special verdict is much less frequently used on damages however than on liability. And it is not unlikely that the jury could easily escape the special verdict control and tailor its specific damage answers after the fact so as to make them accord with the "felt" appropriate overall sum.\(^{13}\) Similarly one wonders whether radical changes in trial procedure whereby for example the jury would not be instructed on the damage issue until they had completed their decision on liability would make a difference.\(^{14}\) One matter that has impressed us is the sheer time gap between the time the jury hears the damage instruction and the first time they are ready to turn seriously to it in the deliberation.\(^{15}\)

Consideration of the damage instruction suggests one other interesting point that has in recent years broken through on the appellate level. To what degree do the instructions fail to control because they remain silent? This has two aspects. First should the court like a good teacher not only tell the jury what it is to do but also anticipate certain probable misunderstandings and negate them in advance? In two wrongful death cases we have been able to study by post trial interview it is apparent how readily such misunderstandings can arise. In the one case the jury simply does not understand that it is not being asked to place a value such as such on human life; therefore the point arises with some intensity in the deliberation that any human life must be worth at least $5,000. In the other case where damages for loss of support were clearly substantial the jury somehow gets the notion that damages are a sort of welfare payment based on minimum subsistence notions rather than the direct measure of loss of support.\(^{16}\) The propriety and wisdom of the court anticipating such misunderstandings is of course a controversial matter. I would favor it here since the general instruction standing alone seems to expose the jury to needless misconceptions and nothing more.

The second aspect of the "silent" instruction is more familiar. Several important and clear damage rules are normally kept from the jury altogether. Thus they are not told that his lawyer's fees are not part of plaintiff's damage; they are not told that interest is not to be awarded from the time of injury; they are not told that the award is not subject to federal income taxation.\(^{17}\) The law on these points is perfectly clear—in fact it is ironically the only clear part of damage law. The non-disclosure of the law to the jury raises an obvious policy dilemma. Undoubtedly in part the non-disclosure stems from a suspicion that the instruction will only sensitize the jury and stimulate them to do something they otherwise might not do—a suspicion that our study suggests is well founded.\(^{18}\) And in part it stems, I suppose, from an ambivalence toward the rules themselves. We are not so sure how we feel about the plaintiff paying his attorney out of his award. And as with contributory negligence we may not mind too much the jury eroding the rule as a crude de facto reform.

Another detail is suggested by a recent English case.\(^{29}\) Here the judge was trying the issue without a jury and the question arose as to the propriety of his considering as precedent awards in other comparable cases. The trial court thought this improper. The reviewing court thought it might prove helpful to the trial judge if done in moderation, but limited its view to bench trials. The court went on: "It may be asked: 'Why should a judge have something before him which a jury would not have?' I am not sure there is any good reason, except perhaps, that if jurors, new to the task, are called on to assess damages in a case such as this, the more one can keep their minds directed to the actual issues the better." Perhaps it is hard to escape the conclusion of the English court but

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From The Silver Collection

An extensive collection of autographed portraits and letters of Justices of the United States Supreme Court has been presented to the Law School by Louis H. Silver, JD '28. A photograph of a portrait of Chief Justice Salmon P. Chase, with a letter from Chief Justice Chase to a Mr. E. A. Stansbury, is reproduced on this page. The text of that letter, written shortly before the presidential election of 1860, when Chase was Governor of, and a candidate for, Senator from Ohio, is as follows:

My dear friend,

Nothing in the future is even tolerably clear to me except the probability, approaching certainty, that Mr. Lincoln will be our next President, and that by his election the power of slavery in this country will be broken. What lies beyond I see not. I hope the Administration will be Republican, and that faithful Republicans will be called into the Cabinet, and that all will be well. To that end I shall honestly, sincerely and earnestly labor. I do not know Mr. Lincoln personally. All I hear of him inspires confidence in his ability, honesty and magnanimity. These qualities justify the best hopes, but we must remember that he has not been educated in our school, and may not adopt our ideas, therefore, either in the selection of men or in the shaping of measures.

As to your own matter, you are enough acquainted with the course of things in Washington to know that in appointments from New York, New York Senators and Representatives and leading men will be principally consulted. Where the President has personal knowledge and personal confidence he may act upon
that, as, were I President, I might in your case; but aside from such knowledge and confidence, decisions must be based chiefly on the recommendations of men nearest the heart of the party. Of course, I pledge to you that I shall always stand ready to promote your interests, when I can do so effectively and without injustice to the claims upon me of citizens of my own state. I know nothing now in the way of my aiding any efforts of your friends in New York regarding the positions you desire; and yet it is too early to say whether circumstances may not arise which will prevent me from being of any valuable service to you.

I have no expectation of occupying any other relation to the Administration than that of Senator; nor do I desire any other.

Your references to your own affairs give me pain. I supposed you had got rid of the pecuniary troubles you some time complained of. That you have been faithful to the cause, to your convictions, and to Republican principles I know. Were I so situated as to act independently, and had the power to give you a significant proof of my affection, that proof should not be wanting. But I am only a passenger in the boat; I bear no command.

To me, a loyal devotion to the cause has proved a prize of anything but wealth. For ten years I have given my almost undivided attention to this affair, and my private interests have suffered greatly. If I could honorably do so, I would have willingly retired from all public employment, and given myself to the more profitable business of private life, in which I am sure far more enjoyment is to be found than in public.

Faithfully your friend,
S. P. Chase