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Pattern Jury Instructions

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NOTES

PATTERN JURY INSTRUCTIONS

Critics of the jury system have long argued that certain reforms must be made in order to improve and preserve this instrument of justice. Among the changes which could streamline the practice are the special verdict, pre-trial discovery procedure, a return to oral instruction, special juries, and comment on the evidence.[1]

Pattern jury instructions represent yet another attempt to improve the jury system, by serving as a guide or model for the bench and bar in jury trials. The idea was born in an article written in 1935 by Judge William J Palmer of the Los Angeles County Superior Court, in which he lamented that many hours and days were wasted in duplicated effort in drawing up jury instructions for each trial. He closed his article by suggesting that much of this time could be saved if there existed a set of approved jury instructions, available to all trial lawyers.[2] Two years later Judge Palmer was asked to undertake the editing of just such a collection, and in 1938 there appeared the first edition of *California Jury Instructions—Civil*,[3] which has been acclaimed for its excellence and scope.[4] The spirit and philosophy of this work is to try to avoid any mechanical rigidity in order to serve as a model, much like a dressmaker's pattern, to be shaped by the trial judge and counsel to fit the facts of each case.[5]

In 1941 the District of Columbia Bar Association followed

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1. See FRANK, COURTS ON TRIAL 141-45 (1963), Wright, *The Invasion of The Jury Temperature of The War*, 27 TEMPLE L.Q. 137 (1953) Wright, *Instructions to The Jury· Summary Without Comment*, 1954 WASH. UNIV. L. Q. 177 Wright, *Adequecy of Instructions to The Jury:I*, 53 MICH. L. REV. 505 (1955) JOINER, CIVIL JUSTICE AND THE JURY (1962).

2. Palmer, *History of An Adventure with Pattern Jury Instructions*, CALIFORNIA JURY INSTRUCTIONS—CIVIL, 1 BAJI 35 (4th ed. 1956).

3. *Id.*, 36-38 (commonly called the *Book of Approved Jury Instructions*—BAJI).

4. See Winslow, *The Instruction Ritual*, 13 HASTINGS L. J. 456 (1962), for a personal appraisal by a trial judge who uses BAJI.

5. Palmer, *Patterns For Jury Instructions*, 29 CAN. BAR REV. 256 (1951). See *Panel Discussion Part III Instructing The Jury*, 47 CAL. L. REV. 888 (1959).

suit with its own set of suggested instructions.[6] At present nine states have jury instructions in one form or another, and four more have committees at work on such a project.[7] The apparent popularity of pattern jury instructions, and the possibility that North Dakota may follow suit, have led to this report.

II

The reasons given for the adoption of pattern jury instructions vary from state to state, and in order of importance; but generally there are five: accuracy, time savings, impartiality, intelligibility, uniformity

Accuracy is the most important reason for the use of approved instructions.[8] The needless cost and unnecessary delay caused by a reversal and a new trial are largely eliminated by the use of this device.[9] A survey of California negligence cases showed that during a two-year period there were seventeen reversals out of two hundred fifty decisions, while in Missouri in the same period the number of reversals based on faulty instructions was fifty-one out of two hundred fifty [10] Over a twenty-five year period in Illinois, thirty-eight percent of the judgments were reversed where the instructions were challenged.[11] Another recent survey of California appellate cases reveals a seven percent rate of reversals in cases where the instructions were in issue.[12]

That pattern jury instructions are time-saving can hardly be denied; indeed, this was the reason which prompted them in the first place.[13] Unslanted, impartial and brief instruc-

6. REVISED STANDARDIZED JURY INSTRUCTIONS FOR THE DISTRICT OF COLUMBIA at XI. (Rev. ed. 1963).

7. See *Committee Report on Jury Instructions*, 17 ARK. L. REV. 328, and MELLINKOFF, THE LANGUAGE OF THE LAW 434 (1963) for enumerations. The Federal courts do not have a uniform system of pattern instructions, but several sets of forms have been suggested from time to time by Hon. William C. Mathes, Judge for the So. Dist. of Cal. See. 3 F.R.D. 118 (1944) 20 F.R.D. 231 (1958) 22 F.R.D. 127 (1959) 27 F.R.D. 39 (1961), 28 F.R.D. 401 (1962) 223 F Supp. at XXXI (1963).

8. 1 BAJI 44 (4th ed. 1956).

9. See Snyder, *Pattern Jury Instructions*, 20 MO. B. J. 53, 58-59 (1964).

10. White, *Standardized Instructions*, 23 U. KAN. CITY L. REV. 179, 183 (1954-55).

11. Corboy *Instructing Jurors In Civil Cases*. 8 DEPAUL L. REV. 141 (1959). This article is a progress report of the Illinois Supreme Court Committee on Pattern Jury Instructions, and contains a description of the Committee's work schedule.

12. *Ibid.*

13. *Supra* note 2.

tions are fairer to the litigants;[14] and by their use, the number of peremptory instructions, which have been strongly criticised,[15] can be reduced or eliminated. Another reason is the possibility of making the instructions easier to understand, a necessity if the jury system is to function properly [16] Finally, there is the advantage of uniformity, which has been considered important enough in Illinois and Missouri to warrant the adoption of mandatory instructions.[17] In California the forms are not compulsory, but the language of BAJI is substantially followed in most cases.[18]

III

The working theory of pattern instructions is very simple. Where they are not compulsory, the forms are supposed to be the basis upon which a trial judge may formulate his own set of instructions.[19] Accuracy is aided by the annotations to each instruction, citing cases wherein the language has been quoted with approval.[20] The California system is structured like a set of building blocks, using a number of abstract definitions, knitted together by an issue instruction which refers back to the definition.[21] The flexibility of this method is supposed to give enough variations to fit each case. In Illinois and Missouri the instructions are compulsory and must be followed in every case where they apply and correctly state the law Failure to do so has been held to be reversible error in Illinois.[22] The aims of the Illinois committee were that the instructions should be conversational, understandable, unslanted and accurate.[23] Where the book does not contain an instruction on the point of law needed, the Committee has

14. See generally, Guerra v. Handlery Hotels, Inc., 53 Cal. 2d 266, 347 P.2d 674, 677 (1959), and Texaco Country Club v. Wade, 163 S.W.2d 219, 222-23 (Tex. 1942). See also Soper, *The Charge to The Jury*, 1 F.R.D. 540, 545 (1941).

15. See Scerrino v. Dunlap, 14 Ill. App. 2d 355, 144 N.E.2d 859 (1957), and Randal v. Deka, 10 Ill. App. 2d 10, 134 N.E.2d 36 (1956).

16. *Supra* note 10.

17. See. Illinois Supreme Court Rules, 25-1, and Missouri Supreme Court Rules, 70.01.

18. Winslow, *The Instruction Ritual*, 13 HASTINGS L. J. 456 (1962). See Reed v. Stroh, 54 Cal. App. 2d 183, 128 P.2d 829 (1942), in which the Court urges that instructions conform to BAJI.

19. See generally, *Panel Discussion Part III Instructing The Jury*, *supra* note 5, and BRAND, *Preface*, MINNESOTA JURY INSTRUCTION GUIDES—JIG (1963).

20. See, *e.g.*, 1 BAJI 51 (4th ed. 1956), and IPI 7 (1961).

21. See Winslow, *The Instruction Ritual*, 13 HASTINGS L. J. 456 (1962). See, *e.g.*, 1 BAJI 252-282 (4th ed. 1956) for the possibilities of "proximate cause."

22. Zeller v. Durham, 33 Ill. App. 2d 273, 179 N.E.2d 34 (1962).

23. See Snyder, *Pattern Jury Instructions*, 20 Mo. B. J. 53 (1964).

prescribed that the instruction drafted by the trial judge shall follow the same pattern which it has used. It has even gone as far as recommending that certain instructions *not* be given.[24]

In each state which has a set of pattern jury instructions, a standing committee remains constantly at work revising, simplifying, and expanding their work. Regular revisions, annual pocket parts, and loose-leaf supplements are necessary features of the system. The drafting committees vary from state to state in composition, but all committees consist of judges, practitioners for both plaintiffs and defendants, and law professors.[25]

IV

The decision of whether or not North Dakota needs pattern jury instructions will depend upon a consideration of all the relevant factors. An analysis of one of these is set out in the chart below, which is a survey of all the cases decided in the Supreme Court of North Dakota from 1953 to 1963:

60-120 N. W 2d

North Dakota cases	586
Appeals from jury verdicts	154
Challenges to the instructions	61
Refusal of instructions was error	3
New trials *affirmed*	2
Faulty instructions *not* prejudicial	7
Faulty instructions *held* prejudicial	13

Thus, in the period of ten years, the use of pattern jury instructions would have helped in twenty-two cases,[26] and might have affected the outcome of fifteen. It is a relevant question, then, whether the bench and bar wish to devote the necessary five years of hard work to influence such a small number of cases.

V

The idea and practice of pattern jury instructions has

24. See, *e.g.*, IPI 122 (1961).
25. The membership of each drafting committee is set out in the preface of each collection.

not escaped criticism. And though the critics are not as numerous as the advocates, they have been more articulate and persuasive.

Proponents of pattern instructions claim that the quality of abstractness toward which they aim in drafting is an advantage.[27] Yet, according to the leading authorities on the subject of semantics, the mind does not work in a manner which would enable it to assimilate an abstract definition. The giving of such instructions assumes that jurors are capable of learning the meaning of a word like "negligence" from the definition.[28] But S. I. Hayakawa, an eminent semanticist, has said, "We learn the meanings of practically all words (which are, it will be remembered, merely complicated noises), not from dictionaries, not from definitions, but from hearing these noises as they accompany actual situations in life. "[29] Unless jurors can relate the "complicated noises" of an instruction to some factual context within their own experience, then the giving of such instructions is pointless. The cure for this fault would be to weave the instruction into a summary of the evidence, but this much debated practice is prohibited in some states,[30] and prevented by the generalized nature of the pattern instructions themselves.

That the pattern instructions as they now exist are too general has caused at least one writer to question their efficiency David Mellinkoff, of the California Bar, argues that "The form instruction is gobbledygook partly because it tries to cover too much, once and for all, and for that very reason it is too cumbersome to be repeated at the places where it would do the most good."[31] And Judge Frank G. Swain of the Los Angeles County Superior Court writes that

26. It would be mere speculation to predict whether pattern instructions would have reduced the number of challenges to instructions in the appealed cases.

27. See White, *Standardized Instructions*, 23 U. KAN. CITY L. REV. 179 (1954-55). (The term "abstract" is used here to mean unconnected with the facts from which the definition is drawn.) *But see* State v. Thompson, 10 Utah 113, 170 P.2d 153, 162 (1946), in which the Court said, "We have repeatedly criticized the giving of abstract statements of law to the jury," and Chesnut, *Instructions to The Jury*, 3 F.R.D. 113 (1944).

28. *Supra* note 4.

29. HAYAKAWA, LANGUAGE IN THOUGHT AND ACTION 57 (1949)

30. See generally Wright, *Instructions to The Jury Summary Without Comment*, 1954 WASH. UNIV. L. Q. 177.

31. MELLINKOFF, *supra* note 7.

he once read a set of sixteen instructions to a freshman class at the University of Southern California School of Law Then he passed out a mimeographed questionnaire and asked the class to answer it. Not one student passed the test.[32]

In many states the judge reads his written charge to the jury The purpose of this practice is threefold — to incorporate the instructions into the record, to provide a copy for the jury, and to allow counsel to make timely objections.[33] Pattern instructions cater to this requirement, and, indeed, sometimes the judge merely reads his charge directly from the form book. Whatever meaning the legal language of the instructions may have for the jury disappears when it is read rather than spoken. The Illinois Supreme Court Committee On Pattern Jury Instructions has recognized this difficulty, and has attempted to make its pattern instructions "conversational", but to a large degree caution has prevailed, and they still sound stilted when read aloud.

The most telling criticism of pattern jury instructions is that they are written by lawyers in legal language. To be any good at all, the instructions must mean the same thing to the jury as they do to the judge. Yet this elementary requirement often conflicts with the paramount desire for accuracy, and the dispute is usually settled by including whatever legal language is considered indispensable.[34] Judge Robert Winslow of the Los Angeles County Superior Court says, "We use terms like 'reasonably prudent person', 'negligence', and 'proximate cause' because we are afraid to use other terms, not because they are descriptive of a relationship which must be conveyed to the jury "[35] It takes lawyers many years to feel at home with the language of the profession, largely because it is written, and not spoken freely Stuart Chase has called it a dead language.[36] Whether or not this is so, it cannot be denied that laymen view the language of the law with some suspicion. Brevity is another aim of the pattern instructions, but even the forms of the excellent California instructions are written by lawyers for

32. Swain, *Common Sense In Jury Trials*, 30 CAL. S. B. J. 405, 412 (1955).
33. See N.D. R. Civ. P., Rule 51(a).
34. *Supra* note 8.
35. *Supra* note 4, at 463.
36. CHASE, THE POWER OF WORDS 252 (1954).

lawyers, and their use is neither simple nor brief. In one California case using the approved forms there were sixty-nine instructions, fifty-seven of them taken from BAJI, covering more than thirty-three pages of the record.[37] The inordinate length of the charge provoked a concurring opinion from Presiding Justice Shinn, criticizing the conventional use of the pattern instructions. He said, "While it is customary to give these abstruse instructions on proximate cause and intervening agency, I doubt that they have ever had an effect upon the mind of an average juror except to confuse him."[38] What is lacking is some means of knowing whether the jury actually understood what they were told. It is a commonplace that lawyers are uniquely unqualified, by their familiarity with legal language, to answer this question; and appellate judges, with only a copy of the record before them, are equally at a loss.[39] Often, the unfortunate result is jury-made law [40]

VI

For any state considering the drafting of a complete set of pattern jury instructions, there exist several alternatives.

The easiest course is to do nothing. The survey of cases set out above shows that even though the administration of justice would be speeded somewhat, the ultimate effect of the forms would be negligible in North Dakota. And unless the drafting committee adopts a different procedure and set of goals, the result would likely be subject to the same criticisms which have cast doubt upon the existing models.

Or, the committee could imitate those of other states

37. Werkman v. Howard Zink Corp., 97 Cal. App. 2d 418, 218 P.2d 43 (1950).

38. *Id.*, at 50. See also, Swain, *Common Sense In Jury Trials*, 30 CAL. S. B. J. 405, 412 (1955), "One of the greatest fictions known to the law is that a jury of twelve laymen can hear a judge read a set of instructions once, then understand them, digest them, and correctly apply them to the facts in the case."

39. See MELLINKOFF, THE LANGUAGE OF THE LAW 434 (1963), "One explanation of the needless explanations and needless confusion is that many of these instructions are not designed for the quick understanding of listening laymen, but rather for more or less intelligible reading for appellate judges. 'More or less, because when the instructions have become standardized and commonplace, with pet names like BAJI, IPI, JIFU, etc., almost all the reviewing judge need do is hold them up to the light to see if the paragraph indentations and periods are in the right places. So that he may say: *This jury has been instructed.* That speeds the administration of justice, even if the juror understands nothing of what is said to him. In his confusion he reverts to his somewhat muddled common sense, and brings in a verdict that does not shock the sense of justice."

40. FRANK, COURTS ON TRIAL 120 (1963).

and start from the beginning. But this would involve a prodigious amount of time and money It took Illinois five years to produce its book of instructions, and the Arkansas committee estimated its cost for two years at ten thousand dollars, for which it obtained a legislative appropriation.[41] And it is possible that the case-law of North Dakota might be insufficient to supply authority for a complete set of instructions.

Short of beginning anew, the committee could investigate the possibility of adopting the best instructions from the form books already compiled in other states. This approach has the advantage of being time- and money-saving. Also, the collection so adopted would be more complete, and would have been tested in the courts.

The most desirable approach, in the view of this writer, is for the bench and bar to do what no other state appears to have considered. The most important feature of this approach is to have a committee composed of both lawyers and laymen. By making the drafting of a set of instructions a cooperative venture, it is far more likely that the forms would be composed in English rather than some form of legalese. The difference between the two can be seen by a comparison of the forms set out below[42] Further, it would be desirable for the committee to have as one of its draftsmen a layman with a professional acquaintance with semantics or linguistics. Instructions on each point could be made short enough so that there would be a variety for most situations; and this could lead to the desirable integration of the instructions and the evidence in the court's charge. Such a flexible approach would require that the instructions would not be compulsory There is an additional reason for suggested, rather than mandatory forms. A committee drafting compulsory instructions unavoidably takes on the character of a law revision committee, and the healthy growth of the law through judicial experimentation is thus prevented at its inception.[43]

41. *Committee Report on Jury Instructions*, 17 ARK. L. REV. 328 (1963).

42. *E.g.*, 1 BAJI 63 (4th ed. 1956), "In civil actions the party who asserts the affirmative of an issue must carry the burden of proving it. This means that if no evidence were given on either side of such issue, your finding as to it would have to be against that party. When the evidence is contradictory, the

This writer believes that it is possible to draft a set of jury instructions which would be both clear and accurate. The fact that none of the committees who have so far addressed themselves to this great task has accomplished all its aims is probably due more to their composition and viewpoint, rather than to any lack of ability or dedication. Lawyers should seek the help of the very laymen for whose ears the pattern jury instructions are ultimately intended. If this is done, the models can be a useful tool to the attorney and judge, an aid to the understanding of the juror, and a means of improving the administration of justice.

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decision must be made according to the preponderance of evidence, by which is meant such evidence as, when weighed with that opposed to it, has more convincing force, and from which it results that the greater probability of truth lies therein. Should the conflicting evidence be evenly balanced in your minds, so that you are unable to say that the evidence on either side of the issue preponderates, then your finding must be against the party carrying the burden of proof, namely, the one who asserts the affirmative of the issue."

IPI 116 (1961), "When I say that a party has the burden of proof on any proposition, or use the expression 'if you find', or 'if you decide', I mean you must be persuaded, considering all the evidence in the case, that the proposition on which [he] has the burden of proof is more probably true than not true."

JIG 42 (1963), "Whenever I say a claim must be proved, I mean that all of the evidence by whomever produced must lead you to believe it is more likely that the claim is true than not true. If the evidence does not lead you to believe it is more likely that the claim is true than not true, then the claim has not been proved. Proof of a claim does not necessarily mean the greater number of witnesses or the greater volume of testimony. Any believable evidence may be a sufficient basis to prove a claim."

See also MELLINKOFF, THE LANGUAGE OF THE LAW 433-34 (1963), "The judge would have done his job much better telling the jury: 'Jones brought this case to court and it is his job to satisfy you that Smith hit him.' True, unlike the room-shaking form instruction, the shorter one would have to be recast and repeated as the charge progressed. 'Smith says that if he hit Jones, he struck in self-defense. It is Smith's job to satisfy you on that point. "

43. See generally, *Panel Discussion Part III Instructing The Jury,* 47 CAL. L.REV. 888 (1959).