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INSTRUCTING A JURY IN WASHINGTON

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One of the most burdensome, time-consuming and vexing aspects of a jury trial is the preparation of jury instructions. Several matters in the area of instructions are particularly troublesome in Washington, and the purpose of this article is to analyze some of them, point out certain pitfalls, and make certain suggestions, with emphasis on simplification and standardization.

The effectiveness of jury instructions may be improved, their susceptibility to error reduced and their preparation made less arduous by simplifying and standardizing them. They may be simplified by giving fewer instructions and by eliminating, as far as possible, all long, "ify," complicated and confusing theoretical instructions. As stated by Professor Samore: "There is some basis for the conclusion that too many instructions could not enlighten a seasoned lawyer, let alone a jury of laymen. The hypothetical instruction, for example, usually is incredibly complex, the 'ifs' snowballing until an entire page of print may be consumed."

Instructions may be standardized by adopting so-called "uniform instructions," as has been done in King and Yakima Counties in Washington. The products of those counties, however, are very limited in scope. In the interest of saving time, helping to prevent a backlog of cases, and reducing error and frequency of appeal, the bench and bar should be encouraged in developing state-wide, uniform or pattern jury instructions. While standardized instructions should never be used blindly or isolated from the particular facts of a case, they are extremely useful as time-saving and error-preventing devices, since they may serve as patterns or guides, if not as exact expositions of the law.

SIMPLICITY

The purpose of jury instructions in any case is and should be to advise the jurors of the principles of law applicable to the particular

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1 Samore, Preface to 1 Reid's Branson Instructions to Juries at iii [hereinafter cited as Reid's Branson] (3d ed. Samore, 1960).

2 "An instruction is an exposition of the principles of the law applicable to the case in its entirety, or to some branch or phase of the case, which it is the duty of the jury to apply in order to render a verdict establishing the rights of the parties in accordance with the facts proved." Jackson v. Department of Labor & Indus., 54 Wn.2d 643, 648, 343 P.2d 1033, 1036 (1959), quoting from 1 Reid's Branson § 1 (3d ed. 1936). (Emphasis added.)
facts of the case as simply and succinctly as possible. Two many attorneys and judges fail to do this effectively because they forget that jurors are not lawyers or versed in legal terminology, and that they become confused by complicated and voluminous instructions. In rather simple cases the writer has had as many as forty proposed instructions presented to him by each side, not including stock instructions. If any considerable amount of the proposed instructions are given, together with a long narrative of the pleadings and the usual stock instructions, the result will probably be a volume completely confusing and unintelligible to the ordinary juror. As an end result, most of the instructions will usually be totally ignored by the jury.

Even though long complicated instructions are ignored, the case may end up in an appellate court, only to be reversed because of an error in an instruction. Judge Jerome Frank has stated:

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Time, money and lives are consumed in debating the precise words which the judge may address to the jury, although everyone who stops to see and think knows that these words might as well be spoken in a foreign language—that, indeed, for all the jury's understanding of them, they are spoken in a foreign language. Yet, every day, cases which have taken weeks to try are reversed by upper courts because a phrase or a sentence, meaningless to the jury, has been included or omitted from the judge's charge.
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Many jury instructions are not only meaningless to the average juror, but "Further, the more accurately a general charge is written, the more difficult it is for a layman to understand it. The anomaly is that the necessity for the general instruction creates pitfalls over legal distinctions which appellate courts will consider as requiring new trials, which distinctions have no effect on jury deliberations."

This is not a criticism of the appellate court, since of necessity it must assume that all instructions are carefully studied and readily understood by the jury, even though as a practical matter such is not the case. At least one court has faced the problem squarely, however. In a case in which "the trial court was deluged with sixty requested instructions, twenty-seven of which were asked by defendants," the Oregon Supreme Court said:

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It is not surprising that the court's instructions might have failed to entirely satisfy counsel and, in one or two instances, perhaps to have strayed somewhat from the paths of accuracy. However, we believe,
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*Frank, Law and the Modern Mind 181 (6th printing 1949).*

*Grubb, False Fears, 26 Ins. Counsel J. 481 (1959).*

*Ellensberger v. Fremont Land Co., 165 Ore. 375, 107 P.2d 837, 842 (1940).*
under such circumstances, the appellate court should be somewhat charitable to trial courts and, in the language of the poet, "be to their faults a little blind and to their virtues very kind."

The Washington Supreme Court has on occasion stressed the need for simplicity of instructions. In a case in which the instructions covered thirty-three pages of the transcript, the court in speaking of the trial court's refusal to give them to the jury, stated:

[W]e feel that, if given, they would have tended to confuse the minds of the jurors rather than aid them in reaching a correct verdict.

It is the duty of the court to state the law to the jury as succinctly and directly as possible. This is best done by a few simple, direct, and plain statements which cover the issues rather than by a voluminous and lengthy dissertation upon the law involved, or, where the issues are not numerous or complicated, by numerous instructions.

The more simply and plainly instructions can be framed and cover the issues, the better the jury will understand them, and the less likely will they be to run counter to some rule of law.

What then, can be done to simplify instructions and make them more understandable to lay jurors?

**Instruction on Issues of the Case.** To start, let us first consider the old practice of giving a narrative or almost complete quotation of the pleadings, which often consume several pages of instructions. In consolidated cases or cases containing several claims, such an instruction may consume many more pages. Very often, many of the original issues as outlined by the pleadings must be removed from the jury's consideration by following the long narrative instructions with numerous special instructions. In other words, you first give the jury certain issues and then take part of them away. This is a useless, confusing and unnecessary feature. It is not necessary that the court follow the wording or arrangement of the pleadings in stating the issues to the jury; the court may adopt language of its own choosing. The only material inquiry is whether the jury was properly instructed as to the issues.

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6 Ibid.
8 Mathias v. Eichelberger, supra note 7, at 192-93, 45 P.2d at 622.
10 Mathias v. Eichelberger, 182 Wash. 185, 193, 45 P.2d 619, 622 (1935), quoting from In re Keithley's Estate, 134 Cal. 9, 66 Pac. 5 (1901).
11 Settles v. Johnson, 162 Wash. 466, 298 Pac. 690 (1931).
12 Ibid.
In *Murray v. Mossman*, the Washington court points out the danger of quoting too extensively from the pleadings when defining the issues. The trial court's duty is fulfilled when it simply, clearly and concisely calls attention to the essential issues of the case or contentions of the parties as they are developed at the pre-trial conference, if any, or as developed during the trial of the case. In *Lee v. Gleason Co.*, the Washington Supreme Court advised that: "Upon a new trial, it appears to us that the jury could better be instructed by giving a few well worded concise instructions covering the issues, in addition to the ordinary stock instructions given in such cases."

In striving for simplicity of instruction on the issues, one point is apt to be overlooked. In instructing on the issues of a negligence case, the trial court should include reference to all specific acts of negligence relied upon by each party.

In Washington it may be difficult to prepare an instruction on the issues in advance of the trial in some cases, since under the present Rule 8 of the Rules of Pleading, Practice and Procedure, the parties may include as many separate claims or defenses as they have, regardless of consistency. In such cases the issues will be considerably narrowed during the trial, if no pre-trial conference has been had, and the attorneys or court may well wait until the issues of the case are developed by substantial evidence in the trial of the case.

The old practice of giving long narrative instructions from the pleadings may be partially remedied in Washington by use of the new Rules of Pleading, Practice and Procedure and by extensive use of pre-trial conferences. Until such conferences become more popular, however, it is suggested that the correct procedure is merely to include a brief statement of the issues or contentions that remain in the case to be submitted to the jury. It has been a practice for some time in Yakima County, Washington, for the court to have a conference with counsel in regard to proposed instructions and at that time a brief statement of issues can be agreed upon.

\[^{13}52\text{Wn.2d}\ 885,\ 329\ P.2d\ 1089\ (1958).\ \text{See also,}\ 1\ \text{Reid's Branson}\ \S\ 11\ (1960).\]

\[^{14}146\ \text{Wash.}\ 66,\ 262\ \text{Pac.}\ 133\ (1927).\]

\[^{15}\text{Id.}\ \text{at}\ 72-73,\ 262\ \text{Pac.}\ \text{at}\ 135.}\]

\[^{16}\text{See Woods v. Goodson,}\ 55\ \text{Wn.2d}\ 687,\ 349\ \text{P.2d}\ 731\ (1960).}\]

\[^{17}\text{WASH. RPPP}\ 8(e)(2).\ \text{This rule corresponds with Fed. R. Civ. P.}\ 8(e)(2).\]

\[^{18}\text{In general the Washington Rules of Pleading, Practice and Procedure correspond with similarly numbered Federal Rules of Civil Procedure.}\]

\[^{19}\text{This is authorized by WASH. RPPP 51.08W. See also Yakima County, Wash., Special Rule 30, a portion of which reads as follows:}\ \text{"A judge trying a case, will, prior to instructing the jury, except in cases where it may appear unnecessary, cause a recess to be taken in order to settle the instructions, at which time the attorneys engaged in the cause will be heard on the proposed instructions."}\]
Instruction on Theories of the Case. Another means of simplifying jury instructions is elimination of unnecessary, repetitive, argumentative and long drawn-out hypothetical or "formula" instructions on each party's theory of the case. While each party is entitled to have his theory of the case presented to the jury by proper instructions if there is evidence to support it,²⁰ it is error for the court to instruct upon some issue or theory when there is no substantial evidence concerning it.²¹

The Washington Supreme Court has said that the trial court should refuse to give proposed instructions dealing with matters not within the pleadings and evidence.²² It is submitted, however, that the primary area of concern is the evidence, since the pleadings are deemed amended to conform to the evidence admitted by the court. Thus, the trial court should scan the evidence carefully to determine whether there is substantial evidence to support a theory in regard to which one of the parties has requested instructions. If there is not, the instruction should not be given, even though the theory may be in the pleadings. For example, the court should not instruct on any of the following theories or doctrines, absent any substantial evidence to support it: Unavoidable accident,²³ deception,²⁴ emergency or sudden peril,²⁵ contributory negligence,²⁶ last clear chance,²⁷ or damages.²⁸

Giving an instruction on a party's theory of the case is required—provided there is evidence to support it—and not discretionary with the trial court.²⁹ The number of instructions given on any party's theory of the case is discretionary with the court, however.³⁰

Although the trial court has it within its discretion to determine how many instructions should be given regarding each litigant's theory, a word of caution is in order. Giving too many instructions may result in

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²⁶ Cote v. Allen, 50 Wn.2d 584, 313 P.2d 693 (1957).
²⁸ Nelson v. Fairfield, 40 Wn.2d 496, 244 P.2d 244 (1952).
overemphasis and constitute error. In considering the number of instructions to be given on any party’s theory, the trial court should be constantly alert to avoid overemphasis. If one instruction adequately covers a single theory, then other proposed instructions, even though couched in different language, should be refused. With the perils of overemphasis in mind, the trial court might very well refuse to give instructions on such elaborations as “unavoidable accident,” since the matter is usually well covered by the stock instructions on negligence, proximate cause, and burden of proof. The same might be said of the “emergency” and “deception” doctrines.

It is not necessary for each instruction to contain a complete exposition of the law applying to any given theory if it is covered by other instructions, since instructions are to be considered as a whole. Further, while a party is entitled to have his theory of the case presented to the jury by a proper instruction—if substantial evidence supports it—it is up to the party to request it. In the absence of a request, the trial court’s failure to instruct on a given theory is not error.

The most difficult problem arises when “formula,” “pinpointed,” or “spotlighted” instructions upon a party’s theory in the case are requested. These instructions are usually hypothetical in nature and do not technically constitute a comment on the evidence. However, many courts and authorities now question the advisability of giving such instructions because they become involved and confusing.

The question presented to the trial court is whether an abstract or general statement of the law containing a party’s theory of the case

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31 Jackson v. Department of Labor & Indus., 54 Wn.2d 643, 343 P.2d 1033 (1959); Ulve v Raymond, supra note 30.
32 For a complete discussion of cases involving “unavoidable accident” instructions, see Annot., 65 A.L.R.2d 12 (1959). The annotation indicates the perils incident to such instructions, even though the giving of them, if the theory is supported by substantial evidence, may not be error. See also Butigan v. Yellow Cab Co., 49 Cal. App. 2nd 652, 320 P.2d 500 (1958), in which the California Supreme Court, sitting en banc, held such an instruction not only unnecessary but also confusing and therefore erroneous. Compare, however, Bennett v. McCready, 157 Wash. Dec. 211, 356 P.2d 712 (1960), in which the court held such an instruction proper under the facts of the case, and differentiated between an emergency and an unavoidable accident. See also Pement v. F. W. Woolworth Co., 53 Wn.2d 768, 337 P.2d 30 (1959). It is interesting here to note that in the new ILLINOIS PATTERN JURY INSTRUCTIONS, §§ 12.02-03 (1961), the committee recommends against giving either “unavoidable accident” or “emergency” instructions.
36 Some cases use the phrase “general” in alluding to instructions and others use the word “abstract.” It is simply a matter of semantics, since an abstract statement refers to a general as opposed to a particular or specific statement.
is sufficient. With respect to instructions in the form of abstract legal principles, the Washington Supreme Court has said that, "a court is not required to instruct a jury on abstract legal principles,"37 that abstract instructions are not prejudicial unless they mislead the jury,38 and very recently, that, "an abstract statement of the law of contributory negligence... was manifestly proper."39

An analysis of DeKoning v. Williams,40 however, would seem to indicate that the Washington court, at least in 1955, held the view that a general instruction covering a party’s theory of the case was not sufficient, and that it must be pinpointed, at least to the particular party to which it applied. The trial court had given a general instruction on the “emergency doctrine” but did not apply it to the appellant alone. The instruction was held to be error since the jurors might believe that the doctrine was also applicable to the respondent. In deciding the case, the court, perhaps unnecessarily, said: “Each party is entitled to have his theory of a case presented to the jury by proper instruction, if there is any evidence to support it, and this right is not affected by the fact that the law is covered in a general way by instructions given.” (Emphasis added.)41

In a dissenting opinion, Judge Schwellenbach strongly criticized the majority opinion as requiring the giving of “pinpointed” or “highlighted” instructions. He said:

It is the duty of the trial judge to advise the jury, without taking sides, as to what the law is which must guide it in its determination of the case. Here the trial court, without any favoritism, thoroughly, fairly, and adequately instructed the jury as to the law covering all of the issues involved, including appellant’s theory of the case.42

It was the writer’s considered opinion, at the time the DeKoning case was reported, that the dictum, at least, of the opinion was incorrect. It calls forth a rash of “pinpointed” and argumentative instructions under the pretense that they are submitting some party’s theory of the case. One party will submit an instruction reading, “If you find, etc., etc., then I instruct you that you should return a verdict for the plaintiff.” The opposing counsel will then request an instruction reading, “If you do not find, etc., etc., then I instruct you to return a verdict for

37 Easton v. Chaffee, 16 Wn.2d 183, 192, 132 P.2d 1006, 1010 (1943).
40 47 Wn.2d 139, 286 P.2d 694 (1955).
41 Id. at 141, 286 P.2d at 695.
42 Id. at 147, 286 P.2d at 699.
the defendant.” Or, one counsel will submit an instruction that, “If you so find, then I instruct you that defendant is guilty of negligence,” and the opposite party will then propose an instruction, “If you do so find, (or you do not so find), then I instruct you that the defendant is not guilty of negligence.”

The trial court is presented with the proposition of balancing the “formula” instructions in such a way as not to overemphasize a point or to indicate to the jury that he is favoring one side or the other. Some courts hold such balancing to be necessary. To be fair the court must give instructions proposed by both sides covering the same point. This only adds to the confusion of too many instructions.

The DeKoning case could and should be limited to the proposition that a general instruction is bad when the trial court fails to instruct that it applies to only one of the parties when in fact it does not apply to both parties. Its dictum, at least, appears to be considerably altered, if not reversed, by two recent cases, O’Brien v. City of Seattle and Barracliff v. Maritime Overseas Corp. In the Barracliff case, Judge Hill very adequately and correctly stated: “We have but recently indicated that pinpointed or spotlighted instructions are not necessary where adequate general instructions are given.”

Since the Barracliff case is in keeping with the modern thinking on the subject, giving slanted or formula instructions should be avoided wherever possible. They should be given only where a general instruction would clearly be inadequate or would confuse or mislead the jury. While it would be dangerous to totally ignore the DeKoning case, in view of the Barracliff case it will probably be limited strictly to its facts and should be followed only where there might be some confusion as to which party the instruction should apply.

Since the number of instructions to be given on any party’s theory of the case is within the trial judge’s discretion, it is the writer’s opinion that one instruction on any particular point should suffice. If that in-
struction is general in nature, the court will not be required to reiterate it two or three times in order to slant it both ways so as to avoid favoritism or prejudicial emphasis. Jury instructions will then become less argumentative, lengthy, complicated and confusing.

Finally, if it is deemed advisable to give a hypothetical or formula instruction in order to adequately convey a party's theory: (1) Uncontroverted facts should not be stated hypothetically; (2) Controverted facts should always be stated hypothetically; and (3) All of the facts essential to a directed verdict should be stated if the instruction authorizes the jury to return a verdict on an affirmative finding of certain facts. In other words, the instruction should require a finding of all facts necessary to make out a complete case. Matters such as proximate cause, contributory negligence, and ordinary care should not be left out when they are necessary to state a complete case.

**Presumptions and Burden of Proof**

The necessity or advisability of instructing on presumptions presents another perplexing question in Washington. In an effort to arrive at a satisfactory answer, the trial court and counsel requesting instructions must work through a body of opinions in which the court has not always made a careful distinction between presumptions and inferences, conclusive and rebuttable presumptions, and between burden of proof and burden of going forward with the evidence. The area has become further complicated by the court's failure to attribute the same meanings to words in each case.

**Presumptions.** The term "presumption" has been defined in various ways. As defined by the Uniform Rules of Evidence, "A presumption is an assumption of fact resulting from a rule of law which requires such fact to be assumed from another fact or group of facts found or otherwise established in the action." (Emphasis added.) Similarly, Jones on Evidence defines a presumption as, "an inference required by rule of law to be drawn as to the existence of one fact from the existence of some other established basic fact." (Emphasis added.) The Washington court, in *Heidelbach v. Campbell*, defines a presumption as, "an inference, affirmative or disaffirmative, of the truth of a proposition of fact which is drawn by a process of reasoning from some one or more matters of known fact." While the definition in *Heidelbach*

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48 Rule 13, p. 171. See also Bradley v. Savidge Inc., 13 Wn.2d 28, 123 P.2d 780 (1942), for other definitions.
49 1 Jones, Evidence § 9 (5th ed. 1958).
50 95 Wash. 661, 668, 164 Pac. 247, 249 (1917).
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v. Campbell is a convenient starting point for the analysis which follows, it has two objectionable features which detract from its usefulness as a working definition for the trial court and counsel.

Presumptions arise out of expedience, or continuous human experience showing probability, which ripens into common law or a statutory enactment. At this juncture, the first objection to the Heidelbach v. Campbell, as opposed to the Uniform Rules of Evidence-Jones definition appears. The Heidelbach v. Campbell definition addresses itself only to those presumptions whose good sense commends them. It does not take presumptions which arise out of expedience into account. The Uniform Rules of Evidence-Jones definition, by defining presumptions in terms of a rule of law, rather than of reason, is broad enough to include presumptions which arise out of both experience and expedience.

Presumptions are usually divided into two main classes: conclusive and rebuttable. Conclusive presumptions, such as the presumption that all persons have knowledge of the law, are not permitted to be overcome by any proof. They are rules of substantive law. They will not be discussed because they do not present a question for the jury except as to foundation proof.

Rebuttable presumptions should be divided into two sub-classes: mandatory and permissive. Mandatory presumptions are mandatory in that they require a certain decision by the jury in the absence of rebuttal evidence. They will also be referred to as true presumptions, as opposed to permissive presumptions, which are really only permissive inferences. Mandatory presumptions are sometimes referred to as "rebuttable" or "prima facie" presumptions. They state a rule of evidence rather than a rule of substantive law.

The so-called permissive presumptions are not presumptions at all. They are permissive inferences, such as the inference of negligence in res ipsa loquitur cases, and should be treated specially, or the facts which give rise to them should be submitted as any other circumstantial evidence.51 Accordingly, they have been dropped from the definitions

51 See Chase v. Beard, 55 Wn.2d 58, 346 P.2d 315 (1959), in which the court apparently holds that res ipsa is only a permissible inference and requires no instruction. This holding is certainly in keeping with the clear weight of American authority. See 2 Harper & James, Torts § 19.11 at 1100 (1956). Accord, Prosser, Torts § 43 at 211 (1955). If the trial court feels that a res ipsa instruction is necessary or desirable, the court should include in the instruction the matter suggested by the Georgia court in Palmer Brick Co. v. Chenall, 119 Ga. 837, 47 S.E. 329 (1904), which was quoted by the Washington court in Chase v. Beard. Giving such an instruction in a true res ipsa case certainly would not be error and might be desirable, where other evidence as to negligence and/or lack of negligence is missing, in order to properly advise the jurors as to what they may do with the evidence and inferences at hand.
of presumptions found in Jones, the Uniform Rules of Evidence, and the California Jury Instructions. 52

The second objectionable feature of the Heidelbach v. Campbell 53 definition is its failure to distinguish between permissive inferences and mandatory or true presumptions. Since it defines presumptions in terms of inferences, with no indication of their strength or the effect to be given them, it is broad enough to include both permissive inferences and mandatory or true presumptions. The definition and the thinking which it typifies has produced much confusion.

The Washington Supreme Court has called attention to presumptions in a large number of cases. 54 Very few of the cases contain a discussion of the difference between so-called permissive (in that they permit the jury to infer) presumptions and mandatory (in the absence of contrary proof) presumptions, simply because in most cases there was contrary proof. As a group, the cases in which the difference is discussed are confusing.

In Bradley v. Savidge, Inc., 55 the Washington court attempted to divide presumptions into two main classes: "presumptions of law," and

53 95 Wash. 661, 668, 164 Pac. 247, 249 (1917).
54 State v. Kelberg, 56 Wn.2d 283, 352 P.2d 189 (1960) (presumption of innocence); Binder v. Binder, 50 Wn.2d 142, 309 P.2d 1050 (1957) (presumption of mental competency); Callen v. Coca Cola Bottling, 50 Wn.2d 180, 310 P.2d 236 (1957) (presumption that a person driving another's car is doing so as his agent); Spangler v. Glover, 50 Wn.2d 473, 313 P.2d 354 (1957) (presumption that a publication, libelous per se, is false); Mills v. Pacific County, 48 Wn.2d 211, 292 P.2d 362 (1956) (presumption of due care); In re Madsen's Estate, 48 Wn.2d 675, 296 P.2d 518 (1956) (presumptions that property acquired during coverture is community property and that property remains separate property when once separate); Arnold v. National Union Marine Cooks, 44 Wn.2d 183, 265 P.2d 1051 (1954) (presumption of good reputation and character); In re Peters' Estate, 43 Wn.2d 846, 264 P.2d 1109 (1953) (presumptions of continued insanity and of testamentary capacity); Palmer v. Palmer, 42 Wn.2d 715, 258 P.2d 475 (1953) (presumption of legitimacy); Lieb v. Webster, 30 Wn.2d 43, 190 P.2d 701 (1948) (presumptions of due delivery of duly mailed letter and of delivery of deed by its recording); Kay v. Occidental Life Ins. Co., 28 Wn.2d 300, 183 P.2d 181 (1947) (presumption that a false statement, knowingly made, is made with intent to deceive); Northwest Cities Gas Co. v. Western Fuel Co., 13 Wn.2d 75, 123 P.2d 771 (1942) (presumption of adverse use); Brotherton v. Day & Night Fuel Co., 192 Wash. 362, 73 P.2d 788 (1937) (presumption of negligence arising from violation of a positive statute, also referred to as "negligence per se," which, contrary to some belief, is not a conclusive presumption since it is rebuttable and therefore mandatory only in the absence of evidence tending to excuse or justify); Camp v. Peterson, 191 Wash. 634, 71 P.2d 1074 (1937) (presumption that public officers have performed their duties); City of Tacoma v. Peterson, 174 Wash. 621, 25 P.2d 1034 (1933) (presumption that all men are, in law, able to meet their just obligations); Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P.2d 39 (1933) (presumption that owner is operating automobile); Shaw v. Prudential Ins. Co., 158 Wash. 43, 290 Pac. 694 (1936) (presumption of death after seven years' absence); Stempel v. Oregon Life Ins. Co., 157 Wash. 678, 29 Pac. 222 (1930) (presumption against suicide); Gustafson v. Cullen, 155 Wash. 107, 283 Pac. 1087 (1930) (presumption that all men act honestly); State v. Jones, 80 Wash. 588, 142 Pac. 35 (1914) (presumption of chastity).
55 13 Wn.2d 28, 123 P.2d 780 (1942).
“presumptions of fact.” It then apparently classified mandatory (not conclusive) presumptions as presumptions of law and permissive presumptions (permissive inferences) as presumptions of fact. The confusion was compounded by classifying the presumption of agency as a presumption of fact (permissive inference). For authority, the court quoted Professor Morgan: “The presumptions which operate to compel the assumption of B upon the establishment of A owe their existence . . . .” (Emphasis added.) Obviously, Professor Morgan was speaking of mandatory presumptions because of the word “compel” which he used. Consequently he was talking about what the court called a presumption of law; not of fact. It is interesting to note that Professor McCormick classifies the presumption of agency as a mandatory or true presumption.

Later, in McGinn v. Kimmel, the Washington court further confused the situation by classifying a conclusive presumption as a presumption of law and a rebuttable presumption as a presumption of fact, and going on to say: “By treating a presumption of fact (then newly made to include mandatory, rebuttable presumptions), and an inference on the same basis with reference to how they may be met and overcome, we have clarified much confusion and have adopted a rule which is sound, logical and practical.

Finally, in a recent case, Chase v. Beard, the court drew a distinction between permissive inferences and mandatory presumptions, holding that res ipsa loquitur (inference of negligence) is merely a permissive inference which requires no instruction to the jury. The Chase v. Beard opinion is difficult if not impossible to square with the quotation from McGinn v. Kimmel. What can a trial judge do when requested to give an instruction on a given presumption?

Professor McCormick attempts to classify presumptions as either mandatory or permissive. Professors Thayer, and Wigmore both adopt the compulsory or mandatory aspect of a presumption, similar to

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50 Morgan, Instructing the Jury upon Presumptions and Burden of Proof, 47 Harv. L. Rev. 59, 77 (1933).
52 36 Wn.2d 786, 221 P.2d 467 (1950).
53 Id. at 791, 221 P.2d at 470.
56 Thayer, Evidence 317, 321, 326 (1898).
57 Wigmore, Evidence § 2490 (3d ed. 1940).
the definitions in Jones and the Uniform Rules of Evidence. If one adopts Professor McCormick's classifications or guesses what the Washington Supreme Court will hold to be a permissive presumption (inference) or a true (mandatory) presumption in a particular case, he finds himself hopelessly confused as to what to tell the jury, if anything. Consequently, it is suggested that in the future both the trial courts and the supreme court eliminate all permissive inferences from the category of presumptions, thus eliminating the necessity of giving instructions concerning them. In effect, this is what was done in Chase v. Beard. It is suggested that the elimination of permissive inferences from the category and concept of presumptions could best be accomplished by adopting the definition of presumption contained in the Uniform Rules of Evidence.

If the field of presumptions is narrowed to include only those which require a given verdict in the absence of contrary evidence, the question remains: What instruction should be given concerning them in the various situations which may arise? An examination and evaluation of what the Washington Supreme Court has said with respect to mentioning presumptions in instructions to juries follows.

No problem arises in cases where a true presumption is not rebutted by evidence sufficient to take the matter to the jury. The matter will be determined by the trial court as a matter of law and a simple instruction to that effect suffices. However, when the presumption is rebutted by credible evidence (interested or disinterested), a real question arises in Washington as to if and when an instruction, setting forth the presumption and its effect, should be given, and whether such an instruction is required or is optional. Only a few Washington cases hold that such an instruction is required. However, there are numerous cases in which the Washington court has approved, either directly or inferentially, giving such instructions, either in whole or in part.

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64 Rule 13, p. 171. Accord, 1 Reid's Branson § 20 (1960).
65 55 Wn.2d 58, 346 P.2d 315 (1959). In State v. Thomas, 158 Wash. Dec. 745, 364 P.2d 930 (1961), the Washington court, in discussing a statutory presumption making a prima facie case, commented that whether an instruction, based on the statute, should be given is "arguable."
66 Rule 13, p. 171.
67 See Goodwin Co. v. Schwaegler, 147 Wash. 547, 266 Pac. 177 (1928) (requiring an instruction on presumption of receipt of a letter properly addressed and mailed); State v. Tyree, 143 Wash. 313, 255 Pac. 382 (1927) (requiring an instruction on the statutory presumption of innocence).
The easy way out on this question of instructing on presumptions would be to say that they should never be mentioned at all. That approach was adopted in the Model Code of Evidence, and expresses the Thayerian Theory. Some modern opinions also espouse that theory. Chamberlayne believes that an instruction on a presumption invades the "no comment rule," and should not be given.

Professor Morgan suggests adopting the Pennsylvania Rule that a presumption shifts not only the burden of going forward with the evidence, but the burden of persuasion as well. Presumptions are then simply handled by an instruction on the burden of proof alone; not mentioning the presumption at all. The Uniform Rules of Evidence have adopted the Pennsylvania Rule in cases where the basic facts have probative value as evidence of the presumed fact, and the Thayerian rule in cases where the presumption is one of expediency and the basic facts have no probative value. Professor McCormick makes certain other suggestions in regard to instructions.

Regardless of theoretical analyses by text writers and court cases to the contrary, the Washington court seems to have at least approved, if not required, instructions on presumptions in certain instances. It has held an instruction on presumptions erroneous or unnecessary in only two types of cases. It has held such an instruction unnecessary in res ipsa loquitur cases. Res ipsa cases, however, deal with permissive inferences; not with true presumptions. In the other type of cases, the Washington court, in Hutton v. Martin, and Mills v. Pacific County, has held it not only unnecessary, but actually erroneous to instruct on

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and character); Steiner v. Royal Blue Cab Co., 172 Wash. 396, 20 P.2d 39 (1933) (presumption that car is being operated by owner); State v. Dunn, 159 Wash. 608, 294 Pac. 217 (1930) (presumption of innocence); Shaw v. Prudential Ins. Co., 158 Wash. 43, 290 Pac. 694 (1930) (presumption of death after seven years' absence); Biel v. Tolsma, 94 Wash. 104, 161 Pac. 1047 (1916) (presumption of honesty); State v. Jones, 80 Wash. 588, 142 Pac. 35 (1914) (presumption of chastity).

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71 2 Modern Law of Evidence § 1084 (1916).
72 See Morgan, Presumptions, 12 Wash. L. Rev. 255 (1937).
73 Rule 14.
74 McCormick, What Shall the Trial Judge Tell the Jury About Presumptions, 13 Wash. L. Rev. 185 (1938).
75 See cases collected in notes 67, 68 supra.
76 See Chase v. Beard, 55 Wn.2d 58, 346 P.2d 315 (1959), in which the court held the "doctrine" requires no instruction. But see McKinney v. Frodsham, 157 Wash. Dec. 21, 356 P.2d 100 (1960), in which the Washington court held an instruction on res ipsa as erroneous, not on the ground that it was unnecessary or should not have been given, but on the basis that the "doctrine" did not apply to the factual situation. The McKinney case therefore indicates that such an instruction on res ipsa would not be erroneous or forbidden if given in a proper case, even though unnecessary.
77 41 Wn.2d 780, 252 P.2d 581 (1953).
78 48 Wn.2d 211, 292 P.2d 362 (1956).
the presumption of due care where the issue is contributory negligence. Since the presumption operates against the party who has the burden of proving contributory negligence, it establishes in effect a double burden.

It seems that the rationale underlying the *Hutton* case should also apply to the statutory presumption of innocence in criminal cases, where juries have traditionally been instructed on both the burden of proof and the presumption of innocence. The Washington court held in *State v. Tyree,* that an instruction on the presumption of innocence was absolutely necessary. Professor McCormick points out the needlessness of such an instruction, saying: "It seems, however, that the standard instruction on the state's burden of proving the crime beyond a reasonable doubt amply covers these points." However, in view of *State v. Tyree,* the safer procedure in Washington is for the trial court to continue to instruct on the presumption of innocence as well as the burden of proof; at least until the Washington court holds otherwise.

Courts traditionally seem to favor statutory presumptions over common law presumptions, though no good reason for doing so is apparent. In a good share of the cases in which the Washington court has approved instructing on presumptions, they have been statutory presumptions. Except for the presumption of innocence, a statutory presumption should not be treated differently from a common law presumption unless the statute requires a special handling.

With the possible exception of *res ipsa* cases and with the exception of cases in which the presumption operates against the party who also has the burden of persuasion, it appears that in Washington instructions on presumptions are proper and perhaps necessary in some cases. What shall the trial court tell a jury concerning a true presumption? What shall it say about the effect of such a presumption on the burden of proof?

Much has been written on the requirements of instructions on presumptions. In an early case, *Steele v. Northern Pac. Ry.,* the Washington court approved an instruction on the presumption of due care to the effect that the presumption must be overcome or rebutted by a "preponderance of the testimony." The case was followed by *Karpe v.*

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79 143 Wash. 313, 255 Pac. 382 (1927).
81 Jones, Evidence 205 (5th ed. 1958); McCormick, Evidence 663 (1954); Comment on Rule 14, Uniform Rules of Evidence (1953); Comment on Rule 704, Model Code of Evidence (1942); Falknor, Notes on Presumptions, 15 Wash. L. Rev. 71 (1940); McCormick, What Shall the Trial Judge Tell the Jury About Presumptions, 13 Wash. L. Rev. 185 (1938); Morgan, Presumptions, 12 Wash. L. Rev. 255 (1937).
INSTRUCTING A JURY

Herder, in which an instruction to the effect that the presumption of due care continues "until it has been overcome by the evidence in the case," was approved. While the Steele and the Karp cases have been overruled by Hutton v. Martin and Mills v. Pacific County insofar as they approve giving any instruction on the presumption of due care where the issue is contributory negligence, they have not been criticized by the Washington court on the wording of the instructions as they pertain to the quantum of proof required to overcome a presumption.

In Samuels v. Hiawatha Holstein Dairy Co., the Washington court upheld an instruction to the effect that whenever a presumption that an automobile is operated by its owner exists, the burden is then cast upon the defendants "to overcome such presumption by competent evidence." This case was followed by Steiner v. Royal Blue Cab Co. in which the court approved an instruction to the effect that a presumption of operation of a vehicle by the owner arises when the ownership is admitted or proved, and that the burden is then cast upon the defendant to overcome the presumption by "a fair preponderance of all the evidence." In the Steiner case, the court cited two previous cases, Griffin v. Smith and Foster v. Pacific Clipper Line with approval. In the Griffin case, the court had held that the presumption stood until "overcome by testimony to the contrary." In the Foster case, the court upheld an instruction to the effect that if the facts raised a presumption of negligence on the part of the defendant who had set up an affirmative defense of due care, then the burden of removing the presumption was on the defendant, and a jury should find for the plaintiff if the evidence was "evenly balanced." While the Steiner case has been altered by Bradley v. Savidge, Inc. as to what type of evidence is necessary to overcome the presumption, it has not been overruled as to the type of instruction to be given when submitted to a jury. The court in the Bradley case did say, however, that the presumption did not shift the ultimate burden of proof.

It is clear in Washington, at present at least, that a presumption is not evidence and does not shift the burden of persuasion. It shifts the

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82 21 Wash. 287, 57 Pac. 820 (1899).
83 181 Wash. 583, 44 P.2d 808 (1935).
84 41 Wn.2d 780, 252 P.2d 581 (1953).
85 48 Wn.2d 211, 292 P.2d 362 (1956).
86 115 Wash. 343, 197 Pac. 24 (1921).
87 172 Wash. 396, 20 P.2d 39 (1933).
89 30 Wash. 515, 71 Pac. 48 (1902).
90 13 Wn.2d 28, 123 P.2d 780 (1942).
burden of evidence; i.e. the burden of "going forward" with the evidence.91

Keeping in mind what the Washington court has recently held concerning presumptions, the older cases to the contrary notwithstanding, it seems that Instruction No. 22 of CALIFORNIA JURY INSTRUCTIONS—CIVIL92 should be adequate. That instruction reads as follows:

Evidence may be direct or indirect. Direct evidence is that which, if true, proves a fact in dispute directly.

Indirect evidence is also known as circumstantial evidence. It is evidence which, if true, proves a fact which gives rise to an inference or presumption of the existence of a fact in dispute.

The law makes no distinction between direct and indirect evidence as to the degree of proof required, but accepts each as a reasonable method of proof and respects each for such convincing force as it may carry. An inference is a deduction which the reason of the jury draws from the facts proved.

A presumption is a deduction which the law expressly directs to be made from particular facts. Unless declared by law to be conclusive, it may be controverted by other evidence. If it is not controverted, the jury is bound to find in accordance with the presumption.

The fact that a presumption arises is never to be taken to mean a change in the burden of proof.

If the burden of proof of the issue to which a presumption relates rests on the party in whose favor the presumption arises, then it is not necessary for the other party to overcome the presumption by a preponderance of the evidence. In that case, the presumption together with any other evidence supporting it must have more convincing force than the contrary evidence in order to justify a finding in accordance therewith. If the party in whose favor the presumption arises does not have the burden of proof of the issues to which it relates, then it is necessary for the other party to overcome the presumption by a preponderance of contrary evidence.

The above instruction seems to embody all of the principles of law recently adopted by the Washington court, both as to the burden of proof applied to presumptions and as to its effect. The only change the writer could suggest would be to start the last paragraph with the word "Therefore," and eliminate the last sentence of the last paragraph, in


keeping with the rationale of *Hutton v. Martin*[^3] and *Mills v. Pacific County*,[^4] which hold an instruction erroneous where the presumption operates against the party who has the burden of proof.

When should an instruction on presumptions be given? Of course, an instruction need not be given in the absence of a true presumption and should not be given where it is ruled on as a matter of law. If the presumption is a true one and no rebuttal evidence (interested or disinterested) is produced, the court must rule as a matter of law that the presumed fact exists, and no problem of instructing the jury arises.

In cases where agency is presumed from ownership of a car, the rebuttal evidence must be “uncontradicted, unimpeached, clear, and convincing” for the court to rule on it as a matter of law. If the court determines that the rebuttal evidence is of that quality, then it must rule, as a matter of law, against the presumption. If the evidence is not of sufficient quality, it must go to the jury.[^5] This rule should apply to similar cases, such as those requiring “clear, cogent and convincing” evidence to overcome the presumptions of competency and honesty,[^6] i.e., the court cannot rule as a matter of law unless such evidence is also “uncontradicted and unimpeached.”

If evidence is introduced by the party against whom the presumption operates, a jury question is usually presented, even though no more evidence is presented in favor of the presumed fact. This is especially true in cases where the basic facts giving rise to the presumption have some probative value presenting a jury question in and of themselves, or where the evidence presented against the presumption is of doubted credibility.

What must the trial court do where contradictory evidence is submitted which establishes a prima facie case against the presumption and no evidence is submitted in substantiation of the presumption? In a recent summary judgment case, *Bates v. Bowles White & Co., Inc.*[^7], the Washington court held that where a presumption is met by a prima facie case against it, the trial court must rule, as a matter of law, against the presumption since it has lost its “efficacy.” The court said, in effect, that where a presumption, unsupported by other evidence, is met by a prima facie case it is not to be submitted to the jury. If the prima facie

[^3]: 41 Wn.2d 780, 252 P.2d 581 (1953).
[^7]: 56 Wn.2d 374, 353 P.2d 663 (1960).
case is disbelieved or could be disbelieved by a trier of fact, the presumption has not lost its efficacy. Thus it seems that the Bates case stands only for the proposition that if the prima facie case is unimpeached and uncontradicted and so unimpeachable that reasonable minds could not differ as to its veracity, then, and then only, there is no jury question. That certainly is the meaning of the Bradley and Callen cases.

It is the writer's opinion that until the Washington Supreme Court adopts the Thayerian Theory or states otherwise, a true presumption should be submitted to the jury by means of the instruction suggested if the foundation facts have been proven by believable evidence, even though unsupported by other evidence of the presumed fact, and even though it is contradicted by a prima facie case, unless:

1. The foundation facts giving rise to the presumption have no probative value in and of themselves upon which reasonable minds could differ; and
2. The evidence supporting the prima facie case is so unimpeachable or irresistible that reasonable minds cannot differ as to its weight or veracity. To do otherwise would destroy the whole concept of presumptions, as well as the function of the jury.

In cases where the presumed fact is substantiated by other believable evidence, it must be submitted to the jury with proper instructions, even though met by substantial proof or a prima facie case.

**Inconsistent Presumptions.** One suggested method for handling inconsistent presumptions is contained in the Uniform Rules of Evidence.

**Inconsistent Presumptions.** If two presumptions arise which are conflicting with each other the judge shall apply the presumption which is founded on the weightier considerations of policy and logic. If there is no such preponderance both presumptions shall be disregarded.

The problems confronting a trial court in determining which presumption is the "weightier" is discussed in the "comment" following the rule.

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98 Even uncontradicted evidence is not binding on a jury when the jury can find circumstances inconsistent with it; and a jury is not at all bound to believe interested testimony. See Pearsall v. Paltas, 48 Wn.2d 78, 291 P.2d 414 (1955); Brotherton v. Day & Night Fuel Co., 192 Wash. 362, 73 P.2d 788 (1937).

99 Callen v. Coca Cola Bottling, 50 Wn.2d 180, 310 P.2d 236 (1957); Bradley v. Savidge, Inc., 13 Wn.2d 28, 123 P.2d 780 (1942). See also City of Seattle v. Bryan, 53 Wn.2d 321, 333 P.2d 680 (1958), in which the court held that a jury question was presented where the state's case, based upon the statutory presumption of intoxication, was rebutted by the testimony of an interested witness.

100 Instruction 22, 1 California Jury Instructions—Civil [BAJI] (4th ed. 1959 Supp.).

101 Rule 15.
As a practical matter, where there are two conflicting presumptions, one of them usually operates against the party having the burden of proof and the other operates in his favor. If that is the case and if the rationale of *Hutton v. Martin*¹⁰² is applied, the presumption operating against the party having the burden of proof will be disregarded since it is swallowed up by the stock instruction on burden of proof. Only the presumption operating in favor of the party having the burden of proof should be mentioned and the suggested instruction given.¹⁰³ In criminal cases, however, the admonition of the court set out in *State v. Kellberg*¹⁰⁴ should be heeded; which in effect, makes a presumption operating against the defendant merely a permissive inference.¹⁰⁵

**Quality of Evidence.** Some Washington cases indicate that the usual civil case burden of proof by a preponderance of the evidence changes. This is especially true in fraud cases, and cases where the plaintiff seeks to prove lack of testamentary capacity, in which courts require the proof to be “clear, cogent and convincing.” The first case to indicate such a change (not a shift) in the burden of persuasion was *Clark v. Federal Motor Truck Sales Corp.*¹⁰⁶ The case involved fraud and the Washington court held it reversible error to instruct the jury that the plaintiff must prove all elements of his case by a “fair preponderance of the evidence,” even though three special instructions advised the jury that the burden rested on the plaintiff to establish his case by “clear and convincing” evidence. The court said the instructions were “confusing” and cited two cases¹⁰⁷ as authority for its ruling. It is interesting to note that the two cases cited deal with confusing instructions generally, and do not deal with burden of proof. They do not support the holding that the instructions were in fact “confusing.” An identical situation was presented in *Olympia Credit Bureau, Inc. v. Smedegard,*¹⁰⁸ in which the court adopted the rule announced in the *Clark* case and said:

The statement of the correct rule, *i.e.*, that fraud must be proved by clear, cogent and convincing evidence, given in a general instruction,

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¹⁰² 41 Wn.2d 780, 252 P.2d 581 (1953).
¹⁰⁴ 56 Wn.2d 283, 352 P.2d 189 (1960).
¹⁰⁵ Compare, however, City of Seattle v. Bryan, 53 Wn.2d 321, 333 P.2d 680 (1958), in which the Washington court approved an instruction on the presumption alone, even though rebuttal evidence was introduced.
¹⁰⁶ 175 Wash. 438, 27 P.2d 726 (1933).
¹⁰⁸ 40 Wn.2d 76, 78, 241 P.2d 203, 204 (1952).
cannot cure the error of applying the test of a preponderance of the evidence to the establishment of fraud under the facts of the particular case. In *Cheesman v. Sathre*, the court again adhered to the rule, saying: "Unquestionably, the words 'clear, cogent, and convincing' mean something more than a mere preponderance of the evidence." (Emphasis added.) The Washington court recently held clear, cogent and convincing evidence necessary to prove mental incompetency, which inferentially at least, would require "something more than a mere preponderance of the evidence." The same could be said for all cases in Washington which require that quality of evidence, such as the cases holding that the evidence to overcome the presumption of testamentary capacity must be "clear, cogent and convincing."

The fallacy of the *Clark* case, so ardently followed by the Washington court in the later cases, is apparent on close scrutiny. The traditional burden of proof is not incongruous with the requirement that the evidence also must be "clear and convincing" or "clear, cogent and convincing," since burden of proof deals in comparisons and not in quality of proof alone. A sharp distinction is drawn between the "quality" of evidence and the quantum of evidence in an early Washington case. *Ohlson v. Sawbridge* clearly defines "preponderance of the evidence" as the greater weight of evidence on the one side when "contrasted and weighed" against the evidence opposed to it. The *Ohlson* case is followed to this day in stock instructions. In the usual civil case then, the burden is not one of fineness but one of comparison of probability or weight. The weight takes into account not only the quality or fineness, but also the number of witnesses and amount of proof, regardless of fineness. As a matter of fact, in the usual civil case an issue may be found in accord with the preponderance of evidence, and yet the mind may be left in doubt as to the very truth. In other words, the scales of justice may be tipped by evidence that is good, bad or only fair. Whether evidence is "clear and convincing" is undoubtedly one factor in the comparison but not the only one, since the evidence on both sides

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111 See *In re Peters' Estate*, 43 Wn.2d 846, 264 P.2d 1109 (1953).
112 Gilmore v. Seattle & Renton Ry., 29 Wash. 150, 69 Pac. 743 (1902). See also Peart v. Perry, 152 Wash. 5, 277 Pac. 81 (1929), in which the same distinction is made.
113 156 Wash. 430, 287 Pac. 206 (1930).
114 See Heacock v. Baule, 216 Iowa 311, 249 N.W. 437 (1932). Actually, when dealing with burden of proof in a civil case, one is dealing with probabilities, i.e., the party having the burden of proof must persuade the finder of fact that the proposition on which he has the burden of proof is more probably true than not true. It is submitted that perhaps a definition along those lines would be more understandable to a jury than the traditional definition of burden of proof now usually given in Washington.
may be of that degree of fineness and so considered by the jury. The
jury, however, must reach a verdict. They should not be instructed that
they can find for a party simply because he submits evidence that is
"clear and convincing," and nothing more. They would be told to
weigh without a scale. However, if the jury is told that the plaintiff in
such a case must prove its case by "clear, cogent and convincing evi-
dence that preponderates over the evidence of the opposite party," both
the quality and the quantum of evidence necessary is taken into account
and the traditional burden of proof is not disturbed. If, on the other
hand, it is said that the burden of proof must be met by something dif-
ferent than a preponderance of the evidence, then what scale or measure
is used? Is it "beyond a reasonable doubt" or somewhere between that
and a "fair preponderance of the evidence?" If it is somewhere be-
tween, how far down the scale does one go?

The basic theme of this article is to simplify instructions; not to make
them more confusing. Accordingly, it seems wiser to instruct the jury
that the plaintiff must prove his case by evidence which is clear, cogent
and convincing, and which preponderates over the opposing evidence.
Trial attorneys and trial courts should remember the mandate of the
Clark case, however. No one can say for sure whether the Washing-
ton court will persist in following it.

Instructions Regarding Evidence Evenly Balanced. Much diffi-
culty has been encountered in Washington in wording instructions tell-
ing a jury what to do in the event the evidence for both parties is
"evenly balanced." In the recent case of Dods v. Harrison, the court
rejected an instruction that told the jury if it was "unable to find from
a preponderance of the evidence whose negligence, if any was negligent,
was the direct and proximate cause of the injuries," then the verdict
should be for the defendants. (Emphasis added.)

In another recent case, Chase v. Beard, the court approved an
instruction which said that if the evidence were "evenly balanced," the
jury should find for the defendant. Likewise, the court approved such
an instruction in Sherman v. Mobbs, distinguishing the Dods case.

The Washington court has also held that while the giving of such an
instruction is not error, if correctly worded, the refusal to give it is also

116 51 Wn.2d 446, 319 P.2d 558 (1957).
117 Id. at 449, 319 P.2d at 560.
not error where the jury is otherwise adequately instructed on the burden of proof in the traditional manner. In the interest of brevity and simplicity, it is suggested that the trial court reject "evenly balanced" instructions, since the matter is and should be adequately covered by the traditional instruction on burden of proof.

COMMENT ON THE EVIDENCE

As a further incentive to simplification, the "no comment" provision of the Washington Constitution provides that "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law." An instruction which assumes as true the essence or nonessence of any material fact in issue, in respect of which the evidence is conflicting, is a comment on the evidence and should never be given. The constitutional provision simply means that the court is prohibited from informing the jury, by either words or actions, of its own personal opinion upon any evidentiary matter. The assumption or recital of undisputed, admitted or conclusively shown facts in an instruction does not constitute a comment on the evidence. Instructions are not open to the objection that they assume controverted facts where they merely state the issues of the case, claims of the parties, matters of common knowledge, or abstract legal propositions without applying them to the facts, if they do not mislead or confuse the jury.

If controverted facts are mentioned by the court, the instruction should be worded hypothetically. It should start out with the words "If you find by a preponderance of the evidence . . .;" or the recitation of facts should be followed by the words "if any" or "if you so find." As stated by the author of Reid's Branson:

There is an invasion of the province of the jury where the judge:
(1) states an uncontroverted fact hypothetically; or (2) asserts a con-

120 See Johnson v. Barnes, 55 Wn.2d 785, 350 P.2d 471 (1960); Dods v. Harrison, 51 Wn.2d 446, 319 P.2d 558 (1957). See also Illinois Pattern Jury Instructions § 21.06 (1961), in which the committee "recommends that no 'evenly balanced evidence' instruction be given."
121 Wash. Const. art. IV, § 16.
124 See Case v. Peterson, 17 Wn.2d 523, 136 P.2d 192 (1943); Blair v. Callhoun, 87 Wash. 154, 151 Pac. 259 (1915).
125 See Herndon v. City of Seattle, 11 Wn.2d 88, 118 P.2d 421 (1941); Brammer v. Lappenbusch, 176 Wash. 625, 30 P.2d 947 (1934); Settles v. Johnson, 162 Wash. 466, 298 Pac. 690 (1931).
troverted fact instead of stating it hypothetically; or (3) fails to hypothetically state all the essential facts necessary to be found as a basis for the indicated verdict. 127

While hypothetical instructions or so-called formula instructions are frowned upon by some courts, 128 they do not constitute a comment on the evidence in Washington, and may be necessary in properly submitting a party's theory of the case to the jury. They should be used sparingly and should not be complicated or repetitive of general instructions where the general instructions are adequate. The following observation was made by the Washington Supreme Court:

In simple negligence cases, such as this one, in order to be fair to both parties litigant, instructions should not go beyond a simple general statement of the basic requirement of the law respecting ordinary care, unless it is necessary to explain one party's duty with respect to a unique or special phase of the particular case. If the average juror should be able to apply a simple general statement of the law properly to all the facts in the case, then a further instruction is unnecessary. 129

Proposed instructions advising the jury that it may or should consider certain specific evidence in arriving at certain conclusions or findings or in arriving at a verdict should ordinarily be rejected. They are often proposed in negligence cases where one party wishes to call attention to certain facts in evidence as indicative of distance or speed. While such instructions may be legally correct and, if worded properly, may not technically be a comment on the evidence, they approach "comment" since they intimate to the jury that the judge thinks that particular evidence commands special attention or has more weight than the other evidence. They tend to "highlight" or "pinpoint" certain evidence to the detriment of other evidence in the case. In that way they do constitute "comment." Such instructions are ordinarily needless since the jury will consider all evidence not stricken by the court, and it is the attorneys' function to (and they undoubtedly will) call attention to such evidence in their argument. The only time they should be given is when some other instruction or some special quirk in the case may lead the jury to believe that it should ignore such evidence, even though not specifically told to do so. For example, if a jury is told in an instruction that evidence cannot be considered for certain purposes or in arriving at certain conclusions, they should also be told whether

127 1 Red's Branson, § 21 (1960).
that same evidence may be considered for other purposes. In most instances, the whole matter can be covered by a single instruction.

An instruction advising jurors that they may consider the interest, bias, or demeanor, of a witness in determining the weight they will give to his testimony is not obnoxious if it applies equally to all parties and witnesses and does not pinpoint any particular evidence or witness.\(^3\) Another exception occurs in certain damage cases, in which the jury should be instructed as to what may or should be considered as an element of damages. While such damage instructions may tend to pinpoint or highlight certain evidence in a general way, they may be necessary to properly advise the jury what may be considered. Such instructions, if given, should be general in form, and should not call attention to specific evidence in a specific case, and should be followed by the words "if any," or be preceded by the words "if you find," where the evidence is conflicting. An instruction may refer to the evidence only so long as the reference does not amount to an explanation or criticism of it, assert or assume that a particular fact is proven,\(^3\) or unduly highlight that particular evidence.

**MISCELLANEOUS RULES AND SUGGESTIONS**

Several other miscellaneous suggestions and rules leading to simplicity should be remembered in preparing jury instructions: (1) Instructions should not be repetitious. Repetitious instructions may or may not be in error, depending on whether they overemphasize one party's theory.\(^2\) (2) The trial court is not required to rewrite a requested instruction to eliminate inapplicable portions; and unless a requested instruction may be given without modification, error may not be assigned for not giving it.\(^2\) (3) It is not necessary that each instruction contain a complete exposition of the law applying to the point in controversy.\(^4\) (4) Giving or refusing to give instructions admonishing the jury not to be influenced by sympathy or prejudice is discretionary with the trial court.\(^5\) (5) Submitting special interrogatories to the jury is discretionary with the trial court, whose refusal to submit them will not be reviewed on appeal.\(^6\)

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\(^{130}\) See Klepsch v. Donald, 4 Wash. 436, 30 Pac. 991 (1892).


\(^{133}\) See Krogh v. Pemble, 50 Wn.2d 250, 310 P.2d 1069 (1957).

\(^{134}\) See Hutton v. Martin, 41 Wn.2d 780, 252 P.2d 581 (1953).

\(^{135}\) See Curtis v. Perry, 171 Wash. 542, 18 P.2d 840 (1933).

\(^{136}\) See Brown v. Intercoastal Fisheries, 34 Wn.2d 48, 207 P.2d 1205 (1949).
(6) An instruction should not be given simply because it is a direct quote or excerpt from a supreme court decision. It may be out of context, or may not apply to the conditions of the case being considered.\(^{137}\) Giving such instructions is a common fault and should be guarded against by thoroughly understanding the case from which the excerpt is taken. Thoughts or principles may be borrowed, but not words. Also, the case from which the quotation or statement is taken should be analyzed to see whether the court really meant what it seemed to say. In *Kerlik v. Jerke*,\(^ {138} \) the court said: "Because appellant driver's view was obstructed, it was incumbent upon him to proceed with *extra-ordinary care.*" (Emphasis added.)\(^ {139} \) This would seem to change the Washington ordinary care "doctrine." The next paragraph indicates that the court is only applying *ordinary* care, which requires a greater *amount* of care, and so, under the circumstances, is in keeping with *Ulve v. Raymond*,\(^ {140} \) which definitely says that there are *no degrees of care*.

Speaking of degrees of care, instructions such as those approved in *Bell v. Bennett*,\(^ {141} \) elaborating on the ordinary care instruction to the effect that the duty of ordinary care in certain instances is "*intensified rather than diminished,*" should be forgotten. That type of instruction here is useless, meaningless and confusing, and should be "*diminished*" rather than "*intensified.*" *One should strive for simplicity and clarity rather than duplicity and complication.*

(7) Negative instructions need not be given as to matters already covered by positive instructions.\(^ {142} \) The practice of giving negative instructions as to matters already covered by other instructions should be discouraged. Repetitious instructions, although couched in different language, do not add to the simplicity or clarity of a jury charge.

**SUMMATION**

From the observations made heretofore, one may arrive at certain rules or recommendations:

(1) The final issues of the case should be submitted to the jury in a simple, clear, concise and complete statement. Instructions should not be encumbered by long, drawn-out narratives of evidence or argumentation which may be contained in the pleadings.

\(^{138}\) 56 Wn.2d 575, 354 P.2d 702 (1960).
\(^{139}\) Id. at 577, 354 P.2d at 705.
\(^{140}\) 51 Wn.2d 241, 317 P.2d 908 (1957).
\(^{141}\) 56 Wn.2d 780, 355 P.2d 331 (1960).
Material facts in controversy, in respect of which the evidence is conflicting, must not be assumed but should be treated hypothetically. However, long, complicated hypothetical instructions should be avoided.

(3) Each party is entitled to have his theory of the case presented in instructions to the jury if there is substantial evidence in the case to support it. Instructions on the theory of the case should not be repetitious, argumentative, complicated or confusing.

(4) Instructions on presumptions and burden of proof should be carefully worded, keeping the rationale of the holdings of the supreme court in mind. They should ordinarily be omitted where the matter has been adequately covered by traditional instructions on burden of proof, or where true presumptions are not involved.

(5) Instructions should not be repetitious or given where the matter is substantially covered by other instructions, where they will single out a particular item of evidence for comment, or give undue prominence to certain phases of the case. The mere fact that the supreme court has held it not to be erroneous to give some particular instruction does not mean that it must be given, nor does it mean that two or more slanted instructions should be given where one good general instruction will adequately cover the subject. Slanted instructions should be entirely eliminated.

(6) Instructions should be refused where they are ambiguous, misleading or not entirely correct.

(7) Special interrogatories are discretionary with the trial court. They should be given where they will perhaps prevent the need for a new trial or are necessary to a complete determination of the case. They should not be given out of curiosity or as a trap for a new trial.

(8) Instructions should never be given unless they are called into play by the issues or evidence of the case, and then only if they are pertinent to the issues and evidence.

See Duplanty v. Matson Nav. Co., 53 Wn.2d 434, 333 P.2d 1092 (1959), in which the Washington court held it not error to refuse to give three proposed instructions, which were "argumentative and slanted," the instructions given being complete and proper. The proposed instructions are three frequent offenders: (1) stating that a person may not cast the burden of his protection upon another but must use his own intelligence and faculties for his own protection, etc.; (2) stating that the defendant is not an insurer and is liable only for his negligence; and (3) stating that one is charged with the duty of seeing those objects or persons, which he would have seen had he been exercising reasonable care. These three instructions have been proposed many times, and given many times, and are, perhaps, not in error if given. Nevertheless, they are not required and should not be given where the usual unslanted instructions on negligence and burden of proof cover the issues of the case adequately. Accord, Gaunt v. Alaska Steamship Co., 157 Wash. Dec. 747, 360 P.2d 354 (1961).
(9) Finally, and most important, instructions should be correct, plain, simple, concise and limited to as few in number as possible. If it is deemed necessary to give an instruction, it should be tested by the following questions: (a) Is it a completely correct statement of the law? (b) Is it as brief as possible? (c) Is it understandable to the average juror? (d) Is it impartial, unslanted and free from argument?

CONCLUSION

It is hoped that this article, though certainly not an unique approach to an old problem, will inspire some positive thinking on the dire need in Washington for standardized or pattern jury instructions, similar to those developed in other states. Uniform instructions will lead to better and simplified instructions, and greatly minimize error. They

144 The following states, among others, have apparently developed so-called uniform or pattern jury instructions: Alabama (an article in 58 Dick. L. Rev. 354, 360 (1954), says, without citing authority, that Alabama has uniform jury instructions); California (prepared by judges of the Superior Court of Los Angeles County, financed by royalties and entitled CALIFORNIA JURY INSTRUCTIONS—CIVIL, also known as BAJI, and CALIFORNIA JURY INSTRUCTIONS—CRIMINAL, also known as CALJIC, published by West Publishing Co. in 1956 and 1958); Illinois (prepared by a committee, comprised of lawyers, judges and law professors, appointed by the Supreme Court of Illinois, effective Feb. 1, 1961, and entitled ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL, also known as IPI, published in 1961 and being sold for $20.00 per copy by Burdette Smith Co. of Chicago); Iowa (prepared by the State Bar Association under grant from the Iowa State Bar Foundation and distributed to each member of the association without charge; referred to in 44 J. AM. JUD. Soc’y 148 (1960)); Nebraska (the first instructions were published in pamphlet form and supplemented in 33 Neb. L. Rev. 124 (1953)); Utah (referred to in 5 Utah L. Rev. 149 (1956)); Wisconsin (approved by Wisconsin Board of Circuit Judges in 1960, entitled WISCONSIN JURY INSTRUCTIONS—CIVIL, Part 1, published and sold by the University of Wisconsin Extension Law Dept. in loose-leaf form for $20.00 per copy). It is interesting to note that the Supreme Court of Illinois, by Supreme Court Rule 25—1 requires the use of the applicable IPI instruction if the trial court, after due consideration of the law and the facts, determines that the jury should be instructed on the subject, unless the court determines that it does not accurately state the law, and if an IPI instruction is not used that the instruction on the subject “be simple, brief, impartial and free from argument.” It is the writer’s opinion that the ILLINOIS PATTERN JURY INSTRUCTIONS [IPI] is the finest work of its kind yet published and the procedure used in developing the work product, as outlined in the foreword to the publication, might well be imitated. The Illinois Supreme Court has effectively and commendably eliminated the so-called “slanted” instruction. Minnesota is working on such a project according to 44 J. AM. JUD. Soc’y 107 (1960).

145 See Reed v. Stroh, 54 Cal. App.2d 183, 188, 128 P.2d 829, 832 (1942), in which the court said: “We again suggest the advisability of conforming instructions with the California Jury Instruction, Civil, sometimes referred to as BAJI, prepared by the Superior Court of Los Angeles County. A more generous use of such forms and a more consistent adoption of the system of stating the law free from unnecessary verbiage, as indicated by such forms, is calculated to diminish the causes for appeals and at the same time will serve as insurance against the confusion of juries.” See also comment of Gerald C. Snyder, Chairman of Illinois Supreme Court Committee On Jury Instructions contained in Foreword, ILLINOIS PATTERN JURY INSTRUCTIONS [IPI] at xix (1961), in which he said: “We feel that under this instruction system the 38% record of reversals, based in whole or in part upon erroneous instructions, will be practically eliminated. The saving of the time of Courts, counsel and witnesses, and the reduction of the expense to the taxpayer and litigants will amount to millions of dollars annually. More important, prompt and true administration of justice in jury trials will be greatly advanced.”
will also result in a considerable saving of time by both lawyers and judges at the trial level. It may also be anticipated that the study and work by the bench and bar in formulating them will lead to the determination of some of the complex problems now facing us, especially in regard to the confused state of the law pertaining to such matters as burden of proof, presumptions and due care. This article has barely scratched the surface on a few of the problems, but it is hoped that it will encourage a new appreciation of the difficulties now encountered. A project to standardize jury instructions on a state-wide basis will not be easy. It will entail much work, thought, trial and error.\textsuperscript{146} It will also call forth many amendments as the years roll by, since jurisprudence is a living, changing science, expressing the thoughts and mores of the changing times.

\textsuperscript{146} It took the Illinois Committee four years to prepare the \textsc{illinois pattern jury instructions}.