ORAL ARGUMENTS - 10/8/97

96-0995

H.E.B. v. Bilotto

LAWYER: There is one question before the court today: Whether the TC's conditioning instruction in this premise liability case improperly informed the jury of the legal effect of its answers? The resolution of the question implicates considerations far outside the scope of this particular appeal. The answer to the narrow question in this case will go a long way toward the rational progression of jury submission in Texas. The court's opinion may also resolve what H.E.B. had thought to be a matter of common understanding, that the work of the Texas Patterned Jury Charge Committee does not bear the _____ of law.

I would like to begin by briefly summarizing what the case is about, and then quoting the TC's conditioning language, which in our view, instructed the jury on the esoteric law of comparative responsibility.

Next, I will explain how that instruction thins nearly a century's worth of Texas jurisprudence and as part of that explanation, I will articulate why rule 277 does not authorize the instruction given here. And I will show that the jury's answers to the comparative causation question are not affirmative finding of liability, which is the only authority the rule provides for an incidental instruction on the legal effect of the answer.

GONZALEZ: At some point would you respond to the amici argument by Luke Sales that Carriso and Griger were abandoned in 1987 by the amendment to the rules?

LAWYER: Yes, sir, I certainly will.

PHILLIPS: And you said nearly a century's worth of law would be upset by this opinion. But all the cases you're relying on would also have been upset by the 1987-88 amendments to rule 277. And it's just a question of how far that rule changed them.

LAWYER: Except your honor, that it's my view that the Griger case was actually codified in Rule 277. It wasn't upset. And what the committee did both in the early 1970s and in 1986 was just to further what this court held in Griger v. _____, which was back in 1935. And so I think that it is a continuation of Texas jurisprudence. And I would like to explain briefly also why patterned jury charges indeed are helpful to the bench and the bar in formulating submissions to the jury. But they are not law. And this case proves that to be true.

As I mentioned at the outset this is a premise liability case. Vinny Bilotto

alleged that he slipped and fell in a grocery store in Bexar County, Texas. In its answer to the lawsuit, HEB pled contributory negligence, and that the cause of any injuries were the fault of Mr. Bilotto and not HEB. In its submission to the jury, the TC asked the jury to determine the negligence of both HEB and Bilotto. The court then asked a standard comparative responsibility question. And it's the instruction that immediately follows that question that brings us here this morning. That instruction is _____ from the §33.001, Comparative Responsibility Statute in Civ. Prac. & Rem. Code. It instructed the jury: That if in answer to Question 1, which was the liability question, you've answered "No" for Bilotto, or you've found that 50% or less of the negligence that caused the occurrence is attributable to Bilotto, then answer Question No. 3; otherwise, do not answer question No. 3. That is basically an instruction on 33.001, which provided that a claimant may recover damages only if his percentage of responsibility is less than or equal to 50%.

Now, what you have in this charge is essentially three questions that we're concerned about. The first one is the liability question, and the only liability question submitted in the case. Question No. 2, was HEB's defense, the comparative responsibility defense. And Question No. 3, was damages.

Well then how does that instruction that I've just read to you offend Rule 277 and in my opinion, the court's views on this subject for decades? Rule 277 says: "That the court may predicate the damage question or question upon affirmative findings of liability." Well let's be clear on one point, the comparative negligence question does not seek an affirmative finding of liability. It is not a question of liability. It is submitted by virtue of the defendant's plea of an affirmative defense.

PHILLIPS: What do you think the drafters were attempting to get at if you're correct in your interpretation when they were saying: If the plaintiff doesn't prove their case in the liability issue, then you don't have to answer damages. But if we're talking about an affirmative defense, you do have to go ahead and answer to damages. What's the rationale for that disjunction?

LAWYER: When you ask the drafters are you talking about rule 277?

PHILLIPS: Yes.

LAWYER: I think what they were getting at is what does a jury ordinarily know anyway without regard to further instructions by the court. I think what the drafters were doing is just what Griger v. ___ was doing. And that was to say: Look, there's certain questions, the answer to which the jury will know is going to affect the damage submission. If the jury gets the question: Is the defendant liable, is it negligent? And the answer is, no, then a jury of common intelligence is going to believe and most of them do I think, well that means whether we answer damages or not, you can't hold someone liable for damages if they haven't done anything that's wrong. Well I think that's clear. So Rule 277 puts that into effect.

What Griger says is: Well then it can't be error to tell the jury that if there's no liability, don't worry about damages. But what Griger also says is: You still can't tell the jury the legal effect of the answers especially when the instruction will tell the jury what it wouldn't know but for the instruction.

I will give an example, and I've given it before, and that is let's say you've got limitations cases (and they seem to be proliferating these days and the court has decided a couple of them in the last couple of years) where the discovery rule is at issue. Well let's say the discovery submission is given to the jury. Do you predicate the damages on the answer to the discovery rule? In other words, what if they're asking for a date and it's a date that distinguishes between Dec. 31, and Jan 1; and you tell the jury: If you answer with one date, then you don't get to the damage question at all. If you answer with another one, then, yes, you may proceed to the damage clause.

ABBOTT: In fact, you may not even get to the liability question depending on the discovery rule?

LAWYER: That's exactly right.

ABBOTT: And if we're dealing with a very complex commercial case, or any other type of complex case that took 6 weeks to try, and if the jury could dispose of the case on the limitations issue in a manner of 30 minutes, but still have to go on and answer all of the liability questions and damage questions, which could total in the dozens, it would require the jury to be there perhaps another week when the case would have been disposed a week ago.

LAWYER: Well there is certainly and the DCs have raised this question before the court, a question of efficiency. Are you going to make the jury go through and answer damages when they wouldn't even have to get to the..that they could follow this sort of instruction. And I think that's a valid point, but I don't think that it overcomes Rule 277, and the admonition that you cannot tell the jury the legal effect of their answers.

HECHT: Is there any substance to the argument that prudence would get as many answers as you could so that if there is a reversal there won't necessarily be a re-trial?

LAWYER: That is an extremely important point. And in fact, when you look at the transcript of the SC Advisory Committee minutes and I think they've gotten this wrong, the question before the advisory committee was whether we expand the submission practice in rather a radical way, and that is to inform them to especially tell the DC courts that you must at the request of either party inform the jury the effect of their answers.

ABBOTT: Would you concede that it would be better then to have separate submission for each element of damages?

LAWYER: In no sense shall we go back to the days of Fox v. Dallas Hotel. And I think that the logical progression has led to the point where we submit broad form and it ought to be that way. But to answer Justice Hecht's question, Mr. McMains was involved in those hearings. And he said, and I'm quoting at page 230 of the very first transcript which is in the record: "I suppose I will be labeled a traitor to the cause in some respects..." But then goes on to address what Justice Hecht said: "What happens when a judge has told them what the effect is, and that wasn't what it was? Do you have reversible error there because the judge told them that it would affect the judgment this way and then he changes his mind later on maybe in a JNOV motion? I just see a specter of that problem in that I'm not confident that the trial judge or the parties altogether know what the effect is going to be on the judgment."

Sometimes what the judge will do is submit the question, and it's unlike federal court where they have briefing clerks researching law, they will defer looking at the substance of the effect of the judgment until after the verdict. It gives them time to decide, "Yes, we can submit it now and then let's see what happens." "Let's see what the jury does, and then I will hear arguments from both sides on what the effect of this judgment is."

SPECTOR: That does leave it up to the discretion of the TC?

LAWYER: No, the rule doesn't, and the cases don't. The rule says you shall not advise a jury of the effect of their answers except only in a narrow circumstance, and that's where it's incidentally part of an instruction or definition.

SPECTOR: And that's at the courts discretion?

LAWYER: The incidental, yes. But this is not incidental in any respect.

ABBOTT: But on the flip side of at least your answer to her question, it's up to the trial court's discretion (currently before we consider this case) to predicate or not predicate. In other words, the trial judge did not have to submit the issue with the 51% predication as it did in this case, and if the trial judge had wanted to under the current rule, the trial judge could not put that predication in there, correct?

LAWYER: Even if the judge wanted to, cannot.

ABBOTT: You're saying that predication is mandatory?

LAWYER: No. I am saying that the TC cannot predicate the damages the way the TC did here. Now if the TC had wanted to, it could have predicated the damages on an affirmative answer to liability. In other words, going back to question No. 1, that's the only liability question submitted in the whole charge. And rule 277 says you can predicate it on answers to liability, but you can't tell the jury the effect of their answer on other contributory negligence principles.

ENOCH: Did the jury ask a question about this?

LAWYER: Yes. At the charge conference, and I think this is undisputed, we objected wholeheartedly to submission and cited 277 and Griger. And told the court, and I think this is true as well, if you instruct them this way they are going to be confused, because you instruct them on page 1, subparagraph 4, don't concern yourself with the effect of your answer. And then you're telling them in the instruction do concern yourselves with the effect. They are going to be confused. Well the jury came back confused. They came back with a question saying: Well what do you mean by this? What does this if/or situation mean? And I think that just demonstrates beyond a doubt, and that's why this case is perfect for the court to consider it whether there's harmful error and I think that there is.

PHILLIPS: Do you think that alone is enough to prove harmful error or do we have to look at closely contested, lots of witnesses going both ways, the jury was out a long time, those kind of _____ and _____ factors?

LAWYER: I don't think you have to reach that. I think that that is enough in itself. And the fact that the jury then came back 50/50 I think is quite enough. But the record will reflect and it's before the court that it was hotly contested. In fact, it was HEB's position that there was no evidence to submit HEB whatsoever. And the parties argued for almost a week about the circumstances of the fall and the cleaning up and all of that. So it was a hotly contested trial.

Now what happened during these debates, and again the debate was before the SC Advisory Committee it wasn't Griger or Grasso or anything like that, is should we change the submission practice altogether and should we now tell them the legal effect of their answer. That was the context of the quotes that the opposition has provided to you. Should we change the system altogether and mandate that at the request of either party, the court tell them the effect of their answers? And the advisory committee was getting close to making that recommendation until Justice Pope weighed in and he said, No. Now the committee minutes on that section are not present. But you can tell from his writings on the court and off the court, that it's his opinion that there is a division between jury as fact finder and the judge as the only person who is to interpret the law and to decide what the effect of the jury's answer is going to be.

And so my argument is, rule 277 prohibits the instruction that the judge gave here. Outright. The only exception is a liability filing. You can predicate damages on an affirmative answer to liability. That's not our case. There's no question that that's not our case.

OWEN: Can you quickly tell us other areas this might impact?

LAWYER: I believe that if the court were correct, that you can condition the damages on the defense, well then you are going to see it in all kinds of cases and the more complex cases that we're talking about. In a commercial case, you've got all kinds of — statute of frauds for example --

you know a breach of contract is going to be there, but one of the defenses is the statute of frauds. I think we would have a right as a defendant or either side would have a right and it would impact the case depending on the jury's answer to a discovery question or the statute of limitations question. There are several different avenues where this could become affected.

The amici district judges point to some examples. I don't think those are relevant examples. Whether you condition exemplary damages on the finding of gross negligence, I think that's proper. I think that's an affirmative finding of liability. You don't get exemplary damages unless there is gross negligence. You don't get gross negligence unless there are actual damages. I don't think there is anything improper in submitting a case that way.

What I think that the rule is, and I don't think it was changed by 277, I think it was codified in 277, is if you're going to instruct the jury on something that they would have no knowledge of, you might as well just give them the civil practice & remedies code and say: Look through this and decide what the effect of your answer is going to be. If that's what the effect of the instruction is, then it's improper under the former law. And if it needs to be changed, there are a lot of people who want it to be changed they can advocate this change. Just like they did in the SC Advisory Committee submitted to this court and asked them to change the rule. But as it stands, as it is right now it's simply not allowed and I don't think we're entitled to stand on the rule as it.

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RESPONDENT

MIDDLETON: This appeal gives this court the opportunity to proclaim to the bench and bar once and for all, that not only shall trial courts where applicable provide broad submission jury issues, but also just as the rule says: The trial judge may in its discretion predicate findings of damages on findings of liability.

Now this appeal has nothing to do with whether or not it's good policy to predicate answers to damages.

PHILLIPS: If it were affirmative findings of liability does that just mean a "yes" finding regardless of whether it's for the plaintiff or the defense?

LAWYER: What our argument is and what we touch upon more deeply is that affirmative findings of liability in a comparative negligence jurisdiction means those findings which result in a finding for the plaintiff. And we will show that those mean findings in regard to the liability issue as to the defendant, and the liability issues as to the plaintiff.

HECHT: Why doesn't it include affirmative defenses if that's your theory?

LAWYER: I believe it does. I think that it's very simple. And I will state it at this point.

Affirmative findings of liability in a comparative negligence jurisdiction would include findings that the defendant's negligence was 50% or more to the cause of the occurrence or the harm, and that the plaintiff's negligence if any was less than 50% of the cause of the harm. Those are the affirmative findings because that is the change that was wrought by the 1988 rules. That's the difference.

For the first time we talked about questions and we talked about affirmative findings. And as we will show, the committee went through and very laboriously considered whether or not we should go all the way to inform the jury of the effect of its answers pretty much as in a general charge in federal courts. The choice was not to go that far, but to leave it to the discretion of the TC as to whether or not in an appropriate case to condition the damage's issues on affirmative findings of liability.

OWEN: What's left of the rule, that says: You may do that but you still may not tell them the effect of their answers, if they do that?

LAWYER: That is correct.

OWEN: What does that apply to?

LAWYER: Well you cannot tell the jury that if you find a, b, c, then you must find d. You cannot tell them that they must find a certain way. In this instance, in no way was the jury informed of the effect of its answer in violation of the rule. Now we're dealing with the rule. If the court wishes to change the rule, then it should go through its legislative process to do so by a rules committee - not change it by a judicial fiat in this case.

ENOCH: How do you respond to Mr. Jefferson's argument that all 277 was doing was trying to recognize that there are certain things that are just generally within the knowledge of a jury of common sense and it didn't make sense not to let them stop their process when everybody's reached the conclusion that their process has no purpose beyond that. And I will give you an example when I was trying cases: in every case that I did not conditionally submit the damages issue on liability, I got a question from the jury asking: Well we've answered no to the liability, do we need to proceed? So that quickly convinced me to just stick it in there because you're wasting their time. This though, according to Mr. Jefferson, would not fit into that mold because it would not be an automatic conclusion to a jury of common sense that once they have found liability, that somehow determining this 50% deal did something else with regard to damages.

LAWYER: In the first place, you have to look at what the rule says, because that's what we're basing our submissions on. The rule says that the court may predicate the damage question. But it also says that it is not objectionable to...the courts cannot comment on the weight of the evidence or advise the jury the effect of their answers, but the court's charge shall not be objectionable on the ground that it incidentally advises the jury of the effect of their answer when it is properly part of an instruction. And that's really what we have to focus on. It may incidentally

advise them of a partial effect, and that is, that the court will consider the damages that you find. But there is nowhere in the charge where it tells the jurors if there is 40% causal relation to the plaintiff, and 60% to the defendant, and you find $100,000 in damages, that the plaintiff is going to get $60,000.

ENOCH: But it does tell the jury that if you apportion the respective responsibility greater than 50% for the plaintiff, the plaintiff then is not entitled to any damages. And that's not a liability issue. That's a bar issue isn't it?

LAWYER: No, I think it is part of the liability issue. It is affirmative findings of liability. That was a change from talking about negligence in the rule previously, and talking about special issues. Now we talk about questions and affirmative findings of liability. And affirmative finding of liability as I said earlier is a finding that there is legal responsibility of 50% or more in a negligence case on the defendant and less than that on the plaintiff. You take all the issues together, all the questions that are decided together and then you can make a determination that if there are affirmative findings of liability, then the trial court has the discretion in a proper case to condition. It may tell the jurors that in a proper case they will have to answer questions on damages. But it doesn't tell them what the effect of the answer is.

PHILLIPS: Is opposing counsel correct that you could predicate a limitations question or discovery rule question, predicate damages on a certain date, or is that an affirmative finding of liability?

LAWYER: I think that if you have those kinds of questions where you would be requiring the jury to try to second-guess the outcome, it may be a proper case for the TC to decline to condition.

PHILLIPS: It would be improper for the TC not to decline?

LAWYER: I think that if you condition an answer on whether or not...if the question is for example: Ddid the plaintiff discover his cause of action on or before Jan 1, 1995? And if you answer, yes, then you may answer as to whether or not the defendant is liable and so on and so forth. That's not what we're talking about, because that's a different kind of conditioning. What you're suggesting I believe is conditioning an answer to a potential defense or a hurdle to get to the affirmative findings of liability. And that is not what the rule relates to. The rules was merely trying to deal with very simple cases like this.

BAKER: Isn't that what this does in this case, the instruction about the percentage?

LAWYER: All that it tells the jury is that you may answer questions as to damages. It doesn't tell the jury the effect of its answer; and if it does, it does not do so in violation of the rule. Because the rule says that it may incidentally do so if part of a proper instruction.

BAKER: Well is it then a question of whether it's incidental or not to tell the jury that if you answer percentages in a certain way, you answer the damage question; if you don't, you don't answer the damage question?

LAWYER: I believe that it goes to whether or not it is incidental. Yes, sir. I think that is true.

BAKER: If I understand your position, it's basically in agreement with Mr. Jefferson's. That is, that we're dealing with the rule that we shouldn't change the rule by judicial fiat in an opinion, but where the problem lies is y'all don't freeze the rules you're saying?

LAWYER: I think that he is reading the rule in light of 1935 and 1954 law where there was a complete bar to recovery if there was contributory negligence. So if you told the jury: If you find that the defendant was negligent and the plaintiff was negligent don't answer this question...

OWEN: How's that any different than 51%? If 51% is a complete bar, what's the difference?

LAWYER: Because it doesn't tell the jurors at all how much money, if any, the plaintiff is going to recover.

OWEN: It tells them none. Don't answer damages if it's more than...

LAWYER: Well that is correct. It does tell them incidentally that if the plaintiff is 51% at fault, or more, that the plaintiff does not recover.

HECHT: It's not incidental. There's no two ways about it. They know if they write down that number, they don't have to write down another number...

LAWYER: Yes, sir, I understand that. But if you read the rule, and if you read the committee hearings, this was clearly what was contemplated. It was clearly contemplated that this kind of information going to the jury was permissible, that we are going to not completely take off the blindfold, but we will put some gauze so that you can kind of see through it. Because we will let the jurors have an understanding just like when Justice Enoch was on the trial bench, the jury knew if they zeroed out the plaintiff on liability, it was stupid to answer damages. Some did. There may be cases, however, where it is inappropriate to condition. But here if you look at what happened in this case, there was a question that was asked, the judge said: I don't understand your question, make it more explicit. They didn't answer the question. We don't know if they had already decided the answer to the question or not before they asked the question. And then they awarded some damages and they divided the liability 50/50. We were very disappointed.

This case was hotly contested, but we had substantial proof of negligence

consistent with the law against HEB, and all they had was someone who didn't see a spilled coke behind the box. So we were very disappointed that it was 50%. The jury awarded no damages for pain and suffering , mental anguish, or for physical incapacity. And the medical bills were all predicated on his pain and his suffering and his inability to perform as a professional wrestler. But our client decided that he would rather accept the judgment of the court, and not appeal the case. That did not show that there was any great benefit to the plaintiff nor was it any great benefit to the defendant. The point is, that the rule is written in such a way to take the blindfold off to a certain extent, to allow the TC the discretion to present to the jury enough evidence to say that: If you answer these questions in such a way that the plaintiff's negligence is more than 50%, you don't have to answer this question. That is what the rule contemplated.

SPECTOR: Wouldn't it be fair to say that the instruction informs the jury of whether or not damages will be awarded, but in no way what amount?

LAWYER: That's absolutely correct. Because in the Grider situation, the jury knew that, and the law was clear that whatever the jury awarded, unless there was something that went on outside the presence of the jury those were the damages, because it was all or nothing. And that came from really back to a 1916 case where the San Antonio court said: "Any fool can plainly tell that if the defendant is not liable, he's not going to get anything, but the plaintiff's not going to recover. But if plaintiff is contributorily negligent, we don't know." Well, all we're saying is that the rules committee and the court made a conscious decision in fashioning the rule to change the law. You change the way cases were submitted by talking about questions not special issues, you went to broad submission, and you said very clearly that the jurors may incidentally be advised of the effect of their answer if it's properly part of an instruction. And that is exactly what the bench and bar had relied upon for 5 years in 1993, the TC relied upon the Pias case, it relied upon the plain language of the rule, and it relied upon in applying the rule, the PJC. It was not in any stretch of the imagination the only thing on which the TC relied on. And I think that's a red herring. This case is not about whether the PJC is law, because it was merely an application of the law.

The important thing I think to consider is that Grasso and Grieger are cases that are involved in an antiquated special issue practice, that cannot be compared to a modern Texas practice today. It would be like comparing the pony express to federal express or comparing using a manual typewriter and carbon paper to wordprocessors and fax machine and computers. It's a different world. And there was a specific intent to inform the jurors that they may know that if they answer a question a certain way they can award damages. That's what the rule says. That's what the committee talked about. And those people who wanted to be a direct information and an opportunity to tell the jury that what the effect of the answers was, was defeated. But what was allowed was to allow a conditioning, a predicating of a damage issue on affirmative findings of liability. And I think it makes no sense to say that an affirmative finding of liability is that the defendant is negligent, because if the affirmative finding of liability is that the defendant was negligent to the tune of 20% and the plaintiff was negligent to tune of 80%, and that's when you answer the damage question, you predicate it that way, that's senseless, that's not what you intended,

that's not what your predecessors intended, that's not what the committee intended. But that's what HEB would like for you to believe.

I will come to the issue of error. Was there error? The fact that it was a hotly contested case merely meant that the plaintiff's lawyer and the defendant's lawyer did a good job. The fact that the instruction was given means simply and I'm going to Justice Duncan's argument in her dissent, means simply that the TC relied upon the language of the rule, relied upon the Piaz case, and found what lawyers had been using for 5 years up to that point, and that was the language in the PJC. And it fairly tracks the language that is in the rule.

Thirdly, the fact that the note came in meant nothing. There was some confusion as to what it meant. But there's no evidence that the jury in any way was confused in terms of the way it answered its questions. The answer to question No. 2 could have already been answered when they gave the question. There's no proof in the record as to what the effect of that note was. And when the judge said: "What do you mean?" They didn't answer and then came back and had a verdict.

Finally, all of that taken together cannot be reversible error. That cannot show you in any way that HEB was harmed because of the note or because of the 10-2 verdict. I mean all that meant was that plaintiff's counsel persuaded 10 people, and defendant's counsel persuaded 2 people, and that was all that that showed.

HECHT: If this were harm would there be any way to show harmful error?

LAWYER: In this case?

HECHT: In any case?

LAWYER: Well sure, because if you can show that the...I am just concerned about jury deliberations and such, and so I think that you cannot show that unless there was something extrinsic that came in you could show harm.

HECHT: You could not show harm?

LAWYER: You could not show harm unless there was something extrinsic that came in. However, again, we're dealing with what this court said the way to submit the case is. We're dealing with what the rule is.

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REBUTTAL

LAWYER: Justice Spector, I would like to answer your question. You were saying, "Well

couldn't the instructions simply tell the jury whether or not to answer the question, but not tell the jury what the damages might or might not be?" I think the answer to that is, no.

On page 1, of the charges of the court, and it's appended to the brief, the jury is instructed that they are the sole judges of the credibility of the witnesses and weight should be given to their testimony, but only matters of law are you to be governed by this court's charge. They are the ones that determine facts. If they haven't written in amounts on damages, then that means that the plaintiff gets no damages, and the jury is instructed that way. So that instruction is...

SPECTOR: I'm not following you. If they had said, "evidence of the damages is a certain amount," why does that instruction tell them to put a different amount?

LAWYER: The instruction doesn't tell them to put any amount. What the instruction says is: "Do not answer damages at all unless you found the plaintiff less than 50%." And that tells the jury that the plaintiff will not recover unless you find 50% or less for the plaintiff. It tells them the exact percentage point difference between victory and defeat. That's what the instruction does. And that's not permitted. And rule 277 says it's not. I'm quite happy to rely only on 277. I don't think your decision in this case even has to mention Greiger or Grasso that explains 277, but that's not the basis of it. It's rule 277 itself.

Let's look at the part that counsel talks about - when properly part of an instruction or definition. When is a condition properly part of an instruction or definition? The rule says when it is. It's at 277, third line down: "The court shall submit such instructions and definitions as shall be proper to enable the jury to render a verdict." That's what that means. And the 50% or less instruction it doesn't tell the jury one way or the other. It doesn't enable the jury to render a verdict. It simply tells a jury what contributory negligence is all about. It simply tells the jury what the Civ. Prac. & Rem Code says. That's something the jury wouldn't know. It doesn't enable the jury to render so it can't incidentally advise the jury of the legal effect of their answers. The rule says that. So I am quite happy to rely just on the rule, and the rule says: "Shall not tell the jury the legal effect of their answers."

You can predicate damages on affirmative findings of liability. There are three questions in the jury charge: one was liability; two was contributory negligence; and three, was damages. It didn't condition on the liability and, therefore, the cause out to be reversed on _____.