Shall We Have Standard Jury Instructions?

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By

FRANK L. PINOLA*

The committee on trial by jury reporting to the section of Judicial Administration of the American Bar Association,1 reminds us:

"Jury service today is the chief remaining governmental function in which lay citizens take a direct and active part, and trial by jury is the best means within our knowledge of keeping the administration of justice in tune with the community. It is highly important that everything be done which can be done to insure the most efficient methods of jury selection and trial procedure."

Many are the essays and speeches dealing with the instruction of the jury by the judge, and almost as many are the differences of opinion as to the effectiveness of the charge of the court.

It has been pointed out that the moment for giving the charge to the jury lends itself to legitimate dramatization which the trial judge may properly call to his avail in order to increase the effectiveness of the charge. Judge Soper2 describes the situation thus:

"Finally the moment arrives when the champions have done all that they can for their respective sides, and the jurors straighten up in their seats, conscious that the period of observation is past and the responsibility of decision is descending upon them. Then the judge speaks as the representative of the law and its authorized expositor; he speaks, and for the first time in the trial the conflict is stilled, and every one is aware that an impartial official, the one unbiased person in the courtroom best qualified to pass judgment, is striving to sort out the tangled skeins of controversy and simplify the issues, so that the jury may pass upon them with understanding. This is the most important function that the judge has to perform in a jury trial, and one of the most difficult in the whole range of his judicial duties. Moreover, it is one of the most dramatic, since it is a manifestation of justice in action, and its adequate performance not only gives direction to the instant trial, but produces upon the listening public a deep impression of the dignity and security afforded by the fair administration of the law under our form of government."

On the other hand, one writer3 declared:

"No extended experience at the bar or upon the trial bench is required to produce a vivid realization that only in the exceptional case is the jury decisively influenced by the judge's instructions."4

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1 Minimum Standards of Judicial Administration, p. 545.
3 Morgan, "Instructing the Jury upon Presumptions and Burden of Proof," 47 Harv. L. Rev. 59.
In one of those exceptional cases the jury returned an intelligent verdict. The federal judge instructed them to bring in a verdict of innocent in a car theft case. The jury foreman dutifully announced: "We find the boy that stole the car not guilty, your honor."

All agree that instructing the jury is the most difficult service which the trial judge has to perform.

The purpose of instructions is to give the jury light and guidance. As Lord Bacon quaintly put it in his advice to trial judges:

"You should be a light to open their eyes, but not a guide to lead them by the noses."4

For the better appreciation of jurors who must pronounce upon them, all trial lawyers agree that the facts of the case have to be reduced to the lowest common denominator of jury-box intelligence. Involved matters must be simplified, and difficult ones made easy. For the same reason, trial judges ought to acquire the technique of the commonplace because it is the man from the street seated in the jury box who sets the standards for all courts.

The possibilities for error and the evils which creep into instructions have been pointed out in an excellent address by Justice Rossman of the Supreme Court of Oregon.5

Trial judges have all encountered those same difficulties.

We are here not concerned with the errors and the evils as such, but with a practice which will tend to minimize the chances of error and the elimination of evils, namely, the standardization of instructions.

If there be a doubt in the mind of anyone that this is a serious problem, let him look at Vale, under trial instructions, and see the number of cases in which instructions were challenged and count the number which have been reversed.

No doubt instances of challenged instructions will come to the mind of all readers, but in order that the picture which confronts us may be seen, let us consider a few cases.

In the civil field, we find that in Hess v. Mamma,6 President Judge Rhodes criticized the instructions "as too meager to supply the jury with the proper legal method for determining the issues of negligence and contributory negligence. True, the trial judge defined those terms, but he did not give the jury any guide for applying them to the facts of the case, as they might be found by the jury."

He said also:7

"The relative rights and duties of the parties, under the circumstances, were not sufficiently defined to the jury by the trial judge by reading merely the section of the Vehicle Code relating to the right of way at intersections."

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5 The Judge Jury Relationship in the State Courts, 3 F.R.D. 98.
6 136 Pa. Sup. 58.
7 Id. at 65.
Finally, he said: 8

"We think that the jury should have had some instruction concerning the quantity and quality of the evidence. They should have been told that it was their duty, after weighing the evidence carefully, to find for the party in whose favor it preponderated."

He concluded that "the charge as a whole (was) so inadequate as to leave the jury 'without guide or compass.' . . ."

All assume that the instruction in connection with contributory negligence is so simple and so fundamental that there should be no trouble about it, and yet in a recent case the trial judge declared that contributory negligence is "a legally contributing cause of the harm, if, but only if, it is a substantial factor in bringing about the harm." The judge declared the language used by him was taken verbatim from Clee v. Brinks, Inc. 9 We find that to be true. The lower court in that case had said that "if contributory negligence in the slightest degree contributed to the accident, there could be no recovery." Judge Cunningham, in discussing the question of contributory negligence, referred to the quoted words and their source. 10

He then added:

"Although the Pennsylvania cases may lay down a slightly different rule from that stated in the section last quoted...there is no doubt that a plaintiff's negligence must, at the least, be a causa sine qua non of his injury before he is barred from recovery...Otherwise, although the plaintiff's conduct may be negligent it is not 'contributory negligence.'"

Since a general exception only had been taken, the supreme court refused to reverse, saying that in such a case it corrects "only errors which are basic and fundamental."

There is an excellent exposition of the law of presumption by then Justice Maxey in Watkins v. Prudential Ins. Co., 11 from which we could deduce understandable instructions.


"We do not intend, at this time, to go further into the question of the admissibility of such tables...but it causes us to again clearly announce that in this and future cases, we will hold trial judges to a strict compliance with their duty."

Referring to present worth, in McKinney v. Pittsburgh Railways Co., 13 Justice Linn said:

"While there should be no difficulty about it, appeals to this court seem to show some difficulty in adequately and simply instructing jurors on the subject."

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8 Id. at 67.
9 135 Pa. Sup. 345.
10 Rest., Torts, § 465.
11 315 Pa. 497.
12 315 Pa. 209, 212.
13 363 Pa. 368, 370.
Just how simply can it be done?
In Rowles v. Evanuk,\textsuperscript{14} we see. The trial judge had said:

"Then also you will be under the duty, if you arrive at any total, to reduce that figure enough to indicate what its fair cash value is by reason of its being paid immediately."

Justice Hughes declared:

"Although this instruction as to present worth was exceedingly brief, it was a correct statement of the law."

Perhaps it is, but we submit that such a statement means absolutely nothing to even the most intelligent jury, much less to one of average intelligence.

Chief Justice Maxey, in Littman v. Bell Tel. Co., stated the law in detail, saying:\textsuperscript{16}

"(1)n making an award for the impairment of earning power the jury must bear in mind that when the gross amount of what claimant will lose in future earnings has been calculated, this amount will have to be reduced to its 'present worth,' i.e., to a sum which if paid on the date of the verdict would then be a just cash equivalent of the sum total of such lost future earnings. The award for permanent impairment of earning power must not exceed, though it should equal, the worth at the date of the verdict, of a sum payable in normal future installments during what would be the period of the injured person's ability to earn money had he not received the injury or injuries complained of. This sum would be made up by adding the money losses the injured person will sustain from year to year or month to month by reason of such impairment of his ability to earn money, during the reasonably expected duration of his life's future earning period. It is, of course, mathematically certain that this 'present worth' will be substantially less than the gross sum of computed lost future earnings; and the longer the person's life expectancy, the wider will be the gap between this gross amount of calculated lost future earnings and its contemporary value."

That statement has been quoted with approval by courts in several other jurisdictions, and we wonder if any lawyer or judge could, without the use of tables, work out a simple problem in less than two hours' time.

Courts have applied present worth and life expectancy tables to a verdict to show that it was excessive and therefore should be reduced.\textsuperscript{16}

If the courts use the present worth tables to determine whether a verdict is proper, why should not the jury use them in their efforts to assist them in arriving at a proper verdict?

Certainly the confusion in connection with present worth calls for a remedy. In the field of criminal law, let us look at Commonwealth v. Barnak.\textsuperscript{17} After

\textsuperscript{14} 350 Pa. 64, 71.
\textsuperscript{15} 315 Pa. 370, 377.
\textsuperscript{16} Florida East Coast Ry. Co. v. Hayes, 67 Fla. 101, 64 So. 504, and other cases referred to in Murray v. Philadelphia Transportation Co., 359 Pa. 69.
\textsuperscript{17} 357 Pa. 391.
discussing the defense of alibi and the supposed burden upon the defendant in
such a case, Chief Justice Maxey declared: 18

"It would be better if the jury was instructed, when the defense of
an alibi is set up, that the burden remains on the Commonwealth to prove
every essential element of the case, including the defendant's presence
at the scene of the homicide when, as in the instant case, that is a material
element in the case. Wigmore on Evidence, 3d Ed., Vol. 9, Sec. 2512(c),
says: 'It is generally conceded that the accused does not have the ultimate
burden of proving an alibi.'"

Yet, in Commonwealth v. Johnson, 19 Justice Chidsey again tells us:

"An alibi is an affirmative defense and the defendant had the bur-
den of establishing it by the fair preponderance of the evidence."

Just what shall a trial judge say to the jury when next he meets an alibi?

In the matter of circumstantial evidence, we are all aware of the confusion
that once existed. Prior to Commonwealth v. Marino, 20 it had been constantly held
in criminal cases that circumstantial evidence sufficient for a conviction must
be such as to exclude to a moral certainty every hypothesis but that of guilt of the
offense imputed. President Judge Keller in the Marino case said that such a rule
placed too heavy a burden upon the Commonwealth to prove guilt beyond any
daubt, rather than beyond a reasonable doubt. He suggested the appropriate rule
and the supreme court subsequently adopted it as a principle of law in Common-
wealth v. Libonati; 21 Commonwealth v. Holt. 22

Surely a carefully worded instruction as to what is circumstantial evidence
and its importance would be helpful.

Dealing with good character evidence, we have in Commonwealth v. Stoner, 23
an example of the overly cautious lawyer who gives the trial judge considerable
trouble. We find 24 four different points relating to the evidence of good character.
One contains eight lines, another fourteen, the third six lines, and the fourth
four lines. All were affirmed, but the judge who thought it necessary to explain
further got into trouble. Justice Stewart pointed out: 25

"Here we find in a single sentence an instruction at variance with
the earlier instructions, and quite as much at variance with what imme-
diately followed, so directly contradictory to both that the jury must have
understood what followed to be a correction of the error committed."

Wouldn't one carefully worded instruction suffice?

In Commonwealth v. Green, 26 Chief Justice Moschzisher said:

"Before parting from the subject of reasonable doubt, we may say
that, though in the past much has been written on the point, yet num-

18 Id. at 407.
19 372 Pa. 266, 282.
20 142 Pa. Sup. 327.
21 346 Pa. 504.
22 350 Pa. 375, 387.
23 265 Pa. 139.
24 Id. at 142.
25 Id. at 144.
26 292 Pa. 579, 590.
erous appeals recently before us show it to be a matter which still troubles the profession; therefore, in the hope of aiding the trial of this and future criminal cases, we take occasion to state that the doctrine of reasonable doubt is as follows: . . . ."

Was that the end of our troubles? No. Chief Justice Stern had to make an extensive study of all cases on the subject in *Commonwealth v. Kluska*. He said: 28

"On this point there has been some vacillation in the cases."


"It may be doubted if the ordinary juror would appreciate the significance of these distinctions, and whether he would have the capacity to understand and the mental ingenuity to apply them. As a standard and approved form of charge, however, we are of opinion that the jury should be told either, as in the Andrews case, that they should not condemn unless so convinced by the evidence that they would venture to act upon that conviction in matters of the highest importance to their own interests, or, as in the Green and Jermyn cases, that a reasonable doubt was one that would cause them to hesitate to act in any of the important affairs of their own lives. The one form of charge explains the state of mind that must exist in order to warrant a conviction, the other the degree of doubt that should lead to an acquittal."

That decision was written in 1939, and yet ten years later, in *Commonwealth v. Krick*, Judge Reno in granting a new trial, directed that on the second trial reasonable doubt "be defined according to the definition in *Commonwealth v. Kluska*."

While President Judge Rhodes in *Commonwealth v. Kohl* declared that the language used was in substantial compliance with the standard in *Commonwealth v. Kluska*, he suggested that "adherence to approved definitions of reasonable doubt is the better practice."

And in *Commonwealth v. Statti*, Judge Hirt was required to devote two pages to the instruction given on reasonable doubt.

Chief Justice Stern, in *Commonwealth v. Wucherer*, points out the necessity of a clear instruction as to presumption of malice in cases of felonious homicide. Here again, an approved instruction would be welcome.

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27 333 Pa. 65.
28 Id. at 73.
29 58 Pa. 9.
30 234 Pa. 597.
31 276 Pa. 566.
32 292 Pa. 579.
33 Id. at 74.
34 164 Pa. Sup. 516, 524.
35 164 Pa. Sup. 630.
36 166 Pa. Sup. 577.
37 351 Pa. 305.
Professor Leo J. Reiss suggests that we might obtain great advantages and gain from innovations and progressive methods applied in other countries. He said:

"We need not slavishly copy them, but we can and should learn from them. To do so will conserve time, effort and the taxpayers' money, and, what is most important, will promote the efficient administration of justice."

There is merit in his suggestion, but we agree with Chief Justice Vanderbilt that we ought to see America first. As he pointed out:

"Although each state has borrowed freely from other states in every branch of the substantive law, in the field of adjective law we have been singularly insular and narrowly provincial. It is by no means uncommon to find adjoining states, each with some splendid points of practice of which the other seems to be totally oblivious, even though there may be many lawyers who are members of the bar of both states. Such a strange phenomenon could not exist in the realm of business, for competition would quickly eliminate such absurdities."

As Tacitus said:

"The fault lies with the spitefulness of mankind that we are always praising what is old and scorning what is new."

Let us who can overcome that frailty; let us heed the advice of Pope. Though we be not the first the new to try, let us be not the last the old to lay aside, for the new, in this instance, has much indeed to commend it.

A monumental work has been done in the standardization of instructions to juries by Judge William J. Palmer of the Superior Court of California. Begun in 1938 and continued to date, the work and its value is being gradually appreciated. The publication is now in its third revised edition with a supplement published in 1950, and amplified with pocket parts. The Municipal Court of Chicago followed ten years later, and then Alabama provided two volumes for use throughout the state. Utah is now in the course of preparing standard instructions, and the American Bar Association has appointed a committee to study the subject of standard instructions for federal courts.

Returning to the work of Judge Palmer, here is how he himself describes it:

"For many years a book of jury instructions has not been a novelty. But until our projects were completed, the work within this field consisted of assemblies of instructions that had reached the appellate courts and, in the respective cases and in relation thereto, were approved by those courts. A very recent publication, 'Alabama Jury Instructions,' is of that type.

"Obviously, compiling a collection of instructions in such a manner is a comparatively simple, virtually a clerical task.

"It would hardly be precisely correct to say that in editing our California pattern-instructions, we 'started from scratch.' We, of course,
gathered together all the starting points we could locate. We, of course, always have looked to the statutes and to the cases for the law. In some instances, of course, the statement of a rule of law had become so fixed and standardized before we began our project that we were bound to accept such a statement, subject only to editing. It is doubtful that even in any such instance we have used any instruction exactly as we found it.

"We have not approved and included in our work any form of instruction simply because it was approved in a particular case by an appellate court. In very large measure and with only the exceptions mentioned, our work has been done 'from scratch'; we have written our own instructions or edited them to our standards. Therein, and in our unique and convenient plan of organization, numbering and annotating, lies the distinctive character of our project.

"In the selection of subjects for pattern instructions and in designing and editing them, we have been guided by these considerations:

"1. The practical need for a certain instruction, a need that might arise either from the common occurrence of a type of circumstance or set of circumstances, or from the difficulty and great possibility of error involved in drafting an instruction to cover a certain subject, although infrequently encountered.

"2. A positive effort to state the law (a) from an impartial viewpoint, (b) to state it correctly, (c) to express it as clearly as possible to a lay mind, (d) to state it as concisely as possible without sacrificing anything in correctness and completeness, and (e) to speak in good English with correct diction and grammatical propriety."

The volumes are used extensively by lawyers as reference works for the quick identification of principles of law and their statement in clear language, understandable to the client.

They are also used by courts throughout the state of California and by many courts in other states in the west.

The state-wide rules for Superior Courts of California adopted by the Judicial Council recognizes in Rule 16(a) and (b) the existence and common use of these works.

And the rule of court in Los Angeles County requires the use, as far as practicable, of the instruction forms contained in the manuals. Specially prepared instructions are refused in each instance where the subject matter thereof is fully covered by the printed form of instructions.

Of the practical results, Judge Palmer says:

"It is, of course, impossible to appraise with accuracy and in terms of money the results of these projects, but these services should be noted:

"1. The time saved for the judges of our own court is a very substantial factor and is equivalent to the full time of several judges, probably from three to five additional judges, as against conditions prevailing before BAJI and CALJIC.

40 33 Cal. 2d 1-26.
"2. Without doubt, many second trials are avoided, trials that would be granted or result from reversals because of erroneous instructions.

"3. Certainly a great deal of time is saved for our appellate courts. A judge in another state a while ago made a survey of opinions of appellate courts of his state and of ours and he found that a far higher percentage of reversals were ordered in his state because of error in instructions than in ours. He published an article on the subject, but I do not seem to be able to put my fingers on it at this time. His survey, however, did not tell the whole truth. Most of the reversals in this state for error in instructions come from not using, rather than from using, our instructions

"4. It is my own estimate that the time saved lawyers and judges in all California by our projects, as against conditions existing before BAJI and CALJIC, has a fair value of $2,000,000 a year."

Judge Oscar S. Caplan of the Municipal Court of Chicago, the largest court of its kind in the world, gives these as the results:

(1) There is a greater percentage of proper, just and fair verdicts under this simplified system. Much time is saved in the preparation of instructions by counsel and their examination by the trial judge.

(2) Lawyers and judges feel that under approved instructions advantage cannot be taken by an overly zealous advocate who would be inclined to insert something favorable to his client in the next to the last time or thereabouts, about sixty seconds before the instruction is handed to the judge.

(3) The number of appeals is minimized.

(4) These instructions will help to remove the "mystifying" feeling of jurors that the court is "giving" them legal fiction merely as a perfunctory duty and not legal instructions for their guidance and advice.

(5) No question can arise that by inference or verbiage or emphasis of certain sentences that the judge is attempting to favor one of the litigants.

(6) The shortening of the instructions, as well as their simplification and clarification, tends to assist jurors instead of confusing them.

(7) The tender by a lawyer of long, verbose and complicated instructions, as a basis for appeal, should the verdict be against him, is the kind of "hide and seek" law which is discouraged.

On the basis of this experience, we believe that standardized jury instructions are not only worthwhile but necessary.

As Judge Caplan so well said:

"In a world of rehabilitation, of shifting concepts of government, of legal reforms, it must be conceivable that our system of justice must be affected. We cannot further tolerate known abuses. We must eradicate known defects. We must adopt known methods of improvement, and we must make them work. The procedure of modern law can stand for one more improvement. That improvement is the use of standardized jury instructions. It will meet the challenge for quicker, better, impartial and more proper jury verdicts in our courts of record."