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Sometimes support comes from an unlikely source

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Sometimes support for a position comes from an unlikely source. For example, during the debate over the prejudgment interest bills (which, as of this writing, still sits on the governor's desk) it came to light that there was a proposal from New York Gov. Andrew Cuomo to amend that state's prejudgment interest statute to reduce the interest imposed from its current 9% to a one-year constant maturity treasury yield.

Similar unexpected support for the necessity and utility of special interrogatories occurred in a recent oral argument before the 4th District Appellate Court in *MarkAllen v. Sarah Bush Lincoln Health Center*. This medical malpractice case, which resulted in a record verdict in favor of the plaintiff, arose from an alleged failure to order an MRI on a patient in the emergency room who presented with a suspected spinal epidural abscess. The plaintiff sued the emergency room physician, one Dr. Stout, and the hospital, but not the radiologist, one Dr. Dale, who read a CT. The hospital presented a sole proximate cause defense with regard to Dale.

On appeal, among several other arguments, the defense contended that it was error for the trial court not to give the long form of Illinois Pattern Instruction 12.04 in such a circumstance. The defense asserted that it was further error for the trial court to have given a modified version of IPI 105.11 that concerns apparent agency, which the defense argued was not an issue in the case.

At oral argument, one of the justices asked counsel for the plaintiff-appellant, Steve Phillips, the following question:

"What is your position regarding whether or not some type of special interrogatory would have helped us out here in terms of determining exactly what the basis was for the jury's decision?"

In response, the past president of the Illinois Trial Lawyers Association, stated:

"I agree whole heartedly it would have and I think under the … *Mikolajczyk v. Ford*, [231 Ill.2d 516 (2008)], I think the Supreme Court has held that not only do they have to object, they have tender an alternate version which they did not. And they didn't tender any special interrogatories in this case and they certainly could have. And they could have tested the verdict simply by asking '[w]as Dr. Stout a proximate cause of Mark Allen's injuries.' And if they didn't like that, they could have taken any or all the six allegations against Dr. Stout and asked was Dr. Stout a proximate cause of injuries to Mark Allen. They didn't do it. And there's no way to test this general verdict when they didn't do it."

A better argument for the special interrogatories could not be made, especially in the context of a medical malpractice case in which complex issues of causation are at issue. It was precisely this kind of circumstance that the Illinois Defense Counsel had in mind when it issued its position paper opposing HB2233 on Feb. 15, 2019, and stated:

"[S]pecial interrogatories are essential under Illinois law for courts to ascertain the propriety of a jury's verdict and indeed for the jury itself to ensure that it is coming to the correct conclusion. Testing the elements of a cause of action, and in particular negligence and causation, as well as the fundamentals of an affirmative defense, is necessary to safeguard the integrity of the jury's general verdict. In a great many cases, unless a jury is asked about specific controlling issues in special interrogatories, the court and public cannot have assurance of the verdict."

For their part, counsel for the defendant-appellant in *Allen* argued on rebuttal that a special interrogatory would not have been appropriate in that case because it would not have been controlling as a result of the improper injection of apparent agency into the instructions.

Whether a special interrogatory is appropriate in any particular case, as articulated in this space on April 22, 2020, and April 7, the principle is the same: prior to the effective elimination of special interrogatories by P.A. 101-184, they served a unique and essential role in the jury instruction process in Illinois that benefited plaintiffs, defendants, and the cause of civil justice.

The plaintiff's bar worked in 2019 to effectively eliminate special interrogatories. It is the height of irony that one of their former leaders now contends at oral argument, in an effort to defend a verdict that he obtained, that special interrogatories would have done precisely what the defense bar argued they would do: test the general verdict on discrete issues of an element of the claim. Assuming it was appropriate in the *Allen* case, had a special interrogatory been issued and answered by the jury consistent with the general verdict, there would likely be no doubt about the propriety of the causation aspects of the jury instructions in this case.

Even though diminished in efficacy and without an instruction from the Committee on Jury Instructions in Civil Cases on how a trial judge is to charge the jury in the event the answer to a special interrogatory conflicts with their general verdict, as trials begin again, special interrogatories should still be considered by both sides and offered in appropriate situations.
