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F. William McGinn II v. Utah Power and Light Company : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

F. WILLIAM McGINN II,
Plaintiff-Respondent,

v.

UTAH POWER & LIGHT COMPANY, a Maine corporation
Defendant-Appellant.

Case No. 13619

Brief of Respondent and Cross-Appellant

Appeal From an Order of the Third District Court
In and For Salt Lake County, Utah
The Honorable Marcellus K. Snow, Judge

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NATURE OF THE CASE

This is an action for personal injuries sustained by the plaintiff when the mast of a sailboat he and four others were carrying into Bear Lake came in contact with one of defendant's electric power lines resulting in substantial burns and other injuries to plaintiff.

DISPOSITION IN THE LOWER COURT

After a five day jury trial, and upon special verdict, the jury found that both the plaintiff and de-

fendant were negligent but the plaintiff's negligence was 60 percent responsible for the accident whereas the defendant contributed 40 percent to the accident. The lower court entered a judgment of no cause of action and subsequently granted plaintiff's motion for new trial on alternative grounds.

RELIEF SOUGHT ON APPEAL

Defendant seeks reversal of the order granting a new trial and reinstatement of the judgment of no cause of action.

Plaintiff, (and cross-appellant), seeks first that the trial court's order granting a new trial be affirmed and, in the alternative, that this court grant a new trial on the additional grounds raised by way of cross-appeal.

STATEMENT OF FACTS

On July 23, 1972, F. William McGinn II was electrocuted and burned while carrying a sailboat across an open beach with friends on the north shore of Bear Lake in Bear Lake County, Idaho. The unmarked beach across which Mr. McGinn and his friends were carrying the boat was owned by Utah Power and Light Company. To its immediate north is a county road which runs along the north shore past a Utah Power and Light pumping station called Camp Lifton and an Idaho State Park.

The beach where the accident occurred west of the Camp Lifton pumping station has other characteristics which make it a desirable recreation area, despite the presence of the three power lines described at length by defendant-appellant in its brief. The water is shallow (R. 538), the beach itself is composed of gently rolling sand dunes covered with annual grass (R. 539), and it is generally a "nice family area," "a particularly appealing area for young families with young children." (R. 538-539). There were no signs or fencing or any other form of warning indicating high tension wires or indicating no trespassing (R. 542). The beach has been regularly used for recreation for years, particularly on July 4th and 24th (R. 178). Based on the evidence the court found as a matter of law that plaintiff was not a trespasser at the time and place of the accident (R. 815).

Although the members of the party were aware of the 230,000 volt line on the north side of the road, they were not aware of the smaller 46,000 volt line where the accident occurred (R. 626, 651, 640). When the mast of the boat struck the power line Mr. McGinn was shocked, he fell to the ground stunned with no pulse or breathing (R. 588, 589). He immediately caught fire (R. 638). From the burns which he received, both from the power lines and from the fire, Mr. McGinn suffered burns over thirty percent of his body surface (R. 484). He had a serious electrical burn on the right flank and another on the left foot. His chest, right arm, groin and both legs were covered with second and third degree burns. Following all treatment Mr.

McGinn, characterized by the surgeon who treated him as being an exceptionally successful case (R. 523), lost four toes, suffered considerable scarring (R. 521) and has a substantial surface of his body covered with skin grafts which will always be slow in healing, highly sensitive to extreme temperatures, susceptible to trauma which will require new skin grafts, and otherwise provide physical limitations for plaintiff for the rest of his life (R. 591-594). In addition, plaintiff will be susceptible to thrombophlebitis (R. 501) and cataracts (R. 505). In addition to his lost wages of $4,797.37 (Ex. 11P, 72P) plaintiff, Mr. McGinn, was forced to give up his planned career in the National Guard with the resulting loss of future income of somewhere between $40,172.26 to $88,487.28 (Ex. 73P, 74P).

The focus of this appeal is not the merits of the case but rather the procedures by which the case was submitted to the jury and subsequently a new trial was granted. Therefore, although a brief summary of facts of the case is given as a supplement to those facts presented in appellant's brief, a greater emphasis should be placed upon the precedural aspects of the case.

As pointed out by Appellant this case was tried under the Idaho Comparative Negligence Statute. However, of course, it was tried under Utah procedural law. The trial judge ruled that no instructions would be given to the jury concerning the effect of their decision on percentage of negligence and further, the court prohibited any argument or mention of percentages in closing argument (R. 817).

The jury returned a verdict finding defendant, Utah Power and Light Company, forty percent negligent and plaintiff, F. William McGinn II, sixty percent negligent. The jury also assessed $150,000.00 general damages and $18,150.00 special damages. Following entry of judgment plaintiff filed a motion for a judgment not withstanding the verdict or in the alternative for a new trial.

The motion for a new trial was based upon defects in the issuance of special interrogatories and errors of law committed in the judge's direction on argument before the jury. In support of that motion plaintiff filed an extensive brief and, in addition, filed affidavits of five jurors indicating there was substantial confusion concerning the meaning and effect of the special interrogatories which confusion resulted in significant error by the jury. Trial Judge Marcellus K. Snow granted the Motion for a New Trial on two alternative grounds. The first ground was that the jury should have been advised of the results of their percentage findings through appropriate instructions and argument of counsel. The alternative ground which the court found to be a sufficient independent reason for granting a new trial was that the jurors were not sufficiently instructed as to the relationship, or lack of relationship, between the percentage findings and damages regardless of the instruction received as to the legal meaning of the percentages. The judge indicated in the ruling that the affidavits of jurors had no substantial affect upon the order granting a new trial. It is from this

order granting a new trial that defendant appealed and it is in light of the propriety of that order that the appeal should be judged.

INTRODUCTORY STATEMENT

As the Court is perhaps aware, the instant case was the first case ever tried in the State of Utah involving an application of comparative negligence, with the exception, of course, of numerous FELA cases which have been processed through the courts of this State and which involve a concept of so-called "complete comparative negligence". During the course of the trial several issues arose which were issues of first impression in this State. Only one of those was the issue of "blindfolding" the jury which is discussed extensively in the Appellant's Brief and which will be discussed in Point I hereinafter. Other issues, equally critical, and before this Court either by way of the appeal, or the cross appeal, include instructions to be given to the jury regarding the percentage findings and damages as well as the sphere of permissible argument on the percentages.

It is the position of plaintiff that this Court should resolve all of these issues of first impression and, after resolving the same, should remand the case for a new trial in accordance with the ruling of the trial court,

with the guidance of this Court on the various issues. A dismissal of this case, by this Court, would result in substantial prejudice to the plaintiff whose principle dilemma is that his case happened to be the first comparative negligence case tried in this jurisdiction.

POINT I

THE TRIAL COURT DID NOT ERR IN GRANTING PLAINTIFF'S MOTION FOR NEW TRIAL.

We preface this discussion by noting that the granting or denying of a new trial is essentially a matter within the sound discretion of the trial court. *Lehi Irrigation Co. v. Steven Moyle*, 4 Utah 327, 9 Pac. 867 (1886):

> Motions for new trial are always addressed to the sound discretion of the court, and whether graned or denied, the discretion of the trial court will be presumed to have been properly exercised unless the contrary may be made clearly to appear .(4 Utah 327 at 329, 9 Pac. 867 at 869).

The Appellant seems to have forgotten, in its Brief, that the Motion and Order for new trial were in the alternative. Appellant would lead this Court to believe that the only issue presented and resolved was whether or not the jury should be "blindfolded". To the contrary, the Motion for New Trial itself, in addition to other grounds, was framed in the alternative as follows:

> There was error of law committed by the trial court in failing to instruct the jury as to the consequences of their special verdict findings and, in the *alternative*, in failing to submit special interrogatories in such a fashion as to not mislead the jury. (R. 45, Emphasis added).

Likewise, in argument before the trial court on the Motion for New Trial, following argument on the "blindfolding" issue, the alternative ground for new trial was argued whereby plaintiff sought more specific instructions on the relationship between the percentages and the damages such as those given in Wisconsin (see R. 930), and also seeking more liberality in terms of argument. (R. 931). In concluding argument on this point counsel made it clear that the request for new trial was in the alternative:

> . . . grant a new trial either on the theory that we tell them, or if we don't tell them, give them more instruction so that we can at least eliminate some of these problems that we have discussed.

The order of the trial court, granting the new trial, was likewise phrased in the alternative. The court first found that a new trial should be granted on the ground that:

> In comparative negligence cases the jury should be advised of the results of their percentage findings through appropriate instructions and argument of counsel. (Para 3 at R. 16)

The Court continued:

> 4. Alternatively, and in all events, the Court is of the opinion that substantial justice has not

> been done in the present case. The jurors were not sufficiently instructed as to the relationship, or lack of relationship, between the percentage findings and the damages. Therefore, even if the jury is not told the legal meaning of the percentages, it should be more specifically instructed on how to answer the interrogatiories. The jury should be advised and instructed specifically that there is no relationship between the damage answer and the percentages. (R. 16)

Although Appellant has argued at length about the "blindfolding question", it has not addressed itself whatsoever to the alternative holding of the trial court as set forth above regarding appropriate instructions.

In this point, we will discuss both grounds for the new trial and in the remaining points of the brief we shall discuss the points on cross-appeal.

A. *The jury should be advised of the effect of its percentage findings.*

An issue presented by the appeal, among others, is whether in instructing the jury and allowing argument to the jury, the trial court should either inform them or allow counsel to inform them that a finding of the plaintiff's negligence being greater than that of the defendant will defeat recovery by the plaintiff.

It is important that the Court, in grappling with the problem, be fully aware that the question is *entirely open.* That is, this matter is not controlled by the Idaho case law nor is it necessarily resolved by reference to another State such as Wisconsin. The question pre-

sented is a philosophical one, touching rather fundamental concepts, which ought properly to be resolved by each State in accordance with its own traditions and philosophy.

The law of Utah rather than the law of Idaho is controlling on matters regarding the submission of the case to the jury.

Perhaps the most fundamental error committed by the Power Company in its Brief is the assumption that Idaho law, rather than Utah law, is controlling on the question of whether or not the jury should be blindfolded.[1] Appellant simply ignores the fundamental choice of law question inherent in this matter — in considering how the jury is to be instructed does the law of the forum (Utah) or the law of the *lex loci* (Idaho) apply?

The law is settled beyond reasonable argument that such a question should be governed by the law of Utah rather than that of the law of Idaho.[2] We start with the general proposition that the procedural laws of the forum are to apply rather than those of the place of the tort. *Buhler v. Maddison,* 109 Utah 245, 166 P.2d 205 (1946). It is also quite clear that the method of submission to the jury and the form of verdict are "procedural" rather than substantive in this context. See, for example, Section 127, *American Law Institute, Re-*

1 See, for example, the assertion at page 16 of Appellant's Brief to the effect that "Holland v. Petersen, the Idaho Comparative Negligence Case . . . is controlling in this case."

2 This matter was briefed in the lower court — see R 63, 64.

statement of the Law of Conflict of Laws 2nd (1971) which states that:

> The local law of the forum governs rules of pleading and the conduct of proceedings in Court.

In a comment to that general proposition, there is an elaboration stating that:

> The local law of the forum governs, among other things, the following matters: . . . the form of verdict and judgment.

Analogously, the Federal Courts have held in diversity cases that State law regarding the relative function of judge and jury should not be applied, but that the Federal law on that subject is controlling as it is "procedural". For example, in *Mississippi Power & Light Co. v. Whitescarver*, 68 F.2d 928, 929 (5th Cir. 1934), the Court observed:

> Section 511 of Mississippi Code of 1930 provides that the negligence of the person injured shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to him. Section 512 is that all questions of negligence and contributory negligence shall be for the jury to determine. We agree with appellant's contention that the latter section is not binding in a federal court, but deals with the functions of judge and jury as to which federal courts have their own organization and as to which state law is without effect.

Therefore, while Idaho's substantive law applies in this case, (i.e. the law of comparative negligence),

Utah is free to apply its own procedural law and to decide for itself the nature of the relationship between judge and jury. The assumption of the Power Company that Idaho law is "controlling" is palpably erroneous.

THE CONTROVERSEY

The basic question — "should the jury be blindfolded?" is far more simply stated than resolved. There is respectable and indeed plethoric authority on this subject, both case and commentary, pro and con.[3] To summarize, analyze, quote from and argue those volumes would consume far more pages than this Court's rules or time would allow, and thus we would rather analyze a more specific question — "should the jury be blindfolded *in Utah?*"

We start with the proposition that, although Rule 49, *Utah Rules of Court Procedure*, no doubt allows the use of special verdicts, the tradition in this State has been essentially a tradition of general verdicts.

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3 See, e.g. **Badger v. Louisville & Nashville RR**, 414 F.2d 880 (5th Cir. 1969); **Wilson v. Benton**, 476 S.W.2d 214 (Ark. 1972); **Chitwood v. Myers**, 443 S.W.2d 827 (Tenn. 1969); Thode, **Comparative Negligence Contribution Among Tort-Feasors and the Effect of a Release — A Triple Play by the Utah Legislature**, 1973 Utah L. Rev. 406; Fine, **Does the Trend in Our Substantive Law Dictate an Expanded Use of the Special Verdict?**, 37 Albany L. Rev. 229 (1973); Flynn, **Comparative Negligence: the Debate**, Trial 219 (May/June 1972); Guinn, **The Jury System and Special Verdicts**, 2 St. Mary's L.J. 175 (1970); Denton, **Informing a Jury of the Legal Effect of its Answer**, 2 St. Mary's L.J. 1 (1970); Green, **The Submission of Special Verdicts in Negligence Cases — A Critique of the Bug Bite Case**, XVII University of Miami L. Rev. 469 (1963); Bertelsman, **Special Verdicts and Interrogatories**, 30 Univ. of Cincinnati L. Rev. 208 (1961).

This Court has placed its imprimatur on that tradition. In *Baker v. Cook*, 6 Utah 2d 161, 164, 308 P. 2d 264, 267 (1957) the Court noted:

> As heretofore observed, great care should be taken to submit questions to the jury so that they are as clear as possible. When a general verdict will best settle the issues, it should be used. When specific issues cannot be reached by a general verdict, the trial court should take advantage of special verdicts or special interrogatories.

And in *Barton v. Jensen*, 19 Utah 2d 196, 199, 429 P. 2d 44, 46 (1967) four of the Justices adopted the following statement:

> A majority of the members of the Court are of the opinion that in cases such as this, which consist of simple negligence, where only two parties are involved, it would be better practice to submit the case to the jury upon a general verdict. It appears that the best efforts of trial judges to make interrogatories simple, concise and understandable still result in juries misunderstanding what is intended.

Justice Ellett, concurring in result, stated a preference for special verdicts.

Likewise in Rule 49, *Utah Rules of Civil Procedure,* although there are provisions for the special verdicts (R 49 (a)) and general verdicts accompanied by answers to interrogatories (R 49 (b)), these matters are left to the trial court's discretion and indeed, Rule 49(b) suggests that the jury should be advised as to what it is doing and the significance of its answers:

> The Court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict.

See also *JIFU* Section 1.11 which shows a typical use of special verdict or interrogatories accompanied with what is tantamount to general verdict.

We suggest that it has been the practice in the State of Utah that the form and nature of interrogatories and verdicts submitted to a jury have been largely left to the discretion of the trial court depending upon the nature of the case involved. Certainly, it is the law generally that the form of submission to the jury is a matter within the sound discretion of the trial court. See, for example; 5A *Moore's Federal Practice*, § 49.03 [1] wherein the author observes:

> Under Rule 49 (a) the court has *complete discretion* as to whether a special or general verdict is to be returned. (Emphasis added.)

Thus the method of submission has typically been controlled by the philosophy and the discretion of the trial judge, the nature of the case (i.e. in a complex, multiparty case the need for special interrogatories is perhaps more evident), and other similar factors.

The next question is whether there is anything about the nature of comparative negligence itself which suggests that we should deviate abruptly from the prior practice in this State and deprive the trial courts of the

discretion they have heretofore enjoyed. Professor Thode, in his excellent article on comparative negligence (1973 *Utah Law Review* 406, 414) asserts that section 38 of the Utah Law on Comparative Negligence (which is virtually identical to the Idaho Statute) does not require this result. He notes in this respect:

> Attempting to fit the statutory language into the choices under Rule 49, I find the only sensible construction is that the trial judge must choose a method of submission that directs the jury to answer questions concerning the amount of damages and the percentage of negligence attributable to each party. The trial judge should be allowed to choose the special verdict or general verdict with interrogatories because either method complies with the mandate of Section 38. The quoted language from section 38, in my judgment, cannot support the construction that upon demand all issues *must* be decided upon the basis of a special verdict submission to the jury.

Even more so in the instant case, any mandate in the Idaho statute which could arguably be construed as requiring the blindfolding of the jury is clearly not controlling in view of the fact that such would be a "procedural" rather than a "substantive" provision and therefore not applicable in the courts of Utah under the choice of law doctrines discussed herein.

As further support for the proposition that there is nothing about comparative negligence itself which requires "blindfolding" the jury, we refer this Court to

the numerous cases which have heretofore been decided under FELA. It apparently has never occurred to anyone in this State that there is anything wrong with telling a jury what it was doing in a FELA comparative negligence case. See, for example, ***JIFU*** instructions 81.1 and 81.3 which clearly advise the jury the effect of its findings in a FELA case. See also *Bennett v. Denver & Rio Grande Western Railway Company*, 117 Utah 57, 213 P.2d 325, 332 (1950) wherein Justice Wolfe, concurring, quite frankly acknowledged that the jury may tend to average out the various factors in order to arrive at a just verdict.

> It is quite likely that the jury looks at these cases realistically by determining what net amount the plaintiff should receive to see him decently through life and then makes the verdict high enough so that its guess as to the amount the plaintiff should be penalized for contributory negligence when subtracted will bring the verdict to the amount that they think he should receive.

Justice Wolfe expressed no shock or dismay at this concept. It would appear to be an erratic and discriminatory policy to fully advise a jury of the law in FELA "complete" comparative negligence cases but to isolate them from that knowledge in "51-49" comparative negligence cases.

There are two basic facets to the question which ought to be considered. First, on a philosophical level one must decide whether the jury is to be entrusted with knowledge of what it is doing or whether it should

be scrupulously circumscribed and isolated. Certainly reasonable minds can differ on this subject.

Professor Wigmore, Ezra Pound and Professor Moore have all written on this subject and have each advocated the "general verdict" approach.[4] Moore (5A Moore's *Federal Practice*, §49.07 at 2235-36) puts it as follows:

> 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 from the man in the street.

On the polar side of this philosophical issue perhaps the most quoted spokesmen are Carroll R. Heft and C. James Heft who in Heft, *Comparative Negligence Manual*, Section 8.10 (1971) state as follows:

> The special verdict is the very cornerstone of the comparative negligence concept, and the jury does not, and should not, know the legal effect and result of its answers to the interrogatories on the special verdict.
>
> By using the procedure of a special verdict under comparative negligence, a jury finds the facts without regard to the ultimate outcome of the case. The court takes the facts as found by the jury and awards judgment. The procedure is

4 Wigmore, **A Program for the Trial of a Jury Trial**, 12 Am. Jud. Soc'y. 166 (1929); and Pound, **Law in Books and Law in Action**, 44 Am. L. Rev. 12 (1910).

> intended to ascertain the truth untainted by prejudice or a desire to see one of the parties win or lose.

It probably ought to be observed, in fairness, that the Hefts represent approximately twenty five insurance companies ranging from The American Family Insurance Company to Western Casualty & Surety Company. (See 197 *Martindale-Hubbell Law Dictionary*, Vol. IV, p. 3004B.)

In determining which approach is desirable, this court might well consider whether there is any empirical support in Utah for the proposition that juries are no longer worthy of the trust we have traditionally placed in them. Has Utah experienced run-away plaintiff's verdicts? Have juries acted lawlessly in granting verdicts to plaintiffs solely out of compassion? Do juries disregard the trial court's instructions on the law? We submit that this court is in an excellent position to evaluate the effectiveness of judge-jury functioning in Utah and to determine if there is any truly compelling reason now, for the first time, to significantly diminish the relative role of the jury in this state.

Aside from the purely philosophical considerations, there are, of course, numerous pragmatic considerations which this Court should consider:

How long can you keep juries blindfolded? It would seem that sooner or later people are going to find out what the law of comparative negligence is and, when they are asked to serve upon juries, they will

apply that knowledge. The Colorado Court of Appeals, in deciding that the jury should be advised of the affect of their findings upon the verdict noted:

> The manner in which the law applies to a given state of facts should not be a closely guarded secret which is known only to judges and lawyers. It will, in fact, ultimately become known to at least some members of the community who will be asked to sit upon juries. It is far better for courts to be the vehicle by which the operation of the law is explained than to rely upon whatever chance understanding may come the way of potential jurors. *Simpson v. Anderson,* 517 P.2d 416, 419 (Colo. App. 1973).

The possibility of affirmative injustice. The principal problem of not advising the jury as to the law of comparative negligence is that it is quite likely the jury will come to conclusions or assumptions which may be affirmatively misleading. They may assume that the plaintiff will recover but the damages will be reduced proportionally (as in FELA cases). They may assume that in a fifty-fifty case, the plaintiff will recover fifty percent, (which because of certain abuses with the 51-49 type of statute, Wisconsin has now adopted as a measure of recovery) or they might assume any number of other possibilities. This problem has bothered various commentators on this subject. The Court of Appeals in Colorado noted in this respect:

> A realistic approach requires that we recognize the jury's will to anticipate the consequence of their findings relative to percentage of negligence.

> Under the Colorado Comparative Negligence provision, which denies recovery to the plaintiff found 50% negligent, there is a substantial possibility that a jury might misunderstand the consequences of its decision. Acknowledging that jurors will anticipate the effect of their findings, we believe it preferable for the jury to deliberate with an understanding of the true effect of the law rather than under possible misapprehensions. Id. at 418.

Professor Thode shares this concern:

> An instruction on the law of comparative negligence is especially needed because the absence of such instruction may be affirmatively misleading. Absent such an instruction, a sensible juror is likely to believe that the plaintiff will recover, but that the damages will be reduced proportionally if plaintiff's contributory negligence is found to be less than one hundred percent. Such an assumption would be accurate in a "pure" comparative negligence state, but not in Utah where the plaintiff's negligence must be less than the defendant's negligence for plaintiff to recover anything from that defendant. Thode, *supra.* at 417-418.

Inconsequentiality. Another problem which we believe is serious is that if the jury is not advised of the consequences and impact of their answers to the interrogatories, they may well assume that the questions are insignificant or unimportant. One author (William J. Flynn in "Comparative Negligence: Debate," *Trial Magazine*, 49, 51, May-June 1972) notes in this respect:

> The percentage inquiry in a special question, when posed without explanation, sounds incon-

sequential and nonprobative unless the jury is told how it does or does not result in a verdict, and unless the jury is required to work out the end-verdict in dollars themselves.

Juror Frustration. Another highly important consideration is that service as a juror is, for many people, their only exposure to the judicial system. We submit that the performance of that duty will be frustrating and promotive of distrust if the jurors are not trusted with the consequences of their decisions. They should know how a case comes out and not be required to resort to guess. The public, including jurors, is legally presumed to know the law. It certainly seems, therefore, that we should not attempt to hide it from them.

We recognize that there will undoubtedly be cases where it will be almost impossible to advise the jury of the affect of their findings, particularly in complex, multi-party litigation involving claims for indemnity, contribution, counterclaims, etc. In such cases, as has been historically the case in this jurisdiction, the trial judge should continue to have discretion to utilize the form of verdict which will best produre a just result. If that form of verdict happens to be a special verdict, certainly the trial court should have that discretion. On the other hand, we respectfully submit that the trial court's discretion ought not to be circumscribed against using interrogatories with a general verdict in comparative negligence cases. In the instant case, after living with the case, observing the results, and hearing all relevant arguments, Judge Snow determined that

the jury should have been told the affect of their findings and that the failure to do so resulted in a substantial injustice.

In conclusion, we commend the following discussion of this subject to the Court. It represents the views of two University of Texas law professors which we think fairly summarize our position.

> Why indeed should juries be denied the understanding of how their answers will affect the outcome of the case? Further, how successful are the efforts of the judges to control the juror's answers in favor of the party the juror thinks should win? How can an intelligent person who listens to what goes on in the courtroom go to the jury room without having an opinion that one of the parties should have his verdict? And if he has a conviction, what can keep him from voting his conviction whether he keeps quiet or becomes an advocate for the answer he thinks will support the judgment he desires? To ask him to find the facts is to ask him to consider the outcome to which the facts contribute. There is no such thing as findings facts in a vacuum—they have meaning only when found with respect to some objective. Since the juror cannot be kept from considering the effect of his answer, why should the attempt be made?
>
> We think that jury trial necessarily is based on the assumption that a jury is entitled to have all the aid the court can give in understanding the law relevant to the controlling issues as they are submitted. Any attempt to "hide the ball" is beneath the dignity of a court and is a challenge to the integrity of trial by jury. If the case is tried before a judge sitting also as a jury, he

> has the benefit of the evidence and the law and makes such findings supported by the evidence as he conisders necessary to support the judgment he renders for one party or the other. In all fairness to the parties and the jury, why should the jury not have the benefit of all the law and the relevant facts that a judge would have in trying the case without a jury? The only answer is fear of the jury.
>
> Denying instructions to guide the jury in the performance of its functions because of fear that it may reach a judgment based on the layman's sense of justice can hardly be called jury trial.
> . . .
> Green & Smith, *Negligence, Law, No-Fault, and Jury Trial*—I, 50 Tex. L. Rev. 1093, 1113-15 (1972).

B.

In the event this court should rule that the jury should not be advised as to the effect of its findings on comparative negligence, the new trial should nonetheless be allowed in order to give a more appropriate instruction to the jury explaining the lack of relationship between percentages of relative fault and damages.

As noted above, the trial court granted a new trial on two grounds alternative in nature. First, the court held that the jury should be advised on the law of comparative negligence (R. 16). Secondly, pursuant to a request in the motion for new trial and argument, the court ruled alternatively as follows:

> Alternatively, and in all events, the Court is of the opinion that substantial justice has not been

done in the present case. The jurors were not sufficiently instructed as to the relationship, or lack of relationship, between the percentage findings and the damages. Therefore, even if the jury is not told the legal meaning of the percentages, it should be more specifically instructed on how to answer the interrogatories. The jury should be advised and instructed specifically that there is no relationship between the damage answer and the percentages. (R. 16)

This issue was not treated by the Appellant in its brief, but it is certainly deserving of consideration by this Court. If Utah is going to adopt the procedure of not advising the jury of the affect of their percentage answer, we must, as the corallary to that practice, adopt what procedures and instructions are possible to minimize the possibility of the jury making unwarranted assumptions. The only effort made by Judge Snow to accomplish this in instructions submitted to the jury in the instant case was contained in Question No. 4 of the Special Verdict. After asking about negligence, and the percentages, question No. 4 asks about damages as follows:

> ***QUESTION NO. 4.*** Disregarding any of the previous answers, what is the total amount of damages sustained by plaintiff F. William McGinn II as a result of the incident?
>
> (a) General damages including lost wages $\$$ _____
>
> (b) Special damages $18,150.00
>
> TOTAL $\$$ _____

The question is whether the first phrase, "disregarding any of the previous answers", is sufficient to advise the jury that there is to be no reduction in damages based upon the possible fault of the plaintiff; that the plaintiff may or may not be entitled to damages, even though they are set forth by the jury, and that, in effect, they should consider the damage question in the abstract.

In arguing the new trial motion, plaintiff's counsel suggested that an instruction comparable to that given in Wisconsin should be given in the event that the court determined the jury should not be advised of the affect of its answers to the damage interrogatories. A proposed insruction was tendered to the Court (R. 930). That instruction is set forth, in total, in a bulletin entitled *Comparative Negligence Institute*, dated December 14, 1973, sponsored by the Utah State Bar Continuing Legal Education Committee, at page 67. It is a form instruction given in Wisconsin where the jury is not advised of the effect of its answers to percentage questions. The critical portions of that instruction as they relate to the damage issue are as follows:

> You must answer the damage question no matter how you have answered any of the previous questions in the verdict. By asking you to determine the amount of damages, the Court is not indicating, nor is it asking you to indicate that the party whose damages are being determined is entitled to them.
>
> In answering the damage question, you will disregard any percentages you may find or state in answer to the comparative negligence question:

> any use or application of such percentages will be for the Court to determine in directing judgment.
>
> * * *
>
> Nothing should be added by way of punishment or because of sympathy or resentement [sic], nor should anything be deducted by reason of doubt of the liability of any of the defendants, . . .[5]

The value of such an instruction is apparent. If the jury is not to be told what the percentages mean, they may be under the mistaken belief that the plaintiff will receive something inasmuch as the jury is asked to determine what the damages are. If Utah is going to "blindfold the jury" there are at least two different ways to obviate this problem. The first, which is not as satisfactory as informing the jury about the law, is to give them a precautionary instruction such as that set forth above. A second, and perhaps preferable if more cumbersome method, would be to have a bifurcated submission whereby the jury would first determine the answer to the liability question and then, only if necessary, retire to the jury room a second time in order to determine the question of damages.

This phenomenon has not escaped literary comment. In *Comparative Negligence*: *The Debate*, Trial Magazine, (May-June 1972), the author, William J. Flynn, notes that one of the problems with not advising the jury is:

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5 Heft and Heft also recommend this instruction — **Comparative Negligence Manual**, Section 7.550 (1970).

> An illusion is cultivated among the jury that the plaintiff is to be awarded *something*, merely because they have been instructed by the judge to work out a damage evaluation—which means extended discussion in the jury, deliberation room of physicians' testimony, future incapacitation, pain and suffering, loss of enjoyment of living, detailed medical special damages, loss of earnings past and future, and auto property damage. Hours may thus be devoted by the jury to wrestling with these damage issues in the jury deliberation room, particularly where there was conflicting medical testimony or where the jury members hold different views as to the extent of damages.
>
> This is a deceptive state of affairs calculated to create miscarriage of justice. *Id.* at 50.

No matter how this Court decides the first issue presented in this appeal, it is respectfully submitted that it is critical this issue be decided in a way consistent with Judge Snow's ruling on the motion for new trial. There is a clear danger that the jury was uninformed in this respect which may have affected their answers to the percentage questions. If we are going to adopt the "blindfolded" approach utilized in Wisconsin, we should, as a necessary corollary adopt instructions developed over many years in Wisconsin including, specifically, that which Judge Snow found should have been granted regarding the lack of relationship between the percentages of fault and damages.

Thus, the order granting a new trial should be sustained regardless of how the court answers the first question presented on appeal.

POINT II

CROSS-APPEAL BY RESPONDENT

THE TRIAL COURT COMMIITED PREJUDICIAL ERROR IN THE COURSE OF THE TRIAL IN REFUSING TO ADMIT CERTAIN PHOTOGRAPHS.

Regardless of how this Court rules on the other issues presented in this appeal, plaintiff nonetheless submits that error was committed by the trial court in excluding certain photographs from evidence and therefore that he is entitled to a new trial.

The exhibits in question are Exhibits 66p, 67p and 68p. Each of these is a photograph of the area in which the accident occurred showing warning signs which were placed on the beach subsequent to the accident in question.

These pictures were offered in connection with the testimony of a witness from Utah Power & Light Company, Mr. Daniel James Raymond, District Representative of the Montpelier, Idaho District which includes the subject area. Mr. Raymond testified that he was familiar with warning signs such as that admitted as exhibit 58p (R. 794). He further admitted that those signs have been available for many years in the Montpelier district, (Ibid). Mr. Raymond was asked regarding the use of these signs in recreational areas as follows:

Q. As of July 1972 there was no particular reason why the signs could not have been placed on that beach area west of Lifton, was there?

A. This did not pertain at all to the, anything except for irrigation areas, these signs.

Q. Now I don't - I am not sure I quite catch that distinction.

A. This sign there, it says, I believe it says, keep the pipe horizontal. It is strictly for an irrigation pipe that it shows in the picture. And it's meant, I think, strictly for an irrigation area, the sign. The bottom of the sign says, keep the pipe horizontal.

Q. I see, and that only refers to irrigation pipes?

A. That is what these were put out for, yes.

Q. I see. Any other kind of pipe, you happen to have that kind of pipe, you are just not protected by this sign, is that your policy?

A. These were sent out with the information that they should be put around irrigation systems. (R. 795-796.)

Based upon this testimony, plaintiff offered exhibits 66p through 68p for the purpose of demonstrating that signs, (identical to 58p), could feasibly and practicably be utilized for warning purposes in recreation areas. The jury was excused from the room and an offer of proof made with respect to these photos, (R. 797). Plaintiff requested the photographs be admitted with a

> [C]autionary instruction that they are not to be considered as evidence of negligence of the defendant, but are offered for two purposes: Number 1, to show the practicality and ease with which the signs could have been put up; Number 2, on a question of impeachment of testimony of the gentleman we just had on the stand. His testimony was that these signs were used only for irrigation purposes. That is what they are for, and so forth, and so on. This [referring to the photographs] is evidence that they've been used for recreational purposes and are just as good for that as they are for irrigation. And thirdly, we offer them on the trespass issue. (R. 797-798.)

There was extensive argument on this subject, (R. 700 et seq), briefs were submitted, (R. 222 et seq), and the court ultimately excluded evidence of defendant's subsequent sign posting on the beach area in question (R. 815).

The admission of these photographs should be controlled by Utah's newly adopted *Rules of Evidence.* Rule 51 thereof provides as follows:

> When after the occurrence of an event remedial or precautionary measures are taken, which, if taken previously would have tended to make the event less likely to occur, evidence of such subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event.
>
> NOTE: This rule relates only to negligence and not to causation. It is not intended to exclude evidence which might be admissible on other grounds independent of such provisions.

This rule of evidence restates what has been recognized by most courts as being the law of this subject. See generally Annotation: *Admissibility of evidence of repairs, change of conditions, or precautions taken after the accident*, 64 A.L.R. 2d 1298.

In a number of cases, remedial measures in connection with electrocution incidents have been held admissible under a number of the exceptions to the general rule. In *Cooper v. Heintz Manufacturing Company*, 385 Pa. 296, 122 A.2d 699 (1956), evidence regarding a guard placed at a transformer tower following an electrocution incident was held admissible for the purpose of designating control over the instrumenality. To the same general effect see *Houston Lighting & Power v. Tabor*, 221 S.W. 2d 339 (Texas 1949). In *Johnson v. United States*, 163 F. Supp. 388 (D.C. Montana 1958), repairs to an electrical substation barbed wire were held admissible "for the sole purpose of showing the practicality of this additional safeguard." *Id.* at 395. And in *Hyadman v. Pennsylvania Railway Company*, 396 Pa. 190, 152 A.2d 251, it was held that warning signs, placed after an injury on a transformer tower, were admissible on the question of whether it was practical for the defendant to take steps to further guard the area.

It is respectfully submitted that the defendant Power Company, having taken the position tha warning signs, such as exhibit 58p, were used "strictly" for irrigation purposes, placed in issue the question of the practicality of utilizing such signs in other areas includ-

ing the beach in question. Having placed the question in issue, the Power Company should be estopped from objecting to the admissibility of subsequent signs. These signs do demonstrate that it was practicable, feasible and perhaps effective to place warning signs along the beach in question in such a way as to fairly advise the visiting public of hidden dangers above.

It is further submitted that the error in excluding these photographs was prejudicial to plaintiff. Had the jury been advised as to the practicality and feasibility of placing these signs in a recreation area and had they not been led to believe that the signs were "strictly" for irrigation purposes, they may well have assessed a greater amount of negligence to the defendant and a lesser amount to the plaintiff.

POINT III

THE COURT ERRED IN UNREASONABLY RESTRICTING THE AREA OF PERMISSIBLE CLOSING ARGUMENT ON PERCENTAGES.

If this Court should rule that the jury may be advised of the affect of its percentage findings, there is no need to consider this point. On the other hand, if the court should rule that the Wisconsin practice of blindfolding the jury is to be followed, then the Court should consider this additional point since it does raise an issue as to the proper scope of argument.

The practice in Wisconsin has been that, although a jury is not advised as to the affect of its percentage findings, counsel have been allowed to argue various percentages without advising the jury as to what the legal affect will be.

Apparently one trick that defense lawyers in Wisconsin have used is to argue that the parties are fifty-fifty responsible. This is recommended by Heft & Heft in *Comparative Negligence Manual*. Section 6.50 as follows:

> The argument that both parties are equally at fault is very effective in a close case. It compels the plaintiff to "reach" and argue that the plaintiff is either not at fault at all, or is at fault in a lesser degree.

Apparently, defense lawyers have utilized this technique extensively in Wisconsin, to such an extent that Wisconsin finally amended its statute to provide that the plaintiff recovers even though his negligence is fifty percent. See *Thode, supra.*, 406, 418 N. 41.

In the trial of this case Judge Snow, while preventing the parties informing the jury of the effect of their findings, went further and stated that the parties could not argue the percentages. The colloquy on this subject commences at R. 816. The trial judge finally advised as follows:

> I think each party can argue within legal bounds that their own client is either not negligent at all or very, very slight and that the other party was grossly negligent or almost the only negli-

> gence, but no mention of the fact that the money award depends on the degree. See what I mean? Even like a ten-ninety or anything else. Stay away from anything like that, and especially don't even get near that fifty-fifty thing. (R. 817).

Although we do not commend the practice of the Wisconsin defense lawyers exploiting this type of argument, we do believe that if the jury is not to be instructed as to what the percentages mean, at bare minimum counsel ought to be allowed to fully argue various percentages. In other words, we should not simply adopt part of the Wisconsin rules and not others. It is extremely difficult to argue a case like this by using words such as "great" or "small." Counsel should be allowed to argue specific percentages including fifty one-forty nine or fifty-fifty, or any other figures.

It is respectfully submitted that the failure to allow that type of argument consitutes reversible error, in the event this court should ultimately decide the jury should be blindfolded.

CONCLUSION

Plaintiff respectfully submits that Judge Snow did not abuse his inherent discretion in granting the new trial in this proceeding. To a considerable degree, this trial was an experimental one inasmuch as Judge Snow was required to rule upon various issues of first impression in this jurisdiction. Although his rulings were considered and studied, we respectfully submit that his final conclusion, that is that justice was not done, is well supported and that a new trial should be granted. Before that new trial is held, however, the rulings of this Court are needed on critical issues: (1) Should the jury be "blindfolded"—as to this matter we respectfully submit that the tradition in Utah entrusting our juries with knowledge of the consequences of their action should be continued; (2) Should more precise instructions be given in the event the juries are "blindfolded"—as to this issue we submit that Judge Snow's ruling on the new trial motion is correct and that juries should be given more careful instructions than were provided in the instant case to prevent injustice even if the jury is to be "blindfolded"; (3) On the evidentiary issue, we respectfully submit that in a close case (and this was close) a ruling such as that questioned in point 2 of this brief could well be prejudicial and therefore, the Court's error in that respect should be, independently, ground for a new trial and; (4) Finally, the Court erred prejudicially in unduly restricting argument on percentages and hence increased the confusion of the jury which, itself, is independent grounds for a new trial.

It is respectfully submitted that a new trial be ordered by the Court with the guidance of this Court on the issues presented.

Dated this 6th day of September, 1974.

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