Special Findings and Special Verdicts in Nebraska

Gerald E. Matzke
University of Nebraska College of Law

Follow this and additional works at: https://digitalcommons.unl.edu/nlr

Recommended Citation
Gerald E. Matzke, Special Findings and Special Verdicts in Nebraska, 35 Neb. L. Rev. 523 (1956)
Available at: https://digitalcommons.unl.edu/nlr/vol35/iss4/2
SPECIAL FINDINGS AND SPECIAL VERDICTS IN NEBRASKA

Gerald E. Matzke*  

INTRODUCTION

The application of scientific techniques to the study of the efficiency of the jury in arriving at verdicts, absent wilful error, prejudice and mistake, can only indicate defects in the jury system in civil litigation known to every trial lawyer of experience. It is questionable whether decimal point conclusions as to the effect of the prejudices and mistakes of the jury on general verdicts in civil cases will be productive of advantageous alterations in our system of trial by jury. The experience of the legal profession in witnessing and participating in the development of the jury as a judicial tool to determine civil controversies has been the ingredient in the life of the law that has in centuries past initiated refinements in the jury system. Legal history dictates that this day to day experience with the operation of the jury will be the factor that will cause the legal profession to compel a continued deliberate mutation in the jury system toward a greater ability to achieve verdicts in accordance with law.

Presently the use of the general verdict requires the jury to (1) determine the true facts from a consideration of conflicting evidence, (2) ascertain and understand the pertinent principles of law as set forth in the trial court's instructions, and (3) apply these legal principles to the facts found.† If this procedure is observed by the jury, the trial of a lawsuit and the deliberation of the jury provide an orderly method for arriving at a just determination of civil controversies. If prejudice or mistake cause the jury to wilfully or unintentionally disregard any of these three necessary steps, then in such instances trial by jury is little better than determing legal controversies on principles of favoritism or chance. For behind the facade of a general verdict can readily hide every evil which our legal tradition has sought to evade.

* Teaching Associate, University of Nebraska College of Law, 1955-6; Member, Nebraska Bar Association.
† See Sunderland, Verdicts, General and Special, 29 Yale L.J. 253 (1920).
The jury may refuse or fail to find the true facts as dictated by the evidence, fail to understand or intentionally disregard the applicable principles of law, or refuse or be unable to apply the legal principles involved to the facts—and the general verdict stands impenetrable.2

The danger lies in the inability of our legal processes to rectify unknown errors hiding behind the general verdict. Such a weakness, if allowed to continue, may prompt serious consideration by the public and the legal profession that the jury or general verdict be discarded in civil litigation.3

The resolution of the problem here defined lies not in the addition of any new procedure to the jury system,4 or limitation of the use of the jury in civil cases. An effective device is now a part of our law. The statutes of Nebraska have for eighty-nine years made provision for the use of special findings and for special verdicts.5 It is suggested that by the utilization of these devices the jury can be compelled to make a methodical determination of all the facts. Furthermore the jury’s understanding of the principles of law may be tested, and its application of the law to the facts found may be guided.

The purpose of this article is to point out the advantages in the use of these techniques and to outline the major problems involved and how these problems are treated under Nebraska law.

Nebraska courts have not failed to use the special finding technique. Fifty-five cases involving special questions have reached the Nebraska Supreme Court.6 The reports of these cases in-

2The general verdict is of course subject to the power of the trial court to enter judgment after reception of a verdict in accordance with a motion made during the trial for a directed verdict, Neb. Rev. Stat. § 25-1315.02 (Reissue 1948), or to grant a new trial, Neb. Rev. Stat. § 25-1142 (Reissue 1948).


4See Report of the Committee on the Jury System, Nebraska Bar Association, 11 Neb. L. Bull. 248 (1932), recommending the enactment of legislation abolishing the general verdict and substituting therefore a “special issue” verdict.

5See Statutes of Nebraska §§ 292, 293, 294 (1867).

6In re Estate of Wilson, 114 Neb. 593, 208 N.W. 961 (1926); Kelly v. E. Meyer Fruit Co., 98 Neb. 503, 153 N.W. 554 (1915); Union Stock Yards Nat’l Bank v. Lamb, 92 Neb. 608, 139 N.W. 216 (1912); Kafka v. Union Stock Yards Co., 87 Neb. 331, 127 N.W. 129 (1910); Wallenberg v. Missouri P. R.R., 86 Neb. 642, 126 N.W. 289 (1910); Bloomfield v. Pinn, 84 Neb. 472, 121 N.W. 716 (1909); Schlageck v. Widhalm, 59 Neb. 541, 81 N.W. 448 (1900); Norfolk Beet-Sugar Co. v. Hight, 59 Neb. 100.
dicate that in only one-third of the cases has the trial judge exercised his discretion in refusing a request by trial counsel that the jury be required to return special findings of fact with their general verdict. In no case decided by the Nebraska Supreme Court has the court acknowledged the use of a special verdict.

SPECIAL FINDINGS AND SPECIAL VERDICTS DEFINED

The statutes of Nebraska provide for three different forms in which a jury can be required to return its verdict: (1) a general verdict; (2) a general verdict with special findings; and (3) a special verdict.

§ 25-1122: General and special verdicts; definitions; form of special verdicts generally. The verdict of a jury is either general or special. A general verdict is that by which they pronounce, generally, upon all or any of the issues either in favor of the plaintiff or defendant. A special verdict is that by which the jury finds the facts only. It must present the facts as established by the evidence, and not the evidence to prove them; and they must be so presented that nothing remains to the court but to draw from them conclusions of law.

§ 25-1121: Special verdicts; when allowed; procedure; filing; record. In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues; and in all cases may instruct them, if they render a general

80 N.W. 276 (1899); Thompson v. Thompson, 49 Neb. 157, 68 N.W. 372 (1896); Omaha & R.V.R.R. v. Chollette. 41 Neb. 578, 59 N.W. 921 (1894). The foregoing cases and those cited in notes 16, 19, 24, 33, 34, 39, 46, 51, 54, 55, 56, 57, 60, 62, 63, 67, 72, 73, 74, and 76, infra, comprise all those in which the Nebraska Supreme Court has dealt with special findings.

7 Ibid. See I. Discretion in the Trial Judge, this article, infra.
6 Messmore, J., contended in his dissent in In re Estate of George, 144 Neb. 915, 917, 18 N.W.2d 68, 69 (1945), that two special findings constituted a special verdict, but the majority did not discuss this theory and by implication indicated that the special questions did not constitute a special verdict.

In Olson v. Shellington, 162 Neb. 325, 75 N.W.2d 709 (1956) the appellant contended that a gratuitous comment written on the general verdict form by the jury was a special verdict but the court noted that it was not necessary to decide this question.

Also in Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N.W.2d 474 (1956), the court did not determine whether the verdict returned was or was not a special verdict. See notes 16, 17, infra.
verdict, to find upon particular questions of fact to be stated in writing, and may direct a written finding thereon. The special verdict or finding must be filed with the clerk and entered on the journal.

Thus the trial judge may choose one of the three alternative forms in which the jury may be required to return its verdict. 10 (1) Under a general verdict the jury returns its decision for either the plaintiff or the defendant. (2) The trial judge may require the jury to answer certain questions concerning all or any number of the factual issues in the case in addition to returning its general verdict. In this instance the jury's determination is stated in a general verdict and in special findings in answer to interrogatories. (3) The trial court also can choose the third alternative and require the jury to return a special verdict, i.e. a specific determination of each ultimate fact issue in the case, and thus dispense with a general verdict.

The Iowa Supreme Court in Morbey v. Chicago & Northwestern Ry. 11 explained the difference between a special verdict and a general verdict with special findings in response to interrogatories in these words:

There is, as contended by appellant, a manifest difference between a special verdict and the finding of the facts in answer to interrogatories propounded to the jury. A special verdict is in lieu of a general verdict, and its design is to exhibit all the ultimate facts, and leave the legal conclusions entirely to the court ... Findings of fact in answer to interrogatories do not dispense with the general verdict ... A special verdict covers all the issues in the case, while an answer to a special interrogation may respond to but a single inquiry, pertaining merely to one issue, essential to the general verdict. 12 (citations omitted)

The statutes of Nebraska provide for what might be referred to as the "old style" or common law special verdict which requires the jury to make a finding on every issuable fact. 13 If the trial judge fails to require the jury to return a finding on every material issue of ultimate fact, the special verdict cannot stand. 14

When employed ... [the special verdict] must be complete; the

10 Note that under Neb. Rev. Stat. § 25-1121 (Reissue 1948) the jury may of its own accord return a special verdict in an action for the recovery of money only, or specific real property. This prerogative of the jury is of historical derivation. See Morgan, A Brief History of Special Verdicts and Special Interrogatories, 32 Yale L.J. 575 (1923).
11 116 Iowa 84, 89 N.W. 105 (1902).
12 Id. at 89, 89 N.W at 107.
SPECIAL FINDINGS AND VERDICTS IN NEBRASKA

The special verdict has long fallen into disuse because of the risk necessarily implied in its use. Trial judges will quite naturally refuse to utilize this device because the failure to obtain a holding on even one material but undisputed fact will require judgment for the defendant.

No case clearly involving the use of the special verdict has reached the Supreme Court of Nebraska, however the case of Peetz v. Masek Auto Supply Co. raises a question as to whether the trial judge intended to require the jury to return a special verdict or a general verdict with special findings of fact. The Peetz case was an action for damages arising out of a head-on collision between a truck driven by Marvin Hagler and an automobile driven by Kenneth Conner, an employee of the defendant, Masek Auto Supply Co. Three causes of action were alleged for recovery for the benefit of the next of kin of Hagler, for funeral expenses, and for damages to the truck. Fourteen questions were submitted to the jury for their determination but the jury was not required to hold generally either for the plaintiff or defendant.17

The special verdict has long fallen into disuse because of the risk necessarily implied in its use. Trial judges will quite naturally refuse to utilize this device because the failure to obtain a holding on even one material but undisputed fact will require judgment for the defendant.

No case clearly involving the use of the special verdict has reached the Supreme Court of Nebraska, however the case of Peetz v. Masek Auto Supply Co. raises a question as to whether the trial judge intended to require the jury to return a special verdict or a general verdict with special findings of fact. The Peetz case was an action for damages arising out of a head-on collision between a truck driven by Marvin Hagler and an automobile driven by Kenneth Conner, an employee of the defendant, Masek Auto Supply Co. Three causes of action were alleged for recovery for the benefit of the next of kin of Hagler, for funeral expenses, and for damages to the truck. Fourteen questions were submitted to the jury for their determination but the jury was not required to hold generally either for the plaintiff or defendant.17

15 Green, supra note 13, at 715.
16 161 Neb. 588, 74 N.W.2d 474 (1956).
17 Transcript of Record, pp. 47-49, Peetz v. Masek Auto Supply Co., 161 Neb. 588, 74 N.W.2d 474 (1956). The following is the verdict which the jury returned:

We, the Jury duly impanelled and sworn in the above entitled cause do find that:

1-A. On June 11, 1953, was Kenneth J. Conner an employee of Masek Auto Supply Company?
Answer yes or no. Yes.

B. Was Kenneth J. Conner there acting within the scope of such employment?
Answer yes or no. Yes.

2. Do you find that Kenneth J. Conner was negligent in any way at the time of or immediately before the collision?
Answer yes or no. Yes.

3. Did such negligence, if found, form the proximate cause of the collision?
Answer yes or no. Yes.
(If any one of the preceding findings is answered "No", you need not proceed further, but may return such answer as your verdict.)

4. Do you find that Marvin L. Hagler was negligent in any way at the time of or immediately before the collision?
   Answer yes or no. No.

5. Did such negligence, if found, contribute to form such a part of the proximate cause that such collision would not have occurred but for such negligence.
   Answer yes or no. No.

6. (To be answered only if Special Findings 2, 3, 4, and 5 have all been answered "Yes").
   After a comparison of the negligence of each driver with that of the other, do you find that:
   A. The negligence of Conner was gross or less than gross?
      State degree. ...........
   B. The negligence of Hagler was slight or more than slight?
      State degree. ...........
   C. What proportion of all of the negligence of both parties do you find as to each driver?
      Answer in form of percentage or fraction as to each driver.
      Conner ............
      Hagler ............

7. Who are the next of kin of Marvin L. Hagler?
   Answered by the Court. Michael Dennis Hagler and David Lee Hagler.

8. Were such next of kin dependent upon Marvin L. Hagler for contribution to their support?
   Answered (sic) yes or no as to each.
   Michael Dennis Hagler Yes.
   David Lee Hagler Yes

9. What was a reasonable rate of return upon investments in Cheyenne County, Nebraska, as of June 11, 1953?
   Answered by Court. 4%

10. What amount of money do you find Marvin L. Hagler would have contributed each year on the average, to each of his next of kin?
    State average annual amount as to each.
    Michael Dennis Hagler $1,136.00
    David Lee Hagler $1,165.00

11. During what period of years do you find that such contribution would have been made to each of his next of kin?
    State number of years as to each.
    Michael Dennis Hagler 19 years
    David Lee Hagler 17 years

12. What is the reasonable value of the funeral expenses of Marvin L. Hagler incurred by the plaintiff?
    Answered by the court. $928.30

13. What was the value of the 1947 White truck tractor as of June 11, 1953 after deducting $75.00 salvage value?
    State net amount. $825.00

Dated this 16th day of April, 1954. Frank E. Smith, Foreman
However, by drawing an analogy between the right of the trial judge to compute interest (best illustrated by *Swygert v. Platte Valley Public Power & Irrigation Dist.*\(^{18}\)) it could be logically argued that the trial judge intended the verdict in the *Peetz* case to represent a general verdict—the trial judge merely reserving to himself the task of adding up the sums comprising the general verdict.

In view of sections 25-1122 and 25-1121 which clearly require a general verdict to be returned when the special finding device is used, the fact that the trial judge did not require a general verdict with answers to the interrogatories indicates that a special verdict was intended. Assuming that the trial judge sought to require a type of verdict in certain accord with the provisions of the statute, section 25-1121 raises a further doubt as to the nature of the verdict in the *Peetz* case. The first two sentences of section 25-1121 read: "In every action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict. In all other cases the court may direct the jury to find a special verdict . . . ." In view of the fact that the *Peetz* case was an action for money only it appears doubtful whether there was statutory authority for requiring a special verdict. However, a more logical interpretation of the statute which would sanction the use of the special verdict in the *Peetz* situation is suggested. If the phrase "In all other cases" refers only to those cases where the jury does not return a special verdict on its own accord, then the trial judge is granted power by the statute to require a special verdict in any type of case.

Another objection might be directed to the form of the verdict which the jury was required to return in this case—if such verdict is assumed to be a special verdict. The principle of the special verdict requires a holding on each ultimate issue. The *Peetz* case presents the question of (A) whether one sum representing the present value of future monetary support is an ultimate issue to be determined—or (B) whether the three individual holdings as to: (1) the amount contributed to each son per year by the deceased father, (2) the number of years such contribution would be made had the father lived, and (3) the reasonable return on investments, are each ultimate issues. If it were held that the former only, i.e. (A), constituted an ultimate issue and not the latter, i.e. (B), then the special verdict on the complex issue of damages in this case would serve no better purpose than a general verdict. To achieve the advantages of the special verdict it should

---

\(^{18}\) 133 Neb. 194, 274 N.W. 492 (1937).
be decided that the three facts stated under (B) are ultimate facts for the purpose of the special verdict. This would allow the special verdict to include the holdings illustrated in (B) and thereby protect the verdict from the danger of mathematical error inherent in the jury's attempt to calculate the present value of anticipated future support. The question of what is an "ultimate fact" in this instance should be determined by consideration of the advantages and purposes sought to be attained by the utilization of the special verdict. Certainly the concept of "ultimate fact" here advocated is in accord with the procedure stated in section 25-1122, requiring holdings on all ultimate facts so that all that remains for the trial judge to do is to draw from the facts their legal consequences. In addition, such an approach to defining ultimate fact will better facilitate appellate review by making the findings more intelligible, as indeed was the the situation in the Peetz case.

Another ambiguity present in section 25-1121 relative to special verdicts has not failed to disturb the Nebraska Supreme Court. The pertinent part of the section reads: "In all other cases the court may direct the jury to find a special verdict, in writing, upon all or any of the issues..." (emphasis added). This provision is in apparent conflict with the last sentence of section 25-1122 which requires a special verdict to include a holding on all the material fact issues in the case.

The Federal Rules of Civil Procedure include provisions for a "modified" special verdict, provisions not afflicted with the ambiguity contained in the Nebraska statutes. Also, the last two sentences of the federal rule cure the primary objection to the "old style" special verdict which stringently requires a holding on every material fact issue.

Rule 49. Special Verdicts and Interrogatories (a) Special Verdicts. The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court

19 See In re Estate of George, 144 Neb. 915, 917, 18 N.W.2d 68, 69 (1944) (dissent by Messmore, J.).
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.

Consideration should certainly be given to the advisability of incorporating a provision similar to the above quoted Federal Rule into the Nebraska statutes.

The Nebraska trial judge and trial lawyer, nevertheless, have available the special finding technique, an effective means of guiding the jury in its deliberation and of checking the general verdict. The remainder of this article will be limited to an analysis of the special finding technique and the principles which govern its use.

ADVANTAGES AND PURPOSES OF SPECIAL FINDINGS OF FACT

In the trial of any civil case the jury may allow its prejudices to prompt it to jump to a conclusion on the questions of liability or damages. It can purposely refuse or unintentionally neglect to determine individual fact issues which are material to its verdict. However, in the ordinary tort action if the trial judge has submitted an interrogatory to the jury on the issue of contributory negligence it is impossible for the jury to omit consideration of this crucial issue. Under the holdings of the Supreme Court of Nebraska the jury is not permitted to ignore special questions submitted to it by the trial court. If special findings are required of the jury on the primary issues of the case, the jury is compelled to make its determination step by step in accordance with the questions submitted and the court's instructions. The decision of the jury cannot easily be dictated by its favoritism for a greatly injured plaintiff or an underdog defendant unless the jury is willing to purposely return special findings of fact which it knows to be false.

Moreover, in the complex case the jury will be aided by interrogatories requiring special findings. If the trial involves many parties, complicated counterclaims, or a number of various affirmative defenses it is obvious that even the most conscientious jury will have great difficulty in following the instructions of the

21 See, IV. Effect of Failure of Jury to Make Special Findings of Fact in Answer to Interrogatories Submitted by Trial Court, this article, infra.
court in rendering a general verdict. Through the employment of special findings, the complex case can be broken down into a series of individual issues for the jury’s determination and the jury is guided in its attempt to reach a verdict in harmony with the applicable concepts of law.

Also, the technique of special findings can serve to test the general verdict of the jury. The best example is again the case involving the litigated issue of contributory negligence. If in answer to an interrogatory requiring a special finding on the question of contributory negligence the jury states that plaintiff was guilty of contributory negligence, this finding may, in the proper case, provide the basis for a reversal of a general verdict for the plaintiff, for the special finding is generally said to control the general verdict. Thus the understanding of the pertinent law by the jury and its application thereof can be tested. In *Sohler v. Christensen* the plaintiff sued for a stipulated commission claimed to be due under a contract for the sale of real property. The defendant raised the defense of alteration. This defense was the only fact question in issue. The jury returned a general verdict for the defendant and a special finding that the contract had not been altered. The plaintiff’s motion for judgment notwithstanding the verdict was sustained. The court in affirming the trial court’s action on the motion stated:

> On the evidence the plaintiff was entitled to a judgment in his favor on his cause of action, subject only to the finding of the jury on the question of whether or not the contract had been altered. The jury by its special verdict . . . [special finding] specifically found that it had not. The effect of this was to say that the general verdict was wrong and that the plaintiff was entitled to a verdict in his favor on his cause of action.

Then too, where the jury is required to return special findings with its general verdict and the general verdict is reversed on appeal, a new trial can be limited to only those causes of action or issues affected by the error. That portion of the verdict which the special findings indicates is not affected by the error need not be retried.

> . . . Its purpose . . . [referring to special findings] and best achievement is to enable errors already potential because of confusions of fact or law “to be localized so that the sound portions of the verdict may be saved”. . . . It is hence best available, when,

---

21 151 Neb. 843, 39 N.W.2d 837 (1949).
25 Id. at 848, 39 N.W.2d at 840.
as the judge can be foresee, the issues can be thus clearly and simply differentiated, to save on appeal at least that portion which cannot be questioned.26

The Nebraska Supreme Court has indicated that the special finding technique can be utilized in this manner in Harper v. Young:27

When error exists as to only one or more issues and the judgment is in other respects free from error, and it is clear that no injustice will result from so doing, the reviewing court may, when remanding the cause for a new trial, limit the new trial to the issues affected by the error whenever these issues are entirely distinct and separable from matters involved in other issues and the trial can be had without danger of complication with other matters. The most frequent application of this rule is found in damage actions where the error affects only the assessment of the damages.28 (citations omitted)

However, in In re Estate of George the Nebraska Supreme Court held that where an appeal is taken from an order refusing a new trial it does not have the power after finding reversible error to remand for retrial on less than all of the issues in the case.29 This raises some doubt as to whether special findings could be used in Nebraska for limiting retrial issues.

The case of Peacock v. J. L. Brandeis & Sons illustrates another instance in which the use of special findings could prove advantageous.30 In following the view of the dissent in Pearse v. Loup River Public Power Dist.31 the Nebraska Supreme Court stated in the Peacock case:

... [W]here a verdict in a personal injury case is excessive and that it appears to have been returned under the influence of passion and prejudice rather than upon the facts or that the jury misapplied the law, it is the duty of this court to set the verdict aside and grant a new trial. ... [W]here the jury has made an error the extent of which the court can with some certainty ascertain, a remittitur is a proper remedy. ... But if there is no method by which the court can rationally ascertain the extent of the excess, a remittitur is nothing more than a substitution of the judgment of the court for that of the jury.32

Special findings on the crucial issues of liability and on the various items of damages would facilitate the granting of a remittitur in a proper case by isolating the effect of errors of law on the amount

27 139 Neb. 624, 298 N.W. 342 (1941).
28 Id. at 631, 298 N.W. at 346.
29 144 Neb. 915, 18 N.W.2d 68 (1944).
30 157 Neb. 514, 60 N.W.2d 643 (1953).
31 137 Neb. 611, 290 N.W. 474, 479 (1940).
32 157 Neb. at 519, 60 N.W.2d at 647.
of the verdict. In *Karr v. Brown* the Nebraska Supreme Court granted a remittitur in accordance with the special findings where the general verdict was $422.04 and the special findings showed that it should have been $71.96.\(^{33}\)

Also, the use of special findings can limit the effect of error committed by the trial judge in another manner. In *Marx & Kempner v. Kilpatrick*,\(^ {34}\) an action on a foreign judgment, the plaintiff contended on appeal that the trial court erred in refusing to give the following instruction:

\[
\ldots \text{The jury are instructed that, if you find from the evidence in this cause that defendant, Kilpatrick, had not resided and had his usual place of residence in the state of Nebraska for five full years prior to the commencement of this action, so that service of summons could be had either upon him personally or by leaving a copy of the summons at his usual place of residence, they must find for the plaintiff.}^{35}\]

The Supreme Court of Nebraska held that it was unnecessary to determine whether the refusal to give the requested instruction was error because the jury returned a special finding on the subject of the refused instruction. The Court noted:

\[
\ldots \text{This point is answered sufficiently by reference to the finding of the jury to the third special question, which was the independent fact that the defendant had an usual place of residence within this state from the 26th day of March, 1878, to the 7th day of April, 1884, for a full period of five years.}^{36}\]

The court went on to say that the special finding demonstrated that the plaintiffs could not have been prejudiced by the refusal to give the instruction for even if the giving of this instruction had occasioned a general verdict for the plaintiffs the special finding of fact would necessarily have controlled and required a reversal. This principle is also applicable where the trial judge has ruled erroneously on a question of the admissibility of evidence. The point may be illustrated by the following hypothetical case. In an action based on the alleged negligence of the defendant in the operation of his automobile, the plaintiff in his specifications of negligence alleges, inter alia, excessive speed, failure to keep a proper lookout, and failure to stop in time to avoid a collision. The trial judge, over the objection of the defendant’s attorney, permits a witness to testify concerning statements made by a passenger in the defendant’s car which were relevant to the issue

\(^{33}\) 112 Neb. 626, 200 N.W. 343 (1924).

\(^{34}\) 25 Neb. 107, 41 N.W. 111 (1888).

\(^{35}\) Id. at 117, 41 N.W. at 115.

\(^{36}\) Ibid.
of proper lookout. After all the evidence was in, the plaintiff's attorney makes a tactical judgment that his proof was very weak on the issue of proper lookout and strongest on the issue of excessive speed. The plaintiff's attorney fears that the trial judge had erred in his ruling on the evidence pertaining to proper lookout and that it might be a basis for reversal if the jury returned a general verdict for the plaintiff. Therefore the plaintiff's attorney requests that the jury be required to return a special finding as to whether the defendant was guilty of negligence in not maintaining a proper lookout. If the jury returns a special finding that the defendant was not negligent in that specification, it would establish that the ruling on the admissibility of the evidence of improper lookout was not prejudicial even though erroneous. In this manner the plaintiff's attorney can protect his verdict and avoid a needless review of this possible error.

In still another way, through the operation of collateral estoppel, the use of special findings may help avoid repetitious litigation. Collateral estoppel is an aspect of res judicata concerned with the effect of a final judgment on subsequent litigation on a different cause of action, but involving some of the same fact issues determined in a prior case. When previous litigation has concluded upon a general verdict, it may be impossible to determine how a specific issue was determined, or if that issue was determined at all. If special findings are required on each issue of importance, the doctrine of collateral estoppel can be given effect with some exactness and needless repetition of preparation and presentation of evidence may be avoided.

Furthermore, the utilization of the special finding technique will tend to compel the jury to return verdicts that are more realistic in terms of dollars and cents and will tend to inhibit compromise on the issues of damages and liability. In McGrew Mach. Co. v. One Spring Alarm Clock Co. the plaintiff brought suit on four causes of action for $1,342.06; $2,373.58; $2,400.00; and $944.40 and the defendant counterclaimed for $2,339.43. The jury returned a general verdict for the plaintiff in the amount of $1,000 indicating that the issues of liability and damages may not have been determined individually. Had the jury been required to return a special finding on each issue of liability and damages

37 See Note, Development In the Law—Res Judicata, 65 Harv. L. Rev. 818 (1952); Restatement, Judgments § 68 (1942).
39 124 Neb. 93, 245 N.W. 263 (1932).
on each cause of action, and on the counterclaim, certainly their verdict would have been more understandable.

Once the jury has determined that the defendant is liable to the plaintiff in a personal injury action the plaintiff is entitled to recover such items of damages as loss of past earnings, impairment of future earning capacity, past and future mental and physical pain and suffering, past and future medical expenses, and disfigurement. The plaintiff under law is entitled to a judgment equal to the sum of the determined damages in each instance. Under a general verdict there is, however, no assurance that the jury has not merely decided to "lump off" plaintiff's recovery. By special findings the court can insure that the jury determines each measure of damages individually. This exactness in damages will only secure to both parties the judgment to which each is entitled under law.

In Borcherding v. Eklund the Supreme Court of Nebraska in holding the trial court's instruction on damages erroneous stated:

. . . . In computing the damages for personal injuries resulting from loss of future earning capacity allowance should be made for the earning power of money and when the loss of future earnings are considered the jury should take into account the present value of the future earnings which it finds the claimant has, by reason of his injuries, been deprived, that is, the damage for future loss of earning power is the amount thereof reduced to its present worth.

It is unrealistic to require a jury of laymen to perform mathematical steps that tax the ability of accountants. The recent Peetz case, supra, illustrates an intelligent possible solution to this difficult problem. In that case the jury was required to find specifically the amount that the deceased father contributed to the support of his minor children, and the period of years during which this contribution would have been made. The trial judge directed a verdict on the question of the rate of return on investments, and from these facts correctly determined the present value of the damages to be awarded.

41 156 Neb. 196, 55 N.W.2d 643 (1952).
42 Id. at 207, 55 N.W.2d at 650.
43 See note 16, supra.
44 See note 17, supra.
SPECIAL FINDINGS AND VERDICTS IN NEBRASKA

SOME ASPECTS OF THE LAW GOVERNING THE USE OF SPECIAL FINDINGS

I. DISCRETION OF THE TRIAL JUDGE

The submission of interrogatories for special findings to the jury is a matter solely in the discretion of the trial judge. This principle is established by statute and it has been given broad interpretation by numerous holdings of the Supreme Court of Nebraska. As an illustration of the broad discretion which rests in the trial court in this matter, here is language from the opinion in Marx & Kemper v. Kilpatrick, "... I can conceive of no case in which it will be error per se in the court to submit proper inquiries to the jury for special findings of fact." Conversely, in no case has the Nebraska Supreme Court found error in a trial court's refusal to submit special interrogatories requested by counsel.

It may be that this broad discretion with respect to the trial court's power to refuse to submit interrogatories has tended to minimize their use in Nebraska trial courts. However, it has been indicated that should the refusal of the trial court constitute a clear abuse of discretion and cause prejudice to the party requesting special findings, such refusal could be considered reversible error. The court has never indicated what it might consider in determining whether there has been such an abuse of

---

47 25 Neb. 107, 120, 41 N.W. 111, 115 (1888).
48 Ibid.
discretion. It is not mandatory for the court to submit requests for special findings in most jurisdictions which provide for their use.\textsuperscript{50}

II. DRAFTING INTERROGATORIES REQUIRING SPECIAL FINDINGS

The written interrogatory submitted to the jury should require the jury to make a finding as to a question of \textit{ultimate} fact in the case and not as to \textit{evidentiary} fact. This distinction is illustrated by the case of Kafka \textit{v. Union Stock Yards Co.}\textsuperscript{51} The plaintiff, as administratrix of the deceased, sued to recover damages caused by the alleged negligence of the defendant in failing to give any warning before it moved its locomotive into an intersection of the railroad tracks and a city street where the train struck the deceased. The railroad tracks were enclosed by a solid board fence and gate which obstructed observation of the tracks and were located in close proximity to a heavily traveled viaduct and a factory area producing a great amount of noise. The jury returned a general verdict for the plaintiff and the following answers to interrogatories submitted to the jury at the request of the defendant:

\begin{quote}
... (1) When James Kafka ... [deceased] reached the point five feet west of the west rail of the track upon which he was injured, how far could he have seen an engine approaching from the south on that track? Answer. 100 feet. (2) At the time that James Kafka stepped upon the track, how far south of that point was the engine which afterwards struck him? Answer. About 1 foot. (3) When James Kafka ... [sic] was within five feet of the west rail of the west track, how far south of that point was the engine which afterwards struck him? Answer. 21 feet.\textsuperscript{52}
\end{quote}

Relying on these special findings which it contended established contributory negligence, the defendant moved for judgment on the special findings notwithstanding the general verdict. The motion was sustained, and judgment given for the defendant. In reversing, the Nebraska Supreme Court stated:

\begin{quote}
... The most that can be said of the special findings is that, if the deceased had looked in the proper direction when he was within five feet of the track, he could have seen the approaching engine in time to have avoided the catastrophe. But that does not of itself convict him of contributory negligence. ...\end{quote}

\textsuperscript{50} See Note, Special Findings and General Verdicts—The Reconciliation Doctrine, 18 U. Chi. L. Rev. 321, n. 13 (1951).
\textsuperscript{51} 78 Neb. 140, 110 N.W. 672 (1907).
\textsuperscript{52} Id. at 144, 110 N.W. at 673.
It was not for the trial court, and is not for this court, to determine and say as a matter of law just at what exact point in the plaintiff's approach to the railroad he should have looked in either direction on the track for a train, or just at what instant he should have looked in either direction for the same purpose.

... Granting that the facts found by the special findings are true, they are not necessarily irreconcilable with the general verdict. They are not ultimate facts, but evidentiary facts, which the jury had a right to weigh, and presumably did weigh, in connection with all the other facts and circumstances shown in evidence, in arriving at the general verdict.53 (emphasis supplied)

It is possible that today such evidentiary facts would entitle the defendant to a verdict as a matter of law—but the view of what constitutes an ultimate fact has not been altered. Only if interrogatories are so drafted that the special finding will present ultimate facts which could conflict with the general verdict will the failure of the trial judge to require the jury to answer such interrogatories constitute an error.54 Interrogatories on matters which are outside the issues of the case, or which are not within the pleadings, or which are undisputed in the testimony should not be the subject of special findings.55 Special findings on immaterial fact issues will be disregarded.56

The interrogatories should, of course, be concise and easily understood. Questions which are susceptible of double meanings should be avoided. The desire to help juries reach proper verdicts is one of the reasons for employing the special finding and this end is best served by questions which will not mislead or confuse the jurors. Beyond this, clarity is necessary to preserve to the party requesting special findings the benefits of a check on the general verdict. Though special findings control where there is a clear conflict between the general verdict and the special findings, the special findings will not control where the interrogatories are ambiguous. It will be assumed that the jury intended the special findings to be in harmony with the general verdict.57

The Supreme Court of Nebraska has indicated that trial counsel should submit to the trial court proposed interrogatories

53 Id. at 146, 110 N.W. at 674.
54 McClary v. Stull, 44 Neb. 175, 62 N.W. 501 (1895).
56 Hawe v. Higgins, 89 Neb. 575, 131 N.W. 937 (1911); Town v. Missouri P. R.R., 50 Neb. 768, 70 N.W. 402 (1897); Citizens Nat'l Bank v. Wedgewood, 45 Neb. 143, 63 N.W. 375 (1895).
which he wishes the trial court to submit to the jury for special findings. In *Town v. Missouri P. R.R.*\(^6\) the court said:

One assignment of error is based upon the proposition that it was the duty of the trial court, in submitting special questions to the jury, to have included one to which an answer would have disclosed what the jury estimated to be the amount of the damages caused to the property of plaintiff by the waters, so that if it became necessary to render judgment on the special findings for plaintiff, as is the contention should now be done, it would be possible to do so intelligently and in full. . . . If any other or different . . . [interrogatories] from those submitted were desired, they should have been prepared and submitted to the court by counsel, or at least there should have been a request for the submission of such further queries as were desired, and if refused, an exception noted. This not having been done, the assignment must be overruled.\(^5\) (citations omitted)

The Nebraska statutes do not place any numerical limit on the number of interrogatories which can be submitted to the jury. In one case the defendant requested that 55 interrogatories be submitted to the jury.\(^6\) The trial court correctly exercised its discretion to deny this request and thereby prevented an apparent attempt to gain a strategic advantage by abuse of this useful procedural technique.

### III. EFFECT OF SPECIAL FINDINGS OF FACT WHICH ARE IN CONFLICT WITH THE GENERAL VERDICT

Of what effect is a special finding of fact which dictates that a verdict cannot under law be given to the party awarded the general verdict? The relevant statute says:

§ 25-1120. *Special verdict; controls general verdict.* When the special finding of facts is inconsistent with the general verdict, the former controls the latter, and the court may give judgment accordingly.\(^6\)

The Nebraska Supreme Court has not allowed this statutory provision to become a sterile rule. This principle has been relied upon in allowing special findings of fact to upset a general verdict and require a new trial or judgment upon the special finding.\(^6\)

\(^5\) 50 Neb. 768, 70 N.W. 402 (1897).
\(^6\) Id. at 777, 778, 70 N.W. at 405, 406.
The inconsistency referred to in the statute must be clear in law and fact before the special finding will control the general verdict.\(^{63}\) Where the special findings are ambiguous and are capable of an interpretation both consistent and inconsistent with the general verdict the meaning which is in harmony with the general verdict will be accepted.\(^{64}\)

An inconsistency between the general verdict and special findings may require two different results. The first type of result is exemplified in *Story v. Sramek*\(^{65}\) where the Supreme Court’s opinion states:

... [D]efendant is alleged to have agreed to put plaintiff in possession of certain real estate and the growing crops on March 1, 1919. Defendant is alleged to have failed to keep the terms of said contract on his part. Plaintiff brings this action to recover damages for the breach thereon. The jury in its consideration of this matter brought in a verdict for the plaintiff in the sum of $1,240.86. The court submitted two interrogatories, which were answered by the jury as follows; (1) What do you find was the value on March 1, 1919, of the crop of wheat on the land? Answer. $900. (2) What do you find was the value of possession of the land on March 1, 1919, without the wheat? Answer. Nothing. Thereupon the plaintiff moved the court to vacate and set aside the special findings. This motion the court sustained. The defendant’s motion for a new trial was overruled and judgment was entered on the general verdict for $1,240.86, and from this judgment appeal is taken.

Now the question is: Did the court commit reversible error when it set aside these special interrogatories and entered judgment on the general verdict?

An examination of section 7859, Rev. St. 1913 ... [which is identical to § 25-1120 quoted in full above] shows that what the court did in this matter is sustaining the motion of Plaintiff is diametrically opposed to the provisions of the statute. That action of itself entitled defendant to a new trial. ... It does not matter what citations there are on point, they do not or cannot overrule the section of the statute which was enacted to afford relief for this situation when it would arise in the course of litigation, and it is this section of the statute which is decisive of this case under the facts. The plain remedy in this case, in our opinion, when such an inconsistency between the general verdict and the special findings exists, is to grant a new trial.\(^{66}\)

However, where the special findings requested by a party

---


\(^{64}\) Note 57, supra.

\(^{65}\) 108 Neb. 440, 187 N.W. 881 (1922).

\(^{66}\) Ibid.
establish all the ultimate facts from which his right to a judgment results as a necessary legal conclusion, and the material special findings are consistent with each other and inconsistent with the general verdict, the trial court must on proper motion render judgment on the special findings and not on the general verdict. 67 Though both the general verdict and special findings dictate a verdict for the same party, if there is an inconsistency as to the amount of damages, judgment must be given in accordance with the special findings. 68

Most states which utilize the special question technique, or a closely related manner of submission, hold that it is reversible error for the trial judge to charge the jury that the special findings must conform to the general verdict. 69 The Nebraska Supreme Court has never ruled on this question. However, in Crabtree v. Missouri P. R.R. the plaintiff's counsel at the close of his argument to the jury said: "All we ask of you is that you be careful and not allow the special findings to conflict with your general findings." 70 On appeal this statement was urged as misconduct on the part of counsel requiring reversal. The Nebraska Supreme Court held:

We cannot see that the defendant was harmed by this remark. While, as defendant contends, the full duty of the jury with respect to the special findings was to answer the questions as they believed the facts to be, and we think it would have been better if counsel had refrained from making this remark, yet, at the same time, we cannot see how the defendant could be prejudiced by it. The special findings were all answered in accordance with its views; it seeks to base a judgment upon them, and, even if we accept the defendant's theory that they are inconsistent with the general verdict, the jury not only paid no attention to the remark, but acted in direct opposition to the request. 71 (Emphasis supplied)

67 In re Estate of Kerr, 117 Neb. 630, 222 N.W. 63 (1928); Omaha Life Ass'n v. Kettenbach, 55 Neb. 330, 75 N.W. 827 (1898); Williams v. Elkenberry, 22 Neb. 210, 34 N.W. 373 (1887). See Neb. Rev. Stat. § 25-1314 (Reissue 1948), which makes provision for the entry of judgment where the verdict is special or where there has been a special finding on questions of fact.


69 Wicker, Special Interrogatories to Juries in Civil Cases, 35 Yale L.J. 296, 303 (1925).

70 86 Neb. 33, 124 N.W. 932 (1910).

71 Id. at 46, 124 N.W. at 936.
IV. EFFECT OF FAILURE OF JURY TO MAKE SPECIAL FINDINGS OF FACT IN ANSWER TO INTERROGATORIES SUMBMITTED BY TRIAL COURT

As early as 1883 the Supreme Court of Nebraska was required to determine the effect of the failure of the jury to answer interrogatories for special findings. In *Doom v. Walker* the court ruled that it was reversible error for the trial judge to grant judgment on the general verdict for the plaintiff over the objection of the defendant where the jury recited in answer to three of five material interrogatories that it had failed to agree. 72 A new trial was ordered. However where the defendant in *Missouri P. R.R. v. Vandeventer* requested a special finding on a question of fact upon which there was no evidence and the jury failed to answer the interrogatory it was not reversible error for the trial judge to refuse the defendant's request that the jury be sent back and required to answer the interrogatory. 73 Also, the court has held that it is not reversible error for the trial judge to accept the general verdict and special findings of the jury where an interrogatory is answered "Don’t know" where the question submitted to the jury for special findings is immaterial under the pleadings and the evidence. 74 If interrogatories require the jury to make special findings of evidentiary fact and not of ultimate fact, it is not error for the trial court to receive the verdict without requiring the jury to answer the interrogatories submitted to them. 75

In *Sandwich Enterprise Co. v. West* the Supreme Court of Nebraska describes the discretion and duty of the trial judge and the jury with reference to interrogatories submitted to the jury for special findings. 76

... In an unbroken line of decisions it has been held that it is within the sound discretion of the trial court to submit or refuse to give to the jury questions for special findings of fact. It does not follow, however, that it is discretionary with a jury to answer, or decline to do so, special interrogatories submitted to them by the court, and that it is not reversible error for the court, after having directed special findings to be returned, to receive a general verdict where all the questions propounded to the jury have not been answered by them. ... The failure of the jury to answer immaterial questions for special findings will

---

72 15 Neb. 339, 18 N.W. 138 (1883).
73 26 Neb. 222, 41 N.W. 398 (1889).
74 Modlin v. C. L. Jones & Co., 84 Neb. 551, 121 N.W. 984 (1909); *Town v. Missouri P. R.R.*, 50 Neb. 768, 70 N.W. 402 (1897).
75 McClary v. Stull. 44 Neb. 175, 62 N.W. 501 (1895).
76 42 Neb. 722, 60 N.W. 1012 (1894).
not lead to a reversal of the case (Missouri P. R. Co. v. Vandeventer, 26 Neb. 222); but when a general verdict is returned, and the jury fail to answer special interrogatories, which are material under the pleadings and evidence, the verdict cannot be sustained.77

V. SPECIAL FINDINGS AND THE FIVE-SIXTHS VERDICT

The Nebraska statutes make the following provision for a five-sixths verdict:

In all trials in civil actions in any court in this state, a verdict shall be rendered if five sixths or more of the members of the jury concur therein, and such verdict shall have the same force and effect as though agreed to by all members of the jury: Provided, that a verdict concurred in by less than all members of the jury shall not be rendered until the jury shall have had an opportunity for deliberation and consideration of the case for a period of not less than six hours after the same is submitted to said jury. If a verdict be concurred in by all the members of the jury, the foreman alone may sign it, but if rendered by a less number, such verdict shall be signed by all the jurors who shall agree to the verdict.78

No Nebraska Supreme Court opinion has considered the effect of this provision on the use of the special finding device. The problem is whether the same ten jurors must agree on all the special findings, or whether it is sufficient if any ten jurors agree on the answers to each interrogatory. Jurisdictions which have met this question have held that questions not essential to support the judgment may be disagreed upon by three or more jurors.79 However, at least ten and the same ten must agree on all material special findings necessary to support the judgment entered thereon or the case will be remanded for new trial.80 However, this view has not failed to receive intelligent criticism.81

CONCLUSION

Positive arguments favoring the utilization of the special finding technique in conjunction with the general verdict have been stated herein with a limited practical discussion of the principles governing the use of this technique in Nebraska. It has further been suggested that the Nebraska statutes be amended to

77 Id. at 727, 728, 60 N.W. at 1013, 1014.
79 See Note, 26 Wash. L. Rev. 56 (1951), Note, 7 Wls. L. Rev. 111 (1932).
80 Ibid.
81 See Note. 37 Colum. L. Rev. 1235 (1937).
make provision for the "modified" special verdict used in the federal courts.\textsuperscript{82}

Cogent reasons dictate that trial by jury be supplemented by the use of a special finding or special verdict type of procedural device. Judge Frank in his significant discussion of this matter in \textit{Skidmore v. Baltimore & O. R.R.} expressly suggests the advisability of limiting the jury to the exact function of fact finders.\textsuperscript{83} However, there are eminent legal writers who raise a caution sign to those who wish to demand the same exactness from the jury in the execution of its duty of fact finding as we do from our judges in their rulings of law on the admissibility of evidence and in their instructions to the jury. Professor Moore has stated this view clearly:

The jury is not, nor should it become, a scientific fact finding body. Its chief value is that it applies the "law", oftentimes a body of technical and refined theoretical principles and sometimes edged with harshness, in an earthy fashion that comports with "justice" as conceived by the masses, for whom after all the law is mainly meant to serve. The general verdict is the answer for the man in the street. If on occasion the trial judge thinks the jury should be quizzed about its overall judgment as evidenced by the general verdict, this can be done by interrogatories accompanying the general verdict. But if there is sufficient evidence to get by a motion for directed verdict, then the problem is usually best solved by an over-all, common judgment of the jurors—the general verdict.\textsuperscript{84}

The intelligent argument in favor of the use of the special finding technique does not suggest that the jury be molded into a precise fact finding body with the duty to determine issues of fact with scientific certainty. In theory trial by jury assumes an orderly procedure whereby the judicial process can decide fact issues. The special finding device merely permits the trial court to insure that the jury in its deliberation is not derailed from the traditional procedural track by prejudice, ignorance, favoritism or mistake. The use of special findings is not recommended for every civil jury case. However, where the factual situation indicates that the use of special findings will achieve some of the purposes herein discussed then thought should certainly be given to the utilization of this procedural technique. For, in this manner the disadvantages inherent in the operation of trial by jury may, in part, be eliminated and a just and intelligent verdict encouraged.

\textsuperscript{82} Fed. R. Civ. P. 49(a).
\textsuperscript{83} 167 F.2d 54 (2d Cir. 1948).
\textsuperscript{84} 5 Moore, Federal Practice § 49.05, at p. 2217 (2d ed. 1951).
By use of the special finding technique the jury can be compelled to give attention to those principles of law which must govern civil litigation and on which we rely in our day to day actions and transactions.

The jury can be afforded a workable outline of a complex case and guided through an orderly determination of the rights and liabilities of the litigants.

If the jury has erred in its application of certain principles of law the special finding is an effective test which will bring to light these mistakes.

The necessary appellate review of errors can be limited in a twofold manner with a conservation of judicial energy and expense to litigants.

Use of special findings accompanying a general verdict will insure a somewhat more exact basis from which to apply the doctrine of collateral estoppel, the Nebraska rules relative to remittitur, and will compel the jury to determine damages more realistically and in accordance with law.

These functions of the special finding should recommend its use in various cases to plaintiffs' attorneys, defendants' attorneys, and the trial judges in Nebraska. The broad justice imparted by the general verdict will not be curtailed, and the too frequent incidence of "general verdict injustice" will be limited.