

Special and General Verdicts

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In more than thirty years of practice, I don't think I ever saw a general verdict form used in a civil trial. The so-called "special" verdict is not so special anymore; in fact, it is routine, and these days it's unusual to see a "general" verdict in a civil action. How else would we find out what the jury decides on various issues like comparative fault, or the split on the various items of special damages?

General versus Special versus General With Interrogatories

Rule 49 identifies three kinds of jury verdicts: general, special, and general with interrogatories. The general verdict asks the jury one (or two) questions going to the ultimate issues ("do you find for the plaintiff or the defendant?" or "do you find the defendant guilty or not guilty?"). It allows the jury to decide who wins.

The special verdict, on the other hand, asks the jury to answer a series of fact questions ("Do you find that defendant violated the standard of care? If so, do you find that this violation caused injury to the plaintiff? And if so, what damages do you award?"), and then afterwards the court applies the law to the factual findings and enters judgment accordingly.¹

Finally, there is the "general verdict with special interrogatories," where the jury decides both the ultimate outcome and answers specific questions. It gets confusing telling this one from a special verdict, and sometimes even appellate courts struggle over the distinction. Read *Johnson v. Abt Trucking*² for a discussion by the Tenth Circuit of the sometimes-subtle

¹See *Morales v. Golston*, 141 P.3d 901, 906 (Colo. App. 2005).

²412 F.3d 1138, 1142 (10th Cir 2005).

distinction between a general verdict with special interrogatories and a special verdict.³

Don't worry about understanding the difference between the general and special verdict and general verdict with special interrogatories. You're unlikely to ever encounter a general verdict, or an attorney who asks for one, in most civil cases. It's really only a matter of academic interest except in one unusual circumstance in federal court.

When the Distinction Can Matter

When does it matter? In federal court, with an inconsistent verdict, you must speak up before the jury is discharged *only* if the court is using a general verdict with special interrogatories. If you don't, you've waived the issue.⁴ On the other hand, if it's a special verdict, under rule 49(a), before the jury leaves you have *no* duty to speak up to preserve your point on appeal.⁵ In state court, of course, Rule 47(s) requires you to be quick enough to spot inconsistencies in the verdict answers before the jury is discharged – however the verdict form is

³See *Thompson v. State Farm Fire & Casualty Co.*, 34 F.3d 932, 945 (10th Cir. 1994) (verdict form asked the jury whether “the plaintiffs ... should recover on their contract claim against the defendant.” *Id.* at 945. Tenth Circuit determined that this question was plainly a general verdict, and subsequent questions regarding damages, bad faith, and the plaintiffs' violation of specific policy provisions, were “special interrogatories.”); *Babcock v. General Motors Corp.*, 299 F.3d 60, 63 (1st Cir. 2002) (verdict form asked: “Has plaintiff proved her negligence claim by a preponderance of the evidence?” and “Has plaintiff proved her product liability claim by a preponderance of the evidence?”) Even though it was entitled a “special verdict form,” the First Circuit held that this was a general verdict. Because the jury did not merely make findings of fact, but by determining whether the plaintiff proved her negligence and product liability claims, it entered conclusions of law and determined who prevailed on each count.

⁴Rule 49(b), Fed. R. Civ. P.

⁵See *Bonin v. Tour West, Inc.*, 896 F.2d 1260, 1263 (10th Cir. 1990) and *Johnson v. Abt Trucking* for a discussion of the distinction between the requirements of federal rules 49(a) and 49(b).

characterized.⁶

Special Verdicts are Routine

While Rule 49 gives the court discretion on whether to give a special verdict instead of a general verdict, I have never yet encountered a judge unwilling to use one when asked. And the comparative negligence statute *requires* the judge to honor a request for a special verdict whenever comparative fault is at issue and a special verdict is requested.⁷ The bottom line is that you should plan on using a special verdict being used in every civil trial.

Forms for Special Verdicts

The Model Utah Jury Instructions- Civil 2d provide excellent forms for special verdicts⁸ You can also find them in any of the stock jury instruction books. Don't neglect the form of the special verdict; indeed, it's a good practice to prepare a draft form at the start of your case, just like your jury instructions, to help you focus on what needs to be proved.

⁶ See *Balderas v. Starks*, 138 P.3d 74, 2006 UT App. 218; *Bennion v. LeGrand Johnson Const. Co.*, 701 P.2d 1078 (Utah 1985); *Ute-Cal Land Dev. Corp. v. Sather*, 605 P.2d 1240 (Utah 1980). But I do not know how to reconcile the apparent inconsistency between 47(s) (requiring action before the jury is discharged, and 49(b) (stating that when one or more answers to special interrogatories are consistent with each other but one or more are inconsistent with the general verdict, the court *may* return the jury for further consideration of its answers and verdict. If any of the answers are inconsistent with each other, and likewise one or more is inconsistent with the general verdict, then the court *shall* return the jury for further consideration of its answers and verdict.

⁷ Utah Code section 78B-5-819: “(1) The trial court may, and when requested by any party shall, direct the jury, if any, to find separate special verdicts determining the total amount of damages sustained and the percentage or proportion of fault attributable to each person seeking recovery, to each defendant, to any person immune from suit, and to any other person identified under Subsection 78B-5-821(4) for whom there is a factual and legal basis to allocate fault.”

⁸ See 2 MUJI 2d- Civil, 299 and 399. www.utcourts.gov/resources/muji The form for personal injury cases follows this article.

Watch Out for These Things

Juries are often confused by the form of special verdicts. They're written by lawyers and judges, often in haste, and read by people (usually) with no legal training. So mistakes happen frequently. Here's my checklist for avoiding the most common errors:

- Tell the jury in the verdict form to answer the questions *in the order presented*. (We assume this is implied, but jurors sometimes don't realize it.) The usual method is to start with breach or negligence or fault, then causation, then with questions as to comparative fault, then allocation of percentages, then damages.
- Make sure it's clear what questions to answer, and what questions *not* to answer. These "conditional answers" are necessary, but they do get convoluted: "*Answer Question 3, but only if you answered Questions 1 and 2, "Yes." If you did not answer both Questions 1 and 2 as "Yes," then skip Question 3, and go on to Answer Question 5, but do not answer Question 6.*" No matter how convoluted, make sure these instructions make sense— they often don't. So have your spouse read the special verdict to make sure *they* can figure out what the jurors are being asked to do.
- Tell the jury it takes six of eight to answer a question "YES," but it need not be the *same* six for each question. (They may not understand this if it's not explained to them.)⁹
- Feel free to ask them refer back to specific instructions in the special verdict form. ("Was defendant at fault as defined by the court in Instruction 17?")
- Make sure the verdict form tells the jury *not* to deduct any percentage of

⁹Of course, this is in state civil actions. *See* rule 47(r) (three-fourths). In federal actions, an unanimous verdict is required. *See* Fed. R. Civ. P. 48(b).

fault from the damages they award, but to simply give a gross verdict and leave it to the judge to make any deductions. (This is the so-called "net verdict" error, addressed in a separate paper in these materials.)

- It's a small point, but tell them to "check one" after the "Yes" and "No" questions. (I had a trial where the jury penciled in the number who voted "yes" and the number who voted "no" as to each question.)

- If you are a plaintiff's attorney, insist on a breakdown of special damages (past medical expenses, future medical expenses, past lost wages, etc.). Defense counsel may resist your request to do this, usually on the grounds that it gives the jury too many "lines" to award damages, and thus that the award may be larger.

The MUJI- Civil 2d Advisory Committee takes the position that there *should* be a specific breakdown of the elements of special damages. (See CV 299 and 399). There are several reasons why this damage breakdown is necessary:

- Liens and reimbursement claims by private health insurers, Workers Compensation, Medicaid, and Medicare are common in personal injury actions. An unspecified award of special damages¹⁰ gives no guidance to lien claimants or the plaintiff on whether the lien attaches – did the jury award special damages for medical expenses? Lost wages? Future medical expenses? In what amounts? There's no way to determine this without a breakdown, and you cannot go back to the jury afterward and ask for further explanation.

- In a medical malpractice action, section 78B-3-405 requires the court to make

¹⁰Or worse yet, a verdict not distinguishing between general (non-economic) and special (economic) damages.

deductions from past special damages for expenses paid by collateral sources. This cannot be done unless the amount of past medical expenses (and past lost wages in the case of disability income collateral sources) is specifically set forth by the jury in its special damage award.

- A judge cannot assess prejudgment interest under section 78B-5-824 on past special damages if no distinction's made in the special verdict between past and future special damages, or between general and special damages.¹¹

- Finally, amounts may be awarded for special damages that aren't supported by the evidence, and specificity in the special verdict allows the court the opportunity to correct such miscalculations or improper awards.

Waiver of Issues

You ought by now to be attuned to the legal reality that things not raised on the record in trial are waived for purposes of post-trial motions or appeals. This principle applies to special verdicts, and Rule 49(a) makes it explicit:

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 jury.

So if you think the special verdict omits something, or is confusing, raise it and object on the record, or waive the point on appeal.¹²

¹¹See *Donatelli v. Beaumont*, 204 P.3d 201, 24, 2009 UT App 34: “The verdict form presented to the jury here was flawed because it failed to differentiate between general and special damages” (and thus the trial court could not determine if prejudgment interest was to be added, even though the award was for *exactly* the amount of claimed medical expenses.)

¹²See *Baker v. Cook*, 308 P.2d 264 (1957) and *Campbell v. Dalton*, 745 P.2d 1239 (Utah 1987).

Use the Special Verdict Form in Closing Argument

Blow-up the special verdict form to 3' x 5' and use it in your closing argument. (This works better for me than using a computer projection.) Explain to the jury how it works, and how you suggest they might fill it in. You don't necessarily have to "fill out" for them the space for general damages (many counsel argue the options, but leave the general damage line blank), but you should fill in the exact numbers in special damages you seek while standing before the jury, and tell them how the evidence proves your client's entitlement to those items.

And Don't Forget Rule 47(s)

I have repeatedly emphasized the importance of understanding Rule 47(s). (See my paper on trial motions.) But I will say it once again – if there is *any* inconsistency in the answers on the special verdict form when the jury returns, you *must* ask for them to be sent out and correct it, or waive the point.¹³

Poll the Jury

If you are on the losing end of a verdict, always take the opportunity to “poll” the jury. This means that the judge asks each member of the panel in turn, “Is this your verdict?” Normally a trial will ask the losing side if they wish to poll; if not, by all means move for it yourself: you have the right to do this.¹⁴ And though I know of no decision on point in Utah, I

¹³The classic example is a jury awarding special damages but no general damages. *See Balderas v Starks*, 138 P.3d 75, 79, 2006 UT App 218 (plaintiff's counsel properly asked the jury to be sent back to reconsider an award of no general damages, only specials; when the jury came back a second time awarding only \$1.00, he failed to ask that they be sent back again, and thus waived the point for appeal).

¹⁴Rule 47(r): “Either party may require the jury to be polled, which shall be done by the court or clerk asking each juror if it is the juror's verdict. If, upon such inquiry or polling there is an insufficient number of jurors agreeing therewith, the jury must be sent out again; otherwise the verdict is complete and the jury shall be discharged from the cause.”

believe that you also have the right to ask for a poll on *each* question within the special verdict.¹⁵

If you do this, you may well learn of inconsistencies or disagreements that merit further action.

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¹⁵See 71 A.L.R.2d 640, *Polling of Jury in Civil Cases* at Sec. 16. and *Sandford v. Chevrolet Div. of Gen'l. Motors*, 642 P.2d 624, 637 (Or. 1982).