Patterns for Jury Instructions

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This is the story of a project relating to jury instructions that we inaugurated in California and have maintained for a number of years—for more than twelve years in civil practice and nearly five years in criminal practice. The Editor of the Review honoured me with a request that I write the article to tell my colleagues of the Canadian bench and bar about the project. It has been the subject of a number of articles that have appeared in various publications in the United States, but this is the first time I have ventured publicly to describe the enterprise. This venture should be charged against or credited to the graciousness of your editor.

Our work sometimes has been referred to as a regime of standardized jury instructions, but the term "standardized" is one which, in this connection, I do not wholly approve and strive to avoid using. Its connotation of mechanical rigidity is inappropriate and misleading. The reason for my terminological preference for "patterns" lies in the spirit and philosophy that have underlain our effort, and perhaps it will be as fitting to comment on that philosophy at this point in my essay as later.

I

We fully recognize all the values in mechanical standardization — in weights and measures, coinage, industrial and household utilities and designs, for example. But in the field of creative art, a field that includes much of a lawyer's work, we, naturally and with justifiable conceit and pride, are inclined to shy away from the suggestion of standardization. However, we would deceive ourselves badly if we questioned the influence and value of pat-

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terns in any field of human activity, and we should be hypocritical if we pretended that we have not used those patterns and availed ourselves of their values. Even in the realms of pure art, in literature, painting, sculpture and music, we have our "schools", a term denoting those persons, considered collectively, whose work is influenced and guided by respective patterns established by originators in theory and method. All our education is achieved by patterns; and every well-established law office not only has and uses its books of forms, but has a cherished accumulation, often methodically indexed, of its own drafts, pleadings, contracts, wills, judgments, jury instructions and others—forms which, in a measure, capitalize a lawyer's energies and abilities, and by reference to and repeated use of which the time and energy of members of the firm are conserved.

Whenever you hear a lawyer scoff at the use of forms, or make pretension of not looking to patterns for ideas and guidance, you can know that either he is putting on an act, staging a pose or is suffering from a serious case of self-deception. It has been said that a person who never quotes is not worth quoting and, by like deduction, it can be said that a lawyer who has not looked for usable values in patterns designed by others seldom, if ever, designs a pattern worthy of imitation or serious consideration. The theory behind our work on jury instructions is the theory of helpful patterns, not of imposed standardization. Perhaps the difference can be illustrated better by two homely allegories than by verbose exposition.

One can go to the neighbourhood hardware store and buy many standardized products — let us say, for example, nuts and bolts. The bolts have standardized lengths, diameters, threads, and shapes and sizes of heads, and the buyer almost always is put to a choice of using them exactly as they come or not using them at all. This is standardization in its strict mechanical sense. But a pattern is something different. When I was a boy in Minnesota, a good deal of dressmaking was done in our home. This craft belonged to the home of that period and locale as did breadmaking and the Saturday night bath in the wooden tub. I have a vivid mental picture of the pattern books that the women folk bought at the stores and used in a way that seemed so very complex and skillful to me. Standing out particularly in my memory is the fact that the women were not slaves to the patterns and often used them as foundations or outlines to which to attach their own creations. The significant value of the pattern was that it was something that could be criticized, altered, supplemented

and, in general, adapted to the needs, tastes and whims of the woman to be adorned.

The lawyer has two commodities to sell: his ability, which embraces a number of distinct media of service — natural endowments, education, experience, character, reputation, knowledge, skill and judgment; and his energy, the oversale of which occasionally costs an early death. It often has been said that what a lawyer sells is his time, but that is an inaccurate and misleading statement. As a matter of expediency, he measures out his ability and energy in units of time, and those units are limited. He begins his career with an abundance of energy compensating for a comparatively limited ability. As the ability increases, his energy reasonably available for sale diminishes, quite imperceptibly at first and possibly for many years, but with compelling reality as the proverbial age of "hoary wisdom" comes on, bringing a compensating knowledge, dignity of countenance and composure of spirit. The lawyer's three R's might be said to be: at 25, Research; at 45, Reason; at 65, Rheumatism. We can best aid and guide the younger lawyer by providing for him good patterns, patterns of conduct, method and draftsmanship. Our most valuable service for the lawyer in the middle years consists in saving his time, enabling him to achieve more things satisfactorily in less time than otherwise would be required. And to the lawyer approaching the sunset we bring the most apt assistance when we conserve his energy. The project I am about to describe originated in a desire to accomplish these services.

II

Los Angeles County has an area nearly equal to that of the state of Connecticut and almost half that of the state of Massachusetts. Its population is well over four million. It has a registered motor vehicle for every 2.42 residents. More than 136,000 of these vehicles are trucks, needed to serve the oil, citrus, airplane, motion picture, steel, automobile and other industries and the shipping through the county's harbours. In addition to our home-owned automobiles, we have on our streets and highways those of many visitors. In the three summer months of 1950, 181,082 automobiles entered California through the Southern California border stations alone, and in the three winter months of December 1949 and January and February 1950, 133,513 vehicles thus entered. In the county are more than 12,000 miles of good roads, paved and oiled, threading an area that extends from mountains that reach

up over 10,000 feet above sea level, down to the sea, leading through the congested districts of cities and across expanses of open country, into desert and through richly cultivated lands. Out of all the gasoline, power, wheels and highway that these statistics suggest, blended with indefinable amounts of alcohol, fog, smog, ambition, hurry and the famous California sunshine, a tremendous business in the field of negligence comes, as you can imagine, to the trial courts of the county.

My own court, the trial court of general jurisdiction in this county, with a minimum of $3,000 fixing the lower jurisdiction in actions in law, and no upper limit, has 62 judges of its own, and usually employs the services of at least ten other judges assigned by the State Judicial Council. Our lawyers have come from every section, probably from every state, of the United States, and nearly all the law schools of our national country have had a part in their education. They have brought with them heterogeneous backgrounds, rooted in local customs, laws, standards and procedures. In short, except in so far as we deliberately have undertaken to establish certain styles and patterns in legal draftsmanship, we have had none that could be regarded as indigenous.

III

Our law provides that in every case to be tried before a jury, "it shall be the duty of counsel for the respective parties, before the first witness is sworn" to deliver to the judge and to serve upon all opposing counsel all instructions that they respectively propose be given to the jury, each instruction to commence on a separate page. Additional proposed instructions, as indicated by the evidence to be necessary or proper, may be submitted in like manner during the trial. The judge must give thoughtful consideration to each submitted instruction, for the verdict of the jury may be reversed on appeal not only because of an instruction given, but also because of the refusal of one which, in the opinion of the appellate court, ought to have been given. Reversals on this latter ground have not been so infrequent as to seem unusual. As our criminal jurisprudence has developed, the trial judge is charged with responsibility for giving many particular instructions on his own motion, even when not requested by either the People or the defendant.

From what has been said it will be seen that under our procedures, even in a simple jury case, the preparation of instructions is a three-cornered affair. This fact results in an unnecessary mul-

tiplication of effort wherever no regime of court-approved patterns exists. Certain instructions are required or advisable from all viewpoints and will be drafted and proposed by each side. Others, although not necessary, may be desired by both parties. Extending in opposing directions from this central area of jury guidance, which both parties purpose or are willing to cover, are the fields of competing concern, which embrace the slants, angles, aspects and contentions urged by the respective parties, and which they seek to present in jury instructions, thus to gain an advantageous position with the jury and to give a desired and inclined impetus to its reasoning or emotions or such thinking of a sort as it may do. Hence, in the preparation of this simple case for trial, we have two law offices doing a work of draftsmanship which, in part, either alone could do in a satisfactory way if motivated by an impartial sense of duty and guided by a desire to be fair; and we have each law office trying to outdo the other in grafting its argument and persuasion upon the tree of pure law, in whose calm and cooling shadows the jury presumptively will deliberate.

Having in mind the whole range of human attributes that enter into the three-cornered project, the justifiably prejudiced points of view and the conflicts of sincere advocacy, the sometimes designed suggestion, innuendo and artifice, and the wide variations in knowledge, skill and ethical considerations, you will appreciate the fact that before the inauguration of our regime of patterns and styles, the trial judge often had to work for hours with a chaotic mass of instructions, replete with or marked by prejudice, repetition, inaccurate and incomplete statements of law, awkward, ungrammatical constructions, bad syntax, prolix and confusing sentences, and heavily laden with possibilities for new trials, appeals and reversals.

If we will now take that simple, individual case we have been considering, and multiply it through the months and years by thousands, and often complicate it by giving it three, four or five sides or more, we shall appreciate the tremendous opportunity for the conservation of the energy of legal minds that lay in the first projection of a regime of thoughtfully designed patterns for jury instructions.

IV

Our system of patterns for jury instructions is simply one phase of the rather high degree of specialization that we must practise in a large court, and it consists of two complementary imple-

ments. The first is a book. To be exact, I should say two books, one now having a supplementary volume and the other having a pocket part. One of these books contains an organized, analyzed, numbered, titled, annotated and indexed assembly of instructions for use in civil trials. Except for one group of general instructions that may be needed or useful in any kind of jury case, this work is devoted exclusively to the field of negligence, because more than 90 per cent of our jury trials involve the law of negligence. The other book contains the same kind of an assembly of instructions for use in criminal trials. The titles of these books are *California Jury Instructions, Civil* and *California Jury Instructions, Criminal.* Both are published by the West Publishing Company of Saint Paul, Minnesota. Each book has a nickname. The civil work commonly is called "BAJI", the letters being the initial letters of the words, Book of Approved Jury Instructions. The criminal book is called "CALJIC".

The civil work has four parts, the titles to which are: Part I — General Instructions; Part II — General Instructions on Negligence; Part III — Special Duties, Doctrines and Relationships in the Law of Negligence; Part IV — Instructions on the Federal Employers' Liability Act.

We carry instructions applying the law of the Federal Employers' Liability Act because actions under it may be brought in either the federal or state courts.

Part II, General Instructions on Negligence, includes two divisions, one containing what we call Extension Instructions, and the other containing the more commonly used instructions on negligence and liability for negligence. This latter subject embraces Basic Definitions; Issues and Burden of Proof; Miscellaneous Principles and Admonitions; and Damages. The "extension instructions" deal with such subjects as agency, imputed liability, and the statutory liability of parent for child and of owner for permitee, instructions that are designed to extend the usefulness of other instructions to varying situations, often without the necessity of modifying or amplifying the latter instructions.

Part III embraces many subjects, such as the doctrine of last clear chance, *res ipsa loquitur*, assumption of risk, common carrier and passenger for hire, the attractive nuisance doctrine, the relative rights of pedestrians and vehicles, the relative rights of street railway companies and other persons using the street, the crossing of inter-urban railroad tracks and the relative rights and duties involved, the California guest law, imputed negligence of joint venturers, the law governing trespassers, licensees and in-

vitees, malpractice, nurses and hospitals, authorized emergency vehicles, landlord and tenant, dogs and dangerous animals, manufacturers, public corporations, independent contractor and owner, non-delegable risks, driver and rider, the law of absolute liability in relation to ultra-hazardous activity, and the rules governing the survival of causes of action after death.

The criminal work is divided into nine parts. They are: Part One — General Instructions (this subject embraces Duties of Jurors and How They Should be Performed, Evidence and Requirements of Proof, Witnesses, The Mental Factor, Persons and Parties, Attempt, and The Pleading and The Verdict); Part Two — The Unlawful Taking of Property, embracing burglary, robbery, theft, extortion, and so on; Part Three — Homicide; Part Four — Certain Crimes Involving Writing and Written Instruments; Part Five—Sex; Part Six — Certain Crimes against the Right of Personal Security, embracing such subjects as Assault, Self-defence, Mayhem and Kidnapping; Part Seven — Certain Crimes against Social Policy and the Security of the State, embracing such subjects as Narcotics, Betting, Perjury and Bribery; Part Eight — In relation to Certain Rules Protective of the Defendant, embracing the subjects of Insanity, Accomplices and Entrapment; Part Nine — Miscellany, embracing the subjects of Arson, Fraudulent Claim for Payment of Insurance, Conspiracy, Escape and such Violations of the Vehicle Code as amount to felonies. It should be noted that our work on criminal instructions deals only with felonies; misdemeanours come within the jurisdiction of the inferior courts.

The second implement in our regime is not a necessary one, but is an extraordinarily effective saver of time and expense for the profession. It consists of a file of the loose-sheet forms which actually are used in trials. Not all the instructions in the books are carried in the loose-sheet form; indeed, many of them are not, but only those that are commonly used. These loose-sheet forms are printed on the same style of legal cap, with numbered margins, as our rules require for all instructions submitted to the judge. Each is a duplicate of an instruction in the books, each is numbered and titled as is its prototype in the book, and each is a separate document so that it may be placed as the judge wishes in the final arrangement of his instructions.

These forms are not given out in advance of trial. When the lawyer enters the courtroom for trial, he hands to the clerk a written request for certain instructions, listing them by number. He may modify some of these and fill in blanks. He arranges them

with such instructions as were prepared in his office and hands the group to the judge.

As previously stated, this plus feature of service is not necessary and is provided only in our own county, although our books are used throughout the state and have been sold in a majority of the other states. Sales in other states, however, never have been solicited by the publisher. Except for our instructions on the Federal Employers' Liability Act, our work is designed and maintained with only the law and the needs of our own state in mind.

V

In summary, these are the services that we endeavour to perform for lawyers and judges through our regime of patterns for jury instructions:

1. An analysis of the particular legal subject involved, which we have aimed to make as practical as litigation itself, an analysis born of actual experience in the courtroom. This analysis will not be complete for, or perfectly fit, all cases, but immediately it tells lawyer and judge what has been the general outline of instructions in cases such as the one instantly at bar. It tells him out of experience the most critical points to have in mind and the dangers to guard against. It tells the advocate what his evidence and that of his adversary must accomplish to be successful.

Our books are used in the lawyer's consultations and in his own deliberations on a case quite as much as they are in preparation for trial. Our county law library requires eight copies of the civil work to meet the demand for it, and the library imposes its most severe borrowing rules on each copy—a two-day limit with no renewal.

2. Numerous annotations, all also derived from experience in litigation, and all directed to a practical purpose.

3. Citations of authority, with many pertinent comments. Our table of cases cited in the civil work requires 79 pages.

4. Hundreds of patterns for jury instructions.

5. A watchful maintenance service, with occasional pocket parts, designed to keep ourselves, the other judges of our court, and lawyers up-to-date.

6. Finally, in our own court, numerous loose-sheet forms to be used in trials, thus saving the lawyer the expense of typing and stationery.

You might fittingly ask: Doesn't all this service cost your county a great deal? The answer is that it costs us something, of

course, but it pays dividends of incalcuable amount. The chief item of cost is the time required for editing. All royalties in the books were irrevocably assigned to the county, and those royalties have more than paid for all our own copies of the books, pocket parts, loose-sheet forms and supplies. One of our ablest judges, an efficient, industrious and thoughtful jurist, conservative of statement, and somewhat of an expert in the gathering of statistical data, estimates that our system of jury instruction patterns saves at least 30% of the time that his work presiding in a jury department otherwise would require. The time conserved for all our judges engaged in jury trials, including the time saved through the reduction of error that otherwise would cause new trials, and the time and expense saved for lawyers, constitutes handsome and continuing dividends on our investment of effort.

VI

For the guidance of any who might be inclined to urge or launch a project similar to ours, a few further facts ought to be told.

First, ours has been a programme entirely different from the mere assembly of instructions that have been approved or criticized by appellate courts. We, of course, availed ourselves of such "starting points" as we could gather from litigation of the past, but the greater part of our work has consisted of original drafting, significant revision, reduction to essentials and practical analyses. This manner of labour was required by the five ends that we sought to accomplish in our patterns: to make a correct statement of the law; to state it in such a way that its application to the facts of a case would be fair and impartial; to state it as clearly as we could, as consisely as we could, and in good English.

Secondly, difficulties, obstacles and unpleasant factors are to be expected in a project such as I have described. The legal profession ought to have and does have a good deal of inertia. A treatise could be written justifying this fact and showing its benefits. However, that much of inertia which is rooted in obstinacy, indolence, myopia, pettiness of spirit, and the placing of immediate self-interests above the service of justice and the long-range interests of the profession, often makes needed innovations difficult of attainment. We, the editors of our works, have been accused of favouring the plaintiffs and also of favouring the defendants. The best answer to these criticisms is that both are made. They cancel each other out. We have been criticised for writing instructions in good English — the jurors, say

these critics, cannot understand it. This criticism is answered by the fact that jurors themselves often after trial have volunteered to the trial judges expressions of their appreciation of the clarity of the instructions. Another criticism is that our regime of pattern-instructions caters to and promotes indolence of lawyers and judges. One answer to this is that by the same token the lawyer ought to discharge his stenographic secretary, sell his typewriters, and return to the handwriting of his documents, thus to give us an admirable model of unnecessary drudgery. Another answer, so far as judges are concerned, is that no large court in the world and few if any small ones turn out so much work per judge as does our court. One of the significant contributions to this result is our specialized service in the field of jury instructions. In launching a project such as ours, your efforts will be foredoomed to failure by some members of the profession, you will be suspected of some sinister self-seeking motive by those who cannot understand an unselfish application to the realization of a vision of public service, and the tedious, patient time-taking work of an editor will be understood by few, while others will suspect you of loafing on the job.

But, if you have a sense of humour and persist undaunted, you will have a great deal of fun!

Thirdly, a programme such as I have described must be regarded as a major editorial undertaking and must be approached as such, with thoughtful preparations to deal with it as such. Otherwise, discouragement, delay and difficulties sooner or later will permanently obstruct the effort.

Finally, have in mind that your first achievement, the "completion" of your plan, will be only a beginning. Thereafter, its shortcomings must be honestly noted and corrected, it must be enlarged, supported and in all respects maintained abreast the ever-moving current of the law.

Recent Judicial Appointments

Honourable Mr. Justice R. T. Graham, a judge of the Court of King's Bench for Saskatchewan, to be Deputy Judge of the Exchequer Court of Canada, under section 8 of the Exchequer Court Act, until June 30th, 1951.

Farquhar J. MacRae, Esquire, K.C., of the City of Toronto, to be Judge of the County Court for the County of Ontario and also a local judge of the High Court of Justice for Ontario.