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Gap in jury instructions highlighted by elimination of special interrogatories

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The civil justice system relies on juries to find the facts of a case and render a verdict. Based upon that verdict, which comes from the Latin *verus* meaning “truth,” the trial court enters a judgment by applying the law to those facts found by the jury.

Last year, the Illinois General Assembly effectively eliminated special interrogatories through Public Act 101-84, and in doing so, upended a century and a half of Illinois precedent and tradition. See *Pittsburgh, C., C. & St. L.R. Co. v. Smith*, 207 Ill. 486, 490-91 (1904) and *Albaugh v. Cooley*, 87 Ill.2d 241, 251-252 (1981). That act, which modifies 735 ILCS 5/2-1108, makes the giving of a special interrogatory discretionary with the trial court, not mandatory, and makes the response to a special interrogatory that contradicts the general verdict not binding on the judgment to be entered by the trial judge.

As a result of this change, in situations in which the Illinois Pattern Instructions do not provide an instruction, the parties have no meaningful and accurate way to present particular factual issues to the jury. This is especially so in cases in which the liability of premises owners for third-party criminal acts is at issue and in cases in which the sole proximate cause defense is at issue.

As set forth in the recent decision in *Witcher v. 1104 Madison St. Restaurant*, 2019 IL App (1st) 181641, foreseeability is the touchstone for whether a defendant had a duty to protect the plaintiff from the criminal acts of a third party. The court, citing *Marshall v. Burger King Corp.*, 222 Ill. 2d 422, 436-37 (2006), held that “[b]efore a duty to protect will be imposed on a possessor of land,

the court must also consider (1) whether the criminal attack was reasonably foreseeable (2) the likelihood of the injury (3) the magnitude of the burden to guard against the injury and (4) the consequences of placing that burden upon the possessor.”

If a trial court finds a question of fact on the issue of foreseeability and orders the matter proceed to trial, the problem becomes how to instruct the jury because there are no jury instructions on foreseeability for this kind of case.

While duty is typically a question of law, in the context of liability for the criminal acts of third parties, foreseeability is not only in the duty element, but also in the causation element. See *Sanchez v. Wilmette Real Estate and Management, Co.*, 404 Ill.App.3d 54, 62 (2010). In most cases involving liability of landowners for the criminal acts of third parties, foreseeability is the critical issue in the case. In the absence of a special interrogatory that would test the verdict and is binding on the outcome should the answer be contrary to the general verdict, the jury has no opportunity to decide the central issue in the case because it is not directly presented to them in the jury instructions. Burying duty and causation in the issues instruction is hardly a remedy to allowing juries to decide this issue and get to the truth of the matter.

Likewise, following the Supreme Court’s decision in *Ready v. United/Geodecke Services Inc.*, 232 Ill.2d 369 (2008), settling or dismissed defendants do not appear on the jury verdict form for the purposes of allocating fault. As a result, defendants are left to rely on the sole proximate cause instruction. See *Douglas v. Arlington Park Racecourse LLC*, 2018 IL App (1st) 162962.

Unlike the duty element, which is usually a question of law, causation is usually a question for the jury that is often fact-dependent and frequently based upon conflicting expert testimony through which the jury must sort to come to a conclusion. In the absence of a meaningful prospect of having the trial judge include a special interrogatory in the jury instructions, IPI 12.04 and IPI 12.05 will be the only means of presenting the issue of sole proximate cause to the jury. Even the long forms of those instructions are often inadequate to present one of the principal issues in the case directly to the jury.

The appropriate response to fill these gaps, and perhaps others, is for the Committee on Jury Instructions in Civil Cases to craft appropriate jury instructions to reflect the new reality of Illinois civil jury trials without special interrogatories. Not only is there a need for instructions on foreseeability in third-party criminal liability cases and a modification of the sole proximate cause instructions, but there is also a need for an instruction on how the trial judge is to charge the jury in the event the answer to a special interrogatory conflicts with the jurors’ verdict.

The General Assembly, responding to political pressure, created an issue by modifying the long held practice of special interrogatories in Illinois. It is now incumbent on the bench and bar to respond to remedy this situation and ensure that the facts the jury actually finds are reflected in verdicts and judgments.

