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# TORTS SYMPOSIUM\*

## THE SUBMISSION OF SPECIAL VERDICTS IN NEGLIGENCE CASES—A CRITIQUE OF THE BUG BITE CASE

LEON GREEN\*\*

*Gallick v. Baltimore & O.R.R.*<sup>1</sup> reflects anew the difficulties of the special verdict<sup>2</sup> or special issue practice<sup>3</sup> in negligence cases. The power to formulate issues adequately is a fine art possessed by few practitioners. The inability to formulate the basic issues of a case, the fragmentation of the issues by a multitude of questions which fail to present an issue, and the frequent apparent or actual conflicts in the answers given by the jury to such questions, render the special verdict practice exceedingly treacherous. All of these vices are present in the case under study and created great difficulties for the appellate courts. The case was finally resolved by a divided Supreme Court after a serious and puzzling exercise in "exegesis"<sup>4</sup> on the part of the judges.

The factual situation giving rise to the litigation is not complicated.<sup>5</sup> The plaintiff was the foreman of a switching crew engaged in spotting cars on the defendant's tracks in an industrial area of Cleveland. The track ran near a river and under bridges. A ditch along the right-of-way and near the track was filled with stagnant water infested with vermin, dead rats and pigeons. The condition of the ditch was known by the defendant to have existed for a long time. While the plaintiff was standing near the track under a bridge waiting for a switch engine, a bug some two inches long and one-half inch wide bit his leg under his trousers just above the knee. He crushed the bug beneath his trousers

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\* Except for the article by Professor Leon Green, all other articles in this symposium were written by members of the *University of Miami Law Review* under Professor Green's supervision.

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1. 83 Sup. Ct. 659 (1963).

2. OHIO REV. CODE § 2315.15. The statutory special verdict is quite different from the common law special verdict, and is also to be distinguished from the special interrogatory practice employed to test a general verdict. The statutory special verdict based on modern English practice normally requires the submission of ultimate issues but not evidentiary issues which are merely in support of the ultimate issues.

3. See HODGES, SPECIAL ISSUE SUBMISSION IN TEXAS (1959) for detailed treatment of the highly complex Texas special issue practice.

4. "We therefore must attempt to reconcile the jury's findings, by exegesis if necessary . . . before we are free to disregard the jury's special verdict . . ." *Supra* note 1 at 666.

5. For a more complete statement of the case see the reports of the case in 173 N.E.2d 382 (Ohio Ct. App.) and 83 Sup. Ct. at 661.

with his hand, heard it pop, and it fell out of the leg of his trousers on the ground. At that instant he caught the passing engine and did not examine the bug. When he went home he discovered that the bite was a serious one. It did not yield to home treatment; the infection increased and he consulted a doctor who administered penicillin. His condition became worse, he consulted other doctors and other drugs were utilized to no avail. Boils developed over his body and after several years of treatment both legs had to be amputated. At the time of the trial the loss of an arm seemed likely.

At trial he was awarded a judgment for 625,000 dollars. On appeal to the Ohio Court of Appeals the judgment was reversed on the ground that the evidence was insufficient to raise the issue and support a finding of causal relation between the defendant's conduct in permitting the ditch of infested water on its right-of-way and the bug bite plaintiff received while working near the ditch. The Ohio Supreme Court refused further review. On certiorari to the Supreme Court of the United States the judgment of the Ohio Court of Appeals was reversed and the case remanded for further proceedings not inconsistent with the opinion here under review.

The basic issues involved are the usual issues found in a negligence case under the Federal Employers' Liability Act:

(1) Did the conduct of the defendant in permitting the ditch of stagnant water infested by vermin on its right-of-way where the plaintiff was working contribute to the injury? That the plaintiff was bitten by a bug and as a result suffered the frightful impairment of his body that followed was supported by the evidence and so found by the jury.<sup>6</sup> Whether the bug was causally related to the vermin-infested ditch of water was more questionable but, as was found by the jury and held by the Supreme Court, the evidence was sufficient to support a reasonable inference that this causal relation did in fact exist. Instead of the causal relation issue being submitted pointedly in a single inquiry, it was submitted in *four* parts as indicated by questions 10, 18, 19 and 21 set out in the margin.<sup>7</sup> The fact that there were competing and conflicting reasonable inferences that might have been drawn did not require that the issue be withdrawn from the jury. The choice of inferences was the function of the jury.

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6. "10. On approximately August 10, 1954, was plaintiff bitten by an insect? *Yes.*" 83 Sup. Ct. at 661.

7. *Id.* note 6 *supra*. "18. Was the illness or disease from which Mr. Gallick now suffers caused in whole or in part by an insect bite sustained by him on defendant B. & O.'s premises? *Yes.*

"19. Were the injuries to the plaintiff proximately caused . . . by . . . the acts or omissions of the defendant? *Yes . . . .*

"21. Was there a proximate causal relationship to the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? *Yes.*" *Id.* at 662.

In this connection it may be noted that the court throughout the opinion speaks of causal relation between the defendant's *negligence* and the plaintiff's injury. While this professional habit is widespread it is not well founded and may be quite harmful to clear analysis. It is not harmful so long as it is understood that the relation is between *conduct* and injury. Whether the conduct is *negligent* is another issue determinable by different considerations.<sup>8</sup>

(2) Did the defendant owe the plaintiff a duty with respect to the risk of being bitten by a bug harbored by the ditch of stagnant water? This was a question of law for the court. The jury had no part to play in its determination. Whether the scope of the defendant's duty to the plaintiff with respect to the danger of being bitten by a poisonous bug included that risk was an issue of policy, not one of fact.<sup>9</sup> There was slight discussion of this problem. Apparently the defendant's duty was assumed once it was shown that the plaintiff's injury was the result of the defendant's conduct in permitting the vermin-infested ditch to exist so near its track.

(3) Did the defendant violate its duty to the plaintiff, that is, was the defendant negligent in maintaining the stagnant ditch infested with vermin near its track with respect to the bug bite suffered by the plaintiff? If the plaintiff's allegations were supported by sufficient evidence, whether the defendant was negligent with respect to the bug bite suffered by the plaintiff was an issue for the jury. As reflected by the Supreme Court opinion, no question of the sufficiency of the evidence on this issue was raised, and under the facts given, its submission to the jury was required.

This issue, however, was not clearly submitted to the jury by any one of the questions reflected in the reports of the case. Questions 14, 15, 16, 17, 20 and 22 make stabs at the issue,<sup>10</sup> but neither separately

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8. *Benedick v. Potts*, 88 Md. 52, 56 (1898): "Until you know *what* did occasion an injury, you cannot say that defendant was guilty of some negligence that produced the injury." On necessity of showing that defendant's conduct contributed to a victim's injury before the negligence issue arises see *Brocato v. Standard Oil Co.*, 331 P.2d 111, 116 (Cal. App. 1958); *Manley v. New York Tel. Co.*, 303 N.Y. 18, 100 N.E.2d 113 (1951) with which compare companion case, *Seeley v. New York Tel. Co.*, 281 App. Div. 285, 120 N.Y.S.2d 262 (1953). See also full discussion, Green, *The Causal Relation Issue in Negligence Cases*, 60 MICH. L. REV. 543, 548 et seq. (1962).

9. The issue of "duty" only raises the problem whether there is any law to support the plaintiff's case. Usually it is so clear that no point is made of it. But the risk of injury may be such that it falls without any principle of law on which the case is rested. For full discussion see Green, *Duties, Risks, Causation Doctrines*, 41 TEXAS L. REV. 42 (1962).

10. "14. [D]id the defendant B. & O. know that by permitting the accumulation of said pool of stagnant water, dead pigeons, dead rats, bugs and vermin would be attracted to this area? *Yes*.

"15. If the answer to 14 is yes, did the defendant B. & O. know that its employees would have to work in this area? *Yes*.

"16. Was the defendant negligent in one or more of the particulars alleged in the petition? *Yes*.

nor together do they adequately state the issue. The instructions of the trial court in connection with the several questions submitted, as set forth in the footnotes of the Supreme Court opinion,<sup>11</sup> do little to clarify the issue and fall far short of informing the jury what it was to decide and by what standards. At best, both the questions, fragmented as they were, and the less-than-accurate instructions, were confusing.

The negligence of the defendant was a single issue, the heart of the case, which should have been submitted with proper instructions. The Ohio Court of Appeals did not consider any of the points of error directed at the submission of the issue, but reversed the judgment of the trial court on the insufficiency of evidence to support a finding of causal relation. Nevertheless, the negligence issue got before the Supreme Court on the basis of the contention of the defendant that the judgment of the Court of Appeals could be supported and based on the finding of the jury that "the injury was not reasonably foreseeable and therefore there was no negligence."<sup>12</sup> This alternative ground was sought to be supported by a fatal inconsistency between the jury's negative answers to questions 20 and 22 and the affirmative answers to other questions.<sup>13</sup> The majority of the court responded to the defendant's challenge in this respect and concluded that there was no inconsistency in the answers. The dissenting judges made strong arguments supporting the contention of inconsistency, but it is believed that questions 20 and 22 are impertinent with respect to the negligence issue, as will be indicated below. The majority, as has often been done in poorly tried cases, pieced together the scraps of findings by the jury as supported by the evidence and presented a rational basis for holding that the trial judgment was based on defendant's negligent conduct.<sup>14</sup> As opposed to any inconsistency of the findings based on impertinent questions, this affirmative showing of liability as developed by the court seems well founded.

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"17. If the answer to Question 16 is yes, indicate in the words of the petition the acts or omissions which constitute defendant's negligence. (Answer:) *There existed a pool of stagnant water on premises in the possession of and under the control of defendant into which was accumulated dead pigeons, rats and various forms of bugs and vermin.* . . .

"20. [W]as there any reason for the defendant B. & O. to anticipate that such (maintaining stagnant, infested pool) would or might probably result in a mishap or injury? *No* . . . .

"22. If the answer to Question 21 is yes, was it within the realm of reasonable probability or foreseeability of the defendant B. & O. to appreciate this proximate causal relationship between the stagnant water, the dead rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff? *No.*" 83 Sup. Ct. at 662.

Question 21 is set out in note 7 *supra*.

11. 83 Sup. Ct. at 665-67, notes 6, 7 and 9; *id.* at 669, notes 1, 2 (dissenting opinion).

12. "Respondent makes the further argument that the judgment under review may be sustained on the alternative ground, not accepted by the Court of Appeals, that the injury was not reasonably foreseeable, and that therefore there was no negligence." 83 Sup. Ct. at 665.

13. *Supra* note 10.

14. 83 Sup. Ct. at 665-66 (summarizing statement).

The negligence issue and the formula for its determination are most comprehensive and give a jury great power in the determination of a negligence case. As was agreed by all the judges, the issue is measured by the foreseeability of danger *and* the failure to exercise reasonable care to avoid injury that may result from the danger. It is only in the light of foreseeable danger that negligent conduct has meaning. Both phases of the formula must be found favorably to the plaintiff as a basis of recovery of damages. Moreover, the issue must be determined with respect to the conduct of the defendant and the injury suffered by the victim. Conduct must be brought in focus with injury. As normally phrased the formula inquires: Should the defendant, as an ordinarily prudent person, under all the circumstances surrounding the particular situation, have reasonably foreseen as a result of his conduct, some such injury as was suffered by the victim, or any one else so situated, *and* did the defendant fail to exercise the care of a reasonably prudent person to avoid this injury?

It will be noted that the specific hurt does not have to be foreseen, nor do its *consequences* have to be foreseen.<sup>15</sup> Nor does the injury have to be *probable*. It need only be the result of the absence of reasonable care that a reasonably prudent person would have exercised to avoid it. In most negligence cases the *possibility* of injury is one which requires reasonable care to avoid it.<sup>16</sup>

In this connection it will be noted that questions 20 and 22<sup>17</sup> place the emphasis on the *defendant railroad* and not on what a reasonably prudent person should have foreseen. Also, both questions require *probability* of injury to the plaintiff, when the risk of injury need only be that which a reasonably prudent person would have exercised reasonable care to avoid. It will be further noted that question 22, tied as it is to question 21,<sup>18</sup> inquires of the jury: "[W]as it within the realm of reasonable probability or foreseeability of the defendant B. & O. to appreciate this proximate causal relationship between the stagnant water, the dead

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15. The authorities cited by the court, 83 Sup. Ct. at 667, adequately support this point.

16. See *Santos v. Unity Hospital*, 301 N.Y. 153, 93 N.E.2d 574 (1950). Due to a rare mental derangement, patient jumped out of hospital window during childbirth; one case in 300,000; no other case in 25,000 births at defendant's hospital. Nurse had turned to answer phone fifteen feet away, negligence not to have bars on window and in not providing uninterrupted attendance of patient. See example in *Tullgren v. Amoskeag Mfg. Co.*, 82 N.H. 268, 133 Atl. 4 (1926). A motorist takes the inside of a sharp curve on a mountain road where only three or four cars pass each day and it is highly improbable that the motorist will meet another car coming around the curve. But he does and a collision occurs. *Would a reasonable person in the exercise of ordinary care have taken the risk?* Nine times out of ten when a motorist violates some rule of the road no injury to anyone results. But it is the unexpected that usually happens, there is always the possibility that someone will be hurt, and that is enough in most cases to impose liability.

17. Note 10 *supra*.

18. Note 7 *supra*.

rats, the dead pigeons, the insect bite and the present physical condition of the plaintiff?"<sup>19</sup> There is no rule of law anywhere that would require this type of finding nor would this type of finding be pertinent. Foreseeability is not directed at "*proximate causal relationship*," nor at the "*present physical condition of the plaintiff*," and neither is relevant to the determination of the negligence issue. Danger of injury at the time of its occurrence, and not its consequences at the time of the trial, is all that is required to be within the range of the foreseeability of a defendant as a reasonably prudent person. It need only be added that the weight put on the imponderable concepts of foreseeability,<sup>20</sup> probability and proximate, in all their numerous combinations, is more than the litigation process in negligence cases can successfully sustain.<sup>21</sup> Some adequate method of submitting the issues of a negligence case within the range of general professional understanding has been too long delayed.<sup>22</sup>

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19. 83 Sup. Ct. at 662.

20. See Green, *Foreseeability in Negligence Law*, 61 COLUM. L. REV. 1401 (1961) for a fuller discussion.

21. Justice Harlan in his dissent, 83 Sup. Ct. 668 makes a significant statement: "It [this case] affords a particularly dramatic example of the inadequacy of ordinary negligence law to meet the social obligations of modern industrial society. The cure for that, however, lies with the legislature and not the courts." His indictment seems fully justified, but it is doubtful that legislatures can or will give an adequate remedy. The courts themselves can relieve the situation to a great extent by simply refusing to carry forward much of the metaphysical nonsense that characterizes nineteenth century negligence law such as much of that found in Vol. II, chapters 12 and 16 of the Restatement of Torts. The Supreme Court's work in protecting the integrity of the Federal Employer's Liability Act has been due in large part to the attempts of state and lower federal courts to read back into the Act much of obsolescent negligence law that Congress had read out of it. The case under review is a good example of how a relatively simple case can be subjected to highly questionable litigation procedures.

22. The damage issue of the case under review was not reached by the Ohio Court of Appeals or the Supreme Court. The verdict is a large one and while the disposition of the case by the Supreme Court may preclude denial of liability, presumably the Ohio court may reduce the damages unless the federal constitutional provision for jury trial prevents a state appellate court from requiring a remittitur. This apparently is a point still unsettled—a sort of Achilles heel of F.E.L.A., especially if state appellate courts can reduce the amount of damages for which judgment is given by a trial court.