The Case for Interrogatories Accompanying a General Verdict

Roy E. Potter

University of Kentucky

Follow this and additional works at: https://uknowledge.uky.edu/klj

Part of the Civil Procedure Commons

Recommended Citation

Available at: https://uknowledge.uky.edu/klj/vol52/iss4/7
THE CASE FOR INTERROGATORIES ACCOMPANYING A GENERAL VERDICT

INTRODUCTION

In Kentucky and federal practice there are three types of verdicts available: (1) a general verdict; (2) a general verdict with written interrogatories upon one or more material issues of fact; or (3) written findings only on each issue of fact; i.e., a special verdict. The purpose of this note is to deal with the general verdict with interrogatories.

THE ORIGIN AND DEVELOPMENT OF INTERROGATORIES ACCOMPANYING A GENERAL VERDICT

The use of interrogatories with a general verdict is not a new procedure. Such a procedure was used as a matter of practice in Massachusetts and other New England states early in our history. The procedure was adopted by statute in the New York Code of 1848. Inquiries were directed to jurors after a verdict to ascertain how they arrived at their verdict. When New York adopted this procedure an additional refinement was made. In case of conflict between a general verdict and a special finding, the latter was to control the judgment. This is an American procedure not founded in the English common law. In England, jurors had resisted this type of inquiry and were not required to explain their verdict. However, an unreasonable or unexpected general verdict was subject to investigation by a jury of attainder.

After interrogatories were formally adopted in the New York Code, this procedure became a part of the civil procedure of more than one-half of the states. Kentucky was among these states. The procedure in Kentucky, under the Civil Code, was termed a separate general verdict. The court was empowered to separate the issues being tried and request that the jury return a separate general verdict on each issue submitted.

---

1 Ky. R. Civ. P. 49.02 [hereinafter referred to as CR], Fed. R. Civ. P. 49(b) [hereinafter referred to as FR].
2 CR 49.01, FR 49(a).
3 See Miller, Civil Procedure of The Trial Court on Historical Perspective, 319 (1952).
4 New York Civil Code § 216 (1848).
5 Ibid.
6 Blume, American Civil Procedure 176 (1955).
7 Wicker, Special Interrogatories to Juries in Civil Cases, 35 Yale L.J. 296, 298 (1926).
8 See generally, Note 37 Iowa L. Rev. 95, 97 (1951).
9 Blume, op. cit. supra note 6 at 176.
10 Ky. Civ. Code § 327(1) [amendment of 1888].
11 Ibid.
One of the primary difficulties in the early use of interrogatories was the interpretation of the effect of inconsistencies between interrogatories. Some courts held that such inconsistencies destroyed the interrogatories; others held that the general verdict was also valid. This problem was taken care of by Federal Rule 49(b) which empowers the court to grant a new trial or to return the jury for further consideration of its answers.

Kentucky adopted Federal Rule 49(b) in 1953 restyling it as Kentucky Civil Rule 49.02. Our rule is identical with the federal rule so federal decisions will be an aid in determining how interrogatories should be used in Kentucky.

### The Operation of Interrogatories Accompanying A General Verdict

The use of the procedure authorized by Kentucky Civil Rule 49.02 lies in the discretion of the trial judge. Once this type of verdict has been decided upon, certain collateral procedures must be followed. The operation of Civil Rule 49.02 can be divided into two phases: (a) drafting a submission of the interrogatories; and (b) form and sufficiency of verdict or finding.

(a) **Drafting and submission.** There are certain general principles which must be complied with in the drafting of interrogatories. The questions should be as few as feasible. They should be posed in simple and clear language, with only one issue in each question. Care should be exercised to avoid composite questions of law and fact. The court should give appropriate instructions or explanations eliminating the legal aspects of the interrogatories. These general rules of drafting all have a common purpose, *i.e.*, to make the procedure of submitting interrogatories as simple as possible.

The content of the questions should in no way be susceptible of construction as comment on the evidence by the court. In Kentucky this would be deemed objectionable as an interference by the court with the function of the jury to consider the weight of the evidence and the credibility of the witnesses. Further, an interrogatory should not assume the existence of a material fact in controversy. For example, where one of the facts in issue is whether or not there was a collision between the cars of plaintiff and defendant, the court

---

15 Jackson v. King, 223 F.2d 714, 717 (8th Cir. 1955).
16 Ibid, at 718.
17 Collins v. Sparks, 310 S.W.2d 45, 46 (Ky. 1958).
in framing its questions should not include any reference to the collision as if it had in fact occurred. Qualifying phraseology is frequently used to negate any assumption of fact as proof of other issues. Instead of asking, "Was the negligence of defendant a proximate cause of the accident?", the court should phrase the question, "If the defendant were guilty of negligence, was such negligence a proximate cause of the accident?"

Interrogatories which are improper in form will of course be submitted. This is especially true in jurisdictions where interrogatories are new. Improper interrogatories present three questions: (1) How can they be guarded against? (2) What can a trial judge do after an improper interrogatory has been submitted? (3) Are they reversible error? Improper interrogatories do not necessarily constitute reversible error. The doctrine of harmless error prevents reversals based on mere technical failures. An improper interrogatory is reversible error only where the record shows that the answer thereto determined the result reached. Before the effect of improper interrogatories can be considered on appeal, counsel must object to their submission. This objection must be specific enough to inform the trial judge of his alleged error, otherwise the error is waived.

If error in an interrogatory is not discovered until after submission, all is not lost. In such a case the court may withdraw the interrogatory. This power of withdrawal is implied from its express power to submit interrogatories. Such withdrawal was upheld in the case of Diniero v. U.S. Lines Co. In this case the trial judge withdrew all the questions and authorized the jury to render a general verdict. One of the questions submitted was ambiguous and was not understood by the jury. An attempted explanation by the court not only failed to clear up the ambiguity but to some extent increased it. Withdrawal of the interrogatory was held proper as being the only logical course to pursue.

(b) Form and sufficiency of verdict or finding. When the interrogatories have been properly drafted and submitted to the jury one

References:
21 CR 61.01 provides "... [that] the court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."
23 Martin v. United Fruit Co., 272 F.2d 847, 848 (2d Cir. 1959).
24 Ibid. at 848.
26 Ibid.
phase of the operation of Civil Rule 49.01 is complete. The other phase begins when the jury returns the general verdict and answers to the interrogatories. These must be examined to determine (1) whether the verdict and findings are inconsistent or (2) whether the findings themselves are inconsistent.

The most difficult problem in this phase of Civil Rule 49.01's application is the determination of when verdict and interrogatories are inconsistent. In order to be inconsistent the verdict and findings must be wholly incompatible.\(^\text{27}\) This incompatibility must be on a material question and must be beyond reconciliation on any reasonable theory which is consistent with the evidence and its fair inferences.\(^\text{28}\) If an answer to an interrogatory is inconsistent with the verdict and the interrogatory relates to a factual issue which the jury must necessarily have decided to reach its verdict, the court may disregard the general verdict and enter judgment in accordance with the answers to the interrogatories.\(^\text{29}\)

The court also has the power to order a new trial or return the jury for further deliberation.\(^\text{30}\) The choice of alternatives is discretionary; however, this discretion is subject to review. In Phillips Chemical Company v. Hulbert,\(^\text{31}\) it was held that it was improper to return the jury for further deliberation. Here the jury had been rendered incapable of fairly resolving the inconsistency. The jury first reached a general verdict for plaintiff without the benefit of a special interrogatory on malice. This interrogatory was inadvertently withheld from the jury room. The jury after reaching the general verdict was sent back to determine the issue of malice and found no malice. When it was pointed out that this was inconsistent with the general verdict, the jury reconsidered and changed its answer on the special interrogatory.

The failure of a jury to answer interrogatories is not necessarily reversible error. The court may enter an answer most favorable to the losing party. If the general verdict is consistent with the answer then the verdict should be allowed to stand.\(^\text{32}\) For example, where two grounds of recovery were alleged, failure of the jury to answer interrogatories relating only to one ground was not fatal to the

\(\text{\[27\] Wayne v. New York Life Ins. Co., 5 Fed. Rules Serv. 49 b 42, Case 1, (1941).}\)
\(\text{\[28\] Theuer v. Holland Furnace Co., 124 F.2d 494, 498 (10th Cir. 1941).}\)
\(\text{\[30\] CR 49.02.}\)
\(\text{\[31\] 301 F.2d 747 (5th Cir. 1962).}\)
\(\text{\[32\] Gulf Refining Co. v. Fetscham, 130 F.2d 129, 135 (1942).}\)
The general verdict could be supported on the other ground.

It is clear that interrogatories are complicated and require careful attention both in their formulation and in determining the form and sufficiency of their finding. Why bother? Why not just use the familiar general verdict?

**The Need for Special Finding Procedures**

Although the use of interrogatories with a general verdict creates problems which tend to burden both counsel and judge, there is a real need for special finding procedure in our practice. This need is reflected in the criticism of juries which has been abundant in the past few years. Special finding procedures may be the answer to the critics of our jury system. Critics of the jury system indicted it on two counts: (a) decisions are often based upon extraneous factors, *i.e.*, jury caprice and (b) jury incompetence.

(a) *Jury caprice.* The jury which returns a general verdict is more or less independent. The only check the court has on it is through the weight of the evidence that it has considered and the correctness of the instructions it has received. In those instances where the evidence can support more than one verdict, *i.e.*, where a directed verdict cannot be entered and where instructions are not erroneous, the jury is in effect free to base its decision on prejudice or bias. Elements such as comparative wealth, race, possible insurance, or other like elements are considered. Such elements are extraneous and should not enter into the verdict rendered by the jury. Where interrogatories are submitted to be returned with the general verdict, the jury must base its verdict upon the answers to interrogatories. The interrogatories lay bare the thought process which the jury followed in reaching its verdict. The interrogatories require that the jurors direct their attention at specific issues of fact thus minimizing the influence of extraneous factors.

It would be neglecting the duty of candor if the major argument favoring the general verdict was omitted. This argument supports the independence of the jury. Professor Moore in his treatise on federal practice has stated this argument as follows:

> [T]he general verdict, at times, achieves a triumph of justice over law. The jury is not, nor should it become, a scientific fact finding body. Its chief value is that it applies the 'law,' often times a body of technical and refined theoretical principles and sometimes edged with harshness, in an earthy fashion that comports with 'justice' as conceived by

---

34 Moore, Federal Practice (2d Ed. 1950).
Perhaps the general verdict does *at times* achieve a triumph of justice over law. However, the jury's function is to apply the law, not make the law. Decisions which are based on the jury's concept of justice amount to jury-made law. Although these decisions are not legal precedent they affect subsequent litigation. A mythical jury lingers in the background of every attempt at settlement, thus in an area where juries favor plaintiffs as opposed to corporate defendants, settlements paid by corporate defendants will be higher than they would in an area where cases are decided on their merits. Interrogatories accompanying a general verdict serve as a check on the legal accuracy of the jury's application of law to the facts.

(b) *Jury incompetency.* Jurors have been castigated as being incompetent. One of the traditional functions of juries is to apply the law of the case to the facts. It seems far-fetched that a jury composed of twelve men who have no knowledge of law could properly apply law and thus decide controversies involving such complex doctrines as last clear chance, assumption of the risk and contributory negligence. The late Judge Jerome Frank stated this position as follows:

It is inconceivable that a body of twelve ordinary men, casually gathered together for a few days, could merely from, listening to the instructions of the judge, gain the knowledge necessary to grasp the true import of the judge's words. For these words have often acquired their meaning as the result of hundreds of years of professional disputa-tion in the courts. The jurors are as likely to get the meaning of those words as if they were spoken in Chinese, Sanskrit or Choctaw.

It is still necessary to give instructions when interrogatories are used. However, these instructions may be simpler than when only a general verdict is to be returned. Very often the necessity of giving a separate instruction on legal standards may be avoided by incorporating the definition into the question asked. For instance, in an action for trespass one of the issues might be, "Did the defendant trespass upon the land of the plaintiff and remove therefrom corn and wheat as alleged?" As the question stands, a definition of the term trespass is required in order for the jury to answer it with reasonable certainty. This instruction can be avoided. The interrogatory on this issue could be phrased, "Did the defendant knowingly enter upon the land of the plaintiff without his consent and take

---

35 Moore, Federal Practice 2217 (2d ed. 1950).
36 Green, Juries and Justice, U. Ill. L.F. 152, 158 (Summer 1962).
37 Ibid. at 156.
corn and wheat therefrom?" Not every case will be as simple but instructions used with interrogatories can usually be limited to definitions of legal terms.

The jury often ignores the instructions because they don't know what to do with them. The interrogatories accompanying a general verdict give the jury concrete guidelines to follow in its deliberation, eliminating any need to reply on extraneous matters. Interrogatories accompanying a general verdict will not cure every deficiency in our jury system; however, use of them should eliminate jury caprice and better equip jurors for their task of applying the law to the facts.

THE EFFECT ON JURY TRIALS OF INTERROGATORIES AND SPECIAL VERDICTS

The use of interrogatories accompanying a general verdict is but one of two special finding procedures. The other is the special verdict. Both achieve about the same result with respect to control over the jury. There is a clear distinction between the practice of requiring the jury to render a special verdict on the one side and that of submitting the case to the jury for a general verdict accompanied by interrogatories on the other. A special verdict is in lieu of a general verdict. The jury returns answers to specific questions of fact and the court applies the law. Where a general verdict accompanied by interrogatories is to be returned, the jury finds the facts and applies the law of the case to these facts. The interrogatories serve as a check on the accuracy of the jury's application of the law.

Either of these two methods would result in better procedure, but the one difference between the two types of special finding procedures presents a problem. Where a special verdict is returned, there is an element of doubt as to whether litigants are in fact receiving a jury trial. Traditionally, the application of law to facts was a jury function; thus, it would seem that where a special verdict is returned the litigants are not getting a full trial by jury. It is beyond the scope of this paper to discuss the arguments on both sides of this question. Irrespective of whether special verdicts in fact violate the trial by jury concept, the doubt exists. In the face of this doubt it seems that special verdicts will have difficulty in being accepted for use, especially in those cases triable by jury as a matter of right.

BENEFITS OF INTERROGATORIES ACCOMPANYING A GENERAL VERDICT

If the value of interrogatories accompanying a general verdict ended with the elimination of jury caprice, this would be quite enough.
Fortunately, this is not the case. There are additional benefits to be derived by the use of interrogatories accompanying a general verdict.

Most points argued on appeal concern alleged error in instructions or the admission and exclusion of evidence.\(^39\) Unless the actual decision on factual issues to which instruction or evidence was pertinent is revealed, the court cannot know with certainty the effect of such an error. How are appellate courts to know whether the error had any bearing on the jury’s verdict?

The use of interrogatories with the general verdict separates the general questions of whether plaintiff is entitled to recover, and if so, how much, into several issues of fact. Answers to the interrogatories give the appellate court information as to the jury’s decision on a particular facet of the case. With this information the court can determine the effect of error in the admission or exclusion of evidence.

Perhaps the best summary of the benefits to be derived from interrogatories was made by Justice Sutherland in a comment on the usefulness of special verdicts:

> The special verdict compels detailed consideration. But above all it enables the public, the parties and the court to see what the jury has really done. . . . The general verdict is either all wrong or all right, because it is an inseparable and inscrutable unit. A single error completely destroys it. But the special verdict enables errors to be localized so that the sound portions of the verdict may be saved and only the unsound portions be subject to redetermination through a new trial.\(^40\)

This statement is also true if we insert interrogatories in the place of special verdict. The benefits derived from the use of interrogatories with a general verdict cannot be achieved if such a procedure is not used.

**Present Kentucky Practice**

Without a poll of circuit judges in Kentucky one cannot be sure of the extent to which interrogatories are submitted along with a general verdict. From all indications, however, there seems to be a heavy reliance upon the general verdict in present Kentucky practice. This can be attributed to a reluctance on the part of bench and bar to accept interrogatories accompanying a general verdict. Such a reluctance is perhaps due to a fear that this type of verdict would add “ponderness to an already over ponderness process.”\(^41\) This would seem to be true with respect to early attempts at using this type of verdict. However, we should look beyond the inceptive process to

---


\(^{40}\) Sutherland, Verdicts. General and Special, 29 Yale L.J. 253, 258 (1920).

what practice would be like under this type of verdict when properly used.

Common usage of this type of verdict would have a favorable effect upon (a) judge, (b) juror and (c) counsel.

(a) Judge. Judges seem hesitant in the acceptance of special finding procedures. One of the most important reasons is a fear that widespread use of special finding procedures will place a heavier burden upon them. The general verdict accompanied by interrogatories should have the opposite effect. The need for complex instructions is greatly reduced. The effect of erroneous admissions or exclusions of evidence can be readily seen. Retrials will not demand as much of the judge's time as those where a general verdict was rendered because the issues are separable and errors can be localized. Thus those issues in which there is no error may be allowed to stand as determined and a new trial had only on those issues which have been improperly decided.

(b) Jury. The jury will be better able to perform its function where interrogatories are to be returned along with a general verdict. The interrogatories supplement the instructions on the law of the case, acting as concrete guidelines for the jury to follow in deliberation. Decisions of the jury will gain more respect and trust for they will no longer be hidden in the minds of the individual jurors. The public, parties, and the court will be able to see what the jury has really done.

(c) Counsel. Trial attorneys are often critical of special finding procedures. Plaintiffs' counsel in personal injury litigation find solace in the general verdict. This is due primarily to the freedom which the jury has in considering extraneous factors such as ability to pay and possible insurance. One of the strongest reasons these attorneys offer in support of the general verdict is that the jury is free to ignore the doctrine of contributory negligence and apply instead comparative negligence. If a comparative negligence doctrine is desired, then enactment of a statute so providing should be sought. Jurors should not be allowed to enact legislation at their will.

Separate findings will be of benefit to counsel. This is especially true with respect to damages. Total damages may be excessive and a new trial granted on the issue of damages. If the issue of damages is divided into component parts, then the new trial may be solely on one of these component parts, and the other damages awarded may be allowed to stand.

425 Richardson, Kentucky Practice, § 2292 at 81 (Supp. 1962).
Finally, counsel will be able to evaluate the merits of appealing where specific findings of fact are available to him. He can evaluate the probable success of appeal with a higher degree of certainty because he has before him information as to the effect of alleged errors in the admission or exclusion of evidence. Very often the need for appealing will be eliminated, for the trial judge will have the opportunity to correct errors by granting a motion for a new trial or a judgment notwithstanding the verdict. With the answers to the interrogatories before him he can make a more intelligent decision.

**CONCLUSION**

Significant improvements in our civil procedure will result from the proper use of interrogatories with a general verdict. The responsibility for seeing that this is done lies upon the shoulders of the judges of our state. The type of verdict to be rendered lies in the discretion of the court and our judges must be willing to use this type of verdict before these improvements can be achieved. The judge can educate jury, counsel, and himself by putting Civil Rule 49.02 into practice. Perfection in our judicial process is perhaps unattainable, but interrogatories accompanying a general verdict will take us one step nearer that goal.

*Roy E. Potter*