Effective Instructions to the Federal Jury in Civil Cases: A Consideration in Microcosm

George P. Smith II

The Catholic University of America, Columbus School of Law

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INTRODUCTION†

SILENCE! The sounds of strife are past;
The law will be explained at last.
When rests the plaintiff’s action,
Each juror cranes his neck in awe
To hear the judge expound the law
With keenest satisfaction.

Silence! The lynx-eyed counsel weigh
Each word the careful court may say,
Each sentence closely heeding;
With now and then a smile or frown
While noting all he utters down,
In hope he’s error breeding.

Silence! The jurymen pretend
Their close attention now to lend
To what the judge is saying:
But soon they stretch their limbs and yawn
Like sleepyheads ere break of dawn,
Their listlessness betraying.

Silence! The nineteenth “If you find”
With eighteen others well designed


All personal letters and forms of instructions cited throughout this article are on file in the law review offices at the Syracuse University College of Law.
Along its course is straying,
While mentally good counsel swear,
And puzzled jurors blankly stare,
Their wonderment displaying.

Silence! The jurors heed no more;
The charge to them is but a bore,
Although the court has more said
Concerning questions most abstruse,
Well calculated to confuse,
With many a droned "aforesaid."

Silence! The charging time has ceased,
The jurors' troubles are increased,
The client's woes extended.
They've heard a charge, but know it not;
For all they heard they soon forgot,
With truth and error blended.

Silence! The jurors leave the court
To promptly render their report
And disagree—averring
More jurors, on some later day,
Will disagree the selfsame way
With charging judges erring.¹

One of the most intriguing topics of current conversation among today's experienced, as well as inexperienced, trial lawyers is the preparation and use of jury instructions.² This interest is initiated within the law school setting, where professors teaching courses in evidence and procedure will invariably seek to impart in one lecture—or implicitly consider throughout the entire course—what they consider to be the rationale for effective and successful jury instructions. Yet it has only been recently that the federal bench has expressed itself with convincing clarity on this timely matter.³

Previously, unrecorded comments and ideas concerning the preparation of jury instructions were exchanged in the privacy of court chambers and among the jurists themselves but were never released for general publica- tion. Additionally, model or pattern instructions have been a matter of individual discretion with each judge. Because of this situation, the author has chosen to write an article directed toward the "art" of instructing federal juries.

The Honorable Chief Judge of the United States District Court for the Southern District of Indiana, William E. Steckler, a prominent jurist and one who has continually expressed a sincere interest in the general improvement of courtroom procedure, presented the basic idea in which this article found its roots.⁴ Judge Steckler suggested the need for an article which

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2. The first form book of jury instructions appears to have been Sir James Astyr's, A General Charge to All Grand Juries and Other Juries (1725).
3. The best known books concerning pattern jury instructions at the state level are: California Jury Instructions (4th ed. 1959); Illinois Pattern Jury Instructions (1961); New York Pattern Jury Instructions (1965).
would probe in depth the various, divergent viewpoints of the bench concerning the necessary components of sound jury instructions in federal civil cases. Consequently, original research was undertaken to survey the thoughts of other prominent jurists throughout the country on the area of jury instructions. What follows is a synthesis based upon the results of this survey, buttressed, however, by extensive case analysis. It is hoped that the article will present the reader with new insights into a vital area of federal civil practice.

Much deserved credit goes to Judge Steckler for his guiding spirit in this particular effort and also for his genuine interest in improving the standards of legal education and standards of the professional bar. Because of the significant part he played in the initial formation of this article, and because of his sincere encouragement and invaluable assistance throughout its writing, this article is respectfully dedicated to Judge Steckler—an outstanding jurist by all standards and a dynamic force in continuing legal education.

I

Rule 51 of the Federal Rules of Civil Procedure is the fountain head from which the attorney receives the power to author, and the judge to receive and review, instructions on the law pertaining to the issues under adjudicative consideration. Any discussion of jury instructions must of necessity be tied to an analysis of this rule.

The underlying purpose of Rule 51 is to enable the judge to avoid committing error by affording him a direct opportunity to correct the various statements made by the parties' counsel and to avoid omissions in his own later charge which is delivered before the case is given to the jury. Furthermore, that part of the rule that requires counsel to be informed prior to

5. Rule 51 states:
At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform counsel of its proposed action upon the requests prior to their arguments to the jury, but the court shall instruct the jury after the arguments are completed. No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires to consider the verdict, stating distinctly the matter to which he objects and the grounds of his objection. Opportunity shall be given to make the objection out of the hearing of the jury.

In a personal letter from Hon. Chief Judge J. Braxton Craven, Jr., dated January 25, 1966, it was stated:
Rule 51 requires some awkwardness. The last two sentences read together mean that with the jury still in the box in the courtroom, and before it retires, I must have a whispered bench conference with counsel, but loud enough for the court reporter to take it down. This is very awkward. The jury is sometimes amused—who can blame them? It would be considerably smoother if I could let the jury retire and then immediately permit counsel to object to instructions.

their arguments to the jury of the judge’s proposed action on requested instructions provides counsel a guide in shaping their arguments. However, when counsel embark upon summation without any request for such information, the judge may, and in fact usually does, assume that they have no need for such information and treat the requirement as thereby waived.


Mr. Justice Tom C. Clark, United States Supreme Court, stated in a personal letter dated March 17, 1966, that he felt the best approach was to require counsel to file his request at the beginning of the trial, with the understanding that he could supplement it if additional factual issues arose.

Hon. Senior Judge Roy M. Shelbourne, in a letter dated March 1, 1966, stated that it was his practice to prepare written instructions in each case after the introduction of all of the testimony and following a conference with counsel for the parties.

Hon. Chief Judge Steckler, in an article entitled, A System for Handling Jury Instructions, Proceedings of the Seminars for Newly Appointed United States District Judges [hereinafter cited as Proceedings] 135, 139, 140 (1963), observed that at the pre-trial conference in civil cases, and prior to trial in criminal cases, the attorneys are required to tender in triplicate their requested instructions before or at the commencement of the trial. One notable exception is allowed—that is, where unanticipated issues arise, they may be covered by later instructions if filed at a time reasonably in advance of the close of the trial, or as required by the Rules. The lawyers are informed that they need not submit instructions on matters which are covered by the court’s “stock” or pattern instructions. Stock instructions (which are mimeographed) cover such matters as the burden of proof and definitions of reasonable care.

Hon. Judge John D. Butzner, Jr., in a letter dated February 8, 1966, stated that in his district, counsel are asked to file and exchange their special charges fourteen days before trial and that in this way, the preparation of the later charge is simplified.

Hon. Judge Robert L. Taylor, in his letter of January 20, 1966, noted that he holds a pre-trial conference in nearly 100% of his cases, and has found it most helpful in separating the theories of the case.

Generally, the statements made at the pre-trial outline the theories in simpler and more understandable language than is used in the pleadings and these theories are incorporated into the charge. Likewise, at the pre-trial with the aid of counsel, the court attempts to formulate in simple language the issues of fact which will have to be submitted to the jury. In most cases, and especially in non-routine ones, I also request counsel for each side to provide suggested instructions. In a letter dated February 24, 1966, Hon. Judge John W. Oliver stated that he felt the key to all problems within the area of instructions would be found if only counsel for both sides were required to submit suggested forms of instructions well in advance of trial, citing the sources of authority for the proposed instruction.

Hon. Chief Judge J. Braxton Craven, Jr. observed in his letter of January 25, 1966, that he was not helped by counsel’s written request for instructions, but rather handicapped by them.

Fortunately, in my state counsel do not make written requests for instructions—except in the most unusual case, and, even then, in an abbreviated form relating to the one or two difficult legal questions. I once held court in the Southern District of New York and was utterly dismayed to receive nearly 100 pages of requested instructions on the afternoon before I was to charge the jury.

Hon. Senior Judge Orie L. Phillips uses the following practice in civil cases.

Prepare a tentative draft of the charge you propose to give to the jury. When the evidence is closed, take a recess and call counsel on both sides into your chambers. Read the instructions to them and ask them to indicate any objections they may have thereto. When the objections have been indicated, correct the instructions if you think the objections are well taken. Otherwise, overrule them. This does not mean that you will read the instructions to the jury when you give them the charge. It means you will follow substantially what you have put in your written draft. I think the practice serves two useful purposes. It gives you an opportunity
As Rule 51 and Rule 46 are recognized as co-ordinating compliments, they are similarly construed by the courts. The court may, without any reservation, state its charge in the language of broad legal principles without discussing the specific contentions made by the parties. Yet, if there is any evidence to support him, a party is fully entitled to have his theories of the case presented to the jury by proper judicial instructions. It is generally regarded as a poor practice for the

to correct any errors in the instructions, made inadvertently or otherwise, and it advises counsel what the charge will be when they argue the case.


Formal exceptions to rulings or orders of the court are unnecessary; but for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take on his objection to the actions of the court and his grounds therefor; and, if a party has no opportunity to object to a ruling or order at the time it is made, the absence of an objection does not thereafter prejudice him.


Rule 46 modifies the previous practice of requiring formal exceptions to rulings or orders of the court. Wright v. Farm Journal Inc., 158 F.2d 976 (2d Cir. 1947).


All that is required is that the charge as a whole convey to the jury a clear and correct understanding of the law. Kayo Oil Co. v. Sammons, 321 F.2d 729 (5th Cir. 1965); Barkdoll v. Schue, Roebuck & Co., 238 F. Supp. 213 (D. Minn. 1964), rev'd on other grounds, 353 F.2d 101 (8th Cir. 1965). Tyler v. Dowell Inc., 274 F.2d 890 (10th Cir. 1960) however, presents the contrary view that the judge, as governor of the trial, has an inescapable duty to state fully and correctly in his instructions to the jurors the applicable law of the case, and to guide, direct and assist them toward reaching an intelligent understanding of the legal and factual issues involved in their search for truth. A mere abstract statement or copious legal definitions do not meet the court's duty. What is needed is a fair and impartial statement of the factual issues and the applicable law. The instructions should be stated in logical sequence and in the common speech of man if they are to serve their traditional and, indeed, constitutional purpose in a workable system of jurisprudence. Id. at 897.

Accord, Texas & P. Ry. v. Jones, 298 F.2d 188 (5th Cir. 1962).

See generally, Mathes & Devitt, op. cit. supra note 3, at § 5.05.


In Dow nie v. Powers, supra note 6, the court held that it was prejudicial error for the lower court to deny counsel's request for an indication of which of his requested instructions would be refused and which would be given or what instructions would be tendered by the court. Chief Judge Murrah observed that in order to enable counsel to intelligently argue the facts on the law of the case, it had always been considered good practice "for the court to informally advise counsel before his argument generally what its instructions would be on controverted questions of law." Id. at 766. Rule 51 incorporated into its provisions, this concept of good practice. Therefore, it would seem, "that good practice requires the court to do no more than inform counsel generally as to its views on the requested instructions, . . ." Ibid. Yet, the court cannot act arbitrarily.

It cannot assume that counsel will know what the instructions will be, and counsel is not required to speculate at the risk of having his arguments nullified or its effectiveness impaired by the court's subsequent charge to the jury. If after argument of counsel, the court changes its mind or ultimately gives an instruction, or the substance of an instruction, it has indicated it will not, or fails to give an instruction which it has indicated it will, counsel should be given an opportunity, if justice requires, to re-argue the facts in the light of the case. Id. at 767.

It is accepted that the court has an inherent duty to instruct on all pertinent points of law presented by each case—irrespective of whether the court is requested to do so. Turner Construction Co. v. Houlihan, 240 F.2d 435 (1st Cir. 1957). However, a trial judge
court to give his instructions in absolute statutory language. The requisites for proper jury instructions and the test of their sufficiency must, because of the varying matters of substantive and procedural law involved in each case, quite naturally be viewed on a case by case basis. However, certain considerations remain constant and do not vary with the case.

A court should always endeavor to relate the evidence of each particular case to the applicable law and when, as in negligence, a legal standard must be postulated, it remains for the court to determine that standard, being careful to mention all possible factual alternatives to the jury. Instructions is not required to write out his charge in advance and submit it to counsel for their editing and exceptions. Puggioni v. Luckenbach S.S. Co., 286 F.2d 340 (2d Cir. 1961).

For an interesting state case holding it reversible error in Georgia for a trial judge to refuse to give a legal and pertinent charge, submitted in writing, in the language requested even though the propositions stated therein are substantially and correctly covered by the general charge, see Bibb Transit Co. v. Johnson, 107 Ga. App. 804, 181 S.E.2d 631 (1963).

12. La Presti v. Goodall Oil Co., 290 F.2d 653 (7th Cir. 1961). In Wolff v. Puerto Rico, 341 F.2d 945 (1st Cir. 1965) it was held that a court was in no way obliged to charge in the precise language of a party's request even if the instruction tendered by the party was copied from a Supreme Court decision. To merely repeat statutory language is not sufficient for a court to meet its duty to instruct unless the meaning of the language is clear and concise. Williams v. Powers, supra note 8, at 157. Accord, Cohen v. Western Hotels, Inc., 276 F.2d 26 (9th Cir. 1960); Tyler v. Dowell, Inc., supra note 9; McDonnell v. Timmerman, 269 F.2d 54 (8th Cir. 1959).

See also Glendenning Motorways v. Anderson, 213 F.2d 429 (8th Cir. 1954) where plaintiff's counsel in his closing argument read to the jury pertinent statutes of the state and proceeded to comment upon them by giving his personal views regarding their meaning; despite objection, plaintiff's case was sustained on appeal.

13. Where a state created right is to be enforced, the state law must be looked to for the substance of the instructions, but the form of instructions and the method of objection to them are procedural matters to which the federal court is not bound by state concepts. Odekirk v. Sears, Roebuck & Co., 274 F.2d 441, 445 (7th Cir. 1960). Accord, Erie R.R. v. Tompkins, 304 U.S. 64 (1938).

Federal courts follow their own rules, regardless of state practice and legislation, concerning both the manner and the method of instructing the jury. Nudd v. Burrows, 91 U.S. 426 (1875). However, strong disapproval has been voiced by the Judicial Conference of the United States concerning any proposed legislation which would require federal judges to conform to state procedure in instructing jurors. 1952 Report of the Judicial Conference of the United States, p. 17-18.

14. In McNello v. John B. Kelly Inc., 283 F.2d 96 (3d Cir. 1960), it was held that the following charge as to the Pennsylvania law of negligence was inadequate:

Now what is negligence? When you go into your room you are going to consider that. Everything will come right straight down to that one central point: who was negligent or who was not negligent. Negligence has been defined by the Supreme Court to be the want of due and proper care. It is the doing of something that the ordinary prudent man and woman would not do under the circumstances of that case or it is the not doing of something that the ordinary prudent man or woman would do under the circumstances of that case. Now, this is a very plain definition of negligence, and it can bring about no confusion. . . . Id. at 101.

See Olsen v. Realty Hotel Corp., 210 F.2d 785 (2d Cir. 1954) where a defect in a charge on proximate cause was cured by a subsequent statement in the charge concerning the standard of care owed to the decedent; Mazer v. Lipschutz, 327 F.2d 42 (3d Cir. 1964) where the restrictions to an instruction on the vicarious liability of a surgeon and anesthesiologist for administering the wrong type of blood furnished by a hospital employee to a patient who later died are considered. See also Worden v. Tri State Ins. Co., 347 F.2d 356 (10th Cir. 1965); Joyner v. George Washington Univ., 242 F.2d 37 (D.C. Cir. 1957); Sanders v. Glenshaw Glass Co., 204 F.2d 436 (3d Cir.), cert. denied, 346 U.S. 916.
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on the sudden emergency doctrine,¹⁵ last clear chance¹⁶ and assumption of
the risk¹⁷ are especially vulnerable to misconception by the lay jury and
should be carefully applied and considered by a court in its charge.

There can be no judicial review of instructions to which neither objec-
tion nor exception has been made at trial.¹⁸ When a review is allowed, the
court of appeals will look at the complete charge, rather than at the isolated
segments thereof in an attempt to discover whether certain instructions were
in fact erroneous.¹⁰

That the trial judge may not, in his charge to the jury, refer to a sum
or sums which are suggestive of a proper award is commonly accepted.²⁰
Even when the lower court couches its mathematical formulations in a series

(1953); Palmer v. Miller, 145 F.2d 926 (8th Cir. 1944).

For complete sets of instructions by Hon. Judge Charles E. Wyzanski, Jr., see Brewster
(conspiracy to violate anti-trust laws); Hegarty v. Hegarty, 52 F. Supp. 296 (D. Mass. 1943)
tort of malicious interference).

For model instructions on the following issues, see 3A Reid’s Branson Instructions to
Juries (3d ed. 1961), § 1295A (assumption of risk); § 1291 (last clear chance); Mathes &
Devitt, op. cit. supra note 3, § 73.03 (negligence); §§ 73.04, 73.05 (ordinary care); § 73.18
(proximate cause); §§ 73.21-73.24 (contributory negligence); § 73.25 (last clear chance). For
other possible charges on negligence, see Appendix A.

15. Frank’s Plastering Co. v. Koenig, 341 F.2d 257 (8th Cir. 1965). Here, the court held
that evidence showing that a west bound truck was confronted with an emergency (when
an east bound truck crossed over its side of the highway) warranted the submission of the
sudden emergency doctrine as to the west bound vehicle but not as to the east bound
vehicle.

16. See Miles & Sons Trucking Serv. v. McMurtrey, 341 F.2d 9 (10th Cir. 1965), where
it was held that an instruction on the last clear chance doctrine was prejudicial.

17. See Al G. Barnes Amusement Co. v. Olvera, 154 F.2d 497 (9th Cir. 1946), where a
trapeze performer was held to have assumed the risk of injury in his circus act because he
neither supervised nor inspected the installation of his high wire apparatus. Yet, in Watford
v. Evening Star Newspaper Co., 211 F.2d 31 (D.C. Cir. 1954), the doctrine of assumption
of the risk was held of less importance than an invitor’s absolute duty to exercise reason-
able care toward spectators who were watching free of charge a soap box derby being
conducted on public property. In Swann v. Ashton, 327 F.2d 105 (10th Cir. 1964), the court
chose to escape the harsh consequences of applying the doctrine of assumption of the risk
by basing its decision on a rather tight consideration of a bailment for hire of animals
(saddle horses) and the liability attaching thereto.

18. Maupin v. Erie R.R., 245 F.2d 461 (2d Cir. 1957); Bedwell v. Grand Trunk W.
R.R., 226 F.2d 150 (7th Cir. 1955); United States v. Glascott, 216 F.2d 487 (7th Cir.), cert.

A general exception to a charge will ordinarily preserve no rights on appeal. Byrne v.
Matczak, 254 F.2d 525 (3d Cir.), cert. denied, 358 U.S. 816 (1958). Furthermore, where plain-
tiff’s counsel stated at the completion of the court’s instructions that the plaintiff was
completely satisfied with the instructions as given, the plaintiff was precluded from urging on
appeal an erroneous exclusion from the instructions. Williams v. Union Pac. R.R., 286
F.2d 20 (8th Cir. 1960).

The only time where it is held error to refuse a requested instruction is on a defense
theory which was not covered in the instruction which the court gave. Sessions v. Union Sav.
& Trust Co., 342 F.2d 751 (6th Cir.), cert. denied, 382 U.S. 821 (1965); Gillam v. J. C. Penny
Co., 341 F.2d 457 (7th Cir. 1965).

For a generally, Wright, The Use of Special Verdicts in Federal Court, 38 F.R.D. 199

19. Forester v. Texas Pac. Ry., 338 F.2d 970 (5th Cir. 1965), cert. denied, 381 U.S. 944
(1965).

of hypotheticals, it is held prejudicial error. Sophisticated judicial guidelines are needed desperately in the area of damages. Generalities in a charge confuse the issue, while specifics would do much to assist in enabling the average juror to grasp the bases employed in arriving at an award. Although there would be some danger that the figures employed by the court in its charge would be accepted without question in arriving at a monetary determination, a cautionary instruction could be given to eliminate any doubt surrounding the matter. For example, a charge along these lines might be used:

The jury is not to infer from the fact that an instruction on measure of damages is given that the court is instructing the jury to award damages. The question of whether or not damages are given is a question for the jury's consideration.

The federal judiciary has a right, and some feel an obligation, to comment upon, discuss and marshall the evidence which is presented in court. The purpose of this practice is to assist the jury in arriving at an equitable and just result. The issues, framed and reiterated as such in the instruc-


Hon. Chief Judge William H. Becker prefers the following general instructions when charging in the area of damages:

If you find the issues in favor of the plaintiff, (on plaintiff's claim for damages,) then you must award the plaintiff such sum as you believe will fairly and justly compensate the plaintiff for any damages you believe he sustained (and is reasonably certain to sustain in the future) as a direct result of the occurrence mentioned in the evidence.

If, under the court's instructions, you should find the plaintiff is entitled to a verdict, in fixing the amount of your award you may not include in or add to an otherwise just award any sum for the purpose of punishing the defendant or to set an example.

In a case involving damage to property, the reasonable cost of repairs necessary to restore the property to the condition it was in immediately before the damage, and the reasonable value of loss of use pending repairs, are usually the determining factors in arriving at the amount of damages.

If, under the court's instructions, you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you should include:

(1) the reasonable value of the time, if any, necessarily lost up to date by the plaintiff since the injury, because of being unable to pursue his occupation as a proximate result of the injury. In determining this amount, you should consider evidence of plaintiff's earning capacity, his earnings, and the manner in which he ordinarily occupied his time before the injury, and find what he was reasonably certain to have earned during the time so lost, had he not been disabled.

If under the court's instructions, you should find that the plaintiff is entitled to a verdict, in arriving at the amount of the award you should include:

(1) the reasonable value, to the plaintiff, of any examinations, attention and care by physicians and surgeons and others, reasonably required and actually given in the treatment of the plaintiff, not to exceed on this item the sum of $_______. Enclosed in letter from Hon. Chief Judge Becker, February 24, 1966.


Indeed, a cardinal characteristic of the venerable common law tradition was the judge's instruction, or charge, to the jury. See generally, Holtzoff, Modern Trends in Trial by Jury, 16 Wash. & Lee L. Rev. 27, 33 (1959).

Arizona, Nevada, South Carolina, Tennessee and Washington are the only states having a constitutional prohibition against the (state) trial court commenting upon evidence sub-
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tions, are clarified by a lucid court analysis and discussion of the evidence, and the jury is enabled to discard the wide number of extraneous points that are invariably injected into a trial. In his position as chief moderator of the trial, the judge is duty-bound to place all items of evidence in their proper perspective rather than permitting them to remain in the somewhat distorted shape which they often naturally assume as a result of counsel’s partisan presentation. The judge’s observations may, on occasion, further assist the jury in resolving doubts regarding the weight to be accorded or, for that matter, the importance to be attached to some phase of the evidence.24

Undoubtedly, considerable time is spent by the jury when they ponder the imponderable—the instructions given to them by the court. The initial accuracy of the court’s charge as retained by twelve different men only in their memory banks, as well as various shades of semantic confusion and interpretation surrounding a new vocabulary to which they are introduced, could be eliminated in large part, if indeed not entirely, by the courts submission of a copy of its instructions to the jury to be considered by them in their deliberations. The trial judge has complete discretion as to whether

mitted during the trial. Ariz. Const. art. 6, § 27; Nev. Const. art. 6, § 120; S.C. Const. art. 5, § 26; Tenn. Const. art. 6, § 9; Wash. Const. art. 4, § 6. Yet, many state courts are reluctant to comment upon the evidence—even though no statutory prohibition exists—because of their incompetency or because they are uneasy about what they might say which in turn would bring them a reversal by a higher court.

Hon. Chief Judge Gus J. Solomon stated at page 9 of an address entitled, The Charge to the Jury, and delivered at the Seminar for Newly Appointed United States District Judges in Denver, Colorado, on June 29, 1965 [hereinafter referred to as Address], that if a judge clearly sets out the theories of both the plaintiff and the defendant’s case, defines with particularity the factual issues, and then proceeds to instruct the jurors on the principles of law which are applicable to each of the factual issues, there should then be no necessity to marshall the evidence—even in complicated cases. A copy of this address is on file in the law review offices at the Syracuse University College of Law.

See Mathes & Devitt, op. cit. supra note 3, § 6.04, at 75 where the authors state that although federal judges should exercise more frequently their authority to analyze and comment upon the evidence, it is only in the very exceptional case that a judge should express his opinion on the facts or on the value of the testimony or on the credibility of witnesses. Yet, if the federal trial judges will but exercise their complete common law authority to summarize and comment upon the evidence they will make a significant contribution to the administration of justice. See also Mathes & Devitt, op. cit. supra, § 14.01.

24. See Wormwood, op. cit. supra note 22, at 8 where the federal courts’ prerogative to comment upon the evidence is criticized as a usurpation of the right of the jury to be the trier of fact. It is submitted that this position is exceedingly narrow. See Stone, Instructions to Juries: A Survey of the General Field, 26 Wash. L.Q. 455, 464-66 (1941).

In an automobile case, the trial judge commented in his charge that personal injury cases had risen markedly since the advent of the automobile and that some fifty thousand people were killed and over a million injured on the highways each year. This was held to be merely extraneous to the controversy and not prejudicial, erroneous or calculated to inflame the jury. Rodgers v. Ashley, 207 F.2d 534 (3d Cir. 1953).

Chief Judge Solomon, Address op. cit. supra note 23, at 8 observed that although the federal trial judges have the historic common-law privilege of commenting upon the evidence It should be “rarely exercised” and the judge who does in fact choose to comment should always make it clear to the jurors that they may always disregard his comments since they, themselves, are the sole and exclusive judges of the facts and all the witnesses’ credibility.
he will allow a copy of his instructions to be taken into the jury room; regrettably, most courts do not often favorably exercise this discretion.\textsuperscript{25} It is generally felt that if the jury is given a copy of the charge it might select and weigh passages out of context and thereby fail to consider the instructions as an integrated whole.\textsuperscript{26} Nevertheless the preferred practice and the one most usually followed—is to await the jury's request for additional instructions on confusing points. These additional supporting instructions are then given orally.\textsuperscript{27}

Although a copy of the charge is not given to the jury in most federal courts, many courts allow the members of the jury to take notes during the entire trial.\textsuperscript{28} This practice is seemingly inconsistent with the primary reason

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\item United States v. Standard Oil Co., 316 F.2d 884, 896 (7th Cir. 1963).
\item One recognized authority in the area suggests that if copies of the instructions to the jury are not available, they should be taped on a recorder and allowed to be taken into the jury room and played back when and if necessary. Joiner, Civil Justice and the Jury 84 (1962).
\item Judge Steckler allows his written instructions, as well as all of the courtroom exhibits, to be taken by the jury into the jury room during deliberations. Steckler, A System for Handling Jury Instructions, Proceedings, 149 (1963).
\item Hon. Judge Bernard M. Decker stated in a letter dated February 10, 1966, that: During eleven years as a state court trial judge, I prepared written instructions which were taken to the jury room. Since coming to the Federal Court three years ago, I consistently have followed the practice of giving my instructions orally, and where jurors have expressed some question about the instructions after retiring, I have had all the instructions reread to them by the means of the tape recorder.
\item The judge continued, although I see no particular purpose in sending written instructions to the jury room in the ordinary negligence case, I think there may be some value in preparing written instructions in a long, complicated anti-trust suit and sending them to the jury room. It is apparent to me that in a case in which it takes three to four hours to read the instructions, that no jury is qualified to absorb what they hear. I recognize that some judges question the value of any instructions at all, and if this view is taken, it makes little difference which procedure is followed.
\item Hon. Judge Charles L. Powell stated in a personal letter dated January 31, 1966, “I have often thought that copies of the instructions should go into the jury room, but I have consistently refused to do so without a stipulation of the attorneys.”
\item See Solomon, Address, op. cit. supra note 23, at 15, where Judge Solomon states his belief that juries should not be encouraged to request additional instructions or have portions of the testimony read.
\item When a juror sends a note asking that an instruction be reread or clarified, I show the request to counsel, and unless there is a serious objection I order the jury returned to court. I then tell the jurors of the dangers of re-instructing and remind them of my previous instruction that “they must not single out one instruction alone as stating the law, but they must consider the instructions as a whole.” I tell them there is always the tendency to place greater emphasis on the particular issues on which they may be re-instructed. With this admonition, I usually re-instruct, but these jurors rarely make another request.
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for the court's refusal to submit copies of the instructions to the jury. The possibility of a juror isolating a comment from the judge's oral charge and misconstruing it in his written notes is far greater than it would be if an exact copy of the court's charge were provided for the jury.

II

The ritual of instruction is regarded as the last stage of a jury trial and one of the most important. Where a court feels that it has not given the veniremen adequate orientation instructions or, for that matter, does not choose to rely solely on the Juror's Handbook to meet this purpose, the judge should, and quite often does, endeavor to explain in brief the basic process of trying a jury trial by way of preliminary instructions.

Examine the prospective jurors as to their note-taking ability. In any such case, the notebooks should be impounded, as was done in the case at bar, and made a part of the record on appeal where counsel for either party has promptly registered objection to compulsory notetaking by the jury. Id. at 897.

See Chief Judge Steckler's most interesting comments concerning this matter in, "The Civil Jury Trial and Charge to the Jury," Proceedings 118-120 (1963), wherein the judge lists the primary reasons against note-taking as being a belief that such actions would divert the jurors' attention from the evidence as it would be progressively submitted during the trial; that the notes might emphasize one feature of the case over other equally important ones; that there is an ever present danger of inaccuracy in the jurors' notes because of their ineptness in taking notes; that there would be a conflict in the various sets of notes of the jurors; that counsel, in picking a jury, would become concerned with their note-taking ability; that the best note-takers would become the most influential jurors; and that a juror might purposely falsify his notes for a corrupt purpose. Even though it has been Judge Steckler's practice during the past six to eight years to refuse a request for note-taking by the jury, the judge has in fact allowed such a request in a few cases. The judge observes that there would be nothing wrong with the practice of permitting the members of the jury to take notes, so long as they were instructed properly with respect to the limits of their use.


There appears to be no valid reason, other than perhaps a saving of time or duplication of effort, why the jury should not also be given many of the basic instructions before hearing the testimony.\textsuperscript{31} It is generally accepted that the jury is entitled, at a minimum, to a preliminary statement setting forth the issues to be tried.\textsuperscript{32} Likewise, more efficient use of the jury could be realized if, when sworn, the jurors were told about burdens of proof, the treatment of pleadings, the judgment of the credibility of witnesses, and the duty to disregard stricken evidence.\textsuperscript{33} A reiteration of these points could then be undertaken at the conclusion of the case. Considerable disagreement exists among the authorities concerning the questioning of witnesses by jurors. It would seem that limited questions of a spontaneous nature should be tolerated, but only when strictly controlled by the judge. Ordinarily, a judge will not invite the jury to ask questions; the initiative should come from the jury.\textsuperscript{34}

A jury charge is in effect a lecture on the law and the facts of a particular case. As such, the judge becomes a professor and acting in that capacity he must impart to his students, the jurors, a wide yet basic understanding of many new and complicated matters (some of which are not easily comprehended even by lawyers) in one lecture. If impediments in the court's medium of communication arise, the charge may just as well have been delivered in a foreign language.\textsuperscript{35} Both counsel and judge should remember that words are but symbols the significance of which vary with the knowledge and experience of the minds that receive them.\textsuperscript{36}

\textsuperscript{31} Steckler, op. cit. supra note 30, at 95.
\textsuperscript{32} Id. See also Prettyman, Jury Instructions—First or Last? 46 A.B.A.J. 1066 (1960).

In a personal letter from Hon. Chief Judge Joseph C. Zavatt, dated January 27, 1966, Judge Zavatt stated his great concern in seeing that every juror fully understood the law involved in each case. "I believe," he said, "in explaining the law involved, as the trial progresses, rather than to hold out on the jurors until after all of the evidence is in. If they can understand as the trial progresses what is involved, they can listen to the testimony with a greater appreciation."

\textsuperscript{33} Steckler, op. cit. supra note 30, at 95.

Judge Prettyman, op. cit. supra note 32, at 1066, suggests that the following "rules of the game" be given to the jury when they are sworn: the function of the indictment; the function of juries as sole judge of the facts; the restriction of the jurors to a consideration of only the evidence; the rules concerning credibility; the presumption of innocence and the burden of reasonable doubt in criminal matters; the functions of the court and counsel; the elements of the civil or criminal wrongs charged; a glossary of some of the important terms which will be used; an admonition as to outside conversation and newspaper accounts and explanations of the verdict and how it is to be reached.

Judge Steckler observed that with the exception of telling the jury the elements of the offense charged (other than by way of reading the indictment), he covers the "rules" suggested by Judge Prettyman either during the preliminary orientation instructions which he gives or in the explanatory remarks in the voir dire examination. Steckler, op. cit. supra, at 94.


\textsuperscript{35} Laub, Trial and Submission of a Case from a Judge's Standpoint, 34 Temp. L.Q. 1, 9 (1960). See generally, James, Functions of Judge and Jury in Negligence Cases, 58 Yale L.J. 667, 680-85 (1949).

INSTRUCTIONS 571

The most effective instructions are those which are delivered in a clear, audible and, when possible, conversational tone; simple, non-technical language should be used over legalese. Instructions which are organized in a logical manner are preferred.

In addition, the judge must address the jury in such a way as to capture their complete attention and to present such a vivid picture of the case that the jurors can perform their function conscientiously and in accordance with law, rather than in an emotional and prejudiced manner.

An equally pressing problem is the concern of too many judges over the possibility of a reversal if, in their charge, they say too much to the jury. Consequently, many judges will purposely limit their charges to quotations from decisions of the appellate courts. Although these quotations may have

The opening charge by Justice Agnew in Commonwealth v. Drum, 58 Pa. 9, 14, 15 (1868), affords an excellent example of a masterpiece of oratory which could well in fact serve as a guide for modern instructions whose foremost purpose must be to educate the jury to their responsibilities:

The solemnity of the form in which the prisoner has been arraigned, and through which you have been set apart to become his triers, is well calculated to impress your minds with the high responsibility of the duty you have taken upon you. It should remind you that you are not to be blind to the interests of society in the pity you may feel for his youth; nor to forget the justice due to him in the horror you may feel for the crime. Following the pathway of the evidence, you should turn neither to the right nor the left, except as its light may illumine, guide and direct you. . . . You must not be affrighted from duty by the consequences of your finding. The weak and timid mind, alarmed at the picture which eloquence invokes, shrinks and often fears to follow whither the evidence leads. But the consequences are not yours—they follow the crime and not the finding. . . . If, through fear, pity, indignation or passion, you suffer your minds to be drawn away from a true and just verdict, you do err. Remember this, as a kind and faithful warning of the minister of justice, to preserve you wholly blameless in the high office you are called to perform.

37. Solomon, op. cit. supra note 23, at 3-5. Judge Solomon observes that instructions are personal and that words and phrases within them should belong to the judge as a part of his own vocabulary. Op. cit. supra at 6. While he acknowledges his use of pattern instructions, he further states that he often adds or deletes words to make the instructions run more smoothly for him. See Judge Solomon's letter of September 23, 1966. He notes further that the Mathes and Devitt book more than meets this requirement as a guide for effective instructions, supra, p. 6. See Joiner, Civil Justice and the Jury 83 (1962). For additional information see Appendix B.


39. Personal letter from Hon. Chief Judge Joseph C. Zavatt, dated January 27, 1966. The judge observed further that when he first came to the bench, he was advised by an experienced judge that when a charge had to be given on proximate cause, all that should be said, in order to thereby prevent a possible reversal, was that “proximate cause means what the words imply; that, were I to attempt to explain proximate cause, I might run the risk of a reversal on appeal. This fear of reversal, I submit, explains why so much gobbledygook is used in charges to juries.”

Hon. Chief Judge William H. Becker listed in a letter dated February 24, 1966, the following additional problem areas in the field of civil instructions: “1. Problem of use of abstract instructions instead of specific instructions hypothesizing facts of particular case; 2. Problem of reducing time required to settle charge to jury; 3. Problem of securing pretrial drafts of instructions to be requested by counsel with citation of source or authority in support; 4. Problem of whether to comment on evidence.”

Furthermore, the Hon. Judge John F. Dooling, Jr., stated that he felt the following were the central problems in this area: “difficulty in preparing adequate instructions during trial and passing adequately on requested instructions that often do not fairly present the points that they are intended to make.” See the judge's personal letter dated March 1, 1966.
meaning to fellow members of the legal profession, it is exceedingly doubtful that they are appropriate for laymen. Appellate court opinions are written for a far different purpose than that for which jury instructions are designed. While the points of law may oftentimes be controlling, the language is not.40

It is submitted that sounder and more effective jury instructions could be realized if: proposed instructions were submitted in writing, with accurate supporting citations, well in advance of their intended use by the court; a limited number of instructions were given by the court in cases where the issues are simple; the instructions were in understandable language, objective in their content and effectively delivered in a logical sequence. It would also be helpful if the court were to instruct on all pertinent legal points even though not specifically requested by counsel and go further in commenting upon and marshalling the evidence of the trial.41

III

While the jury system has rich historical beginnings and is regarded as a basic right,42 it is nonetheless the object of much criticism: It is a costly operation,43 often an exercise in caprice and utter folly,44 and is in need of

40. Devitt, Ten Practical Suggestions About Federal Jury Instructions, 38 F.R.D. 75 (1960) noted, "A not uncommon complaint of jurors is that they just do not understand the judge's charge to the jury. They suggest that it is too long, dis-jointed, repetitious and replete with technical legal terms and latin expressions."
42. 1 Holdsworth, History of English Law 312 passim (1922); Radin, Anglo-American Legal History 217 (1936); Thayer, Preliminary Treatise on Evidence (1898), Chs. II-IV; de Tocqueville, Democracy in America 283-85 (Reeve transl. rev. ed. 1945); James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 655 (1963).
43. The number of jury trials in the federal courts during the years 1948 to 1959 is shown below:

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Total</th>
<th>Civil</th>
<th>Criminal</th>
<th>Total Jury Cost*</th>
</tr>
</thead>
<tbody>
<tr>
<td>1948</td>
<td>3,809</td>
<td>1,952</td>
<td>1,857</td>
<td>$1,395,169.00</td>
</tr>
<tr>
<td>1949</td>
<td>4,136</td>
<td>2,577</td>
<td>1,569</td>
<td>1,720,136.00</td>
</tr>
<tr>
<td>1950</td>
<td>4,335</td>
<td>2,263</td>
<td>2,072</td>
<td>2,850,000.00</td>
</tr>
<tr>
<td>1951</td>
<td>4,331</td>
<td>2,470</td>
<td>1,881</td>
<td>2,870,000.00</td>
</tr>
<tr>
<td>1952</td>
<td>4,727</td>
<td>2,489</td>
<td>2,238</td>
<td>3,031,000.00</td>
</tr>
<tr>
<td>1953</td>
<td>5,135</td>
<td>2,589</td>
<td>2,546</td>
<td>3,166,000.00</td>
</tr>
<tr>
<td>1954</td>
<td>5,600</td>
<td>2,776</td>
<td>2,824</td>
<td>3,385,000.00</td>
</tr>
<tr>
<td>1955</td>
<td>5,721</td>
<td>2,925</td>
<td>2,796</td>
<td>3,471,000.00</td>
</tr>
<tr>
<td>1956</td>
<td>6,068</td>
<td>3,530</td>
<td>2,538</td>
<td>3,730,000.00</td>
</tr>
<tr>
<td>1957</td>
<td>5,634</td>
<td>3,289</td>
<td>2,345</td>
<td>3,720,000.00</td>
</tr>
<tr>
<td>1958</td>
<td>5,896</td>
<td>3,391</td>
<td>2,505</td>
<td>4,199,000.00</td>
</tr>
<tr>
<td>1959</td>
<td>5,694</td>
<td>3,330</td>
<td>2,364</td>
<td>4,209,000.00</td>
</tr>
</tbody>
</table>

* Includes grand jurors and jury commissioners.

44. Frank, Law and the Modern Mind 183, 327 passim (1963 ed.). Holmes, Collected
reform, if not abolition. In face of this criticism the question may be raised as to whether pattern or model instructions would benefit the jury system.

Pattern jury instructions may be defined simply as formulated or specimen copies of instructions which may be applied repeatedly in typical cases. If uniform standards were to be framed in understandable terminology, the jury would unquestionably be assisted in its efforts to comprehend and analyze the charge. The real and sustained value of pattern instructions would only be realized, however, if they were duplicated and then given to the jurymen to be considered in their subsequent deliberations. Regrettably, it would seem that this step will not be taken for quite some time by the federal courts.

One of the primary difficulties in adopting pattern instructions is that they are often improperly substituted in their entirety for individualized and personalized instructions which must be adapted to the facts of each case. Two prominent leaders in the movement for liberal use of pattern instructions are quick to caution that no set of instructions is ever complete until it is fitted to the facts of the particular case in trial. Pattern instructions are not to be "swallowed whole" by the judge and counsel, but rather should serve only as guides for improving the content of jury instructions while at the same time expediting the trial of the case. Countless
office hours on the part of the advocate and the court which were normally spent in preparing, researching and drafting instructions are drastically reduced as a consequence of the introduction and cautious use of model instructions.

No consensus of opinion is to be found in the federal judiciary or in the practicing bar concerning the free use of pattern instructions. What is important to recognize is the fact that greater reliance is being attached to standard instructions by both the courts and trial lawyers. Thus, arguments favoring the adoption of pattern jury instructions are: the court's quest for greater efficiency in scheduling its calendar and ridding itself of the usual backlog of cases and the trial lawyer's constant attempts to minimize his expenditures of effort in preparing for and meeting a heavy schedule of appearances in court.

Only the extent to which it is actually followed is the court's charge an effective device in the adjudicative process. To be certain, jurors are put under oath, but this still offers no solid assurance that the instructions will be followed. Perhaps the most effective insurance is some form of special verdict or interrogatory to which the jury must respond. Under the special verdict, the jury finds the facts and the judge then proceeds to find and apply the law. In this way, the matter of law-application is reserved exclusively

Mr. Justice Tom C. Clark observed in his letter of March 17, 1966, that "quite a few cases go off on errors on instruction."

"Instructions furnish the most prolific source of error and reversal by appellate courts." Green, op. cit. supra note 29, at 351 (1930).

Three basic standards were employed by the Illinois Jury Instruction Committee in formulating pattern instructions: 1. Negative instructions, those telling the jury not to do something, were eliminated from the new instructions; 2. The singling out of evidence was eliminated and left to the arguments of partisan counsel; 3. Instead of instructions which told juries not to do something or which singled out evidence, the committee prepared single, general instructions pertinent to the respective segments of the law and proceeded to calate them into the pattern instructions which were then drafted according to the principles of instructions being conversational, understandable, unslanted and accurate. Corboy, supra, at p. 63.

Since 1942, Missouri has used a set of pattern instructions in its courts (Raymond's Missouri Instructions) and Indiana just recently published such a set also (Indiana Pattern Jury Instructions 1966).

50. See Appendix C which refers to various personal opinions of members of the judiciary in this field.

51. Dooley, Jury Instructions: An Appraisal by a Plaintiff's Attorney, 1963 U. Ill. L.F. 586 argues in support of the Illinois Pattern Instructions noting in his article that simplification makes for justice and that pattern instructions greatly simplify courtroom practice. Accord, Corboy, op. cit. supra note 49. But see, Fowler, Jury Instructions: An Appraisal by a Defendant's Attorney, 1963 U. Ill. L.F. 612 where the author criticizes the standard forms and suggests that they give a "plaintiff-slanted version of the law;" and Close, Theory and Practice of Standardized Jury Instructions, 31 Ins. Counsel J. 490 (1964) where the author says that the Illinois Pattern Jury Instructions, in particular, have become a type of bible so far as instructions are concerned, and that it is increasingly more difficult to convince the trial judge to accept a modification—no matter how slight—of the model instructions or to convince him to give instructions which are not included within the forms. See Note, 98 U. Pa. L. Rev. 225, 229 (1949) where the view is taken that standard instructions add an element of sterility to the law.

52. James, Functions of Judge and Jury in Negligence Cases, 58 Yale L.J. 667, 681 (1949).
for the expert in law rather than for a jury composed of laymen.\textsuperscript{53} The special verdict presents one important drawback: that is, the jury may arrive at a factual conclusion on an insufficient evidentiary basis in order to answer the interrogatories in such a way as to support their desired verdict.\textsuperscript{54} Perhaps this possibility explains in part the reason why special verdicts are not widely employed in the federal courts.\textsuperscript{55}

The present concern and confusion surrounding the inefficiencies of the jury system, and more particularly the jury's inability to follow and comprehend the instructions given to it by the court, could be eliminated in large part if a wider and more effective use were made of the pre-trial conference. Issues could be clarified with certainty and both counsel and the court could then present the case for the consideration of the jury in a more logical and orderly manner. Of course, the chief advantage of the pre-trial conference is that it often resolves the legal problem and thus obviates the need for a trial in the first instance.\textsuperscript{56}

\textbf{Conclusion}

Effective instructions to a federal civil jury can be attained, but their ultimate success is predicated upon a competent, conscientious judge and an ethical attorney who is skilled in drafting the applicable and correct law of the case. A lay jury is entitled to instructions which are conversational, understandable, unslanted and accurate. In addition, if the jury is provided with either copies or a tape recording of the instructions, some general level of comprehension, as well as sophistication, may be expected of it.

An attorney has a professional duty, in preparing instructions, to present to the court an objective survey of the law of his case well before the conclusion of the evidence and preferably at a pre-trial conference or at least sometime before the trial commences. When such a practice is followed the court may then carefully consider and evaluate the proposals in an unhurried manner. A wider use and fuller understanding of special verdicts would also increase the effectiveness of jury instructions.

When standard or pattern jury instructions are used as guides for the drafting of individualized case instructions, they serve to increase the overall effectiveness of the instructions and improve the administration of

\textsuperscript{53} Joiner, Civil Justice and the Jury 84, 85 (1962). Dean Joiner urges liberal use of special verdicts in all jurisdictions. For the application and use of interrogatories, see Appendix D.

\textsuperscript{54} James, op. cit. supra note 52, at 684.

\textsuperscript{55} Wright, The Use of Special Verdicts in Federal Courts, 38 F.R.D. 199, 200 (1965). Professor Wright feels that "habit," as much as anything, has precluded a full use of special verdicts, that is, the habit of judges and lawyers of preferring the general verdict with which they grew up over the special verdict which is seen as a novel form of procedure. See also Wormwood, op. cit. supra note 30, at 11 for an interesting method called "the carrying instruction" which closely parallels that of the special verdict.

\textsuperscript{56} See Kaufman, Discovery, Motions and the Pre-Trial Conference, Proceedings 27-69 (1963). See also Chantry, Pre-Trial—Utility or Futility, 32 Ins. Counsel J. 602 (1965).
justice by expediting the complicated routine of a trial. Although in itself not a panacea to all instructional problems, the proper use of pattern instructions would enable the lay jury to discharge its most important role as the decider of fact.

APPENDIX A

OTHER NEGLIGENCE INSTRUCTIONS

I

"Negligence" is the omission to do something which a reasonable person guided by those considerations which ordinarily influence a person of reasonable prudence would do under all the circumstances of the situation in question, or the doing of something which a person of ordinarily reasonable prudence would not do under all the circumstances of the situation in question. The question of whether or not there was negligence in a particular instance would be determined by you from all the circumstances and conditions as shown in the evidence at the time surrounding the person to whom the negligence is charged.

Negligence is comparative and not a positive term. It always relates to some circumstances of time, place or person. It is determined in all cases by reference to the situation and knowledge of the parties and to all the attendant circumstances.

Negligence may also be defined as a breach of, or failure to discharge a legal duty.

"Ordinary care" as used in these instructions is that degree of care that an ordinarily prudent person exercises under the same or similar circumstances, and is never absolute, but relates to circumstances, time and place, and a failure to use such care is negligence.

In considering the question of contributory negligence of the plaintiff, I instruct you that the burden is on the defendants to establish by a preponderance of the evidence that the plaintiffs were guilty of contributory negligence, which proximately contributed to the injuries; and if the evidence on that issue is, in your judgment, evenly balanced or if it proponderates against such contributory negligence, then it is not proved and you should find that the plaintiff is not guilty of contributory negligence.

Contributory negligence is a want of ordinary care on the part of a person injured by the actionable negligence of another, combining and concurring with that negligence and contributing to the injury as a proximate cause thereof without which the injury would not have occurred. If you find that at the time of the accident plaintiff was guilty of contributory negligence, no matter how slight, which contributed proximately to the accident, then plaintiff cannot recover against defendant, even though you find defendant was also negligent.

In order to find a verdict for the plaintiff, you must not only find from a preponderance of the evidence that the defendant was negligent, but also that such negligence was the proximate cause of the injuries to plaintiff, and you must further find that the evidence fails to show by a preponderance thereof that plaintiff was guilty of negligence, however slight, which contributed proximately thereto; otherwise your verdict must be for the defendant.

The foregoing sample instruction was enclosed in a letter from the Hon. Judge Yankwich, February 28, 1966.

II

Hon. Chief Judge W. H. Becker in a letter dated February 24, 1966 expressed the following as his preference for an instruction on negligence and proximate cause:

The term "negligence" as used in these instructions means the failure to use the highest degree of care which means that degree of care that a very careful and prudent person would use under the same or similar circumstances.

An injury is proximately caused by an act or omission whenever it appears:

(1) that the act or omission played a substantial part in bringing about or actually causing the injury, and it further appears

(2) that the injury was either a direct result or a reasonably probable consequence of the act or omission. . . .
Contributory negligence is fault on the part of a person injured which, cooperating in some degree with the negligence of another, helps in bringing about the injury.

III

Compare this instruction:

"Negligence" is a failure to exercise ordinary care, and ordinary care means such care as a person of ordinary prudence would exercise under like or similar circumstances.

The fact alone that an accident occurred does not mean that it was proximately caused by anyone's negligence, as those terms are defined herein.

An "unavoidable accident" is an occurrence which happens without any causal negligence on the part of either the plaintiff or the defendant, that is, something which happens unexpectedly and in spite of the fact that no lack of ordinary care by either party, or both parties has brought it about.

"Contributory negligence" means negligence of one party which concurs or combines with the negligence of another party to become the proximate cause of the particular event.

A "proximate cause" is an act or an omission which naturally, and in a connected sequence, leads to certain consequences which are such that a person of ordinary prudence, under all of the circumstances, should have reasonably foreseen the same or similar consequences as a result of said cause.

A given event may result from more than one proximate cause or from only one proximate cause. When the event results from only one proximate cause that proximate cause is called the "sole proximate cause." That is to say, "sole proximate cause" means the only proximate cause of an event.


APPENDIX B

Words Used In Instructions

In a personal letter dated January 20, 1966 Hon. Judge Robert L. Taylor observed that in charging orally, he tried to make the charge as simple as possible.

I have heard complaints of the stereotyped charge which is read to a jury. Many people feel that the jury does not get much help from such a charge. You know the story, in a case where the jury couldn't agree and the judge asked the foreman what was giving the jury trouble. The foreman replied that some of them wanted to decide it according to the charge and others wanted to decide it according to the law. . . . It is my practice to prepare a written charge in every civil case.

Hon. Judge John D. Butzner, Jr. stated in a letter dated February 8, 1966, that "probably the most frequently encountered problems are incomplete, slanted or argumentative statements of the law and, secondly, lack of simplicity."


Hon. Chief Judge J. Braxton Craven, Jr. stated in a letter dated January 25, 1966, that instructions should be in simple, non-legal language calculated to be understood by the average juror, and ought to be done by the judge from brief notes in a mostly extemporaneous manner. . . . I keep all definitions as short as possible . . . my definition of negligence . . . usually is about as follows: Negligence is the failure to exercise due care. Due care is that degree of care which a reasonably prudent person would exercise under similar circumstances when charged with a similar duty.

Hon. Sr. Judge Frank L. Kloeb observed in a letter dated March 30, 1966: It seems to me that our greatest problem in preparing and delivering charges to juries is to avoid extreme detail that will prove to be confusing to the jury. In my experience, the simpler the statements to the jury the better the results . . . I have been concerned . . . in trying to make my jury instructions in both civil and criminal cases as short and precise as possible. It has been my idea to get the main point in controversy before the jury, stating the factual situation as clearly as possible, and then giving to the jury credit for the exercise of common sense and good judgment in the light of the evidence that has been presented to them and the general rules that the Court is obliged to give. It has seemed to me that more confusion can ensue from engaging in lengthy instructions to the jury.
than by merely stating the facts, giving them the necessary legal guidelines, and then allowing them to exercise their judgment.

Hon. Judge Charles L. Powell stated, "I think it is a failing of all judges that they read instructions to the jury without trying to communicate the contents of the instructions adequately." Personal letter, January 31, 1966.

APPENDIX C

USE OF PATERNJ INSTRUCTIONS-OPINIONS

Mr. Justice Tom C. Clark's letter of March 17, 1966, stated the Justice's firm belief in pattern jury instructions. He observed, "Personally, if I were on the trial court I would search for instructions which had been approved and attempt to fit them to the particular case on trial."

Hon. Judge John W. Oliver noted in his letter of February 24, 1966, "Generally speaking, we attempt in [the Western District of Missouri] to follow the standardized instructions approved by the Supreme Court of Missouri in all diversity cases."

Hon. Judge Edwin A. Robson stated in his letter of February 21, 1966, that he used the Illinois Pattern Jury Instructions as a basis for preparing his charges although noting that in some areas of litigation—anti-trust diversity actions involving contracts entered in other states, and Jones' Act suits brought in admiralty—the pattern instructions were not of any value.

Hon. Chief Judge Roszel C. Thomsen observed in his letter of January 20, 1966, "No standard instructions have been compiled for use in this District," although some members of his court use Mathes and Devitt adjusting it always to fit local rules of law in diversity cases and to fit the facts in a given case.

Hon. Judge Robert L. Taylor cautioned, in his letter of January 20, 1966, "A judge should not be too dependent even upon his own standardized instructions, since the law is constantly changing and he must avoid the pitfalls of charging on a matter in which the law has changed."

Judge Charles E. Wyzanski, Jr. observed in his letter of January 20, 1966, "I never use standardized instructions, either from a form book or from any other charge, or even from my own past practice." In an effort to follow the English practice, the judge noted further that, in so far as he could, he would deliver his charge in an extemporaneous manner, without the benefit of notes and immediately after counsel finished their speeches to the jury.

Chief Judge J. Braxton Craven, Jr. said in his letter of January 25, 1966, "I am biased against pattern jury instructions. I think the inevitable result is that the judge ends up largely charging the appellate court rather than the jury."

Chief Judge W. Wallace Kent said in his letter of February 2, 1966, "In my opinion the preparation of instructions to a jury must be done in each case in light of the facts of the individual case and with attention to the most recent decisions of the Supreme Court of the state of the forum. Instructions relative to particular areas of negligence and particular areas of contract law are prepared in the light of the facts of the case. . . . We use general instructions relative to burden of proof, credibility of witnesses, defense of negligence, contributory negligence, etc. . . . Written instructions are used in every case.

Judge Mac Swinford in his letter of January 21, 1966, said, "it is necessary to make a special study and preparation of instructions in each case and I have gained little assistance from instructions I have given in previous cases . . . since each case involves distinctive facts, it is difficult to find a stereotyped instruction, aside from definitions of rules and legal terminology."

Judge John E. Miller stated in his letter of January 25, 1966, his belief that the federal judges are not confronted with any particular problems in formulating jury instructions. "In cases where the jurisdiction depends upon diversity of citizenship and the amount involved, the substantive law of the state governs and in most of the states there are publications containing approved instructions on practically every question of law."

The readers attention is further directed to Hannah, Jury Instructions: An Appraisal by a Trial Judge, 1963 U. Ill. L.F. 627 which hails pattern jury instructions, and especially the Illinois instructions, as a great stride in modernizing and preserving the judicial system. See United States v. Kelly, 349 F.2d 720 (2d Cir. 1965) where Judge Medina rejected the use of standard, "boiler-plate" instructions. See also a letter from the late Dean Emeritus Roscoe Pound to Judge William C. Mathes wherein the Dean's fear of super mechanization in jury trials, and particularly in jury instructions, is expressed, 28 F.R.D. 401 (1962).
APPENDIX D

USE OF INTERROGATORIES

In a letter dated January 24, 1966, Hon. Chief Judge Caleb M. Wright enclosed a complete set of instructions for a case involving a special verdict with appropriate charges on the interrogatories. Only part of the charge is given here:

Under the rules of this court the judge has discretion of asking for a general verdict, i.e., a verdict based upon your consideration of the evidence in its entirety and finding in favor of one party or the other. Or the court may submit certain questions with respect to ultimate issues of fact which the court deems essential in order for it to frame a judgment, upon application by the court of the law pertinent to the issues in the case. This is called in law a Special Verdict.

I have prepared a list of 9 questions or interrogatories. The original of these your foreman has and the other members of the jury have copies. You will note that after various questions are instructions as to what you should or should not do, depending on how you have answered previous questions. If you carefully follow these instructions you will have no difficulty. I will first explain to you some of the general rules that apply to all civil actions, such as who has the burden of proof; what is meant by preponderance of evidence and general rules of like nature. I will then read to you the first interrogatory and will endeavor to explain the law which you must keep in mind in order to answer the interrogatory. I will do this with each interrogatory in sequence. Your answer to each of the interrogatories which you find necessary to answer must be unanimous.

Question No. 1

Was Lyle Mundy guilty of negligence which was a proximate cause of the accident between the truck driven by Mundy and the car driven by Mary Beth Thorns?

Charge on Interrogatory No. 1

In answering this question you must consider two concepts: negligence and proximate cause. Negligence generally is the want of ordinary care, that is, the want of such care as a reasonably prudent and careful person would exercise in similar circumstances. The standard to which one is held is found, then, in the conduct of a reasonably prudent person. ... If the conduct of a defendant in given circumstances does not measure up to that which, in the opinion of the jury, is the conduct of an ordinarily prudent and careful person in like circumstances, such defendant may be said to have been negligent. If, on the other hand, his conduct does measure up to the conduct of an ordinarily prudent and careful person, he may not be said to have been negligent. Negligence, then, relative and comparative, and dependent on the circumstances, and its existence is to be determined from the facts and circumstances of each case.

Question No. 2

Was the flagman, Horace Baugh, guilty of negligence which was a proximate cause of the accident between the truck driven by Mundy and the car driven by Mary Beth Thoms?

Charge on Interrogatory No. 2

To answer this question, the concepts of negligence and proximate cause must again be applied.

I have instructed you that it is negligence per se to drive through a blinking red light. If you find, therefore, that Baugh signaled Mundy to proceed through the red light, and his signal was a proximate cause of the accident, then you must find Baugh negligent and your answer to this interrogatory must be "yes."

Question No. 3

Was Mary Beth Thoms guilty of negligence which was a proximate cause of the accident between the car driven by her and the truck driven by Mundy?

Charge on Interrogatory No. 3

A plaintiff seeking damages alleged to have resulted from negligence on the part of the defendant may not recover if the plaintiff was guilty of contributory
negligence and such negligence was a proximate cause of the accident. Although Mary Beth Thorns is not a plaintiff here, in answering this interrogatory you will apply the same rules to determine whether or not she was contributorily negligent as you would have applied if she were a plaintiff in this suit. You need not concern yourself with the reasons for this. . . ."


APPENDIX E

It is useful to consider a jury charge as a complete, integrated unit. In addition to gaining insights into the contents of the instructions, one can learn what goes into a complete charge; how it is organized; the sequence in which it is delivered; etc. Consequently, there is included for the reader's perusal a charge given to the jury by Judge Steckler in a case involving the Federal Employers' Liability Act. Due to the nature of the particular issues involved here, these instructions are more complex and longer than a set of instructions in a standard contract problem, for example.

EMMA I. HAMILTON, Administratrix of the Estate of Clarence Hamilton, Deceased
VS.
BALTIMORE AND OHIO RAILROAD COMPANY

PRELIMINARY STATEMENT

Ladies and Gentlemen:

It is necessary for me at this time to explain to you the nature of the case to be tried today so that the court and the attorneys may determine whether you are qualified to hear and resolve the disputed issues in this action.

This is an action for damages for wrongful death which is brought pursuant to the terms of the Federal Employers' Liability Act. The plaintiff, Emma I. Hamilton, is suing in her legal capacity as administratrix of the estate of Clarence Hamilton, deceased, on behalf of herself as the dependent next of kin of said decedent. The plaintiff's complaint alleges that on July 20, 1957 the defendant Baltimore and Ohio Railroad Company owned and operated a railroad between the City of Cincinnati, Ohio, and the City of St. Louis, Missouri, as a common carrier in interstate commerce; that on said date, the decedent, Clarence Hamilton, was employed by defendant as an engineer on defendant's westbound passenger train operating from Cincinnati, Ohio, to St. Louis, Missouri in interstate commerce as a common carrier. The complaint then alleges that the railroad operated by defendant runs in a generally easterly and westerly direction through Jennings County, Indiana; that at a point approximately 3,609 feet east of defendant's station at North Vernon, Indiana, there is the east switch of a siding, which siding is approximately 2.2 miles long and which parallels the main railroad track of the defendant on the north side thereof. It is then alleged that at about 9:32 a.m. the defendant stopped a westbound freight train at the east switch of said siding, with the rear end of the caboose of said train being on the main track at a point approximately 2,935 feet east of said switch. The complaint then alleges that at or about 9:37 a.m. on said date the aforesaid westbound passenger train collided with said freight train and that said collision was proximately caused by the negligence of the defendant. It is then alleged that as a proximate result of said collision, plaintiff's decedent was killed, wherefore the plaintiff asks judgment against defendant in the sum of $100,000.00.

The defendant, by way of answer denies the material allegations of the complaint and by way of affirmative defense in mitigation of damages, avers that any damages sustained by plaintiff were caused in whole or in part or were contributed to by the negligence of plaintiff's decedent, Clarence Hamilton.

Will the attorneys please introduce themselves to the jury panel. (The Judge then proceeds to conduct the voir dire examination. After he has finished, he turns the jury over to counsel for further examination.)

THE COURT'S INSTRUCTIONS

A. Introductory.

1. Introductory remarks.*
2. Instructions must be considered as a whole.*
4. Pleadings are not evidence; judicial admissions must be accepted as true.**
5. Corporation acting by its agent.

* Stock instruction.
** Modified stock instruction.
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7. Plaintiff has burden of proof.
8. Plaintiff need only prove one act of negligence.
9. Defendant has burden of proving contributory negligence and sole proximate cause.
10. Definition of fair preponderance of the evidence.
11. Jury may draw inferences.
12. Jury must consider all the evidence.
13. Definition of negligence.
14. Definition of reasonable care.
15. Definition of proximate cause.
16. Definition of sole proximate cause. (Pltf's Instr. 6)
17. Definition of contributory negligence.

B. Nature of the case.
1. Negligence.
19. F.E.L.A. applicable to case.
20. Explanation of F.E.L.A.
22. Employee's duty.
23. Violation of specific company rules is negligence on part of the violator. (Atchison, T. & S.F. v. Ballard, 108 F.2d 768 (5th Cir. 1940).
24. Law presumes that a person can see that which by the use of ordinary care he could have seen had he looked. (Deft's Instr. 14.)
25. No assumption of risk under F.E.L.A. (Pltf's No. 8.)
26. If defendant guilty of any negligence whatsoever, jury must find for plaintiff. (Pltf's Instr. 2.)
27. No presumption of negligence or contributory negligence.

2. Specific questions.
28. Transition to specific questions.
29. Questions jury must decide.
30. Mandatory instruction directed to non-liability.
31. Mandatory instruction directed to liability.

3. Damages.
32. Transition to damages.
33. Damages should compensate plaintiff reasonably.
34. Measure of damages.
35. Beneficiary can recover pecuniary loss only. (Deft's Instr. 22.)
36. Jury must reduce plaintiff's damages to present value. (Pltf's Instr. 18.)
37. Future earnings should be calculated on length of time plaintiff's decedent would be employed. (Deft's Instr. 23.)
38. Effect of evidence on life expectancy. (Pltf's Instr. 19.)
39. Mortality and annuity tables. (Deft's Instr. 25.)
40. Diminution of damages under F.E.L.A.
41. Damages allowed not to exceed amount prayed for.
42. Amount demanded optional with plaintiff.

C. General principles.
43. Transition to general principles.
44. Credibility of witnesses.
45. Expert witnesses.
46. Impeachment of witnesses. (Pltf's Instr. 13.)
47. Effect of impeachment. (Deft's Instr. 35.)
48. Assertions of counsel are not evidence.
49. Effect of counsel mistaking the law or misstating the evidence.
50. Jury must disregard stricken evidence; court does not pass on credibility or weight in admitting evidence.
51. Judge's impartiality.
52. Parties to be treated as individuals equal in all things.
53. How jury should deliberate.
54. Closing remarks—verdicts—exceptions.

* Stock instruction.
** Modified stock instruction.
*** Stock F.E.L.A. burden of proof. Not used in other cases.
Instruction No. 1

Members of the Jury:

At this time it becomes the duty of the Court to instruct you on the law as it applies to this case, but first of all I should like to thank you for...

It will be your duty as jurors to follow the law as the Court states it to you. On the other hand, you must keep in mind that it is the exclusive province of the jury to determine the facts of the case, and for that purpose to consider and weigh the evidence.

Instruction No. 2

If, in these instructions, any rule, direction, or idea be stated in varying ways, no emphasis thereon is intended by me and none must be inferred by you. For that reason you are not to single out any certain sentence or any individual point or instruction, and ignore the others, but you are to consider all the instructions, and as a whole, and you are to regard each instruction in the light of all the others.

Instruction No. 3

This action was commenced by the filing of a complaint by the plaintiff, Emma I. Hamilton, Administratrix of the Estate of Clarence Hamilton, deceased, against the defendant Baltimore and Ohio Railroad Company. The complaint of the plaintiff is drafted in thirteen rhetorical paragraphs and reads as follows:

1. This action arises under the Act of Congress of April 22, 1908, Chapter 149, Section 1, 35 Stat. 65, as amended; Title 45 U.S. Code Section 51 et seq.; commonly called the Federal Employers' Liability Act.
2. At all times herein mentioned the defendant owned and operated as a common carrier in interstate commerce a railroad between the City of Cincinnati, Ohio, and the City of St. Louis, Missouri.
3. On the 20th day of July, 1957, the decedent, Clarence Hamilton, was employed by the defendant as an engineer on the defendant's passenger train operating from the City of Cincinnati, Ohio, to the City of St. Louis, Missouri, in interstate commerce as a common carrier.
4. Said railroad operated by the defendant, so described in Rhetorical Paragraphs 2 and 3, runs in a generally easterly and westerly direction through Jennings County, Indiana. At a point approximately 3,609 (three thousand six hundred nine) feet east of the defendant's station at North Vernon in Jennings County, Indiana, there is the east switch of a siding, which siding is approximately 2.2 (two and two tenths) miles in length, and which parallels the main railroad track of the defendant on the north side thereof.
5. On the 20th day of July, 1957, at or about 9:22 o'clock in the morning, the defendant stopped a westbound second class freight train with two diesel electric units, 62 (sixty-two) cars, and a caboose at the east siding switch, described in Rhetorical Paragraph 4, with the rear end of the caboose on the main track at a point approximately 2,935 (two thousand nine hundred thirty-five) feet east of said switch.
6. On the 20th day of July, 1957, the defendant had in effect certain operating rules, which read in part as follows:
   99. When a train is moving under circumstances in which it may be overtaken by another train, the flagman must take action to insure full protection. By night, or by day when the view is obscured, lighted fuses must be thrown off at proper intervals.
   When a train stops under circumstances in which it may be overtaken by another train, the flagman must go back immediately with flagman's signals a sufficient distance to insure full protection, placing two torpedoes on the rail, and when necessary, displaying lighted fusee in addition.
7. On the 20th day of July, 1957, the defendant maintained and operated an automatic approach signal, described as No. W69-36, governing the westbound movement of trains on the main track, at a point approximately 1.38 (one and thirty-eight hundredths) miles east of the point where the rear end of the caboose of the westbound second class freight train was stopped on the main track in Jennings County, Indiana, as set forth in Rhetorical Paragraph 5. Said signal displayed red, yellow, green, and white light in positions to indicate the occupancy and condition of the railroad track ahead.
8. On the 20th day of July, 1957, the decedent, Clarence Hamilton, was employed as an engineer in interstate commerce by the defendant in the operation of one of its westbound passenger trains through Jennings County, Indiana.
9. On the 20th day of July, 1957, as said passenger train of the defendant proceeded in a westward direction, it collided, in Jennings County, Indiana, at or about 9:37 o'clock.
INSTRUCTIONS

in the morning, with the rear of the defendant's freight train stopped on the main track, as set forth in Rhetorical Paragraph 5, at a point approximately 6,544 (six thousand five hundred forty-four) feet east of the defendant's station at North Vernon, Indiana.

10. Said collision was proximately caused by each of the following negligent acts on the part of the defendant:
   a. Causing and permitting said freight train, described in Rhetorical Paragraph 5, to stop and stand on the main track at a time when it knew said passenger train was following and approaching from the east on said main track.
   b. Failing and refusing to give adequate warning to the said approaching passenger train that the freight train was stopped and standing on the main track ahead of it, by sending a flagman back with signals a sufficient distance to insure full protection, by placing two torpedoes on the rail and by displaying a lighted fusee in addition.
   c. Causing said automatic approach signal No. W69-36 to be constructed and maintained at such a position that it could not be read clearly and distinctly.
   d. Permitting obstructions, growth, and vegetation on its right of way to the east of said automatic approach signal interfering with a clear and proper view of said automatic approach signal.

11. As a proximate result of the collision of said passenger train with said freight train, as described in Rhetorical Paragraph 9, the said Clarence Hamilton was killed.

12. The decedent, Clarence Hamilton, at the time of his death was 63 (sixty-three) years of age, was healthy, robust, and strong, and was earning and capable of earning approximately $7,513.44 (seven thousand five hundred thirteen dollars and forty-four cents) per year in his occupation as an engineer for the defendant.

13. Said decedent, Clarence Hamilton, left surviving him no widow, no children, and no parents, but a sister, Emma Hamilton, who was wholly and entirely dependent on him for support and maintenance. By reason of the death of the said Clarence Hamilton, the said Emma Hamilton has been deprived of his support and maintenance.

WHEREFORE, the plaintiff demands judgment against the defendant in the sum of $100,000 (one hundred thousand dollars) and costs."

In response to the complaint, the defendant Baltimore and Ohio Railroad Company has filed its answer. This answer raises two defenses and reads as follows:

First Defense

"1. The defendant admits the material allegations of rhetorical paragraphs 1, 2, 3, 5, 6, 7, 8 and 9.

2. The defendant denies the material allegations of rhetorical paragraph 10.

3. The defendant admits the material allegations contained in rhetorical paragraph 4 except it denies that portion of said rhetorical paragraph 4 which describes a siding as being approximately 2.2 miles in length but on the contrary alleges that said siding is only five-eighths (5/8) of a mile in length.

4. The defendant denies the material allegations contained in rhetorical paragraph 11 except it admits that Clarence Hamilton was killed on the 20th day of July, 1957.

5. The defendant admits the material allegations contained in rhetorical paragraph 12 except that it is without sufficient knowledge to either admit or deny the allegation that the decedent was healthy, robust and strong.

6. The defendant admits the material allegations of rhetorical paragraph 13 except that it is without sufficient knowledge to either admit or deny the allegations that decedent's sister, Emma Hamilton, was wholly and entirely dependent upon him for support and maintenance and that she has been deprived of his support and maintenance.

Second Defense

Any damages sustained by plaintiff as set forth in her complaint were caused in whole or in part or were contributed to by the negligence of plaintiff's decedent, Clarence Hamilton."

Instruction No. 4

Those are the pleadings in this case. I have read the pleadings to you in order that you may know what the parties have said and claimed in the papers they have filed in this court, and that you may better understand the issues in the case. The pleadings are merely the formal way of presenting the case for trial. I instruct you that the pleadings except in so far as any admissions are contained therein, are not a part of the evidence in this case, and should not be considered by you as such. Any admissions contained in the
pleadings or any other papers filed by the parties must be accepted by you as true, and are not required to be supported by additional evidence.

Instruction No. 5
The defendant in this case, the Baltimore and Ohio Railroad Company, is a corporation and can act only by its agents, servants or employees. Therefore, whenever mention is made of defendant doing or not doing anything, then of course it means defendant or any of its agents, servants or employees acting within the scope of their employment.

Instruction No. 6
The attorneys for both sides have agreed to stipulate certain matters involved in this case. The Court instructs you that the matters so stipulated or agreed to must be accepted by you as true.

Instruction No. 7
The plaintiff, having brought this case, has the burden of establishing, by a fair preponderance of the evidence, the material allegations of the complaint, upon the issues joined, and the negligence of the defendant, either in whole or in part, as the proximate cause of the death complained of.

Instruction No. 8
It is necessary that the plaintiff prove one or more of those acts of negligence which she has charged against the defendant by a fair preponderance of the evidence, and that such act or acts of negligence, proximately caused, in whole or in part, the accident and death complained of. It is not necessary that all of the acts of negligence charged in the complaint be proved, however.

Instruction No. 9
The defendant's answer alleges affirmatively that “Any damages sustained by plaintiff as set forth in her complaint were caused in whole or in part or were contributed to by the negligence of plaintiff's decedent, Clarence Hamilton.” Stated in other words, the defendant alleges that plaintiff's decedent was guilty of contributory negligence which contributed in part to the accident and death complained of, or was guilty of negligence which was the sole proximate cause of the accident and death complained of.

I instruct you that the burden is upon defendant to prove these defenses by a fair preponderance of the evidence.

Instruction No. 10
It might be well at this point, before I proceed further, to explain to you the meaning of certain terms and expressions which I shall use during the course of these instructions.

The plaintiff must prove her case, and the defendant its affirmative defenses, by a fair preponderance of the evidence. By that is meant that the evidence must preponderate or weigh heavier in favor of the party having the burden of proof as to the complaint or the affirmative defenses. By a fair preponderance is not necessarily meant the greater number of witnesses, or the length of presentation of testimony, but rather the greater weight of the evidence, taken together—that is, that evidence upon any question at issue which convinces you most strongly of its truthfulness. If the evidence on an issue is equally balanced, then there is no preponderance and the party having the burden to establish that issue must fail.

Instruction No. 11
It is not required that every material fact upon which the plaintiff bases her claim, or upon which the defendant bases its affirmative defenses must be established by direct and positive evidence, but it is within the legitimate province of the jury to draw reasonable and natural inferences from the facts and circumstances either admitted or proven by a preponderance of the evidence.

Instruction No. 12
When it is said in these instructions that the burden is upon the plaintiff or defendant to prove certain issues in the case, it is not to be understood that the plaintiff or defendant is confined solely to the proof furnished by such party or parties alone, but on the other hand, the jury has the right, to take into consideration all the evidence in the case bearing upon the issues, whether such evidence comes from the side of the plaintiff or whether it comes from the side of the defendant.
Instruction No. 13

I have used the term “negligence.” Negligence is defined, in its general meaning, as the failure to do what a reasonably careful and prudent person would have done under the same or like circumstances, or the doing of something which a reasonably careful and prudent person would not have done under the same or like circumstances; or, in other words, negligence is the failure to exercise reasonable and ordinary care. Reasonable and ordinary care is such care as a reasonably careful and ordinarily prudent person would exercise under the same or like circumstances. A failure to exercise such care is negligence on the part of the one so failing.

Instruction No. 14

The question of reasonable care depends wholly upon the situation before and at the time of the accident and injuries complained of, and not upon anything known or discovered afterwards, which could not, with reasonable diligence, have been known or discovered before the occurrence of the accident or injuries complained of. Or, in other words, in the consideration of the evidence, you should put yourselves in the position of the parties involved in the alleged accident at the time of the occurrence, and have in mind what each knew or ought to have known in the exercise of reasonable care at that time.

Instruction No. 15

I have already mentioned to you in these instructions, and I shall have occasion later on, to talk to you about proximate cause, or proximate causation, as it is called. By proximate cause is meant the efficient and producing cause of an accident or injury. It is that cause which in natural and continuous sequence, unbroken by an efficient intervening cause, produces an accident or injury and the consequent damage complained of, and without which the result would not have occurred. It need not be the immediate cause, but must be the efficient cause which set in motion the chain of circumstances which led up to and produced the accident or injury complained of.

This does not mean that the law recognizes only one proximate cause of an injury or death, consisting of only one factor or thing, or consisting of the conduct of only one person. To the contrary, many factors or things, the conduct of two or more persons, may operate concurrently, either independently or together, to cause an injury or death. In such a case, each may be a proximate cause.

Instruction No. 16

I have also used the term “sole proximate cause.” Sole proximate cause is that cause which, alone and of itself, proximately caused an accident, injury or death complained of.

Instruction No. 17

I have used the term “contributory negligence.” For the purposes of this case, contributory negligence means negligence on the part of the plaintiff’s decedent which proximately contributed to the accident and death complained of.

Instruction No. 18

As has been mentioned to you, this action is brought under a federal statute known as the Federal Employers’ Liability Act. The pertinent parts of the sections of this act which are germane to this case, read as follows:

Section 51. Every common carrier by railroad while engaging in commerce between any of the several states... shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or in case of the death of such employee, to his or her personal representative, for the benefit of... the next of kin dependent upon such employee for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its... equipment.

Section 53. In all actions brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee:...

Instruction No. 19

The defendant has admitted in its answer that Clarence Hamilton was at the time of the alleged accident an employee of the defendant railroad and that both the plaintiff and
defendant were engaged in interstate commerce. You are instructed, therefore, that the aforesaid Federal Employers' Liability Act is applicable in this case.

Instruction No. 20

I instruct you that under the provisions of the Federal Employers' Liability Act, a common carrier is not an insurer of the safety or health of its employees. The basis of liability under this act is the negligence of such a carrier which proximately causes, in whole or in part, injuries or death to an employee. In addition, I should like to point out to you that under this act, contributory negligence—that is, negligence of the employee, if any is found, which proximately contributes to the injuries or death, cannot operate to bar a recovery. But if it is found that the employee is entitled to recover, contributory negligence, if found, does operate to diminish the damages which are recoverable as hereinafter explained.

Instruction No. 21

I instruct you that it was the duty of the employer of the plaintiff's decedent to use reasonable and ordinary care in furnishing said decedent reasonably safe methods and equipment with which to work. The employer's duty was not limited to such risks as it actually knew about but extended to such risks as it ought to have known about in the exercise of reasonable care.

Instruction No. 22

While plaintiff's decedent was entitled to assume that his employer would discharge its duty of care in these respects, he was nevertheless under a duty himself to use reasonable and ordinary care to protect his own safety and avoid injury.

Instruction No. 23

I instruct you that at the time of the accident here in question there were in full force and effect certain rules and regulations of the Operating Department of the Baltimore and Ohio Railroad Company which were introduced and made a part of the record of the evidence in this case. It was the duty of the plaintiff's decedent, Clarence Hamilton, and the duty of the other employees here involved to know said rules and regulations and to obey them.

I instruct you that a violation of specific company rules for the conduct of its employees constitutes negligence on the part of the violator. I further instruct you that if you find that plaintiff's decedent, Clarence Hamilton, or the defendant, through its employees, violated any of the specific rules which have been placed in evidence in this case, then such a violation would constitute negligence on the part of plaintiff's decedent or the other employee or employees of defendant committing such violation.

Instruction No. 24

I instruct you that the law presumes that a person can see that which by the use of ordinary care he could have seen had he looked. If after considering all of the evidence in this case you find that the plaintiff's decedent, Clarence Hamilton, when he was operating defendant's train as a locomotive engineer could by the exercise of ordinary care have seen the defendant's signal light W69-36, it is presumed that he did see such signal and the lights showing on such signal during the time it could have been seen by said Clarence Hamilton, and that he did all further acts disclosed by the evidence with knowledge on his part of such signal and its lights. And if you further find from a consideration of all the evidence that his actions were not those of an ordinary prudent person under like circumstances, then plaintiff's decedent, Clarence Hamilton, was guilty of negligence and if you should further find that such negligence was the sole proximate cause of his injuries and resulting death, then I instruct you that his administratrix, the plaintiff herein, cannot recover.

Instruction No. 25

Under the Federal Employers' Liability Act there is no such thing as assumption of risk. There was a time when an accident occurred as a result of negligence on the railroad's part, it was held there could be no recovery in certain instances, for by the nature of his employment the employee had to assume the risk. That, of course, was considered the risk of the job.

However, it is no longer the law.

Eliminating the assumption of the risk does not mean when an accident occurs, and a man working as a railroad employee is injured or killed he must be compensated.
The question in this case is, did the railroad commit an act of negligence as alleged in the plaintiff's complaint, which proximately contributed to the death of Clarence Hamilton.

Instruction No. 26
Under the terms of the Federal Employers' Liability Act, if you find from a fair preponderance of the evidence that the Baltimore and Ohio Railroad Company was guilty of any negligence whatsoever, as alleged in the plaintiff's complaint, and you further find from a fair preponderance of the evidence that such negligence was a proximate cause of the collision of two of the defendant's railroad trains resulting in the death of the decedent, Clarence Hamilton, then your verdict must be in favor of the plaintiff, Emma I. Hamilton, administratrix of the estate of Clarence Hamilton, deceased, and against the defendant, Baltimore and Ohio Railroad Company.

Instruction No. 27
The fact alone that an accident or injury may have occurred is not sufficient to justify your finding that the defendant or the plaintiff's decedent was or was not guilty of negligence. There is no presumption that either defendant or plaintiff's decedent was or was not negligent. This is a case to be decided on the facts as you heard them and as you interpret the evidence.

Instruction No. 28
At this time the court, having outlined to you the nature of this case, having defined certain terms and concepts in order that you may better understand these instructions, and having given you the rules of law applicable to this case, would like to state to you, more specifically, the questions that you will have to decide in this case.

Instruction No. 29
In reaching an ultimate conclusion in this case, you must first decide whether the defendant was negligent as charged in plaintiff's complaint and whether the death of Clarence Hamilton was the proximate result, in whole or in part, of such negligence, if any.

You must then decide whether Clarence Hamilton, the plaintiff's decedent, committed any act of negligence which proximately contributed to the accident in question and to his own death.

Finally, you must decide whether the accident and death complained of were proximately caused solely by the negligence, if any, of Clarence Hamilton.

Instruction No. 30
If you find that the defendant was not negligent as charged, or, if it was negligent, that such negligence was not, either in whole or in part, the proximate cause of the accident and death complained of, then the plaintiff cannot recover and you will not be concerned with the question of damages.

Instruction No. 31
On the other hand, if you find that the defendant was negligent as charged, and that such negligence, if any, proximately caused, either in whole or in part, the accident and death complained of, then your verdict should be for the plaintiff, and it will be your further duty to determine what, if any, damages should be awarded to the plaintiff.

Instruction No. 32
I must further instruct you with regard to the measure of the plaintiff's damages, if there is to be any recovery in this case.

I do not mean, however, to intimate in any way that there is or is not any right to recover in this case. That is a question solely for you to determine, from the law and the evidence.

Instruction No. 33
But if you should find for the plaintiff, then it is your duty to fix the amount of damages which the plaintiff is entitled to recover, if any, and the recovery allowed should be of such amount as will compensate the plaintiff reasonably for the pecuniary loss sustained by her as the result of the death of Clarence Hamilton to which you find her entitled under the law as defined to you in these instructions.
Instruction No. 34

If you find from a fair preponderance of the evidence and under the instructions of the court that the plaintiff, Emma I. Hamilton, Administratrix of the Estate of Clarence Hamilton, Deceased, is entitled to recover, you should determine the full amount of the damages, if any, which have been sustained by her as the dependent next of kin on whose behalf the action is brought for the pecuniary damage which she has sustained as a consequence of the death of the decedent. In determining the full amount of the damages you may take into consideration the age of the deceased and the normal expectancy of his life, his health, occupation, opportunities, capabilities and earning capacity. You may also consider the disposition and habits of the deceased, as shown by the evidence, as to whether he was industrious and frugal, or otherwise; the amount of money, or other things having a pecuniary value furnished by the deceased to his dependent next of kin on behalf of whom this action was brought, or which she might reasonably have expected to receive during his lifetime had he lived. From a consideration of all of the elements above mentioned, as shown by the evidence, you may compute the full damages for decedent's death at such sum as would fully and fairly compensate the dependent next of kin on whose behalf this action is brought for the pecuniary loss caused her by the death of the deceased.

Instruction No. 35

In determining the damages which plaintiff should recover from defendant, assuming that you have first determined that she is entitled to recover from defendant, I instruct you that the pecuniary loss which she may recover is not what her decedent, Clarence Hamilton, might have earned, but what part of his earnings, if any, she might have reasonably expected to receive. I further instruct you that where death is instantaneous, as in this case, that the beneficiary of the decedent can recover his or her pecuniary loss and nothing more. However, the relationship between the beneficiary and the decedent is a proper circumstance for your consideration in computing the pecuniary loss. Your verdict must be based upon money values, the amount of which can be ascertained only upon a view of all the material facts presented by the evidence.

Instruction No. 36

In assessing the total damages sustained by the plaintiff, if you find from a fair preponderance of the evidence she is entitled to recover, you are required to reduce what you find will be the plaintiff's loss in contributions from the decedent to its present value. Apply such interest or discount rate as you find from the evidence the plaintiff would be able to receive on the investment of her money from a safe and prudent investment considering her background, experience, and capability in making investments.

Instruction No. 37

The award of damages for loss of contributions from future earnings, if any, must be reduced to its present cash value and adequate allowance must be made for the earning power of money, and future earnings should be calculated on the length of time the plaintiff's decedent would expect to be employed rather than on the time he would expect to live.

Instruction No. 38

Life expectancy, as shown by a mortality table, is merely an estimate of the probable average remaining length of life of all persons in our country of a given age. The inference which may be drawn from the life expectancy shown by the table applies only to one who has the average health and the exposure to danger of people that age.

The life expectancy of the beneficiary, Emma I. Hamilton, was admitted in evidence in this case for the sole purpose to show that her life expectancy was for a longer period of time than that of her brother, the decedent, Clarence Hamilton.

Emma I. Hamilton, the beneficiary, could not expect contributions or support from her brother, Clarence Hamilton, for a period longer than his life expectancy. For that reason the life expectancy of Emma I. Hamilton, the beneficiary, will be considered by you for no purpose other than to show it was longer than that of Clarence Hamilton, the decedent.

Instruction No. 39

I instruct you that mortality and annuity tables are not binding upon you. They are merely received as an aid to the jury in estimating the present value of the pecuniary loss, if any, sustained by the plaintiff. You may consider the fact that all persons do not live to
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the age of expectancy and that some may live to an age beyond their expectancy and may or may not work during all the years of their life, and you may also consider that earnings may not remain stationary, but may reasonably be expected to increase or decrease in the future. Also you may consider the nature of the plaintiff's decedent's employment.

I further instruct you that such life expectancy cannot be used by you as a factor by multiplying the number of years of plaintiff's decedent's life expectancy by his annual gross earnings because to permit you to do this would enable plaintiff to receive in advance earnings based on such life expectancy without consideration of other circumstances such as I have mentioned which might materially reduce her pecuniary loss.

Instruction No. 40

As heretofore indicated to you, if you should find that there was negligence on the part of the defendant Baltimore and Ohio Railroad Company, and further find negligence on the part of plaintiff's decedent, Clarence Hamilton, which proximately contributed to the accident and death complained of, the plaintiff is not precluded from a recovery, but the damages should be diminished by the jury in proportion to the amount of negligence attributable to plaintiff's decedent. This means that the damages allowed should not be the full damages which you find plaintiff to have suffered, if any, but should be a diminished sum which bears the same relation to the full damages that the negligence of the defendant bears to the combined negligence of both defendant and plaintiff's decedent. The purpose of this rule is to exclude from the plaintiff's recovery a part of the total damages which corresponds proportionately to plaintiff's decedent's negligence, if any, and thereby limit plaintiff's recovery to that part of the total damages which are attributable to the defendant's part of the total combined negligence.

Instruction No. 41

In fixing the amount of the plaintiff's recovery, if any, you are limited to the pecuniary loss sustained by Emma I. Hamilton as the dependent next of kin of deceased, and you are not to consider such elements as bereavement or any mental pain and suffering of said dependent next of kin or the loss of the society of the deceased. Nor may you consider anything by way of punitive damages.

In no event should the damages allowed exceed the sum of $100,000, the amount prayed for in the complaint.

Instruction No. 42

The fact that the plaintiff has demanded a certain amount in her complaint, which amount has been mentioned to you in these instructions, does not mean that the plaintiff is entitled to recover such amount or any amount in this action. The amount demanded is optional with the plaintiff.

Instruction No. 43

There are certain other general principles governing the manner in which you should approach your duties in this case which I should like to mention to you at this time.

Instruction No. 44

I should like to instruct you that you are the sole judges of the credibility of the witnesses and of the testimony that you have heard. In determining the credibility of witnesses, you have a right to take into consideration the demeanor of such witness or witnesses on the stand, his candor and sincerity in testifying; or the lack of the same; his interest or lack of interest in the outcome of the suit; his knowledge or lack of knowledge concerning the facts about which he testifies; his prejudices or biases, if any are shown; his relationship, if any, to either party to the suit, and such other facts and circumstances, as disclosed by the evidence, as will assist you in determining the weight you should give to the evidence in the case.

If you find that any witness knowingly testified falsely to any material fact in issue in this case, I instruct you that you may disregard all of the evidence of such witness wherein such evidence is not corroborated by other evidence.

Instruction No. 45

Ordinarily, in the trial of cases in court, witnesses are confined in their testimony to facts within their personal knowledge and they are not permitted to draw conclusions or express opinions. That is the general rule, but there is an exception to that rule where the
points in issue arise out of a particular science or art concerning which there are trained minds who have special knowledge, learning, or schooling in that particular field. Such persons are called experts and because of that special training or learning they are entitled to express opinions concerning the matters at issue.

You will, of course, weigh and evaluate the testimony of an expert witness in this case precisely as you weigh the testimony of any non-expert witness; that is to say, you will take into account the probability and reasonableness of the matters to which he has testified, the schooling he has had, the learning and standing that he has in his profession, or the want of it, and the breadth of his experience in the field which would enable him to arrive at a correct conclusion. You should ask yourselves: Is this witness, as a matter of fact, an expert qualified by scientific training and experience to acquaint me with the scientific facts? His testimony should be given such weight as you believe it is entitled to receive.

Instruction No. 46

The credibility of a witness may be impeached by proof that he made statements in a deposition or statements out of court contrary to, and inconsistent with, what he testifies on the trial concerning matters material and relevant to the issues.

If you find any witness has thus been impeached, you have the right to reject all of the testimony of such witness, except in so far as the witness has been corroborated by other credible evidence in this cause of action.

Instruction No. 47

While it is proper for you to reject all of the testimony of a witness who has been impeached, yet I instruct you it would not be proper for you to consider such impeaching testimony as either tending to prove or disprove any of the material allegations of plaintiff's complaint or defendant's answer but such impeaching evidence can only be considered by you in determining the credibility of the witness. However, it is for you to determine whether the witness has in fact been impeached before you have the right to reject all or any part of the testimony of such witness.

Instruction No. 48

Mere assertions alone by counsel in opening statement or in the asking of questions of witnesses do not constitute any evidence whatever in this case, and should be disregarded by you as proof of any facts.

Instruction No. 49

I instruct you that while it is the duty and the right of counsel to address you and to explain the testimony to enable you better to understand the questions which you are to decide, yet if counsel inadvertently mistake the law or misstate the evidence, you will follow the law as given to you by the Court in these instructions and not as stated by counsel, and you will take the evidence detailed by the witnesses and shown by the documents introduced instead of the statements of counsel.

Instruction No. 50

In your deliberation you are not to pay any attention to any testimony that was stricken out or any statements of counsel directed to the Court with reference to matters of that kind.

You are to try the case upon the evidence and the legitimate inferences that you may draw from that evidence. You should not be concerned with the reason why the Court decided, at various times throughout the trial, that certain evidence should or should not properly be admitted.

Whether such evidence is admissible is purely a question of law, and you should draw no inferences from the Court's rulings on this matter. In admitting evidence to which an objection is made, the Court does not determine what weight should be given to such evidence; nor does it pass on the credibility of the witnesses.

Instruction No. 51

You are further instructed that if the Judge has said or done anything which has suggested to you that he is inclined to favor the claims or positions of either of the parties you will not suffer yourselves to be influenced by any such suggestion.

I have not expressed, nor have I intended to express, any opinion as to what witnesses are or are not worthy of credence or what inference or inferences should be drawn from the evidence adduced in this case.
Instruction No. 52

In your deliberation of this case, you should not permit yourself to be influenced by any sympathy for either of the parties. This case must be tried precisely as a controversy between individuals equal in all things. The jury cannot entertain any conjecture or speculation as to the relative wealth of the parties.

Instruction No. 53

When you retire to deliberate upon this case, each juror should exercise his individual judgment, so that when a verdict is agreed upon it will constitute the verdict of each individual juror.

In arriving at a verdict, each juror should give due consideration to the views and opinions of the other jurors, and should listen to their arguments with a willingness to be convinced and to yield to their views, if induced to believe them to be correct; but no juror should agree upon a verdict unless he is convinced that the same is correct, and such as his conscience approves, and such as each juror under his oath, after full consideration, believes to be right.

Instruction No. 54

(Explain forms of verdict.) (Excuse the alternate jurors.) When you go to your jury room, elect one of your number as foreman. When you have arrived at your verdict, have the foreman sign it and notify the bailiff in whose charge you will be. (Ask the attorneys out of the hearing of the jury for exceptions, if any.) (Jury retires.)