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Instructions to the Jury

Comments

INSTRUCTIONS TO THE JURY

Under Trial Rules 6 and 7 of the new Rules several different methods may be used by the Court in submitting the case to the jury. In order to illustrate these methods and permit a comparison between them, the Editors present below examples of how each method might be applied to the same typical case. The case selected is *Merrick v. United Railways Company,* 163 Md. 641 (1933) in which the lower Court was affirmed.

The facts in this case as shown by the record were briefly as follows: The plaintiff was driving his automobile north on Broadway, just above Fleet Street, looking for a place to park. There was a parking space of triangular shape between the northbound and southbound tracks on Broadway, about 100 or 125 feet north of Fleet Street, and plaintiff was endeavoring to get his car into an empty space west of the northbound track when the accident occurred. The defendant's street car had left Fleet Street, and was proceeding north just before the accident occurred. The front of defendant's street car struck the left side of plaintiff's automobile at an angle of about forty-five degrees, doing some damage to the automobile and injuring the plaintiff. Both sides agreed that the trolley's bell was ringing all the way from Fleet Street. The plaintiff claimed that he had just turned north into Broadway from Fleet Street, proceeded 75 to 100 feet north on the northbound track; seeing a space open, he stopped, backed, went forward, and backed again across the track. When just about to go ahead into the parking space, he was struck by the trolley, which, when he started the parking maneuver, had been standing still at Fleet Street, at least seventy-five feet away. The defendant's story, on the other hand, was that while the trolley was proceeding north, after leaving Fleet Street, plaintiff, who had been to its right and a little ahead of it, suddenly, and without warning, made a left turn across the track, and was struck before the trolley could be stopped.

Three forms of submitting the case are illustrated. First are printed the prayers actually granted in the case and given to the jury according to the record in the case. Second is a suggested oral charge which attempts to incor-

porate in simple language the essence of the granted prayers. In order to keep it short, very little summing up of the facts has been included and, of course, the extent to which this power is used will depend on the individual judge. Third there is presented a suggested charge in connection with special questions on particular issues in place of the general verdict. As pointed out below, an ordinary negligence case, like the present one, does not bring out the basic advantages of special questions, and is used here primarily to indicate the *method* of their use.

The Editors do not pretend that the suggested charges are by any means perfect or models. Indeed as has already been said they do not exercise the power of the judge to sum up the evidence to the extent which many might think desirable. They are presented solely for the purpose of promoting a better understanding of the various available methods and inducing discussions and comparison among the members of the bench and bar.

1. WRITTEN PRAYERS

Plaintiff's No. 1 Prayer

The Jury are instructed that if they shall find a verdict for the Plaintiff, then in estimating the damages they are to consider the health and condition of the Plaintiff before the injury complained of as compared with his present condition in consequence of said injury, and whether the same is in its nature permanent and how far, if at all, it is calculated to disable him from engaging in those employments for which in the absence of said injury he would be qualified and also the physical and mental suffering, if any, to which he was subjected by reason of said injury, and to allow the Plaintiff such damages as in the opinion of the Jury will be a fair and just compensation for the injury which he has sustained; and they shall also award the Plaintiff as damages such sums as they shall find from the evidence represents the reasonable cost of repairing the damage to the automobile of the Plaintiff caused by said accident.

Plaintiff's No. 2 Prayer

The Jury are instructed that if they shall find from the evidence that on or about the 6th day of September, 1930, the Plaintiff, using due care and caution, was driving an automobile northerly on Broadway, at or about its intersection with Fleet Street, and that the automobile

which the Plaintiff was driving was run into, struck against, or collided with by a street car of the Defendant, which was then and there being operated by the Defendant, its agents or servants northerly on Broadway, at or about its intersection with Fleet Street, in a reckless, careless and negligent manner, if the Jury so find, and if they further find that the Plaintiff was injured and his automobile damaged as a result of said collision and that said injuries and damages resulted directly from the failure to exercise ordinary care and prudence on the part of the Defendant, its agents and servants, and not from the failure on the part of the Plaintiff to exercise ordinary care and prudence directly contributing unto said accident, then their verdict must be for the Plaintiff.

Court's Instruction In Lieu Of Plaintiff's Rejected Third Prayer

The Court instructs the Jury that if they shall find from the evidence that prior to the actual collision the Plaintiff was proceeding northerly in the Defendant's tracks and was in front of the Defendant's street car, as testified by him, and that he attempted to turn into the parking space, as testified to by him, and then backed his car out upon the Defendant's tracks, as testified to by him, and then attempted to go forward into said parking space and while so doing was struck by the Defendant's street car, and that the motorman of the Defendant's street car by the exercise of ordinary care could have seen the Plaintiff executing said maneuvers while he, the said motorman, was sufficiently far away with his street car to have avoided colliding with the Plaintiff's car, then their verdict shall be for the Plaintiff.

Plaintiff's No. 4 Prayer

The Jury are instructed that a street car has not a right of way on its tracks paramount to that of an ordinary vehicle, neither has a right superior to that of the other, but each must exercise its right to use the street with due regard to the rights of the other.

Plaintiff's No. 5 Prayer

The Jury are instructed that it is incumbent upon the operator of a street railway car to operate it at such a speed, to have it under such control, and to give such

warning of its approach, as will enable him by the exercise of ordinary care under the circumstances existing at the time to avoid injury to others who may be also in the lawful use of the street.

Defendant's No. 1 Prayer

The Court instructs the Jury that there can be no recovery in this action against defendant, Railways Company, unless the Jury find from the evidence that the plaintiff has affirmatively shown by a fair preponderance of evidence that the accident was caused through the negligence of the motorman of the street car and the Jury are instructed in determining whether or not the motorman was guilty of negligence that the law makes no unreasonable demand and that it will not consider him guilty of culpable negligence in failing to take precautions which in the opinion of the jury no other man of ordinary prudence would have taken under the circumstances.

Defendant's No. 5 Prayer

The Court instructs the Jury that if they find from the evidence in this case that the defendant's street car was proceeding north on Broadway, and that the plaintiff's automobile was also proceeding north on Broadway to the east of the street-car track, if they so find, and find that there was ample room for the street car and the automobile to pass by each other without striking, if each had continued on in the same direction, and if they further find that as the car and the automobile were proceeding in this manner, the plaintiff moved his automobile suddenly towards, and in front of the street car and so suddenly that the motorman was unable by the exercise of ordinary care to stop the car in time to avoid the accident, then their verdict must be for the defendant.

Defendant's No. 7 Prayer.

The Court instructs the Jury that it is the duty of the driver of an automobile before crossing a street railway track to look to see if a car is approaching, and if the jury shall find from the evidence that the plaintiff did not look before crossing the track, and shall further find that if he had looked he could by the use of ordinary and reasonable care have prevented the accident complained of, if

the jury so find, then his negligence directly contributed to the accident, and there can be no recovery in this case, and their verdict must be for the defendant.

Defendant's No. 9 Prayer.

The Court instructs the Jury that if they shall find from the evidence that the accident in question could have been avoided by the exercise of ordinary care and caution on the part of the plaintiff, the plaintiff is not entitled to recover.

Defendant's No. 10 Prayer.

The Court instructs the Jury that if they shall find from the evidence that the plaintiff was careless in the way he drove his automobile and that such carelessness on his part was the direct and proximate cause of the accident, if the jury so find, then their verdict must be for the defendant, Railways Company.

Defendant's No. 14 Prayer.

The Court instructs the jury that the burden of proof is upon the plaintiff to show by the weight of the evidence that the injury was caused by the negligence on the part of the motorman of the street car, and unless the jury shall find that it has been shown by the weight of the evidence that the injuries were caused by the negligence of the motorman, their verdict must be for the defendant Railways Company.

Defendant's No. 15 Prayer.

The Court instructs the jury that the burden of establishing by a preponderance of proof satisfactory to them, the state of facts alleged in the declaration, rests upon the plaintiff; and if the evidence in this case should be such as to leave the minds of the jury in a state of even balance as to the truth of the state of facts alleged in the declaration, the verdict must be for the defendant, Railways Company.

Defendant's No. 16 Prayer.

The Court instructs the jury that even if the verdict should be for the plaintiff, they are to allow him only such damages as in their opinion have been affirmatively proved,

with reasonable certainty, to have resulted as the natural, proximate and direct effect of the accident complained of by him, the jury are not to go into the field of mere probabilities or to engage in conjecture or speculation.

The Defendant is not to be held responsible for any ailments which the plaintiff may suffer, which resulted from any other cause than the accident mentioned in the evidence.

Defendant's No. 17 Prayer.

The Court instructs the jury that the burden of establishing by a preponderance of proof satisfactory to the jury that the plaintiff received in the accident mentioned in the evidence, the injuries and damage which the plaintiff alleges, rests upon the plaintiff.

2. ORAL CHARGE

"Gentlemen of the Jury:

"In giving you my instructions on this case, I wish to emphasize that although what I shall say about the law is binding upon you, and you must follow it in reaching your verdict, nevertheless what I shall say about the facts and about the witnesses, is purely advisory, and not in any way binding upon you. It is your function to decide upon the truth of the testimony, as given by the various witnesses, and whatever I say on the facts will be only for the purpose of making the issues clearer, and not with any idea of influencing your decision on them. That is your responsibility.

"In the present case, there are three principal questions for you to decide in reaching your verdict. First, was the accident caused by the negligence of the defendant; second, did the negligence of the plaintiff also contribute to the accident; and third, did the defendant have the last clear chance to avoid the accident, notwithstanding any negligence of the plaintiff.

"The plaintiff says that he came east on Fleet Street and turned north on Broadway in order to find a place to park his car; that he drove north on the car tracks for approximately one hundred and fifty feet, and then saw a free parking space on his left in the area between the north and southbound tracks which, at that point, are some distance apart on account of the market. He turned the nose of his automobile towards the empty parking space, and

proceeded to go forward and backward on the tracks in order to get into it, when he was suddenly struck by a street car which came north from Fleet Street, and collided with the left side of his automobile. The collision damaged his automobile, and injured him personally. He says that he knew the car was coming, because he had seen it in his mirror, but when he started his manoeuvers of parking, the street car was some distance away, and although he heard the bell of the street car being rung, he says he had ample time to park before the car reached him, or the trolley car had ample time to stop after he had started to park.

"The story told by the motorman is entirely different. It is simply that while the motorman was proceeding north on Broadway, the plaintiff was ahead of him and a little to the right; that suddenly, and without any warning, the plaintiff cut across to the left in front of the street car when the motorman had no time to stop, and the trolley car collided with the automobile.

"It is for you to decide which of these two conflicting stories is correct, and by your verdict to say which of the parties was negligent. Negligence is lack of ordinary care under all the circumstances. It is the failure to act with the care which a reasonable and prudent man would have used under the same conditions.

"To be more specific, it is the duty of all persons using the streets to conduct themselves prudently and act with ordinary care. The Railway Company owed it to the plaintiff to operate its cars with reasonable care, and if you believe that the trolley car involved in this accident was operated at an excessive speed, or otherwise imprudently, then the defendant was negligent. On the other hand, it is the duty of a motorist to drive with ordinary care, and it is negligent for an automobile carelessly to make a sharp turn across the path of a trolley car going in the same direction at such a time as to give the motorman no opportunity to stop it before a collision, when the motorman is operating carefully. If you find that this is what happened, then the motorist was negligent.

"If the defendant was negligent, and his negligence alone caused the accident, then the defendant is liable; if the accident was caused by the negligence of both the plaintiff and the defendant, then the plaintiff was contributorily negligent, and the defendant is not liable. It makes no difference whether the plaintiff was only slightly negli-

gent, or was very negligent, for the law does not compare quantities of negligence. Even if you find that the plaintiff was only slightly negligent, your verdict must be for the defendant. On the other hand, if you find that the accident was caused solely by the negligence of the defendant, then your verdict should be for the plaintiff.

"There is a third possibility which you may find as the real cause of the accident. Even though the plaintiff himself was negligent before the accident in placing his automobile across the street car tracks, there may still have been time for the motorman to have stopped before running into him. It may be that with ordinary care the motorman should have seen that the plaintiff was in a dangerous position which he could not get out of in time, and that if the motorman had used ordinary care he could have stopped the trolley car before the collision. If you believe that the motorman had such a last chance to avoid the accident, but failed to take it, then you may find a verdict for the plaintiff. The reason for this is that the accident would not have been caused by the negligence of the plaintiff and the negligence of the defendant acting together, but only by the negligence of the defendant after a new situation had arisen.

"In deciding which story you believe, and in making up your minds as to what actually happened, you are entitled to use your experience as intelligent men, and to judge the testimony of the witnesses as you would judge matters in which you yourself are interested. In other words, you can take into consideration what the witnesses say; its probability; their manner in saying it, and your understanding of the whole situation. You do not have to be convinced beyond a reasonable doubt, but in order to accept the story of the one who has the burden of proof, you must be convinced that there is more persuasive evidence for it than against it.

"The first burden of proof in this case is on the plaintiff. He has charged that the defendant's motorman was negligent, and he must prove that negligence by the greater weight of the evidence. The weight of the evidence is not measured by the number of witnesses, or by any particular circumstance. It means simply that the evidence of one party must carry more conviction to your minds than that of the other party, so that if you can not make up your minds as to which story is the more convincing, you must decide as though the point in question had not been proved. If, for example, you can not make up your minds whether

the motorman was negligent or not, then you must decide that he was not.

"On the other hand, the burden of proving that the plaintiff himself was contributorily negligent is on the defendant. In order to defeat a recovery on this ground, the defendant must convince you by the greater weight of the evidence that the plaintiff's own negligence contributed to this accident.

"Finally, on the question of whether the motorman had a last clear chance to avoid the accident by ordinary care, notwithstanding previous conduct of the plaintiff, the burden of proof is on the plaintiff. To permit him to recover on that theory, the plaintiff must convince you by the greater weight of the evidence that the motorman had such a last clear chance to prevent the accident, and failed to take advantage of it.

"If your verdict should be for the plaintiff, in fixing the damages you may consider the following items:

"The plaintiff's health before the accident as compared with since; whether his injury has affected his earning capacity, and whether it will be permanent. You may also allow him for his medical expenses, and the damage to his automobile, on both of which points there is testimony in the case. Finally, you may allow him such amount as you think proper for the pain and suffering which he has endured. The law gives no exact measure for pain and suffering, and you must fix the damages, including that item, in such amount as you think fair to both parties.

"I would summarize my instructions by saying this: If you believe that this accident was caused solely by the negligence of the motorman, find a verdict for the plaintiff. If you believe that the accident was caused solely by the negligence of the plaintiff, or by a combination of the negligence of the plaintiff and the defendant, at the same time, find a verdict for defendant. If you believe that even though the plaintiff may have been negligent at some time before the accident, neverthless, the motorman had a last clear chance to avoid the accident then find a verdict for the plaintiff.

"I will now ask counsel to come into my chambers to discuss any other instructions before they make their arguments to you."

3. SPECIAL ISSUES WITH ORAL CHARGE

For the sake of simplicity the same case is used below to illustrate how special issues may be submitted to the jury. But while this example indicates the *method* of doing so, the case does not show the real *advantages* of the use of special questions. Their primary purpose is *not,* as some think, to check or curtail the jury, but to simplify its functions in difficult cases and to avoid retrials for errors. Consequently in the ordinary negligence case which can usually be submitted clearly and directly on oral instructions with a general verdict, special questions are not of great value. They are much more helpful in cases where the legal principles are complex or doubtful but the facts simple or fairly clear. Under some circumstances, however, even in negligence cases they may be useful. For example if there is doubt whether the evidence of a "last clear chance" is sufficient to go to the jury, special questions may save a retrial. If the issue of a last clear chance is left to the jury on a general verdict, and a verdict is returned for the plaintiff, an appeal by the defendant with a possibility of a new trial is most likely. On the other hand, if the case is submitted on special questions, the jury may by its answers find negligence by the defendant and none by the plaintiff, so that the last clear chance issue becomes immaterial and the judgment entered by the court for the plaintiff on the basis of the answers could not be disturbed on that ground. The following example shows how such special questions might be submitted.

"Gentlemen of the Jury:

"In giving you my instructions on this case, I wish to emphasize that what I shall say about the law is binding upon you, but what I shall say about the facts and about the witnesses is purely advisory, and not in any way binding upon you. It is your function to decide upon the truth of the testimony, as given by the various witnesses, and whatever I say on the facts will be only for the purpose of making the issues clearer and not with any idea of influencing your decision on them. That is your responsibility.

"This case will be submitted to you on special questions in place of a general verdict. In other words instead of

finding for one side or the other, you will be asked to answer these four specific questions[1] on the case:

"1. Was the accident in this case caused by the negligence of the defendant?

"2. Did negligence of the plaintiff contribute to the accident?

"3. Notwithstanding any negligence of the plaintiff, did the motorman have a last clear chance to avoid the accident by the use of ordinary care?

"4. What is the amount of the damages of the plaintiff?

"On the basis of your answers I will then enter judgment for the proper party according to the law.

"To answer these questions, which I will take up individually in a moment, you will have to decide how the accident happened. As you know from the testimony, the stories of the parties are conflicting on that.

"The plaintiff says that he came east on Fleet Street and turned north on Broadway in order to find a place to park his car; that he drove north on the car tracks for approximately one hundred and fifty feet, and then saw a free parking space on his left in the area between the north and southbound tracks which, at that point, are some distance apart on account of the market. He turned the nose of his automobile towards the empty parking space, and proceeded to go forward and backward on the tracks in order to get into it, when he was suddenly struck by a street car which came north from Fleet Street, and collided with the left side of his automobile. The collision damaged his automobile, and injured him personally. He says that he knew the car was coming, because he had seen it in his mirror, but when he started his maneuvers of parking, the street car was some distance away, and although he heard the bell of the street car being rung, he says he had ample time to park before the car reached him, or the trolley car had ample time to stop after he had started to park.

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[1] These issues are based upon those suggested by Hon. John W. Staton in his Address in 1929 as President of the Maryland State Bar Association urging the use of special questions for submitting the case to the jury (34 *Proceedings*, Md. State Bar Ass'n. 34). See also the examples in "*Operation of the Modified Special Verdict in Civil Actions in North Carolina*" by Francis E. Winslow, Esq., at page 58 of this issue of the REVIEW. Experience elsewhere has shown the vital importance of keeping the questions simple and direct and of avoiding subtle or technical criticism of their form.

"The story told by the motorman is entirely different. It is simply that while the motorman was proceeding north on Broadway, the plaintiff was ahead of him and a little to the right; that suddenly, and without any warning, the plaintiff cut across to the left and in front of the street car when the motorman had no time to stop, and the trolley car collided with the automobile.

"You must decide which of these two conflicting stories is correct, and by your answers say which of the parties was negligent. In deciding which story you believe, and in making up your minds as to what actually happened, you are entitled to use your experience as intelligent men, and to judge the testimony of the witnesses as you would judge matters in which you yourself are interested. In other words, you can take into consideration what the witnesses say; its probability; their manner in saying it, and your understanding of the whole situation. You do not have to be convinced beyond a reasonable doubt, but in order to accept the story of the one who has the burden of proof, you must be convinced that there is more persuasive evidence for it than against it.

"The first question is as follows:

> "1. Was the accident in this case caused by the negligence of the defendant?"

"What do we mean by "negligence"? Negligence is lack of ordinary care under all the circumstances. It is the failure to act with the care which a reasonable and prudent man would have used under the same conditions.

"To be more specific, every person using the streets has the duty to conduct himself prudently and to act with ordinary care. Therefore the Railway Company owed it to the plaintiff to operate its cars with reasonable care. Consequently if you believe that the trolley car involved in this accident was operated at an excessive speed, or otherwise imprudently, then the defendant was negligent, and you should answer the first question "yes".

"The burden of convincing you that this was the case is on the plaintiff. He has charged that the defendant's motorman was negligent, and he must prove that negligence by the greater weight of the evidence. The weight of the evidence is not measured by the number of witnesses, or by any particular circumstance. It means simply that the evidence for one party must carry more

conviction to your minds than that for the other party, so that if you can not make up your minds as to which story is the more convincing, you must decide as though the point in question had not been proved. Thus, if your minds are in even balance as to whether the motorman was negligent or not, then you must decide that he was not, and must answer this question "No".

"On this question, therefore, if you believe from the greater weight of the evidence that the motorman was not operating the street car with reasonable care and prudence, you should answer "Yes". Otherwise answer it "No".

"The second question is:

"2. Did negligence of the plaintiff contribute to the accident?"

"It is the duty of a motorist, just as much as of a streetcar to drive with ordinary care and prudence, when using the streets. If he fails to do so, then he is negligent. For example, if a motorist makes a sharp turn across the path of a trolley car in a careless or imprudent manner so that the motorman could not stop before a collision when operating with ordinary care, then the motorist is negligent. If you believe that the plaintiff in this case operated his car negligently in this or any other manner, and helped thereby to cause the accident, you must answer this question "Yes". It makes no difference whether the plaintiff was only slightly negligent, or was very negligent, for the law does not consider quantities of negligence. Even if you find that the plaintiff was only slightly negligent, your answer should still be "Yes". But if you believe that the plaintiff was not negligent, your answer should be "No".

"On this issue, the burden of proof is on the defendant Railway Company. It must convince you by the greater weight of the evidence that the plaintiff's own negligence contributed to this accident. If you are so convinced, answer this question "Yes". But if you believe that the plaintiff was driving his car with reasonable care and prudence, or if you are uncertain whether he was or not, then answer it "No".

"The third question is:

"3. Notwithstanding any negligence of the plaintiff, did the motorman have a last clear chance to avoid the accident by the use of ordinary care?"

"If in answering the second question you have decided that the plaintiff here was not negligent in operating his automobile and therefore answer the second question "No", you need *not* answer this question. But if you decided that the plaintiff was negligent and answered "Yes" to the second question, you must also answer this one.

"To answer this question you must decide whether the motorman had what is known as a "last clear chance" to prevent the accident. I can best explain what this means concretely as applied to this case. Even though the plaintiff himself had been negligent before the accident in placing his automobile across the street car tracks, there may still have been time for the motorman to have stopped before running into him. It may be that with ordinary care the motorman should have seen that the plaintiff was in a dangerous position which he could not get out of in time, and that if the motorman had used ordinary care he could have stopped the trolley car before the collision. If you believe that the motorman had such a last chance to avoid the accident, then answer this question "Yes".

"The burden of proving that the motorman had such a last clear chance to avoid the accident by ordinary care, notwithstanding the plaintiff's previous conduct, is on the plaintiff. If you are convinced by the greater weight of the evidence, that the motorman had a last clear chance and failed to take it, answer this question "Yes". If you are not convinced, or your minds are in even balance on the question, answer it "No".

"The fourth question is:

"4. What is the amount of the damages of the plaintiff?"

"In answering this question, you may consider the following items:

"The plaintiff's health before the accident as compared with since; whether his injury has affected his earning capacity, and whether it will be permanent. You may also allow him for his medical expenses, and the damage to his automobile, on both of which points there is testimony in the case. Finally, you may allow him such amount as you think proper for the pain and suffering which he has endured. The law gives no exact measure for pain and suffering, and you must fix the damages, including that item, in such amount as you think fair to both parties.

"The object in thus submitting the case to you upon special questions is to clarify the issues which you are to decide and not to mystify you as to the result. As I said at the beginning the result will depend on the answers you give and counsel in their arguments to you will be free to indicate and explain to you the effect of the various answers which you may make.

"I will now ask counsel to come into my chambers to discuss any other instructions before they make their arguments to you."