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*Lancaster County District Court*

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# SOME APPROACHES TO THE INSTRUCTIONAL PROBLEM\*

Judge Paul W. White\*\*

*The author has intended this article as a practical approach to the topic of instructions. It will be most helpful to the young lawyer or beginning pleader in the negligence area of the law. The article has two distinct parts. First, an examination of Nebraska's instruction procedure in comparison to those procedures in other states, and second, ten very practical "commandments" set forth as guides to the lawyer practicing under Nebraska's present system.*

*The Editors*

## I. INTRODUCTION

The study or science of dialectics was once the proper and perhaps exclusive prerogative and glory of the theologian. The suggestion has been made that the art of reasoning about matters of opinion (as Webster defines the term "dialectics") has been carried to its ultimate and perhaps impractical finality in the over-refinement of appellate court hindsight examination of the trial judge's judicial charge. Counsel and litigant are given, under the Nebraska rules, maximum freedom from any responsibility, both before and at the time of the crisis of submission. Consequently, losing counsel's hindsight effort to destroy each and all of the instructions in the charge is perhaps augmented by the multiple-mind re-examination of a conscientious appellate court. This article has the dual purpose of both reviewing the adequacy of Nebraska's instructional system in the light of other systems and to consider the lawyer's relationship to the present system and make recommendations along these lines.

\*The third section of this article was presented, in part, by Judge Paul W. White as a speech at the National Association of Plaintiff's Attorney's Seminar, October, 1959. However, its publication in this article, following the discussion of Nebraska's inadequacy of instruction procedure, is very timely and, we are sure, it will be helpful to the practicing attorney to have the "ten commandments" in print. *The Editors.*

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## II. ADEQUACY OF INSTRUCTION PROCEDURE

The adequacy of instruction procedure, as distinguished from the substantive correctness of individual instructions, has been a neglected subject in our law schools and in our attempts to reform judicial procedure. On the subject of revision and adequacy of instruction procedure, Curtis Wright, in an exhaustive and dispassionate survey of the practices of the then forty-eight states,<sup>1</sup> said:

. . . [A]dequacy is a neglected subject, whereas the very opposite is true as to the matter of correctness. The striving for correctness has already been carried to a fine point of analysis, as the opinions no less than the treatises show. Errors of commission, it seems, have been taken through all stages of the process of philosophical refinement, which begins with classification and analysis, and ends in casuistry. Many are the opinions that remind us that we have become too technical and refined in ferreting out defects in instructions which by bare possibility might have misled some jurymen.<sup>2</sup>

Here pertinent is a much quoted statement from a Missouri Supreme Court opinion of fifty-five years ago:<sup>3</sup>

It has not hitherto been allowed to a nisi prius judge—a puisne judge—to have been so successful in “mastering the lawless science of our law” . . . that he has the whole body of the law at his fingers’ ends, so to speak, for instantaneous and automatic application, ex mero motu, without having his attention directed by counsel to some specific legal principle. . . . Only appellate courts . . . are so endowed, and even this . . . should be . . . taken “cum grano salis.”

The movement to establish balanced standards for instruction procedure and “adequacy” in this sense received real direction and response in many states about twenty to twenty-five years ago, along with the adoption of the Federal Rules of Discovery and Pre-

<sup>1</sup> Wright, *Adequacy of Instructions to the Jury*, 53 MICH. L. REV. 505, 813 (1955). In this article, the author has included a map entitled “Relative Degrees to Which State Systems Encourage Adequacy of the Charge to the Jury.” This map indicates the following:

*Adequacy encouraged:* Calif., Ariz., N.M., Minn., Wisc., Mich., Me., N.H., Vt., Mass., Conn., R.I., N.Y., Penn., Md., and Del.

*Adequacy factors present to a lesser degree:* Wash., Ore., Nev., Utah, Tex., La., S.Dak., Iowa, Ind., Ky., Tenn., Fla., and S. Car.

*Major restrictions discourage adequacy:* Idaho, Mont., Wyo., N. Dak., Colo., Kans., Ark., Ala., Ohio, W.Va., and Va.

*Nonfunctional systems:* Nebr., Okla., Mo., Ill., Miss., Ga., and N.Car.  
<sup>2</sup> *Id.* at 509.

<sup>3</sup> *Bragg v. Metropolitan St. Ry.*, 192 Mo. 331, 91 S.W. 527 (1905).

Trial Procedure, and Rule 51, as to charging the jury and the timeliness of objection thereto. The classic study and recommendations in that respect were assimilated and formulated in the report of the Section on Judicial Administration of the American Bar Association in 1938.<sup>4</sup> The history of this movement is very interesting, but brevity forbids its inclusion in this article.<sup>5</sup> In the past twenty-five years, California, Arizona, New Mexico, South Dakota, Iowa, Wisconsin, Minnesota and Michigan have either adopted or formulated systems in substantial harmony with the principle of the American Bar Association report of the section on Judicial Administration or have made local adaptations of Rule 51 of the Federal Code of Civil Procedure with respect to jury instructions. Iowa may be used as a prototype. The Iowa Statute and experience since 1944 are readily available. Rule 196 of the Iowa Civil Code, an adaptation of Federal Rule 51, reads as follows:<sup>6</sup>

. . . [B]efore instructions are read to the jury. . . all objections to giving or failing to give any instruction must be made in writing or dictated into the record. . . specifying the matter objected to and on what grounds. No other grounds or objections shall be asserted thereafter, or considered on appeal.

In an exhaustive study of instructional practices in the Eighth Circuit states, Curtis Wright states that the above 1944 rule "makes the very best of a restricted system of instructing."<sup>7</sup> He notes dramatically the change in the number of cases reversed for instructional errors. The best review of the value of the change is by the official statutory "Rules Advisory Committee" of the State of Iowa itself:<sup>8</sup>

It was the tendency of all lawyers heretofore to refrain from calling the attention of the court to any errors in instructions until such questions were raised on a motion for a new trial. As a result of this, many cases were reversed in the Supreme Court due to errors in instructions, which errors would have been cured in the lower court had the same been called to the attention of the lower court.

This Rule aims to Restore instructions to their proper function: to enlighten the jury as to the law which they are to apply to the fact; and not to trap a hurried and harried trial judge. If counsel cannot see anything wrong with the court's final draft, when he reads it, a jury is not likely to be misled by it.

<sup>4</sup> 63 A.B.A. Rep. 517 (1938).

<sup>5</sup> See Wright, *supra* note 1, at 513, 817.

<sup>6</sup> IOWA R. CIV. P. 196.

<sup>7</sup> Wright, *supra* note 1, at 528.

<sup>8</sup> COOK, IOWA RULES OF CIVIL PROCEDURE, (rev. 2d 1951). The first paragraph is from committee's comment to Rule 196, p. 358 while the second paragraph is Cook's comment, p. 359.

Whatever may be the comparative detailed analysis of the various rules adopted in these states, they manifestly have the objective of and seek to accomplish two vital functions. First, they eliminate general unspecified objections to the judge's charge, and, second, they re-establish and enforce the duty of counsel and the litigants with respect to the preparation of and the examination of instructions as to validity *prior to the time of submission*.

Balance is thus restored in the trial picture. A co-operative effort that demands the joint responsible efforts of counsel and the judge is thus infused into the trial picture. The right of the losing litigant leisurely to destroy the finality of submission is materially diminished. The manner of final presentation in the charge of the pleading and theory of a case, thus becomes a concurrent responsibility of litigant and counsel. The task continues through trial and final submission, as it manifestly should if finality in submission and lowered cost of litigation are to be achieved. Thorough preparation and pleading and theoretical preparation of the facts are axiomatic in the function of the true lawyer. The very essence of the function of counsel is to properly weave the facts into apposite and harmonious relation to the law and to structure the pleadings commensurate thereto. To require the construction of such a ship of litigation and then to permit almost complete abandonment when it sets sail on the stormy sea of trial and final submission is to ask for disaster, which is all too common.

That the device of general unspecified objections, coupled with the trial court's broad mandatory duty to charge as to all issues raised by the pleadings and the evidence, irrespective of requests or specific objections may be used by a losing litigant to invite and create error is almost manifestly true. It is commonplace that general shotgun objections are not favored in the law. The traditional attitude of the law coincides with this statement:<sup>9</sup>

Many trials, under such a [general objection] system would practically never end. The effect of it would be to compel one party to fight in the dark, not knowing when his opponent intended to strike, while the other would be free to choose his weapons, and the time and place to use them. Such things may do in love or war, when all things are said to be fair; but life is too short to transact business on such a system in courts of justice.

The reminder that trial must have finality and that life is short returns one to the minimum standards of trial practice. Such is the conclusion in the American Bar Association report previously

<sup>9</sup> Rush v. French, 1 Ariz. 99, 25 Pac. 816 (1874); see also Wright, *supra* note 1, at 512.

cited.<sup>10</sup> The practical results of general objections, nonassistance and freedom from responsibility of counsel, coupled with the inescapable temptation to trap the trial judge under the guise of the right to "preserve error," are doubly aggravated in metropolitan areas or on a congested docket where special settings of cases and advance preparation by the trial judge are utterly impossible.

It is not the function of this dissertation to detail the instructional rules in Nebraska creating this situation or to give an exhaustive comparative analysis with other states. As mentioned before, that work has already been done.<sup>11</sup> It might, however, be helpful in gaining perspective on this problem to give a thumbnail description of the rules.

It is the duty of the court to instruct as to the law on all the issues presented by the pleadings and the evidence, whether requested to do so or not. It is the duty of the court to analyze all of the pleadings and abstract and summarize the issues on which there is any evidence. Conversely, it is prejudicial error to submit any issue on which there is no evidence or upon which there is no pleading to support such issue (with exceptions not important here). Although the statute does not so provide, comment on the evidence or charging on the facts is prohibited. A charge on the weight of the evidence is improper, and a charge giving undue prominence to a portion of the testimony or directing a jury's attention to the weight of certain testimony is reversible error.<sup>12</sup> All matters not in dispute must be eliminated, and only controverted issues of fact supported by the pleadings may be submitted.<sup>13</sup> The court has the duty to instruct *fully* upon a party's theory finding any support in the evidence.<sup>14</sup> Requests to instruct may be as numerous as desired and need not be submitted until just prior to final argument. Objections to instructions need not be asserted until the filing of a motion for a new trial, and, while each instruction must be objected to specifically, no grounds or reasons therefore need be asserted and a general shotgun objection is sufficient.<sup>15</sup>

<sup>10</sup> 63 A.B.A. Rep. 522, 523 (1938).

<sup>11</sup> Wright, *supra* note 1.

<sup>12</sup> *E.g.*, First Nat. Bank of Denver v. Lowrey, 36 Neb. 290 54 N.W. 568 (1893); Wilson v. Gamble, 50 Neb. 426, 69 N.W. 945 (1897); Kleutsch v. Security Mut. Life Ins. Co., 72 Neb. 75, 100 N.W. 139 (1904); Woodward v. Groff, 147 Neb. 270, 23 N.W.2d 275 (1946).

<sup>13</sup> Greyhound Corp. v. Lyman-Richey Sand & Gravel Corp., 161 Neb. 152, 72 N.W.2d 669 (1955).

<sup>14</sup> Gain v. Drennen, 160 Neb. 263, 69 N.W.2d 916 (1955).

<sup>15</sup> NEB. REV. STAT § 25-1114 (Reissue 1956).

A brief inspection of the Nebraska Reports themselves, or the Nebraska Digest, reveals the tremendous volume of the attack by litigants by way of appellate review of instructions.<sup>16</sup> In the 1960 Cumulative Supplement to the 1955 Edition, of the latter, there are approximately 183 annotations in the five years annotated under the key numbers reciting the general rules as to the court's duty in giving instructions.

In reviewing this Nebraska instruction process, one writer, Curtis Wright, has this to say:<sup>17</sup>

Nebraska. This State has gone to the other extreme, and enforces an unreasonable high duty rule—such as that exhibited in the earlier discussion of Oklahoma. It is black on the map simply because there are entirely too many preventable appeals on the score of inadequate instruction. Yet the court's duty is stated unequivocally: "We have often said, and it needs no citation of authority, that it is the duty of the court to instruct the jury upon the issues presented by the pleadings and evidence whether requested to do so or not."

Why is it necessary for the supreme court to repeat and repeat that formula? One answer is that it is provided by statute that "exception to the giving or refusal of instructions may be without any stated reason therefor." [Section 25-1114.] Another is that in 1948 it was held that a shotgun assignment of error to a group of twenty-four instructions suffices to raise error as to each. While the latter decision, which simply confirmed an existing practice, goes only to errors of commission, it cumulates the evidence that the duty of the trial court is in no sense balanced by a reciprocal duty on the part of counsel. The result, which may be seen for oneself by paging through a few volumes of the reports, is inevitable.

Iowa. An almost similar situation existed in Iowa prior to 1944.

It is interesting to note in this study, conducted over a four-year period of time, that seven States are listed as having "nonfunctional systems." The writer, in his conclusion in this study, says:<sup>18</sup>

The so-called trouble spots . . . are Oklahoma; Nebraska and Missouri; Illinois; Mississippi and Georgia; and finally North Carolina. . . . The reasons for such listings, briefly recapitulated, are . . . Nebraska and Oklahoma set the duty of the court to charge *sua sponte* [on its own motion] at a very high level, and counsel is given maximum freedom for [from ?] responsibility.

Since the enactment of our instruction statutes (practically unchanged since Statehood), and since the basic case law was developed applying to original statutes, the substantive law has

<sup>16</sup> WEST'S NEB. DIGEST, *Trial*, §§ 182-296(11) (1955).

<sup>17</sup> Wright, *supra* note 1, at 528.

<sup>18</sup> *Id.* at 837.

developed into a veritable mountain of refined application and special doctrines and theories, both with respect to the subject matter and to the evidence. Congested dockets and mounting case loads demand that there be a reappraisal of considerations involving the terminal point in litigation. Justice delayed is justice denied. All of the cases and the text writers point to the urgency, if the jury is to survive, of maintaining the finality of a jury verdict. A trial can never be a perfect resolution of the law or the facts as long as it is administered by human beings. It perhaps can never stand up under the stress of a dialectical hindsight examination by counsel and an appellate court. To harmonize the law and the facts in an ideally perfect, meshed relationship is impossible. Controversy requires resolution for the sake of order, a first end of the law. Consequently, the suggestion arises that there may be both a time and contention limit to the desires of parties to take adversary advantage and to achieve trial perfection. There is strength in the statement that if the lawyers and the judge, after preparation and trial, together with assumptions of their joint experience and professional skill, are unable to see or point out anything misleading or prejudicial to a jury, reason dictates that it will not mislead a jury.

Whether the solution is in Rule 51 of the Federal Rules or in a rule such as the Iowa rule, this writer cannot assert. There has been no attempt to repeal, change or return to prior practices in the jurisdictions accomplishing these changes, including the Federal. So far as is known, there is no articulated or asserted cry of injustice. Be that as it may, balance and simplicity are changes that are urgently needed in our Nebraska instructional procedure.<sup>19</sup>

### III. RELATIONSHIP OF THE TRIAL LAWYER TO THE AREA OF INSTRUCTIONS

Outside the area of responsibility in connection with requested instructions, the field of the actual affirmative relationship of a trial lawyer to the area of instructions is arid and sterile in the Nebraska cases. It is not without significance that in all the clinics on trial technique that have been held in Nebraska this writer has seldom observed an inclusion of this subject on such a program.

<sup>19</sup> Such changes were proposed in L.B. 76, 72nd Sess., Neb. Leg., which was a bill to amend NEB. REV. STAT. §§ 25-1107, 29-2016 (Reissue 1956) relating to procedure in the district court. The bill further provided the time for filing a written objection to the giving or failure to give an instruction. The bill was, however, postponed indefinitely; see Feb. 7, 1961, Leg. J. p. 370.



This would further tend to prove that in the perspective of trial importance the subject of a trial lawyer's relation to instructions has not been given appropriate attention in the past.

As already noted, reversals under the Nebraska rules because of error in the area of instructions are numerous. Obviously this situation invites attention to some of the various reasons for what appears to be a comparative lack of attention to this integral part of the final resolution of a contested case.

The following are three reasons, suggestions or possible attitudes, call them what you may, on the part of the practicing trial lawyer, that I think are important. With each of these three, I am in complete disagreement for the reasons stated after each one.

First, under our practice and order of trial procedure, custom has finally dictated that instructions should be considered and are exclusively the responsibility and the business of the judge. Any practicing lawyer with experience has observed that the business of instructions, particularly upon fundamental ones with reference to the presentation of the issues, the burden of proof, and the damage instruction usually receive nothing but passive attention from counsel.

True, the transmittal of the theory of recovery or defense, together with the recitation of the issues raised by each of the parties rests with the trial judge in the instruction area. Indeed it is his duty on his own motion to instruct on all issues raised by the pleadings and to properly present the law applicable to each adversary's theory of recovery or defense. But, having carefully built and prepared the ship for the hazardous voyage, the anxious lawyer is yet unwilling to steer it through the sea of the judges' ignorance and desire for eager cooperation with the instructions.

Second, the practical situation confronting counsel in a serious trial probably dictates and produces the usual passive and cursory attention to instructions. Faced with the problems of marshalling the witnesses to trial, detailed examination of the witnesses, introduction of documents and the order of the production of all the evidence, preparation for the cross-examination of witnesses, and preparation of arguments to the jury, the trial lawyer usually feels this does not leave time for any substantial consideration of or assistance with reference to the preparation and submission of the basic theory, issues of his case, and the substantive law applicable thereto.

The anxiety with the evidence and the marshalling of the witnesses and the factual strategizing of the trial are areas that undeniably embrace the exclusive and overwhelming attention of counsel in any serious case. But outside of emergency and unexpected areas, the preparation of the theory, the issues and specialized instructions on the basic theory of his case may be done in the quiet of the office prior to trial. It might be mentioned parentheti-

cally that obviously in complex cases with many issues and serious, controversial questions of law involved, including the difficulty of the presentation of the issues, an assistant counsel is many times needed to adequately prepare and present the instruction portion of the case.

Thirdly, there seems to be a feeling, something approaching an inherited tradition, that the area of instructions is substantially standardized; and among quite a few lawyers there is almost a subconscious feeling that they are unimportant anyway.

It is true that there are certain instructions such as the credibility instruction, the submission instruction, and perhaps the burden of proof instruction in some of the simpler types of cases that require very little attention. But in every case involving a real factual controversy on the issues there is a core area of instruction and phases of the presentation of the theory of a case or its defense that requires the most serious consideration. The more or less prevalent cynicism about instructions and their impact upon actual jury deliberation is not justified by the facts and I doubt that any lawyer in a modern jury trial, at least if he is trying a considerable number of cases, would confirm or acquiesce in any such cynicism.

#### A. FUNDAMENTAL PURPOSE OF INSTRUCTIONS

The fundamental purpose of instructions, as our Court has said in an unbroken line of cases, is to inform the jury as to what the issues are under the pleadings and to furnish them with yardsticks or guides as to the law in determining these issues. That the instructions do furnish such a guide for the jury is a conclusion that cannot be denied after doing any research on the subject.

Any trial judge will advise that the jury's concern with instructions and their conscientious desire to follow the rules of law laid out in the instructions exists and is important. The closer the issue, the hotter the battle, the sharper will be the jury's attempt to penetrate the issues and find resolution of the case in the instructions. A common experience of trial judges is the continuing pressure of a jury to receive instruction or a possible comment in order to effectively resolve a heated difference or division of opinion in the jury room.

There are many reasons for this, a few of which might be mentioned since situations have changed quite markedly in the last fifty years. Almost all jurors now have a high school education, many have been to college, and many are university graduates. This, coupled with television and other mass means of communication and transportation, make the average jury a lot wiser and

better informed than could be assumed in our traditional approach to the jury of the early 1900's.

It has been suggested that the woman juror has added much to the value and caliber of the jury. She usually approaches a case, at least one that does not touch upon any particular feminine emotional area, in a more conscientious and unprejudiced fashion than the average male juror. She seems to be inclined, if for no other reason than some innate submissiveness, to be more conscientious and to give more attention to the Court's instructions. On the other hand the male juror, with a more superior and broadened experience in the actual affairs of business life, is more inclined to have preconceived notions and to be opinionated.

#### B. THE TEN COMMANDMENTS FOR TRIAL ATTORNEYS

With these preliminary approaches and remarks out of the way the proposition of practical suggestions to trial lawyers with reference to instruction can be clarified by reducing them to a catechism of ten commandments. These commandments or practical suggestions do not purport to be logic-type compartments nor do they purport to be mutually exclusive. Some accuracy has been sacrificed in an attempt to formalize such a nebulous area; some repetition is evident; and of course, some exceptions will be obvious. In the interest of clarity and brevity, there is no attempt to consider the exceptions.

The first group of commandments relates to the pleadings and the statement of the case in the petition. These commandments relate to something that can be done in the quiet reflection of preparation and do not require a response during the strenuous pressures and processes of the actual trial.

#### COMMANDMENT NUMBER ONE

**Thou shalt not narrate evidence in thy petition and thou shalt keep narrative at a minimum in thy pleadings.**

A lawyer may be crucified on the cross of his own prolixity, and the anxious uncertainty of the pleader that produces a pre-argument of his case in the petition may very easily be fatal. This tendency on the part of many pleaders presents an almost unsolvable problem to many a trial judge, especially when he has to "shoot from the hip," in the pressures to get the case quickly to the jury. The reasons are as follows: (1) An argumentative or prolix statement of the evidence in your pleading is apt to trap the trial

judge into the fatal error of a repetition of your argumentative statement in the instructions. If the court copies your argumentative statement of the evidence or substantially gives it, leaving the inference that such a statement, or perhaps an unsupported factual statement, is being submitted to the jury, it is reversible error.

(2) It is difficult not to make a long narrative statement of an accident, intertwined with the usual allegations of recklessness and carelessness, and reciting a certain set of facts claimed to have happened under the circumstances, without causing a variance between the narrative portion of your petition and the subsequent paragraph in which you specifically allege acts of negligence. If the judge, in the subsequent burden-of-proof instruction, or by other language in the instructions, does not remove the vice of variance, this confusion on the submission of issues or the statement of issues may be prejudiciously erroneous as misleading to the jury and allowing them to speculate upon a set of facts which do not constitute negligence. Thus, the occasion for reversal and a new trial arises. (3) A general loose narrative statement of the evidence including detailed recitals of what may or may not be proof, if repeated by the trial judge in his instructions, is almost sure to result in reversible error on the grounds that the judge submitted the case to the jury without defining or limiting the issues to specific ultimate acts of negligence. It is, further, reversible error to submit the issue of negligence upon the general allegation that a defendant is negligent. Our supreme court has said that such a verdict is based upon speculation and conjecture and cannot be sustained.

The following allegation of negligence is rather typical and will serve as a good illustration:

The defendants wantonly, negligently and carelessly caused the doors of said bus to be slammed shut, catching the plaintiff's left leg and knee, and left arm in the door of said bus in a vice-like grip, and the same time the defendants wantonly, negligently and carelessly and with utter disregard of their duties and obligations to the plaintiff and while plaintiff's left arm and left leg were impaled by the vice-like grip of the doors of said bus and the right foot on the said sidewalk caused said bus to be pulled away from the sidewalk and started down the street causing the plaintiff to be dragged for a distance of some ten or twelve feet hopping along as best she could on her right foot and the same resulting in an excruciating wrench and twist of her left leg and arm; that finally from the screams of the plaintiff and cries of passengers on the bus waiting to alight at the same place the defense caused said bus to stop and release plaintiff from the vice-like grip of the doors as above set forth.

The duty of the trial court is to extract from the above allegation, to paraphrase, and to substantively state in specific form

separate ultimate acts of negligence for the purpose of submission and statement of the issues to a jury. The ultimate acts of negligence in the areas of reasonable control, reasonable lookout and special duties with respect to the movement of a bus while unloading passengers are not mentioned or recited specifically in this allegation. It is almost exclusively dominated by a description of what happened to the plaintiff rather than errors of omission or commission under the substantive law of common carriers. It is true that this is an aggravated situation but the vice is present in a large number of cases.

Illustrations of the violation of Commandment Number One are: *Fuss v. Williamson*,<sup>20</sup> *Fick v. Herman*,<sup>21</sup> *Shields v. Buffalo County*,<sup>22</sup> *Kroeger v. Safranek*,<sup>23</sup> and *Bramhall v. Abcock*.<sup>24</sup> While the opinions in these cases simply recite the application of the general rule that it is error to submit an issue which has not been plead or, which being plead, has no support in the evidence, one would have to go to the transcripts of the cases to see that in many of them the trial judge was not as ignorant as he appeared to be, but due to the prolixity and complexity of a narrative statement of evidence in the pleadings he was faced with an almost impossible situation in trying to extricate simplicity from the ambiguity and confusion in the pleadings.

## COMMANDMENT NUMBER TWO

**Thou shalt allege ultimate and only ultimate acts of negligence in thy paragraph on specific acts of negligence.**

The injunction contained in this second commandment is probably the most important. Also, it is perhaps the most difficult to apply. It commands brevity and simplicity, coupled with a clear and final analysis of the factual situation in a case.

Here is the cross—and the record in the Supreme Court bears it out—upon which many good negligence cases have been crucified by the appellate court or by the trial court on motion for new trial. Here is the cross created by adversary counsel, waiting leisurely for a hindsight examination of the record.

<sup>20</sup> 159 Neb. 525, 68 N.W.2d 139 (1955).

<sup>21</sup> 159 Neb. 758, 68 N.W.2d 622 (1955).

<sup>22</sup> 161 Neb. 34, 72 N.W.2d 701 (1955).

<sup>23</sup> 161 Neb. 182, 72 N.W.2d 831 (1955).

<sup>24</sup> 162 Neb. 198, 75 N.W.2d 696 (1956).

I have selected from about twenty-five cases in Lancaster County, and from the Supreme Court cases, some classic examples of this. The basic one, *Spomer v. Allied Fixtures*,<sup>25</sup> supplies the principle, but it is difficult for many lawyers who know the principle to see how it applies to their specific acts of negligence. The fatal allegation in that case was: "That the defendant driver of the motor vehicle failed to have it under complete control."

I think most of us realize that the ultimate act of negligence is, of course, "reasonable control," and for the judge to submit an issue of "complete control," or any other narrative statement as to type of control that may be taken from the pleadings, is erroneous and constitutes reversible error. The situation in the *Spomer* case, of course, is clear, but the demarcation line, the twilight zone, in the construction of this type of allegation soon becomes clouded when we start to examine the complex and supposedly ingenious language used by many pleaders.

Consider the following examples:

By failing to have said automobile under such control that he could stop the same before colliding and thus avoid the accident with the plaintiff.

This has been condemned without equivocation. Perhaps the leading case on this subject is *Ficke v. Gibson*.<sup>26</sup>

You are further instructed that if you find from the evidence in this case that the plaintiff was able to avoid the accident and yet failed to do so, then your verdict should be for the defendant.

This instruction was condemned as fatal in *Greyhound Corp. v. Lyman-Richey Sand & Gravel Company*.<sup>27</sup>

It was his duty to exercise ordinary care under the circumstances commensurate with dangers reasonably to be anticipated and to avoid an accident if possible.

On the surface, the above seems to be a very innocuous statement that would not create difficulty if submitted to the jury. However, the Supreme Court condemned this categorically in the case of *Fick v. Herman*.<sup>28</sup> The inferences from that opinion are, first, that it was fatal because it gave the jury a right to return a verdict for the plaintiff if the defendant simply failed to avoid an accident; and second, that inferentially the instruction had probably laid the case open to a jury finding of any act of negligence they might conjecture, rather than confining them to the issues that

<sup>25</sup> 120 Neb. 399, 402, 232 N.W.2d 767, 769 (1930).

<sup>26</sup> 153 Neb. 478, 45 N.W.2d 436 (1950).

<sup>27</sup> 161 Neb. 152, 72 N.W.2d 669 (1955).

<sup>28</sup> 159 Neb. 758, 68 N.W.2d 622 (1955).

should have been stated by way of specific acts of negligence by the court.

By failing to have his truck under such reasonable control so that he could stop the same before colliding with the plaintiff.

In plaintiff failing to avoid a collision between his car and the car driven by the defendant.

Similar allegations are criticized in *Ficke v. Gibson*.<sup>29</sup>

By failing to exercise reasonable control in skidding his automobile.

Of course, skidding is not ultimate negligence or negligence of and by itself.

By failing to swerve or turn his automobile after seeing the automobile of the defendant so as to be able to avoid the accident.

The rationale of the above opinions already cited cover the principle involved. These acts may very likely be ultimate acts of negligence, depending upon the circumstances of the case and the factual theory developed by the trial lawyer, but as it stands they do not constitute negligence or state ultimate acts of negligence.

The converse might as easily be true: "That the failing to turn after seeing the defendant was what a reasonably careful and prudent person would do under the circumstances." The ultimate act of negligence is either failure to keep a proper lookout under all the circumstances of the case or failure to use reasonable control under all the circumstances of the case.

That the defendant failed to give any warning of intention to drive into the path of and against the automobile of the plaintiff.

The blanket allegation of failure to give warning in the specific acts of negligence is one that must be carefully inspected. Our court has held that whether failure to give a warning constitutes negligence depends upon the particular circumstances of the case and an allegation of this type becomes dangerous because it may not be, by itself, an ultimate act of negligence. Our court has never spoken categorically as to when it may be stated as a separate independent act of negligence. The following cases should be carefully read before framing any allegation or pleading to this effect: *Tews*

<sup>29</sup> 153 Neb. 478, 45 N.W.2d 436 (1950). See also *Pongruber v. Patrick*, 157 Neb. 799, 812, 61 N.W.2d 578, 585 (1953).

*v. Bamrick*,<sup>30</sup> *Dorn v. Sturges*,<sup>31</sup> *Long v. Whalen*,<sup>32</sup> *Bresley v. O'Connor*,<sup>33</sup> *Perrine v. Hokser*.<sup>34</sup>

### COMMANDMENT NUMBER THREE

**Thou shalt allege in thy petition with respect to specific acts of negligence all statutory violations, all ordinance violations, failure to use reasonable control, failure to yield right-of-way, failure to maintain a proper lookout, and any specially or categorically recognized doctrine of negligence such as stopping within the range of vision, the last clear chance doctrine, etc., which our court has held to be negligence, and then thou shalt stop.**

This commandment is the affirmative corollary of Commandment Number Two, and I think it tells us what to do. The pitfalls of the pleader in tort actions are confusion, overlapping and the categorization of certain facts in the case as being negligence *per se*. There is no danger in the time honored paths of statutory violations and the classic elementary acts of negligence as alleged in the petition. There seems to be a compulsion by the plaintiff's pleader to overstate and to overargue his case not only in a general narrative statement in his petition, but in the specific acts of negligence. He straightway falls into the abyss of confusion, variance and the submission of issues by the court, either supported or unsupported by evidence, which do not constitute ultimate negligence.

### COMMANDMENT NUMBER FOUR

**Thou shalt not exercise thy ingenuity and cleverness in pleading specific acts of negligence.**

This commandment is overlapping; however, we have all read damage petitions in which as high as twenty-six specific acts of negligence are given, and in which the damages, incidentally, are elaborated out *ad infinitum*. This mental effort may well be apropos and effective in arguing the evidence to the jury, but the danger of drawing together specific acts or evidence situations, which may or may not constitute ultimate acts of negligence, is illustrated by cases in the reports which admonish us to stay in the clear sun-

<sup>30</sup> 148 Neb. 59, 26 N.W.2d 499 (1947).

<sup>31</sup> 157 Neb. 491, 59 N.W.2d 751 (1953).

<sup>32</sup> 160 Neb. 813, 71 N.W.2d 496 (1955).

<sup>33</sup> 163 Neb. 565, 80 N.W.2d 711 (1957).

<sup>34</sup> 158 Neb. 190, 62 N.W.2d 677 (1954).



light of simplicity and to guard carefully our prolixity and our cleverness.

This commandment is particularly applicable to the young lawyer and beginning pleader in an automobile accident or negligence case. Either from an overabundance of caution, or because he is locked in the grips of an evidentiary fear, or just stimulated by the fertility of youthful imagination, the young pleader feels a compulsion to take the facts apart in a simple accident case, reweave them in terms of argument to the jury, and then state them categorically in the pleadings as acts of negligence. To the charge that you might not be able to get your evidence in, I will simply say that in all my experience in practice and on the bench, I have not heard, with the standard allegations of negligence being present along the lines of Commandment Number Three, that a lawyer has not been able to present complete testimony as to every circumstance relevant to the case.

### **COMMANDMENT NUMBER FIVE**

**Thou shalt prepare and file the requested instructions prior to trial of the case.**

It is true that under our statute and procedure instructions may be requested up until the time of final argument of the case to the jury. Obviously, a submission at that time does not permit careful analysis and consideration by the court. Flat adoption or rejection is rarely indicated; rephrasing, amplification and co-ordination with the other instructions given are almost always problems. If the lawyer is interested in the sanctity and finality of the jury verdict, the requests should be carefully buttressed with authority and submitted to the court early in the trial, if not before, so that the request may be given careful consideration by the judge, and knowledge of its adoption communicated so that it may be properly used in argument, as set out in a subsequent commandment herein.

There is a further common trap in this situation. The court may give a hastily submitted instruction leaving the proposer barred from complaining on hindsight examination after the verdict is in. His adversary, however, may examine and destroy it at his leisure.

### **COMMANDMENT NUMBER SIX**

**Thou shalt cite authority for thy requested instructions.**

This commandment requires no elaboration. It follows as a

corollary to Commandment Number Five and facilitates inspection and submission by the trial judge. It quickly places the court and counsel on common ground for discussion and examination as to validity.

### **COMMANDMENT NUMBER SEVEN**

**Thou shalt balance the requested instructions.**

An instruction may, in a technical sense, correctly state a law favorable to the pleader, but if not balanced with applicable exceptions or if phrased in language which could be construed as favoring one side of the case, it falls subject to the vice of being misleading to the jury, and perhaps as being a weighing of the evidence.

In the trial judge trade, we have this standard statement in our shop talk: "On requested instructions, watch out for the stingers." A balanced instruction carefully drawn to present the law on both sides of the case will not injure a final argument. You can select that portion of it which is favorable to you, emphasize it and weave it in your final argument. On the other hand, if the trial judge gives your "stinger" instruction, it will undoubtedly be reversed on appeal or be subject to a motion for a new trial. The latter is particularly appealing to the trial judge who doesn't like being trapped by a "stinger" which he does not see until too late.

### **COMMANDMENT NUMBER EIGHT**

**Thou shalt exercise self-restraint in the instruction on damages, and thou shalt watch to see that the instruction as to future damages is properly submitted.**

Here I am not only suggesting restraint in connection with any submission of an instruction on damages, but affirmatively suggesting that you discuss with, and secure from, the judge a draft of the proposed instruction with reference to damages. Disregarded by the lawyers and many times by the trial judge, this apparently innocuous, innocent and standardized instruction on damages has been the subject of many recent reversals by the Supreme Court.

These reversals turn upon the demarcation line between proof and proper instruction on past damages and injuries in pain and suffering and the proof and proper instruction with respect to future permanent pain and suffering, disability, loss of earnings, or future damages. The distinction between the proof of past damages

by a mere preponderance of the evidence and the further requirement that any future pain and suffering, future permanent injuries or loss of earnings must be proved with "reasonable medical certainty" is not a moot distinction. In the last five or six years the Supreme Court has reversed four or five cases because of laxity in either the proper proof or the proper submission by instruction on this issue.

The term "reasonable medical certainty" is a standard or yardstick to which the average expert medical witness finds it difficult to adapt. It is not responsive or in harmony with a diagnostic or therapeutic analysis indulged in by the average doctor; therefore, the hiatus must be bridged by the careful preparation of the medical testimony in the case. In my own experience, alert cross-examination by counsel of medical witnesses has sometimes destroyed the submission of this issue in the damage instruction to the jury.

The limited scope of this article prevents a detailed discussion of the present status of the cases in Nebraska upon the requirement that the court, on its own motion, must instruct as to the present worth of any allowance for future damages or injuries. It is a must for any trial lawyer in Nebraska to read the following cases in this respect: *Kroeger v. Safranek*,<sup>35</sup> *Borcharding v. Eklund*,<sup>36</sup> *Jacobsen v. Poland*,<sup>37</sup> *Carlile v. Bentley*,<sup>38</sup> *Patras v. Waldbaum*.<sup>39</sup>

### COMMANDMENT NUMBER NINE

**Thou shalt request of the court in all cases that thou be given and presented with a preview of instruction Number One on the statement of the issues in the case; the burden of proof instruction; and the instruction on damages.**

This commandment is a corollary of the first four commandments and implements the performance of those principles. After having properly pleaded the case, proved with reference to properly submitted specific acts of negligence, and properly presented proof of the issue of damages, this work will all be for naught if the trial court, under the time and pressures of a trial, has not properly submitted them. If the case is properly prepared and the substan-

<sup>35</sup> 161 Neb. 182, 72 N.W.2d 831 (1955).

<sup>36</sup> 156 Neb. 196, 55 N.W.2d 643 (1952).

<sup>37</sup> 163 Neb. 590, 80 N.W.2d 891 (1957).

<sup>38</sup> 81 Neb. 715, 116 N.W. 772 (1908).

<sup>39</sup> 170 Neb. 20, 101 N.W.2d 465 (1960).

tive principles of law are well in mind, a few minutes' inspection of the key instructions in a case will prevent reversible error and maintain the finality of the jury verdict and judgment. As otherwise indicated in this article, a requirement that these instructions, along with the others, be submitted to counsel for inspection, is a vital need in Nebraska. Specific objection and consideration before submission are obviously the best preventative to hindsight examination and discovery of error or a shotgun attack upon the completed trial and verdict.

### **COMMANDMENT NUMBER TEN**

**Thou shalt argue instructions to the jury.**

Despite much common cynicism about a jury following instructions, any modern trial judge will advise to the contrary. The written instructions in the jury room are the articulated yardsticks to which almost all juries relate the evidence. This is especially true whenever the issues are complex in nature and require a consecutive application of the evidence proceeding from one step to another. They are also vitally important in sifting the evidence with reference to the issues raised as to multiple parties in a lawsuit. A classic example of this is the importance of the joint tortfeasance, concurrent negligence instruction.

It follows that in counsel's own relating of the evidence to the issues, if he ties it in with an objective statement the jury can refer to in their deliberations, it will be very valuable. This principle is further augmented by the experience of trial judges in the continuing attempt to make informal requests for a further refinement of the core instructions in a hotly contested and close case.

### **C. INSTRUCTIONS AND THE VOIR DIRE**

It is important in voir dire examination to point out the difference between the burden of proof in a civil case and in a criminal case. Many a lawyer, especially in the larger metropolitan areas, has been trapped because of this situation. Jurors take the burden of proof instruction beyond a reasonable doubt in a criminal case very seriously. It is quite commonly argued and it receives emphasis in the court's instructions. There are, many times, jurors in civil cases, who have previously sat in a criminal case and they will follow it unless you take care of it on voir dire. A juror who has been indoctrinated in a criminal case on the presumption of innocence, and who has been admonished as to the "moral certainty"

of the guilt of a defendant, does not easily adapt or respond to the simple requirement of proof by a greater weight of evidence.

The proper place to start your argument with reference to instructions and to weave it into the instructions is on voir dire examination. You can suggest to the jury an instruction with reference to a particular phase of the case or the general area of instructions and pursue it on your voir dire examination. You have plenty of time if you have prepared the theory of your case correctly. A most effective argument can be made by carefully weaving either version of the facts into a core instruction in the case. Much of the verbal argument in a reasoning sense is quickly forgotten and general impressions are many times what a jury carries to its deliberations. However, an argument that strikes the facts home to a responsive statement of the law in a core instruction is very apt to be remembered and given consideration, and is most effective if one juror is able to do so and thereby use it as a weapon in the jury room discussion. This is not idle theory; it is the almost common experience and report of jury deliberations in serious civil cases.

#### D. CONCLUSIONS<sup>40</sup>

The above commandments are not intended to be a precise or dialectical analysis of all the phases of trial procedure with relation to instructions. Like much of the common law itself, the commandments given above are approaches and guides by which the careful trial lawyer can avoid the pitfalls inherent in our instruction procedure. It is true that the total perspective of the trial lawyer in actual trial is centered upon the evidence and the impression it makes on the jury. That is where success or failure rests. But the final resolution of the verdict and the judgment in the case rests fundamentally upon the proper submission of the case to the jury in the charge and the instructions. These commandments are intended to be helpful to the end that the truth may be discovered in the heated crucible of trial, and that its resolution in verdict or judgment may be preserved. Accuracy and perfection are to be commended, but finality of decision and the preservation of order are primary ends of the law itself.

<sup>40</sup> The conclusion to the first part of this article has been set out in the last two paragraphs of part II. An additional conclusion on the "adequacy of instructional procedure" is, therefore, not included here. [Ed.]