The Work of the Illinois Supreme Court Committee on Jury Instructions—The Elimination of Instructions

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My job this afternoon before this very distinguished audience is a curiously negative one. It is not so much to tell you about some of the things the Committee has done as it is to tell you about some of the things the Committee has not done. In brief, I am to tell you about the instructions we decided not to give.

In this connection I am reminded of a story about Harry Bigelow, who some of you will recall as Dean and a distinguished law teacher at the University of Chicago Law School for many many years. On one occasion it was Dean Bigelow's function to introduce Lord Bertrand Russell at a Law School smoker. Lord Russell, as you doubtless know, had been a pacifist during World War I, and had, I think, even gone to jail over it. Dean Bigelow began his introduction somewhat as follows. "Lord Russell has had a celebrated military career. He was the hero of the Battle of West Moreland, he was wounded at Verdun, he was awarded the D.S.O., . . . ." At about this point the Dean was interrupted by a tug at his coat from Lord Russell who audibly whispered "That must be my brother, I was a pacifist." It appeared that the Dean's secretary who had researched Lord Russell for him had looked up the wrong Lord Russell. In this crisis Dean Bigelow, who was a great Boston gentleman as well as a great scholar, with admirable aplomb and without batting an eyelash, continued his introduction—with one minor amendment. Before each characteristic of Lord Russell's he now inserted the word "not". "Lord Russell has not had a celebrated military career. He was not the hero of the Battle of West Moreland, he was not wounded at Verdun, he was not awarded the D.S.O., . . . ." The resulting introduction was among the most effective I have ever heard. I can only hope when I tell you the Committee did not do this, the Committee did not do that, etc. that mighty little word will stand me in half as good a stead as it did Dean Bigelow.

There are of course an infinity of instructions the Committee did not give. Let me then attempt to locate my topic a bit more precisely. There are three different situations in which the Committee did not recommend an instruction, only one of which is relevant to my topic today. (1) On points we are affirmatively covering we have selected a single preferred version of the instruction and have not included alternative forms, as for example BAJI frequently does. In this sense we have recommended against many forms...continued on page 53
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of a given instruction. The selection of appropriate language for an instruction is the most important function of the Committee and is a point to which Mr. Snyder and Mr. Davidson will talk today. (2) Again there are substantive points which we have not considered at all since the Committee’s initial objective is to prepare instructions only for the more urgent and important issues in tort litigation. The fact that the Committee has not considered a topic and has therefore not offered instructions on it does not, of course, represent any judgment by the Committee as to the merits of instructions on these issues. (3) Finally there are points which we have considered and where, regardless of how it would be worded, the Committee recommends against any instruction. It is this activity of the Committee which I shall sketch briefly for you today.

The overall work of the Committee can be viewed as having two aspects, an affirmative and a negative one. The affirmative one is the drafting in model form of instructions which should be given whenever appropriate; the negative one is the vetoing or eliminating of certain instructions which on the Committee’s view are never appropriate and should never be given. This rejecting of instructions has come to be one of the important jobs of the Committee, and will, we hope, turn out to be one of its major accomplishments.

The analogy here is perhaps to the weeding of a choked garden. The elimination of the negative recommendations supports and complements the aim of the affirmative drafts—to produce a select, quality work product of carefully drafted, indispensable instructions. The aim, I would underscore, is to keep our eye on the core of the communication problem between the court and the jury.

At the risk of belaboring the point, I would emphasize once again how radical the stance of the Committee in this matter is. In most instances the Committee is not saying that the instructions rejected were erroneous in law. Frequently the instructions rejected have had the full sanction of appellate opinions and of customary practice. The Committee is saying, however, that the mere fact that it is not error to give an instruction does not necessarily qualify that instruction as one which should be retained in the basic corpus of good instructions.

I will proceed in a moment with a series of illustrations of particular kinds of instructions the Committee has rejected and of the policy considerations underlying such action, but let me pause first to note the benefits that may flow from the veto policy the Committee has been using. There are at least four benefits which have impressed us. First, the eliminating of a large number of instructions has permitted the Committee to devote its attention in drafting to the instructions that matter the most, since time for drafting is a scarce resource, even for so hard-working a committee as this. Second, and this is a point which our jury research at the University of Chicago tends to confirm, the elimination of instructions will improve communication between the court and the jury since the instructions that matter will not be buried among a lot of instructions which do not matter and which need not be given. In brief the jury will not lose the forest because of the trees, or to vary that metaphor, the jury will be able to see the important trees clearly and cleanly. Third, the elimination of instructions should save the lawyer time by simplifying his problem of surveying the instruction field and of selecting the instructions appropriate for his case. Finally, the elimination of instructions should save time for both the court and the lawyer by greatly simplifying the instruction conference between the court and counsel. And in this respect once again we find the negative function of eliminating instructions strongly complementing the affirmative function of providing models.

In a jurisdiction where court congestion and calendar delay are problems of the most serious magnitude, this saving of trial time will in itself be a significant contribution.

So much then for the general framework in which the Committee’s negative activity has been placed. I do not have any exact count, but I would estimate that roughly as much as 40 per cent of all full Committee time at our two-day monthly meetings have been spent on instructions which were ultimately
vetoes. I think it would be fair to say that in a majority of cases where the Committee has finally recommended against an instruction, the recommendation has been made only after full discussion and considerable argument. It has been a rare case indeed in which the full Committee was immediately unanimous in rejecting an instruction. I have become increasingly impressed with what might be called the "career line" of many of the rejected instructions. It runs something like this. The instruction moves from a first draft to a second draft to a third draft and then only to oblivion as the Committee finally decides that the difficulties experienced in drafting a satisfactory instruction have revealed something about the substance of the instruction itself which makes it inappropriate or unnecessary in any case. Thus while the Committee has thrown out many instructions, some of them very familiar to you, it has done so not hastily but only with all deliberate speed.

As I have reviewed instructions we have eliminated and have reflected on our discussions about them, there emerges a series of policies which have more or less explicitly guided the Committee's decisions and which I shall now attempt to summarize briefly for you. First, there have been a few cases in which we thought the instruction would be erroneous as a matter of law and the rejection has been primarily on that grounds. More interesting, there have been some cases in which a majority of the Committee would strongly predict that the law would within the next five years change to conform to the rejected instruction. Nevertheless, in these cases the Committee has carefully abstained from recommending the instruction because it has not wished to lend its weight to changing substantive law. In other words, the Committee has carefully kept its function from overlapping with that of a law revision commission—and, I know this will please this audience,—it has been aware most of the time that there was some difference between its function and the function of the court.

Second, the Committee has been very conservative about recommending instructions that are appropriate only for the rare case and are likely to be a source of error if used at all frequently. In these instances the Committee has recommended against the instruction because it has not wished to add momentum toward the more frequent use of it.

Third, the Committee in general has rejected instructions which are themselves negative in that they tell the jury not to do something. This is an interesting and controversial point about instruction practice. One might argue that the customary practice should be radically revised and that a large number of negative instructions should be given which would caution the jury against the most common jury misconceptions. A persuasive analogy could be built from what is regarded as good practice in teaching, since teaching might almost be defined as the progressive clearing away of misconceptions. However, the Committee decided to close the door against the liberal use of negative instructions, influenced in part by some of the jury researches at the University of Chicago which tend to show that negative instructions may boomerang and serve primarily to remind the jury of something it otherwise would not have thought of doing, much in the fashion of parent's instructions to children.

Fourth, and this has been a very important guiding policy, the Committee has been steady against over particularizing and has carefully refrained from creating a large number of specific instructions simply by making applications of a good general instruction. Here, I might add, we have been much more conservative about holding down the number of instructions than has BAJI.

Fifth, the Committee has been firmly against instructions which tend to single out a particular item of evidence or to comment on it, and it has in general rejected these even though they may have the approval of appellate court opinions.

Underlying all these considerations has been a major policy. We have viewed the problem of communicating law to the jury and of instructing and orienting them as one best handled by a partnership between the court and trial counsel rather than by the court alone. Setting a proper balance between instructions of the court and argument of counsel has emerged as a subtle and interesting problem and the Committee's discussions have given it considerable attention. There are some points which seem to us better handled by permitting counsel on each side to supply the adversary emphasis rather than by having the court try to neutralize the instruction by sounding first like the plaintiff counsel and then in the next sentence like the defense counsel. On the other hand there are times at which counsel is certainly entitled to the protection of an instruction as legitimating in the eyes of the jury the argument he is making. And in any event neither the jury nor counsel should ever lose sight of the cardinal principle that it is the court which is the final arbiter of matters of law. But the Committee, perhaps because there are so many very able practicing lawyers on it, has, I think, given a distinctive emphasis to the role of counsel in communicating the legal context to the jury. In brief, on many occasions when the Committee has rejected an instruction it has felt not so much that the point ought not be told to the jury but rather that it would be more graceful and appropriate if it were told by the jury by counsel, and that therefore the point need not be kept in the permanent body of model instructions.

I know that generalizations such as these can seem
lifeless until made meaningful by illustration and example. I should like now to review with you a few specific examples of instructions the Committee has rejected and indicate the tenor of the Committee's thinking about them.

II

As a first example let me take Instruction No. 158-BAJI, which deals with the failure to render first aid when you and your automobile have been involved in an accident. California appears to have read its hit and run statute as creating a tort duty in this instance but Illinois has not yet had occasion to pass on the problem. While the Committee would predict that Illinois would follow California when the question arises, it has not wanted to place itself in a position of forcing or leading the law and has therefore decided against the inclusion of any instruction on this topic.

Or again, consider No. 179B in BAJI, which deals with the duty of a patient to undergo an operation. Here the Committee's rejection of an instruction on the point illustrates the way in which several policies tend to supplement each other. We think it is doubtful under current Illinois law that the Court would hold that the failure to undergo an operation on the part of a plaintiff was so unreasonable as to bar damages, although here again one can anticipate a change as the medical sophistication of the public increases. At best the instruction was regarded as troublesome and appropriate only for the rare case. Finally the Committee is recommending a general instruction on the duty to mitigate damages in a personal injury case and it was thought this would be quite sufficient without giving the operation question the emphasis of a separate instruction.

Let me turn now to the instruction cautioning the jury against rendering a quotient verdict (see for example, BAJI No. 180). Here again several reasons invite the rejection of any instruction on the point. It is difficult to state the law here precisely. While it is true that the jury should not bind itself by taking a simple average and substituting that for the decision process, it is also true that it is permissible and sensible for the jury as a guide in its deliberation to strike an average from time to time. Any instruction adequately dealing with the point therefore is likely to be complex and burdened with qualifications. At this point we were persuaded that the instruction if given would do more to suggest the possibility of an improper quotient verdict than it would to prevent it. Here again I might add with a note of pride, the jury researches at the University of Chicago have been mildly helpful.

Consider now an example such as the following:

If you believe (find) from the evidence that the plaintiff and the defendant were both guilty of negligence which proximately caused the injury (damage) complained of, then you are instructed that you must not compare the negligence of the plaintiff with that of the defendant for in such case the plaintiff cannot recover.

Here again there was more than one reason which dictated the Committee's rejection of the instruction, although it is certainly a correct statement of law. The Committee is of course recommending a model instruction on contributory negligence and the above instruction would therefore be repetitious, would run the risk of giving undue emphasis, and once again also would run the risk of boomeranging and reminding the jury of the possibilities of a sub rosa form of comparative negligence.

This last example illustrates another criterion the Committee has used. It is anxious to produce a set of instructions which will not only meet the tests when read as separate units but which will remain coherent and satisfactory when put together. In brief the Committee is interested in providing instructions which can be combined with the minimum of repetition and the minimum of adjustment. Perhaps the most dramatic use of this principle has been in connection with the instructions on personal injury damages, which I have a particular fondness for because I was a member of the sub-committee which prepared the drafts. Here by using a general skeleton instruction and a series of building blocks and by emphasizing the internal coherence of the series, it was possible to achieve a startling reduction in the number of independent instructions. To use once again as a whipping boy BAJI, which I should hasten to say the entire Committee greatly admires and has found invaluable, we required just 13 instructions paragraphs to cover
the same ground for which BAJI required 54 instructions covering 70 pages of text.

Let me turn now to another familiar example, the instruction cautioning the jury that the fact the court has given instructions on damages is not to be taken as any indication by the court of the defendant's liability. Her again the instruction is certainly accurate as a statement of law and there is some slight risk that the jury from time to time might misinterpret the meaning of the court's giving an instruction on damages. But here the Committee's feeling that instructions should not be over particularized came into play. The Committee felt that if it were appropriate to caution the jury specially about the implication of the court giving this instruction, it would be equally appropriate to give a companion caution about each other instruction the court gave. And the Committee was quite satisfied that its general cautionary instruction, which includes a warning that the court is not giving any indication of how it feels about the merits of the case, would be quite sufficient for the problem.

Again and again the Committee has rejected familiar instructions on the grounds that they singled out particular items of evidence. Let me give just two examples. The Committee has rejected an instruction cautioning the jury that the testimony of an employee of the defendant is not to be disregarded simply because it is the testimony of an employee of the defendant (see for example, BAJI No. 303E). Here the Committee has followed a policy of relying on one good general instruction on credibility and of rejecting the many advisory instructions now in circulation which high light a particular problem of credibility. A second example of this general point is the instruction telling the jury that flight from the scene of an accident is not decisive one way or another as evidence of negligence (see for example, BAJI No. 153B). Here again, the instruction has the vice of singling out a particular item of evidence and calling it to the jury's attention, although in form the instruction does no more than tell the jury it may consider this item along with all the other evidence in the case. I might note in passing that the Committee completed several drafts of this instruction before it finally rejected it altogether and that we did not reject it until we had prepared a draft which we all regarded as superior to any existing instruction on the topic.

Let me bring this to a close with one more cluster of examples on a point which has again been of major importance to us. The Committee has drafted in a general form a careful definition of negligence, and it has steadfastly resolved against specific instructions stating a standard of care under particular circumstances. It has, I think, quite sensibly taken the position that these instructions add nothing to the substance of the general negligence instruction and serve merely to clutter up and confuse the instruction field by over particularizing instructions in one area. Thus the following instruction, which is once again taken from BAJI (222B), is a good example of the kind of effort to particularize the standard of care which the Committee is rejecting:

The rider in a vehicle being driven by another has the duty to exercise ordinary care for [his] or [her] own safety. This duty, however, does not necessarily require the rider to interfere in any way with handling of the vehicle by the driver or to give or attempt to give the driver advice, instructions, warnings or protests. Indeed, it would be possible for a rider to commit negligence by interfering with or disturbing the driver.

In the absence of indications to the contrary, either apparent to the rider or that would be apparent to [him] or [her] in the exercise of ordinary care, the rider who [himself] [herself], if not negligent, has a right to assume that the driver will operate the vehicle with ordinary care.

However, due care generally requires of the rider that [he] or [she] protest against obvious negligence of the driver, if he has reasonable opportunity to do so. [Also if the rider has superior knowledge over the driver of conditions which relate to the possibility of accident or the encountering of hazard,] [or] if [the driver has made it known to the rider that [he] or [she], the driver, depends on the rider for any specified assistance,] the rider may be bound, in the exercise of ordinary care to conduct [himself] or [herself] in a manner that would not be required in the absence of such [a] fact[.] But the manner in which the rider must conduct himself to comply with the duty to exercise ordinary care depends on the particular circumstances of each case, and in the light of all those circumstances, the jury must determine whether or not the rider acted as a person of ordinary prudence.

III

In conclusion let me say a word now about the format. You may be wondering how a record of the Committee's thinking will be preserved in the cases where it has recommended against an instruction altogether. The Committee has decided that its negative recommendations are sufficiently important to warrant some care in providing a permanent record of them and in keeping them visible to the bench and to the bar. In each case where we recommend against the substance of an instruction, we will devote a full page to it. The page will contain a full descriptive title of the instruction, making it easy to locate. Next it will contain a summary of what instructions of this type cover but it will not offer a full draft. Finally it will have an editorial note by the Committee summarizing the Committee's reason for recommending against the instruction. Thus where the Committee has vetoed, it should not be difficult to quickly find out that it has done so and what its reasons have been.

I come then to the final question: What impact and weight will the Committee's negative recommendations have on trial practice in Illinois? This of course not an easy question for us to answer, and in the last analysis will depend a good deal on you. However as you might guess from the note of pride that has been in my voice throughout, we do have
some impressions which lead us to hope that our negative work, like our affirmative work, will be helpful and influential. It will we think lead to a kind of treaty between counsel where each will be glad to follow our example and reduce the number of instructions provided there was some pressure on the opposing party to do the same. We think also it will strengthen the hand of the trial judge when he wishes to reject a given instruction as unnecessary or as partisan. We think it will make it easier for him to refuse to offset one bad instruction with another.

In the end the work of the Committee in eliminating instructions will not of course solve all of the instruction problems of a trial judge. He will continue to have major areas in which to exercise discretion and he will continue to be the key man in the administration of justice. But it will more than repay the Committee for the many hours they have put in, if their work will serve to make his important job somewhat easier.

First United States Atomic Energy Commission Citation

Casper W. Ooms, distinguished alumnus and member of the Law School Visiting Committee has been awarded the first United States Atomic Energy Commission Citation. The Citation reads:

"To CASPER WILLIAM OOMS, ESQ., Distinguished member of the United States Patent Bar, in recognition by the United States Atomic Energy Commission for his outstanding participation in, and meritorious contribution to, the mission of the Commission in his capacity as a member and chairman of the Commission's Patent Compensation Board since its inception in 1947, during which period he has rendered outstanding and devoted service to the Commission and to his country in an activity which vitally affects the national defense and the civilian atomic energy program."

The Chief Justice of the United States addressing the dinner which followed the laying of the cornerstone of the new Law Buildings, May 28, 1958.