September 1982

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COMMUNICATION IN THE COURTROOM: JURY INSTRUCTIONS

MICHAEL J. FARRELL*

I. INTRODUCTION

Trial by jury began in 1275 after Pope Innocent III ordered the clergy to cease presiding at trial by ordeal or combat.1 Trial by jury to correct mistakes and redress wrongs arose out of the seventeenth century revolutionary movement.2 The jurors of that century faced a different burden than found today. In 1670, William Penn was brought to trial in Old Bailey charged with unlawful assembly for religious purposes. No report exists as to what instructions were given to the jury, but after careful deliberations, the jury reported its verdict: Penn had spoken to a group for religious purposes, but his conduct did not constitute a crime. Whereupon, the judge refused to release the jury until it reached a verdict of guilty. The jury revolted and returned a verdict of not guilty. The court ordered the jury jailed and confined without food, drink, fire or tobacco for a period of two days and nights. When the jury did not change its verdict, each member was fined for contempt. Eight jurors paid their fines and were released. The remainder spent four months in jail. A year later, the appellate court held that jurors could not be punished for returning a verdict which did not satisfy the state.3

Although the modern jury is not faced with such hardships, it nevertheless must make decisions which strongly affect the lives of parties involved in civil or criminal litigation. The anatomy of decision-making may be known to many, but it is appreciated by few. The process involves identifying the problem and material facts, considering the alternative solutions, and reaching a conclusion. But many juror researchers doubt that jurors follow this logical pattern when rendering a verdict. Moreover, the modern jury must be capable of resolving factual conflicts. Its more difficult task involves the application of its factual findings to the legal standards provided by the court. These legal standards are presented to the jury by the court in the form of jury instructions.

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2 Id. at 6.
3 William Penn was sentenced for contempt of court along with the jurors.
The most important purpose of the jury instruction is to educate the jury. In order that it may make a fully informed decision. Although this purpose is straightforward, many persons in the legal profession have expressed concern about the lack of communication between the jury, lawyers and judge during a trial. As professional advocates and jurists, we speak to the jurors, but do they hear what we say? More significantly, we instruct them with little assurance that they understand what we say. This lack of communication in the courtroom may be partially attributed to several defects inherent in our methods of jury instruction. This article will discuss the law of jury instructions in the state of West Virginia: its present, its past, and concepts which should be considered in the future. The article will also discuss the defects in instructions, such as the psychological barriers to comprehension and misapplication of jury instructions.4

First of all, jurors often do not understand jury instructions. One purpose of a jury instruction is to advise the jury on the law of the case. This is the rule in West Virginia, but the rule is not universal.5 The avowed purpose of educating the jury is often misserved by the compulsion and necessity of couching the jury instructions in stilted legalese to meet the legal requirements. Both judges and lawyers strive to present understandable, complete and relevant instructions, but the incomprehensibility occurs because lawyers and judges prepare instructions to be legally correct rather than communicative. The result is garbled legal verbiage (a.k.a. legal garbage).

Social scientists and researchers have been concerned about jury instructions for years because of their incomprehensibility.6 For instance, two federal district court judges in three midwestern states have questioned the comprehensibility of jury instructions. Their study indicated that more than one-third of the three hundred seventy-five actual jurors did not understand the instructions.7 Also, an Illinois committee has published a proposed set of pattern jury instructions suggesting that all instructions should be conversational, understandable, unslanted, and accurate.8 Furthermore, other researchers have criticized jury instructions as presenting language barriers that the jury must overcome.9

4 See footnotes 37 through 43, infra.
5 In Kentucky, the form of jury instructions is considerably shortened from the form utilized in West Virginia. This will be discussed in more detail infra at footnotes 31 through 33. The Kentucky court envisions the “function of instructions in this jurisdiction is only to state what the jury must believe from the evidence (in a criminal case, beyond a reasonable doubt) in order to return a verdict in favor of the party who bears the burden of proof.” Webster v. Commonwealth, 508 S.W.2d 33, 36 (Ky. 1974), cert. denied, 419 U.S. 1070 (1974).
8 ILLINOIS PATTERNED JURY INSTRUCTIONS - CIVIL, p. xiii.
9 A. Elwork, B. Sales, J. Alfini, Making Jury Instructions Understandable (1982). These authors have presented an indepth analysis of the strengths and weaknesses of jury instructions. They seek improved comprehensibility of jury instructions by examining writing techniques, including serious errors in grammar, sentence length and complexity, negative sentences, verb struc-
A second problem with jury instructions arises when lawyers attempt to use them to persuade the individual members of the jury rather than educate them. In West Virginia trial practice, the court relies almost exclusively upon the contending attorneys to draft the necessary instructions. Therefore, the lawyer will attempt to draft cogent instructions which embody the controlling legal principle and persuade the jury at the same time. These conflicting purposes cause many instructions to be confusing and misleading as well as argumentative and objectionable. Responsible attorneys will not deliberately introduce error into the trial by tendering faulty instructions, but they may become oblivious to the difference between proper instruction and advocacy. The court's primary concern must be legal accuracy, clarity, relevancy and completeness. The State Trial Judge's Book warns the trial judge that the trial lawyer's attempt to persuade the jury may not stop at the conclusion of the evidence, but often continues with the preparation and presentation of instructions. The object of instructions must be to educate, not advocate.

Finally, the procedural law of jury instructions in West Virginia will be summarized, analyzed and criticized. For example, a primary criticism is directed at the evidentiary predicate requirements for jury instructions which are inconsistent with logic, judicial economy and fundamental fairness. This article will explore the structural help available to juries through cogent and well-structured jury instructions.

II. FORM OF INSTRUCTIONS

Five forms of instructions will be analyzed in this article. Others may -
ist, but their discussion and efficacy will be left to others. The five forms are: independent single issue instruction;\textsuperscript{13} federal connected jury charge;\textsuperscript{14} pattern jury instructions;\textsuperscript{15} Palmore's Kentucky instruction system;\textsuperscript{16} and the innovative Florida social scientist communication model.\textsuperscript{17} Advantages and disadvantages are inherent in each of the jury instruction forms available.

A. Single-Issue Jury Instructions

Independent single issue jury instructions are the ones used most frequently in West Virginia state courts. This form of jury instruction has been criticized by a student author who repeats Judge Sopher's argument that single issue jury instructions are incomprehensible because they contain conflicting hypothetical statements of fact and law.\textsuperscript{18} Judge Sopher advocated that the trial judge should be permitted to "outline the issues of fact to be decided and explain the applicable rules of law to the jury in simple terms. . ."\textsuperscript{19} The student note proceeded from the premise that the trial lawyer had minimal input regarding the content of the charge and total control of the single issue instruction substance. The note concluded that greater jury confusion resulted from independent instructions since the lawyers were prone to utilize the instructions as trial tactics calculated to persuade rather than educate the jury. Additionally, the article surmised that a connected charge would be more concise and less prone to reversal than a series of independent instructions.

The concerns expressed in the article are valid, but the conclusions are not. In actual practice at the federal and state level, the lawyers submit substantial, if not majority portions, of the proposed charge to the jury. No statistical evidence exists which demonstrates that the connected charges are more concise. On the contrary, experience indicates that counsel will submit and the court will incorporate most non-objectionable individual issue instructions into the charge. The court traditionally has a standard civil and criminal charge which addresses such issues as the role of the court, lawyers, jury as well as

\textsuperscript{13} W. VA. R. CIV. P. 51; W. VA. CODE § 56-6-19 (1966).
\textsuperscript{14} E. Devitt & C. Blackmar, Federal Jury Practice and Instructions (1977).
\textsuperscript{15} See, e.g., Arkansas Model Jury Instructions - Civil (2d ed. 1974); D. Wright, 1 Connecticut Jury Instructions - Civil (1970); Florida Standard Jury Instructions (Hein 1967); Illinois Patterned Jury Instructions - Civil (B. Smith 1961 and Supp. 1965); Indiana Patterned Jury Instructions (Bobbs-Merrill 1966); Michigan Standard Jury Instructions-Civil (Hall 1970); Minnesota Jury Instruction Guides - Civil (1963); Missouri Approved Jury Instruction (1969); New Mexico Uniform Jury Instructions - Civil (1966); Committee on Patterned Jury Instructions, I New York Patterned Jury Instructions - Civil (1965); South Dakota Patterned Jury Instructions - Civil (1971); Washington Patterned Jury Instructions - Civil (1967).
\textsuperscript{16} J. S. Palmore, Instructions to Juries in Kentucky (1975).
\textsuperscript{17} Taylor, Avoiding the Legal Tower of Babel - A Case Study of Innovative Jury Instruction, 19(3) Judges J. 10 (1980); Davis v. State, 373 So.2d 382 (Fla. App. 1979), cert. denied, 385 So. 2d 756 (1980).
\textsuperscript{19} Sopher, supra note 18, at 542.
trial procedure concepts such as burden of proof and proximate causation.\textsuperscript{20} If

\textsuperscript{20} Judge Norman P. Ramsey, United States District Judge for the District of Maryland, presided over the trial of United States v. West Virginia, No. 78-2049 (S.D.W. Va. July 22, 1982). At the conclusion of the evidence, he gave an excellent charge to the jury which outlined and explained the decision-making process. The substantive legal issue instructions have been omitted. At the trial, they began after the deposition use explanation and before the description of the method of deliberations.

\textit{GENERAL CIVIL INSTRUCTIONS}

\textit{INTRODUCTION}

At the outset, I want to thank you for your patience and attention throughout this case, your care in the consideration of the testimonial and documentary evidence, your patience in the matter of recesses and delays when it had been necessary for me to hear counsel out of your presence, and your promptness, making it possible to start each session on time, and to resume sessions after recesses without delay.

\textit{FUNCTIONS of JUDGE and JURY}

As you may already know, the functions of the Judge and of the Jury in a case of this sort are quite different. It is my duty as a Judge to instruct you as to the law which applies to this case. It is your duty to decide the facts and, in deciding these facts, to comply with the rules of law and apply them as I state them to you without regard to what you think the law is or should be. In deciding the facts and issues of fact, you must decide them without prejudice, or bias, or sympathy.

\textit{INSTRUCTIONS as a WHOLE}

In my instructions to you on the law of this case, if I state any rule, direction or idea in varying ways, no emphasis is intended by me and none must be inferred by you. You are not to single out any certain sentence or individual point or instruction and ignore the others. Rather, you are to consider all of my instructions as a whole, and you are to regard each instruction in the light of all others.

\textit{JURY DETERMINES FACTS}

You and only you are the judges of the facts. If any expression of mine or anything I may or may not have done or said would seem to indicate any opinion relating to any factual matters, I instruct you to disregard it. You may consider not only the evidence to which I may refer, and the evidence to which you may have been referred by counsel in their arguments, but you may also consider any testimony or exhibits in the case, whether or not referred to by me or by counsel, which you may believe to be material.

\textit{BURDEN of PROOF}

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his claim by a preponderance of the evidence. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant.

To establish by a preponderance of the evidence means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds belief that what is sought to be proved is more likely true than not true.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them and all exhibits received in evidence, regardless of who may have produced them.

\textit{DIRECT and CIRCUMSTANTIAL EVIDENCE}

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.
the trial judge performs his function appropriately, no substantial difference

FACTS and INFERENCES
You are to consider only the evidence presented, and you may not guess or speculate as to the existence of any facts in this case. But in your consideration of the evidence, you are not limited to the bald statements of the witnesses. On the contrary, you are permitted to draw, from facts which you find have been proved, such reasonable inferences as seem justified in the light of your own experience. Inferences are deductions or conclusions which reason and common sense lead the jury to draw from facts which have been established by the evidence in the case.

ARGUMENTS and STIPULATIONS
The statements and arguments of counsel are not evidence and should not be considered as evidence unless any such statements were made as a stipulation conceding the existence of a fact or facts. When the attorneys on both sides stipulate or agree as to the existence of a fact, the jury must accept the stipulation as evidence and regard that fact as conclusively proved.

COURT RULINGS
At times throughout the trial, the Court has been called upon to pass on the admissibility of certain offered evidence. You should not be concerned with the Court's rulings or the reason for them. Whether evidence which has been offered is admissible or is not admissible is purely a question of law, and from a ruling on such a question you are not to draw any inference. In admitting evidence, to which an objection has been made, the Court does not determine what weight should be given to such evidence. You must not guess what the answer might have been to any question to which an objection was sustained, and you must not speculate as to the reason the question was asked or the reason for the objection.

CREDIBILITY of WITNESSES
You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. A witness is presumed to speak the truth. But this presumption may be outweighed by the manner in which the witness testifies, by the character of the testimony given, or by the contradictory evidence. You should carefully scrutinize the testimony given, the circumstances under which each witness has testified and every matter in evidence which tends to indicate whether the witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and his demeanor and manner while on the stand. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence.

TESTIMONY
Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident may see or hear it differently, and innocent misrecollection, like failure of recollection, is not an uncommon experience. Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of differing witnesses, should be considered by you, but, in weighing their effect, you should consider whether the inconsistencies or discrepancies pertain to a matter of importance or an unimportant detail, and whether the discrepancy or inconsistency results from innocent error or willful falsehood.

DISCREDITED TESTIMONY
A witness may be discredited or impeached, not only by contradictory evidence, but also by evidence that at other times the witness has made statements which are inconsistent with the present testimony of that witness. You should, therefore, consider in weighing the testimony of any witness, whether he has made statements at other times which are inconsistent with his present testimony, and whether such inconsistency, if any you find, results from innocent error or willful falsehood, as well as whether it pertains to a matter of importance or any unimportant detail. Earlier contradictory statements of a witness are admissible to impeach the credibility of such witness and not to establish the truth of such statements.
should occur between the efficacy of independent single issue instructions and

WEIGHT of TESTIMONY

After you have considered all of the factors bearing upon the credibility of a witness which I have mentioned to you, you may conclude to reject all of the testimony of a particular witness, or part of the testimony of a particular witness. In other words, you may give the testimony of any witness such credibility and weight, if any, as you may think it deserves.

EXPERT TESTIMONY

The rules of evidence ordinarily do not permit a witness to testify as to his opinions or conclusions. A so-called "expert witness" is an exception to this rule. A witness who by education and experience has become an expert in any art, science, profession, or calling may be permitted to state his opinion as to a matter in which he is versed and which is material to this case. He may also state the reasons for such opinions. You should consider each expert opinion received in evidence in this case and give it such weight as you think it deserves, and you may reject it entirely if you conclude that the reasons given in support of the opinion are unsound. And, if you find that the facts upon which a particular expert relied are not sufficient to support the opinion or that the facts relied upon are erroneous, you may reject the opinion.

NUMBER and QUALITY of WITNESSES

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses, which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence, which does produce such belief in your minds. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

ORAL ADMISSIONS

Evidence as to any oral admissions, claimed to have been made outside of court by a party to any case, should always be considered with caution and weighed with great care. The person making the alleged admission may have been mistaken, or may not have expressed clearly the meaning intended; or the witness testifying to an alleged admission may have misunderstood, or may have misquoted what was actually said. However, when an oral admission made outside of court is proved by reliable evidence or is uncontroversial, such an admission may be treated as trustworthy, and should be considered along with all other evidence in the case.

DEPOSITIONS

During the trial of this case, certain testimony has been read to you by way of deposition, consisting of sworn written answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath, in the form of a deposition. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present, and had testified from the witness stand.

METHOD of DELIBERATIONS

In conclusion, let me remind you that your verdict must be unanimous, reflecting the judgment of each and every one of you. You should approach the issues of this case as men and women of affairs in the manner in which you would approach any important matter that you have occasion to determine in the course of your everyday business. Consider it in the jury room deliberately and carefully, in the light of the instruction which I have given to you, and use the same common sense and the same intelligence that you would employ in determining any important matter that you have to decide in the course of your own affairs.

INDIVIDUAL JUROR RESPONSIBILITY

It is your duty, as jurors, to consult with one another and to deliberate with a view
connected charge instructions.

B. The Connected Charge

The connected jury charge form of instructions is authorized in West Virginia and apparently used with great frequency in the northern part of the state. Both the Rules of Civil Procedure and the statutory law governing instructions permit the connected charge form. In federal court, the connected charge is the required form of instruction. The duty of the federal court to charge the jury does not extend to all instructions imaginable. It is the duty of counsel who wants to bring a certain point of law to the jury's attention to propose an instruction on that point. Neither the Northern nor the Southern District of West Virginia court rules require the submission of requested charges by counsel. However, the practice in the Southern District normally requires the submission under requested charge by counsel five days before the trial begins.

C. Pattern Jury Instructions

Illinois was the first state to develop a system of pattern jury instructions. The purpose of pattern instructions is to provide a defined formula as

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**COMMUNICATIONS with COURT**

If it becomes necessary during your deliberations to communicate with the Court, you may send a note by the bailiff. Never attempt to communicate with the Court except in writing. And bear in mind always that you are not to reveal to the Court or to any person how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict.

**RETURNING VERDICT**

When you have reached a unanimous agreement as to your verdict, please notify the bailiff and you will return to the courtroom with your verdict. When you return to the courtroom the clerk will ask you, "have you arrived at a verdict and who shall say for you?" Your answer will be "our foreman." Your foreman will then rise and give the verdict.

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21 Note, supra note 18, at 578. Twelve judges who preside in northern West Virginia and three southern judges use the charge form regularly. Thirty-three judges responded to the questionnaire survey.


26 Corboy, Patterned Jury Instructions — Their Function and Effectiveness, 32 INS. COUNS. J. 57, 58 (1985). In 1955, the judicial conference for the State of Illinois undertook a study of 700 cases decided by the appellate court between 1930 and 1955. The conference concluded that an incredibly high ratio of reversals occurred because of improper and partisan instructions. Illinois
to language and legal content coupled with sufficient flexibility so that each instruction can be made applicable to the case at trial. The Committee of the District Judges Association for the United States Court of Appeals for the Fifth Circuit defined two objectives when it promulgated its pattern jury instructions for criminal cases:

1. to provide a body of brief, uniform jury instructions fully stating the law without needless repetition, and related in simple terms to enhance jury comprehension; and
2. to organize the instructions in a special format designed to facilitate rapid assembly and reproduction of a complete jury charge in each case, suitable for submission to the jury in written form it desires.27

The pattern jury instruction format has had many critics including the National College of the State Judiciary which has acknowledged the laudatory motives of many appellate courts in approving pattern instructions, but cautioned that these instructions may be objectionable because their approval tends to mislead a trial bench and bar.28 The rigidity of pattern jury instructions concerned the National College of the State Judiciary sufficiently that it warned its membership not to be reluctant to reframe an instruction where modification would make the instruction more comprehensible to the average juror.

Currentness is another concern when considering the adoption and use of pattern jury instructions. The evolution of the common law has quickened and may be approaching a light speed in West Virginia.29 State court judges in Pennsylvania expressed considerable concern that their system of pattern jury instructions needed "looseleaf updating" in order to remain a viable tool for use in the, courtroom.30

D. Kentucky's System

The Kentucky system of charging a jury may be unique. Justice John F. Palmore of the Court of Appeals in Kentucky has authored the "bible" of instructions. The uniqueness of the instructions lies in their brevity. The jury receives a combination written instruction and verdict form which rarely exceeds three pages. Within this form, the jury is presented with questions which

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28 National College of the State Judiciary, Jury 81.
require it to find facts rather than apply law. A Kentucky instruction will either ask a question or tell the jury what it must do if it believes a specific set of facts. The preoccupation by Kentucky with limiting the jury's role to fact-finding is highlighted by its rule that it is reversible error to instruct the jury as to which party has the burden of proof.

The simplicity of the Kentucky system has substantial appeal. Consider the text of the instruction set out below in the footnote involving a typical rear-end collision wherein Michael Swanson, a guest passenger, sued James Smith (driver of the rear car) and Frank Peters, the man with whom he was riding at the time the collision occurred. In the case assume that the hospital and medical expenses total five thousand dollars ($5,000.00); the medications five hundred dollars ($500.00); the nursing expenses two thousand dollars ($2,000.00) and lost wages three thousand, five hundred dollars ($3,500.00). The ad damnum was two hundred fifty thousand dollars ($250,000.00).  

51 In his book, Justice Palmore succinctly explains Kentucky's philosophy that jurors should not know much about the law of the case. "The increasing use of interrogatories instead of general instructions reflects a realization that the less the jurors know about the law of the case the easier it is for them to remain strictly within the province of fact-finding." Palmore, supra note 16, at 2 (footnotes omitted).


53 1. It was the duty of James Smith in driving his automobile [rear vehicle] to exercise ordinary care for the safety of other persons using the highways, and this general duty included the following specific duties:

(a) to keep a lookout ahead for other persons and vehicles in front of him or so near his intended line of travel as to be in danger of collision, and not to follow another vehicle more closely than was reasonable and prudent, having regard for the speed of the respective vehicles and for the traffic upon and condition of the highway;

(b) to have his automobile under reasonable control;

(c) to drive at a speed no greater than was reasonable and prudent, having regard for the traffic and for the condition and use of the highway, and not exceeding 55 miles per hour;

(d) to sound his horn as a warning to Frank Peters, if you are satisfied from the evidence that such precaution was required by the exercise of ordinary care; and

(e) to exercise ordinary care generally to avoid collision with other persons and vehicles on the highway, including the automobile of Frank Peters.

If you are satisfied from the evidence that James Smith failed to perform any one or more of these duties and that such failure was a substantial factor in causing the collision with Frank Peter's automobile, you will find for Michael Swanson against James Smith; otherwise you will find for James Smith.

2. It was the duty of Frank Peters in the operation of his automobile [front vehicle] to exercise ordinary care for the safety of other persons and vehicles using the highway, and this general duty included the following specific duties:

(a) to keep a lookout ahead and to the rear for other vehicles near enough to be affected by the intended movement of his automobile;

(b) not to stop his automobile [or leave it standing] on the main-traveled portion of the highway [unless it was reasonably necessary in order to avoid conflict with other traffic (or pedestrians)];

(c) not to stop or suddenly decrease the speed of his automobile without first giving to the operator of any vehicle immediately following to the rear, if he had a reasonable opportunity to do so, a signal of his intention by extending his hand and arm downward from the left side of his automobile;

(d) not to drive his automobile at such a slow speed as to impede or block the normal and
Clearly, Kentucky’s system is a significant advance in structuring the thought processes in which a jury must undertake in rendering a verdict.

E. Innovative Jury Instructions

The public and press have significantly criticized the inefficiency and unpredictability of the court and jury system in the United States.\textsuperscript{34} The loudest reasonable movement of other traffic [unless it was reasonably necessary for safe operation, having regard for the traffic and for the condition and use of the highway]; and

(e) to exercise ordinary care generally to avoid collision with other persons and vehicles in the highway, including James Smith’s automobile.

If you are satisfied from the evidence that Frank Peters failed to perform any one or more of these duties and that such failure was a substantial factor in causing the collision with James Smith’s automobile, you will find for Michael Swanson against Frank Peters; otherwise you will find for Frank Peters.

3. You may find for Michael Swanson against either or both of the defendants or you may find for both of the defendants. If you find for Michael Swanson, against both defendants, you will determine from the evidence and state in your verdict what percentage of the causation was attributable to James Smith’s failure to perform his duties and what percentage of the causation was attributable to Frank Peter’s failure to perform his duties, as follows:

\begin{tabular}{ll}
James Smith & \% \\
Frank Peters & \% \\
\hline
Total & 100\% \\
\end{tabular}

4. “Ordinary care” means such care as an ordinarily prudent person would exercise under similar circumstances.

5. If you find for Michael Swanson you will determine from the evidence and award him a sum or sums of money that will fairly and reasonably compensate him for such of the following damages as you believe from the evidence he has sustained directly by reason of the accident:

(a) Mental and physical suffering [including any such suffering he is reasonably certain to endure in the future]: $\_\_\_\_\_\_

(b) Permanent impairment of his power to earn money: $\_\_\_\_\_\_

(c) Reasonable expenses incurred for [hospital and] medical services: $\_\_\_\_\_\_
   (not to exceed $5,000.00)

(d) Reasonable expenses incurred for medicines [and medical supplies]: $\_\_\_\_\_\_
   (not to exceed $500.00)

(e) Reasonable expenses incurred for nursing services: $\_\_\_\_\_\_
   (not to exceed $2,000.00)

(f) Wages or income lost during such time as it was necessary for him to be off work: $\_\_\_\_\_\_
   (not to exceed $3,500.00)

TOTAL $\_\_\_\_\_\_
   (not to exceed $250,000.00)

6. Nine or more of you may agree upon a verdict. If all twelve agree, the verdict need be signed only by the foreman; otherwise it must be signed by the nine or more who agree to it.

\textsuperscript{34} Friedrich, \textit{We, the Jury, Find the . . . That irksome, boring, vital, rewarding, democratic experience}, Time Sept. 28, 1981, at 44. A few highlights from the article reflect both the ambiva-
outcry recently resulted from the District of Columbia jury acquittal of John Hinckley by reason of insanity. Despite long standing concern about the decision-making processes employed by juries, the American Bar and Judiciary have significantly failed to respond with innovative solutions.

The adoption of pattern jury instructions attempted to improve the communication between the judge and the jury but failed to organize the jury's decision-making task. Pattern jury instructions have not lessened the number of cases relying upon instructions as error or reduced the percentage of cases reversed for erroneous instructions. Pattern jury instructions were designed to accomplish two goals: increased jury comprehension of the judge's charge and judicial economy. Another study rejects the thesis that increased comprehen-

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*Expressed in completed years of formal education.


36 Id.
hension occurs with pattern jury instructions. Few attorneys or judges who have had experience with pattern jury instructions can dispute the time saved by the lawyers and the judiciary. However, little credible evidence exists showing that this saving in time is sufficient, standing alone, to conclude that pattern jury instructions are the best possible method of instructing the jury.

One Florida state court judge, David U. Strawn, dissatisfied with pattern jury instructions, allied with a group of college professors specializing in communication to innovate "process" jury instructions. Judge Strawn reasoned that jury comprehension would be enhanced if a map were provided to guide the individual juror through the step-by-step process of reaching a verdict. He also shared the curiosity of the social scientists who wondered whether jurors were faithful to the instruction by the court that they must render their decision based upon the law and the evidence.

The Reed report regarding jury deliberations, voting, and verdict trends determined that actual jury deliberations were often irrational and not based upon the evidence presented at trial. Professor Reed undertook a survey of one hundred fifty-eight petit jurors who served in the trial court in East Baton Rouge, Louisiana. Of that number, fifty percent of the jurors indicated that

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37 See Elwork, Sales & Alföldi, Juridic Decisions: In Ignorance of the Law or in Light of It?, 1 LAW & HUM. BEHAV. 163, 176 (1977); See also Strawn & Buchanan, Jury Confusion: A Threat to Justice, 59 JUDICATURE 478 (1976).
very little or no deliberation had taken place in the jury room prior to the return of the verdict.\textsuperscript{41} Fifty-seven percent of the jurors responding to a question as to what was discussed most in the jury room specified that nonfactual and nonvenditory matters dominated the deliberation time. The jurors discussed such subjects as the weather; the other people on the jury or in the community; the reputation of the parties; their families; their attorneys and racial differences.\textsuperscript{42} Unfortunately, the Louisiana experience probably occurs more frequently than we believe.

Against this backdrop, the instruction innovation devised by Strawn’s group which applied the concepts regarding dynamics of small group behavior should be applauded.\textsuperscript{43} The jury decision-making involves a series of sequential decisions regarding factual contradictions and the application of the factual findings to legal standards. Strawn developed a series of questions which permitted the jury to decide the component issues in the case in a logical sequence. The most recent trial application of “process” instructions occurred in the criminal retrial of Jessie Davis. The first trial involving the same charges resulted in a hung jury. Each juror received a copy of the “process” instruction at the time it was orally read to them by the court. The text of the “process” instruction stated:

DEFINITION OF THE CRIME: The accused (Mr. Davis) can be convicted of committing a crime depending on your answers to the following questions. You must unanimously agree that your answers, if they will result in finding the defendant guilty, are proven beyond any reasonable doubt. You must decide these facts in order. Begin by deciding No. 1:

1. Did he go into the Sepia Lounge? If “yes,” go on to question No. 2. If “no,” immediately return a verdict of “not guilty” and tell the bailiff you want to return to the Courtroom.

2. Did he do so on or about November 17, 1976? If “yes,” go on to question No. 3. If “no,” immediately return a verdict of “not guilty” and tell the bailiff you want to return to the Courtroom.

3. Was the Sepia Lounge closed to the public at the time Mr. Davis went inside? If “yes,” go on to question No. 4. If “no,” immediately return a verdict of “not guilty” and tell the bailiff you want to return to the Courtroom.

4. Was Mr. Davis invited to enter the Sepia Lounge at the time he went in? If “no,” go on to question No. 5. If “yes,” immediately return a verdict of “not guilty” and tell the bailiff you want to return to the Courtroom.

5. Did Mr. Davis have legal authority or invitation to go into the Sepia at the time he did so? If “no,” go on to question No. 6. If “yes,” immediately return a verdict of “not guilty” and tell the bailiff you want to return to the Courtroom.

\textsuperscript{41} Sw. Soc. Sci. Q. at 364.
\textsuperscript{42} Id.
\textsuperscript{43} M. E. SHAW, GROUP DYNAMICS: THE PSYCHOLOGY OF SMALL GROUP BEHAVIOR 330 (1976). The Strawn group applied Shaw’s theory that greater “goal clarity” (knowledge of the problem) and better “goal path clarity” (knowledge of the steps to take to solve the problem) increase the efficiency of the group members.
6. When Mr. Davis went into the Sepia, did he have an intention to commit a further crime? If “yes,” go on to question No. 7. If “no,” skip to question 8 and decide it.

7. Was the crime he intended to commit to steal an object or objects? If "yes," you should return a verdict of guilty of burglary. If "no," go on to question No. 8.

8. Did Mr. Davis enter or remain inside the Sepia without legal authority, but not to commit an additional crime? If "yes," you should find Mr. Davis guilty of trespass. If "no," you should find Mr. Davis not guilty of any offense. There are only two possible convictions in this case: burglary or trespass. If Mr. Davis is not guilty of trespass, you must return a verdict of “not guilty.”

The instructions also explain, among other things, how one legally determines criminal intent. Jessie Davis was convicted of both crimes after deliberation of less than one hour. The appellate court held that the instructions were clear, comprehensive, and legally sufficient, but recommended that innovations be presented to the Florida Supreme Court’s Continuing Committee on Standard Jury Instructions.

Strawn and his associates recognized that present-day instruction forms expressed legal concepts from lawyer to lawyer and judge to judge. But these legal concepts are lost upon the layperson who hears them for the first time in a monotonic, thirty-minute lecture at the end of a rigorous (or perhaps boring) trial. When compared with standard jury instructions, the advantages of process instructions are numerous:

1. the instructions are shorter and more comprehensible;
2. the court, not the jury, identifies the controlling issues of fact for jury determination;
3. deliberations are faster;
4. the impact of a strong personality dominating the deliberation process is eliminated since each juror has equal access to the instructions and the issues;
5. consideration of irrelevant or non-material issues are eliminated;
6. comprehension and communication barriers which result from the judge’s style of reading are not as formidable;
7. the jury takes the written questions to the jury room, thus increasing comprehension;

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44 Taylor, supra note 38, at 12.
46 Taylor, supra note 38, at 14.
47 Despite the best of intentions, trial judges frequently make the reading of jury instructions a torturous, incomprehensible and futile exercise. Speed, slurred and changed words are the primary problems. Normal people read faster than they speak and trial judges are no exception. A judge might read as fast as two hundred twenty-five to two hundred fifty words per minute. This rate of speed makes it difficult to comprehend. The slurred and changed words involve common look alike words. For example, a trial judge may inadvertently substitute “casual” for “causal” in instructions involving proximate causation.
48 Taylor, supra note 38, at 14, reporting the delivery by the authors of a presentation entitled “Legal Communication: An Investigation of Juror Comprehension of Patterned Instructions” at the convention of the International Communication Association, Portland, Oregon, April, 1976. This research revealed that juror comprehension could be increased thirteen percent by permitting
8. the effect of interest, bias, or prejudice by individual jurors on the ultimate verdict in emotionally charged cases involving heinous or lurid crimes is minimized.

Actually, “process” instructions constitute no more than a well-designed set of special interrogatories encapsulating the entire case in a logical, sequential progression. West Virginia Rules of Civil Procedure authorize special interrogatories to the jury. Therefore, the authority appears to be available which

the jurors to read the instructions while being charged by the judge. Rule 51, W. Va. R. Civ. P. permits the taking of instructions to the jury room with the agreement of counsel and the court.

(a) Special verdicts. — The court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the court may submit to the jury written questions susceptible of categorical or other brief answer or may submit written forms of the several special findings which might properly be made under the pleadings and evidence; or it may use such other method of submitting the issues and requiring the written findings thereon as it deems most appropriate. The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

(b) General verdict accompanied by answer to interrogatories. — The court may submit to the jury, together with appropriate forms for a general verdict, written interrogatories upon one or more issues of fact the decision of which is necessary to a verdict. The court shall give such explanation or instruction as may be necessary to enable the jury both to make answers to the interrogatories and to render a general verdict, and the court shall direct the jury both to make written answers and to render a general verdict. When the general verdict and the answers are harmonious, the court shall direct the entry of the appropriate judgment upon the verdict and answers. When the answers are consistent with each other but one or more is inconsistent with the general verdict, the court may direct the entry of judgment in accordance with the answers, notwithstanding the general verdict or may return the jury for further consideration of its answers and verdict or may order a new trial. When the answers are inconsistent with each other and one or more is likewise inconsistent with the general verdict, the court shall not direct the entry of judgment but may return the jury for further consideration of its answers and verdict or may order a new trial.

See also W. Va. Code § 56-6-5 (1966), which provides:
Any court of record having jurisdiction of the trial of common-law actions may, in any case before it other than a chancery case, have an issue tried, or an inquiry of damages made, by a jury, and determine all questions concerning the legality of evidence and other matters of law which may arise. Upon the trial of any issue or issues by a jury, whether under this section or not, the court may, on motion of any party, direct the jury, in addition to rendering a general verdict, to render separate verdicts upon any one or more of the issues, or to find in writing upon particular questions of fact to be stated in writing. The action of the court upon such motions shall be subject to review as in other cases. Where any such separate verdict or special findings shall be inconsistent with the general verdict, the former shall control the latter, and the court shall give judgment accordingly.

would permit a trial judge and consenting counsel to initiate "process" instructions in any West Virginia court by virtue of Rule 49 and West Virginia Code Annotated 56-6-5.

III. ELEMENTS OF INSTRUCTIONS

Few law schools offer courses which identify or discuss the component parts of jury instructions, their arrangements, and their purpose. This void in the formal educational process is generally filled by attorneys blindly copying instructions offered in similar cases by other attorneys practicing in the community. Little regard is given for style, composition and word choice. Time constraints upon the typical attorney preclude creative, stylistic writing. Moreover, trial lawyers will occasionally delay writing the instructions until the trial has started, anticipating that the case may settle on the courthouse steps or a plea bargain may be reached as the jury is impaneled. The inevitable result is a confused set of hastily prepared instructions. If an instruction is confusing and misleading, it is erroneous and should be denied by the trial court.\(^6\)

Every complete set of instructions should have five basic components:

1. juror responsibility;
2. definition of terms;
3. burden of proof and measure of evidence;
4. factual contentions of the parties; and
5. statements of law applicable to the factual issues.

First, the juror responsibility component is the part of the instructions which addresses the burden of responsibility which a juror undertakes. The juror responsibility instruction has also been classified as a cautionary instruction.\(^6\)

For example, most panels are instructed that they are to consider all of the instructions as a whole and not single out one instruction as the controlling law.\(^6\) Also, the jury should be told forthrightly that its primary function is to decide the facts.\(^6\) Further, the court should advise the jury that while it is the exclusive trier of fact, it is compelled to apply the law given to it by the court.

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\(^6\) The STATE TRIAL JUDGES BOOK, supra note 11, at 152.


\(^6\) In actual practice, many circuit judges in West Virginia will briefly describe the jury decision-making function during an orientation session at the beginning of the term and occasionally at the beginning of a trial during the term. Very few attorneys, and even fewer judges, ever specifically advise the jury: "Your job in this case is to decide the facts." This type of plain English command would materially assist some jurors who appear confused and bewildered by the jury deliberation process. Reed's report of the Baton Rouge, Louisiana, jury deliberation topics confirms the misdirection and lack of purpose which afflict many jurors. See references cited supra note 40.
whether or not it agrees with the law.\(^4\)

But juries often do not apply the law given to them by the court. This was especially true in West Virginia before the advent of comparative negligence.\(^5\) Jury verdicts were often nullified because jurors repeatedly violated their oath by rejecting the "however slight" rule of contributory negligence which would bar a plaintiff's recovery.

Jury responsibility instructions often tell the jury members what they cannot do as well as what they must do. For example, jurors are normally admonished to disregard sympathy, passion, prejudice and partiality in their consideration of the case.\(^6\) Further, the jury is instructed that in considering the credibility of each witness, it may accept or reject the testimony in whole or in part.\(^7\)

The second component that jury instructions should contain is a definition of terms. Aside from explaining the standard legal concepts involved in civil and criminal cases, West Virginia trial courts rarely define terms in the instructions to the jury. In the civil case, the court will generally define negligence,\(^8\) ordinary care\(^9\) and proximate cause.\(^10\) In the criminal case, the judge

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\(^6\) The issue of sympathy, passion, prejudice and partiality most often arises in the context of excessive verdict claims by defendants. While it is proper to admonish the jury not to act with these improper motives, it now appears impossible to have a verdict set aside as excessive. Addair v. Majestic Petroleum Co., Inc., 222 S.E.2d 821 (W. Va. 1977).


\(^8\) Two options exist regarding an instructional definition of negligence. The attorney can submit an abstract definition of negligence without any reference to the facts in the case. Alternatively, the instruction can define negligence with a general reference to the facts; for example:

The court instructs the jury that negligence is the doing of an act which a reasonably prudent person would not do or the failure to do an act which a reasonably prudent person would do. If you find from a preponderance of evidence in the case, that John Doe acted or failed to act as a reasonably prudent person would in the same or similar circumstance, and that his conduct proximately caused the injuries to plaintiff, then your verdict may be in favor of plaintiff.

It is preferable to recite the specific legal standard and specific facts in the instruction rather than this general form. An example of the specific format follows:

The law of the State of West Virginia provides that:

No person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential
will define for the jury criminal intent as well as the crime charged. Words

hazards, then existing. In every event, speed shall be so controlled as may be necessary to avoid colliding with any person, vehicle or other conveyance on or entering the highways in compliance with the legal requirements and the duty of all persons to use due care.

If you find from a preponderance of the evidence in this case that John Smith drove his vehicle at a speed greater than was reasonable and prudent under the conditions existing, and that as a proximate result of this conduct, his vehicle collided with the Jones vehicle, then you may find that John Smith was negligent and you may return a verdict in favor of Joyce Jones and against him, in accordance with the other instructions of the Court.

Ordinary care definitional instructions are generally tied to the specific act or acts involved in the case. For example, in Bradley v. Sugarwood, Inc., 260 S.E.2d 839 (W. Va. 1979), the ordinary care required of the plaintiff was couched in these terms:

The court instructs the jury that the law imposes upon the plaintiff the duty of exercising reasonable and ordinary care for his own safety, to look and to look effectively to see what is obviously there. Therefore, if you find from the evidence in this case that plaintiff was not exercising reasonable and ordinary care for his own safety, then he was guilty of negligence and if you find that such negligence caused or contributed proximately to the accident in question, then the plaintiff is not entitled to recover and you should return a verdict for Sugarwood, Inc.

260 S.E.2d at 840. This instruction was offered by the defendant. Plaintiff would have been entitled to a similar instruction which would have further advised the jury that ordinary care does not require that a person "continuously" look. Cf. Sydenstricker v. Vannoy, 151 W. Va. 177, 191-93, 150 S.E.2d 905, 914 (1966).

Another method of instructing the jury as to the definition of a term involves the giving of a directive by the court. A good example of this format was offered by the plaintiff in Cochran v. Appalachian Power Co., 246 S.E.2d 624, 629 (W. Va. 1978), wherein the West Virginia Supreme Court of Appeals approved plaintiff's instruction number 2:

The court instructs the jury that it was the duty of the defendant in this case, Appalachian Power Company, to use reasonable care at all times to provide the plaintiff with a sufficient amount of electricity to enable plaintiff to operate his coal mine.

Plaintiff's counsel obviously did not want to let the jury speculate as to what amount of electricity supply constituted reasonable care. This definitional form of instruction avoids the pitfalls, confusion and incompleteness, normally associated with abstract instructions.

Every instruction which permits the jury to find for or against a party, must address proximate causation. This is equally true to instructions regarding damages. See Kingdon v. Stanley, 215 S.E.2d 462, 465 (W. Va. 1975), wherein the court approved a defense instruction designed to inform the jury that if a pre-existing injury existed, plaintiff cannot recover for the original injury. The instruction did not discuss aggravation of a pre-existing injury. However, plaintiff offered two instructions on the question of aggravation of a pre-existing condition. This is the essence of using a proximate causation instruction to your advantage.

THE COURT INSTRUCTS THE JURY that if you find in favor of the plaintiffs in this case, then in assessing the damages to which the plaintiff, Elsa M. Kingdon is entitled, you can include as elements of damage only such items as you find from the evidence are a proximate result of the collision testified to in this case, and if you believe from the evidence that any of the pain and suffering or other complaints of the plaintiff, Elsa M. Kingdon are a result of a pre-existing condition or conditions not proximately caused by the collision, then you shall not consider any such elements in determining the amount to which she is entitled. (Emphasis supplied).

Counsel for criminal defendants should be especially careful in drafting their instructions and objecting to the state's instructions on the issue of intent. In State v. Woods, 289 S.E.2d 500, 563 (W. Va. 1982), the court found that the state's instruction number 5, relating to the defense of mental incapacity due to the use of intoxicating liquors, was deficient since it omitted an explanation of intent as an element of the crime of robbery. However, defendant's instructions 9 and 10 adequately instructed the jury on the element and the rule of State v. Milam, 226 S.E.2d 493 (W.
familiar to persons of average intelligence do not require a definition. The jury should be instructed as to the definition of material, technical and specialized terms which are part of the proof.

The third requirement for a complete set of jury instructions is that the concepts of burden of proof and measure of evidence be fully and sufficiently explained to the panel. Lawyers occasionally neglect to submit an instruction informing the jury which party has the burden of proof. It should seem obvious that the party making the claim would have to prove it, but the contrary is often true. One apocryphal tale tells about a local magistrate who opined, following a trial to the bench, that the defendant had failed to prove his innocence and, therefore, would be found guilty. Judge Strawn's research group found that only fifty percent of the Florida jurors understood that the defendant did not have to present any evidence of his innocence and that the state had the burden of proof in establishing his guilt. Both positive and negative burden of proof instructions are appropriate in the civil or criminal trial, but a significant problem exists with instructions which impermissibly attempt to shift the burden of proof from plaintiff to defendant. Part of this problem cannot be avoided, as with the retroactive application of Mullaney v. Wilbur and its progeny, State v. Pendry.

Misunderstanding the law, in a civil context, creates equally troublesome

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Va. 1976) was applied:

[When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict. Quoted in 289 S.E.2d at 503.

See McClendon v. Reynolds Electrical & Engineering, 432 F.2d 320, 323 (5th Cir. 1970);

Reyes v. Wyeth Laboratories, 498 F.2d 1264, 1290 (5th Cir. 1974) (medical terms).


For obvious reasons, plaintiffs rarely ask the court to instruct the jury on the burden of proof. Defense counsel should always offer a burden of proof instruction. Positive language affirmatively places the burden of proof issue before the jury. For example, the positive burden of proof instruction might read:

The court instructs the jury that plaintiff has filed this claim against the defendant. As a result, the law requires that the plaintiff prove his case by the preponderance of evidence.

The negative instruction regarding the burden of proof can take one of two forms. Either it can be combined with a positive statement, such as that set forth in note 65, or it can stand alone. If combined, the instruction in note 65 would be supplemented with the following language:

The defendant has no obligation, under the law, to prove that he is without fault in the occurrence of this accident. He has no obligation to bring witnesses or evidence to the jury's attention. The mere fact that an accident occurred is not enough, standing alone, to meet plaintiff's burden of proof that defendant was guilty of negligence which proximately caused the accident.

The negative propositions set out above can stand independent of any other explanations. Most commentators suggest that an instruction be phrased affirmatively, but there is substantial merit to utilizing negative language when instructing on the burden of proof.


problems. In Smith v. City of Morgantown," the West Virginia Supreme Court of Appeals reversed because the lower court incorrectly instructed the jury on the doctrine of res ipsa loquitur as it applied to water escaping from a public utility. The specific instruction given by the trial judge stated:

The Court instructs the jury that under the law of the State of West Virginia if a person, firm or corporation brings water upon land or rights of way owned or controlled by it by artificial means, and collects and keeps it there, either in reservoirs or in pipes, the person or corporation is bound at his peril to see that the water does not escape to damage property of an adjoining owner, and if he does not do so, he is prima facie answerable for all the damage which is proximately caused by and is a consequence of its escape.\footnote{70}

The court correctly held that this instruction impermissibly shifted the burden of proof from plaintiff to defendant to prove that it was not negligent.

Lawyers often merge the concepts of burden of proof and quantum of evidence. These two concepts should be separated for the jury through the instructions. In a civil case, the measure of evidence necessary to carry the burden is a preponderance of the evidence. Plaintiff's counsel will frequently offer instructions defining preponderance of the evidence in terms of the fact being "more likely so than not so" or if the "evidence outweighs the opposing evidence, ever so slightly." Plaintiff's attorneys will numerically quantify the burden of proof by telling the jury in final argument that "preponderance of the evidence" means fifty-one percent of the evidence. Another device frequently used to illustrate preponderance of evidence is the drawing of a scale of justice showing that when the trial begins, both sides of the scale are even and that the prevailing party is required to barely move one side to prevail by a preponderance of the evidence. Psychological studies indicate that jurors do not perceive the phrase "preponderance of the evidence" in this way.\footnote{71} Simon and Mahan contacted sixty-nine actual jurors who had served in the Champaign County, Illinois court system and had them respond to questionnaires regarding a comparison of the quantum of proof reflected by the phrases "preponderance of the evidence" and "beyond a reasonable doubt." Their findings were surprising. The judge and the jurors both quantified "beyond a reasonable doubt" as approximately eighty-six percent probability that the event occurred. The jurors' expectation of the required proof far exceeded the judge's in quantifying "a preponderance of the evidence." The jurors believed that preponderance meant seventy-five percent probability that the event occurred while the judge described a fifty-five percent standard. Other studies have confirmed this reasonable doubt quantification.\footnote{72}

\footnote{69} 289 S.E.2d 223 (W. Va. 1982).
\footnote{70} Id. at 225.
\footnote{71} Simon & Mahan, Quantifying Burdens of Proof, A View from the Bench, the Jury, and the Classroom, 5 Law & Soc. Rev. 319, 325 (1971).
Fourth, the factual contention component should be found in every complete set of instructions. This area is one which is ripe for reversal and controversy. The West Virginia Supreme Court of Appeals has applied different phrases to describe the amount of proof necessary to warrant an instruction. Originally, sufficient proof to sustain a verdict based upon the instruction had to be introduced before the instruction could be given.\(^7\) Thereafter, in \textit{Carrico v. West Virginia Central & Pittsburgh Railway},\(^8\) the West Virginia Supreme Court of Appeals adopted the "slight evidence" rule which required the trial judge to give an instruction even though he believed that he would have to reverse for insufficiency of evidence if the jury returned a verdict based on the instruction. The court muddied the waters by apparently redefining "slight evidence" to be equal to "appreciable evidence in the case tending to show" the necessary facts\(^9\) and "competent evidence tending to support" the theory advanced.\(^6\) The inconsistency of requiring a paucity of proof to permit an instruction will be discussed in more detail later in this article.

It is well-settled that each party in West Virginia litigation is entitled to have his theory of the case presented to the jury if any competent evidence exists, however slight, to support the theory.\(^7\) The factual component of an instruction must be stated in the hypothetical unless the facts are admitted or uncontradicted.\(^8\) A party has a right to his own statement of the facts provided that the facts are supported by the evidence and the language used is not vague, irrelevant, obscure, ambiguous or misleading.\(^9\)

Finally, the legal component of instructions requires a finding by the court that sufficient evidence is present to support an instruction of law on the issue and that the law is clearly, distinctly and accurately stated.\(^10\) Naturally, the law component must contain the applicable common or statutory law. Verbatim statutory language is not required, but the incorporation of the statutory language is acceptable practice so long as the jury is neither confused nor misled.\(^11\) The inclusion of appellate language within the text of an instruction is

\(^{72}\) \textit{Bloyd v. Pollock}, 27 W. Va. 75 (1885). The court adopted this rationale:

\textit{For it would be an absurdity on the part of the court after instructing a jury, if they believed certain facts, to find for the defendants, to set aside a verdict for defendants which the jury were induced to find by its own instructions.}

\textit{Id.} at 139.

\(^{74}\) 39 W. Va. 86, 19 S.E. 571 (1894).


\(^{77}\) \textit{McMillen}, 242 S.E.2d at 459.


hazardous and not recommended. Unlike the language in a state statute or city ordinance, appellate language does not have universal application and should not be included within the text of an instruction.

A. Statutory Provisions and Court Rules

The practice of instructing the jury emerged in West Virginia in 1863 from the common law of Virginia. The first statutory codification on the law of instructions occurred in 1915 when the legislature passed four separate statutes. The West Virginia Supreme Court of Appeals approved and promulgated the Trial Court Rules for Trial Courts of Record and the Rules of Civil Procedure. Rule 51 of the Rules of Civil Procedure followed the prior

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84 The Trial Court Rules and Rules of Civil Procedure complement each other, but overlap in some areas. The Trial Court Rules emphasize how instructions can be used in front of the jury while the Rules of Civil Procedure address the lawyer-judge issues. T.C.R. VI reads:

(a) Counsel may refer to the instructions to juries in their argument, but may not argue against the correctness of any instruction nor read the instructions to the jury. The court in its discretion may reread one or more of the instructions. Counsel may not comment upon any evidence ruled out, nor misquote the evidence, nor make statements of fact dehors the record, nor contend before the jury for any theory of the case that has been overruled. Counsel shall not be interrupted in argument by opposing counsel, except as may be necessary to bring to the court's attention objection to any statement to the jury made by opposing counsel and to obtain a ruling on such objection. No portion of a lawbook shall be read to the jury by counsel.

(b) The time of argument in any case may be determined and regulated by the court, but the convenience of counsel will be consulted. No more than two attorneys on each side shall argue the case, without leave of the court.

(c) In any case not governed by the West Virginia Rules of Civil Procedure for Trial Courts of Record, no party may assign as error the giving of or refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly as to any given instruction, the matter to which he objects and the grounds of his objection; but the trial court or any appellate court, may, in order to avoid manifest injustice or clear prejudice to a party, notice plain error in the giving of or refusal to give an instruction, whether or not it has been made the subject of objection. Opportunity shall be given to make objection to the giving of or refusal to give an instruction out of the hearing of the jury.


Either before or at the close of the evidence, any party may file written requests that the court instruct the jury on the law as set forth in the requests, and the court shall inform counsel of its proposed action upon the requests before it instructs the jury. The court shall instruct the jury before the arguments to the jury are begun, and the instructions given by the court, whether in the form of a connected charge or otherwise, shall be in writing and shall not comment upon the evidence; except that supplemental written instructions may be given later, after opportunity to object thereto has been accorded to the parties. Unless otherwise ordered by the court with the consent of all parties affected thereby, instructions shall not be shown to the jury or taken to the jury room. No party may assign as error the giving of or refusal to give an instruction unless he objects thereto before the arguments to the jury are begun, stating distinctly, as to any given instruction, the matter to which he objects and the grounds of his objection; but the court or any appellate court, may, in the interest of justice, notice plain error in the giving or refusal to give an instruction, whether or not it has been made the subject of objection. Opportunity shall be given to make objection to the giving or refusal to give an
practice.\textsuperscript{85}

Several significant procedural differences exist between the federal and state Rule 51.\textsuperscript{86} In state court, the trial judge is required to read the instructions to the jury before argument of counsel. As a result, the educational benefit of the instructions is diminished by the intervening arguments of counsel before the jury is permitted to deliberate. The federal district judge is required to charge the jury on the applicable law even if counsel chooses not to submit any request for instructions.\textsuperscript{87} In West Virginia, no independent duty is imposed upon the trial judge to charge the jury in a civil case.\textsuperscript{88} West Virginia trial judges do have an obligation to charge the jury in a criminal case, notwithstanding the failure by counsel to submit an appropriate set of instructions.\textsuperscript{89} In state court, the judge may submit the jury instructions to the jury to take into their jury room deliberations with the consent of counsel.\textsuperscript{90} Federal practice does not expressly permit the presence of the charge in the jury room. West Virginia Rule 51 expressly forbids a judge from commenting on the evidence when giving instructions. Conversely, the federal district judge is encouraged to comment upon the evidence so long as he does not comment upon the ultimate issue.\textsuperscript{91} Both the federal and state rules require that all instruc-


\textsuperscript{86} Fed. R. Civ. P. 51 reads:

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 its 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.

\textsuperscript{87} Id.

\textsuperscript{88} Compare W. Va. R. Civ. P. 51 with Fed. R. Civ. P. 51. The West Virginia rule places the entire burden on counsel to prepare instructions in a civil case.


\textsuperscript{90} W. Va. R. Civ. P. 51.

\textsuperscript{91} No express authorization in the Federal Rules of Civil Procedure exists which permits the federal judge to comment on the evidence. The parameters of his power to comment were discussed in Quercia v. United States, 289 U.S. 466, 469 (1933):

In a trial by jury in a federal court, the judge is not a mere moderator, but is the governor of the trial for the purpose of assuring its proper conduct and of determining questions of law. In charging the jury, the trial judge is not limited to instructions of an abstract sort. It is within his province, whenever he thinks it necessary, to assist the jury in arriving at a just conclusion by explaining and commenting upon the evidence, by drawing their attention to the parts of it which he thinks important; and he may express his opinion upon the facts, provided he makes it clear to the jury that all matters of fact are submitted to their determination. Sir Matthew Hale thus described the function of the trial judge at common law: "Herein he is able, in matters of law emerging upon the evidence, to direct them; and also, in matters of fact to give them a great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies, and by showing them his opinion even in matters of fact; which is a great advantage and light to laymen." Hale, History of the Common Law.
tions be in writing to afford counsel an opportunity to inspect the text of the instruction or charge prior to its reading to the jury. One exception to this written instruction rule exists.\(^5\) This exception arose when the trial judge verbally instructed the jury, after deliberations had begun, that it should continue deliberations with the intent of reaching a verdict. The supreme court distinguished Rule 51 and West Virginia Code § 56-6-19 by stating that a trial judge would be permitted to give verbal instructions after submission of the case to the jury on issues which are not material to the outcome of the case. This practice by trial judges should be used sparingly since the potential for reversible error is significant. The supreme court took pains in State v. Hobbs\(^3\) to point out that the verbal instruction by the trial judge was not an "Allen or dynamite" charge.\(^4\) The prejudicial effect of deadlock-breaking instructions militates strict compliance with Rule 51. The only alternative available to counsel when a judge improperly gives a verbal instruction is to make a motion to strike and to admonish the jury. This motion will preserve the error. But if it is granted, it would probably harm the integrity of the jury deliberation.\(^6\) Rule 51 authorizes our supreme court to notice plain error when it occurs. This rule is intended to give the court discretion to redress manifest injustice which might result when the client loses because his attorney blundered.\(^6\) The West Virginia Supreme Court of Appeals has given lip service to its interpretation of the rule that it should be used sparingly and only in exceptional

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291, 292. Under the Federal Constitution the essential prerogatives of the trial judge as they were secured by the rules of the common law are maintained in the federal courts. This privilege of the judge to comment on the facts has its inherent limitations. His discretion is not arbitrary and uncontrolled, but judicial, to be exercised in conformity with the standards governing the judicial office. In commenting upon testimony he may not assume the role of a [w]itness. He may analyze and dissect the evidence, but he may not either distort it or add to it. His privilege of comment in order to give appropriate assistance to the jury is too important to be left without safeguards against abuses. The influence of the trial judge on the jury "is necessarily and properly of great weight" and "his lightest word or intimation is received with deference, and may prove controlling." This Court has accordingly emphasized the duty of the trial judge to use great care that an expression of opinion upon the evidence "should be so given as not to mislead, and especially that it should not be one-sided" and that "deductions and theories not warranted by the evidence should be studiously avoided." He may not charge the jury "upon a supposed or conjectural state of facts, of which no evidence has been offered." [And in criminal cases] it is important that hostile comment of the judge should not render vain the privilege of the accused to testify in his own behalf.


\(^5\) Id. at 272. The "Allen" charge was approved by the Supreme Court in Allen v. United States, 164 U.S. 492 (1896).

\(^6\) This motion should be made on the record, but out of the hearing of the jury. The possibility that the jury will resent counsel for finding fault with the judge must be balanced against the harm caused by the error. The least offensive, but most effective, method for preserving the error is the lodging of a Rule 51 or Rule VI objection, stated distinctly, which specifically declares that the judge's statement constitutes an instruction and, therefore, must have been submitted to counsel in advance.

circumstances."\(^7\)

B. Setting the Stage for Jury Instructions

Success in all stages of trial practice is dependent upon pretrial preparation. Failure to identify the controlling issues before trial will generally result in an adverse verdict. Similarly, failure to identify the controlling legal issues will prevent adequate organization and presentation of the facts. Absent a logical, organized presentation of the facts, neither the court nor the jury will be persuaded. This persuasion process involves two separate levels. First, the court must be persuaded that the facts presented support the legal theories couched in the instructions. Second, the jury must be persuaded. The court can be significantly influenced by clear, crisp refinement of the legal and factual issues in the pretrial order which will predispose the court to favorably consider the proffered instructions. A trial brief which analyzes the legal authorities cited in the instructions will improve the judge's understanding of the competing theories of the case. It is dangerous to delay the legal issue education of the judge until the instructions are argued, since the judge might unwittingly exclude evidence crucial to the instructions. Few trial judges will take the time at the close of the evidence to review the legal citations which support each proffered instruction. This unfortunate truth results because our state court trial judges have crowded dockets and limited time to anticipate trial issue problems. They will depend upon counsel to educate the court about the unusual legal issues presented.

C. Objections to Jury Instructions

The perfecting of an appellate record through adequate objections to instructions is an acquired skill possessed by many and desired by all. Rule 51 and Trial Court Rule VI require specific objections which state the grounds of objection "distinctly." Our jurisprudence is replete with cases in which the lawyer totally failed to object.\(^8\) A total failure to object occurs when the attorney either has not prepared the case or does not understand the applicable law.

Few objections are made to the boilerplate instructions about juror responsibility, definition of terms, burden of proof and measure of damages. Most objections involve the sufficiency of the factual predicate supporting the instruction and the applicability of a theory of law to the facts. Again, a general objection is insufficient to preserve the error on appeal.\(^9\) The following illustrates objections to instructions which appear to be specific, but which are actually general and are, therefore, insufficient.

1. "The Defendant objects to Plaintiff's Instruction I-1 as not being sup-


ported by the evidence, and contrary to the law.”

2. “I don’t think it correctly states the law. Our position is that Nello Teer was not under a duty to notify an invitee such as Hall of any defect or danger which Hall, himself should have known.”

3. “(1) Last phrase is tantamount to directed verdict and, therefore, contrary to law and evidence; (2) unfair to plaintiff when converse instruction offered on behalf of plaintiff was refused; (3) incorrect statement of the law; (4) whole instruction contrary to law and evidence.”

4. “The objection of defendants to plaintiff’s Instruction No. 7 is based on the fact that there is no evidence in this case which was not refuted to the extent that we would be entitled to a directed verdict. We would be entitled to it on the point of Ronnie Dale Napier’s having attempted to pay [pass] at a place where there was a double line.”

5. The instruction was “violative of Walker v. Robertson at page 574.”

These examples of inadequate objections were gleaned from West Virginia cases to demonstrate that the court reviews the quality, not quantity, of the objecting words. Unless counsel “lay his finger” on the precise error he con-

101 Hall v. Nello Teer Co., 157 W. Va. 582, 589, 203 S.E.2d 145, 150 (1974). Counsel probably would have had a specific objection to this instruction except that neither instruction to which this objection was offered mentioned any duty on the part of the defendant to warn plaintiff’s decedent of any danger or defect. As a result, an objection which does not address the merits of the instruction is insufficient.
102 Lambert v. Great Atlantic & Pacific Tea Co., 155 W. Va. 397, 407, 184 S.E.2d 118, 124 (1971). On appeal, counsel for plaintiff relied primarily upon the absence of proof to support this instruction which was offered by defendant and objected to as stated above:
You are also instructed by the Court that in the absence of a preponderance of the evidence to the contrary, it is to be presumed by you that A & P driver, Jerry Struthers, performed each and every obligation imposed upon him by law and that he was not in any wise negligent. (Emphasis supplied).
The court held that counsel’s objection violated Rule 51 because it was not precise and specific on the issue of insufficiency of evidence.
103 Fortner v. Napier, 153 W. Va. 143, 154, 168 S.E.2d 737, 744 (1969). In this case, the objection quoted above was directed to an amended instruction. The original instruction specifically negated contributory negligence as required by the law at that time. The amended instruction did not. The error alleged was the failure to negative contributory negligence. The West Virginia Supreme Court of Appeals held that defense counsel’s objection was insufficiently specific to preserve the error.
104 Graham v. Wriston, 146 W. Va. 484, 496, 120 S.E.2d 713, 721 (1961). The instruction objected to by plaintiff’s counsel on a cross assignment of error read as follows:
The Court instructs the jury that if you should believe from the evidence that both plaintiff and defendant were guilty of negligence which combined and contributed to cause the accident and injuries testified about, then plaintiff cannot recover damages, and it is your duty to return a verdict in favor of the defendant, Orville Wriston.
The reference by plaintiff’s counsel in his objection was to the case of Walker v. Robertson, 141 W. Va. 563, 91 S.E.2d 468 (1956). The instruction was erroneous. The omission of the element of proximate cause made it erroneous. The failure by counsel to specifically advise the court that the instruction did not contain the required reference to proximate cause rendered the objection general and, therefore, ineffective. If counsel intends to rely upon another case as the basis for demonstrating the error in an instruction, a sufficient description of the error must be stated on the record and supplemented by a brief recitation of the case language which supports the objection.
ceives,” the objection will be disregarded by the appellate court.\textsuperscript{105} The infrequent discussion in the legal literature of objection technique reflects a consensus view which requires a distinctly stated objection is easy to state but difficult to apply.\textsuperscript{106} Applying the rule becomes more effective when the components of the instruction are understood.

D. The Factual Component of the Jury Instruction Objection

All instructions embody two basic parts: fact and law. Objections to instructions must be oriented to the facts and to the law. Pretrial and trial preparedness will enable counsel to properly object at the conclusion of the evidence. The analysis of the facts begins with the acceptance of the case; the refinement of the facts occurs in the discovery process; and the organization of the facts must be completed before the trial begins. The presentation of the facts occurs at trial, but the utilization of the facts to frame objections to instructions is totally dependent upon the accuracy of counsel’s recall, notes or “fact charts.” Different judges will adopt different levels of trial testimony recordation. Some judges will take copious notes which fill several legal pads during the course of a lengthy trial. If a dispute exists at the time the instructions are argued regarding the factual basis for the instruction, a judge is more likely to rely upon his notes rather than counsel’s recall. Other judges take no notes and rely heavily on counsel’s representations.

A split of authority exists among trial practice lecturers as to the advantages and disadvantages of the trial lawyer making detailed notes of the testimony during the trial. One school of thought urges trial lawyers to pay attention to the witness and make notes only when necessary for cross-examination, impeachment, rebuttal or final argument. The alternate approach recommends taking a detailed set of notes during trial so that an adequate factual record is available at the time the instructions are argued and the post-trial motions are prepared.

But an intermediate position is available and recommended. It involves the preparation of a pretrial evidentiary issue chart.\textsuperscript{107} This chart has four components: witness identification, testimony, date of testimony and time of

\textsuperscript{105} Strawn v. Ingram, 118 W. Va. 603, 606, 191 S.E. 401, 402 (1937).

\textsuperscript{106} Cf. Blackmar, Problems of Court and Counsel in Requests and Exceptions: How To Avoid Them, 62 F.R.D. 251 (1972); Conason, Jury Instructions - Protecting the Record, 7(2) TRIAL LAW Q. 57 (1970).

\textsuperscript{107} The time component of the chart adds credibility by precise documentation.

<table>
<thead>
<tr>
<th>Issue Presented</th>
</tr>
</thead>
<tbody>
<tr>
<td>Witness</td>
</tr>
</tbody>
</table>

The time component of the chart adds credibility by precise documentation.
testimony. These charts are prepared before trial. A separate chart for each issue should be prepared which can be adapted to record the testimony of your witnesses as well as the witnesses offered by the opposing party. When used for your witnesses, the witness' name and anticipated testimony should be pretyped onto the chart and used as a witness checklist during direct examination. The date and time can be filled in as you examine or after an examination is finished. The use of this chart will eliminate many arguments in judge's chambers at the time the instructions are considered by the judge regarding the testimonial evidence on the record. The chart should also include reference to each exhibit which addresses the issue.

E. How to Perfect an Objection to a Jury Instruction

Before an attorney objects to what s/he believes to be an erroneous instruction, s/he should make every attempt to commit opposing counsel, on the record, as to which witness supports the facts set forth in the instruction and the legal authority relied upon. If the court does not have the court reporter record all colloquy during the discussion of instructions, counsel should either request that all colloquy be reported or embody within the objection the statements of opposing counsel as to the evidentiary and legal predicates relied upon in support of the instructions. This technique should be the first rule of adequate objection practice. Adequate pretrial preparation requires that the trial file include two photocopies of the controlling case or statute on each issue involved: one copy for the judge and one for the file. The retained copy should be appropriately highlighted to facilitate the colloquy with the court.

Too many practitioners will attempt to advance a legal theory without knowing or having available the most recent application of the theory by the West Virginia Supreme Court of Appeals. The attorney with the reputation of bringing an understanding (and photocopies) of the controlling cases or statutes to the courtroom will find his or her credibility with the court significantly enhanced. Success to a judge means having his or her decisions affirmed by the appellate court. The trial judge will sustain objections and give instructions more readily to the lawyer who understands the law, applies it and shares it with the trial court.

The dearth of legal literature regarding objections to instructions is surprising since a large percentage of reversals involve instructions and the objections thereto. The checklist which is offered here is original and has not been approved by any court. But if followed, this list should satisfy the requirements of distinctly stating an objection to an instruction.

1. Make opposing counsel identify, on the record, the evidentiary and legal predicate for the instruction.108
2. Identify, on the record, the exact words in the instruction which are

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108 If the instruction does not, by its terms, identify the source of the evidence, request the court to inquire which witness or exhibit supports the instruction. Similarly, any legal theory advanced in an instruction must be supported by statute or common law. If the legal authority citation is not noted on the face of the instruction, it is imperative that opposing counsel be required to identify his legal authority.
objectionable. 109

3. If the objection relates to the factual component of the instruction, identify the error. These errors typically take four forms:
   a. absence of facts; 110
   b. misstatement of facts; 111
   c. assumption of facts; 112 or
   d. ambiguously worded facts which confuse and mislead the jury.

4. If the objection relates to the law component, state the general defect in the instruction and specifically detail what makes it defective, as well as what, if anything, will cure the defect. The basic general legal defects include:
   a. misstatement of law; 113
   b. confusing and misleading statement of law; 114
   c. submission of a legal issue; 115
   d. inconsistent instruction; 116
   e. repetitious instruction; 117
   f. argumentative instruction; 118
   g. incomplete instruction; 119 or

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109 When counsel reviews the opposing instructions before argument regarding the instructions, it is recommended that the offending words be underlined and the objection annotated on the side. This facilitates the framing of distinct objections to erroneous instructions. This technique also preserves a permanent record for use after trial for post-trial motions.


111 The error of misstating is rarely reported in appellate decisions, but is frequently successfully interposed at trial.

112 The assumption of facts is error because it invades the province of the jury and denies it the opportunity to adjudicate the facts. An early example and statement of the rule is found in Carrico v. West Va. C. & F. Ry., 39 W. Va. 86, 103-04, 19 S.E. 571, 577 (1894):

Instruction No. 12: "The court instructs the jury that, even if they believe from the evidence that the arm of the plaintiff, after the injury, was on the outside of the car, yet, if they further believe from the evidence that at the time the arm was caught by the stone it was not protruding beyond the window of the car, then the plaintiff can recover." What does this instruction mean? What's its aim? There was evidence that immediately after the injury Carrico's arm was hanging limp outside the window. The plaintiff's contention was that when injured it was on the window-sill, inside the car window. This instruction, I think, was to meet before the jury the evidence that it hung outside of the window; to tell the jury that, notwithstanding it was seen out of the window after the hurt, yet, if inside when hurt, he could recover. The words "can recover" support this theory, importing that, notwithstanding that the arm was seen outside the window after the accident, yet that would not prevent recovery. But suppose we say with appellant's counsel, that it assumes the essential fact of the defendant's negligence. It technically violates that cardinal rule touching instructions that an instruction must not assume facts as proven, or assume that the weight of the evidence is in favor of certain facts, thus taking those questions from the jury, or improperly influencing it.


113 See infra note 154.

114 See infra notes 151-60.


116 See infra notes 228-36.

117 See infra note 239.

118 See infra notes 242-46.

119 See infra notes 216-26.
h. irrelevant instruction.\textsuperscript{120}  

5. If the objection relates to a mixed defect involving both the law and the facts, the following general objections, which must be detailed with specific references to the facts or applicable law, are possible:  

a. speculative instructions;\textsuperscript{11a}  
b. confusing and misleading instructions;\textsuperscript{11b}  
c. improperly binding instructions;\textsuperscript{11c}  
d. unduly emphatic instructions;\textsuperscript{11d}  
e. repetitious instruction.\textsuperscript{11e}

The rules and statutes governing instructions require that counsel perfect an objection in a timely manner. Timeliness requires that an objection be made to the instruction before the instruction is read or submitted to the jury.\textsuperscript{11f} The only exception to this rule occurs if the court changes the instructions between the time they are shown to counsel and the time they are read to the jury.\textsuperscript{11g} In that instance, counsel should immediately object, on the record, to the instruction and state specifically what changes the court made and the reason the changes are erroneous. Further, counsel should distinctly state that the changes were not disclosed to him or her before the instructions were presented to the jury.  

The strict requirement of West Virginia Code § 56-6-19 that the instruction objection must be “noted upon the margin” of the instruction has been judicially modified by Parker v. Knowlton Construction Co.\textsuperscript{11h} and the adoption of Rule 46 of the West Virginia Rules of Civil Procedure. The assignment of error brings the judicial ruling to the scrutiny of the appellate court. Any communication form, on the record, between the judge and counsel, including colloquy, is sufficient.\textsuperscript{11i} Objection to an original instruction is preserved if the alleged error is not eliminated by an amendment.\textsuperscript{11j} If the amended instruction is erroneous for additional reasons, counsel must distinctly state these reasons

\textsuperscript{11a} See infra notes 248-49.  
\textsuperscript{11b} See infra notes 151-53.  
\textsuperscript{11c} See infra notes 220-21.  
\textsuperscript{11d} See infra notes 237-41.  
\textsuperscript{11e} See infra note 227.  
\textsuperscript{11g} The trial judge will frequently ask counsel if there are any objections to the instructions after he has read them to the jury. If he has misread or omitted any instruction previously approved in chambers, counsel should bring it to his attention, on the record, at this time. If the trial judge has added a new instruction, counsel must state the objection on the record and clearly say that no opportunity was afforded counsel to review the instruction prior to its submission and it is objectionable on that basis alone.  
\textsuperscript{11h} 210 S.E.2d 918 (1975).  
\textsuperscript{11i} Id. at 923.  
on the record to preserve the error.\textsuperscript{131} Waiver of a properly preserved error can occur if objecting counsel offers and the court gives an instruction containing the same error.\textsuperscript{132}

The last admonition for proper objection practice is: remember the plain error rule. Forgetting to make an objection or making an inadequate objection can be overcome if counsel can persuade the court that the plain error rule applies.\textsuperscript{133} The most recent occasion for the court to apply the plain error doctrine occurred in State v. Dozier.\textsuperscript{134} In that case, the burden-shifting instruction condemned in State v. Pendry\textsuperscript{135} had been offered by the defendant's attorney, rather than the state. The West Virginia Supreme Court of Appeals concluded that the ultimate responsibility in a criminal case to insure that the jury is instructed according to the constitutional requirements rests upon the trial court.\textsuperscript{136} Therefore, "to avoid manifest injustice," the court noticed the

\textsuperscript{131} New errors created by the amendment must be "distinctly" identified to preserve an objection. Do not be lulled into a false security relying upon the original objection.

\textsuperscript{132} This interpretation of the waiver doctrine is also described as invited error when it is applied to erroneous instructions. For example, in State Road Comm'n v. Bowling, 162 W. Va. 688, 693, 166 S.E.2d 119, 123 (1969), the State offered this instruction:

The Court instructs the jury that it is your duty to ascertain from the evidence in this case what will be a just compensation to the landowner for the real property and improvements taken and used for a right of way for the construction of the public road in question, and also what damages, if any, to the residue of said land.

You are further instructed that just compensation means a fair and reasonable cash market value of said land and improvements actually taken, which is the price that property will bring if offered for sale by one who desires, but is not obligated to sell, and is purchased by one who is in no necessity of having it; that it is not a question of the value of the property to the State for use of a public road or the necessity of the State to have such land, nor its necessity to the owner; nor can the value of said property be enhanced or increased by an unwillingness on the part of the landowner to sell it, or because the State may need the same for use of a public road.

You are further instructed that the true measure of damages to the residue of the landowner's property by reason of the construction of said highway in question, from all of the evidence in this case, is the difference between the market value of the property claimed to be damaged thereby immediately before and immediately after the improvement was made.

Counsel for the property owner objected that the instruction "talks about reasonable cash market value of land actually taken. This goes against all common practices. They don't do it on a cash market basis." \textit{Id.} at 696, 166 S.E.2d at 124.

"Cash" was the objectionable term. Unfortunately, the land owner's attorney offered an instruction which began: "The Court instructs the jury that in arriving at the fair and reasonable cash market value of the land and improvements being actually taken, and the true measure of damages to the residue * * *" (Italics supplied by Court) \textit{Id.} at 696, 166 S.E.2d. at 125.

The court implicitly conceded that the "cash" valuation concept was erroneous, but held that the giving of the State's instruction did not constitute prejudicial error since defense counsel invited the error by embodying the same erroneous concept within his instructions. See Nesbitt v. Flaccus, 149 W. Va. 65, 138 S.E.2d 859 (1964); Dangerfield v. Akers, 127 W. Va. 409, 33 S.E.2d 140 (1946); Foard v. Harwood, 113 W. Va. 619, 169 S.E. 465 (1933).


\textsuperscript{134} 255 S.E.2d 552 (W. Va. 1979).

\textsuperscript{135} 227 S.E.2d 210 (W. Va. 1976).

\textsuperscript{136} 255 S.E.2d at 555.
plain error involved. The prejudice test adopted by the court appears to be entirely dependent upon the extent of harm visited upon the client as a result of the lawyer's blunder.  

F. Objection For Failure To Give an Instruction

A different standard of objection specificity applies when counsel objects to the court's refusal to give an instruction. Both Rule 51 and West Virginia Code § 56-6-19 appear to require the same level of objection specificity to the giving of or the refusing to give an erroneous instruction. The West Virginia Supreme Court of Appeals liberally interpreted these standards to permit counsel to satisfy the burden of objection specificity to the court's refusal to give an instruction by merely stating "objection" or "exception" following the court's refusal of an instruction. 

The West Virginia Supreme Court of Appeals reasoned that more specificity to the rejection objection would be "mere duplication or argument." The purpose of the objection is to give the trial court an opportunity to correct the error. The inconsistency of this interpretation is disturbing. If the refusal to give an instruction constitutes error or even "plain error," then the trial judge is entitled to a distinctly stated objection articulating why his action is wrong. The Earp rule which permits the words "objection" and "exception" to preserve the appellate record is wrong and should be changed.

G. Erroneous Instructions: Harmless and Invited Error

West Virginia recognizes three classifications of instructional error: harmless, invited and prejudicial. The giving of an erroneous instruction raises a presumption of prejudice. However, this presumption is overcome when it

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137 The West Virginia Supreme Court of Appeals held that the client's interest must be protected:

However, we cannot ignore the "plain error" exception because our basic philosophy that lawyer errors should never be allowed to prejudice litigants' rights to fair trials demands that we have the opportunity to examine grossly erroneous trial court actions regarding instructions. We stated in Earp, that "[w]here an error respecting an instruction is not preserved by compliance with Rule 51 of the West Virginia Rules of Civil Procedure but is obvious and substantially affects the fairness and integrity of the trial proceeding, the interests of justice may mandate the exercise of this Court's discretionary authority to note plain error." The court found that the trial court had given no instruction on the issue upon which defendants sought to defend or to recover from plaintiff despite detailed testimony on the issue, and held this to be plain error.

Mollohan, 235 S.E.2d at 815.


139 Id. at 518.

140 Consistency is the hallmark of any stable society. Stare decisis grew from the belief that predictability of law is important to its stability. A consistent application of Rule 51 and § 56-6-19 would enhance the quality of instruction practice since the judge would have a better opportunity to correct a reversible error.

appears the jury could not have been misled by a "harmless" error. The doctrine of harmless error is firmly established in West Virginia by statute, court rule and court decision.44 Our court will historically classify errors as harmless if they are considered technical,143 incomplete,144 abstract,145 or given in a case where the verdict is clearly supported by the evidence, notwithstanding the erroneous instruction.146 In determining harmlessness, the court must ask whether the substantial rights of the parties have been affected in accord with Rule 61. If the substantial rights have not been affected, Rule 61 states that the error is harmless:

[n]o error . . . or defect in any ruling or order or in anything done or omitted by the [trial] court or by any of the parties is ground for granting a new trial or for setting aside a verdict . . . unless refusal to take such action appears to the court inconsistent with substantial justice.147

Harmless error is another example of the appellate court's balancing the interests of the parties. Experienced counsel, attempting to sustain the trial court's verdict and faced with the undeniable presence of error in the trial process, should design the appellate brief and oral argument to persuade the West Virginia Supreme Court of Appeals that the error was harmless. Inexperienced counsel will attempt to defend and distinguish the erroneous conduct to the detriment of the client. If the error exists, counsel should argue that it did not affect the substantial rights of the parties and give the appellate court the benefit of sound reasoning as to why it should be classified as harmless. This technique of appellate advocacy is often used in cases where the verdict is


clearly supported by the evidence, notwithstanding the presence of an erroneous instruction. For example, in State v. Mason, the State of West Virginia offered the following instruction in its case against Dennis Eugene Mason:

[j]t the court instructs the jury that a person is presumed to intend that which he does or which is the immediate or necessary consequence of his act; and if the jury believes from all the evidence in this case beyond a reasonable doubt that the defendant, without any or upon very slight provocation, struck the deceased with his fist and feet thereby giving him a mortal wound from which he died, he, the said Dennis Mason, is prima facie guilty of an unlawful and malicious killing and the necessity rests upon him of showing extenuating circumstances or the circumstances appear from the case made by the State, he is guilty of murder in the second degree. (Italics supplied by court)

Defense counsel argued correctly that no evidence was in the record showing the victim suffered or died from a mortal wound. On the contrary, the state's pathologist testified that the cause of death was drowning and that the deceased suffered a superficial head wound prior to drowning. The West Virginia Supreme Court of Appeals held that the instruction was erroneous. However, the court classified the instruction as harmless error since Mr. Mason was convicted of voluntary manslaughter, not second degree murder.

A second example of harmless error is invited error. Chambers v. Smith involved a libel action by a principal and vice-principal of a high school against the superintendent of schools. Both plaintiffs and defendant offered instructions which permitted the jury to decide from the evidence whether malice existed. Plaintiffs prevailed in the trial court and defendant assigned as error the giving of plaintiffs' instructions dealing with the issue of malice. The court held that defendant could not complain since it did not object to plaintiffs' instructions below and it invited the error by offering three instructions on the same issue.

Invited error results when trial counsel fails to grasp the controlling legal principles before the trial begins. In Chambers, the insufficiency and absence of evidence of malice should have been apparent to counsel. Objections should have been made at trial. Defendant might have been able to avail himself of the plain error rule but for the fact that his counsel submitted instructions on the same issue without an evidentiary predicate to support it.

149 Id. at 798.
152 Id. at 85, 198 S.E.2d at 811.
H. Erroneous Instructions: Prejudicial Error

Twelve major prejudicial errors with respect to jury instructions recur in normal trial practice. These are generally identified as: confusing and misleading, misstatement of law, evidentiary predicate, incompleteness, repetitious, conflicting, inconsistent, argumentative, undue emphasis, speculative, assumption of facts and legal issue submission. Incomplete and abstract instructions can also be prejudicial but, more frequently, are classified as harmless error.

1. Confusing And Misleading Instructions. The phrase "confusing and misleading" is frequently uttered by attorneys as a general objection to an instruction. Standing by itself, it is a worthless objection. It must be specifically applied to the facts or law which confuses and/or misleads the jury. It is important to be able to distinguish between these two concepts. A confusing instruction can be prejudicial, but often is held to be harmless error.\(^{103}\) As always, if the objecting party has been prejudiced by the erroneous instruction, the court will reverse. Prejudice resulting from instructions occurs when:

1. the verdict returned by the jury is adverse to the objecting party;
2. the instructions read as a whole do not cure the error; and
3. the outcome of the trial may have been different but for the erroneous instruction.

2. Instructions which Misstate the Law. Positive misstatements of law or incomplete statements of law contained within instructions constitute prejudicial error.\(^{104}\) In State v. McCourt,\(^{105}\) the legal error involved an instruction wherein the court permitted the jurors to impose a personal standard, rather than the legally defined standard, of reasonable doubt.\(^{106}\) In Burdette v. Maust

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\(^{106}\) Id. at 919. The two reasonable doubt instructions offered by the State, over McCourt's objections, read, respectively, as follows:

The Court instructs the jury that to prove beyond a reasonable doubt does not mean that the State must make the proof by an eye witness or to a positive and absolute certainty. This measure of proof is not required in any case. If, from all the evidence, the jury only believes it is possible, or that it may be, or that perhaps the Defendant is not guilty, this degree of uncertainty alone would not amount to such a reasonable doubt as to entitle the Defendant to an acquittal. All that is required for a conviction is that the jury should believe from all the evidence beyond a reasonable doubt that the Defendant is guilty. (Emphasis added [by Court])

* * * * * *

The Court instructs the jury that the accused is presumed to be innocent and that such presumption goes with him through all the stages of the trial until the State, upon which
Coal & Coke Corp., the defendants omitted one element of the law regarding borrowed servants. At first blush, the omission appeared insignificant, but because the law presumes that the right to control employees remains with the general employers, the omitted language regarding relinquishment of control became critical. Misstatements of law can occur with respect to both liability and damage issues. In Salerno v. Manchin, the misstatement of law involved an instruction which prohibited the jury from considering financial or pecuniary loss within the ten thousand dollar “fair and just” section of the then-existing Wrongful Death Act.

3. **Evidentiary Predicate for Instructions.** Evidentiary predicate is a coined phrase which describes the quantum of evidence necessary to authorize a jury instruction. Since 1984, the presence of “slight evidence” in the record has been sufficient to require the trial judge to give the proffered instruction. The new majority of the West Virginia Supreme Court of Appeals has refused to use or abolish the illogical “slight evidence” rule. In its place, it has the burden of proof rests, has shown beyond a reasonable doubt, that the Defendant is guilty. A doubt engendered by sympathy or by a dislike to accept the responsibility of convicting the Defendant is not a reasonable doubt. The law does not require proof amounting to an absolute certainty, nor proof beyond all possibility of mistake. If, after having carefully and impartially heard and weighed all the evidence, you reach the conclusion that the Defendant is guilty with such degree of certainty that you would act upon the faith of it in your own most important and critical affairs, then the evidence is sufficient to warrant a verdict of guilty. (Emphasis added [by Court]).


The following instruction offered by defendants was prejudicial and erroneous because it misstated the law:

The Court instructs the jury that when one employer borrows employees from another and uses them in the borrower’s own business and controls their services, such employees are the agents of the borrower and not the lender, and the borrower is liable for their acts, and the lender is not liable for them.

The Court, therefore, instructs the jury in this case that if you believe from all the evidence that Gauley Coal and Coke Company borrowed surveys and engineers from Cherry River Coal and Coke Company, Summersville Coal Company or Maust Coal and Coke Company, and if Gauley controlled and directed their work during such times, then Gauley would be responsible for their acts, and Maust and/or Summersville would not be so responsible.

222 S.E.2d at 299. The controlling law regarding the borrowed servant doctrine is found in American Tel. & Tel. Co. v. Ohio Valley Sand Co., 131 W. Va. 736, 50 S.E.2d 884 (1948). That doctrine requires that a general employer shall remain liable for the negligent act of his servant unless it affirmatively appears that he has completely relinquished control of the servant’s conduct from which the negligence arose to the person for whom the servant is performing a special service. The failure to include within the proffered instruction language showing the affirmative relinquishment of control was critical and its absence prejudicial.


The Salerno case was tried in December, 1972, more than nine years after the Supreme Court decided Lester v. Rose, 147 W. Va. 575, 130 S.E.2d 80 (1963), which held that pecuniary loss could be considered in connection with the first $10,000.00 award as well as in excess of the $10,000.00 award available under the Wrongful Death Act. The instruction clearly did not state the law and, therefore, was reversible error.


resurrected the "competent evidence" rule. Since the court has not defined the quantum requirements of the "competent evidence" rule, the slight evidence rule controls. Adding to the confusion are other descriptions of the rule, examples of which include:

1. [A]ny appreciable evidence tending to support the theory of an instruction. 
2. The court must give the instruction "no matter how slight and inconclusive the evidence may be." 
3. Competent evidence tending to support a pertinent theory in the case. 
4. "[A] court need not withhold an instruction for paucity of evidence. If there be any, tending in any appreciable degree to establish the hypothesis . . . ." 

The trial judge's decision to reject an instruction for a lack of evidence would be easy but for this state of confusion about the quantum requirements to require that the instruction be given. The West Virginia Supreme Court of Appeals has had no trouble stating the negative of the proposition. The refusal to instruct is proper when there is "no evidence," "no pretense," "not a

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[3,4] The word "appreciable" seems to have a definite legal meaning. "'Appreciable' means capable of being estimated; perceptible" and has been defined as "capable of being estimated; perceptible; as an appreciable quantity." 3 Words and Phrases, Perm. Ed., page 782. Black's Law Dictionary, 3d Ed. 128. In Ketterman v. [Dry Fork] Railroad Co., 48 W. Va. 606, 615, 37 S.E. 683, 687, where a motion to strike the evidence was involved, and where the question of the meaning of the word "appreciable" or "appreciably" was also involved, Judge Brannon, in speaking for the Court, said: "I answer that the evidence must be such as would forbid the court from setting the verdict aside. If that evidence is so weak as not to carry the case in favor of him who bears the burden of proof, so that a verdict based upon that evidence ought to be set aside, the court commits no error in sustaining a motion to exclude, because after verdict the same question comes to the court upon a motion for a new trial. Why go through with the formality of a verdict simply to set it aside?"

This language was correct, as applied to the case then before the Court. But, we do not think it has ever been applied in determining whether or not an instruction should be given either in a civil or criminal case, where a theory was advanced, and testimony introduced thereon which was appreciable, or which required consideration or was capable of being estimated. Under modern practice a motion to strike the evidence should be sustained, where, if a jury found a verdict based on that evidence, the same would have to be set aside, but, in our opinion, such a rule is not applicable to the question of giving an instruction as to which there is appreciable evidence sustaining the theory presented thereby.

168 See supra note 109.
169 State v. Greer, 22 W. Va. 800 (1883).
particle of evidence,”170 “not the slightest evidence.”171

Regardless how it is named, the “competent/slight evidence” rule is illogical, difficult to apply and inconsistent with the just, speedy and inexpensive determination of every action.172 A historical review of the development of the “slight evidence” rule shows that it replaced the rule which required that an instruction could not be given unless there was sufficient evidence, based on that instruction alone, to support a verdict in favor of the offering party.173 In *Bloyd v. Pollock*174 Judge Green wrote a sixty page opinion dissecting the factual proof in which he declared that the three instructions offered by the defendant should not have been given and the actions of the trial court would have constituted prejudicial error but for the wisdom of the jury which returned a verdict in favor of plaintiff.175

The evidentiary predicate rule adopted in *Bloyd* and dispatched in *Carrico v. West Virginia Central & Pacific Railway*176 had an appealing logic to it. The *Bloyd* court considered the slight evidence rule to be an “absurdity” since the trial court would be compelled to set aside a verdict based upon instructions given to the jury without sufficient evidentiary support.177

With express deference to the logic of *Bloyd*, the *Carrico* court adopted the prevailing rule that the quantum of evidence necessary to support an instruction is considerably less than the amount of evidence necessary to support a verdict.178 The unreasonableness of this rule has been described as “folly” by

170 State v. Thompson, 21 W. Va. 741 (1882).
171 State v. McDonie, 96 W. Va. 219, 123 S.E. 405 (1924).
173 Bloyd v. Pollock, 27 W. Va. 75 (1885).
174 Id.
175 Id. at 139.
176 39 W. Va. 86, 19 S.E. 571 (1894).
177 27 W. Va. at 139.

We will now consider the various acts of the judge pending the trial and determine whether the defendants were prejudiced by any of them. The three instructions given by the Court to the jury at the instance of the plaintiff were clearly right being in accord with the principles above laid down. A number of the instructions asked by the defendants were based upon a hypothesis, which there was no evidence to sustain. All such instructions were properly rejected. Even had there been some evidence tending to support any one of these hypotheses, yet, if the weight of the evidence was so strong against such hypothesis, that the court would have been compelled to grant the plaintiff a new trial on the ground that the verdict was contrary to the weight of the evidence, if the jury had rendered a verdict in favor of the defendants, apparently based on the assumption that the hypothesis was true, yet the court ought to have refused such instruction. *For it would be an absurdity on the part of the court after instructing a jury, if they believed certain facts, to find for the defendants, to set aside a verdict for defendants which the jury were induced to find by its own instruction. If therefore the court believes, that the hypothesis, on which an instruction is based, is supported by some evidence, but that the weight of the evidence is so strongly against the hypothesis that the court would set aside a verdict based on the truth of such hypothesis, it ought not to grant any instruction based on such hypothesis. (Emphasis supplied)*

178 39 W. Va. at 100, 19 S.E. at 576.

But it is said that the instruction is irrelevant and abstract, as no evidence tends to show the hypothesis contained in it, that it was at all in the defendant’s power to save Carrico.
our court as recently as 1976.\textsuperscript{179} Since the characterization of the rule as "folly," the West Virginia Supreme Court of Appeals has refused to use the phrase "slight evidence" and has opted for cosmetically appealing "competent evidence" rule. Black's Law Dictionary defines competent evidence as "[t]hat which the very nature of the thing to be proven requires as the production of a writing where its contents are the subject of inquiry."\textsuperscript{180} Competency of evidence measures its quality not quantity. The court must not hide behind empty rephrasings of a bad rule; rather, it must abolish the "slight evidence" rule.

The rationale for the "slight evidence" rule is discernible but not compelling. Carrico involved a personal injury action against the railroad. The contested instruction involved the application of the "last clear chance" doctrine to the facts.\textsuperscript{181} Even though the Carrico court recognized that the evidence of

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The evidence of Kalbaugh, mentioned a few lines back, with the addition that Kalbaugh said he had no time at all, from his sight of Carrico's arm out of the window, to do more than shout to him "Look out!" is the evidence touching this instruction. Kalbaugh's evidence and his credit were before the jury. Weak to show the postulate of the instruction, it seems to me, is true. And I am aware that Boyd v. Pollock, 27 W. Va. 75, holds that an instruction ought not to be given either when there is no evidence tending to sustain the state of facts stated in it, or when, though there is some evidence tending to do so, yet it is so weak that it would be the duty of the court to set aside a verdict as contrary to the weight of evidence if based solely on the assumption that the fact supposed in the instruction was in fact true. This proposition seems logical, and has given me some question about this instruction. In a plain case of total absence of evidence to make out the supposed case the court may well refuse the instruction, but where there is evidence tending to do so, however little its weight may appear to the court to be, it is best to give it. (Emphasis supplied)
\end{quote}

\textsuperscript{179} King v. Bittinger, 231 S.E.2d 239, 242 n.2 (W. Va. 1977). Justice Flowers penned an interesting footnote in this case in which he admitted that the court considered the "slight evidence" rule folly but refused to abolish it in favor of the "sufficient evidence" rule.

We are impressed by the rationale of our sister State as to the folly of requiring an instruction on the basis of evidence so slight that a court would be compelled to reverse a verdict based upon it, but we choose not to disturb a considerable line of West Virginia precedent on this occasion. The Virginia Court in Chesapeake & O. Ry. Co. v. F.W. Stock & Sons, 104 Va. 97, 108, 51 S.E. 161, 165 (1905), said:

'It is true that what is known as the 'scintilla doctrine' has heretofore prevailed in this state, by force of which courts have been required to give instructions, though the evidence by which they were to be supported was such that a verdict founded upon it could not be maintained. In other words, a trial court might, under what is known as the 'scintilla doctrine,' be reversed for failure to give an instruction which rightly propounded the law, and then be again reversed for sustaining a verdict in obedience to the instruction, because not supported by sufficient evidence. Such a doctrine does not seem consonant with reason, nor promotive of good results in the administration of justice.'

\textsuperscript{180} Black's Law Dictionary 257 (rev. 5th ed. 1979).

\textsuperscript{181} Carrico v. W. Va. Cent. & Pac. Ry., 39 W. Va. at 99, 100, 19 S.E. at 575. Instruction No. 8 tendered by plaintiff was disputed. The instruction read:

The court instructs the jury that, even if they believe from the evidence that the plaintiff was guilty of negligence, and that the negligence may have contributed to the injury, yet, if the jury further believe from the evidence that the negligent position of said plaintiff was known to the defendant, or its servants, and that with such knowledge that injury to the plaintiff could then have been prevented by the use of care and diligence on the part of said defendant or its servants, then the plaintiff's negligence will not excuse or relieve
last clear chance was insufficient, it adopted the new standard that a trial court may not refuse an instruction where any evidence tending to support the theory is present. Unfortunately, this rule seems to exist and flourish notwithstanding infirm legal underpinning. The Carrico court was intent on resolving a case which had been tried to a jury twice, each time resulting in a substantial verdict for plaintiff.

Although it is clear that the Carrico court did not expressly overrule Bloyd, the implicit death knell of the Bloyd doctrine was eventually confirmed in State v. Clifford. Clifford denied the trial judge any right to weigh the evidence supporting a proposed instruction. The trial court's sole function regarding the sufficiency of the evidence was to determine that some evidence existed which would tend to support the instruction. This artificial limitation on the power of the trial judge is inconsistent with the orderly administration of justice. Clifford's rationale suggests that only the supreme court of appeals has the right to pass upon the propriety of the instruction complained of and the sufficiency of the evidence supporting the instruction.

Incredibly, the Clifford court sanctioned a system which permits a judge to reverse the jury's verdict for insufficiency of evidence after the verdict but not to prevent injustice by denying an instruction for insufficiency of evidence before the verdict. Does a compelling constitutional basis exist for this inconsistent, cautionary, time wasting approach mandated by Clifford? The Clif-

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The defendant from liability.

Shepard's records Carrico as distinguishing, but not overruling Bloyd. Shepard's West Virginia Citations 209 (1958).

In determining what instructions should be given the court does not consider the weight of any evidence. It simply lays down rules for the analysis and applications thereof by the jury. It is enough that there is evidence appreciably tending to prove or establish a certain theory of a case, however slight the degree of its weight. And a court need not withhold an instruction for paucity of evidence, if there be any, tending in any appreciable degree to establish the hypothesis embodied in the instruction.

Therefore this court must say whether it is the duty of the trial court to determine, in passing upon the propriety of the instruction complained of, to weigh the evidence and see whether it will sustain the hypothesis presented by the instruction. To so hold would put it in the power of the court to take any case from the jury, when the evidence on one side seems to be too weak to sustain a verdict in favor of that side, and this, without any motion or application for such action by either of the parties. Since the parties are content to proceed in the exercise of their constitutional right of trial by jury, however weak their respective cases may be, it seems that an interference by the court, upon its own motion, would be a virtual denial of such right. Until the court is asked to interfere, its duty is merely to preside over the trial by the jury. Decision after decision says the weight of the evidence during the progress of the trial, and until after verdict, is for the jury and not the court, and any instruction or other action of the court, invading the province of the jury, by direction as to the weight of the evidence, is cause of reversal.

Id. The court reasoned that "[a]fter verdict, when the jury has completed its work and the parties have had the benefit of the constitutional guaranty, the function of the court begins, upon a motion to set aside the verdict for insufficiency of evidence."
ford court allegedly balanced the constitutional right of trial by jury\textsuperscript{187} with need for judicial economy and determined that the constitutional requirement was paramount.\textsuperscript{188} This conclusion was wrong in 1906 and is wrong today.

The premise of Clifford that trial judges should not reject unsupported instructions does not have a constitutional basis. Trial by jury is not absolute.\textsuperscript{189} Rejection of an instruction for insufficient evidentiary support does not terminate a trial since the rejection of a tendered instruction merely forecloses a jury verdict based upon the theory of liability or defense embodied therein. The absence of an evidentiary predicate which is raised by a motion for a directed verdict similarly tests this issue. The verdict cannot be directed in a West Virginia trial court unless the facts are undisputed and all reasonable, legitimate inferences from the facts create only one reasonable conclusion.\textsuperscript{190} The federal rule is basically the same.\textsuperscript{191} As restrictive as these directed verdict standards are, the "slight evidence" instruction rule is more harsh. The rule suggests distrust of the trial judge's integrity, intelligence and judgment in considering the sufficiency of evidence, which results in a timid, ineffective judiciary.\textsuperscript{192} The National Conference of Trial Judges admonished its membership to reject unsupported instructions and not to fear reversal as a

\textsuperscript{187} The guarantee of trial by jury is embodied in W. Va. Const. art. III, § 13, which provides: In suits at common law, where the value and controversy exceeds twenty dollars exclusive of interest and costs, the right of trial by jury, if required by either party, shall be preserved; and in such suit in a court of limited jurisdiction a jury shall consist of six persons. No fact tried by a jury shall be otherwise reexamined in any case than according to the rule of court or law.

In Bennett v. Perkins, 47 W. Va. 425, 35 S.E. 8 (1900), the Supreme Court of Appeals held that once a party submits his facts and evidence before a jury impaneled to try the issue and the facts of the opposing parties contradict each other, even in the slightest degree, then the jury, and not the court, must resolve the issues of fact and weigh the evidence.

\textsuperscript{188} State v. Clifford, 59 W. Va. 1, 52 S.E. 981, 989 (1906).

The law regards jurors as being better calculated to weigh evidence than judges. A suitor may prefer the judgment of twelve men upon the weight of his evidence to that of one man upon the bench, and, however weak or strong his case may be upon the evidence, he has the right to proceed with it before the jury until, upon some proper application, such as a motion to direct a verdict, a motion to exclude evidence, or a demurrer to the evidence, the court has no right to interfere.

\textsuperscript{189} Equitable claims are not triable by a jury as a matter of right. Kwass v. Kersey, 139 W. Va. 497, 81 S.E.2d 237 (1954).


When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by non-suit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict. By such direction of the trial, the result is saved from the mischance of speculation over legally unfounded claims.

\textsuperscript{192} Judicial morale is critically important to an effective system of justice. Ryan reports that "[s]kill utilization emerges, in the minds of judges themselves, as the single most important element of the work environment." Ryan, Ashman, Sales & Shane-Dubow, American Trial Judges 146 (1980). The weighing of evidence is the primary skill utilized by the trial judge. There is no rational basis for blindfolding the trial judge during trial regarding the sufficiency of evidence supporting proffered instructions.
The implementation of the "slight evidence" rule does require the intervention of judicial decision making. In King v. Bittinger, the trial court jury awarded a plaintiff five hundred forty-seven dollars and eighty-six cents ($547.86) in an action brought for injuries sustained when his vehicle was struck in the rear by a truck driven by defendant. The instruction issue presented involved the sufficiency of the evidence supporting an instruction on contributory negligence. The plaintiff, Clarence King, was a rural postman who was delivering mail to boxes along the highway at the time of the collision. He testified that he had driven his vehicle completely off the highway onto the berm prior to the collision. Joseph Bittinger, the defendant, did not controvert these facts at trial. But Bittinger contended that an instruction regarding contributory negligence was proper since conflicting testimony had been given regarding the width of the berm and the visibility of the King vehicle from the rear (600 feet versus 100 feet).

Moreover, the West Virginia Supreme Court of Appeals deduced that an inference could be drawn from the conflicting evidence that the width of the berm, coupled with the location of plaintiff's vehicle, might have constituted a basis for contributory negligence. This conclusion seems unwarranted and unreasonable. Without written opinion, Justices Caplan and Wilson stated that they would have reversed the case for a new trial on damages alone rather than following the majority's decision to reverse on both liability and damages. In plain terms, two justices found no evidence of contributory negligence. Their disagreement with the majority suggests dissatisfaction with the "slight evidence" rule.

Occasionally, our supreme court has engaged in circuitous reasoning to vindicate an ineptly drafted instruction and achieve what it considers a socially

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193 The State Trial Judge's Book, supra note 11, at 164.

194 231 S.E.2d 239 (W. Va. 1977).

195 This opinion is a case study regarding how not to address an instruction issue by an appellate court. It begins by identifying the issue as: "the sufficiency of the evidence supporting an instruction on contributory negligence . . . ." Id. at 241. The opinion never reveals the actual text of the contested instruction. The possible act of contributory negligence, stopping a vehicle on a highway, is discussed, but the court advised that no instruction regarding the unlawful stopping of a vehicle on a highway was offered. There is reference to counsel's description of a "blind curve" followed by an admission that there is no evidence of a blind curve. We have an opinion reaffirming the "slight evidence" rule without ever providing any information about the text of the instruction which was sustained.

196 231 S.E.2d at 242.

197 231 S.E.2d at 244.
acceptable result. In *Skeen v. C & G Corp.*, plaintiff had purchased a mobile home manufactured by C & G Corporation and sold by an independent dealer, Casto Trailer Sales, Inc. Upon occupying the mobile home, plaintiff discovered multiple defects including a hot water heater which did not work; a ceiling light which flickered, made noise, burned dim and would not turn off; a wall light which did not function; and an outside shell which transmitted an electric shock upon contact. These defects were reported to Casto promptly. Casto advised the plaintiff that one of his repairmen would stop and correct the defects. The evidence disclosed that a repairman did arrive on the following day and confirmed the existence of each of the defects as alleged by plaintiff. The evidence was uncontradicted that the repairman did not physically undertake any repairs. On the contrary, he advised plaintiff that he would return the following day.

At trial, the instruction regarding negligence offered by plaintiff was objected to by Casto's counsel on the basis that no evidence existed showing that Casto's repairman "did undertake the repair or correction of such defects, if any. . . ."

In reaffirming the "slight evidence" rule, the West Virginia Supreme Court of Appeals cited *Roberts v. Baltimore & Ohio Railroad Co.* and *Dangerfield v. Akers* as the controlling precedents. The court employed definitional gymnastics by resort to Webster's International Dictionary and Black’s Law Dictionary regarding the meaning of the word "undertake" to circumvent the uncontradicted evidence. Judge Berry's dissent properly criticized the majority's manipulation of the "slight evidence" rule to validate an inept instruction. No evidence supported the instruction. The instruction should have been rejected or amended.

West Virginia law is inconsistent since it permits the existence of the "slight evidence" rule for instructions and rejects the "scintilla rule" for the directed verdict. The "scintilla rule" was rejected as legal heresy shortly af-

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188 In *Skeen v. C & G Corp.*, 155 W. Va. 547, 185 S.E.2d 493, 497 (1971), the plaintiff offered the following instruction:

The Court instructs the jury that if they believe from a preponderance of the evidence that the plaintiff called the defendant, Casto Trailer Sales, Inc., for repair service to this hot water heater, and that said employee was aware of any defective functioning of the electrical system of the trailer; and that he thereafter did undertake the repair or correction of such defects if any, then you may find that Casto Trailer Sales, Inc., was negligent, and if you further find such negligence, if any, proximately caused the fire and loss, then you may find for the plaintiff and against the defendant, Casto Trailer Sales, Inc., unless you shall further find from a preponderance of the evidence that the plaintiff himself was guilty of negligence with respect to any such defects which proximately contributed to the fire and loss.

189 Id. at 547, 185 S.E.2d at 493.


202 155 W. Va. at 554, 185 S.E.2d at 498.

203 185 S.E.2d at 501.

204 Black defines "scintilla of evidence" as "[a] spark of evidence. A metaphorical expression to describe a very insignificant or trifling item or particle of evidence . . . ." *Black's Law Dic-
ter the "slight evidence" rule was adopted.\textsuperscript{205} \textit{Ketterman v. Dry Fork Railway}\textsuperscript{206} unequivocally rejects the proposition that a jury question is presented by the presentation of a "scintilla of evidence." \textit{Orander v. Stafford}\textsuperscript{207} announced as plainly that it was not error to "refuse an instruction based on a mere scintilla of evidence."\textsuperscript{208} What is the difference between "slight evidence" and a "scintilla of evidence"? There is no difference. The trial judge commits error if he sends the case to the jury when only a scintilla of evidence is presented. The same trial judge commits error unless he instructs the jury on a theory supported by a scintilla of evidence.

The application of this rule has proved troublesome since "no evidence" does not really mean no evidence.\textsuperscript{209} It means no evidence cognizable by the

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\textsuperscript{205} Ketterman v. Dry Fork R.R. Co., 48 W. Va. 606, 616, 37 S.E. 683, 688 (1900). This court felt compelled to distinguish \textit{Carrico}, without directly addressing the folly of rejecting the scintilla rule and maintaining the slight evidence rule.

At one time in some of the courts, and perhaps in a very few to-day, a rule prevailed known as the "scintilla of evidence rule": meaning that verdict may be directed only where there is no evidence whatever to support the party's case, and that where there is even a scintilla of evidence it cannot be done. It may be claimed that the cases of \textit{Carrico v. Railway Co.}, 35 W. Va. 389, 14 S.E. 12, and \textit{Guinn v. Bowers}, 44 W. Va. 507, 29 S.E. 1027, lean towards that rule; but they do not explicitly approve it. It is very certain that the great current of authority in England and America repudiate that rule. It is very certain that the West Virginia cases and other abundant authority sustain the rule above stated, that the evidence must not merely tend in some small degree to sustain a verdict, but it must be sufficient to justify a verdict, to prove the case according to its nature, by that degree of weight required by the law of evidence, not a mere color of weight. It will be seen from 6 Enc. Pl. \& Prac. 678, that the scintilla of evidence rule is not now the law. "The old rule that a case must go to the jury if there is a scintilla of evidence has been almost everywhere exploded. There is no object in permitting a jury to find a verdict which a court would set aside as soon as found. The better and improved rule is, not to see whether there is any evidence, - a scintilla, or crust, dust of the scales, - but whether there is any upon which a jury can, in any justifiable view, find for the party producing it, upon whom the burden of proof is imposed." \textit{Connor v. Giles}, 76 Me. 122, 134, cited in 2 Thomp. Trials, § 2249. The scintilla rule has been frequently condemned in the United States Supreme Court. \textit{Commissioners v. Clark}, 94 U.S. 284, 24 L. Ed. 59; \textit{Railroad Co. v. Munson}, 14 Wall. 448, 20 L. Ed. 867; \textit{Pleasants v. Pant}, 22 Wall. 120, 22 L. Ed. 780. So, in \textit{Hillyer v. Dickinson}, 154 Mass. 504, 28 N.E. 905, and 2 Thomp. Trials, §§ 2248-2250. (Emphasis supplied)

\textit{Id.}

How can a court be perceptive enough to recognize that a rule which is internally inconsistent be rejected and still sanction the slight evidence rule?

\textsuperscript{206} 48 W. Va. 606, 37 S.E. 683 (1900).


\textsuperscript{208} \textit{Id.} at 503, 127 S.E. at 331.

West Virginia Supreme Court of Appeals. In Cross v. Noland, Mr. Cross sued for personal injuries he sustained as the result of driving his automobile into a freshly dug ditch located in a municipal alley. The defendant obviously raised the standard defenses based upon the failure by Cross to observe the ditch before impact. The trial court instructed the jury on the theories of contributory negligence and assumption of risk as they pertained to plaintiff. The jury returned a verdict for defendant.

But the court reversed by substituting its judgment that no evidence existed to show that the plaintiff was guilty of contributory negligence or that he assumed the risk. The appellate opinion does not recite whether evidence of excessive speed, failure to keep a proper lookout or other possible misconduct by plaintiff existed. Both the trial judge and jury believed misconduct occurred. It is difficult to reconcile the uneven application of the "slight evidence" rule to civil defendants when the appellate court applies it in this fashion. The analysis by the court appears to be result-oriented. In other words, the court did not like the result so it substituted its judgment for that of the trial court and jury while neither hearing the testimony nor observing the demeanor of the witnesses.

Another example of a classic case of appellate fact-finding contrary to the trial judge and jury's view of the evidence occurred in the court's assault on parental immunity. In Groves v. Groves, the predetermined result desired by the West Virginia Supreme Court of Appeals was to maintain parental immunity. The case had been tried in the Circuit Court of Monongalia County and resulted in a seventy-five thousand dollar ($75,000.00) verdict in favor of Richard Allen Groves against his father arising out of a bizarre automobile accident. The West Virginia Supreme Court of Appeals made a jury instruction the scapegoat of its unwillingness to expand our jurisprudence to meet societal needs. In Groves, the court cites the oft repeated distinction between negligence and willfulness adopted in Stone v. Rudolph. Parental immunity ex-


152 W. Va. 1, 158 S.E.2d 18 (1972).


210 Richard Allen Groves was fifteen years of age at the time of his injury. He was driving a truck owned by his father, the defendant, at 6:00 o'clock a.m. on State Route 73 in Monongalia County, between Morgantown and Bruceton Mills. Plaintiff's version of the accident alleged that the defendant was intoxicated and asleep just prior to the crash. The defendant was awakened by a bump in the road and immediately gave the plaintiff "a wild look and grabbed the steering wheel and placed his foot on the accelerator and increased the speed of the truck and caused the plaintiff to lose control and drive it into a tree on the wrong side of the highway." 152 W. Va. at 7, 158 S.E.2d at 714. As a result, plaintiff spent four months as a patient in the hospital and an additional three months in the rehabilitation center at Charleston. Plaintiff had testified that his father had frequently mistreated him when the father became intoxicated. The evidence was conflicting on this point.

211 127 W. Va. 335, 32 S.E.2d 742 (1945). The Groves opinion cites with approval the Virginia case of Thomas v. Snow, 162 Va. 654, 174 S.E. 837 (1934) and quotes the Thomas case, using this
ist for negligent but not willful torts and the essence of the son's claim was proof of willful misconduct. Amazingly, the West Virginia Supreme Court of Appeals concludes, in one line, that a wild looking, intoxicated father who seizes the steering wheel of the pickup truck driven by his fifteen year old son and presses his foot to the accelerator, thereby causing a crash into a tree on the wrong side of the road, was negligent rather than willful. Do these facts present some "slight evidence" of willfulness? Reasonable minds could certainly agree that the father was guilty of willful, wanton and intentional misconduct.

Perhaps the West Virginia Supreme Court of Appeals sub silento has replaced the "slight evidence" rule with a more meaningful standard since it has not been cited in six years. Prof. Lugar's plea for clarification of this anomaly has not been answered for thirty years. Now is the time to adopt a rule which requires that every instruction be supported by sufficient evidence to sustain a verdict on the theory embodied in the instruction.

4. Incomplete Instructions. The basic test for prejudicial error involving an incomplete instruction is whether or not it has misled the jury. No objective standard exists as to what makes an instruction misleading. The analysis goes beyond merely reviewing the contested instruction since the court measures misleadingness by review of all the instructions read as a whole. The incompleteness of the instruction generally occurs in the statement of the legal

language:
Negligence conveys the idea of heedlessness, inattention, inadvertence; willfullness and wantonness convey the idea of purpose or design, actual or constructive. In some jurisdictions they are used to signify a higher degree of neglect than gross negligence. "In order that one may be held guilty of willful or wanton conduct, it must be shown that he was conscious of his conduct, and conscious, from his knowledge of existing conditions, that injury would likely or probably result from his conduct, and that with reckless indifference to consequences he consciously and intentionally did some wrongful act or omitted some known duty which produced the injurious result.

152 W. Va. at 7, 158 S.E.2d at 713.

This assumes that the competent evidence rule announced in McMullen v. Dettore, 242 S.E.2d 459 (W. Va. 1978), requires more than slight evidence to support the instruction. In a per curiam opinion, the court gave some indication that it might raise the quantum requirements: "The amount of evidence to justify the giving of an instruction is not such an amount of evidence as would guarantee a jury finding in favor of the party offering the instruction." State v. Adkins, 280 S.E.2d 293, 295 (W. Va. 1981).


See, e.g., State v. Woods, 289 S.E.2d 500, 503 (W. Va. 1982); State v. Milam, 226 S.E.2d 433 (W. Va. 1976), wherein the court in syllabus point 6 stated the rule as follows: "When instructions are read as a whole and adequately advise the jury of all necessary elements for their consideration, the fact that a single instruction is incomplete or lacks a particular element will not constitute grounds for disturbing a jury verdict."

standard, rather than the hypothetical facts.\textsuperscript{218}

This "read as a whole" rule applies to permissive instructions but not to binding instructions.\textsuperscript{219} Although the technique of utilizing mandatory or binding instructions has been used for many years, many attorneys confuse the difference between permissive and binding instructions. Each binding instruction must be complete in itself since it mandates that the jury find for one party or the other. Therefore, unlike a permissive instruction, its language must embrace every hypothesis which is necessary to justify a verdict in favor of the offeror and every theory or defense available to the opposing party.\textsuperscript{220} When in doubt, it is better practice to use the permissive "may" rather than the binding mandatory "shall," "should" or "must." If a binding instruction ignores a vital issue in the case, it should not be given even though the issue is addressed by other instructions.\textsuperscript{221}

An equally fundamental rule regarding completeness requires that each instruction possess the standard component parts. Those component parts include the statement of the legal standard, statement of hypothetical facts and the permissive or binding conclusion. If the factual component is omitted, the instruction is termed "abstract."\textsuperscript{222} Occasionally, counsel will succeed in having the court charge the jury regarding his client's version of the facts, without giving any legal standard.\textsuperscript{223} This is clearly erroneous and constitutes reversible


\textsuperscript{223} Notice the complete absence of any legal standard to measure the defendant's conduct and the erroneous binding conclusion in this instruction from Addair v. Motors Ins. Corp., 157 W. Va. 1013, 207 S.E.2d. 163 (1974):

The Court instructs the jury that if you believe from a preponderance of the evidence that the plaintiff's 1967 Model Chevrolet Tandem Truck was insured against loss by collision by the defendant for damage to the truck in excess of $100.00 on September 8, 1969, and that on that date plaintiff's truck was damaged to the extent of several hundred dollars and that said damage over and above $100.00 was covered by the insurance policy, and that the defendant was notified September 9, 1969, of the accident which resulted in the damage to the truck and that the plaintiff took the truck to Cole Motor Company at Bluefield, West Virginia, September 9, 1969, so an adjuster for the defendant could inspect the truck and that defendant's adjuster then informed the plaintiff that said truck could be repaired quicker at Ron's Ford Sales at Bristol, Virginia, and said adjuster obtained the permission of the plaintiff and caused said truck to be taken to Ron's Ford Sales at Bristol, Virginia, to be repaired, but that Ron's Ford Sales did not receive the authorization from the defendant to repair said truck until October 24, 1969, and that said truck was not repaired, and plaintiff was not notified it had been repaired until February 28, 1970, and if you further believe from a preponderance of the evidence that said truck could and should have been repaired within 5 to 8 weeks after it was delivered to Ron's Ford Sales, and that plaintiff was damaged as a direct and proximate result thereof, then your verdict should be for the plaintiff in such amount as you believe
error. An abstract instruction will not cause reversible error unless it is misleading to the jury. The characteristic abstract instruction involves a bald statement of law. If the trial court persists in permitting an abstract proposition of law to be submitted to the jury without connecting it to the facts, the opposing party is entitled to an instruction which does state the facts which should have been connected to the statement of law. Do not confuse an abstract proposition of law with a definition of legal concept. Definitions of burden of proof, reasonable care, negligence, proximate causation and criminal intent are frequently and preferably defined without specific reference to a factual hypothesis.

5. Repetitive Instructions. A frequent device used by counsel is the submission of multiple instructions covering the same issue. This tactic is based upon the premise that the trial judge is unlikely to reject all of the instructions and, conceivably, might give more than one on the issue presented. Apparently,

from a preponderance of the evidence he was damaged by reason of loss of use of the truck from the time it could have been and should have been repaired to February 28, 1970.


The court further instructs the jury that a person lawfully in a public highway may rely upon the exercise of reasonable care by drivers of automobiles to avoid injury and failure to anticipate omission of such care does not constitute contributory negligence, and a person lawfully on the highway is not bound as a matter of law to be continuously listening or looking to ascertain if automobiles or other vehicles are approaching, under penalty that [if] he fails to do so and is injured, his own negligence will defeat the recovery of damages sustained.

Id.
The difference between prejudicial and non-prejudicial abstract instruction is in the eye of the beholder. Compare the following non-prejudicial instruction with the one above. While reading this instruction, observe the Supreme Court's explanation as to why this abstract instruction is not prejudicial error:

Plaintiff's instruction No. 1 told the jury that: "* * * it is the duty of the defendant corporation in the operation of its railroad, to keep the public highway at said crossings over its tracks in repair and in reasonably safe condition for the normal use of the public highway at said crossings." This instruction, though abstract, virtually follows the wording of Section 8, Chapter 40, Acts of the Legislature (1st Ex. Sess.), 1933, and the giving of it constitutes no prejudicial error. Plaintiff's instruction No. 3, properly instructs the jury as to the duty to keep a proper lookout by those in charge of the operations of a locomotive when approaching a public highway crossing. Plaintiff's instruction No. 4, as amended, instructs the jury as to the duty of the engineer in charge of a locomotive engine, approaching a public highway crossing, and the duty of the fireman on the engine when the engineer's view is obstructed by virtue of a curve in the tracks. Both of these latter instructions are objectionable because they are in the abstract, but they are not misleading or inapplicable to the case as pleaded in the declaration. Therefore, the giving of these instructions is not reversible error.


few trial judges have been misled by this tactic since no case appears in the reported appellate decisions where the court reverses upon the issue of repetitious instructions. On the contrary, the West Virginia Supreme Court of Appeals has repeatedly held that it is not error for the trial judge to exclude repetitious instructions.227

6. Inconsistent Instructions. West Virginia has adopted the rule that inconsistent instructions, even if one of them states the law correctly, constitute prejudicial error since it is impossible for the reviewing court to determine upon which legal principle the verdict is based.228 In Burdette v. Maust Coal & Coke Corp.,229 the inconsistent instructions involved the determination of proximate causation and concurrent negligence. Defendants Maust and Summersville offered a clearly erroneous instruction which advised the jury that if it were uncertain as to which of several causes was the real cause of death, then the plaintiffs had failed in their burden of proof.230 The inconsistency arose when plaintiffs offered their instruction properly stating the law regarding concurrent negligence. Even though every party is entitled to an instruction supported by "slight evidence," they are not entitled to inconsistent instructions which would mislead the jury.

Recognition of inconsistent instructions is a difficult problem. Counsel should group by legal subject matter his own instructions with those offered by the opposing counsel and compare the competing charges to be communicated to the jury. The inconsistency, if it exists, will involve the law-component of the instruction.

For example, in State Road Commission v. Darrah,231 compare the inconsistent instructions on the proper measure of damages.232 The trial judge in

229 222 S.E.2d 293 (W. Va. 1976).
230 The offending instruction was No. 11 which read as follows:

The Court instructs the jury that where the evidence shows that any one of several things may have caused the deaths of plaintiffs' decedents, for some of which Maust and/or Summersville is responsible, and leaves it uncertain as to what was the real cause, then the plaintiffs have failed to establish their case and you should find in favor of the defendants, Maust and Summersville.

232 The inconsistent instruction offered by plaintiffs, No. 1, read as follows:

You are further instructed that just compensation means a fair and reasonable cash market value of said land actually taken, which is the price that property will bring if offered for sale by one who desires, but is not obligated to sell, and is purchased by one who is in no necessity of having it; that is not a question of the value of the property to the State for use of a public road or the necessity of the State to have such land, nor its necessity to the owner; nor can the value of said property be enhanced or increased by an
Quality Bedding Co. v. American Credit Indemnity Co. would certainly have benefited from an instruction subject-matter comparison prior to giving the instructions on fraud. This may be the best example of inconsistency because he gave the defendant's instruction that "fraud is never presumed" and plaintiff's instruction that "a presumption of fraud exists."

Although inconsistent instructions are generally deemed prejudicial because of their misleading effect upon the jury, one exception to the inconsistency rule appears to exist in criminal cases. The West Virginia Supreme Court of Appeals sanctioned the giving of inconsistent instructions where evidence was present supporting each of the instructions rejecting the state's contention that an entrapment instruction offered by defendant was inconsistent with his defense that he did not participate in the marijuana transaction. The court held that the state had introduced sufficient evidence to warrant an instruction based upon entrapment, notwithstanding defendant's theory that he was not present and, therefore, could not have been entrapped.

The error of inconsistent instructions is also termed contradictory instructions. What semantical difference exists between an inconsistent and contradictory instruction is left to the semanticists. In practice, our supreme court has held that both contradictory and inconsistent instructions generally constitute prejudicial error.

unwillingness on the part of the landowner to sell it, or because the state may need the same for use of a public road.

You are further instructed that the true measure of damages to the residue of the landowner's property by reason of the construction of the said highway in question from all of the evidence in the case, is the difference between the market value of the property claimed to be damaged thereby immediately before and immediately after the improvement was made.

153 S.E.2d at 411.

Compare the state's concept above, which was legally correct, with defendants' instruction No. 1:

The Court instructs the jury that when private property is taken by the State Road Commission under the exercise of the power of eminent domain, the law requires that just compensation be paid to the landowner. Just compensation means a fair and full equivalent for the loss sustained by the landowner. It would be unjust to the State if it were required to pay more than the loss sustained by the property owner and it would be unjust to the property owner if he should receive less than the full and fair equivalent of his loss.

Just compensation is to be ascertained as of the date the State acquired the property, which in this case is November, 1963.

Just compensation in this case includes two separate issues which you as jurors must determine: First, the fair market value of the land, improvements, and fixtures actually taken by the State Road Commission; and second, the damages, if any, to the residue of the property resulting from the taking and the construction of the highway less any benefits to be derived by such residue from the construction of the highway.

153 S.E.2d at 411.

Id. at 358-59, 145 S.E.2d at 473.


Roberts v. Powell, 157 W. Va. 193, 206, 207 S.E.2d 123, 128 (1974). In syllabus point 3, the court held: "Where the instructions given in behalf of plaintiff are erroneous, and contradictory to instructions given on behalf of defendant, judgment in favor of plaintiff will be reversed." See Barnett v. Boone Lumber Co., 43 W. Va. 441, 27 S.E. 209 (1897).
7. Unduly Emphatic Instructions and Cautionary Instructions. Police officers, experts, criminal accomplices and criminal defendants are frequently the subject of instructions which highlight, explain, or limit their testimony. The court is permitted to give cautionary instructions in the appropriate circumstance.237 Police officers have been the subject of both unduly emphatic and cautionary instructions. An instruction which directs the jury to give extra weight to a police officer’s testimony is erroneous and the court should refuse it.238 Error will also result if the jury is instructed to consider the defendant’s interest in the result of the case.239 All instructions of this general nature are prejudicial and objectionable because they invade the province of the jury. Instructing a jury that witnesses are presumed to tell the truth has also been held to be improper.240

While most undue emphasis and cautionary instructions involve witnesses, it is equally improper for the court to present instructions which single out certain facts, ignore other facts and require the jury to find in accordance with those facts.241 This circumstance occurs most frequently in incomplete binding instructions.

8. Argumentative and Speculative Instructions. Jury instructions which are designed to persuade, rather than educate, are generally classified as argumentative. West Virginia does not have a reported decision discussing the factors that make an instruction argumentative. The federal courts approach argumentative instructions by looking at the effect of the instruction rather than its component parts.

The Seventh Circuit upheld the rejection of an automobile accident instruction on the basis that its incompleteness and tone made it argumentative.242 The Third and Fifth Circuits have condemned as argumentative those

238 In State v. Hamrick, 236 S.E.2d 247, 248 (W. Va. 1977), the trial judge gave the following instruction:
State police are specifically authorized and empowered by statute in this State, and the duties of their office require them to arrest persons charged with the violation of any law of this State and to investigate such charges by interviewing witnesses as well as the persons charged with the commission of said crime and that such acts on their part should not be attacked in Court unless it appears by the evidence that they have improperly performed said duties.
241 Hortman v. Henderson, 434 F.2d 77, 79 (7th Cir. 1970). The court gave this instruction:
instructions which single out testimony or give undue emphasis to one aspect of the case. A particularly blatant example of this type of argumentative instruction was offered and rejected in United States v. Vik, a Mann Act prosecution. The court rejected Vik's instruction which told the jury that the charge was easy to make, but difficult to disprove. An inventive but argumentative instruction was rejected in United States v. Posey, a cocaine prosecution case in which the defendant sought to instruct the jury that the sale involved "legal" cocaine to a known undercover agent for the purpose of defrauding the government.

The only West Virginia discussion of speculative instructions involved a question of damages which were allegedly not supported by the evidence. The substantive law regarding speculative damages is the primary focus for evaluation of instructions for speculativeness. If the evidentiary predicate for the instruction establishes that the future pain and suffering or future expenses will be incurred, then the instruction is not speculative.

**CONCLUSION**

West Virginia practitioners have the unique opportunity of innovating and improving the jury instruction and decision-making systems. Our Supreme Court of Appeals should be receptive to progressive changes which might raise the level of trustworthiness of our judicial system.

1. Every person operating a motor vehicle on the highways of this state shall drive the vehicle in a careful and prudent manner and at a rate of speed so as not to endanger the property of another or the life or limb of any person and shall exercise the highest degree of care.

The court rejected as argumentative this additional paragraph tendered by plaintiff:

You are further instructed that under the aforementioned statute, it is the duty of an operator of a motor vehicle, after receiving notice that a collision is imminent, to use all means within his power to avoid such collision, if this can be done with reasonable safety to himself.

243 See Systems, Inc. v. Bridge Electronics Co., 335 F.2d 465, 467 (3d Cir. 1964) and Burleson v. Champion, 283 F.2d 653, 655 (5th Cir. 1960).

244 655 F.2d 878 (8th Cir. 1981).

245 The text of the rejected instruction read:
[ a] charge such as that made against the defendant in this case is one which, generally speaking, is easily made and once made is difficult to disprove, even if the defendant is innocent. From the nature of the case such as this, the complaining witness may be the only witness testifying directly as to the alleged act constituting the crime. Therefore, the law requires that you examine the testimony of the prosecuting witnesses with caution and consider and weigh it in light of all the circumstances shown. In giving this instruction, the Court does not mean to imply an opinion as to the credibility of any witness or the weight to be given his or her testimony. United States v. Merrival, 600 F.2d 717, 719 (8th Cir. 1979).

655 F.2d at 882. Though the Merrival case is cited as supporting this instruction, the case also rejected it.

246 647 F.2d 1048 (10th Cir. 1981).

247 Id. at 1052.

