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1974

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Recommended Citation

Editorial Board, Minn. L. Rev., "Informing the Jury of the Effect of Its Answers to Special Verdict Questions--The Minnesota Experience" (1974). *Minnesota Law Review*. 3047.
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# Note: Informing the Jury of the Effect of Its Answers to Special Verdict Questions — The Minnesota Experience

## I. INTRODUCTION

On January 5, 1973, the Minnesota Supreme Court amended Rule 49.01 of the Minnesota Rules of Civil Procedure to require instruction and permit argument to the jury on the legal effect of its answers to special verdict questions in comparative negligence cases.[1] The amendment reversed the long standing position that any such instruction or argument constitutes error.[2] Minnesota is the only jurisdiction which now permits the jury to be informed in this manner. The amendment poses significant questions regarding the proper role of the special verdict in civil jury trials and the proper role of the supreme court in making procedural rules for trial courts. This Note will examine these questions through an analysis of: (1) the special verdict; (2) the changes in special verdict procedure brought about by the supreme court's amendment; and (3) the impact of these changes.

## II. THE SPECIAL VERDICT

In a special verdict,[3] the jury answers questions on issues of fact (*e.g.*, Was plaintiff negligent? Were defendants engaged in a joint venture? Was *X* the agent of *Y*?). The judge then applies the appropriate law to the jury's answers and arrives at the result.[4] In this way, special verdicts differ from general

1. For the complete text of Rule 49.01 as amended, see text accompanying note 76 *infra*.

2. *See* text accompanying notes 59-71 *infra*.

3. This note will deal exclusively with special verdicts in civil cases as authorized by MINN. R. CIV. P. 49.01 (and FED. R. CIV. P. 49 (a)). It will not deal with special verdicts in criminal cases. Although special verdicts have been used in criminal cases, their use is disfavored as "against the policy of the law." People v. Tessmer, 171 Mich. 522, 529, 137 N.W. 214, 217 (1912). *See also* State v. Boggs, 87 W. Va. 738, 106 S.E. 47 (1921); G. CLEMENTSON, SPECIAL VERDICTS AND SPECIAL FINDINGS BY JURIES 289-96 (1905) [hereinafter cited as CLEMENTSON]. It also will not deal with general verdicts accompanied by interrogatories as authorized by MINN. R. CIV. P. 49.02 (and FED. R. CIV. P. 49(b)). For a sample set of special verdict questions and explanation of their effect, see Prosser, *Comparative Negligence*, 51 MICH. L. REV. 465, 497-99 (1953) [hereinafter cited as Prosser].

4. J. FRANK, COURTS ON TRIAL 141 (1949) [hereinafter cited as FRANK]. For other definitions of the special verdict, see Insurance Com-

verdicts in which the jury arrives at the result by returning a verdict for plaintiff or defendant.[5] The special verdict originated as a device by which English juries avoided having their verdicts attainted[6] but has been transformed in the American courtroom into a method of judicial control of the jury.[7] By using a special verdict, a trial judge can require the jury to decide only the facts while reserving to himself the function of applying the law to the facts.

The statutory authority for the use of special verdicts was firmly established in the United States in the first quarter of the twentieth century.[8] At present one of two approaches to the use of the special verdict is generally adopted. The first approach permits the trial court to order a special verdict.[9] The

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pany v. Piaggio, 83 U.S. (16 Wall.) 378, 387 (1872); Mumford v. Wardwell, 73 U.S. (6 Wall.) 423, 432-33 (1867); Suydam v. Williamson, 61 U.S. (20 How.) 427, 432 (1857); CLEMENTSON, *supra* note 3, at 44-46. For Minnesota definitions, see Roske v. Ilykanyics, 232 Minn. 383, 391-92, 45 N.W.2d 769, 774-75 (1951); Ferch v. Hiller, 209 Minn. 124, 127, 295 N.W. 504, 506 (1941).

5. *See* sources cited in note 4 *supra*; Glenn v. Sumner, 132 U.S. 152, 156 (1889).

6. English jury verdicts were originally subject to a procedure called "attaint," by which the jurors could be fined or imprisoned if their verdict was declared invalid on factual or legal grounds. CLEMENTSON, *supra* note 3, at 203. Histories of the special verdict include CLEMENTSON, *supra* note 3, and Morgan, *A Brief History of Special Verdicts and Special Interrogatories*, 32 YALE L.J. 575 (1923).

7. L. GREEN, JUDGE AND JURY 353 (1930). *See also* CLEMENTSON, *supra* note 3, at 8; F. JAMES, CIVIL PROCEDURE 293-94 (1965) [hereinafter cited as JAMES]; J. THAYER, PRELIMINARY TREATISE ON EVIDENCE 217-19 (1898); Note, *Special Verdicts: Rule 49 of the Federal Rules of Civil Procedure*, 74 YALE L.J. 483, 486-87 (1965).

8. CLEMENTSON, *supra* note 3, at 9; Note, *Special Verdicts, supra* note 7, at 487. *See also* Wicker, *Special Interrogatories to Juries in Civil Cases*, 35 YALE L.J. 296, 297-98 (1926).

9. This approach is followed by the Federal Rules of Civil Procedure. Rule 49(a) provides:

> (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 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

second approach also permits either the plaintiff or the defendant to require a special verdict.[10]

A. VIEWS OF THE SPECIAL VERDICT

The special verdict limits the jury to factfinding and leaves to the judge the task of determining the law and applying it to the facts. Different views of the special verdict reflect different assumptions about how well juries can find facts and determine and apply law. These assumptions have resulted in three general views of the special verdict. The first view sees the special verdict as a necessary check on jury prejudice and ignorance of the law. The second sees it as an undesirable barrier to the jury's right to temper the law to individual cases. The third sees it as a helpful aid to jury factfinding and trial administration.

Each of these views has some merit in describing the nature of civil jury performance.[11] However, since jury deliberations are secret, a commentator can have at best a very imperfect knowledge of how juries function.[12] The Chicago Jury Project, which attempted to study the jury scientifically, dealt primarily with the criminal jury.[13] As to the civil jury, the Chicago study revealed no significant difference between jury verdicts and judicial findings in civil cases.[14] This raises the possibility that

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> 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.

The Federal Rules also provide for a general verdict to be accompanied by special interrogatories as a check on the jury. *See* FED. R. CIV. P. 49(b).

10. The second approach is followed by some states. For example, the Minnesota comparative negligence statute, MINN. STAT. § 604.01(1) (1971) provides, in part:

> The court may, and when requested by either party shall, direct the jury to find separate special verdicts determining the amount of damages and the percentage of negligence attributable to each party; and the court shall then reduce the amount of such damages in proportion to the amount of negligence attributable to the person recovering.

*See also* CLEMENTSON, *supra* note 3, at 297-320.

11. *See* Broeder, *The Functions of The Jury: Fact or Fictions?* 21 U. CHI. L. REV. 386 (1953); James, *Functions of Judge and Jury in Negligence Cases*, 58 YALE L.J. 667 (1949).

12. Kalven, *The Dignity of the Civil Jury*, 50 VA. L. REV. 1055 (1964); *see also* Sunderland, *Trial by Jury*, 11 U. CINN. L. REV. 120, 121 (1937).

13. *See* H. KALVEN & H. ZEISEL, THE AMERICAN JURY (1966).

14. Broeder, *The University of Chicago Jury Project*, 38 NEB. L. REV. 744, 750 (1959) [hereinafter cited as Broeder].

much of the judge versus jury debate is irrelevant.[15] In any event, each of the three views will be examined further to determine whether informing the jury of the effect of its answers is consistent with the perceived roles of the special verdict.

1. *The Special Verdict as a Necessary Check on Jury Prejudice and Legal Ignorance*

It has been said that:

> Experience teaches that not every case is decided on the evidence. Prejudice may be a thirteenth juror that controls the decision.[16]

The desire to expel this thirteenth juror led to a vigorous attack upon the American jury system. The late Judge Jerome Frank was one of the most distinguished leaders of this attack. He argued that jury sympathy and prejudice, encouraged by lawyers' stage tears and dramatic performances, played a major role in civil jury trial decisions.[17] He also acknowledged that jurors often disregard the judge's instructions on the law. In his opinion, this made the law as variable as the passions and prejudices of men.[18] He called the juries "ad hoc ephemeral (un-elected) legislatures" which make law from the jury box.[19] Judge Frank argued that the problem was further compounded by the fact that the jury often did not understand the judge's instructions.[20] He was joined in this by Sunderland who commented that twelve men could "misunderstand more law in a minute than the judge [could] explain in an hour."[21] Sunderland questioned whether twelve such legally ignorant persons should have the power to formulate and apply the law in an individual case.[22] Judge Frank went so far as to hint that the civil jury should be abolished but concluded that constitutional considerations precluded this.[23]

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15. *See also* Sunderland, *Trial by Jury*, 11 U. CINN. L. REV. 120, 123-25 (1937).

16. A. OSBORN, THE MIND OF THE JUROR 92 (1937).

17. Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 61-62 (2d Cir. 1948) (opinion of Frank, J.).

18. *Id.* at 57.

19. *Id.* at 58-59.

20. *Id.* at 64-65.

21. Sunderland, *Verdicts, General and Special*, 29 YALE L.J. 253, 259 (1920) [hereinafter cited as Sunderland].

22. *Id.*

23. Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 56-57 (2d Cir. 1948). The seventh amendment to the United States Constitution provides:

> In suits at common law, where the value in controversy shall exceed $20, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any

Judge Frank, Sunderland and other commentators focused their attack on the general verdict. They argued that a simple finding "for defendant" or "for plaintiff" allows a jury to hide the prejudices and misapplications of law that produced it.[24] Sunderland called the general verdict "as inscrutable and essentially mysterious as the judgment which issued from the ancient oracle of Delphi."[25] Under its guise, the jury could misunderstand the judge's instructions or flagrantly disregard them and no one would be the wiser.[26]

As a remedy for the claimed weaknesses of the general verdict, the commentators urged the use of the special verdict. Judge Frank argued:

> A special verdict would seem to do away with some of the most objectionable features of trial by jury. The division of functions between jury and judge is apparently assured, the one attending to the facts alone, the other to the legal rules alone. The jury seems, by this device, to be shorn of its power to ignore the rules or to make rules to suit itself. As one court said, special verdicts "dispel . . . the darkness visible of general verdicts."[27]

The criticisms by Judge Frank and other opponents of the civil jury reveal the special verdict as a device which confines the jury to factfinding and eliminates the less judicially controllable function of applying the law to the facts. This view of the special verdict has been aptly summarized in the commentary of Judge Gunnar Nordbye of the United States District Court for Minnesota:

> It is quite apparent, therefore, that the whole thought behind the special verdict practice is to free the jury from any procedure which would inject the feeling of partisanship in their minds and limit their deliberations to the specific fact questions submitted. Furthermore, the jury will be relieved of the often difficult task of endeavoring to apply involved principles of law to the issues of fact, which must be done in the event a general verdict is called for.[28]

The critics of the civil jury place much reliance on the existence of jury prejudice, but their use of the term embraces two quite distinct meanings: prejudice for or against a particu-

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Court of the United States, than according to the rules of the common law.

24. Sunderland, *supra* note 21, at 257-60. Skidmore v. Baltimore & O.R.R., 167 F.2d 54, 57 (2d Cir. 1948).

25. Sunderland, *supra* note 21, at 258.

26. *Id.*

27. J. FRANK, COURTS ON TRIAL 141 (1949).

28. Nordbye, *Comments on Selected Provisions of the New Minnesota Rules*, 36 MINN. L. REV. 672, 683 (1952) [hereinafter cited as Nordbye].

lar individual or class of individuals, and agreement or disagreement with prevailing legal rules. Prejudice for or against parties is difficult if not impossible to eradicate by use of a special verdict which can do no more than force the jury to consider specific factual questions. Prejudice against legal rules can in theory be eliminated by the use of a special verdict as the jury will not apply the law to its findings of fact.[29]

2. *The Special Verdict as an Undesirable Barrier to Jury Correction of the Law in Individual Cases*

The jury is the "great corrective of the law in its actual administration."[30] The second view holds that the jury should apply the law to the facts in order to advance the law in accord with popular conceptions of justice. It follows the same basic factual assumption as the first view—that jurors will on occasion disregard instructions and follow their own feelings. The contrast arises from the fact that the second view perceives this "jury legislation" to be a desirable result. This view, too, has drawn much distinguished support. Justice Holmes argued that the jury's "popular prejudice keeps the law in accord with the wishes of the community."[31] Similarly, Judge Wyzanski has argued that the jury can serve as a partial cure for legislative and judicial inertia in areas of needed reform. In his words, the jury acts as a "device by which the rigor of the law is modified pending the enactment of new statutes."[32]

An often-quoted example of this jury function is the way in which some juries have dealt with contributory negligence.[33] The doctrine of contributory negligence bars all recovery to a plaintiff who is even slightly negligent. Some juries, thinking complete denial of compensation to be unfair, have ignored the court's instructions and found in favor of contributorily negligent plaintiffs. Some of these juries also reduced the damage awards of negligent plaintiffs.[34] Legislatures in several juris-

29. *But see* text accompanying notes 54-57 *infra.*

30. Pound, *Law in Books and Law in Action*, 44 AM. L. REV. 12, 18 (1910). *See also* JAMES, *supra* note 7, at 297.

31. O. HOLMES, COLLECTED LEGAL PAPERS 237-38 (1920).

32. Wyzanski, *A Trial Judge's Freedom and Responsibility*, 65 HARV. L. REV. 1281, 1286 (1952).

33. *See, e.g.*, Haeg v. Sprague, Warner and Co., 202 Minn. 425, 429-30, 281 N.W. 261, 263 (1938). *See also* Prosser, *supra* note 3, at 469. However, the Chicago Jury Project disagrees. *See* Broeder, *supra* note 14, at 750.

34. *See* sources cited in note 33 *supra.*

dictions finally codified this result in comparative negligence statutes.[35] Thus, the jury's "popular prejudice" favoring compensation produced fairer results in individual cases before remedial legislation was enacted.

It is logical that strong advocates of the jury system tend to oppose the use of special verdicts. The special verdict removes from the jury the function of applying the law to the facts. Therefore, to the extent that the special verdict is successful, it is a barrier to the corrective role of the jury. This argument can even be extended to constitutional dimensions. Justices Black and Douglas suggested that the use of a special verdict violates the right to jury trial as secured by the seventh amendment to the United States Constitution.[36] Consequently, they maintained that special verdicts should be abolished in the federal courts since only the general verdict preserves the "right of trial by jury as an indispensable part of a free government."[37]

### 3. *The Special Verdict as a Helpful Aid to Jury Factfinding and Trial Administration*

It is generally conceded "[t]hat we have not been particularly successful in endeavoring to adapt the jury system to the many complex fact issues arising in modern litigation . . . ."[38] The third view holds that although the jury is basically a sound institution, it needs the guidance of the special verdict because of the complexity of the law. Hetland and Adamson, the authors of *Minnesota Practice*, are typical of the proponents of this view. They contend that freedom from jury prejudice is only one of many purposes of the special verdict.[39] The purposes they note as most significant are: (1) compliance with comparative negligence statutes which require separate findings of negligence and damages to apportion recovery; and (2) simplification of complicated cases by posing questions in a logical order to assist juries in resolving the issues.[40]

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35. *See* Prosser, *supra* note 3. *See also* MINN. STAT. § 604.01(1) (1971).

36. Statement of Justices Black and Douglas regarding the promulgation of Rules of Civil Procedure, at 374 U.S. 865, 867-68 (1963). *See also* note 23 *supra*.

37. *Id.* at 868.

38. Nordbye, *Use of Special Verdicts Under Rules of Civil Procedure*, 2 F.R.D. 138 (1943).

39. 2 J. HETLAND & O. ADAMSON, MINNESOTA PRACTICE 291 (1970) [hereinafter cited as HETLAND & ADAMSON].

40. *Id. See also* Prosser, *supra* note 3, at 503-05, 520.

A modern automobile case tried under Minnesota's Safety Responsibility[41] and Comparative Negligence[42] statutes provides an example of Hetland and Adamson's analysis. Assume a collision between a car owned by plaintiff *A* and driven by plaintiff *B*, and a car owned by defendant *C* and driven by defendant *D*. Each plaintiff sues each defendant. Defendant *C* counterclaims against both plaintiffs for damage to his automobile. Defendant *D* counterclaims against the plaintiffs for personal injuries. Defendant *C* cross-claims against defendant *D* for indemnity from any judgment entered against him. Under the Safety Responsibility Act, each driver's negligence is imputed to the car's owner if the car was being driven with the owner's consent.[43] However, in the suits by the owners to recover for damage to their cars, the negligence of their drivers is not imputed to them.[44] Under the Comparative Negligence Act, the jury is required to compare the causal negligence of plaintiffs and defendants in percentages. If this case were given to a jury without a special verdict and with a complete set of instructions as to the law, the jury would undoubtedly be confused. A special verdict avoids much of this confusion by asking separate special questions on each issue involved. Thus, the jury can be guided through the multi-issue, multi-party maze to more accurate fact-finding.

Other commentators have suggested two administrative advantages of the special verdict. First, special verdicts localize error.[45] An error in instructing the jury on a general verdict generally requires a new trial. If a special verdict is used, however, the error can often be traced to one of the answers. If that answer is not prejudicial to the party asserting error, a new trial is not necessary. Second, special verdicts avoid long and complex general instructions.[46] When a general verdict is used, the jury must be instructed on all the law necessary to reach their result. When a special verdict is used, the jury need

41. MINN. STAT. § 170.54 (1971).
42. MINN. STAT. § 604.01(1) (1971).
43. MINN. STAT. § 170.54 (1971) provides:
Whenever any motor vehicle shall be operated within this state, by any person other than the owner, with the consent of the owner express or implied, the operator thereof shall in case of accident, be deemed the agent of the owner of such motor vehicle in the operation thereof.
*See also* Schultz v. Swift & Co., 210 Minn. 533, 299 N.W. 7 (1941).
44. Peters v. Bodin, 242 Minn. 489, 65 N.W.2d 917 (1954).
45. *See* JAMES, *supra* note 7, at 295-96.
46. *Id.* at 296-97.

only be instructed on whatever law is necessary to enable them to answer the questions,[47] and instructions on burden of proof and complex rules of law can often be omitted.[48]

### B. Impact of Views Regarding Special Verdicts on the Decision to Inform the Jury of the Effect of Its Answers to Special Verdict Questions

The three views of the special verdict discussed above imply different solutions to the problem of determining what information the jury should have about its special verdict. The first view sees the special verdict as a check on jury prejudice and ignorance of the law. Under this view, any information about the effect of the jury's answers would destroy the purpose of a special verdict since it would return to the jury the power to ignore instructions and manipulate the answers. Because adherents of the second view see the special verdict as an undesirable barrier to jury correction of the law in individual cases, they would probably not use the special verdict at all. However, if the special verdict were to be used, they would argue that the jury should be given complete information on the effect of its verdict since the jury must know the legal result in order to evaluate and correct it. The third view sees the special verdict as a helpful aid to jury factfinding and trial administration. This view does not necessarily preclude informing the jury of the effect of its answers unless that information would confuse the jury or provide a greater source of error.

#### 1. *The Prevailing Rule: No Information*

Both federal and state courts have generally adopted the first view of the special verdict, holding that for the court to inform the jury of the effect of its answers is prejudicial error requiring a new trial.[49] The courts have been inconsistent in

47. Minn. R. Civ. P. 49.01 (Fed. Rule Civ. P. 49(a)). *See* note 89 *infra*. *See also* James, *supra* note 7, at 296-97.

48. Nordbye, *supra* note 28, at 683.

49. *See, e.g.*, Argo v. Blackshear, 242 Ark. 817, 416 S.W.2d 314 (1967); Kennard v. Housing Associates, Inc., 209 N.Y.S.2d 479 (Sup. Ct. 1961); Harbison v. Briggs Bros. Paint Mfg. Co., 209 Tenn. 534, 354 S.W. 2d 464 (1962); Besnah v. City of Fond du Lac, 35 Wis. 2d 755, 151 N.W. 2d 725 (1967). The attitude of the Wisconsin courts is typical:

> The *sole* purpose of a special verdict is to get the jury to answer each question according to the evidence, regardless of the effect or supposed effect of the answer upon the rights of the parties as to recovery. To inform them of the effect of their answer in this respect is to frustrate this purpose.

their determination of what arguments counsel can properly make to the jury. Clearly, reversible error is committed if counsel indicates to the jury the effect of its answers.[50] However, some states allow counsel to argue for individual favorable answers.[51] Thus, counsel can argue to the jury that it should answer question number one "yes," question number two "no," and so on. Some states have also held that a court's corrective instruction can make counsel's error nonprejudicial.[52] Finally, some jurisdictions have produced numerous opinions drawing fine distinctions concerning which arguments do and do not imply the effect of an answer.[53]

2. *Criticisms of the Prevailing Rule*

The rule that information on the effect of the answers must be withheld from the jury is subject to several basic criticisms. First, there is no substantial evidence that juries exhibit harmful prejudices in making decisions. To the contrary, evidence that is available suggests that juries often agree with judges in their decisions.[54] In addition, it must be admitted that judges also have their prejudices. While juror's prejudices last no longer than a single case and can be corrected by group deliberations, the prejudices of an individual judge can affect the results of cases arising over a period of many years. Furthermore, a jury can occasionally produce fairer results if it knows the effect of its verdict, as is shown by jury refusal to find contributory negligence.[55] If the jury knows the law, it can use its "common sense wisdom" to apply that law fairly in an individual case. If the jury is ignorant of the law, this advantage is lost.

Jurors have many sources of information and can be expected to have some opinions about the effect of their verdict. In some jurisdictions, counsel are permitted to argue for designated answers to special verdicts. The effect of the verdict or

Anderson v. Seelow, 224 Wis. 230, 234, 271 N.W. 844, 846 (1937) (emphasis added).

50. *See* Lyon v. City of Grand Rapids, 121 Wis. 609, 99 N.W. 311 (1904).

51. *See, e.g.*, Timins v. Chicago, R.I. & P. Ry., 72 Iowa 94, 33 N.W. 379 (1887).

52. Lyon v. City of Grand Rapids, 121 Wis. 609, 99 N.W. 311 (1904).

53. *See, e.g.*, Grieger v. Vega, 153 Tex. 498, 271 S.W.2d 85 (1954); Texas Employers' Ins. Ass'n v. Charles, 381 S.W.2d 664 (Tex. Civ. App. 1964); Montgomery v. Gay, 212 S.W.2d 941 (Tex. Civ. App. 1948).

54. *See* text accompanying notes 14-15 *supra*.

55. *See* text accompanying notes 33-35 *supra*.

at least parts of it may be inferred from this sort of argument. In addition, individual jurors may have gained knowledge of the law through such means as personal experience, conversations, newspaper reports of the results of cases and service on another jury. If information gained in these ways is accurate, there is no harm in telling the jury what it already knows. If such information is inaccurate, however, the jurors' false assumptions may destroy the justice of the verdict. An important example of the danger of inaccurate jury information lies in the area of comparative negligence. Under some comparative negligence statutes, a verdict finding the plaintiff 50 percent negligent and the defendant 50 percent negligent means that the plaintiff recovers nothing. If the jury returns a 50-50 verdict on the assumption that plaintiff will recover 50 percent of the damages, the jurors will be quite surprised at the result. Proponents of the no information rule might argue that the jury is instructed not to speculate on the result and should not do so. However, the fact remains that juries will speculate. This would seem to be especially true if one assumes that juries are "prejudiced" and will try to manipulate the result. If the speculation is erroneous, it is the parties that suffer injustice, not the jurors.[56]

As a further criticism of the prevailing rule, both the charge under the special verdict and the general charge may result in confusion and error. At the beginning of a case, the jury probably has some ideas on the effect of its verdict. Counsel's remarks and possibly objections, and the judge's cautionary instructions are added to these preconceptions. The result is a necessarily incomplete and confusing picture of the applicable law which the prevailing rule adamantly refuses to correct by providing the necessary information. Finally, the judge may grant a directed verdict or a new trial if jury prejudice or ignorance is contrary to law or to the great weight of the evidence.[57] If the case is so close on the facts and the law that these devices are not available, the jury's "common sense wisdom" is just as reliable as any other method of selecting the proper result.

56. *See* text accompanying notes 33-35 *supra*. For example, Minnesota will not permit the verdict to be impeached because the jury misconceived the effect of its verdict. *See* Gardner v. Germain, 264 Minn. 61, 117 N.W.2d 759 (1962); Fortier v. Newman, 248 Minn. 69, 78 N.W.2d 382 (1956); Bauer v. Kummer, 244 Minn. 488, 70 N.W.2d 273 (1955).

57. *See* FED. R. CIV. P. 50, 59 and MINN. R. CIV. P. 50, 59.

3. *Alternatives to the Prevailing Rule*

Providing the jury with complete information on the effect of the verdict would meet the criticisms just discussed. The jury's function of mitigating the law in individual cases would be preserved and jury confusion would be at least partially eliminated. In addition, the value of the special verdict as an aid to factfinding would not be reduced since the jury would still have the questions to guide its decision.

An intermediate position is also possible. If a case involves doubtful questions of law, giving the jury information on the effect of the verdict could be held erroneous on appeal. This would probably make a second trial of the case necessary. If information could be withheld in such cases, the appellate court could avoid a second trial by simply directing the entry of judgment when the legal question was settled. It is this intermediate position of withholding information in some cases that Minnesota has taken.[58]

## III. THE MINNESOTA EXPERIENCE

### A. No Instruction on the Effect of the Answers — The *McCourtie* Rule

In *McCourtie v. United States Steel Corp.*,[59] the Minnesota Supreme Court held that it was prejudicial error for a trial court to instruct the jury on the effect of its answers to the special verdict questions.[60] In ordering a new trial, the court commented that a trial court could not inform the jury either expressly or by necessary implication of the effect of its answers.[61] The court took the view that the special verdict was a necessary control on jury prejudice.[62] It noted: "The controlling thought behind the special verdict 'is to free the jury from any procedure which would inject the feeling of partisanship

58. For an article reaching this same conclusion, see Wright, *The Use of Special Verdicts in Federal Court*, 38 F.R.D. 199 (1966).

59. 253 Minn. 501, 93 N.W.2d 552 (1958). *See also* Comment, 43 Minn. L. Rev. 823 (1959).

60. 253 Minn. at 515, 93 N.W.2d at 562.

61. *Id.* at 516, 93 N.W.2d at 562. Although he wrote the majority opinion, Justice Murphy observed that counsel could argue to the jury for favorable answers to particular questions. From this he concluded that the jury already knew the effect of its answers. *Id.* at 517, 93 N.W.2d at 563.

62. *See* text accompanying notes 16-28 *supra*. The court cited Judge Nordbye's article, *supra* note 28, 253 Minn. at 516, 93 N.W.2d at 562.

in their minds, and limit the deliberations to the specific fact questions submitted.' "[63] This purpose, the court reasoned, could not be accomplished if the jury was told of the effect of its answers. In support of its holding of prejudicial error, the court noted as evidence of jury prejudice in the particular case that excessive damages had been awarded.[64]

B. No Argument on the Effect of Answers — The *Johnson* and *Patterson* Rule

In *Johnson v. O'Brien*,[65] plaintiff's counsel remarked to the jury that "if the answers to Number 3 and Number 4 were to be answered in any other way, then the burden would be shifted from the shoulders of Mr. and Mrs. O'Brien to the shoulders of Mrs. Elletson."[66] The trial court ordered counsel to refrain from such argument and cautioned the jury not to speculate on the effect of the verdict. Defendant's motion for a mistrial was denied by the trial court and the supreme court affirmed, concluding that the cautionary instruction made the error non-prejudicial.[67] The supreme court also noted that the evidence sustained the findings of the jury.[68] Justice Knutson and Chief Justice Dell dissented. Justice Knutson argued: "It is equally devastating to permit counsel for a plaintiff to argue to the jury that which we have held the court may not do. Here, again, I think the error was prejudicial and that it requires a new trial."[69]

In *Patterson v. Donahue*,[70] plaintiff's counsel indicated to the jury that a finding of contributory negligence would reduce plaintiff's damages. The trial court found no prejudicial error and the supreme court affirmed, commenting:

> References to the legal effect of a verdict by counsel during oral argument are improper. Whether or not such improper argument constitutes grounds for a new trial is a matter resting almost wholly in the discretion of the trial court. [Citing *Jangula v. Klocek*, 284 Minn. 477, 483, 170 N.W. 2d 578, 591 (1969).]

63. *Id.* at 517, 93 N.W.2d at 563. Justice Knutson concurred. *Id.* at 518, 93 N.W.2d at 564. He admitted that under Rule 49.01, use of a special verdict was discretionary with the trial court, but he argued that a special verdict should be used properly if it is to be used at all. *Id.* at 519, 93 N.W.2d at 564.

64. *Id.* at 518, 93 N.W.2d at 563.

65. 258 Minn. 502, 105 N.W.2d 244 (1960).

66. *Id.* at 508, 105 N.W.2d at 248.

67. *Id.* at 509, 105 N.W.2d at 248.

68. *Id.*, 105 N.W.2d at 248-49.

69. *Id.* at 513, 105 N.W.2d at 251.

70. 291 Minn. 285, 190 N.W.2d 864 (1971).

> In this case, where the issue of negligence of the parties is fairly clear, the trial court was not obligated to grant a new trial because of counsel's remark that a finding of negligence on the part of the plaintiff would reduce his damages.[71]

C. COMPLETE INSTRUCTION AND ARGUMENT — THE LEGISLATURE ACTS

In 1971, the Minnesota Legislature attempted to provide the jury with complete information on the effect of its answers by amending MINNESOTA STATUTES § 546.14 to read:

> Before the argument begins either party may submit to the court written instructions to the jury, opposite each of which the judge shall write the words, "Given," "Given as modified," or "Refused"; and the court, in its discretion, may hear arguments before acting on such requests. The court of its own motion may, and, upon request of either party, shall, lay before the parties before the commencement of the argument any instructions which it will give in its charge, and all such instructions may be read to the jury by either party as a part of his argument. *The court shall give to the jury such explanations and instructions concerning the matters thus submitted as may be necessary to enable the jury to make its findings upon each issue, and the court shall explain to the jury the legal conclusions which will follow from its findings, and counsel shall have the right to comment thereon.* At the close of the argument the court may give, with the instructions so approved, such other instructions as may be necessary fully to present the law of the case.[72]

Although the amendment reversed the holdings of the supreme court by requiring instruction and permitting argument on the effect of the special verdict, the question remained unsettled. Two objections to the validity of the amendment were raised. First, section 546.14 had been declared superseded on January 1, 1952, when the Minnesota Rules of Civil Procedure were enacted by the supreme court.[73] If the statute was not in existence at the time of the amendment, it could not be amended. Second, the amendment changed a rule of procedure. Since the supreme

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71. *Id.* at 287-88, 190 N.W.2d at 866 (footnotes omitted).

72. MINN. STAT. § 546.14 (1971) (1971 amendment emphasized).

73. MINN. R. CIV. P. 81.01(3) provides that:

> [T]he statutes listed in Appendix B and all other statutes inconsistent or in conflict with these rules are superseded insofar as they apply to pleading, practice and procedure in the district court.

In 1971, Appendix B of the Minnesota Rules of Civil Procedure read in part:

| Rule | Statute Superseded M.S.A. 1949 |
|---|---|
| . . . . | . . . . |
| 51 | 546.14 |

court had constitutional and inherent power to regulate procedure, the legislature had encroached upon the court's domain.[74] As a result, Minnesota practice was thrown into confusion. The trial courts had been given contradictory orders. The supreme court had ruled that informing the jury of the effect of its answers was error. The legislature had dictated that the jury be informed, but the validity of its action had been questioned. Adding to the confusion, the supreme court questioned the validity of the act in dicta but did not rule on it.[75]

### D. Limited Instruction and Argument—The Supreme Court Responds

The supreme court responded to the legislature by amending Rule 49.01 as follows:

> (1) 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 require written findings thereon as it deems most appropriate. The court shall give to the jury such explanations and instructions concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand, the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict. *Except as provided in Rule 49.01(2), neither the court nor counsel shall inform the jury of the effect of its answers on the outcome of the case.*
>
> *(2) In actions involving Minn. Stat. 1971, Sec. 604.01, the court shall inform the jury of the effect of its answers to the percentage of negligence question and shall permit counsel to comment thereon, unless the court is of the opinion that doubtful*

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74. *See* note 95 *infra.*

75. In Patterson v. Donahue, 291 Minn. 285, 190 N.W.2d 864 (1971), the court did not rule on the validity of the amendment because the case had been tried before it became effective. The court did note, however:

> This case was decided in the court below before the enactment of L. 1971, c. 715, which purports to amend Minn. St. 1969, § 546.14, although by statutory authority this provision was superseded as of January 1, 1952, by promulgation by this court of Rule 51, Rules of Civil Procedure.

*Id.* at 287-88 n.1, 190 N.W.2d at 866 n.1.

*or unresolved questions of law, or complex issues of law or fact are involved, which may render such instruction or comment erroneous, misleading or confusing to the jury.*[76]

By providing for instruction and argument only in comparative negligence cases, the court's rule clearly contradicts the statute which makes instruction mandatory and argument permissible in *all* cases.[77] Even in comparative negligence cases, the rule permits trial courts to decline to instruct or permit argument when they believe that such instruction or argument would mislead or confuse the jury.[78] In addition to amending Rule 49.01, the supreme court also included section 546.14 in the list of superseded statutes in Appendix B of the Minnesota Rules of Civil Procedure.[79] In promulgating its own rule on the subject of special verdict instruction and argument, the court had thus simultaneously declared the statutory amendment which conflicted with the rule "superseded."

On January 12, 1973, the supreme court decided another case involving the problem of special verdict argument and instruction. In *Krengel v. Midwest Automatic Photo, Inc.*,[80] the trial court had decided to follow the amendment to section 546.14 and instruct the jury on the effect of its answers while permitting counsel to argue the effect. The defendant appealed arguing that the amendment was invalid.[81] The supreme court affirmed but elected not to consider the validity of the statutory amendment.[82] The court reasoned that such consideration was unnecessary since the recent amendment to Rule 49.01 permitted instruction and argument in the *Krengel* case (a comparative negligence case). It would have been fruitless to remand the case for retrial when the new rule would permit the same procedure to be used.[83] The court, therefore, chose to apply its own rule rather than the statutory amendment. It also refused to comment on the validity of the statute even though it had declared the statute superseded just seven days earlier.[84]

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76. MINN. R. CIV. P. 49.01 (amendment emphasized).
77. MINN. STAT. § 546.14 (1971). *See* text accompanying note 72 *supra.*
78. MINN. R. CIV. P. 49.01(2). *See* text accompanying note 76 *supra.*
79. For the text prior to amendment see note 73 *supra.*
80. 295 Minn. 200, 203 N.W.2d 841 (1973).
81. Brief for Appellant at 20-24.
82. 295 Minn. at 210-11, 203 N.W.2d at 847-48.
83. *Id.* at 211, 203 N.W.2d at 848.
84. *See* text accompanying note 79 *supra.*

## IV. PROBLEMS ARISING FROM NEW RULE 49.01

The supreme court's amendment of Rule 49.01 raises two sets of problems. First, the amendment conflicts with a 1971 procedural statute. This raises serious questions about the relative powers of the legislature and the supreme court in the area of trail court procedure. Second, the amendment contains ambiguities of policy and language which makes its application uncertain.

### A. AUTHORITY OF THE SUPREME COURT TO SUPERSEDE A PROCEDURAL STATUTE

The supreme court's authority to supersede section 546.14 will be examined both in terms of statutory delegation of authority to the court and in terms of the court's constitutional and inherent powers.

#### 1. *Statutory Authority*

In 1947, the legislature gave the supreme court authority to regulate pleading, practice and procedure in all Minnesota courts. MINNESOTA STATUTES § 480.051 provides:

> The supreme court of this state shall have the power to regulate the pleadings, practice, procedure, and the forms thereof in civil actions in all courts of this state, other than the probate courts, by rules promulgated by it from time to time. Such rules shall not abridge, enlarge, or modify the substantive rights of any litigant.[85]

To implement this authority, the supreme court was allowed to supersede then existing procedural statutes by adopting court rules. MINNESOTA STATUTES § 480.056 provides:

> All *present laws* relating to pleading, practice, and procedure . . . shall be effective as rules of court until modified or superseded by subsequent court rule, and upon the adoption of any rule pursuant to this act *such laws*, in so far as they are in conflict therewith, shall thereafter be of no further force and effect.[86]

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85. MINN. STAT. § 480.051 (1971).

86. MINN. STAT. § 480.056 (1971) (emphasis added). According to a well established principle of statutory construction, the term "such laws" in the statute refers to its antecedent "present laws." Therefore, it was "present laws" (*i.e.*, laws existing in 1947) that the legislature intended should be of no further force or effect upon the adoption of rules of procedure. *See* State v. End, 232 Minn. 266, 45 N.W.2d 378 (1950). *See also* Richardson-Merrell, Inc. v. Main, 240 Ore. 533, 402 P.2d 746 (1965); Sharlin v. Neighborhood Theatre, Inc., 209 Va. 718, 167 S.E.2d 334 (1969).

Pursuant to these statutes, the supreme court enacted the Minnesota Rules of Civil Procedure and listed superseded statutes in Appendix B of the rules. The court subsequently ruled that this original list was not exclusive and has since added statutes to it.[87]

However, there are definite limitations on the court's authority to enact rules and supersede statutes. Section 480.056 allows the court to supersede *present laws, i.e.*, laws in existence when that statute was enacted in 1947. It provides no authority to supersede subsequently enacted laws. Furthermore, the legislature specifically retained the authority to enact subsequent laws and repeal supreme court rules. Section 480.058 provides:

> Sections 480.051 to 480.058 shall not abridge the right of the legislature to enact, modify, or repeal *any statute* or modify or repeal *any rule* of the supreme court pursuant thereto.[88]

In view of these limitations, the court had no statutory authority to supersede amended section 546.14 and replace it with its own amendment to Rule 49.01. The statute was not a "present law" in 1947 but rather was a 1971 law designed to reverse the *McCourtie* rule. It was an enactment of a statute in the sense intended by section 480.058.

In *Krengel v. Midwest Automatic Photo, Inc.*,[89] the appellant argued that section 546.14 was not a "statute" in the sense intended by section 480.058 and could not be validly amended since it was already on the court's superseded list when the legislature enacted the 1971 amendment.[90] It is clear that the 1971 statute was an attempt to amend a statute which had been superseded. However, such a technical deficiency should not be allowed to thwart the obvious intent of the legislature. The 1971 statute is unambiguous on its face and can validly be treated as a distinct statute providing that:

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87. *See* State v. Robnan, 259 Minn. 88, 90, 107 N.W.2d 51, 53 (1960).

88. MINN. STAT. § 480.058 (1971) (emphasis added).

89. 295 Minn. 200, 203 N.W.2d 841 (1973).

90. Brief for Appellant at 19-20. The appellant also argued that the statute violated article 6, section 27 of the Minnesota Constitution which provides that "[n]o law shall embrace more than one subject, which shall be expressed in its title." The appellant contended that MINN. STAT. § 546.14 was entitled "Requested Instructions" and therefore that Minn. Laws 1971, ch. 715 (the amendment) unconstitutionally expanded its coverage. Brief for Appellant at 21-22. The respondent replied that Minn. Laws 1971, ch. 715 embraced a single general subject —courts, trials, and jury instruction and argument—and was constitutional. Brief for Respondent at 35-37. The court did not comment on this argument.

> [T]he court shall explain to the jury the legal conclusions which will follow from its findings, and counsel shall have the right to comment thereon.[91]

Both the statutory and judicial rules of construction favor giving the statute full effect. MINNESOTA STATUTES § 645.16, provides that the object of statutory construction "is to ascertain and effectuate the intention of the legislature" and that laws should be construed "to give effect to all [their] provisions."[92] The supreme court has held that the adoption of an amendment raises a *presumption* that the legislature intended to change the law.[93] In addition, the court has upheld amendments to partially invalid statutes.[94] There is no basis for rebutting the presumption that the legislature intended to reverse the *McCourtie* rule when it enacted the 1971 statute. Such a clear intention should be given effect despite a technical error.

In summary, statutory authority for the supreme court's actions is not persuasive. Although the court was given authority to enact rules and supersede statutes, the legislature retained unabridged authority to enact and change both statutes and court rules under section 480.058. By superseding the 1971 statute, the court improperly disregarded that authority.

### 2. *Constitutional and Inherent Authority*

Hetland and Adamson suggest the possibility that the court can claim constitutional and/or inherent authority to supersede the statute.[95] At present, the Minnesota Constitution does not clearly indicate which branch of the state government has the power to make trial court rules. The original constitution provided: "Legal pleadings and proceedings in the courts of this

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91. *See* the text accompanying note 72 *supra*.

92. MINN. STAT. § 645.16 (1971).

93. *See* Western Union Tel. Co. v. Spaeth, 232 Minn. 128, 132, 44 N.W.2d 440, 442 (1950).

94. State *ex rel.* Grozbach v. Common School Dist. No. 65, 237 Minn. 150, 54 N.W.2d 130 (1952); State *ex rel.* Salten v. McDonald, 121 Minn. 207, 141 N.W. 110 (1913). For a complete analysis of the statutory authority arguments, *see* Brief for Respondent at 28-41, Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 203 N.W.2d 841 (1973).

95. HETLAND & ADAMSON, *supra* note 39, at 11 (Supp. 1972). The commentators note the confusion in trial courts following the adoption of Minn. Laws 1971, ch. 715 and cite McCormack v. Hankscraft Co., 278 Minn. 32, 154 N.W.2d 488 (1967) as authority for the use of the court's inherent power to remedy the situation. It should be noted, however, that *McCormack* is distinguishable on two grounds: (1) that case dealt with the *appellate jurisdiction* of the supreme court, and (2) the result in that case was also supported by statutory authority.

state shall be under the direction of the legislature."[96] However, this provision was deleted from the constitution in 1956. Although constitutional study groups had recommended substitute provisions giving the supreme court rulemaking authority,[97] these provisions were not adopted. Events have therefore made it unclear whether the legislature or the supreme court or both have constitutional power to make trial court rules.[98]

Since early times, the Minnesota legislature has delegated rulemaking authority to the supreme court.[99] The court accepted this delegation and acknowledged that it had no independent rulemaking authority.[100] In 1947, the legislature gave the supreme court broad statutory authority over all court rules.[101] Subsequently, the court again acknowledged that its rulemaking authority was purely statutory:

> At the outset we must bear in mind that the rules of civil procedure were adopted pursuant to authorization granted by the legislature. L. 1947, c. 498. The enabling act itself prescribed the limits beyond which we may not go. The title of the act reads: "An act authorizing the supreme court to regulate by rules the pleading, practice, and procedure in civil cases in all

96. MINN. CONST. art. 6, § 14 (deleted 1956).

97. *See* Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815 (1956) and *Preliminary Report on Revision of the Judiciary Article of the Minnesota State Constitution*, 32 MINN. L. REV. 458 (1948).

98. In 1956, Pirsig commented on the constitution which was then before the voters in the following manner:

> The proposed article does not expressly confer rule-making power upon the supreme court. The present article provides that "legal pleadings and proceedings in the courts of this State shall be under the direction of the legislature." This is not retained in the proposed article. It is probable that under this provision of the present article legislation is authorized which confers power upon courts to make rules of pleading, procedure and evidence. On that assumption, the supreme court has been given power to make rules of procedure in civil actions. The question, however, is not beyond doubt, and the doubt may be increased by the omission of the quoted provision. A provision such as appeared in the draft of the 1947 Constitutional Commission would have been desirable.

Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 820 (1956) (footnotes omitted).

Thus, the wording of the Minnesota Constitution would support a construction that the rulemaking power was legislative in nature and could not properly be delegated to the supreme court. Clearly, such a construction would be unreasonable. However, the fact that a leading contemporary commentator felt the need to rebut this interpretation indicates that there was no intent to give the supreme court exclusive authority over rulemaking.

99. *See* Smith v. Valentine, 19 Minn. 452 (Gil. 393) (1873).

100. *Id.*

101. MINN. STAT. §§ 480.051-.058 (1971).

the courts of this state." . . . *It is obvious that our power under this act is limited . . . .*"[102]

In addition to consistently staying within statutory guidelines, the supreme court also upheld a significant legislative enactment requiring a jury instruction on the presumption of due care of decedents. In *TePoel v. Larson*,[103] the court held that it was error to instruct the jury that a presumption of due care existed. The legislature then enacted a statute which created a presumption of due care, required that the jury be instructed as to the existence of the presumption and provided that the jury should determine whether the presumption was rebutted by the evidence.[104] In *Steinhaus v. Adamson*,[105] the court upheld the statute which in essence required that the jury be informed of the law. In superseding the 1971 statute requiring instruction on the effect of answers to special verdict questions, the court nullified a statute requiring essentially the same result.

Given this history of Minnesota practice, the deletion of article 6, section 14 from the Minnesota Constitution was probably no more than the omission of surplusage.[106] The legislature had delegated rulemaking authority to the supreme court and the supreme court had remained within that authority. Both parties had acquiesced in the power arrangement. This would

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102. Jeppeson v. Swanson, 243 Minn. 547, 550, 68 N.W.2d 649, 651 (1955) (emphasis added).

103. 236 Minn. 482, 53 N.W.2d 468 (1952).

104. MINN. STAT. § 602.04 (1971).

105. 294 Minn. 387, 201 N.W.2d 264 (1972).

106. Pirsig commented on the proposed Judiciary Article as follows:

> It is possible and feasible to leave most questions to legislative decision in which event the provisions of the judicial article can be very brief and general. The United States Constitution Article III, consisting of but three short sections, is an example. States, however, have not followed this example and have tended to go into extensive detail, prescribing the various courts, their jurisdiction, districts, etc. The more modern tendency, exemplified by the 1945 New Jersey Constitution, is toward more general provisions, leaving to the legislature and courts the necessary detail. Details in the constitution not dealing with fundamental principles and problems, make for an inflexible structure and invite litigation over the application of the provisions.
>
> The proposed judiciary article has moved in the direction of the modern trend. There has been a simplification and clarification of the article. But, as will be noted, in some respects it fails to incorporate the best thought on modern court organization.

Pirsig, *The Proposed Amendment of the Judiciary Article of the Minnesota Constitution*, 40 MINN. L. REV. 815, 817 (1956).

also explain why substitute provisions for supreme court authority were never enacted.

The lack of a specific constitutional provision on the making of rules for trial courts raises a further question based upon the separation of powers. It is possible that rulemaking is so inherently a judicial function that invasion by the legislature is improper. The Minnesota constitution formulates the separation of powers in the following manner:

> The powers of government shall be divided into three distinct departments—legislative, executive, and judicial; and *no person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others, except in instances provided in this constitution.*[107]

The problem with such a formulation is that there is no way to determine which governmental functions are properly considered executive, legislative and judicial.

The supreme court has assumed broad power to define judicial functions.[108] In *In Re Greathouse*,[109] the court commented:

> The judicial power of this court had its origin in the constitution; but when the court came into existence it came with inherent powers. Such power is the right to protect itself, to enable it to administer justice whether any previous form of remedy has been granted or not. *This same power authorizes the making of rules of practice.*[110]

Although this dictum authorizes a broad range of inherent powers, the relationship between the judicial exercise of inherent powers and the legislative power is confusing. At that time (1933), the legislature rather than the court possessed constitutional authority to make rules of practice. Likewise, the power of a court to create new remedies could not imply a lack of such power in the legislature. Therefore, it appears that this concept of inherent powers could grant no more than authority concurrent with that of the legislature.

Regulation of the practice of law is the only area in which the court has consistently asserted exclusive authority. The theoretical basis for this position is that in order to preserve itself, the court must regulate the quality of the bar practicing before it.[111] In this area, the court has struck down statutes regulating

107. MINN. CONST. art. 3, § 1 (emphasis added).
108. Sharood v. Hatfield, 210 N.W.2d 275 (Minn. 1973).
109. 189 Minn. 51, 248 N.W. 735 (1933).
110. *Id.* at 55, 248 N.W. at 737 (emphasis added).
111. *In re* Petition for Integration of the Bar of Minnesota, 216 Minn. 195, 199, 12 N.W.2d 515, 518 (1943).

disbarment,[112] the disposition of bar fees[113] and the general practice of law.[114] Other state courts have also claimed inherent powers in these areas.[115]

Courts in other jurisdictions have suggested various tests to determine the validity of procedural legislation. One court has held that the legislature cannot control the procedure of constitutionally created courts.[116] Other courts have held that procedural statutes must be upheld unless they violate substantive rights or hamper courts in the performance of their duties.[117] In contrast, the United States Supreme Court has observed that Congress clearly has the power to enact rules of civil procedure for the federal trial courts.[118]

Application of these tests to the supreme court's action in superseding the 1971 statute produces no clear result. The district and probate courts are mentioned in the Minnesota Constitution,[119] but neither the legislature nor the supreme court is given authority over their internal procedures. The 1971 statute places no undue burden on the trial court's function—it merely requires instruction and permits argument on the effect of the special verdict. While this will require preparing extra instructions, it is hardly a significant impairment of the trial court's functions.

In the face of ambiguous constitutional and inherent authority, several additional considerations cast doubt on the supreme court's action. First, the 1971 statute is more than a procedural statute; it is bound up with a *substantive* right to jury trial.[120]

112. *In re* Disbarment of Tracey, 197 Minn. 35, 266 N.W. 88 (1936).

113. Sharood v. Hatfield, 210 N.W.2d 275 (Minn. 1973).

114. Cowern v. Nelson, 207 Minn. 642, 290 N.W. 795 (1940). For a complete discussion and citation of the pertinent authorities on inherent power to regulate the practice of law in Minnesota, see Sharood v. Hatfield, 210 N.W.2d 275 (Minn. 1973).

115. *See* J. CARRIGAN, INHERENT POWERS OF THE COURTS (1973) for citations to cases on all aspects of inherent power. *See also In re* Integration of Nebraska State Bar, 133 Neb. 283, 275 N.W. 265 (1937); State *ex rel.* State Bar of Wisconsin v. Bonded Collections, Inc., 36 Wis. 2d 643, 154 N.W.2d 250 (1968); State *ex rel.* Reynolds v. Dinger, 14 Wis. 2d 193, 109 N.W.2d 685 (1961); Annot., 27 A.L.R.3d 1138 (1969); Annot., 114 A.L.R. 151 (1938).

116. Adams v. Rubinow, 157 Conn. 150, 251 A.2d 49 (1958).

117. Burton v. Mayer, 274 Ky. 263, 118 S.W.2d 547 (1938). *See also* Annot., 158 A.L.R. 705 (1945) and Annot., 110 A.L.R. 22 (1937) and cases cited therein.

118. Sibbach v. Wilson & Co., 312 U.S. 1, 9 (1949).

119. *See* MINN. CONST. art. 6, § 1, which provides for a supreme court, district courts, and probate courts.

120. To this extent, the problem is identical to that posed in Stein-

The statute provides a trial by a jury that has been informed of the effect of its answers to the special verdict questions. The legislature apparently felt that an informed jury would behave differently from an uninformed one. The 1971 statute represents a policy decision that the informed jury is superior. That decision has the support of many distinguished commentators who believe that the jury should be allowed to consider the application of the law to the facts of a case.[121] The statute therefore has a rational basis, contradicts no constitutional provision and should not have been superseded. Second, the supreme court has throughout its history acquiesced in the legislature's authority to make trial court rules and has stayed within that authority. The legislature relied on that acquiescence in enacting the 1971 statute. The supreme court should not have attempted to construct a new theory of power by purporting to supersede that statute. Finally, even if the supreme court could make a persuasive argument for its authority to supersede the statute, it has not done so.[122]

### B. The Amendment to Rule 49.01

#### 1. *Policy Considerations Underlying the Amendment*

The confusion in Minnesota trial courts regarding the validity of section 546.14 as amended was a major consideration in amending Rule 49.01. The Supreme Court Advisory Committee, which submitted the amendment, stated:

> Your Advisory Committee remains firm in its opinion that such an urgency exists to resolve the confusion and to clarify the inconsistency in practice regarding the proper procedure to be followed in submitting special verdicts to the jury following the enactment of Laws 1971, Chapter 715, and following the report of the Advisory Committee in June, 1972,[123] as to require

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haus v. Adamson, 294 Minn. 387, 201 N.W.2d 264 (1972). The majority recognized that a substantive right was at stake in the presumption of due care. Note, however, Todd, J., dissenting:

> However, I would hold that the statute, Minn. St. 602.04, is invalid since the legislature has no constitutional power to prescribe rules of evidence for the judicial branch of government.

294 Minn. at 397, 201 N.W.2d at 271.

121. *See* notes 30-32 *supra.*

122. *See* Krengel v. Midwest Automatic Photo, Inc., 295 Minn. 200, 203 N.W.2d 841 (1973), wherein the court specifically declined to comment upon the issue.

123. In June, 1972, the Supreme Court Advisory Committee recommended that the *McCourtie* rule be retained without change. The committee suggested an amendment which stated: "Neither the court or counsel shall inform the jury of the effect of its answers on the out-

> immediate action by the Court. Your Advisory Committee . . . recommends that the Court not delay adoption of the proposed amendments to Rule 49.01 . . . .[124]

However, a desire to eliminate trial court confusion does not explain the content of the amendment. The supreme court could have eliminated the confusion by adopting an amendment which accorded with the 1971 statute, but it chose to follow a different course.

The amendment retains the *McCourtie* rule[125] of no instruction or argument on the effect of the verdict in all non-comparative negligence cases.[126] Although this directly contradicts the 1971 statute, the Advisory Committee gave no reason for retaining the rule which, as previously noted, had been subjected to severe criticism.[127] The *McCourtie* rule does not consider the role of the common sense wisdom of juries in mitigating unfair laws and producing just results in individual cases.[128] Rather, it succeeds only in confusing juries and encouraging dangerous jury speculation on the effect of the answers. Furthermore, it is unnecessary in view of other controls on prejudiced juries.[129] The supreme court retained the *McCourtie* rule in its amendment to Rule 49.01(1) without any response to this criticism.

The amendment modifies the *McCourtie* rule in comparative negligence cases by permitting information concerning the effect of the jury's answer to the percentage of negligence question unless the trial judge decides that such information would be erroneous or confusing.[130] In supporting this modification, the Advisory Committee Comment noted that the court must use a special verdict in comparative negligence cases but that it has complete discretion as to verdict form in all other cases.[131] The Comment then stated that special verdicts[132] may not be the

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come of the case." Comment of the Supreme Court Advisory Committee 1 (June 30, 1972).

124. Comment of the Supreme Court Advisory Committee 3 (December 20, 1972).

125. *See* text accompanying notes 59-64 *supra.*

126. MINN. R. CIV. P. 49.01(1). *See* text accompanying note 76 *supra.*

127. *See* text accompanying notes 54-57 *supra.*

128. *See* text accompanying note 30 *supra.*

129. *See* note 57 *supra* and accompanying text.

130. MINN. R. CIV. P. 49.01(2). *See* text accompanying note 76 *supra.*

131. *See* Comment of the Supreme Court Advisory Committee at 3-4 (December 20, 1972). *See also* MINN. STAT. § 604.01(1) (1971).

132. By "special verdict," the Committee apparently meant special verdict *without* instruction or argument on the effect of the answers.

best policy in all comparative negligence cases: "The special verdict may be most desirable in a complex, multi-party, multi-issue negligence action, but quite inappropriate in a simple two or three party negligence action."[133] This conclusion was based upon a belief that special verdicts could be used to avoid error in complex cases.[134]

The Comment contemplated deferring doubtful or complex questions of law until after the verdict is in. The trial judge could then hear argument on the legal questions, decide them and enter judgment accordingly. If the judge is reversed on appeal, judgment could possibly be ordered without the necessity of a second trial because the special verdict itself and the instructions would still be error-free. If, on the other hand, the judge or counsel informed the jury of the effect of the verdict and the verdict was then reversed, a new trial would probably be necessary since the jury would have been influenced by erroneous legal information. The Comment thus emphasized administrative reasons for withholding information. As a result, the Minnesota court has shifted its rationale for the no information rule from a jury prejudice view[135] to a helpful trial aid view.[136] Information is not withheld because juries will manipulate it but because new trials may be avoided in complex cases.

There are two difficulties with this policy. First, it removes from the jury its valuable function of mitigating the law in its application to actual cases.[137] The importance of this function is not diminished merely because the case is complex. Second, the administrative advantage is largely speculative. Many types of error creep into complex cases—for example, errors of instruction, evidence, form of the verdict and argument. The jury still must be instructed on the law necessary to answer the questions, even if that law is doubtful or complex. Thus, avoiding errors on this one kind of jury information—the effect of the verdict—may not prevent many retrials.

The comparative negligence statute[138] may have been an additional reason for the rule's special treatment of comparative negligence. That statute requires the use of special verdicts and

133. *See* Comment of the Supreme Court Advisory Committee at 4 (December 20, 1972).
134. *Id.*
135. *See* text accompanying notes 16-28 *supra.*
136. *See* text accompanying notes 38-48 *supra.*
137. *See* text accompanying notes 30-37 *supra.*
138. MINN. STAT. § 604.01(1) (1971).

is used in a large percentage of civil cases. The statute also denies all recovery to a plaintiff whose percentage of negligence is equal to or greater than the defendant's. These aspects of the law are probably a mystery to the average juror. Thus, when a jury intends that the plaintiff receive some compensation but returns a verdict finding plaintiff 50 percent negligent and defendant 50 percent negligent, it will be quite surprised when the court dismisses the action. On the other hand, if the jury knows the effect of the 50-50 verdict (which is the answer to the percentage of negligence question), it can avoid that verdict in order to permit the plaintiff to recover some damages. Although no legislative history for the 1971 statute is available, it is probable that the legislature was aware of the problem of the 50-50 verdict.[139] If this assumption is correct, Rule 49.01(2) can be interpreted as the supreme court's response to legislative discontent with the administration of the comparative negligence law.[140]

2. *Practical Application of Amended Rule 49.01.*

The operation of Rule 49.01(1) presents no new problems. Since that portion of the rule preserves the *McCourtie* rule, it will no doubt be construed in accord with *McCourtie* and the line of cases that followed it.[141] Instructions and arguments which inform the jury of the effect of its answers will continue to constitute prejudicial error. The trial judge retains discretion as to whether a special verdict is to be used.[142]

139. Wisconsin's comparative negligence statute was the source of Minnesota's statute. *See* The Legislative Committee Comment on MINN. STAT. § 604.01(1) at 38 M.S.A. at 143 (Supp. 1974). Wisconsin has changed its statute to permit recovery on a 50-50 verdict, but it still does not permit information to be given to the jury on the effect of the answers. *See* WIS. STAT. § 895.045 (1972) and Koblenski v. Milwaukee & Suburban Transport Corp., 56 Wis. 2d 504, 202 N.W.2d 415 (1972).

140. In a further assault on the validity of Rule 49.01, Minnesota Fourth District Judge Dana Nicholson has raised the possibility of constitutional objections. He maintained that: (1) the different treatment of comparative and noncomparative negligence cases under the rule violates the equal protection clause of the fourteenth amendment to the United States Constitution; and (2) the right to jury trial embodied in the Minnesota Constitution includes the right to have the jury informed of the effect of its answers. *See* Johnson v. Black, File No. 683912, Order Granting New Trial, at 5 (Minn. Dist. Ct., 4th Dist., filed February 14, 1974).

141. *See* text accompanying notes 59-71 *supra.*

142. MINN. R. CIV. P. 49.01(1). *See* text accompanying note 76 *supra.*

The operation of Rule 49.01(2) presents two construction problems. First, the rule allows the trial court to refuse to inform the jury of the effect but does not suggest a standard for reviewing the trial court's exercise of that discretion. The standard could vary from virtually complete to quite limited discretion in determining when issues are doubtful or complex and when information is misleading or erroneous. The Advisory Committee Comment provides little help in ascertaining the appropriate standard of review. It merely suggests that cases of withholding information will be "unusual" and that the trial court's discretion will be "reviewable."[143]

The language of the rule places broad discretion in the hands of trial judges. Information is withheld not merely when it would be erroneous or misleading but also when the *trial court* is of the opinion that it could be erroneous or misleading. The language of the statute suggests two sets of questions which trial judges should ask in determining whether to withhold information: (1) Are doubtful questions of law involved? Would information on the percentage of negligence involve speculation on a legal issue of first impression? The reference point for this set of questions is the supreme court. If information on the effect of the answers is likely to be held erroneous on appeal, it can be properly withheld. (2) Is the case complex? How many parties, claims, and issues are involved? Do the individual issues involve simple or complicated rules of law? The point of reference for this set of questions is the jury. If information is likely to confuse or mislead the jury, it can also be properly withheld. If either series of questions can be answered "yes" the trial court has a reason to avoid informing the jury of the effect of its answers.

Second, the term "percentage of negligence question"[144] may cause construction problems. In a simple comparative negligence case, the jury might be asked:

1. Was defendant negligent?
2. Was defendant's negligence a cause of plaintiff's injury?
3. Was plaintiff negligent?
4. Was plaintiff's negligence a cause of plaintiff's injury?
5. Indicate in percentages the negligence attributable to each party. Plaintiff ———. Defendant ———.

143. *See* Comment of the Supreme Court Advisory Committee at 4 (December 20, 1972).

144. MINN. R. CIV. P. 49.01(2).

6. Did plaintiff assume the risk that caused his injury?[145]

7. What was the amount of plaintiff's damages?

In this case, the jury would be informed of the effect of its answers to question number 5 only. Under the comparative negligence statute, this would involve telling the jury: (1) that plaintiff can recover only if his percentage of negligence is less than defendant's percentage; and (2) that plaintiff's damages will be reduced in proportion to plaintiff's percentage of negligence. The jury would *not* be told: (1) that it must find negligence and cause on the part of both parties before question number 5 is even relevant; and (2) that an affirmative answer to question number 6 on assumption of risk will bar all recovery regardless of the other answers. Thus, unless the supreme court changes the rule or expands the definition of "percentage of negligence question," the jury will still not be informed of crucial matters regarding the verdict. While the supreme court might allow the information concerning the relevance of question number 5 since it is necessary before the percentage question can be answered, it cannot permit information relating to the other special verdict questions without violating its own rule. This problem promises to be a subject of future litigation.[146]

## V. CONCLUSION

The new Rule 49.01 has complicated and confused Minnesota special verdict procedure. Rule 49.01(1) preserves the *McCourtie* no-information-on-the-effect-of-the-verdict-rule in the face of severe policy criticism as to its necessity and desirability. Rule 49.01(2) abolishes *McCourtie* in comparative negligence cases, but its ambiguity in limiting the jury to information regarding the effect of the percentage of negligence question and in allowing judges to refuse information in complex cases invites fruitless appellate litigation. Furthermore, the rule was enacted by superseding a valid statute and encroaching on legislative power to make a policy decision.

Straightening out this unfortunate development in special verdict procedure is in the first instance the job of the supreme

145. Minnesota *prospectively* abolished the separate defense of implied assumption of risk in Springrose v. Willmore, 292 Minn. 23, 192 N.W.2d 826 (1971). However, this problem will still be present whenever a special verdict question other than the comparative negligence question might conceivably bar recovery.

146. *See* Johnson v. Black, File No. 683912, Order Granting New Trial at 2-4 (Minn. Dist. Ct., 4th Dist., filed February 14, 1974).

court. The court should amend Rule 49.01 of the Minnesota Rules of Civil Procedure again, this time using the exact wording of the 1971 amendment to section 546.14. This would eliminate conflicting authority and return the court to its proper role in rule enactment. If the court fails to take this action the legislature should regard this situation as a covert attempt to expand "inherent power" and thwart legislative intent in an important area of public policy. To deal with this situation, the legislature should enact a special statute which repeals the Rule 49.01 amendments and reinstates the 1971 statute.

The Minnesota experience with the problem of informing the jury of the effect of its answers to special verdict questions has important implications for other jurisdictions using the special verdict. First, it should give those jurisdictions an opportunity to consider the role of the jury in civil litigation. One of the greatest problems in assessing the policies underlying what information is given to juries about special verdicts is the lack of reliable data on how juries behave in civil litigation. A careful and scientific study of the results of Minnesota's departure from a policy of no instruction or argument thereon should be instructive to those jurisdictions. Second, the history of the change in the Minnesota rule should provide some insight into the proper roles of the courts and the legislature in working toward procedural reform.