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Appendix--Sample Special Interrogatory Forms

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APPENDIX—SAMPLE SPECIAL INTERROGATORY FORMS*

The adoption of comparative negligence in West Virginia has led to considerable confusion regarding the form of special interrogatories to the jury. The Supreme Court of Appeals in *Bradley*¹ stated that the jury shall return a general verdict declaring the total or gross amount of damages for each party whom they find entitled to a recovery. The jury is further required to find, by the use of special interrogatories, the percentage of fault or negligence attributable to each party. Following the return and acceptance of these verdicts, the trial judge will then calculate the net amount recoverable by deducting the party's percentage of fault or negligence from the gross award.²

The following examples of special interrogatories were drafted in compliance with two primary considerations: first, the wording and format of the special interrogatories should not favor any one party;³ second, the composition of the interrogatories

* These sample interrogatories were prepared by John F. Cyrus and Gene W. Gardner, members of the West Virginia College of Law Class of 1981. The authors and the West Virginia Law Review wish to express their gratitude to the Honorable Russell C. Dunbar, Chief Circuit Judge of Cabell County, for his assistance and suggestions in the drafting of these interrogatories.

¹ *Bradley v. Appalachian Power Co.*, 256 S.E.2d 879 (W. Va. 1979).

² *Id.* at 885-86. The use of a general verdict accompanied by written interrogatories is sanctioned by both W. VA. CODE § 56-6-5 (1976 Replacement Vol.) and W. VA. R. Civ. P. 49.

³ An example of a pro-plaintiff interrogatory is set forth below. The advantage to the plaintiff is derived not from the content of the questions, but rather from the order in which they are asked. The following was submitted to the court by plaintiff's counsel in a recent trial held in Cabell County, but was found to be too favorable to the plaintiff and thus was rejected by the court:

Questions For Jury To Answer

1. Do you find from a preponderance of the evidence that defendant, _____, was negligent which was a proximate cause of plaintiff's injuries?

Answer: _____ (Yes or No)

If the answer to Number 1 is "No" then do not answer the questions below.

2. State the total amount of any damages which you find from a preponderance of the evidence were sustained by plaintiff as a result of the occurrence.

Answer: _____ (Note: Do not reduce plaintiff's damages by the percentage of plaintiff's negligence, if any. This will be done by the

must be simplistic and straightforward to minimize jury confusion resulting in inaccurate awards.⁴

EXAMPLE 1: SINGLE PLAINTIFF SINGLE DEFENDANT

The following interrogatories should be given to the jury in three parts:

court if you find plaintiff was negligent in the following questions).

3. Do you find from a preponderance of the evidence that plaintiff was negligent which was a proximate cause of plaintiff's injuries?

Answer: _____ (Yes or No).

4. If you found the plaintiff was also negligent, then, using 100% to represent the total negligence of the parties, apportion the negligence between them.

Plaintiff: _____%

Defendant: _____%

⁴ The desire to minimize or eliminate any possible juror confusion has prompted the compilers to adopt a trifurcated approach in which the jury is directed to address the separate issues of negligence, percentage of negligence, and damages. It is believed that an interrogatory which combines these issues would tend to have a "blurring" effect upon the jury. For this reason, we decline to adopt the following suggested form which was developed and distributed by Justices Miller and Harshbarger of the West Virginia Supreme Court of Appeals. It is noted that the Justices were not acting in any official capacity, but rather were engaged in a commendable effort to assist the various circuit judges throughout the state. Barring a verdict totally in favor of either party, Justices Miller and Harshbarger proposed the following be submitted to the jury:

VERDICT FORM NUMBER 3

We, the jury, find for the plaintiff and find that the plaintiff was guilty of contributory negligence proximately causing the accident, but that such contributory negligence did not equal or exceed the combined negligence of the defendant, and we find that, based on 100% as the total combined negligence of all parties found to have contributed to the accident, the percent of negligence attributable to the plaintiff is _____%.

We also find that the total damages incurred by the plaintiff without regard to his contributory negligence is in the amount of \$_____.

Foreman

(To be filled out if the jury believes from a preponderance of the evidence that the negligence of the defendant caused the accident, and that the plaintiff was guilty of contributory negligence but such contributory negligence did not equal or exceed the negligence of the defendant.)

Part I

I. Do you agree and find from a preponderance of the evidence that the defendant was negligent, and that such negligence was a proximate cause of plaintiff's damages?

Yes ___ No ___

If the answer is "No," proceed no further and notify the bailiff you are ready to report. If the answer is "Yes," proceed to question II.

II. Do you agree and find from a preponderance of the evidence that the plaintiff was negligent, and that such negligence was a proximate cause of plaintiff's damages?

Yes ___ No ___

At this juncture, the jury returns and the trial judge reviews the answers. If the answer to question I is "No," a verdict for the defendant is rendered.

Part II

If the answer to question I is "Yes," and the answer to question II is "No," the jury has found that the plaintiff was not negligent, and therefore, the defendant is 100% liable for plaintiff's damages. Thus, the following is submitted to the jury:

We, the jury, do agree to find for the plaintiff and assess his damages in the amount of \$ _____.

If the answers to questions I and II are "Yes," the jury was obviously determined that the plaintiff was also negligent. Therefore, the following question is submitted to the jury:

What percentage of fault or negligence have you apportioned or attributed to each party?

Plaintiff _____%

Defendant _____%

Total _____% (The sum must equal 100%)

Under the form of comparative negligence adopted in *Bradley*, if the percentage of fault attributed to the plaintiff is greater than or equal to that of the defendant, the plaintiff will be denied

recovery.⁵

Part III

If the percentage of fault attributed to the plaintiff is less than that of the defendant (less than 50%), the plaintiff is entitled to an award. The remaining function to be performed by the jury is an assessment of the total damages sustained by the plaintiff. The trial judge must take pains to emphasize to the jurors that any finding of negligence on the part of the plaintiff must not effect their determination in regard to the gross amount of damages. Upon the return of the jury's findings as to the gross amount of plaintiff's damages, the trial judge will compute the net award.

We, the jury, do agree and find that the plaintiff sustained total damages, without regard to any negligence attributable to

⁵ 256 S.E.2d at 884-85. One potential problem not addressed by the *Bradley* court is whether the jury should be informed of the "50% rule" prior to its apportionment of negligence. It has been argued that in close cases the jury has a natural tendency to apportion equally the liability between plaintiff and defendant. From the standpoint of the plaintiff, such a finding serves to bar any recovery. To avoid these disastrous, and possibly unintended results, plaintiff-oriented counsel strenuously contend that it is essential that the jury be informed of the full effects of its findings. See Buffa, *Plaintiff's View of Comparative Negligence, Symposium on Bradley v. Appalachian Power Co.—West Virginia Adopts Comparative Negligence*, 82 W. VA. L. REV. 523, 530 (1980).

On the other hand, the defense would clearly benefit from the adoption of the "Wisconsin rule," holding that the jury is not to be informed that the plaintiff will be denied recovery if his negligence is found to be equal to or greater than defendant's. *Blahnik v. Dax*, 22 Wis. 2d 67, 125 N.W.2d 364 (1963). This argument is based upon the belief that an "informed" jury's final apportionment may be unduly influenced by sympathy and a desire to allow some recovery to the plaintiff. Further, it has been held that informing the jury of the legal consequences of such an apportionment of negligence tends to usurp the function and diminish the control of the trial judge regarding the use and purposes of interrogatories. *Simpson v. Anderson*, 116 Colo. 163, 526 P.2d 298 (1974)(overruled by COLO. REV. STAT. 1973 § 13-21-111(4) (Cum. Supp. 1978)). See generally V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 17.5 (1974); Emch, *Comparative Negligence in West Virginia: A Defense Overview, Symposium on Bradley v. Appalachian Power Co.—West Virginia Adopts Comparative Negligence*, 82 W. VA. L. REV. 493, 515-16 (1980).

plaintiff, in the amount of \$ _____.

EXAMPLE 2: MULTIPLE DEFENDANTS

When the suit involves multiple defendants, there is no major difference in the interrogatories submitted to the jury. The basic format need not be changed drastically, but rather entails a slight expansion. As to the initial finding of negligence, the jury should be required to consider the negligence of each individual defendant. For example, the jury would answer the following questions concerning defendants X, Y, and Z:

I. (A) Do you agree and find from a preponderance of the evidence that defendant X was negligent, and that such negligence was a proximate cause of plaintiff's damages?

Yes ___ No ___

(B) Do you agree and find from a preponderance of the evidence that defendant Y was negligent, and that such negligence was a proximate cause of plaintiff's damages?

Yes ___ No ___

(C) Do you agree and find from a preponderance of the evidence that defendant Z was negligent, and that such negligence was a proximate cause of plaintiff's damages?

Yes ___ No ___

If the answer is "No" to all of the above, proceed no further and notify the bailiff you are ready to report. If the answer is Yes to any or all of the above questions, proceed to question II.

II. Do you agree and find from a preponderance of the evidence that the plaintiff was negligent, and that such negligence was a proximate cause of plaintiff's damages?

Yes ___ No ___

If the answer to any part of Question I is "No," verdict is entered for that defendant(s). If the jury has found two or more of the defendants negligent, and the plaintiff free from any negligence, interrogatories would be submitted to the jury to deter-

mine the proportionate liability among the negligent defendants⁶ and the total damages sustained by the plaintiff.

Assuming the jury has found defendants X and Y negligent, defendant Z free from fault, and the plaintiff negligent, the following would be submitted to the jury:

What percent of fault or negligence have you apportioned or attributed to each party?

Plaintiff _____ %
 Defendant X _____ %
 Defendant Y _____ %
 Total _____ % (The sum must equal 100%)

As in the case of the single defendant, if the jury finds the plaintiff's negligence is less than 50%, the following is then given to the jury:

We, the jury, do agree and find that plaintiff sustained total damages, without regard to any negligence attributable to plaintiff, in the amount of \$ ____.

As before, computation of the net award is performed by the judge who reduces the plaintiff's total damages by plaintiff's percentage of fault or negligence.

The formats offered above should prove easily adaptable to the vast majority of cases encountered by the court, ranging from the simple one plaintiff/one defendant suit to the more complex multiple party situations.⁷

⁶ The court in *Bradley* states that the negligence of plaintiff should be compared to "the other parties involved in the accident." The ambiguity of this language raises the question as to whether the jury should apportion fault among all tortfeasors both present and absent in the suit, or confine its considerations to those defendants actually joined. For a discussion of the varying approaches adopted by comparative negligence jurisdictions, see Buffa, *supra* note 5, at 528-29.

For the purposes of the above illustration, it is assumed that all tortfeasors involved in the accident are joined as defendants in the suit.

⁷ See, e.g., H. WOODS, *COMPARATIVE FAULT*, 381-406 (1978) (wherein sample jury interrogatories are provided for various factual situations such as: one plaintiff/one defendant; complaint and counterclaim; complaint against principal and agent; plaintiff suing in a representative capacity; contributory negligence of decedent and one or more beneficiaries; and guest passenger cases); V. SCHWARTZ, *COMPARATIVE NEGLIGENCE* § 17.4 (1974).