

1975

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Recommended Citation

Smith, Glenn E. (1975) "Comparative Negligence Problems with the Special Verdict: Informing the Jury of the Legal Effects of Their Answers," *Land & Water Law Review*. Vol. 10 : Iss. 1 , pp. 199 - 228.
Available at: https://scholarship.law.uwyo.edu/land_water/vol10/iss1/7

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University of Wyoming
College of Law

LAND AND WATER LAW REVIEW

VOLUME X

1975

NUMBER 1

The recently adopted Wyoming comparative negligence statute has raised certain ancillary questions. In this article, the author, Mr. Smith examines one of these issues, the use of the special verdict device and proposes that Wyoming is not bound to follow the rule that prevents the jury from being informed of the legal effects of their answers.

COMPARATIVE NEGLIGENCE PROBLEMS WITH THE SPECIAL VERDICT: INFORMING THE JURY OF THE LEGAL EFFECTS OF THEIR ANSWERS

*Glenn E. Smith**

THE "Assault Upon the Citadel,"¹ a title chosen for an article by the late Dean Prosser fifteen years ago to signal the demise of the privity requirement in products liability cases, might today just as appropriately depict the recent legislative assault on the obsolescent common law defense of contributory negligence. Although the rule which completely bars a recovery by a negligent plaintiff has remained stubbornly entrenched in Anglo-American law since the 1809 English decision of *Butterfield v. Forrester*,² the growing roster of American states that have adopted some form of comparative negligence legislation is a competent prognostication that the "all or nothing" rule of contributory negligence will become as archaic in the immediate years ahead as the technical common law forms of action.³

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*Deputy Insurance Commissioner, State of Wyoming; B.A., 1966, University of Wyoming; J.D., 1974, University of Wyoming.

1. Prosser, *Assault Upon the Citadel*, 69 YALE L.J. 1099 (1960).
2. 11 East 60, 103 Eng. Rep. 926 (1809).
3. Over twenty states have now adopted some form of comparative negligence legislation. Prior to 1965 there were only four such states, and by 1970 this number had increased to only ten. For a discussion of the modern trend toward the adoption of apportionment legislation and the states that have already taken some action see Comment, *Comparative Negligence in Wyoming*, 8 LAND & WATER L. REV. 597 (1973).

This unprecedented popularity of the century-old concept of comparative negligence has created a host of new problems for bench and bar alike, not the least of which is the new statutory prominence given to the controversial special verdict procedure. Since inherent in any comparative negligence scheme is some type of comparison of the plaintiff's negligence with that of the defendant, most states with comparative negligence legislation have provided for the submission of separate fact issues to the jury in lieu of the more familiar general verdict as a means of facilitating the mechanical apportionment of fault.⁴ Under the Wyoming statute these fact issues consist of the percentages of negligence attributable to each party and the amount of damages incurred by each, and they must be submitted to the jury at the request of either attorney or in the sound discretion of the trial court.⁵ As soon as these issues are resolved by the jury the appropriate figures are given to the trial judge, who completes the entire procedure with a simple arithmetic computation and announces the final verdict.⁶

Until now, the general verdict has been the near-exclusive means of submitting a case to the jury in Wyoming,⁷ in spite

4. See, e.g., IDAHO CODE § 6-802 (Supp. 1973); HAWAII REV. STAT. § 663-31(b) (Supp. 1973); COLO. REV. STAT. § 41-2-14(2) (Supp. 1971); MINN. STAT. ANN. § 604.01 (1969).

5. WYO. STAT. § 1-7.2(b) (Supp. 1973).

(b) The court may, and when requested by any party, shall:

(i) If a jury trial, direct the jury to find separate special verdicts;

(ii) If a trial before the court without a jury, make special findings of fact; determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributed to the person recovering.

6. The special verdict provision of Wyoming's comparative negligence statute, as the preceding footnote indicates, is ambiguous and poorly written. Better drafted provisions in other jurisdictions, however, make it clear that the judge is to reduce the total damages returned by the jury by the plaintiff's degree of negligence, whether or not the case is tried before the court. See C. HEFT & C. HEFT, *COMPARATIVE NEGLIGENCE MANUAL* § 8.10, at 1 (1971). Thus if the jury returns total damages of \$5000 in favor of the plaintiff, and indicates that the plaintiff was 40 percent negligent, the court would reduce the plaintiff's damages to \$3000, which is 60 percent of \$5000.

7. Correspondence with nearly all of Wyoming's district court judges indicates that the special verdict procedure provided by Rule 49(a) of the Wyoming Rules of Civil Procedure is rarely, if ever, used. One judge said he used the special verdict in about one-fourth of his cases, and another reported that he has issued special verdict forms for complex damages questions in personal injury cases. In the remainder of the district courts, however, submission of the case on a special verdict is a procedure which remains unused. As one trial judge remarked:

of the adoption in this state of Rule 49 of the Federal Rules of Civil Procedure, which gives the trial court the discretion to submit special issues of fact or written interrogatories to the jury in any type of civil action.⁸ Under the Wyoming comparative negligence scheme, however, either attorney can exercise his right to request that the issues of apportionment and damages be submitted to the jury in special verdict form,⁹ and if the experience in other jurisdictions is any indication, this request will probably be forthcoming as a matter of course in Wyoming in all personal injury actions.¹⁰

The likely transition from the familiar general verdict to a special verdict procedure in Wyoming has a significance which transcends the mere form by which the verdict is reported to the court. Under a special verdict procedure the role of the jury is transformed into that of a fact-finding tribunal, one which has no legitimate interest in the outcome of the case.¹¹ To ensure that the jury returns its findings of fact in an unbiased and unprejudiced manner and without a conscious desire to see one party or the other win the lawsuit, several restrictive rules have emerged in those jurisdictions which make frequent use of special verdict procedures.¹² The most important of these rules, and the one that will have the greatest impact in a Wyoming jury trial, if adopted, is the

Perhaps there has been no case before me appropriate for a special verdict. Where requested and denied, the offered form has usually been too complex, would unnecessarily waste the time of the jury and tend to confuse them. Where it involved a division of damages, it would possibly require more voting, more discussion than really essential. Fixing a single value on a case lends a greater flexibility to compromise amongst members of the jury.

8. Notes 59 and 60 *infra*.

9. WYO. STAT. § 1.7-2(b) (Supp. 1973).

10. Experience in other jurisdictions indicates that defense counsel has traditionally invoked the special verdict procedure where given the right to do so, on the theory that compelling the jury to focus their attention on factual issues only has an over-all tendency to keep the size of the verdict down. See Nordbye, *Use of Special Verdicts*, 2 F.R.D. 138 (1941), where the author states that special verdicts are used almost exclusively in Wisconsin, at the request of the defendant. See also Green, *Blindfolding the Jury*, 33 TEXAS L. REV. 275 (1955) and Judge Frank's exhaustive concurring opinion on special verdict procedures in *Skidmore v. Baltimore & Ohio R.R.*, 167 F.2d 54 (2d Cir. 1948).

11. 9 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 2503, at 488 (1971); Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483 (1965).

12. In addition to the rule against informing the jury of the legal effects of their answers, rules have also emerged to cover the nature and scope of issues, the form of the questions submitted, omitted issues, and instructions to the jury. See C. WRIGHT, *supra* note 11, §§ 2505-10.

Wisconsin-originated rule of law which holds *it is reversible error for court or counsel, expressly or by necessary implication, to inform the jury of the legal effects of their answers to special issues regarding the ultimate right of either party to the action to recover.*

The adoption of this rule in Wyoming, aside from changing the role of the jury into that of a fact-finding tribunal, will significantly alter the conduct of a jury trial in personal injury actions by placing new restraints on the forensic abilities of counsel and restricting the manner by which the trial court has traditionally charged the jury with the applicable law. Specifically, the following changes, based on the development of the rule in other jurisdictions, may be expected:

- (1) the trial court will not be able to phrase its oral or written instructions to the jury so that the members thereof are able to determine whether the answers to any one special question benefit one party or the other, nor can the questions themselves impart such information.¹³
- (2) counsel will not be able to argue before the jury how he believes such questions should be answered, even if such arguments are based solely upon evidence elicited at trial.¹⁴
- (3) neither court nor counsel will be able to intimate to the jury that the plaintiff's damages will be reduced by his degree of negligence, nor can the jury be told that a finding of equal negligence bars the plaintiff's recovery entirely, even if the jury is obviously confused and requests this information from the court.¹⁵

There is considerable support for the view that Wyoming's courts, having adopted a Wisconsin-type comparative

13. *McCourtie v. United States Steel Corp.*, 253 Minn. 501, 93 N.W.2d 552 (1958).

14. *Erb v. Mutual Service Casualty Co.*, 20 Wis.2d 530, 123 N.W.2d 493 (1963).

15. *Thedorf v. Lipsey*, 237 F.2d 190 (7th Cir. 1956); *Cashman v. Matson*, 286 Minn. 516, 174 N.W.2d 236 (1970); *Argo v. Blackshear*, 242 Ark. 817, 416 S.W.2d 314 (1967); *De Groot v. Van Akkeren*, 225 Wis. 105, 273 N.W. 725 (1937).

negligence law,¹⁶ are similarly bound to follow Wisconsin special verdict rules whenever fact issues are submitted to the jury. Not only is the use of Wisconsin jury instructions contemplated by some of Wyoming's most respected district court judges,¹⁷ but there is, more importantly, a formidable source of authority from a number of jurisdictions which forbids the jury from knowing the legal effects of their findings if written questions are submitted to the jury in special verdict form.¹⁸

Not everyone favors the adoption of this rule. It has received as much criticism as acclaim from a wide spectrum of commentators and for a variety of reasons.¹⁹ Its application under the Wyoming comparative negligence scheme, moreover, is suspect on other grounds,²⁰ and the dangers inherent in "blindfolding the jury" from the legal consequences of their answers present potentially serious problems which

16. Wyoming's comparative negligence law, WYO. STAT. § 1-7.2(a) (Supp. 1973), reads:

Contributory negligence shall not bar a recovery in an action by any person or his legal representative to recover damages for negligence resulting in death or in injury to person or property, if such negligence was not as great as the negligence of the person against whom recovery is sought. Any damages allowed shall be diminished, in proportion to the amount of negligence attributed to the person recovering.

This is a verbatim copy of the pre-1971 Wisconsin comparative negligence statute. In 1971 the Wisconsin legislature amended the statute so that now a finding of equal negligence results in a recovery for the plaintiff. See text accompanying notes 77 through 81.

17. Correspondence with most of Wyoming's district court judges reveals that many expect to make use of Wisconsin jury instructions in trials falling within the ambit of Wyoming's comparative negligence scheme, and most feel that Wisconsin law will play a prominent role in the interpretation of Wyoming's comparative negligence problems.
18. The cases collected in Annot., 90 A.L.R.2d 1040 (1963) indicate that well over a dozen jurisdictions follow the rule. While there is some federal authority to the contrary, e.g., *Weymount v. Colorado Interstate Gas Co.*, 367 F.2d 84, 93 (5th Cir. 1966), most of the state courts where the special issue procedure is used exclusively, such as Wisconsin, North Carolina, and Texas have adhered religiously to the rule against informing the jury of the legal effects of their answers. See Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199, 200 (1965).
19. See Guinn, *The Jury System and Special Verdicts*, 2 ST. MARY'S L.J. 175 (1970); Wright, *The Use of Special Verdicts in Federal Court*, supra note 18; Green, *Blindfolding the Jury*, supra note 10; Flynn, *Comparative Negligence: The Debate*, 8 TRIAL May/June 1972, at 49; Brown, *Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 338 (1968); Comment, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, supra note 11; Note, *Informing the Jury of the Legal Effect of Its Answers to Special Verdicts*, 43 MINN. L. REV. 823 (1959); Denton, *Informing A Jury of the Legal Effect of Its Answers*, 2 ST. MARY'S L.J. 1 (1970); Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, 58 MINN. L. REV. 903 (1974).
20. See text accompanying notes 52 through 85 *infra*..

cannot be justified or ignored in the quest for a more scientifically-arrived-at verdict. The position taken by this article, therefore, is that strict adherence to the rule against informing the jury of the legal effects of their answers in Wyoming is neither necessary nor desirable, and that, for reasons enumerated below, its adoption is not mandated by precedent in other jurisdictions.

ORIGIN, DEVELOPMENT, AND RATIONALE OF THE RULE
AGAINST INFORMING THE JURY OF THE LEGAL EFFECTS OF
THEIR ANSWERS TO SPECIAL VERDICT QUESTIONS

The earliest case on record to find reversible error in informing the jury of the legal consequences of their answers appears to be *Ryan v. Rockford Ins. Co.*,²¹ an 1890 Wisconsin decision. In that case the court submitted separate fact issues to the jury along with a general verdict. With each special question the court instructed the jury that a "yes" answer would be in accordance with a general verdict for the plaintiff, and a "no" answer would favor the defendant. These instructions were held objectionable for reasons that have remained substantially the same over the years in similar cases.²²

It has often been demonstrated in the trial of causes that the non-expert jurymen are more liable than the experienced lawyer or judge to be led away from the material issues of fact involved by some collateral circumstance of little or no significance, or by sympathy, bias, or prejudice; and hence it is common practice for courts, in the submission of such particular questions and special verdicts, to charge the jury, in effect, that they have nothing to do with, and must not consider the effect which their answers may have upon, the controversy or the parties.²³

There is some confusion in the *Ryan* decision whether the court reversed the case on this objection, or for some other

21. 77 Wis. 611, 46 N.W. 885 (1890).

22. See *Erb v. Mutual Service Casualty Co.*, *supra* note 14; *Corti v. Cooney*, 191 Wis. 464, 211 N.W. 274 (1926); *Georgeson v. Nielson*, 218 Wis. 180, 260 N.W. 461 (1935); *McGaw v. Wassman*, 263 Wis. 486, 57 N.W.2d 920 (1953).

23. *Ryan v. Rockford Ins. Co.*, *supra* note 21, at 886.

error.²⁴ But subsequent decisions, in Wisconsin and elsewhere, leave no doubt that an attempt to tell members of the legal consequences of their answers to special questions is prejudicial error, and the reporters are replete with cases reversed on this basis.²⁵ Perhaps the case cited most often in support of the rule is *McCourtie v. U.S. Steel Corp.*,²⁶ where a Minnesota trial court at various times in its instructions explained to the jury the conditions under which the plaintiff might maintain the action against the defendant, though the court did not categorically tell the jury the conditions upon which the plaintiff would recover. Nevertheless, the Minnesota Supreme Court held:

[T]he error of the court in indicating the effect of the answers to the interrogatories requires a new trial. The controlling thought behind the special verdict "is to free the jury from any procedure which would inject the feeling of partisanship in their minds, and limit the deliberations to the specific fact questions submitted." . . . We cannot ignore the fact that the verdict, which was so excessive as to indicate that it was rendered under the influence of passion and prejudice, was returned by the jury pursuant to an instruction which breached a rule designed to prevent the play of passion and prejudice.²⁷

24. The court also found error in the trial court's instruction to the jury that the answers to written interrogatories must be made consistent with the general verdict, where the two were inconsistent, without designating whether both errors were cause for reversing the case. *Id.* at 887.

25. A listing of Wisconsin cases prior to 1910 alone is voluminous. See *Coats v. Town of Stanton*, 90 Wis. 130, 62 N.W. 619 (1895); *Conway v. Mitchell*, 97 Wis. 290, 72 N.W. 752 (1897); *Kohler v. West Side Ry.*, 99 Wis. 33, 74 N.W. 568 (1898); *Worachek v. New Denmark Mut. Home Fire Ins. Co.*, 102 Wis. 81, 87 N.W. 165 (1899); *Ward v. Chicago M. & St. P. R.R.*, 102 Wis. 215, 78 N.W. 442 (1899); *Schaidler v. Chicago & N.W. Ry.*, 102 Wis. 564, 78 N.W. 732 (1899); *Baxter v. Chicago & N.W. Ry.*, 104 Wis. 307, 80 N.W. 644 (1899); *Rhyner v. City of Menasha*, 107 Wis. 201, 83 N.W. 303 (1900); *Musbach v. Wisconsin Chair Co.*, 108 Wis. 57, 84 N.W. 36 (1900); *Sheppard v. Rosenkrans*, 109 Wis. 58, 85 N.W. 199 (1901); *Bartlett v. Collins*, 109 Wis. 477, 85 N.W. 703 (1901); *Byington v. City of Merrill*, 112 Wis. 211, 88 N.W. 26 (1901); *Gerrard v. La Crosse City Ry.*, 113 Wis. 258, 89 N.W. 125 (1902); *Gutzman v. Clancy*, 114 Wis. 589, 90 N.W. 1081 (1902); *Lyon v. City of Grand Rapids*, 121 Wis. 609, 99 N.W. 311 (1904); *Meyer v. Home Ins. Co.*, 127 Wis. 293, 106 N.W. 1087 (1906); *Van De Bogart v. Marinnette & Menominee Paper Co.*, 127 Wis. 104, 106 N.W. 805 (1906); *Howard v. Beldenville Lumber Co.*, 129 Wis. 98, 108 N.W. 48 (1906).

26. *Supra* note 13. For a discussion of the case see Note, *Informing the Jury of the Legal Effect of Its Answers to Special Verdicts*, *supra* note 19.

27. *McCourtie v. United States Steel*, *supra* note 13, at 563.

These decisions reveal the obvious rationale behind the rule against informing the jury of the legal consequences of their factual findings. Those jurisdictions which follow this rule reason that the sole purpose of the special verdict procedure is to ensure objective jury findings, and that it would destroy the purpose of the procedure if juries knew which party would be favored by a particular answer.²⁸

Initially, only those instructions or general charges from the bench which informed the jury of the effects of their answers were held to create error. Later decisions, however, extended the rule to include remarks made by counsel in closing arguments. Below is a sampling of such remarks, all held to require reversal of the case.

- (1) "If the jury finds that Earl Pike assumed the risk of his own injury, he will not receive a nickel."²⁹ (informs jury that an affirmative answer to the assumption of risk question bars the plaintiff's recovery).
- (2) "You could if you wanted to bring in a verdict against young Dennis, if it was made up for a million dollars and they wouldn't collect a penny."³⁰ (informs the jury that a finding of negligence on the part of Dennis would be futile, because he is not insured, while the jury knows that the co-defendant in the case is an insurance company).

28. In *McFadden v. Hebert*, 118 Tex. 314, 15 S.W.2d 213, 216 (Tex. Comm. App. 1929), for example, the court held:

Clearly, the prime object, purpose, and intent of the law for submitting cases on special issues is to remove the jury from any bias in favor of, or prejudice against, either party to the suit, to relieve them from the duty of directly passing on who shall prevail in the suit, and to make it the duty of the jury to answer each question truly as they find the facts to be from the evidence, without regard to what the result of their answers may be. If the Court or the attorney, or anyone else, is allowed to tell the jury the legal result of the answers, and to appeal to them in argument to so frame their answers so as to accomplish a result rather than to answer the issues truly as they find the facts to be from the evidence, or if the jury is permitted to agree on the result, and then designedly form the answers to accomplish such result, the law providing for special issue verdicts would be an idle and vain thing. But not all agree that this is the only, or even the major, purpose of the special verdict. See note 91, *infra*.

29. *International Harvester Co. v. Pike*, 249 Ark. 1026, 466 S.W.2d 901, 905 (1971).

30. *Georgeson v. Nielsen*, *supra* note 22, at 462.

- (3) "If you are going to give Mr. Mitchell something for his damages, then you will answer both of these questions 'No'."³¹ (informs jury which party is favored by negative answers).
- (4) "Mr Eslien, Mr. Strossenreuther (attorneys for the plaintiff) and I, while we actually represent different people, we take the same position in this case that . . . no act occurred, to wit: the sale of the automobile, which would void the insurance policy, and of course we are all concerned with that proposition."³² (informs jury that if they found there was no sale of the automobile, the insurance policy upon which the plaintiff sought to recover would be voided).
- (5) "And it would be a veritable miscarriage of justice, I submit to you, if in a case of this kind a boy can be reduced, as he has, in his earning capacity,—can suffer as he has, and then come into Court and say, 'Oh you assumed the risk. You are out of court.'"³³ (informs jury that a finding of assumption of risk bars recovery).

Although counsel may have intentionally attempted to persuade the jury in one or two of the remarks above that a particular question should be answered one way or the other, in many instances error will be created by a slip of the tongue or by necessary implication of something inadvertently said in closing argument. It can be seen from the quotations above that meticulous care must be taken when the case is submitted in special verdict form to argue only the facts of the case, and not the conclusions that logically follow.

GENERAL CRITICISMS OF THE RULE AGAINST INFORMING THE JURY OF THE LEGAL EFFECTS OF THEIR ANSWERS TO SPECIAL QUESTIONS

Notwithstanding the comparative negligence problems in attempting to isolate the jury from its factual findings and

31. *Mitchell v. Perkins*, 334 Mich. 192, 54 N.W.2d 293, 294 (1952).

32. *Erb v. Mutual Services Casualty Co.*, *supra* note 14, at 495.

33. *Pecor v. Home Indemnity Co. of New York*, 234 Wis. 407, 291 N.W. 313, 317 (1940).

the relationship of those findings to the case,³⁴ the propriety of a rule which forbids court or counsel from explaining to the jury the consequences of their answers to special questions has been questioned on general grounds by an increasing roster of commentators and judges alike.³⁵ Critics of the rule point to at least three reasons why it should not be followed indiscriminately: (1) it is a senseless practice, since an intelligent juror will in most cases already have a good idea of what effect his answers will have on the ultimate verdict; (2) adherence to the rule can and has led juries to speculate unnecessarily as to the meaning of the law, resulting in mistaken verdicts that do not reflect the true intent of the jury; (3) the rule is an unwarranted intrusion on the traditional role of the jury to temper harsh rules of law and see that substantial justice is done between the parties.

1. *Jury already knows the effects of their answers in most cases*

A prominent reprobation of the rule against informing the jury of the legal consequences of their answers to special questions is that in most cases the jury will already have a good idea of how their answers to special questions affect the verdict. Indeed, only an extremely unsophisticated juror could sit through an entire trial and not have some indication of what the legal effects of his factual findings are, particularly since he is likely to receive and consider most of the evidence in terms of whether it favors one party or the other. As Judge John R. Brown of the Court of Appeals for the Fifth Circuit has written:

In this day and time with advanced education and advocacy of such a highly developed and demonstrative state, it is little short of insulting to the jurors—more so to the lawyers and most of all to the Judges who report such Shibboleths—to think that a juror will not have a good idea of the effect of his answer.³⁶

34. See text accompanying notes 67 through 85 *infra*.

35. *Supra* note 19.

36. Brown, *Federal Speech Verdicts: The Doubt Eliminator*, *supra* note 19, at 341.

Another writer has stated that a jury would have to be extremely "thick-witted" if they did not know the legal significance of their answers.

In the overwhelming number of cases juries, without being told, know the legal effect of their verdict. If the issues are simply and clearly put it would be rare for the jury to misunderstand the significance of their answers.³⁷

Professor Wright agrees. He points out that in most cases the jury will in fact know which party is favored by a particular answer, and that it is difficult to imagine any argument counsel can make which will not have such an effect, at least by implication.

If plaintiff's counsel argues eloquently that there is no evidence of contributory negligence, even a juror unfamiliar with that legal doctrine is likely to deduce that it will be in the plaintiff's interest for him to answer "No" to the question asking about contributory negligence.³⁸

Blind adherence to a rule which forbids the jury from knowing the legal effects of their answers presumes a particular ignorance on the part of each juror, a presumption which is questionable at best. The average jury in most cases, having listened attentively to the testimony of many witnesses over a period of days or weeks, drawing conclusions and wondering how everything ties together into a verdict, cannot help but have some knowledge of the relationship between the ultimate facts he is called upon to find and the result which should follow from them. There is no way a trial can be so antiseptically organized as to insulate jurors from any knowledge of the connection between their answers and the judgment to be rendered in the case. On this basis alone, attempts to blindfold the jury and guide the members thereof carefully through an entire trial without once eliciting some utterance by court or counsel which inadvertently informs the jury of

37. Green, *Blindfolding the Jury*, *supra* note 10, at 282.

38. C. WRIGHT, *supra* note 11, § 2509, at 512-13.

the legal consequences of their answers would appear to be a waste of judicial effort.³⁹

2. *Speculation as to the meaning of the law*

In an attempt to keep juries in the dark as to the legal effects of their answers there is a recurrent danger that some jurors will guess wrong about the law, resulting in hit and miss answers to special questions and in some cases a verdict for the wrong party. This is not an uncommon occurrence in the case law, as illustrated by the decision of *Bauer v. Kummer*,⁴⁰ a personal injury action in which several special verdict questions were submitted to the jury. The jury in this case found both defendant drivers negligent in the action, and found further that the negligence of each was a proximate cause of the accident. Judgment was entered accordingly for the plaintiff. Thereafter a motion was made to vacate the judgment as to the negligence of one of the defendant drivers and to change the jury's answer to the question which asked whether that driver's negligence was a proximate cause of the accident from "yes" to "no", on the grounds that the affir-

39. This criticism of the rule against informing the jury of the legal effects of their answers has actually become a well-carved exception to the rule in some states. Several cases have held there is no error, or where there is error that such error is harmless, where the jury already understands the effects of their answers, or where the jury is informed of a fact which they would already logically know. Thus, in *Lyttle v. Goldberg*, 131 Wis. 613, 111 N.W. 718, 720 (1907), it was said:

Nevertheless, it is of course true that the ordinary jury will, in the great majority of cases, appreciate the effect of an answer, and not every intimation from the court from which they might draw inferences is to be held so prejudicial as to necessitate reversal. In the present case, there could be little, if any, doubt that the jury must have understood the effect of their answers without any suggestion other than the knowledge of the issues necessarily obtained by them in the course of the trial.

It was similarly held in *Wankowski v. Crivitz P. & P. Co.*, 137 Wis. 123, 118 N.W. 643, 645 (1908) that "[W]here the information to the jury was thought to reach the ultimate effect of the answers, yet because it was quite apparent that the jury must have otherwise known just what the court informed them of was held not prejudicial."

It has also been held that an error of this type may also be rendered harmless where the court instructs the jury to disregard remarks of counsel. In *Johnson v. O'Brien*, 258 Minn. 502, 105 N.W.2d 244 (1960), after counsel for the plaintiff had told the jury how he believed that special issues should be answered, the court admonished the jury "to eradicate it entirely from your mind so far as it may influence your decision in this case." Also, in the instructions the court stated: "Do not speculate as to the legal result of your answers. You are concerned only with deciding these disputes between these parties which we cannot agree upon." *Id.* at 248. Because of these admonishments, the court held there was no error in the case.

40. 244 Minn. 488, 70 N.W.2d 273 (1955).

mative answers of the jury on this question were due to mistaken impressions of the law, and did not express the jury's true intent. In identical affidavits, all twelve jurors stated that through mistake and misunderstanding of the limited instructions given them, they had answered the proximate cause question "yes" instead of "no", that they had not intended to hold one of the defendants in any way responsible for the accident, and specifically that they had not correctly understood the concept of proximate cause. To preserve the sanctity and finality of the verdict the court had no choice but to deny the motion.⁴¹ But had counsel been able to explain to the jury the legal intricacies of proximate cause and its possible effects on the verdict, this judgment, which in the opinion of each and every juror was erroneous, could have been avoided.

In *Harris v. Hercules, Inc.*,⁴² another example of the mistaken results arrived at by an uninformed jury, suit was brought against an employer alleging his negligence in the death of a crane operator, who was killed when the boom of his crane came into contact with a high voltage wire. The case was submitted on interrogatories, and the jury found that the defendant was 85 percent negligent, the plaintiff 15 percent negligent, that the plaintiff assumed the risk, and that he was damaged in the amount of \$90,000. The finding that the plaintiff assumed the risk, of course, resulted in a verdict for the defendant. In a motion for a new trial on the grounds that the jury's answer to the assumption of risk interrogatory was the result of a misunderstanding, and did not represent the jury's true intentions, the court held that the understanding and intent of the jurors as to the effect of their answers was immaterial, and accordingly the motion was denied. This was done in spite of the court's candid ac-

41. In this case the attorney attempted to impeach the verdict of the jury by affidavits of individual jurors. It is a general rule that, after a jury has been discharged, no affidavit of a juror—and no affidavit of any other person relating to what a juror has said—will be received to impeach the verdict where the facts sought to be shown inhere in the verdict itself, such as the attempt to show that the jurors misapprehended the evidence, or did not understand the charge of the court, or as in this case, that they misconceived the legal consequences of their factual findings as to negligence and contributory negligence. *Id.* at 275. See also Wyo. R. Civ. P. 60(b).

42. 328 F. Supp. 360 (E.D. Ark. 1971).

knowledge that the jury did not know or intend that their findings on the assumption of risk question would constitute a complete bar to the plaintiff's action.⁴³

There are other instances where the true intentions of the jury are thwarted because of their mistaken impressions of the law,⁴⁴ and particularly is this true in some comparative negligence jurisdictions, as will be seen below. It suffices here to say that blindfolding the jury from the legal effects of their answers is a practice fraught with danger and results in an unnecessary and precarious speculation on the part of each juror as to what the law is.⁴⁵ As the cases above make clear, a jury who under a general verdict would find an absence of contributory negligence in a given case may, when asked the same question in special verdict form, find that the plaintiff was negligent, simply because the jury was confused about the significance and application of a rule of law and because neither the court nor counsel could explain to the members thereof the effect of that law on their verdict. It is very questionable whether the manner in which a case is submitted to the jury was ever intended to affect the substantive results of a lawsuit.

3. *Invading the traditional province of the jury*

In the final analysis, the debate over informing the jury of the legal consequences of its factual findings reflects a more fundamental dispute as to the proper role of the jury in a civil action. Advocates of the rule which shields the jury from applicable legal principles favor a widespread use of special verdict procedures as a means of making the law more scientific and eliminating the passion and prejudice of

43. The court remarks in a footnote that "For the purposes of this opinion it is assumed that, if a hearing were permitted on this issue it would result in the conclusion that the jury believed, and intended, that their verdict would result in a judgment in favor of the plaintiff for \$90,000.00 reduced by 15% as in the ordinary comparative negligence case." *Id.* at 361 n. 1.

44. *E.g.*, Gardner v. Germain, 264 Minn. 61, 117 N.W.2d 759 (1962).

45. There is always the danger in keeping the law from the jury that an individual juror has gained some knowledge of the law through such means as personal experience, conversations, newspaper reports of the results of cases, or service on another jury. The chances are equally great that a juror who possesses some knowledge of the applicable law in a personal injury action will have an inaccurate and incomplete grasp of what he does know. See Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, *supra* note 19, at 912.

jurors which, it is claimed, are reflected in a frightening number of inflated jury awards.⁴⁶ They prefer to limit the role of the jury to that of strictly a fact-finding tribunal in an effort to prevent misapplications of the law by untrained and unintelligent jurors.⁴⁷ This objective is at least partially served by a rule which prevents the jury from knowing the legal consequences of their factual findings, because the jury is kept ignorant about applicable legal principles, and hence cannot take the law into consideration when arriving at a verdict.

The vast majority of cases, however, have traditionally been resolved by the general verdict, which according to many has as its primary purpose the dispensation of "corrective" justice and the tempering of legal doctrines which are often too harsh in their application,⁴⁸ thereby giving the law a much needed element of flexibility. Opponents of the rule against informing the jury of the legal effects of their answers, therefore, see these procedures as an unwarranted intrusion into a traditional province of the jury. Justice Douglas, for example, has said of special verdict rules:

Such devices are used to impair or wholly take away the power of a jury to render a general verdict . . . [They are] but another means utilized by courts to weaken the constitutional power of juries and to vest judges with more power to decide cases according to their own judgments.⁴⁹

There is no compelling reason why the jury should not be trusted with a knowledge of applicable legal principles in a trial governed by comparative negligence concepts. It is a commonly known fact that for years American juries have

46. See *McCourtie v. United States Steel Corp.*, *supra* note 13, at 563, for example, where the court attributes an excessive verdict to the failure to observe the rule against informing the jury of the legal effects of their answers.

47. See C. HEFT & C. HEFT, *supra* note 6, § 8.10, at 1.

48. Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910); O. HOLMES, COLLECTED LEGAL PAPERS 237-38 (1920). For a discussion of the special verdict as an undesirable barrier to jury correction of the law, see Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, *supra* note 19, at 908.

49. Statement of Mr. Justice Black and Mr. Justice Douglas regarding the 1963 Amendments to Rules of Civil Procedure for the United States District Courts, 374 U.S. 865, 867 (1963).

mitigated the harsh common law doctrine of contributory negligence where its application would have unjustly defeated a recovery by the plaintiff.⁵⁰ Although the defense of contributory negligence has now been modified, there are some aspects of the newly adopted comparative negligence scheme in Wyoming which operate just as arbitrarily and which are just as deserving of the jury's consideration as the rule it replaced.⁵¹

COMPARATIVE NEGLIGENCE CONSIDERATIONS

Aside from the general criticisms discussed above, there are several comparative negligence considerations which, when considered together, militate against the adoption in Wyoming of the rule against informing the jury of the legal effects of their answers to special questions.

1. *Dissimilarities in the Wisconsin and Wyoming procedures*

Whereas Wyoming has adopted a verbatim account of the Wisconsin-type comparative negligence statute,⁵² and consequently is presumed to follow Wisconsin law on questions of interpretation,⁵³ the procedure for submitting factual issues

50. Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 469 (1953). See also *Haeg v. Sprague*, Warner & Co., 202 Minn. 425, 281 N.W. 261, 263 (1938).

51. See text accompanying notes 68 through 70. Several authorities claim that the "equal to or greater than" variety of comparative negligence enacted in Wyoming contains many of the vices inherent under the rule of contributory negligence itself, pointing to the fact that a theoretical one percent of negligence can mean the difference between recovering nothing and recovering 51 percent of the damages claimed. See Comment, *Comparative Negligence in Wyoming*, *supra* note 3, at 604. See also *Vincent v. Pabst Brewing Co.*, 47 Wis. 2d 120, 177 N.W.2d 513, 520 (1970), where Chief Justice Hallows of the Wisconsin Supreme Court remarks in a dissenting opinion:

There is nothing just in requiring a defendant to pay 51 percent of the plaintiff's damages when the plaintiff is 49 percent at fault and allowing the defendant to go scot-free when he is 49 percent at fault and the plaintiff is 51 percent at fault. What is so magic about being less than, greater than, or equally negligent, that justice may depend upon it.

See also Campbell, *Ten Years of Comparative Negligence*, 1941 WIS. L. REV. 289 (1941); Flynn, *Comparative Negligence: The Debate*, *supra* note 19; Prosser, *Comparative Negligence*, *supra* note 50; Fuchsberg, *Comparing Comparative Negligence*, ABA PROCEEDINGS ON INSURANCE, NEGLIGENCE, & COMPENSATION LAW, 522 (1970).

52. WYO. STAT. § 1-7.2(a) (Supp. 1973). See note 16, *supra*.

53. According to *Mitchell v. Walters*, 55 Wyo. 317, 100 P.2d 102 (1940), if an identical statute is adopted which has already received a known and definite construction in the court of the state from which the statute was taken, it is presumed that Wyoming's courts will adopt the construction thus given.

to the jury in Wisconsin is significantly different than that in Wyoming,⁵⁴ and hence the courts of this state are not similarly bound to follow Wisconsin special verdict rules.⁵⁵ The statute in Wyoming requires only that the questions of apportionment and damages be submitted to the jury when the appropriate request is made by either counsel or when the court deems it desirable. This is a very limited procedure when compared with the Wisconsin special verdict, which in most cases requires a finding by the jury on specific negligent acts and omissions, alleged and established by the evidence, in addition to questions of apportionment and damages.⁵⁶ In Wyoming, on the other hand, any necessary deliberation on

54. The wording of the Wisconsin special verdict statute, WIS. STAT. ANN. § 270.27 (1966), is as follows:

Special Verdicts. The court may, and when requested by either party, before the introduction of any testimony in his behalf, shall direct the jury to find a special verdict. Such verdict shall be prepared by the court in the form of written questions, relating only to material issues of fact and admitting a direct answer, to which the jury shall make answer in writing. It shall be discretionary with the court whether to submit such questions in terms of issues of ultimate fact, or to submit separate questions with respect to the component issues which comprise such issues of ultimate fact. In cases founded upon negligence, the court may submit separate questions as to the negligence of each party, and whether such negligence was a cause without submitting separately any particular respect in which the party was allegedly negligent. The court may also direct the jury, if they render a general verdict, to find upon particular questions of fact.

Compare this procedure with the limited Wyoming procedure, *supra* note 5.

55. *Mitchell v. Walters*, *supra* note 53. The presumption holds only as long as an identical statute is adopted from another state. Where there are substantive differences in the two statutes, the presumption fails.

56. C. HEFT & C. HEFT, *supra* note 6, § 8.30, at 4. The first two questions in a Wisconsin special verdict would typically read as follows:

Question 1. At the time and place in question and under the conditions shown by the evidence was the defendant negligent in any of the following respects:

(a) As to speed

Answer _____

(b) As to lookout

Answer _____

(c) As to failure to yield the right of way

Answer _____

Question 2. If you answer any subdivision of Question 1 "Yes," then answer the corresponding subdivisions of this question: Was such negligence on the part of the defendant a cause of the collision:

(a) As to speed

Answer _____

(b) As to lookout

Answer _____

(c) As to failure to yield the right of way

Answer _____

C. HEFT & C. HEFT, *supra* note 6, § 8.40, at 5. Forms of special verdicts are set forth in Appendix III, pp. 48-57. The remaining questions would follow, covering the negligence of all parties, the proximate cause questions, the apportionment of negligence, and the question of damages as to all parties.

issues other than the apportionment and damages questions are not part of the special verdict procedure, and hence findings on such questions as look-out, speed, or proximate cause become only part of a mental process which the jury must go through under general instructions from the court, as they do under the ordinary general verdict, before percentages of negligence can ever be entered on the special verdict form. Findings on these issues are simply not recorded, and it can only be presumed from the percentages found whether one party or the other committed some negligent act which was a proximate cause of the damage incurred.

These two different special verdict procedures serve two very different purposes. The purpose of the Wyoming procedure is not to ensure impartial findings of fact and to prevent the jury from indulging in a conscious desire to see one of the two parties win the lawsuit, as it is under the Wisconsin procedure,⁵⁷ because in Wyoming *the jury can be told of the legal effects of all issues not put in special verdict form (which includes everything but the damages and apportionment questions) just as court or counsel may do when the case is submitted under a general verdict.* Since in Wyoming the jury will already be instructed as to the law on all issues not put in special verdict form, and counsel in closing argument will have had the opportunity to argue his case from those instructions,⁵⁸ the jury must take some aspects of the law into consideration when it finds either party to the action guilty of some degree of negligence, and consequently it is very much aware of the legal effects of most of its findings. This being the case, it is senseless to inform the jury about the effects of the law on their unrecorded findings and at the same time conceal the applicable law on those findings which are recorded in special verdict form. It is completely illogical to instruct the jury as to the law on most of the issues in a personal injury case, and then adhere to a rule which seeks to prevent the jury from becoming aware of comparative negligence principles, on the ground that such knowledge will prejudice the rights of one of the two parties. If the jury is

57. C. HEFT & C. HEFT, *supra* note 6, § 8.10, at 1.

58. Wyo. R. Civ. P. 51.

to be trusted with a knowledge of the law on all issues not put in special verdict form, there is no good reason why they should not also be trusted with a similar knowledge of Wyoming's comparative negligence law.

The objectives of ensuring impartial jury findings and preventing the jury from answering special issues with a desire to see one of the parties win the lawsuit can only be accomplished, if at all, in a jurisdiction where total dependence is placed on the special verdict procedure. They have no place in a state where only the questions of apportionment and damages are required to be submitted to the jury. It should be recognized, therefore, that the limited Wyoming procedure has an equally limited purpose, that of simply facilitating the mechanical apportionment of fault between two or more parties, particularly in complicated cases, allowing the public to see what has been done in regard to the apportionment made, and preventing a possible misunderstanding or error by the jury in reducing the plaintiff's damages, if any, by his degree of negligence.

2. *Trial court's discretionary use of Rule 49(b)*

The adoption of Rule 49 of the Federal Rules of Civil Procedure in Wyoming provides the judge with three possible ways of submitting a case to the jury. He can, of course, submit the case on a general verdict where the jury, after receiving instructions on all aspects of the law, applies the law to the facts and renders the verdict. He can, as a second alternative, submit the case to the jury under the special verdict procedure provided by Rule 49(a).⁵⁹ Under that proce-

59. Wyo. R. Civ. P. 49(a) provides:

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

ture written questions are submitted to the jury on all controverted issues. The court then arrives at a verdict by applying the law to the jury's factual findings. Or, as a third alternative, the trial court can submit a case on a general verdict with written interrogatories according to the provisions of Rule 49(b).⁶⁰ Here the trial court submits written questions along with a general charge in order to test the jury's findings on one or more vital issues.

The discretion vested in the trial court to use any one of these methods of submitting the case to the jury reveals another reason why the rule against informing the jury of the legal effects of their answers to special issues need not be mandated in Wyoming. Although the trial court cannot strictly employ the general verdict in a comparative negligence case when counsel for one of the parties requests that the issues of apportionment and damages be put to the jury in special verdict form there is nothing to preclude the court from availing itself of Rule 49(b), which allows the trial court to submit these issues in the form of written interrogatories along with a general verdict.⁶¹ In this way the apportionment and damages questions can be submitted in the form

60. Wyo. R. Civ. P. 49(b) provides:

The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanations or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

61. Rule 49 of the Wyoming Rules of Civil Procedure grants the court unlimited discretion to submit issues of fact to the jury. Not only may the court submit such issues as written interrogatories along with a general verdict, but according to Rule 49(a) the court "may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate." Rule 49(a), moreover, empowers the trial court to "give the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."

of written issues, as required by Wyoming's comparative negligence scheme, but the court retains the privilege of giving a general charge to the jury on all aspects of the law.

The legitimacy of using Rule 49(b) as a means of obviating the rule against informing the jury of the legal consequences of their factual findings is confirmed by the case of *Lowery v. Clouse*.⁶² In this case, Justice Blackmun, while still a circuit judge, held that:

Under Rule 49(b) the court could have submitted written interrogatories with forms for a general verdict and, of course, it could have submitted the case on a general verdict. It seems both illogical and unrealistic, particularly in the light of the discretionary aspect of the rule, to say that, because a special verdict was employed, nothing in the charge must intimate to the jury the legal effects of their answers.⁶³

An Idaho court has held, moreover, that the question of whether the jury can be informed of the legal results of their answers is one that need never arise, since the discretion of the trial court to submit the verdict to the jury in any one of a number of ways means at least that it is not error for the court not to give such instructions.⁶⁴ And another writer, criticizing the Minnesota rule against informing the jury of the consequences of their findings, has said:

Furthermore, it is not logical to allow the judge, at his uncontrolled discretion, to choose any one of the three verdict forms available and then to hold that if he chooses one form he must completely instruct the jury on the effect of the law, while with another the jury can know nothing of the effect of the law.⁶⁵

So, as Wright has commented, the discretionary use of Rule 49(b) dilutes the value of state court precedents from other jurisdictions which have no legislation comparable to

62. 348 F.2d 252 (8th Cir. 1965).

63. *Id.* at 261.

64. *Cassis Creek Reservoir Co. v. Harper*, 91 Idaho 488, 426 P.2d 209 (1967).

65. Note, *Informing the Jury of the Legal Effects of Its Answers to Special Verdicts*, *supra* note 19, at 825.

Rule 49(b) in Wyoming.⁶⁶ A Wyoming judge, by discretionary use of 49(b), can submit the special issues required by the comparative negligence statute in the form of written interrogatories along with a general verdict, thereby allowing the trial judge to instruct the jury on all issues of law. This same recourse is not available to the trial court in Wisconsin, for example, where no such discretion exists once the special verdict procedure has been invoked by the appropriate request from counsel.⁶⁷

3. *The "equal to or greater than" rule*

Wyoming's comparative negligence statute is of the "equal to or greater than" variety, popularized by the state of Wisconsin and adopted by the majority of states that have enacted some form of apportionment legislation.⁶⁸ Under this type of statute, the plaintiff recovers 51 percent of his damages if he is found 49 percent negligent, he recovers nothing if he is found 50 percent negligent, and he is liable for 51 percent of the defendant's damages if he is found 51 percent at fault, in which case he must also suffer his own loss.

The Wisconsin-type special verdict rules have an aggravating significance in an "equal to or greater than" jurisdiction. Under the rule that jurors cannot be informed of the legal consequences of their answers to special verdict questions, the fact that a plaintiff's negligence cannot exceed 49 percent if he is to recover anything cannot be disclosed to the jury if the apportionment question is submitted in special verdict form.⁶⁹ This has resulted in cases where the unknowing jury has found the plaintiff 50 percent negligent

66. C. WRIGHT, *supra* note 11, § 2509, at 512.

67. WIS. STAT. ANN. § 270.27 (1966). See note 54 *supra*. There is nothing in the Wisconsin special verdict procedure which gives the trial court the discretion to submit interrogatories along with a general verdict. Although the trial court can "direct the jury . . . to find upon particular questions" in Wisconsin, this does not mean that the trial court can also charge the jury as to the law.

68. WYO. STAT. § 1-7.2 (Supp. 1973). About three-fourths of all states that have enacted some form of comparative negligence legislation have opted for the "equal to or greater than" rule. For a discussion of the different types of comparative negligence legislation and the states that have enacted them see Comment, *Comparative Negligence in Wyoming*, *supra* note 3, at 598-99.

69. De Groot v. Van Akkeren, *supra* note 15.

on the assumption that he would recover 50 percent of his loss, only to discover later that he gets nothing.⁷⁰ In other cases the jury, obviously concerned with the outcome of the case, has requested instructions from the trial court on the significance of negligence percentages, and the court has steadfastly refused to explain to the jury which percentages favor one party or the other, reasoning that the jury cannot be told of the legal effects of any of their answers.⁷¹ This creates a strategic ploy for defense attorneys, who under this rule can argue before the unsuspecting jury how equitable it is, particularly where there are conflicting liability factors and inconsistent testimony, to return a finding of equal negligence, while the plaintiff's counsel (or the trial court) commits reversible error if he attempts to inform the jury that a 50-50 apportionment results in no recovery at all for the plaintiff.⁷² The jury, unfortunately, is left to retire with its own opinion of what the law is, and it proceeds to answer the apportionment question in speculative fashion, presuming that their answers will produce a desired result. This creates the danger that the jury will guess wrong about the law, and may shape their answers to the special verdict questions contrary to their actual beliefs in a mistaken attempt to ensure the result it deems desirable.⁷³

70. *E.g.*, *Argo v. Blackshear*, *supra* note 15. The Chief Justice of the Wisconsin Supreme Court has remarked in *Vincent v. Pabst Brewing Co.*, *supra* note 51, at 520:

I suggest that most juries believe when they find a plaintiff and a defendant each 50 percent negligent that the plaintiff will get one half of his damages; but under the Wisconsin rule, he will recover nothing.

71. *E.g.*, *Thedorf v. Lipsey*, *supra* note 15.

72. There are several factors which naturally gravitate toward a finding of equal negligence in a jury trial. In some cases percentages are not easily distilled when comparing different kinds of negligence, nor is it easy for the jury to assign percentages of fault when the testimony is conflicting. As one writer has said:

The result is apt to be jury frustration and an inevitable "split it down the middle" attitude. When jurymen become polarized in their deliberations, with some favoring the plaintiff and some the defendant, the instinctive compromise (human nature being involved at this point), is to assign 50% fault to each party.

Flynn, *Comparative Negligence: The Debate*, *supra* note 19, at 50-51.

73. C. WRIGHT, *supra* note 11, § 2509, at 513. Another author has described the dangers this way:

The consequences of failure to instruct the jury that plaintiff may recover only if his negligence "was not as great as" defendant's (the 49%-type statute), or "was not greater than" (the 50%-type statute) are: An illusion is cultivated among the jury that the plaintiff is to be awarded *something*, merely because they have been instructed by the judge to work out a damage evaluation—

Illustrative of these problems is the case of *Argo v. Blackshear*,⁷⁴ a personal injury action in which four interrogatories were submitted to the jury. The jury found that a pedestrian and driver were equally negligent and fixed the total damages for the plaintiff at \$18,000. In somewhat unorthodox fashion, counsel for the plaintiff requested the trial judge to ascertain of the jurors whether it was their intent that the plaintiff should recover in the case, since the effect of their finding of equal negligence was to allow each party to suffer his own loss. Addressing the jury, the court inquired:

I have to go rather carefully on this, this is very delicate, I want to know if it was the jury's finding and your intention that you intended for your answers to reflect that the plaintiffs in this case would not recover any amount from the defendant.⁷⁵

Speaking for the jury, the foreman responded that it was the intent of all jurors that the plaintiff should recover \$18,000, in spite of the fact that the jury had found the plaintiff 50 percent negligent. Based on this information the judge ruled that the interrogatories had confused the jury as to the effect of their answers on the question of ultimate liability, re-submitted the case to the jury on a general verdict,⁷⁶ and allowed counsel for both sides to address the jury on the subject of comparative negligence. The jury then re-convened and later reaffirmed the \$18,000 award for the plaintiff. On appeal the Arkansas Supreme Court held that the case must be reversed on the basis that the trial court erroneously informed the jury of the legal consequences of a finding of equal negligence on the ultimate verdict. But rather than remand the case for a new trial, the court took the unexpected

which means extended discussion in the jury deliberation room of physicians' testimony, future incapacitation, pain and suffering, loss of enjoyment of living, detailed medical special damages, loss of earnings past and future, and auto property damage.

Flynn, *Comparative Negligence: The Debate*, *supra* note 19, at 50.

74. *Supra* note 15.

75. *Id.* at 315.

76. In Wyoming this would be impossible, since once counsel has invoked the special verdict procedure by the appropriate request under Wyoming's comparative negligence law, he is entitled as a matter of right to have the apportionment and damages questions submitted to the jury in special verdict form.

step of setting aside the judgment for plaintiff on the general verdict and directed that the special verdict questions, which were answered out of a misconception of the law, be entered in favor of the defendant.

In *Theodor v. Lipsey*,⁷⁷ a jury again found the parties equally negligent on special questions submitted by the trial court. After the issues were submitted to the jury, the foreman returned and requested the court to advise the jurors of the legal effects of a finding of equal negligence upon the two parties to the action. The trial court refused to give the jury this information, and was affirmed on appeal, on the grounds that it is error to inform the jury expressly or by necessary implication of the effect of an answer to a special question. Clearly, had the jury not been concerned with the ultimate outcome of the case, and whether one party or the other should win or lose, they would not have requested an instruction regarding the application of Wisconsin's comparative negligence statute. This concern will unfortunately but inevitably lead the jury to speculate on what the law is while they deliberate, which in turn creates a less than desirable atmosphere for resolving important questions of fact.

THE RESPONSE IN OTHER JURISDICTIONS

The problems raised by the cases above have not gone unnoticed in other jurisdictions. One author has reported that in Wisconsin the number of findings of equal negligence and the resulting injustices wrought by the Wisconsin special verdict rules were at one time a great concern in that state.

In the 1970 Wisconsin Legislative Council hearings (which led to the 1971 change from a 49% to a 50% statute)⁷⁸ it was reported that, under the 49% statute, many Wisconsin defense attorneys were telling the unknowing jury to find a 50-50 apportionment of negligence because it was "the democratic thing to do." The Wisconsin Senate in 1971 has passed a bill, which at this writing is pending in the Assembly, re-

77. *Supra* note 15.

78. See text accompanying notes 80 through 82.

quiring that juries be instructed as to the effect upon damages of their negligence findings.⁷⁹

The bill referred to did not become law, but Wisconsin later arrived at alternative solutions to the problems created by administering the rule against informing the jury of the legal consequences of their findings in an "equal to or greater than" jurisdiction.⁸⁰ In 1971 Wisconsin amended its comparative negligence statute so that a finding of equal negligence now favors the plaintiff and not the defendant.⁸¹ Now when a jury returns a finding of equal negligence in Wisconsin, the intent of the jury is no longer frustrated and the plaintiff is permitted to recoup one half of his loss, even though the jury cannot be informed of the legal effects of their answers. Similar legislation has passed or is pending in several other comparative negligence jurisdictions.⁸²

Minnesota and Texas, on the other hand, have responded to the same problem with new legislation allowing the jury to be informed as to the effects of their factual findings by the trial court. The Minnesota equivalent to Rule 49 in Wyoming, for example, was revised by the Minnesota Supreme Court to read:

(2) In actions involving Minn. Stat. 1971, Sec. 604.01,⁸³ the court shall inform the jury of the effect of its answers to the percentage of negligence question and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful or unresolved questions of law, or complex issues of law or fact are involved, which may render such instruction or comment erroneous, misleading or confusing to the jury.⁸⁴

79. Flynn, *Comparative Negligence: The Debate*, *supra* note 19, at 50.

80. In addition to amending its comparative negligence statute so that a finding of equal negligence now favors the plaintiff, Wisconsin has also enacted a "5/6 jury rule," which means that only 10 jurors need agree on all questions essential to support a judgment. WIS. STAT ANN. § 270.25 (1966). In Wyoming, unless the parties agree otherwise, a unanimous opinion by all twelve members of the jury is required to support a judgment. WYO. R. CIV. P. 48. For a discussion of the Wisconsin rule, see C. HEFT & C. HEFT, *supra* note 6, § 8.40, at 6 n. 2.

81. WIS. STAT. ANN. § 895.045 (Supp. 1973).

82. *E.g.*, N.H. REV. STAT. ANN. § 507:7-a (Supp. 1972); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1972).

83. This is a citation to Minnesota's comparative negligence law.

84. MINN. R. CIV. P. 49.01.

It is interesting to note that while this revised rule of civil procedure is restricted to comparative negligence actions, the Minnesota Legislature prior to the revision enacted a contradictory statute which allows the jury to be similarly informed in all civil actions.⁸⁵

The Texas statute does not go quite as far, but it nonetheless allows the jury to be indirectly informed as to the legal effects of their answers.

The court shall not in its charge comment directly on the weight of the evidence or advise the jury of their answers, but the court's charge shall not be objectionable on the ground that it incidentally constitutes a comment on the weight of the evidence or advises the jury of the effect of their answers where it is properly a part of an explanatory instruction or definition.⁸⁶

At least five other states have completely abandoned the mandatory special verdict procedure by legislative amendments which now require the plaintiff's damages to be diminished by general verdict.⁸⁷ The jury in these states is instructed by the court to reduce the total damages by dollars and cents, to the extent deemed equitable, taking into consideration any contributory negligence on the part of the plaintiff. Two figures are returned by the jury, one representing the total damages suffered by the plaintiff and the other representing a reduction of the same damages to reflect

85. MINN. STAT. § 546.14 (1971). For a discussion of the conflict see Note, *Informing the Jury of the Effect of Its Answers to Special Verdict Questions—The Minnesota Experience*, *supra* note 19.

86. TEX. R. CIV. P. 277. For a discussion of the Texas procedure see Cadena, *Comparative Negligence and the Special Verdict*, 5 ST. MARY'S L.J. 688 (1974).

87. R.I. GEN. LAWS ANN. § 9-20-4 (1971); ME. REV. STAT. ANN. tit. 14, § 156 (Supp. 1972); N.H. REV. STAT. ANN. § 507:7-a (Supp. 1972); VT. STAT. ANN. tit. 12, § 1036 (Supp. 1972); MISS. CODE ANN. § 11-7-15 (1972). The Maine statute, for example, reads:

Where damages are recoverable by any person by virtue of this section, subject to such reduction as is mentioned, the court shall instruct the jury to find and record the total damages which would have been recoverable if the claimant had not been at fault, and further instruct the jury to reduce the total damages by dollars and cents, and not by percentage, to the extent deemed just and equitable, having regard to the claimant's share in the responsibility for damages, and instruct the jury to return both amounts with the knowledge that the lesser figure is the final verdict in the case.

the plaintiff's negligence, if any. The jury is then instructed that the lesser figure is to represent the final verdict in the case. This procedure contrasts with that in Wyoming, where the only function of the jury is to return percentages of negligence to the court, leaving it to the trial court to reduce the plaintiff's award in the event the plaintiff is found negligent.⁸⁸

The legislative preference for the general verdict in these states was a direct result of jury confusion under the special verdict procedure. As one author in Maine has reported:

The judge-deduction procedure sometimes resulted in a phenomenon described by Maine lawyers as the double deduction. Juries, in attempting to answer special questions on verdict forms, would sometimes, consciously or unconsciously, reduce the dollar amount of what was supposed to be the plaintiff's recovery without respect to his proportionate causal negligence themselves. Thereafter, the presiding judge, applying the negligence percentage found by the jury to the dollar amount written on the verdict bank, would reduce it again.⁸⁹

Thus the experience with special verdict rules in Maine is evidence of the very real danger of a jury taking it upon themselves to decrease the damage award by the percentage of plaintiff's negligence, and concealing this fact in the special verdict form.⁹⁰ There is no way the jury can be forewarned that the required reduction is a statutory duty of the trial court, because a jury instruction to this effect would inform the jury of the legal consequences of one of their answers, namely, the extent to which the plaintiff is found negligent.

CONCLUSION

Jury confusion, unnecessary speculation on the law by uninformed jurors, and erroneous judgments which do not

88. WYO. STAT. § 1-7.2(b) (Supp. 1973). See note 5 *supra*.

89. Nixon, *The Actual Legislative Intent Behind New Hampshire's Comparative Negligence Statute*, N.H.B.J. 27, 29 (Fall, 1969).

90. There is no way of ascertaining from the special verdict form alone whether the jury may have taken it upon themselves to reduce the plaintiff's damages by his degree of negligence.

reflect the true intent of the jury are all inevitable by-products of the rule against informing the jury of the legal effects of their answers to special questions. They are inevitable in the sense that a jury conceives of their function as being much broader than that of a fact-finding tribunal. They ordinarily think they have been called upon to decide a dispute, and no instruction, however carefully worded, can inspire them to return accurate and scientific findings of fact with computer-like precision without pausing once to ponder what possible significance their answers might have on the ultimate verdict. Nor should the jury think otherwise. The role of the jury must consist of something more than ascertaining and declaring facts in ignorance of the law, for if that were the extent of the jury's function, certainly more accurate and less expensive ways of doing it could be found than by asking twelve laymen to hear eyewitness accounts of events that are months or years old by the time a trial is convened and make their report thereon.

The use of the special verdict does have its redeeming characteristics in certain types of cases,⁹¹ but blindfolding the jury from the legal effects of their answers under the pretense of striving for a more scientific verdict is not one of

91. The major advantages of the special verdict are primarily administrative in nature. In the first place, the special verdict procedure can localize an error and avoid the necessity of re-trying an entire case, since the error can often be traced to one of the answers. Secondly, in complex cases the special verdict can avoid long and confusing jury instructions. The jury does not need to be instructed on all aspects of the law, as with a general verdict. When a special verdict is used, the jury need only be instructed on whatever law is necessary to enable them to answer the questions. Therefore, instructions on burden of proof and complex rules of law which the jury probably won't understand anyway can be omitted. As Judge Brown of the Fifth Circuit Court of Appeals has said:

[Problems are presented] in a variety of ways under a variety of circumstances in today's complex multi-party, multi-claim, multi-cross claim situations in which on Tinker-to-Evers-to-Chance notions contingent, secondary liabilities or defenses are asserted, frequently under the spell of compulsory joinder, cross claim, or the like. These frequently involve quite different standards of conduct, burden of proof and defenses making a submission under a general charge-verdict a complex, hour-long recitation of a dozen different variables beyond either the comprehension or recollection of jurors, or for that matter, lawyers and judges. In some situations a bifurcated, disjointed, subsequent separate submission is almost required. Even in these latter situations and certainly in all the others the 49(a) Special Verdict supplies the ready mechanism by which to (1) give precise instructions related directly to the case and to specific questions and (2) obtain a specific fact answer as to each.

Brown, *Federal Special Verdicts: The Doubt Eliminator*, *supra* note 19, at 345-46.

them. The fact that an intelligent juror will in many cases have a good idea of the effect of his answers on the ultimate verdict, the dangers of a jury speculating as to the meaning of the law, and the unwarranted intrusion which the rule against informing the jury of the law has on the traditional role of the jury to temper harsh legal principles are all good reasons to question the applicability of the rule in Wyoming.

A good number of states have already recognized the difficulties inherent in isolating the jury from the legal consequences of their findings and have made necessary legislative changes. There is, however, no need to wait for corrective legislation in Wyoming. The substantive differences that exist between the two procedures, the different purposes served by each, and the availability of Rule 49(b) in Wyoming, under which the trial court can submit the required written issues and still give a general charge to the jury, are all viable alternatives to the rule against informing jurors of the legal consequences of their factual findings, and any one or all should be employed to allow the trial court to give a general charge on Wyoming's comparative negligence law to the jury and to allow counsel in closing argument to argue therefrom.