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Leon Green

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THE SUBMISSION OF ISSUES IN NEGLIGENCE CASES

LEON GREEN*

The submission of a case to a jury is the most difficult step in negligence litigation and also the most treacherous. A case having reached the stage for decision, the trial judge must submit to the jury for its determination all the contested issues of fact that remain doubtful. All uncontested facts, all agreed facts, all issues of fact that fall by the way for lack of evidence to sustain them or that are so fully sustained that no issue remains, require no submission. But what is an issue of fact? Here is the rub, for "fact" is a highly variable concept that will not submit to stable definition but takes its meaning from its context. It is generally said that only ultimate or controlling issues of fact should be submitted. Ultimate issues imply conclusions reached after consideration of extensive factual detail offered in evidence by the litigants. Moreover, ultimate issues in most instances require conclusions reached in the light of instructions on the law as given by the court. Thus, the determination of ultimate issues is based on both facts and law. Ultimate issues are for jury determination only when the evidentiary facts are in dispute, or when the inferences to be drawn from them will support different conclusions. When the evidentiary facts are undisputed and only one reasonable inference can be supported by them, the ultimate issue is one of law for the judge.

In order to submit the ultimate issues in litigation, the trial judge must be able to assess the claims and defenses made by the litigants in the pleadings and to evaluate the evidence in their support, and must then instruct on the law pertinent to their determination. Inasmuch as it cannot be known what claims and defenses and what evidence in their support will be accepted by the jury, the judge usually instructs hypothetically, stating the law applicable to the different conclusions the jury may reach on the facts. After consideration of the evidence covering the whole case and the judge's instructions, the jury responds with a verdict for the plaintiff or the defendant. This is the orthodox method of submission by general charge calling for a general verdict.²

The general charge, in addition to various cautionary instructions,³ may consist of numerous lengthy and involved instructions on the law subject to many objections and exceptions made by the litigants, and frequently supplemented by a multitude of special instructions requested

* Professor, University of Texas Law School.
1. Frank, Courts On Trial ch. III (1949); Green, Judge And Jury ch. 9 (1930).
3. See Randall, Instructions To Juries ch. 30 (1922); Reed, Branson's Instructions To Juries (3d ed. 1960).
SUBMISSION OF ISSUES

by opposing advocates which may be given or refused and made the basis of exception by one party if given and by the other if refused. Some jurisdictions also permit special interrogatories on important factual details to be given at the instance of the parties, usually the defendant, in order to test the jury's general verdict, and if a special interrogatory is answered inconsistently with the general verdict, the latter must fall and judgment will be rendered in favor of the party in whose favor the interrogatory is answered, or a new trial will be granted. Several jurisdictions employ a method of submission by special issues—a modification of the common-law special verdict. Where well administered this device is an improvement over the general charge and general verdict, but where not well administered it is abortive of jury trial.

The general charge and general verdict, together with the numerous variations found in the American states, have a long and weird development. From the single issue of early English practice with oral instructions by the judge, together with his comments on the weight that should be given certain aspects of the evidence thought to be significant, the submission of a negligence case in more recent years may involve any number of claims and defenses, several parties plaintiff and defendant, different issues as between the several parties, and complex written instructions which in many jurisdictions must avoid comment or over-emphasis on any phase of the evidence. There has never been any wide agreement on what constitutes a satisfactory submission method, and

4. Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 YALE L.J. 588 (1923); Fed. R. Civ. P. 49; Tugwell v. A. F. Klaveness & Co., 320 F.2d 866 n.2 (5th Cir. 1963); Hopper v. Reed, 320 F.2d 433 (6th Cir. 1963).

5. Green, A New Development in Jury Trial, 13 A.B.A.J. 715 (1927); Green, Judge and Jury ch. 13 (1930). Since this study was published many refinements have been made in the use of the special issue method of submission, and in most instances hurtfully. In addition to North Carolina, Texas and Wisconsin, Ohio now employs the special issue method. Ohio Rev. Code § 2315.15 (1963). The fragmentation of the issues into numerous questions has greatly impaired the practice. See Green, The Submission of Special Verdicts in Negligence Cases—A Critique of the Bug Bite Case, 17 U. MIAMI L. REV. 469 (1963) for a critique of Gallick v. Baltimore & Ohio R.R., 83 Sup. Ct. 659 (1963), indicating extreme abuse of the method by the Ohio court. For Texas practice see Green, Special Issues, 14 TEXAS B.J. 521 (1951). How extravagant the Texas practice has become is reflected by Hodges, Special Issue Submission in Texas (1959); Thode, Personal Injury Litigation in Texas, ch. 12 (1961). The method is still further perverted by the attempt to use it to prevent the jury from knowing the significance of their answers to the issues. The very heart of jury trial is the doing of justice as between the parties by the shaping of their verdict accordingly. See Green, Blindfolding the Jury, 33 TEXAS L. REV. 274 (1955), and authorities cited. This tendency to keep the jury in the dark is reflected in McCourtie v. United States Steel Corp., 253 Minn. 501, 93 N.W.2d 552 (1958), noted in 43 MINN. L. REV. 823 (1959).


every method which has been attempted has been subjected to severe
criticism, modification, and refinement.  

Why should the submission process be so difficult—and why not
remove some of the difficulties? The considerations are numerous:

FIRST. There is frequently no general acceptance of what the issues
are in a litigated negligence case, and their identification, isolation and
formulation in the particular case are frequently in hot dispute.

SECOND. Tort law is constantly in flux. Theories of liability undergo
modification, methods of making proof are extended and refined and
different procedures from case to case are not uniform.

THIRD. The trial judge is usually put under great pressure by the
litigants to present to the jury every phase of the factual data favorable
to their contentions. To this end attorneys invoke numerous rules of law
which have grown up to avoid the "no comment on the evidence" re-
straint, including special instructions on presumptions of various dimen-
sions, and other refinements, for example, unavoidable accident, sudden
emergency, imminent peril and sole proximate cause.

FOURTH. The litigants, especially defendants, have a vested interest
in the multiplication of issues and instructions in order to divert the
jury's attention from the basic issues of a case, and to create a "fall out"
of error for purposes of appellate review.

FIFTH. The appellate courts find in the instructions the chief means
of control of trial judge and jury, the just disposition of the particular
case and the basis for the development of the law through the writing of
judicial opinions.

SIXTH. Changes on a large scale in local procedures are extremely
difficult to make and they usually come only after an extended campaign
spearheaded by some powerful member of the highest state court, for
example, Chief Justices Vanderbilt of New Jersey and Alexander of
Texas, with the support of leading members of the bar.

This list of difficulties that would be encountered in developing a
satisfactory method of submission falls short of describing the magnitude
of the problem, as will be recognized by everyone conversant with the
litigation of negligence cases. 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

8. See materials cited in note 6 supra.
10. Farley, supra note 7; GREEN, JUDGE AND JURY ch. 14 (1930).
part are too timid or are unwilling to undergo the extended study, trials and tribulations of such an undertaking.

Nevertheless, it may be worthwhile to suggest a type of a submission that might eventually merit acceptance by some jurisdiction anxious to be freed of the woes and waste of its current practice.

**Formulation of Issues**

It is believed that a clear statement of the issues involved in a litigated case is the prime essential of an acceptable submission process. Most of the decisions in negligence cases about which doubts are expressed are those in which the issues either were not identified or were erroneously formulated. The basic issues of any negligence case are those that the plaintiff must sustain on the facts and on the law. Incident to the basic issues there may be any number of subordinate issues or qualifications which add to the plaintiff's burden. The defensive issues are directed at one or more of the issues which must be sustained by the plaintiff, though some defensive issues may be directed at the whole case as, for example, a plea of limitations or the interposition of some immunity from liability. There are several issues basic to every negligence case, though it is rare for all to be hotly contested in the same case.\(^\text{11}\)

**Causal Relation**

The *first* basic issue of any negligence issue is the identification of the defendant as a person whose conduct contributed to the injury the plaintiff claims to have sustained; this is the causal relation issue. The plaintiff must offer proof that he, or the victim in whose behalf he sues,\(^\text{12}\) suffered injury and that it resulted from the defendant's conduct. With reference to submitting the issue, the trial judge's function is to determine whether the evidence is sufficient to raise the issue and then to state it in proper form for jury consideration.

In many cases there is no contest of the causal relation issue, or the evidentiary facts are so conclusive that the court should affirmatively instruct the jury that there is no issue and it must accept the fact that the plaintiff suffered injury as a result of the defendant's conduct. Likewise, in some cases there is no sufficient evidence linking the plaintiff's injury to the conduct of the defendant and the case should be dismissed or an instructed or directed verdict given for the defendant. In some cases there will be doubt that the plaintiff has suffered injury, or if he has, there will be doubt that his injury was contributed to by the defendant's

\(^{11}\) Tullgren v. Omoskeag Mfg. Co., 92 N.H. 268, 133 Atl. 4 (1926), is one of the few cases that presents a full-dress consideration of the basic issues in a negligence case.

\(^{12}\) For the purposes of this study "plaintiff" is used to indicate the person who institutes the suit as well as the victim who suffered the injury, though in many instances the plaintiff is not the victim.
conduct. In other words, the plaintiff may be malingering, or his injury may be the result of the conduct of others, or of the plaintiff himself. If there is evidence that the plaintiff’s injury was contributed to by the defendant’s conduct, the issue is submissible although the injury was also contributed to by other persons, the plaintiff himself, or some natural phenomena for which no one is responsible. In rare cases the burden may be imposed upon the defendant to show what his conduct was with respect to the plaintiff’s injury and that he did not contribute to it. This is especially true in cases of personal injury in which the plaintiff is in no position to know what happened and the defendant is in a position to know what happened. There is no test by which the judge can measure whether the proof rises to a level requiring the issue to be submitted except that of his trained and experienced judgment. The test usually stated is whether the evidence will support two reasonable opposing inferences, but this does nothing more than state the problem.

The issue should be stated simply: did the defendant by his conduct (for example, in the operation of his car) contribute substantially to the plaintiff’s injury? This would seem to be as simple a fact question as can be asked a jury. Immediately, however, the court will be requested to instruct the jury what is meant by “substantially”; how much is “substantially”? Obviously the term cannot be broken down into terms of more definite meaning and any synonym, such as “materially” or “appreciably,” would meet with the same request. The term had best be left for any clarification that can be given it by the arguments of the advocates and the jury’s good judgment. The issue may be doubtful indeed, in some cases supported wholly by circumstantial evidence, or by expert testimony sharply contradicted by the opinions of other experts.

As simple as it is, the submission of the issue should be followed by

14. Rudick v. Princeville Memorial Hosp., 319 F.2d 764 (9th Cir. 1963); Evans v. United States, 319 F.2d 751 (1st Cir. 1963); Nordmeyer v. Sanzone, 314 F.2d 202 (6th Cir. 1963); McDougle v. Woodward & Lothrop, Inc., 312 F.2d 21 (4th Cir. 1963); Mehan v. Gulf Oil Corp., 312 F.2d 737 (3rd Cir. 1963); Grey v. Hayes-Sammons Chem. Co., 310 F.2d 291 (5th Cir. 1962); Gipson v. Memphis St. Ry., 364 S.W.2d 110 (Tenn. Ct. App. 1962); Walton v. Guthrie, 362 S.W.2d 41 (Tenn. Ct. App. 1962); Helman v. Sacred Heart Hosp., 381 P.2d 605 (Wash. 1963). It is interesting to note that many cases confuse the causal relation and negligence issues and talk about causation when the only issue is one of negligence. See Great No. Ry. v. Ross, 315 F.2d 51 (9th Cir. 1963); Jeffery v. Gordon, 365 S.W.2d 128 (Ark. 1963); McCauley v. Lasher, 368 S.W.2d 49 (Tex. Civ. App. 1963). In a few cases there is no doubt about causal relation one way or the other. Products, Inc. v. Eazor Express, Inc., 318 F.2d 27 (3d Cir. 1963); Athens Canning Co. v. Ballard, 365 S.W.2d 369 (Tex. Civ. App. 1963). In Hartscock v. Forsgren, Inc., 365 S.W.2d 117 (Ark. 1963), there was no issue of causal relation, but a problem of whether the risk of injury was within the scope of defendant’s duty. The court treated the issue as one of negligence for the court’s determination—and reached a highly doubtful conclusion. The factual data may be so skimpy that causal relation, duty, sufficiency of the evidence on the negligence issue and negligence are all doubtful. Croisant v. Horner, 378 P.2d 760 (Okla. 1963).
explanatory instructions. The jury may be told that the fact that other persons may also have contributed to the plaintiff's injury is of no importance other than the light such fact may throw upon defendant's conduct as a substantial factor in contributing to the injury. The fact alone that the plaintiff suffered injury is no basis for attributing it to the defendant's conduct. Nor is the fact alone that the defendant's conduct was calculated to do injury to some one enough to link his conduct to the plaintiff's injury. The jury may be cautioned that the inquiry is not how much injury the plaintiff suffered as a result of the defendant's conduct, nor whether a pre-existing injury of the plaintiff was merely aggravated, as those considerations are pertinent to other issues. The issue and the explanatory instructions should allow full consideration of all the evidence and pertinent arguments of the advocates. Aside from the statement of the issue, there may be little uniformity in submissions of the issue from case to case inasmuch as the explanatory instructions should vary to accommodate the factual data in evidence and the type of case. The chief requisites are that the explanatory instructions should be as brief and as clear as possible. The appellate courts should be satisfied with approximate perfection.

It will be noted that the use of such terms as proximate, remote, sole, intervening, superseding and other "cause" terminology has been studiously avoided. This has been done in order to escape the limitless confusion that is found throughout legal literature in the use of cause concepts. There may be and usually are many "causes" of an injury, but the only inquiry before the court and jury is whether the defendant's conduct contributed substantially to the injury. The term "cause" is too ambiguous, too indefinable, too incomprehensible, too treacherous and points in too many directions to focus attention on the defendant's conduct as the only "cause" in litigation. Despite what seems to be the general understanding of the profession, causation terms are not always employed in the sense of causal relation or connection between conduct and injury. They are more frequently used in the sense of liability, wrongdoing and fault. The causal relation issue is satisfied by a finding that the defendant's conduct contributed substantially to the plaintiff's injury. Whether the defendant is liable to the plaintiff, even though he did

15. See Prosser, Torts ch. 9 (2d ed. 1955) and citation of authorities; 2 Harper & James, Torts ch. 20 (1956) and authorities listed; Hart & Honore, Causation in the Law (1959); Green, Rationale of Proximate Cause (1927); Green, The Causal Relation Issue in Negligence Law, 60 Mich. L. Rev. 543 (1962).

16. Restatement, Torts §§ 430-62 (1934), "The Causal Relation Necessary to Responsibility for Negligence," deals elaborately with legal cause and many other causes which are concerned with wrongdoing as opposed to cause-in-fact or causal relation although each term used has almost 100% ambiguity. Some eminent authorities are inclined to reduce the whole of negligence law to doctrines of causation. See Hart & Honore, op. cit. supra note 15; R. Keeton, Legal Cause in the Law of Torts (1963); Kendrick v. Piper Aircraft Corp., 265 F.2d 482 (3d Cir. 1959) (concurring "causes" used in sense of causal relation and wrongdoing).
contribute to his injury, and for how much, are distinct basic issues yet to be considered.

**DUTY**

The *second* basic issue in a negligence case is whether the plaintiff has any law on which to rest his case. Did the defendant owe the plaintiff any duty under the law with respect to the injury suffered by the plaintiff? Duty is never a matter for the jury, and when a court submits the finding of a duty to the jury the error is due to a failure to identify and formulate the issues in the case. The plaintiff must base his case upon some duty owed the plaintiff incident to the affirmative conduct of the defendant and this must be made known to the jury. Inasmuch as the facts may be in dispute or subject to a diversity of interpretations the court's instructions will normally be hypothetical, i.e., conditioned on the particular findings of fact made by the jury. In negligence cases the defendant's duty is usually expressed as a duty "to exercise care." But this is only the root; the duty must be specific, the duty to use care in doing whatever the defendant was engaged upon. Whether the conduct of the defendant imposed a duty upon him with respect to the risk of injury suffered by the plaintiff is a problem the court must determine at least provisionally before the fact issues are submitted to the jury, but its ultimate determination may be deferred until after the verdict is returned by the jury.

The most troublesome phase of the duty problem is the determination of its coverage—what risks are included within its scope—how far does it reach—what protection does the law extend to the plaintiff against the risk of injury suffered by the plaintiff? It is the problem of the extent of liability which can only be determined after all the facts are made known. It is rare indeed that the law will impose liability for all the consequences of the injury suffered by the plaintiff as a result of a defendant's wrongful conduct. There are no mechanical or other rules that define the precise boundaries of a defendant's duty in the particular case.

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17. *Affirmative* conduct as the keystone of tort law is frequently overlooked and the issues of causal relation, duty and violation of duty are frequently sought to be based on some "omission" or failure to act. Omission or failure to act can never be the basis of liability unless it is a detail in the performance or carrying out of some undertaking or activity which imposes a duty on the defendant. It is the affirmative conduct that imposes the duty, and it is the failure of that conduct to meet the standard set by the law that makes the conduct negligent. It is only in this sense that an omission can be considered negligent. For a fuller discussion see Green, *The Causal Relation Issue in Negligence Cases*, 60 Mich. L. Rev. 543 (1962).

18. The absence of duty, fundamental as it is, may be raised by demurrer, motion to dismiss, motion for directed verdict, motion for judgment n.o.v. and perhaps at other stages of the trial. It may be raised even on appeal as fundamental error.

19. This statement assumes a well pleaded case and does not overlook the fact that the pleadings may disclose some vital defense, e.g., the statute of limitations, some immunity, or simply allegations of facts for which there is no law imposing a duty. The statement does imply that duty is not determined by "foresight of harm" as sometimes insisted, but by the "hindsight of the court" in determining whether the law's protection either does or should reach the risk of injury suffered by the plaintiff and the consequences for which he seeks recovery.
Many courts attempt to define the boundaries of liability by rules of causation—legal cause, proximate cause, remote cause, intervening cause, superseding cause and a whole family of other related causes. Here cause terminology is employed not in the sense of causal relation, but in the sense of responsibility, fault wrongdoing, liability. Causation doctrines, once factual causal relation is shown, give no assistance to anyone in making a determination of the extent of liability that should be imposed on a defendant. This function of the judge demands the profoundest considerations of tort law, and reliance on rules of causation at this point, if they are taken seriously, is a complete rejection of the responsibilities of judging. Former decisions of the court based on causation doctrines are frequently treacherous precedents. Every case arises out of a different factual environment though it may be so nearly similar as to require the same treatment as other cases. But new situations are constantly arising which require some modification of the patterns set by former decisions. This is the law making stage of the litigation process. The judge’s best reliance is found in his knowledge of the current state of the law, its difficulties of administration, and the economic and other factors at work in the social environment, plus a well developed sense of justice. The determination of the defendant’s duty and the risks of injury included within its scope provide the essential basis for the determination of the defendant’s wrongdoing and also the items of injury for which the plaintiff may recover damages. Thus, the jury should be instructed as to the specific duty owed by the defendant and its limitations in terms of the risks imposed.

**NEGLIGENCE**

The third basic issue in a negligence action is the violation of duty or the negligence issue. Assuming that the conduct of the defendant contributed to the plaintiff’s injury, the risk of which falls within the scope of the defendant’s duty, the plaintiff still has the burden of proving that the defendant was a wrongdoer, i.e., that he violated his duty to the plaintiff with respect to the injury suffered. This is the negligence issue, the heart of the negligence action. On this issue it is the function of the trial judge to determine whether the evidence raises the issue, and if so, to submit it to the jury. These are both highly important functions. The sufficiency of the evidence to raise the issue question may be exceedingly difficult. Whether reasonable minds can draw different conclusions from the evidence is the test here as it is on all fact issues, and it gives as little aid to the judge in reaching his decision on this as on other issues.

20. See materials cited at note 16 supra.
21. This thesis is more fully developed in Green, Judge and Jury, chs. 3 & 4 (1930).
If the defendant's conduct rests on some common-law duty, the environment of the injury may constitute what is known as a *res ipsa loquitur* situation, and that alone may be sufficient as a basis for submitting the issue. Also, if some statute designed for the plaintiff's protection against the risk of injury suffered is violated by the defendant, that too may warrant the court in submitting the issue of negligence to the jury.

How shall the issue be submitted? As is true of other issues, the negligence issue should be stated simply and at the beginning of the instructions on the issue. Perhaps it is best stated in the form of a question: Was the defendant's conduct negligent (for example, in the operation of his car) with respect to the plaintiff's injury? As an explanatory formula, the jury should be instructed that in order to find the defendant's conduct negligent they must find that as an ordinarily prudent person under all the circumstances surrounding his conduct, the defendant should have reasonably foreseen as a result of his conduct, some such injury as the plaintiff suffered, and they must find also that he failed to exercise reasonable care to avoid the injury.

It will be noted that the formula indicating the measure or standard of the defendant's conduct is two-pronged, the first prong based on the foreseeability of harm, and the second based on the failure to exercise reasonable care to avoid the harm. Both are required to constitute negligent conduct. Some courts split the formula, submitting the first prong as "proximate" or some other cause, and the second as negligence. Thus, it is that causation doctrines are also interposed to resolve a highly important phase of the negligence issue into terms that render endless confusion for courts, jurors and advocates. It is an inexcusable practice and frequently results in unjust decisions. It may be noted also that appellate courts not infrequently pick up the false issue of causation at

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this point and find no evidence or insufficient evidence to warrant its submission although a jury has found the defendant negligent. 26

A plaintiff may allege several grounds of negligence to sustain his action and this adds complexity to the submission of the case. For example, in a collision case the plaintiff may allege that defendant was operating his car at excessive speed, with deficient brakes and inadequate lights. Any one of these grounds if established may be sufficient to support his case, but plaintiff offers evidence sufficient to require the court to submit an issue as to each ground. It is suggested that the issue should be submitted as follows: was defendant's conduct negligent with respect to plaintiff's injury, (a) in operating his car at excessive speed? (b) in operating his car with deficient brakes? (c) in operating his car with inadequate lights? The issue would be followed by appropriate explanatory instructions, and each subdivision should be answered "yes" or "no."

In many jurisdictions each of these grounds if sustained by proof would be in violation of a statute and thus, negligence per se, and the defendant would be held negligent unless he established some legal excuse. 27 In other jurisdictions the violation of the statute would have to be found negligent conduct as governed by the explanatory formula set out above, with the burden of proof on the plaintiff. 28 In most jurisdictions a uniform weight is not given to the violation of all statutes. 29 Wherever the local law deviates from the common law, the local law with respect to the negligence issue would have to be taken into account in the submission process. The point to be emphasized here, however, is that the negligence issue would be sustained if any one ground were found favorable to the plaintiff as negligence per se or by verdict of the jury; yet the defendant by virtue of the separation of the grounds would be in a position to attack the finding if he thought the issue had been improvidently submitted on a particular ground.


Another complication arises at this point because some courts hold that the jury must find that the defendant's negligence was the proximate cause of the plaintiff's injury. This would require the submission of the proximate cause issue as to each ground of negligence found against the defendant. With all respect to the courts so holding, this is foul practice. It is foul practice in that if causal relation as discussed above has been shown between the defendant's conduct and the plaintiff's injury, that issue has then been determined with finality. The causal relation issue in the example given above only involves contribution to plaintiff's injury by the operation of the car. Causal relation will exist whether the car is operated with or without negligence. The specific details of how the defendant operated the car are only relevant to show that his conduct was negligent, and are immaterial on the issue of causal relation on whatever ground defendant's conduct is found to be negligent. The only basis on which there could be two or more issues of causal relation in the same case would be the joinder of two or more separate and distinct causes of action.

If submitted as suggested, the negligence issue is comprehensive and an adequate basis for all further explanations that need be given a jury for its understanding of what should be considered in reaching a verdict on the issue. One of the more important situations that requires explanation on this issue is known as res ipsa loquitur, the thing speaks for itself. A res ipsa loquitur situation is a happening attributable to the defendant's conduct and resulting in injury to the plaintiff, which without explanation is a basis for inferring that the defendant's conduct was negligent. This doctrine is restricted to the negligence issue alone and our interest here is its function in the submission of that issue. It is a troublesome concept inasmuch as it is ill defined, given different weights by different courts in many cases in which one or the other doctrine is apparently employed, it is not always clear if the court is not in fact, exercising its common-law power to determine that under the facts the defendant is negligent, or the plaintiff contributorily negligent, as a matter of law. Woyn v. Perkins, 60 Wash. 2d 789, 375 P.2d 742 (1962). The res ipsa loquitur literature is massive. See Malone, Res Ipsa Loquitur, 4 LA. L. Rev. 70 (1941); Morris, Res Ipsa Loquitur in Texas, 26 Texas L. Rev. 257, 761 (1948); and the long list of writings cited by James and Prosser in their discussions of the subject, op. cit. supra note 23.

courts and by some courts not employed at all.\footnote{33} As is true of all circumstantial evidence, the inference based upon a res ipsa loquitur situation may be weak or strong.\footnote{34}

It is for the judge to say when a happening rises to the level of res ipsa loquitur and certain factual data are usually required for that purpose, but variations are found in these requirements.\footnote{35} Many courts hold that a res ipsa loquitur situation only raises an inference of negligence which the jury may draw but is not required to draw.\footnote{36} Some situations, however, speak so compellingly of a defendant's negligence that the defendant must offer explanation or suffer judgment against him.\footnote{37} Also, the happening may speak so conclusively of the defendant's negligence that the burden of proof is shifted to the defendant to show by a preponderance of the evidence that he was not negligent.\footnote{38} While there


34. Kentucky Home Mut. Life Ins. Co. v. Wise, 364 S.W.2d 338 (Ky. 1963). See also cases cited at note 33 supra.

35. It is usually required that the happening would not ordinarily occur without the negligence of someone, that the instrumentality involved was under the exclusive control of the defendant, that plaintiff did nothing to precipitate the happening and that defendant is in a position to explain what happened. There is wide leeway for variations in these requisites and the appellate courts have a hard time in keeping them bound together with any consistency. See James, Proof of the Breach in Negligence Cases (Including Res Ipsa Loquitur), 37 VA. L. REV. 179, 194 (1951). See also some interesting notes, 41 N.C.L. REV. 301 (1963); 30 TENN. L. REV. 314 (1963); 14 MERCER L. REV. 427 (1963); 60 MICH. L. REV. 1153 (1962); and these cases: United States v. Ridolfi, 318 F.2d 467 (2d Cir. 1963); S. J. Groves & Sons Co. v. Evans, 315 F.2d 335 (2d Cir. 1963); Shahinian v. McCormick, 381 F.2d 377, 30 Cal. Rptr. 521 (1963); Whitby v. One-O-One Trailer Rental Co., 191 Kan. 623, 383 P.2d 560 (1963); Bernsden v. Johnson, 174 Kan. 230, 255 P.2d 1033 (1953); Copher v. Barbee, 361 S.W.2d 137 (Mo. Ct. App. 1962); Renfro v. J. D. Goggins Co., 71 N.M. 310, 378 P.2d 130 (1963); Scafer v. Wells, 171 Ohio St. 506, 172 N.E.2d 708 (1961); Heyduck v. Elder & Johnston Co., 187 N.E.2d 615 (Ohio Ct. App. 1962); Powell v. Moore, 228 Ore. 255, 364 P.2d 1094 (1961).

36. This attempt to limit the doctrine to the single weight of a permissive inference stems largely from Sweeney v. Erving, 228 U.S. 233 (1913), a malpractice case. This is said to be the current weight of authority. Kentucky Home Mut. Life Ins. Co. v. Wise, 364 S.W.2d 338 (Ky. 1963); Centennial Mills, Inc. v. Benson, 383 P.2d 103 (Ore. 1963).


is little uniformity as to the weight to be given such situations, nearly all courts in situations in which the inference of negligence is very strong call the interference a presumption and as a presumption, give it greater weight. But there is little uniformity here either, for the weight to be given a presumption may only require the defendant to go forward and offer an explanation which the jury may accept or not, or may impose upon him the burden to persuade the jury that he was not negligent. Whatever weight is given a res ipsa loquitur situation by the local law, whether inference, presumption of fact or presumption of law, or other weight, is a question for the court concerning which he must instruct the jury. Such an instruction being based on a rule of law avoids the rule of "no comment" on the weight of the evidence, though in fact, the instruction does accomplish a weighting of the evidence. The jurisdictions which do not recognize the doctrine simply treat all such cases as circumstantial evidence and give their instructions accordingly without violating the "no comment" restraint. Inasmuch as this restraint was imposed at a time when legislatures were restricting the power of trial judges at many points in the litigation process, it is considered to be an arbitrary intrusion on the judicial process and in most jurisdictions, for all practical purposes has been eroded out of existence, but not without many hurtful complications in the law governing jury trial.

In many cases, the defendant in meeting the plaintiff's claim of negligence will offer proof that he was faced with a sudden emergency not of his own making. He will contend that the emergency was due to the conduct of someone else or to some combination of circumstances beyond this control and anticipation, that he was placed under great stress, that under all the circumstances surrounding his conduct he acted with the care of a man of ordinary prudence—and that the plaintiff's injury was the result of an unavoidable accident. These are purely negative defenses with the burden of proof on the plaintiff to overcome them by a preponderance of the evidence. Nevertheless, if the evidence reflects facts from which these conclusions can be reasonably drawn—which is a matter of sufficiency of the evidence to raise the defenses—the defendant is entitled to have them considered by the jury on the issue of his negligence. Clearly they are not independent issues entitled to submission on the same level as the basic issue to which they are relevant. They concern environmental details incident to the "circumstances surrounding" the defendant's conduct and should be included in the explanatory instructions given in connection with that clause of the basic

39. McCormick, What Shall the Trial Judge Tell the Jury About Presumptions, 13 WASH. L. REV. 185 (1938); Wiehl, Instructing a Jury in Washington, 36 WASH. L. REV. 378 (1961). (On page 394 of Wiehl's article there is shown an instruction taken from CALIFORNIA JURY INSTRUCTION—CIVIL, which indicates how complicated instructions on presumptions can become.)

40. See authorities cited note 39 supra.

41. See authorities cited note 6 supra.
SUBMISSION OF ISSUES

negligence instruction. In many cases the close and subordinate connection of these negative defenses to the basic negligence issue is not made clear, but the defenses are treated as separate issues and frequently submitted by special instructions. This practice is highly disruptive of the submission process as is so abundantly shown by the attention given the defenses by the appellate courts. 42

The defense of "sole proximate cause" is also sometimes submitted as an independent issue. It is a "false" issue on its face, as there can be no such thing as a sole cause in the sense of causal relation in any case. Moreover, if used in the sense of causal relation, it is excess baggage, for if the causal relation question is submitted as suggested above, it is full, fair and decisive of the cause issue, and "sole cause" as an independent issue can only be confusing. "Sole cause" is more frequently used in the sense of fault or wrongdoing as a negative of negligent conduct on the part of the defendant, or to indicate that some third party was the one at fault, or that the plaintiff himself was the one whose conduct was negligent. 48 These repeated submissions of the negligence issue under different names are grossly unfair to the plaintiff as well as confusing to a jury. They serve chiefly as a cross examination of the jury on legal concepts difficult of understanding even by practitioners and judges.

There may be other important phases of the evidence which should be made a part of the explanatory instructions following the negligence issue, such as joint tort-feasors, host and guest, joint enterprise, weather

42. The courts have been greatly plagued by instructions given and refused on the unavoidable accident, sudden emergency and kindred negative defenses. While only California has had the courage to repudiate the unavoidable accident doctrine as an independent issue deserving special instruction, Butigan v. Yellow Cab Co., 49 Cal. 2d 652, 320 P.2d 500, 65 A.L.R.2d 1 (1958), there are numerous expressions of disfavor of the issue found in many of the opinions of other courts, and some courts would restrict instructions within the narrowest limits. Hart v. Jackson, 142 So.2d 326 (Fla. 1st Dist. 1963); Sirmons v. Pittman, 138 So.2d 765 (Fla. 1st Dist. 1962); Raz v. Mills, 378 P.2d 959 (Ore. 1963). See also Annot., Instructions on Unavoidable Accident, or the Like, in Motor Vehicle Cases, 65 A.L.R.2d 12 (1959).

43. Lankford v. Thompson, 354 Mo. 220, 189 S.W.2d 217 (1945); Green, Proximate Cause in Texas Negligence Law, 28 Texas L. Rev. 471, 480 (1950); 65 C.J.S. Negligence § 281(c) (1950).
phenomena, conduct of third persons, and the age, blindness, intoxication or other physical impairment of the plaintiff or the defendant. All may bear on the issue of negligence or any issue of contributory negligence that may be raised. But they are not independent issues and do not deserve submission except as they bear on the basic issues. The recognition of the litigant's right to special instructions given outside the general charge on matters incidental to a basic issue—especially binding instructions—has greatly aggravated the submission practice. Nothing is more hurtful to the administration of negligence law than the practice of submitting numerous special instructions requested by the litigants in addition to the general charge of the court. If a matter is worthy of instruction it should be given recognition in the appropriate place in the court's charge in connection with the issue on which it bears. Most of the matters requested by special instructions are matters that should be reserved for argument by the advocates in the discussion of the basic issues.

**Contributory Negligence**

Plaintiff's contribution to his own injury is seldom an issue. Naturally, if there is a situation in which it is doubtful that the plaintiff's conduct contributed to his injury, the issue should be submitted by the same causal relation formula and explanation relevant to the issue which are requisite to the determination of causal relation between the defendant's conduct and the plaintiff's injury.

It is also seldom that a situation arises in which a plaintiff suffers injury, that he is not under a duty to protect himself against injury by the exercise of reasonable care. But it may be that frequently the plaintiff's duty does not include the risk of injury incurred by him. If the extent of the plaintiff's duty is doubtful, that also should be dealt with by the court—similarly, to the corresponding problem involving the extent of the defendant's liability.

In most of the situations involving contributory negligence the only issue is that of the plaintiff's negligent conduct. Many times the contributory negligence issue and what is called an "assumption of risk" issue are identical or so similar that they do not deserve distinction in treatment. Perhaps the assumption of risk defenses would best be restricted to a limitation of the defendant's duty and therefore, be wholly a matter for court determination in that respect. Contributory negli-

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44. In Manning v. Noa, 345 Mich. 130, 76 N.W.2d 75, 77 A.L.R.2d 955 (1956), gambling in a bingo game was urged as a defense to the defendant's unsafe premises. The plaintiff's violation of a gambling act was held no defense to the defendant's duty to an invitee on his premises. The court's discussion of causation was beside the point.

gence may also be treated as a limitation on a defendant's duty, but only when the evidence is so clear that the court can rule on it as a matter of law. In other words, when the judge can invoke either doctrine as conclusive on the plaintiff, the court is exercising its power to exclude the injury suffered by the plaintiff as outside the scope of the defendant's duty. On the other hand, when the court holds that there is evidence that raises an issue of the plaintiff's conduct as negligent, then the issue is one of contributory negligence for the jury and should be submitted by the same formula as employed to submit the affirmative issue of the defendant's negligence. The issue should be submitted in the simplest terms: Was the plaintiff's conduct (for example, in the operation of his car) negligent with respect to the injury he suffered? This should be followed by an explanatory instruction in substance as follows: Should the plaintiff as an ordinarily prudent person, under all the circumstances surrounding his conduct, have reasonably foreseen some such injury as he suffered as a result of his conduct, and did he fail to exercise reasonable care to avoid such injury to himself? The evidence may require further explanatory instructions, as are required in submitting the negligence issue. For example, the plaintiff may account for his conduct by showing that he was attempting to rescue someone else put in peril by the negligent conduct of the defendant or that he himself was put in imminent peril by the conduct of the defendant or someone else from whom he was attempting to escape. This is the counterpart of the sudden emergency excuse sometimes offered by the defendant. In most jurisdictions contributory negligence is an affirmative defense with the burden of proof on the defendant, but several jurisdictions still require the plaintiff to show himself free of contributory negligence.

**Last Clear Chance**

The plaintiff may meet the contributory negligence issue by showing that the defendant, after he realized (or should have realized) that the plaintiff was in peril from which he could not, or probably would not, escape, could by the exercise of reasonable care have avoided injuring the plaintiff. In some jurisdictions the issue is stated very restrictively, and in some it is needlessly complicated by causation doctrines. The doctrine goes under many names and varies in requirements in different jurisdictions. It is a subordinate issue to the contributory negligence issue. In

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46. See cases and materials cited note 42 supra.


48. Last clear chance, discovered peril, willful and wanton, humanitarian or Davies v. Mann are some of the more usual names under which the doctrine is accepted, and each has
such cases it is usually incontestable that the defendant's conduct contributed substantially to the plaintiff's injury, and also that the defendant was under a duty to avoid inflicting injury on the plaintiff. The basic problem is whether the evidence raises an issue of the defendant's negligence in avoiding the injury and this is for the court to determine. If the issue is raised it is for the court to formulate the issue for submission in conformity with local law. The doctrine is sometimes thought to require antecedent negligence on the part of the defendant, but this is not true and the doctrine is available as a defense to the plaintiff's contributory negligence conduct without reference to any prior negligence of the defendant. It is based on the same policies as the original negligence action and only differs from it by the time sequence following the negligent conduct of the plaintiff. Its function is to modify the harshness of the contributory negligence doctrine and usually is reflected in the reduction in damages awarded by the jury.

DAMAGES

There are many rules for evaluating the items of loss suffered by a plaintiff as the result of his injury, and the subject is too large for discussion here. The evaluation of the items in nearly all instances is a function of the jury in light of the instructions on the measures to be employed. The only matter of emphasis made here—and its importance is frequently overlooked—is that every item of loss for which the plaintiff may recover must be found by the court to fall within the scope of the defendant's duty with respect to the risk of injury imposed on the plaintiff. It is rare indeed for a plaintiff to recover damages for his full losses. He may suffer losses far beyond the scope of protection of the law and these must be excluded from the items of injury for which he may recover damages. Thus it is that the duty issue is so very important in the litigation process in negligence actions, and is exclusively within the control of the court.

CONCLUSION

This suggestion for the modification of current submission methods is based in great degree on the modern English practice before the English courts abandoned jury trials in negligence cases. Many members of the British Commonwealth of Nations utilize the practice with its own refinements. One of the better statements of the doctrine is found in James v. Keene, 133 So.2d 297 (Fla. 1961), Comment, Last Clear Chance in Florida, 17 U. MIAMI L. REV. 582 (1963); Nichols v. Spokane Sand & Gravel Co., 379 P.2d 1000 (Wash. 1963) (Washington version).


50. The damage issue is considered with some fullness by the writer in RATIONALE OF PROXIMATE CAUSE ch. 6 (1927).
variations. It is designed to retain the chief virtues of the general charge and general verdict and of the special issue practice, making interrogatories unnecessary and avoiding special instructions. In many cases there would not be in excess of four or five issues at the most to be submitted with such explanations as would be relevant to each. Each issue with its explanatory instructions would be framed so that the jury after consideration could answer the issue "yes" or "no," yet the jury would be required to render a general verdict on the whole case for the plaintiff or the defendant. The answer of any issue favorably to the defendant would vitiate a general verdict found for the plaintiff. Since the separate issues would indicate how the answers of the jury would affect the outcome of the case, there would probably be few findings of particular issues in conflict with the general verdict. This is as it should be. The idea of blindfolding the jury as to the significance of its verdict, or to the issues that support its verdict, is a complete repudiation of jury trial in its historic sense, and the courts that have attempted to so control jury verdicts have paid dearly in abortive trials and in miscarriages of justice.

Whose responsibility is it to develop a rational submission practice? Clearly the standard instructions prepared by committees of the bar are not the answer. Such efforts have usually wound up in refined and multitudinous forms wholly unsuited for purposes of informing a jury and more generally designed to give a footing for review by appellate courts if either given or refused. In whatever direction one may look the wild growth of instructions has rendered the submission process all but incomprehensible. Perhaps the best hope for the development of a rational submission practice lies in the rule making and decisional power of the appellate courts with such assistance as they may receive from practitioners who have no axe to grind. Needless to say, however successful their efforts might be, they would have to guard against the strangulation of the process made by the refinements insisted upon by practitioners. They would have to guard even more zealously against the refinements made by the courts themselves. Doing justice by jury trial can never be more than approximate, and no more effective way can be designed for destroying its usefulness than by the over elaboration of the submission process.

51. See materials cited note 5 supra.

52. Mills v. Charles Roberts Air Conditioning Appliances, 93 Ariz. 176, 379 P.2d 455 (1963). Instructions on the negligence issue as reflected in this case require more of jury trial than it can respond to. Considerations such as here submitted for jury determination are well enough for judges with respect to the scope of duties and for the arguments of advocates, but as instructions on the law they say too much.