agreement and the narrower range of disagreement.

Inevitably, there will emerge some means of comparing fault, whether the fault be grounded on a negligence, product liability, warranty, or other theory. The Texas Legislature's failure to respond to the supreme court's invitation to resolve the problem has postponed a clearer understanding of the substantive rights to contribution. Additionally, the bench and bar today are at the same stage of uncertainty about absolute defenses to suits in strict liability that they were in 1973 about the several absolute defenses to negligence cases. The question whether voluntary assumption of risk is a complete defense in negligence cases was answered in *Farley*,³¹¹ but the defense has survived in strict liability cases.³¹²

The combination of old and new substantive theories of recovery with the existence of the allocation problems in strict liability has given rise to a new phenomenon. A plaintiff may plead his case alternatively upon grounds of negligence, strict liability, breach of warranty, and a violation of consumer protection rights. The different theories, sounding in both tort and contract law, throw a massive conceptual burden not only upon the attorneys and the trial judge, but also upon lay jurors. Having almost escaped the multitude of issues that once surrounded negligence cases, the bar is now faced with a multitude of new theories of action. Dean Page Keeton has expressed the view that the mixing of several theories in a single lawsuit has resulted in such complexity that there should be a single theory of recovery.³¹³ Likewise Dean Leon Green had previously noted that much of the confusion could be eliminated by restricting the trial to a single action.³¹⁴ Regrettably, no one appears to be addressing the merits of this suggestion at the present time.

310. Motion to Place Committee Substitute House Bill 1161 on Second Reading, TEX. S.J. 1376 (1979).

311. *Farley v. M M Cattle Co.*, 529 S.W.2d 751, 758 (Tex. 1975).

312. See *Rourke v. Garza*, 530 S.W.2d 794, 800 (Tex. 1975); *Henderson v. Ford Motor Co.*, 519 S.W.2d 87, 90-91 (Tex. 1974). See generally Keeton, *Torts, Annual Survey of Texas Law*, 32 Sw. L.J. 1, 11-14 (1978).

313. Keeton, *Torts, Annual Survey of Texas Law*, 32 Sw. L.J. 1, 1-2 (1978).

314. Green, *Strict Liability Under Sections 402A and 402B: A Decade of Litigation*, 54 TEXAS L. REV. 1185, 1192, 1211-12 (1976); see Keeton, *Products Liability—Inadequacy of Information*, 48 TEXAS L. REV. 398, 409 (1970). In his article Dean Keeton states,

Consumer Protection

The Deceptive Trade Practice—Consumer Protection Act,³¹⁵ effective May 21, 1973, has been described as “probably the most far-reaching legislation that has been enacted in Texas since the adoption of the English common law in 1840.”³¹⁶ Much of today’s consumer law is related to the doctrine of strict liability. Both strict liability and recent consumer protection laws are forms of the maxim *caveat venditor*.³¹⁷ The Deceptive Trade Practices Act is popular because it provides for the recovery of damages, treble damages in some circumstances, and attorney fees by a consumer who has been adversely affected by the use of any false, misleading, or deceptive act or practice in the conduct of any trade or commerce.³¹⁸

My principal thesis is and has been that theories of negligence should be avoided altogether in the products liability area in order to simplify the law, and that if the sale of a product is made under circumstances that would subject someone to an unreasonable risk in fact, liability for harm resulting from those risks should follow.

Id. at 409 (original emphasis). He adds in a footnote: “There is no longer any reason to complicate a trial by submitting a case to the jury on negligence and warranty theories, and a trial judge would not err in refusing to do so.” *Id.* at 409 n.25. *But cf.* *Mather v. Caterpillar Tractor Corp.*, 533 P.2d 717, 720 n.1 (Ariz. App. 1975) (sometimes case should be submitted on both strict liability and negligence); *Jiminez v. Sears, Roebuck & Co.*, 482 P.2d 681, 686, 93 Cal. Rptr. 769, 774-75 (1971) (sometimes beneficial to plaintiff to submit both strict liability and negligence issues). It is a common practice in Texas to combine the several theories of action in a single suit.

315. TEX. BUS. & COM. CODE ANN. §§ 17.41-.63 (Vernon Supp. 1978-1979).

316. *Singleton v. Pennington*, 568 S.W.2d 382, 385 (Tex. Civ. App.—Dallas 1978, writ filed) (on motion to dismiss).

317. *See generally* Maleson, *Negligence Is Dead But Its Doctrines Rule Us From the Grave: A Proposal To Limit Defendant’s Responsibility in Strict Products Liability Actions Without Resort to Proximate Cause*, 51 TEMP. L.Q. 1, 5-13 (1978).

318. *See* *Woods v. Littleton*, 554 S.W.2d 662, 671 (Tex. 1977); TEX. BUS. & COM. CODE ANN. § 17.50 (Vernon Supp. 1978-1979). The 66th Legislature, apparently in response to the large number of cases that are being filed pursuant to the Deceptive Trade Practices Act, has passed, and the Governor has signed, Senate Bill 357, amending the Act. 1979 Tex. Sess. Law Serv., ch. 603, § 1, at 1327 (Vernon). The 1979 amendments purport to limit the applicability of the Act in many respects. Among other things, a consumer may now recover damages, pursuant to section 17.50, for “false, misleading, or deceptive acts or practices” only when those acts or practices are included within the laundry list found in section 17.46(b). *Id.* § 4, at 1329. The amount of recoverable damages has been reduced greatly by eliminating the treble damage requirement and substituting a recovery of two times that portion of the actual damages that does not exceed \$1,000. It is only when the conduct of the defendant was committed “knowingly” that the trier of fact may treble the damage award. *Id.* § 4, at 1330. In addition, it now appears to be a total defense to a damage claim when the defendant proves, *inter alia*, either that he relied upon certain false or inaccurate written information relating to the goods or services in question when the information was received

With the definition of a "consumer" expanded to include any "individual, partnership, corporation, or governmental entity who seeks or acquires by purchase or lease, any goods or services,"³¹⁹ the Deceptive Trade Practices Act is now being applied to an ever increasing number of transactions.³²⁰ In addition, with the deletion of a definition of "merchant," there should no longer be any doubt that the Act now applies to purely commercial transactions as well as those types of transactions that would normally come to mind when one hears the term "consumer protection."³²¹ At least one writer has written that the Act "would seem to apply to literally anyone who sells or leases goods or services to anyone else."³²² Although this Act potentially covers almost every sale or lease of goods and services in Texas and although much writing has occurred during the past five or six years regarding the substantive aspects of the law, relatively few decisions have been written concerning the special issues to be used in trials of consumer cases.³²³ One unsolved problem is the difficulty that arises from mixing tort with contract actions.³²⁴ In the jury charge for the ordinary consumer case, however, the same principles stated in *Mobil Chemical* concerning broad issues will apply.³²⁵

from official government records or another source, or that he relied upon written information when it concerns a test required or prescribed by a government agency. *Id.* § 6, at 1331.

319. TEX. BUS. & COM. CODE ANN. § 17.45(4) (Vernon Supp. 1978-1979).

320. See generally Bragg, *Now We're All Consumers! The 1975 Amendments to the Consumer Protection Act*, 28 BAYLOR L. REV. 1 (1976). One limitation that courts appear to apply to cases brought pursuant to the Deceptive Trade Practices Act is that, in order to be a "consumer," one must have either purchased or leased the goods from the defendant. See *Exxon Corp. v. Dunn*, 581 S.W.2d 500, 501 (Tex. Civ. App.—Dallas 1979, no writ); *Russell v. Hartford Cas. Ins. Co.*, 548 S.W.2d 737, 741 (Tex. Civ. App.—Austin 1977, writ ref'd n.r.e.).

321. See *Singleton v. Pennington*, 568 S.W.2d 367, 376 (Tex. Civ. App.—Dallas 1977, writ filed) (on motion for rehearing); Comment, *What Hath the Legislature Wrought? A Critique of the Deceptive Trade Practices Act as Amended in 1977*, 29 BAYLOR L. REV. 525, 525-531 (1977).

322. Comment, *What Hath the Legislature Wrought? A Critique of the Deceptive Trade Practices Act as Amended in 1977*, 29 BAYLOR L. REV. 525, 531 (1977). One possible exception to this statement might occur when the alleged wrongdoer is a governmental body that is entitled to the defense of sovereign immunity. See *id.* at 527.

323. See generally *Spradling v. Williams*, 566 S.W.2d 561 (Tex. 1978).

324. Compare *Nobility Homes, Inc. v. Shivers*, 557 S.W.2d 77, 79-80 (Tex. 1977) with *Mid Continent Aircraft Corp. v. Curry County Spraying Serv., Inc.*, 572 S.W.2d 308, 311-12 (Tex. 1978) and *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 324-25 (Tex. 1978).

325. See *Mobil Chem. Co. v. Bell*, 517 S.W.2d 245, 256 (Tex. 1974). One suggested set of court charges for consumer actions is contained in D. BRAGG, P. MAXWELL, J. LONGLEY, TEXAS CONSUMER LITIGATION §§ 9.01-.35 (1978).

In *Spradling v. Williams*³²⁶ the supreme court recognized that section 17.46 of the Consumer Protection Act, which lists the statutory violations, excuses the submission of an issue inquiring whether the act or practice was "false, misleading, or deceptive" because the statute declares it to be.³²⁷ The correct issue is one that asks whether the defendant violated the provision, followed by the issues on causation and damages.³²⁸

A very significant development in the relations between sellers and buyers was the supreme court's decision in *Signal Oil & Gas Co. v. Universal Oil Products*.³²⁹ Signal Oil sued three defendants, and it alternatively alleged actions in negligence, strict liability, and breach of an implied warranty under the Texas Business and Commerce Code.³³⁰ Signal's suit was to recover damages to its refinery that it alleged was destroyed by reason of the defects in the manufacture, design, and/or installation of an isomax reactor charge heater. Jury findings defeated Signal's negligence and strict liability findings, but the supreme court reversed the judgments of the trial court and court of civil appeals and remanded the cause for a retrial on the implied warranty action.³³¹

The jury in *Signal Oil* found that two of the defendants, Alcorn Combustion Company and Procon, Inc., had failed to erect a heater that was reasonably suited for its intended use or purpose and that the unsuitability was a proximate cause of the rupture that caused the fire. The basis for the denial of Signal's recovery in the courts below was the jury's additional finding that Signal Oil was contributorily negligent. The supreme court rejected the argument that contributory negligence is an absolute and total defense to an action for breach of an implied warranty of fitness or suitability. The court, as it had done earlier in the case of strict liability in *General Motors Corp. v. Hopkins*,³³² fashioned a system of pure comparative liability. The cause was remanded with instruction that on retrial the court should make a determination of the percentage of the concurring cause that contributed to the consequential damages. A seller

326. 566 S.W.2d 561 (Tex. 1978).

327. *Id.* at 563-64.

328. See D. BRAGG, P. MAXWELL, J. LONGLEY, TEXAS CONSUMER LITIGATION § 9.02 (1978). The authors suggest that while the language of the statute may be changed to fit the evidence in a particular case, the statute should be followed as closely as possible.

329. 572 S.W.2d 320 (Tex. 1978).

330. *Id.* at 322; see TEX. BUS. & COM. CODE ANN. §§ 2.314-.315 (Vernon 1968).

331. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 331 (Tex. 1978).

332. 548 S.W.2d 344 (Tex. 1977).

is liable for that part of the damages caused by the breach of implied warranty but not for that part of the damages proximately caused by the buyer's "negligence or fault."³³³

Texas now has a confusing system of comparing negligence under the modified comparative negligence statute³³⁴ and a system of pure comparison of causation in strict liability and implied warranty cases. The court in *Signal* did not have before it issues that would clarify the extent to which assumption of risk, misuse, and alteration would afford defenses to a suit for breach of implied warranty.

Medical Malpractice

The Medical Liability and Insurance Improvement Act³³⁵ was a legislative response to an outcry over dramatic increases in premiums that physicians were having to pay for malpractice insurance.³³⁶ The act addressed both substantive and procedural law and changed the applicable statute of limitations by discarding the court-adopted discovery rule³³⁷ and adopting a rigid two-year limitation period from the occurrence of the alleged negligent act.³³⁸ The act limits recovery of damages to \$500,000³³⁹ as well as the use of *res ipsa loquitur* when used against physicians and those who provide health care.³⁴⁰ The act also requires the inclusion of certain instructions in the court's charge to the jury. Section 11.02(d) states that the charge shall include an instruction stating, "Do not consider, discuss, nor speculate whether or not liability, if any on the part of any party is or is not subject to any limit under applicable law."³⁴¹ In the absence of this instruction one can only speculate why the jurors would even think that such limitations might be present. The

333. *Signal Oil & Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320, 329 (Tex. 1978).

334. TEX. REV. CIV. STAT. ANN. art. 2212a (Vernon Supp. 1978-1979).

335. *Id.* art. 4590i.

336. *Id.* art. 4590i, § 1.02(7). See generally Redish, *Legislative Response to the Medical Malpractice Insurance Crisis: Constitutional Implications*, 55 TEXAS L. REV. 759, 759-61 (1977).

337. The supreme court has defined the discovery rule as "the legal principle that a statute of limitations barring prosecution of an action for medical malpractice runs, not from the date of the practitioner's wrongful act or omission, but from the date the nature of the injury was or should have been discovered by the plaintiff." *Weaver v. Witt*, 561 S.W.2d 792, 793-94 (Tex. 1977) (negligent surgical operation); see *Hays v. Hall*, 488 S.W.2d 412, 413-14 (Tex. 1972) (vasectomy); *Gaddis v. Smith*, 417 S.W.2d 577, 580-81 (Tex. 1967) (failure to remove surgical sponge).

338. See TEX. REV. CIV. STAT. ANN. art. 4590i, § 10.01 (Vernon Supp. 1978-1979).

339. See *id.* § 11.02.

340. See *id.* § 7.01.

341. *Id.* § 11.02(d).

legislature also has provided that, in a case grounded upon the failure of a physician to disclose adequately to his patient the risks involved in some medical procedure, the court is required to include an instruction advising the jury that a rebuttable presumption arises from either the physician's compliance or his failure to comply with the disclosure procedure that has been established by the Texas Medical Disclosure Panel.³⁴² None of these statutory changes in medical malpractice law, however, prohibit a medical malpractice case from being submitted on a broad issue. In a recent malpractice suit a broad issue was permitted that inquired whether the doctor "was negligent in his diagnosis and/or medical care and treatment of Joe Bert Andrews, Jr., deceased, after the operation in question."³⁴³

CONCLUSION

Since its revision in 1973, rule 277 has eliminated many special issues that were too narrowly drawn. Broad and global issues may now be submitted. Consequently, conflicting jury answers, appeals, and retrials have been avoided. Trial judges, armed with more discretion in the submission of issues, are better able to command the form that the court's charge will take, knowing that there is more than one fair way to try a case. Advocacy and oral argument have found room for a rebirth and should be more generally relied upon to supplant a multitude of issues and unnecessary instructions since almost all allegedly necessary instructions can be adequately handled by argument. Even with these advancements, however, the rapidly developing substantive law supplies the bench and bar with ambiguities bringing new pressures upon the procedural system.

Long-standing practices, even bad ones, and mind-sets that have been molded by several generations of teaching are slow to die.³⁴⁴ Dean Green once wrote,

342. *Id.* § 6.07.

343. *Lee v. Andrews*, 545 S.W.2d 238, 247 (Tex. Civ. App.—Amarillo 1976, writ dismissed).

344. Dean Leon Green has listed several of the obstacles to finding a satisfactory submission method: (1) usually there is no general agreement on what the issues should be in a negligence suit; (2) tort law is always changing; (3) the litigants usually press the trial judge to submit every facet of favorable factual data; (4) the litigants frequently prefer multiple issues and instructions that distract the jurors from the basic issues and provide a source of error for appeal; (5) appellate courts use instructions to control the trial judge and jury; and (6) large scale changes of local procedures are very difficult to accomplish. Green, *The Submission of Issues in Negligence Cases*, 18 *MIAMI L. REV.* 30, 32 (1963).

The practitioners of negligence law are divided into powerful and professionally hostile camps neither of which would be likely to support any serious changes in current methods of the submission process. Moreover, the appellate courts which have the power and responsibility for developing and sustaining a rational process of submission, are manned by judges of too many minds, who for the most part are too timid or are unwilling to undergo the extended study, trials and tribulations of such an undertaking.³⁴⁵

He also might have added that bad practices are tenacious, have a strong will to survive, possess the power of regeneration, and have a charming way of gradually creeping back into the practice.

The major part of the tort reparations system now handled by the judicial process could be at the edge of extinction. Petty quarrels about the breadth or narrowness of an issue are insignificant when compared with the powerful external forces that are working to sweep away the whole tort system.³⁴⁶ There is probably no legislative assembly in the nation that is not presently considering statutory limitations upon or non-judicial alternatives to the present disposition of tort cases. In 1977 the Senate Commerce Committee of the United States Congress by a vote of 9-7 favorably reported its "no-fault" bill.³⁴⁷ The House Interstate and Foreign Commerce Committee refused to approve the corresponding House Bill by a close vote of 22-19.³⁴⁸ The bills would have required state acceptance of a no-fault insurance system within four years, or else an alternative state plan would become effective under the administration of the Secretary of the Department of Transportation.³⁴⁹ Additionally, on January 12, 1979, the Department of Commerce published its Draft Uniform Product Liability Law in the Federal Register and invited

345. *Id.* at 32-33.

346. See Combs, *The Tort System: Yesterday and Today*, 41 *TEX. B.J.* 949, 950 (1978). The tort system, the jury system and the adversary system have been eroded in many areas in recent times. A common example may be found in the setting up of many federal boards and commissions which have the right to pass on complaints and controversies and whose findings of fact, if supported by substantial evidence, are conclusive and which the Courts have no authority to overturn.

Id. at 952; see White, *The Reasonably Just Man*, 5 *HOUSTON L. REV.* 575, 601-18 (1968). In this article Professor White inveighs against the confusion of technical concepts that have invaded personal injury law and suggests the grant of almost complete independence to jurors from confining issues and instructions in reaching decisions.

347. Kircher & Maloney, *Analysis of Proposed Federal "No-Fault" Legislation*, 19 *FOR THE DEFENSE* 135, 135 (Aug. 1978).

348. *Id.* at 135.

349. See S.1381, 95th Cong., 1st Sess. (1977); H.R. 13,048, 95th Cong., 1st Sess. (1977).

public comment.³⁵⁰ What the next step will be is uncertain. Already, arbitration is being considered as an alternative to court resolution of product liability cases.³⁵¹

Strong and bold must be the efforts of those of us who believe that the courthouse is the best place for the resolution of disputes. Those efforts must be directed at discovering ways to expedite trials, move dockets, and simplify the issues that jurors must answer. In the absence of such efforts, it is very likely that the federal government will impose its own administrative solutions upon us.

350. 44 Fed. Reg. 2996, 2997-3002 (1979).

351. See Draft Uniform Product Liability Law, 44 Fed. Reg. 2996, 3001-02 (1979); Chief Justice Greenhill, State of Judiciary Address, TEX. H.R.J. 264, 270 (1979); Coulson, *Texas Arbitration—Modern Machinery Standing Idle*, 25 SW. L.J. 290, 291 (1971); cf. L.H. Lacy Co. v. City of Lubbock, 559 S.W.2d 348, 351-52 (Tex. 1977) (contractual arbitration agreement). The 66th Legislature amended article 224 and added article 224-1 to the Texas General Arbitration Act. See 1979 Tex. Sess. Law Serv., ch 704, § 1-3, at 1708-09 (Vernon). Effective upon August 27, 1979, the amendments remove the requirement that written agreements to arbitrate controversies may be concluded only with the concurrence of counsel of both parties, except for certain contracts in which the amount concerned is \$50,000 or less, or in claims for personal injury. A court may refuse to enforce an arbitration clause in a contract if found unconscionable, and a conspicuous notice of an arbitration clause must appear on the first page of a contract.