THE SPECIAL INTERROGATORY: AN INSTRUMENT OF UNFAIRNESS IN THE JURY SYSTEM

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This article advocates the abolition of the special interrogatory in Illinois jury practice. The reasons for eliminating special interrogatories are threefold. First, the underlying premise, that the jury needs to be tested, is faulty. Second, special interrogatories generate confusion and waste precious legal and judicial resources. Finally, their use is unjust because they inherently favor the defendant, and place an additional, unnecessary burden on the plaintiff.

A. Background

The practice of asking a jury specific questions regarding the facts supporting its verdict, called "special interrogatories," dates back to the earliest days of English common law.[1] In Anglo-Norman legal practice, judges would ask these questions where the specific facts found by the jury were needed, in addition to their primary finding, to render judgment in the case.[2] Later authorities advocated using special interrogatories to encourage the jury to "correct" a "surprising" finding.[3]

Special interrogatories entered into American practice through the common law at an early date, although their modern use is usually governed by statute.[4] In Illinois, their use is codified in 735 ILCS 5/2-1108. The Federal Rules of Civil Procedure also provide for the use of special interrogatories, under Rule 49.

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B. The Nuts and Bolts of the Special Interrogatory

Special interrogatories are submitted to the jury upon the request of one of the parties.[5] In the broadest terms, each special interrogatory requires a jury to determine a specific issue of ultimate fact.[6] It must concern a "material question" at issue in the case.[7] If a special interrogatory is properly requested, the judge must submit it to the jury, and he has no discretion to refuse it.[8]

The purposes of special interrogatories under Illinois law are: (1) to act as a test or check of the jury's general conclusions against a specific finding;[9] and (2) to "clarify and sharpen the jury's consideration of the questions presented by the case."[10] The facts found by the jury in response to special interrogatories are known as special findings.[11]

In an attempt to prevent confusion and to ensure the jury's understanding, courts require a special interrogatory to: (1) be a single question, (2) relate only to an ultimate issue of fact, (3) be simple and unambiguous, and (4) not be repetitive, confusing, or misleading.[12] Additionally, it should not be argumentative.[13] It should not mislead or prejudice one of the parties.[14] It cannot, in the asking, assume that the jury has made other findings.[15] In short, it should be a direct question, eliciting a direct answer.

Although there is a presumption in favor of the general verdict,[16] the special findings determine the outcome of the case in the event that there is a conflict between the two.[17] If this occurs, the general verdict is rendered a nullity.[18] The rationale for this rule is that the jury, by having their deliberations directed to specific questions which determine the ultimate outcome of the case, gave these specific questions more thought than they did the general verdict.[19]

C. The Notion That The Jury Needs To Be Tested On Their Verdict Is An Affront To Our System of Justice.

The right to have your case decided by a jury is a "fundamental right"[20] of the "highest importance."[21] This right is protected by both the federal and state constitutions,[22] and its scope must be liberally construed.[23] It seems odd that the primacy of this institution, so central and fundamental to our system of justice, is then presumed to be the weak reed, whose work needs further shaping by the artifice of special interrogatories.

Nevertheless, the premise underlying special interrogatories is the patrician view that juries are a necessary evil at best. This argument has been fueled by the belief that litigation has become increasingly complex, beyond the ken of the average juror. Consequently, these safeguards were added to the system to guard against a jury's "wrong" answer. However, other, more appropriate safeguards exist which do not create the problems raised by special interrogatories.

i. The Proper Safeguards

Our legal system has implemented numerous safeguards to combat any weakness in the jury system. First, the judge is armed with two weapons by which he may correct a clearly erroneous finding, namely, judgment notwithstanding the verdict and remittitur. Judgment notwithstanding the verdict allows the judge to overturn the jury's verdict when it is against the manifest weight of the evidence. This allows the judge to countermand the jury's verdict when it simply cannot be reconciled with the law and

facts presented in the case. Remittitur enables the judge to reduce a damage award that does not conform to the evidence. Both of these instruments allow the judge to correct a "surprising" finding by the jury without resorting to the special interrogatory and its many associated pitfalls.

ii. Jury Instructions Alone Are Sufficient.

Modern jury instruction practice has eliminated the need to use special interrogatories to test the jury's general verdict. Improvements in the way that juries are instructed, particularly the use of the Illinois Pattern Instructions ("IPI"), combined with painstaking jury instruction conferences, greatly reduce the chance that a jury will be improperly instructed. The IPI also gives the attorney the tools to do the best job that he or she is capable of in preparing the jury for their deliberations and providing a clear explanation of the applicable law.

In Illinois, litigants have an absolute right to have the jury instructed both fairly and correctly.[24] A jury instruction meets this burden when it "fully, fairly and comprehensively inform[s] the jury of the relevant legal principles."[25] A presumption exists in favor of using the instructions found in the IPI,[26] ensuring that any given jury will receive the same standard, approved instructions that every other jury considering the same claim receives. With this mechanism in place to ensure that the jury is correctly instructed on the "relevant legal principles," it follows that the general verdict it reaches should also be correct,

especially in light of the presumption that a jury follows the instructions it has been given.[27] Thus, there is no need to test the resulting verdict with special findings.

Unfortunately however, even if a jury is correctly instructed, the court must still submit proper special interrogatories to the jury even if the subject matter of the interrogatory is already covered in an instruction.[28] The submission of a special interrogatory on top of a correct jury instruction, often using exactly the same language, is redundant.[29] This raises additional problems for all concerned.

D. The Special Interrogatory As An Additional Safeguard Breeds Confusion.

Asking repetitive questions of the jury increases the chance the jury will be confused and render a general verdict inconsistent with one or more of the special findings. Moreover, the use of special interrogatories expends valuable judicial resources in the inevitable appeals that emanate from them. Indeed, Justice Cook of the Fourth Appellate District raised the argument that special interrogatories not only frequently fail to achieve their purpose, but often disrupt the trial with a result not intended by the jury and not expected by the court or the parties.[30]

However, if juries were required to render only a general verdict, there could be no confusion since a general verdict cannot contradict itself. Appellate courts would not have to guess or engage in contrasting factual flights of fancy to evaluate the proper meaning of the special findings.

In evaluating the propriety of the special interrogatory, an appellate court looks at the context of the entire submission to the jury, including the offending special interrogatory, to see how it would be understood.[31] However, because juries cannot impeach their own verdicts by showing how or why the verdict was reached,[32] it is

impossible for the appellate court to ever know for certain whether the special interrogatory actually confused the jury. Therefore, the court is forced to make a guess. This leads to appellate speculation, but not necessarily to the truth. Determining when a special interrogatory is improper is sometimes difficult to gauge, creating further confusion.

Because there is a presumption in favor of the general verdict, judges are often asked to engage in contorted intellectual exercises to determine if the jury could have reasonably reached both the general verdict and the special finding. A recent medical malpractice case brings this point home. Parents sued their pediatrician based upon his failure to properly diagnose and treat their infant daughter resulting in the child's death.[33] The plaintiffs presented evidence that the child suffered from dehydration, while the defendant offered other possible causes of death. The defendant offered a special interrogatory asking, "Did dehydration contribute to cause the death of LaTonya King?" The jury returned a verdict for the plaintiffs but answered the special interrogatory in the negative. The court entered judgment for the defendant on the special finding and denied the plaintiff's motion for a new trial; the appellate court affirmed. This course of events clearly reveals the jury confusion raised by the special interrogatory which ultimately resulted in the court overruling the will of the jury.

On the other hand, if the judge can construct a hypothetical scenario of the jury's thought process, allowing him to reach a "reasonable hypothesis consistent with the general verdict," he may ignore the inconsistent special finding and enter judgment on the general verdict.[34] In essence, if a creative judge can sidestep inconsistent special

findings, the jury's general verdict still stands. Nevertheless, the appellate court can then weigh in and trump the trial court's judgment–spreading yet another layer of confusion. For example, in an indemnity action the trial court gave two special interrogatories on the third-party complaints.[35] The jury entered a general verdict in favor of one of the third-party plaintiffs, but answered a special interrogatory stating that the same party was guilty of major fault. The trial court set aside the special interrogatory and entered judgment on the general verdict. On appeal, the court reversed stating that, based upon the response to the special interrogatory, the trial court should have rendered judgment against the third-party plaintiff. The case was remanded to the trial court with instructions to adhere to the jury's findings.

E. Special Interrogatories Favor The Defendant

Finally, special interrogatories result in disparate treatment of the plaintiff in favor of the defendant.[36] This occurs because the parties are prohibited from explaining the effect that the jury's special findings may have on the outcome of the case during closing argument.[37] Specific rules govern the treatment of special interrogatories during closing argument. Since it is considered to be a test of the jury's general verdict, informing the jury of the source of the special interrogatory or the necessity to conform its answer to the special interrogatory with its general verdict is said to interfere with this test, and has been held improper.[38] It is also generally reversible error to tell the jury that it must answer a special interrogatory in a specific way in order to protect the plaintiff's verdict.[39] Accordingly, it is reversible error to tell the jury that if it is going to be

consistent with a finding in favor of the plaintiff it must answer affirmatively, and if the jury awards any amount of damages, the jury must answer "yes" to the interrogatory in order to be consistent.[40] The most common scenarios constituting reversible error *per se* are those in which the jury is told that the special interrogatory supersedes the general verdict, or that the special interrogatory has to be answered in a certain way for the plaintiff to recover damages.[41]

On the other hand, the court will find no *per se* reversible error when the jury is told that answering a particular interrogatory in a specified manner is equivalent to saying that the plaintiff is at fault and should not recover.[42] Likewise, there is no *per se* reversible error when the jury is informed that the special interrogatory and general verdict should be consistent, coupled with a curative instruction reminding the jury to base their answer to the special interrogatory upon the evidence.[43] Accordingly, if the attorney merely requests that the jury answer its special interrogatories in a manner consistent with the verdict, this is not reversible error *per se*.[44]

In light of these rules, special interrogatories effectively give defendants more "bites at the apple." They increase the number of positive outcomes for the defendant while decreasing the number of positive outcomes for the plaintiff. Defendants win if they receive a positive general verdict, and they also win if they receive a single, contrary special finding.

Conversely, the plaintiff is saddled with the burden of not only prevailing on the general verdict, but must prevail on all special interrogatories as well. The best the plaintiff can hope for is that the special findings will not hurt the case–but they certainly

won't help. There are a number of reported cases where the plaintiffs convinced the jury that they were entitled to recover, thus meriting a general verdict in their favor, yet the jury's inconsistent answer to a single special interrogatory resulted in a verdict for the defendant.[45] For instance, in one case, the jury returned a general verdict for the plaintiff for $2.7 million based on negligence against the city. However, the jury's special finding that the city did not have constructive notice of the defective condition that caused the injury forced the court to enter judgment for the defendant.[46] Jurors, after discovering that their general verdict has been overturned by their answer to a special interrogatory are generally outraged. As is so often the case where special interrogatories are used, the jury has been confused by the interrogatory but not by the verdict form.

Special interrogatories require plaintiffs to prove and then reprove their case in order to prevail. The plaintiff is only given one chance to win, but has as many chances

to lose as there are special interrogatories. This instills a patent unfairness in our jury system that demands the elimination of the special interrogatory.

Avoiding Special Interrogatory Pitfalls

Special interrogatories are not allowed unless a responsive answer would be inconsistent with the general verdict.[53] This means that the party submitting the special interrogatory, usually the defendant, is trying to rankle the other side just one last time in order to win their case. Therefore, you must anticipate the special interrogatory and ensure that you have thoroughly answered the ultimate issues of fact during the

presentation of evidence so that the jury could not find in your favor but then render a contrary finding through the special interrogatory. A new tactic, and one that appears successful is to meet the interrogatory head-on in closing argument. Address it first, so the jury will address it first and then be less likely to treat it as an afterthought and consequently answer it incorrectly. Furthermore, within the parameters of acceptable closing argument, you must clearly argue these ultimate issues and the vital importance they have in your case. You must also fervently object to any special interrogatories that relate to matters not in issue, questions of law, or evidentiary matters, as they are wholly improper.[54] As in all good trial practice, it is essential that you constantly revisit the elements of your case and anticipate all possible defenses or tactics including those in the form of special interrogatories.

Conclusion

It is time to end the use of special interrogatories. The historical justifications supporting their use have withered. Special interrogatories are not necessary for Illinois juries to render their verdicts. The idea that special interrogatories are necessary to check juries is an outmoded view of jurors' intelligence. Moreover, this purported corrective device creates needless confusion and complexity while draining judicial resources.

It is time the legislature moved Illinois toward a system based solely on general verdicts.[55] Matters now committed to special interrogatories will become fodder for evidence, argument, and persuasion, and the lawyer's skill at presenting his client's case

will decide more cases than confusing throwbacks to the days of knights and kings.

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1. Morgan, Edmund M., *A Brief History of Special Verdicts and Special Interrogatories*, 32 Yale L. J. 575, 591 (1923).

2. *Id*.

3. *Id*. at 592. In 1670, English Chief Justice Vaughan noted that:

> "[The asking of special interrogatories] is ordinary, when the jury finds unexpectedly for the plaintiff or the defendant, the Judge will ask, how do you find such a fact in particular? and upon their answer he will say, then it is for the defendant, though they found for the plaintiff, or *e contrario*, and thereupon they rectifie (sic) their verdict."; The Constitutionality of Special interrogatories, p. 761.

4. *Id*.

5. 735 ILCS 5/2-1108: Verdict--Special interrogatories. Unless the nature of the case requires otherwise, the jury shall render a general verdict. The jury may be required by the court, and must be required on request of any party, to find specially upon any material question or questions of fact submitted to the jury in writing. Special interrogatories shall be tendered, objected to, ruled upon and submitted to the jury as in the case of instructions. Submitting or refusing to submit a question of fact to the jury may be reviewed on appeal, as a ruling on a question of law. When the special finding of fact is inconsistent with the general verdict, the former controls the latter and the court may enter judgment accordingly.

6. *Lozado v. City of Chicago*, 279 Ill. App. 3d 285, 664 N.E.2d 333 (1st Dist. 1996)

7. 735 ILCS 5/2-1108.

8. *Johnson v. Owens-Corning Fiberglass Corp.*, 313 Ill. App. 3d 230, 729 N.E.2d 883, 888 (3rd Dist. 2000); *Snyder v. Curran Township*, 281 Ill. App. 3d 56, 666 N.E.2d 818, 823-4 (4th Dist. 1996).

9. *Kurrack v. American Dist. Tel. Co.*, 252 Ill. App. 3d 885, 625 N.E.2d 675, 681 (1st Dist. 1993); *Betts v. Manville Personal Injury Settlement Trust*, 225 Ill. App. 3d 882, 588 N.E.2d 1193, 1206 (4th Dist. 1992).

10. 735 ILCS 5/2-1108, Historical & Practice Notes.

11. *Burns v. Howel Tractor & Equip. Co.*, 45 Ill. App. 3d 838, 360 N.E.2d 377, 383 (1977).

12. *Snyder*, 666 N.E.2d at 822; *Lundquist*, 605 N.E.2d at 1389.

13. *Young v. Chicago Transit Authority*, 209 Ill. App. 3d 84, 568 N.E.2d 18, 25 (1st Dist. 1990)

14. *Fakhoury v. Vapor Corp.*, 218 Ill. App. 3d 20, 578 N.E.2d 121, 127 (1st Dist. 1991)

15. *Lundquist*, 605 N.E.2d at1390.

16. *Wicks v. Cuneo-Henneberry Co.*, 319 Ill. 344, 150 N.E. 276 (1925); *Zygaldo v. McCarthy*, 17 Ill. App. 3d 454, 308 N.E.2d 167, 169 (1974).

17. *Borries v. Z. Frank, Inc.*, 37 Ill.2d 263, 226 N.E.2d 16, 18 (1967). Before entering a verdict based on the special findings, the judge must also independently determine that the special findings are supported by either "substantial evidence" or are "not contrary to the manifest weight of the evidence." Vosicky, Joseph F., Jr., *The Constitutionality of Special Interrogatories Under the Illinois Civil Practice Act*, 14 John Marshall L. Rev. 761, 764-66 (1981).

18. *Freeman v. Chicago Transit Auth.*, 33 Ill.2d 103, 210 N.E.2d 191, 195 (1965) (Underwood, J., specially concurring).

19. *Borries*, 226 N.E.2d at 19; *Kurrack*, 625 N.E.2d at 681; *Blakey v. Gilbane Building Corp.*, 303 Ill. App. 3d 872, 708 N.E.2d 1187, 1193 (4th Dist. 1999).

20. *Ney v. Yellow Cab Co.*, 2 Ill.2d 74, 117 N.E.2d 74, 80 (1954).

21. *People v. Pruitte*, 125 Ill. App. 3d 580, 466 N.E.2d 341, 346 (1984).

22. Ill. Const. 1970, art. I, § 13; *Weisman v. Schiller, Ducanto & Fleck*, 314 Ill. App. 3d 577, 733 N.E.2d 818, 821 (2000).

23.23. *Hernandez v. Power Constr. Co.*, 73 Ill.2d 90, 382 N.E.2d 1201, 1203 (1978).*Pecoraro v. Kesner*, 217 Ill. App. 3d 1039, 578 N.E.2d 53, 56 (1991); *Williams v. National Super Markets, Inc.*, 143 Ill. App. 3d 110, 491 N.E.2d 938, 939 (1986).

24. *Herron v. Anderson*, 254 Ill. App. 3d 365, 626 N.E.2d 1035, 1045 (1993).

25. *Sanders v. City of Chicago*, 306 Ill. App. 3d 356, 714 N.E.2d 547, 554 (1999).

26. Supreme Court Rule 239(a); *Herron*, 714 N.E.2d at 1045.

27. *People v. Cole*, 131 Ill. App. 3d 36, 475 N.E.2d 620, 625 (1985).

28. *Lundquist v. Nickels*, 238 Ill. App. 3d 410, 605 N.E.2d 1373, 1389 (1st Dist. 1992); *Santos v. Chicago Transit Authority*, 198 Ill. App. 3d 866, 556 N.E.2d 607, 610 (1st Dist. 1990).

29. To avoid confusing special interrogatories the courts mandate using the same language as is used in the instructions. *Slavin v. Saltzman*, 268 Ill. App. 3d 392, 643 N.E.2d 1383 (2nd Dist. 1994); *Lundquist*, 605 N.E.2d at 1389-90; *Duffin v. Seibring*, 154 Ill. App. 3d 821, 507 N.E.2d 930, 939 (4th Dist. 1987); *but see Eaves v. Hyster Co.,* 244 Ill.App.3d 260, 614 N.E.2d 214, 218 (1st. Dist., 1991), 614 N.E.2d at 218 (special interrogatory was clear, despite failure to use same terms as used in instructions).

30. *Blakey,* 708 N.E.2d at 1193.

31. *Blakey*, 708 N.E.2d at 1194, *La Pook v. City of Chicago*, 211 Ill. App. 3d 856, 570 N.E.2d 708, 713 (1st Dist. 1991)

32.*Chalmers v. City of Chicago*, 88 Ill.2d 532, 431 N.E.2d 361, 363 (1982).

33. *Simmons v. Garces,* Case 319 Ill.App.3d 308, 745 N.E.2d 569 (1st Dist. 2001).

34. *La Pook*, 570 N.E.2d at 713; *Smilgis v. City of Chicago*, 97 Ill.App.3d 1127, 423 N.E.2d 1289 (1st Dist., 1981).

35. *Ciborowski v. Philip Dresler & Associates*, 110 Ill. App. 3d 981, 443 N.E.2d 618 (1st Dist. 1983).

36. *Albaugh v. Cooley*, 88 Ill. App. 3d 320, 410 N.E.2d 873, 880 fn 5 (1st Dist. 1980) *rev'd on other grounds* 87 Ill.2d 241, 429 N.E.2d 837 (1981) (noting that the plaintiff cannot win without the general verdict, and so special interrogatories are at best neutral to the plaintiff (they do not cost him the general verdict) and at worst harmful (contrary special findings take away the general verdict); *see also* Vosicky, *Constitutionality of Special Interrogatories*, 767 fn 40; *Blakey*, 708 N.E.2d at 1193 ("The possibility of an unintended, unreasoned result is made more likely by the fact that the court and counsel are severely restricted in their discussion of a special interrogatory.").

37. *Sommese v. Maling Brothers, Inc.*, 36 Ill. 2d 263, 222 N.E.2d 468, 470 (1966).

38. *Blakely*, 708 N.E.2d at 1193.

39. *White v. Stevens*, 301 Ill. App. 3d 709, 704 N.E.2d 882, 883 (2nd Dist. 1998).

40. *Id*.

41. *Wojtowicz v. Cervantes*, 284 Ill. App. 3d 524, 672 N.E.2d 357, 360 (1st Dist. 1996).

42. *Id*.

43. *Id*. at 361.

44. *Id.*

45. *See e.g., LaPook*, 570 N.E.2d 713-715 (plaintiff won general verdict in wrongful death action arising out of death of wife and child; jury's special finding that paramedics did not engage in willful or wanton conduct entitled defendants to judgment); *State Farm Fire & Cas. Co. v. Miller Elec. Co., a Div. of Carol Cable Co., Inc.*, 204 Ill. App. 3d 52, 562 N.E.2d 589 (2nd Dist. 1990) (plaintiff won general verdict in product liability case; jury's special finding that extension cord was not defective when it left manufacturer entitled manufacturer to judgment).

46. *DiMarco v. City of Chicago*, 278 Ill. App. 3d 318, 662 N.E.2d 525 (1st Dist. 1996).

53. Stites, Richard E. and Brandt, Peter W., IICLE, Illinois Civil Practice, Vol. III, Ch. 11, *Instructions and Special Interrogatories*, § 11.32 (1997).

54. *Id*. at § 11.35 *citing Rice v. Gulf, Mobile & Ohio Ry.*, 84 Ill. App. 2d 163, 228 N.E.2d 162 (1st Dist. 1967).

55.53. Almost 20 years ago, a court found that the statute allowing parties to request special interrogatories to be unconstitutional, holding that it constituted an impermissible legislative intrusion on the powers of the judicial branch, and therefore violated the separation of powers doctrine. *Albaugh*, 410 N.E.2d at 877-80. The Supreme Court rejected this, finding that the statute allowing special interrogatories did not infringe on the court's inherent rule-making authority, absent a conflicting Supreme Court rule. *Albaugh v. Cooley*, 87 Ill.2d 241, 429 N.E.2d 837, 840 (1981).