

1976

# Note, Civil Procedure: Written Specification of Reasons for New Trial Orders

Charles Adams

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## Recommended Citation

64 Cal. L. Rev. 286 (1976).

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## I

## CIVIL PROCEDURE

## A. WRITTEN SPECIFICATION OF REASONS FOR NEW TRIAL ORDERS

*La Manna v. Stewart*.<sup>1</sup> The California Supreme Court once again warned trial judges that it will require full and timely compliance with Code of Civil Procedure section 657, which contains detailed statutory provisions governing the issuance of new trial orders.<sup>2</sup> Despite the court's

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1. 13 Cal. 3d 413, 530 P.2d 1073, 118 Cal. Rptr. 761 (1975) (Mosk, J.) (unanimous decision).

2. The statute reads as follows:

The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:

1. Irregularity in the proceedings of the court, jury or adverse party, or any order of the court or abuse of discretion by which either party was prevented from having a fair trial.

2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors.

3. Accident or surprise, which ordinary prudence could not have guarded against.

4. Newly discovered evidence, material for the party making the application, which he could not, with reasonable diligence have discovered and produced at the trial.

5. Excessive or inadequate damages.

6. Insufficiency of the evidence to justify the verdict or other decision, or the verdict or other decision is against law.

7. Error in law, occurring at the trial and excepted to by the party making the application.

When a new trial is granted, on all or part of the issues, the court shall specify the ground or grounds upon which it is granted and the court's reason or reasons for granting the new trial upon each ground stated.

A new trial shall not be granted upon the ground of insufficiency of the evidence to justify the verdict or other decision, nor upon the ground of excessive or inadequate damages, unless after weighing the evidence the court is convinced from the entire record, including reasonable inferences therefrom, that the court or jury clearly should have reached a different verdict or decision. The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

On appeal from an order granting a new trial the order shall be affirmed if it should have been granted upon any ground stated in the motion, whether or not specified in the order or specification of reasons, except that (a) the

earlier decision in *Mercer v. Perez*,<sup>3</sup> which also required compliance with section 657, there had been considerable appellate litigation prior to *La Manna* concerning both section 657 and improperly prepared new trial orders.<sup>4</sup> Even after *La Manna*, however, the litigants who suffer when a judge issues a new trial order that is reversed because of noncompliance with section 657 have no remedy for the judge's failure to perform his duty. The hardship is especially unfair to diligent litigants who specifically request that the judge comply with section 657.

This Note will first examine section 657 and the judicial treatment of the section which preceded *La Manna*. Next, the principal case will be analyzed. Finally, a possible legislative solution to the problem of the litigant left without remedy will be proposed.

### I. *New Trial Orders and Section 657*

Section 657 requires the trial court to specify in the new trial order the grounds on which a new trial is granted. If the order does not contain a specification of reasons supporting the grounds for new trial, the court must prepare such specifications within 10 days after the filing of the new trial order. If the ground on which the new trial order is based is either insufficiency of the evidence or excessive or inadequate damages,<sup>5</sup> the order cannot be affirmed on appeal unless the above

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order shall not be affirmed upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, unless such ground is stated in the order granting the motion and (b) on appeal from an order granting a new trial upon the ground of the insufficiency of the evidence to justify the verdict or other decision, or upon the ground of excessive or inadequate damages, it shall be conclusively presumed that said order as to such ground was made only for the reasons specified in said order or said specification of reasons, and such order shall be reversed as to such ground only if there is no substantial basis in the record for any of such reasons.

CAL. CODE CIV. PRO. § 657 (West Supp. 1975).

3. 68 Cal. 2d 104, 436 P.2d 315, 65 Cal. Rptr. 315 (1968).

4. *Stevens v. Parke, Davis & Co.*, 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973); *Jones v. Citrus Motors Ontario, Inc.*, 8 Cal. 3d 706, 505 P.2d 220, 106 Cal. Rptr. 28 (1973); *Miller v. County Flood Control Dist.*, 8 Cal. 3d 689, 505 P.2d 193, 106 Cal. Rptr. 1 (1973); *Scala v. Jerry Witt & Sons, Inc.*, 3 Cal. 3d 359, 475 P.2d 864, 90 Cal. Rptr. 592 (1970); *Mercer v. Perez*, 68 Cal. 2d 104, 436 P.2d 315, 65 Cal. Rptr. 315 (1968).

In the first 9 months of 1975 new trial orders were reversed in four California Court of Appeal decisions because of the trial judge's noncompliance with section 657. *Worden v. Gentry*, 50 Cal. App. 3d 600, 123 Cal. Rptr. 496 (2d Dist. 1975); *Devine v. Murrieta*, 49 Cal. App. 3d 855, 122 Cal. Rptr. 847 (2d Dist. 1975); *Previte v. Lincolnwood, Inc.*, 48 Cal. App. 3d 976, 122 Cal. Rptr. 194 (1st Dist. 1975); *Krueger v. Meyer*, 48 Cal. App. 3d 760, 121 Cal. Rptr. 814 (3d Dist. 1975). A new trial order was affirmed in *McKenzie v. Memorial Hosp.*, 50 Cal. App. 3d 977, 123 Cal. Rptr. 855 (2d Dist. 1975) after a discussion of the requirements of section 657.

5. Section 657 distinguishes these grounds, where the trial judge acts as a thirteenth juror, from the other grounds upon which a new trial order can be based. A

requirements are met. Section 657 also prohibits the judge from directing the attorney for either party to prepare the order or specification of reasons.<sup>6</sup>

The specification of reasons requirement of section 657 fulfills two purposes.<sup>7</sup> The first purpose is to encourage careful judicial review of new trial orders. Much discretion is given the trial court in ruling on a motion for new trial on the ground of insufficiency of the evidence. The judge may disbelieve witnesses, reweigh evidence, and draw reasonable inferences from the evidence that are contrary to inferences drawn by the jury. On review, all presumptions are in favor of the new trial order as against the jury verdict, and the order will be reversed only on a showing of manifest and unmistakable abuse of the trial court's discretion.<sup>8</sup> For this reason it is necessary that the trial court's broad powers be exercised only after serious deliberation. It is thought that a trial judge will take greater care in granting a new trial order if he has to specify the reasons for granting it. The objective of encouraging serious judicial deliberation of new trial orders is furthered by the requirement that the judge may not direct the attorneys to prepare either the new trial order or the specification of reasons.<sup>9</sup>

Second, the specification of reasons requirement makes the right to appeal from the order more meaningful by narrowing the scope of appellate review. Because the trial judge exercises broad discretion in issuing a new trial order on the ground of insufficiency of the evidence, it is important to the successful prosecution of an appeal that the reasons for granting the order be specified. If an appellant could not know—from examining the trial court's specification of reasons—in what respects the trial judge found the evidence insufficient, it would be diffi-

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new trial order must be affirmed on appeal if it should have been granted on any ground stated in the motion other than insufficiency of the evidence or excessive or inadequate damages. Although a trial judge is required by section 657 to specify his reasons for granting a new trial—on the ground of, for example, errors in law—his failure to do so does not prevent the moving party from showing an appellate court why the order should be affirmed. *Treber v. Superior Court*, 68 Cal. 2d 128, 436 P.2d 330, 65 Cal. Rptr. 330 (1968); *People v. Hunt*, 2 Cal. App. 3d 158, 82 Cal. Rptr. 546 (1st Dist. 1969).

6. An appellate court cannot affirm a new trial order on the ground of insufficiency of the evidence if the order is prepared by an attorney instead of the judge. *Worden v. Gentry*, 50 Cal. App. 3d 600, 123 Cal. Rptr. 496 (2d Dist. 1975); *BART v. McKeegan*, 265 Cal. App. 2d 263, 71 Cal. Rptr. 204 (1st Dist. 1968).

7. These purposes are discussed in *Mercer v. Perez*, 68 Cal. 2d 104, 436 P.2d 315, 65 Cal. Rptr. 315 (1968).

8. *Id.* at 112, 436 P.2d at 320, 65 Cal. Rptr. at 320; *Malkasian v. Irwin*, 61 Cal. 2d 738, 394 P.2d 822, 40 Cal. Rptr. 78 (1964); *Yarrow v. State*, 53 Cal. 2d 427, 348 P.2d 687, 2 Cal. Rptr. 137 (1960); *Brandelius v. City & County of San Francisco*, 47 Cal. 2d 729, 306 P.2d 432 (1957); *Christian v. Bolls*, 7 Cal. App. 3d 408, 86 Cal. Rptr. 545 (4th Dist. 1970).

9. *Mercer v. Perez*, 68 Cal. 2d 104, 113, 436 P.2d 315, 321, 65 Cal. Rptr. 315, 321 (1968).

cult to demonstrate to an appellate court that the evidence was in fact sufficient and that the trial court had abused its discretion by granting the new trial order. Absent a specification of reasons an appellate court would be required to search the record for any insufficiency that would support the new trial order; and in such a search the appellate court might consider insufficiencies totally unrelated to those found by the trial judge. When it is remembered that the trial judge can disbelieve witnesses and consider factors that are not part of the record in ruling on a motion for new trial on the ground of insufficiency of the evidence, it is apparent that unless the trial judge specifies his reasons for ordering a new trial, the right to appeal his order is of little practical significance.

Section 657 thus encourages careful judicial review of new trial orders and narrows an appellate court's scope of review of a new trial order issued on the ground of insufficiency of the evidence so that only those reasons specified within 10 days of the issuance of the order are considered.

## II. Construction and Application of Section 657 Before La Manna

In *Mercer v. Perez*,<sup>10</sup> the court interpreted the section 657 requirement that the specification of reasons be filed within 10 days of the new trial order as a statute of limitations restricting the trial court's jurisdiction. An attempt to file a specification of reasons after the 10-day period had elapsed was held void as in excess of that jurisdiction. Furthermore, the court determined that to adopt a policy of remanding cases to trial judges so that they might file late specifications of reasons would frustrate the two purposes of the specification of reasons requirement.<sup>11</sup> If on remand a trial judge could correct his failure to file a specification of reasons, his incentive to deliberate carefully before granting the new trial would be reduced. Moreover, if a trial judge initially failed to file an adequate specification of reasons, the party appealing the new trial order would have to prosecute a preliminary appeal to obtain the judge's reasons for the order before appealing the order on the merits. In short, effective review of new trial orders would be hindered. Therefore, the court in *Mercer* insisted on full and timely compliance with the requirements of section 657.<sup>12</sup>

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10. 68 Cal. 2d 104, 436 P.2d 315, 65 Cal. Rptr. 315 (1968).

11. *Id.* at 123, 436 P.2d at 328, 65 Cal. Rptr. at 328. See text accompanying notes 7-10 *supra*.

12. Many California decisions have followed the principles set down in *Mercer*. Several have dealt with the adequacy of the specification of reasons. In *Scala v. Jerry Witt & Sons, Inc.*, 3 Cal. 3d 359, 475 P.2d 864, 90 Cal. Rptr. 592 (1970), the court held that a specification of reasons phrased in terms of "ultimate facts" is not adequate. The specification of reasons must do more than restate the ground for the new trial order; it must identify the part of the record that convinces the trial judge that the jury should

In *Stevens v. Parke, Davis & Co.*<sup>13</sup> the court reversed a new trial order based on excessive damages because the specification of reasons was inadequate. The court held that remarks by the trial judge during oral argument on the motion for new trial may not satisfy the specification of reasons requirement of section 657. The court stressed that section 657 requires that the specification of reasons be in the new trial order itself or in a separate document signed by the trial judge and filed with the clerk within 10 days of the filing of the order.<sup>14</sup> It also emphasized section 657's purpose—facilitating appellate review—and stated that this purpose would be frustrated if an appellant challenging a new trial order were required to search the trial judge's statements, as contained in the record, to locate possible reasons for the new trial order.<sup>15</sup>

As can be seen, the California Supreme Court had clearly announced in cases preceding *La Manna* that it would require trial judges to adhere strictly to the provisions of section 657. It was against this background that the court examined the facts of *La Manna*.

### III. *The Facts in La Manna*

*La Manna* arose out of an accident in which the plaintiff was

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have reached a different verdict, so that appellate review of the new trial order is facilitated. The specification of reasons in *Scala* stated only that while the evidence was not sufficient to show that the defendant was negligent, it was sufficient to show that the plaintiff was contributorily negligent. This specification was not adequate because it did not narrow the issues so as to make appellate review of the new trial order feasible.

In *Miller v. County Flood Control District*, 8 Cal. 3d 689, 505 P.2d 193, 106 Cal. Rptr. 1 (1973), the court reversed a new trial order issued on the ground of insufficiency of the evidence because the specification of reasons was not adequate to permit meaningful review of the order. Additional reasons for granting the new trial were, however, stated in another section of the trial court's order which dealt with the denial of a motion for judgment notwithstanding the verdict. But the court refused to consider these reasons on appeal because the specification of reasons in the new trial order did not refer to them. It decided that the purpose of section 657—facilitation of appellate review—was furthered by requiring all the reasons to be set out in the specification of reasons; therefore, the court chose to limit its review to those reasons. See also *Previte v. Lincolnwood, Inc.*, 48 Cal. App. 3d 976, 122 Cal. Rptr. 194 (1st Dist. 1975); *Van Zee v. Bayview Hardware Store*, 268 Cal. App. 2d 351, 74 Cal. Rptr. 21 (1st Dist. 1968).

13. 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973).

14. Section 657 provides in part:

The order passing upon and determining the motion must be made and entered as provided in Section 660 and if the motion is granted must state the ground or grounds relied upon by the court, and may contain the specification of reasons. If an order granting such motion does not contain such specification of reasons, the court must, within 10 days after filing such order, prepare, sign and file such specification of reasons in writing with the clerk. The court shall not direct the attorney for a party to prepare either or both said order and said specification of reasons.

CAL. CODE CIV. PRO. § 657 (West Supp. 1975).

15. 9 Cal. 3d at 62, 507 P.2d at 659, 107 Cal. Rptr. at 51.

struck by the defendant's car while she was crossing an intersection in a marked crosswalk. The defendant denied negligence and raised the defense of contributory negligence, and, the jury returned a verdict for the defendant.

The plaintiff moved for judgment notwithstanding the verdict and for a new trial on the ground of insufficiency of the evidence. The court denied the motion for judgment notwithstanding the verdict; but it granted the motion for new trial, orally specifying from the bench its reasons for doing so.<sup>16</sup> Nevertheless, these reasons were not specified in the written minute order filed by the court later that day. Four days later, the plaintiff filed a memorandum with the trial court, bringing to the court's attention the requirement that it file a written specification of its reasons for granting a new trial order. Accompanying the memorandum was a 3-page specification of reasons supporting the order prepared by the plaintiff for the court's consideration. In spite of the efforts of plaintiff's counsel, however, the court did not file a written specification of reasons until after the period for compliance with section 657 had expired.<sup>17</sup>

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16. The trial judge stated:

The specifications of some of the reasons are that the defendant was clearly negligent. He did violate the pedestrian right of way in the crosswalk and the negligence was a proximate cause of the injury to the Plaintiff and she was injured. The Plaintiff herself, Aida La Manna, was not in any manner negligent. She did use ordinary care as she walked across the street, and there is no substantial evidence whatsoever that she was negligent. She did walk across seven lanes, and I believe there were seven—(interruption by defense counsel) Seventy-seven feet. She was about almost there, anyway, and there was no place of safety. She didn't dart. She didn't make any sudden movements. She was walking along minding her own business. She thought she was home, but when she was hit her conduct was normal. She did all that was expected of her. She did not walk into the car and she did not walk or blunder into the car, and that is the end of the order.

13 Cal. 3d at 417 n.1, 530 P.2d at 1075 n.1, 118 Cal. Rptr. at 763 n.1.

17. Section 657 of the Code of Civil Procedure requires the trial judge to prepare, sign and file a specification of reasons in writing with the clerk within 10 days of the filing of the new trial order. Section 660 requires the trial judge to rule on a motion for new trial within 60 days of the mailing of the notice of entry of judgment to the parties (or of service on the moving party of notice of the entry of judgment, if this is earlier; or if no notice of entry of judgment has been given, within 60 days after the filing of notice of intention to move for new trial). The effect of a failure to rule on a new trial motion within the 60-day period is a denial of the motion. CAL. CODE CIV. PRO. § 660 (West Supp. 1975).

In *La Manna* the trial judge filed a written minute order granting the motion for new trial 35 days after the mailing of notice of the entry of judgment. The order contained neither the grounds nor a specification of reasons supporting the order.

No further action was taken by the trial court until 57 days later (102 days after the mailing of notice of the entry of judgment), when the court filed a *nunc pro tunc* minute order, which purported to amend the earlier order by adding a transcript of the oral statement of reasons the judge had given when he granted the motion for new trial from the bench. The *nunc pro tunc* order had no effect because it was made after the expiration of both the 10-day period of section 657 and the 60-day period of section 660.

The California Supreme Court reversed the new trial order because the trial court had failed to state in writing its reasons for granting the new trial within 10 days of the filing of the order, as required by section 657. In order to avoid a miscarriage of justice, however, the court also reversed the judgment for the defendant. It found the defendant negligent as a matter of law and found the evidence insufficient to support a finding that the plaintiff was contributorily negligent.<sup>18</sup>

#### IV. *The Court's Analysis in La Manna*

The defendant urged reversal of the new trial order on the ground that the trial judge had failed to satisfy the written specification of reasons requirement of section 657. The plaintiff, in support of the new trial order, argued that the trial judge's action had been in substantial compliance with section 657 and that the plaintiff's efforts to secure the trial judge's compliance with section 657 should have relieved her of the consequences of the judge's omission.

The California Supreme Court responded to the plaintiff's substantial compliance argument by noting that section 657 explicitly requires a written specification of reasons. The fact that the two-fold purpose of the specification of reasons<sup>19</sup> might be met by an oral statement by the trial judge was found unpersuasive. According to the court, although the test for determining whether the *content* of a specification of reasons is adequate is whether the two-fold purpose of the requirement is satisfied, the *form* of the specification of reasons is governed by the express provisions of section 657.<sup>20</sup> The court concluded that an oral statement of reasons cannot amount to compliance with section 657's directive that the specification of reasons be in writing. In so doing it

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13 Cal. 3d at 418, 530 P.2d at 1076, 118 Cal. Rptr. at 764. *Siegal v. Superior Court*, 68 Cal. 2d 97, 436 P.2d 311, 65 Cal. Rptr. 311 (1968). *See also* *Treber v. Superior Court*, 68 Cal. 2d 128, 135, 436 P.2d 330, 335, 65 Cal. Rptr. 330, 335 (1968); *Mercer v. Perez*, 68 Cal. 2d 104, 121, 436 P.2d 315, 326, 65 Cal. Rptr. 315, 326 (1968).

18. The plaintiff was hit by defendant's car as she was crossing an intersection in a marked crosswalk. The defendant testified that he noticed a car approaching the intersection from his right as he drove toward the intersection. He took his eyes off the road to watch the car to make sure that it halted at the stop sign; he did not turn back to see the plaintiff in the crosswalk until it was too late to avoid her. The court found that the defendant had violated section 21950(a) of the Vehicle Code, which requires motorists to yield the right of way to pedestrians in marked crosswalks. The court therefore found that the defendant's conduct constituted negligence as a matter of law. The court also found that the defendant could not satisfy his burden of proving that the plaintiff was contributorily negligent because he did not see her before the accident. The court's decision in *La Manna* was controlled by *Schmitt v. Henderson*, 1 Cal. 3d 460, 462 P.2d 30, 82 Cal. Rptr. 502 (1969); *Novak v. Dewar*, 55 Cal. 2d 749, 361 P.2d 709, 13 Cal. Rptr. 101 (1961); and *Gray v. Brinkerhoff*, 41 Cal. 2d 180, 258 P.2d 834 (1953).

19. See text accompanying notes 7-10 *supra*.

20. 13 Cal. 3d at 423, 530 P.2d at 1079, 118 Cal. Rptr. at 767.



relied heavily on *Stevens v. Parke, Davis & Co.*<sup>21</sup> Other decisions where incomplete but substantial compliance with section 657's requirements was found to suffice were distinguished because they involved written specifications of reasons.<sup>22</sup>

The court's answer to the plaintiff's claim that litigants who request judicial compliance with section 657 should not be penalized for the trial court's failure to comply was that the trial judge alone is responsible for compliance with section 657. While the attorney may remind the judge of the requirements of section 657, it is the judge's duty to see that those requirements are met. The justices believed that if the court were to allow the efforts of an attorney to excuse a judge's omission, the responsibility for compliance with section 657 would be shifted from judges to attorneys. The court refused to sanction any such shift of responsibility. It flatly declared:

In view of the plain statutory directive that "the court" shall specify the reasons for granting a new trial, the fatal omission of such a specification cannot be filled by any act of counsel or party.<sup>23</sup>

#### V. Implications of *La Manna*

The need for compliance with section 657 in the interests of judicial efficiency is clear, and the holding of *La Manna* was obviously

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21. 9 Cal. 3d 51, 507 P.2d 653, 107 Cal. Rptr. 45 (1973). See text accompanying notes 13-15 *supra*.

22. 13 Cal. 3d at 422, 530 P.2d at 1079, 118 Cal. Rptr. at 767.

The court discussed *Herman v. Shandor*, 8 Cal. App. 3d 476, 87 Cal. Rptr. 443 (5th Dist. 1970) and *Deshrow v. Rhodes*, 1 Cal. App. 3d 733, 82 Cal. Rptr. 138 (2d Dist. 1969). In *Herman* the trial judge granted an oral motion for new trial; however, the judge's action was a nullity because section 659 of the Code of Civil Procedure requires written notice of the motion for new trial to be filed with the clerk and served on the adverse party. Subsequently, the requirements of sections 659 and 660 were met and the trial judge again granted the motion for new trial. However, the judge had already filed a written specification of reasons after the oral motion for new trial. In granting the second motion the judge adopted those reasons and both parties agreed in court that it was unnecessary for the trial judge to file another specification of reasons in order to comply with section 657. Although section 657 requires that the specification of reasons be contained in the new trial order or be filed within 10 days *after* the issuance of the new trial order, the court in *Herman* held that there was "substantial compliance" with section 657 and affirmed the new trial order.

In *Deshrow*, a motion for new trial was heard on the 60th day following notice of entry of judgment. The judge granted the motion and directed the clerk of the court to enter the written minute order granting the new trial in the permanent minutes of the court on that same day. The clerk did not place a file entry stamp on the minute order until 2 days later and it was contended that the new trial order did not satisfy section 660's requirement that the new trial order be entered in the permanent minutes of the court within 60 days of notice of entry of judgment. The court decided that the clerk's failure to stamp the new trial order in time was merely clerical nonfeasance and refused to allow this deficiency to invalidate the new trial order. *Deshrow* contains a lengthy discussion of the development of the doctrine of substantial compliance.

23. 13 Cal. 3d at 424, 530 P.2d at 1080, 118 Cal. Rptr. at 768.

compelled by the explicit language of section 657. Nevertheless, the case is subject to criticism on two grounds. First, a necessary result of the California Supreme Court's effort to avoid a miscarriage of justice was an apparent disregard of the policies underlying section 657's specification of reasons requirement. Even more important, however, was the court's failure to provide a remedy for the diligent litigant injured by a judge's failure to fulfill the obligations of his office.

The two policies behind section 657—careful trial court deliberation and efficient appellate review—were clearly satisfied by the substantial compliance of the trial judge in *La Manna*, but the supreme court departed from these policies in its decision and instead exalted form over substance. It is clear from the trial judge's oral specification of the reasons for granting the new trial order<sup>24</sup> that he did carefully consider the verdict. And the supreme court, contrary to the policy of section 657, undoubtedly searched the record in order to find evidence to support its determination that the defendant was negligent as a matter of law.<sup>25</sup>

Most significant, however, was the court's apparent failure to note the injustice caused by the moving party's lack of remedy for the trial judge's failure to comply with section 657. In cases such as *La Manna*, the judge's omission is the clear cause of an injury—a judgment against the moving party—but the judge is given absolute immunity from suit.<sup>26</sup> The law of torts thus provides no incentive for a judge to comply with section 657. All the moving party can do is remind the judge of the clear command of section 657. When, as in *La Manna*, these efforts are unsuccessful, the moving party has no way to protect himself from the consequences of the court's failure to fulfill the duties imposed by the legislature and the responsibilities attending judicial office.

Ultimately, the significance of *La Manna* is unclear. It reaffirmed the supreme court's requirement of strict compliance with section 657, but in so doing it ignored the policies behind the rule itself. Although the court's reversal on the merits achieved a just result in *La Manna*, the ad hoc remedy of appellate reversal on the merits is not always available.

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24. See note 16 *supra*.

25. 13 Cal. 3d at 425, 530 P.2d at 1081, 118 Cal. Rptr. at 769. The court apparently considered the merits without noting the inconsistency with the policy of section 657. There is no reference in the opinion to the reasons for doing so; there is no express approval or disapproval for appellate review of the record in similar subsequent cases. Therefore, whether the court has approved the remedy of appellate search of the record is unclear. It is also unclear whether such remedy, if it is to be used at all, should be used only in cases of extreme hardship to the party favored by the order—cases in which the party favored by the order has requested the trial court's compliance with section 657 in order to protect the new trial order.

26. W. PROSSER, *LAW OF TORTS* 987-88 (4th ed. 1971); 4 B. WITKIN, *SUMMARY OF CALIFORNIA LAW* 2456-59 (8th ed. 1974).

Thus, in cases involving facts that are less dramatic than those in *La Manna*, reversal may be denied and judicially injured litigants may suffer. Because judicial deference to the command of the legislature dictated the result in *La Manna*, relief from the potential unfairness inherent in section 657 must be provided by the legislature.

#### VI. *A Proposal For Legislative Change*

The legislature could deal with the problem posed by *La Manna* by providing for a writ of mandamus to compel the trial judge's compliance with the specification of reasons requirement of section 657. Obviously only the party granted a new trial order should be given the right to seek the writ, as the writ procedure should not be used as a means of providing an unsuccessful litigant with expedited appellate review.

There are only two possible grounds for the proposed writ. First, the party receiving the new trial could urge the trial court's complete failure to comply with section 657's requirements as a basis for invoking the writ. This was the situation presented in *La Manna*. Second, the party who obtains a new trial order could seek the writ in order to obtain protection from an insufficient specification of reasons. The first basis for the writ would not involve resolution of any significant legal issues—the appellate court would simply compel the trial court to fulfill its duty to the aggrieved litigant. The second basis, however, might raise more difficult legal questions, since the appellate court might be required to evaluate the legal sufficiency of the trial judge's specification of reasons.

In order to eliminate the possibility that the extraordinary writ procedure would be abused by litigants seeking what would amount to an expedited appeal, issuance of a writ of mandamus to review the sufficiency of a trial court's specification of reasons would have to be limited to the situations where the judge failed, on the face of the written specification, to state sufficient reasons for granting the new trial order. This limitation would prevent litigants who obtained a new trial from using the writ procedure to compel the trial court to buttress its reasons, and would limit use of the writ to those situations in which the specification suffered from formal or facial defects. In addition, this limitation would probably be compelled by the doctrine that mandamus may not be used to control a court's exercise of its discretion.<sup>27</sup> Mandamus may, however, be used to compel the exercise of a judge's discretion.<sup>28</sup> Thus, compelling a judge to prepare a formally sufficient specification of

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27. See, e.g., *Faulkner v. Toll Bridge Authority*, 40 Cal. 2d 317, 253 P.2d 659 (1953); *Palmer v. Fox*, 118 Cal. App. 2d 453, 258 P.2d 30 (2d Dist. 1953).

28. Frank, *Mandamus*, in CALIFORNIA CIVIL WRITS § 5.30 (1970).

reasons would not be objectionable—it would not involve control of discretion.

Mandamus could be used in the case in which a specification of reasons contained a formal or facial defect that could be shown to be fatally prejudicial to the grant of a new trial. Mandamus can be used to remedy an abuse of discretion;<sup>29</sup> and it should be obvious that failure to cure unnecessary formal insufficiency in a specification of reasons for a new trial order amounts to an abuse of discretion.<sup>30</sup> If, on the other hand, it could not be demonstrated that the defects amounted to prejudicial formal legal insufficiency, the writ would not issue—appeal by the party who received the verdict would determine the correctness on the merits of the grant of a new trial. In deciding whether to issue the writ, an appellate court would need to consider only whether the easily verifiable written specifications requirement of section 657 had been met. The *correctness* of the trial judge's grant of a new trial would not be placed in issue if a writ was sought. Since issuance of the writ would not require an examination of the trial record, expedited determination could be had. The legislature could provide a short interval, after the 10-day period for the filing of the specification of reasons had expired, during which a litigant could seek the writ. Similarly, expedited appellate decision on the petition could be required. The speed with which appellate determination could be obtained would minimize the possibility that the writ procedure would be abused as a means of delay. Although it is true that the responsibility of seeking the writ would be placed on the litigant, it is believed that this inconsistency with the presently expressed policy of section 657 would be outweighed by the benefits of providing a remedy to the litigant injured by a trial judge's noncompliance with section 657. During the time that a return on the writ was pending, the trial judge would, of course, be allowed to modify the new trial order or specification of reasons so that they would comply with section 657.

### Conclusion

Although the California Supreme Court's decision in *La Manna v. Stewart* reaffirmed the need for trial court compliance with the requirements of Code of Civil Procedure section 657, it overlooked the injustices created when trial court judges fail to provide written specifications

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29. See *State Farm Mut. Auto. Ins. Co. v. Superior Court*, 47 Cal. 2d 428, 304 P.2d 13 (1956).

30. "In a legal sense discretion is abused whenever in the exercise of its discretion the court exceeds the bounds of reason, all the circumstances before it being considered." *Id.* at 432, 304 P.2d at 15, quoting *Berry v. Chaplin*, 74 Cal. App. 2d 669, 672, 169 P.2d 453, 456 (2d Dist. 1946).

of their reasons for granting new trial orders. Given that the language of section 657 may have compelled the result in *La Manna*, legislative action is urged to correct the potential injustice inherent in the present statute.

The proposed statutory amendment would encourage fulfillment of the two purposes of section 657—encouraging careful judicial review of new trial orders, and narrowing the scope of appellate review—because it would provide a means by which litigants could compel judicial compliance with that section. A trial judge who failed to deliberate carefully before ordering a new trial, or who did not specify sufficient reasons to adequately narrow the scope of appellate review of the new trial order, would receive a writ from an appellate court ordering him to do so. It is hoped that the existence of such a remedy for litigants would both eliminate the necessity for its use and reduce the number of appeals of new trial orders.

*Chuck Adams*