ISSUES--BURDEN OF PROOF

20.00
ISSUES IN THE CASE

INTRODUCTION

An issue instruction tells the jury what points are in controversy between the parties and thereby simplifies their task of applying the law to the facts--a task made more difficult in many instances after jurors have participated in several types of cases.

The committee recommends that such an instruction be given; if tendered, the court has the duty to give it. *Goertz v. Chicago & N.W. Ry. Co.*, 19 Ill.App.2d 261, 270, 153 N.E.2d 486, 491 (1st Dist.1958).

The practice of informing the jury as to the respective contentions of the parties has developed gradually.

Some of the early cases indicate that the jury could take pleadings to the jury room and find the issues by referring to the pleadings. *West Chicago St. R. Co. v. Buckley*, 200 Ill. 260, 65 N.E. 708 (1902); *City of East Dubuque v. Burhyte*, 173 Ill. 553, 50 N.E. 1077 (1898). Later cases held that it was error to refer the jury to charges in the complaint in the absence of further instructions pointing out what was charged. *E.g.*, *Krieger v. Aurora, E. & C. R. Co.*, 242 Ill. 544, 90 N.E. 266 (1909).

It then became common to have a lengthy commentary read to the jury which elaborately informed them of the plaintiff's allegations of negligence, proximate cause and whatever other legal verbiage may have been placed in the complaint. These lengthy quotes from the complaint lent the office of the trial judge to the plaintiff to state his case to the jury. Frequent warnings by the appellate court went unheeded by lawyers representing plaintiffs until 1953, when the Appellate Court for the First District reversed a case in which an almost 800-word summary of the complaint had been given to the jury. *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist.1953).

Signa held that the court should inform the jury of the issues raised by the pleadings in a clear and concise manner, and that this could be accomplished by a summary of the pleadings succinctly stated without repetition and without undue emphasis. This method has been approved in later cases. *Smith v. Illinois Valley Ice Cream Co.*, 20 Ill.App.2d 312, 156 N.E.2d 361 (2d Dist.1959); *Asplund v. Pavlik*, 1 Ill.App.2d 220, 117 N.E.2d 408 (1st Dist.1953) (abstract). Consistent with this view is the conclusion that an instruction which omits reference to a defendant's affirmative defenses is reversible error. *Walton v. Greenberg Mercantile Corp.*, 1 Ill.App.2d 99, 116 N.E.2d 197 (4th Dist.1953). Similarly, issue instructions which include charges not found in the complaint or supported by the evidence constitute error. *Fraider v. Hannah*, 338 Ill.App. 440, 451-52, 87 N.E.2d 795, 800-01 (2d Dist.1949); *Burns v. Stouffer*, 344 Ill.App. 105, 111, 100 N.E.2d 507, 510 (2d Dist.1951).

20.01 Issues Made By The Pleadings--Negligence--One Or More Defendants

[1] The plaintiff claims that he was injured and sustained damage, and that the defendant[s] [was] [were] negligent in one or more of the following respects:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the negligence of the defendants which have not been withdrawn or ruled out by the court and are supported by the evidence. If there is more than one defendant and the allegations of negligence are different as between them, use a form such as:*

"Defendant C, in [e.g., failing to keep a proper lookout."

"Defendant D, in_____."]

[2] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[3] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries].

[4] The defendant[s] claim[s] that the plaintiff was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[5] The defendant[s] further claim[s] that one or more of the foregoing was [a] [the] proximate cause of the plaintiff's injuries.

[6] The plaintiff [denies that he did any of the things claimed by defendant(s),] denies that he was negligent [in doing any of the things claimed by defendant(s),] [to the extent claimed by defendant(s),] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[7] The defendant [Defendant C] also sets up the following affirmative defense[s]:

Defendant [Defendant C] claims

> [*here set forth in simple form without undue emphasis or repetition those affirmative defenses (except contributory negligence) in the answer which have not been withdrawn or*

ruled out by the court and are supported by the evidence].

[8] The plaintiff denies that [summarize affirmative defense[s]].

[9] The defendant[s] further den[ies] [y] that the plaintiff was injured or sustained damages [to the extent claimed].

Instruction [5] revised August 2023.

Notes on Use

This instruction may also be used in this form for multiple plaintiffs if the allegations of negligence of all plaintiffs are the same. Where multiple plaintiffs allege different acts of negligence, the instruction must be modified to set forth separately the allegations by each plaintiff. If there is a counterclaim, use IPI 20.02.

This instruction must be modified to fit the allegations of the complaint and answer. The bracketed materials cover various contingencies that may result from the pleadings. The pertinent phrases in the brackets should be used if they fit the particular case. Additional innovations consistent with the pleadings should, of course, be used whenever required.

All "special defenses" which must be pleaded under the notice requirements of §2-613(d) of the Code of Civil Procedure (735 ILCS 5/2-613(d) (1994)) are not necessarily "affirmative defenses" in the sense that they bar recovery. Although §2-613(d) (as amended in P.A. 84-624, effective 9/20/85) refers to contributory negligence as an "affirmative defense," it does not bar the cause of action, but mitigates damages and therefore is treated in paragraph [4] and not in paragraph [7]. Only affirmative defenses that bar recovery should be set forth under paragraph [7] of this instruction. Other defenses that do not bar recovery, such as a claim that the plaintiff failed to mitigate damages, should be set forth in a separate paragraph, with the plaintiff's denials in a following paragraph.

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of "plaintiff" whenever appropriate.

Comment

An issue instruction must meet the standards of *Signa v. Alluri*, 351 Ill.App. 11, 113 N.E.2d 475 (1st Dist.1953), that the issues made by the pleadings be concisely stated without characterization and undue emphasis.

Two cases pre-dating the 1985 amendment to §2-613(d) held that the defendant does not have to specify the contributory negligence relied upon, and if specific acts of contributory negligence are not alleged, they need not be specified in the issues instructions. *Marcin v. Kipfer*, 117 Ill.App.3d 1065, 454 N.E.2d 370, 73 Ill.Dec. 510 (4th Dist.1983); *Witherell v. Weimer*, 118 Ill.2d 321, 515 N.E.2d 68, 77; 113 Ill.Dec. 259, 268 (1987).

Under *Alvis v. Ribar*, 85 Ill.2d 1, 421 N.E.2d 886, 52 Ill.Dec. 23 (1981), the plaintiff no longer has the burden of pleading and proving freedom from contributory negligence. *Casey v. Baseden*, 111 Ill.2d 341, 490 N.E.2d 4, 95 Ill.Dec. 531 (1986), held that defendant has the burden of proving the plaintiff's contributory negligence. The present instruction includes not only affirmative defenses which may defeat the claim, but also contributory negligence which may only diminish damages.

Failure to mitigate damages is an affirmative defense. *Rozny v. Marnul*, 43 Ill.2d 54, 250 N.E.2d 656 (1969).

20.01.01 Issues Made By the Pleadings--Negligence and Willful and Wanton Counts

[1] The plaintiff's complaint consists of two counts. The issues to be decided by you under Count I of the complaint are as follows:

[2] The plaintiff claims that he was injured and sustained damage and that the defendant was negligent in one or more of the following respects:

> [Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to negligence which have not been withdrawn or ruled out by the court and are supported by the evidence.]

[3] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[4] The defendant [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the defendant's part was a proximate cause of the plaintiff's claimed injuries].

[5] The defendant claims that the plaintiff was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[6] The defendant further claims that one or more of the foregoing was [a] [the] proximate cause of the plaintiff's injuries.

[7] The plaintiff [denies that he did any of the things claimed by defendant,] denies that he was negligent [in doing any of the things claimed by defendant,] [to the extent claimed by defendant,] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[8] [The defendant also sets up the following affirmative defense(s):

Defendant (Defendant C) claims

> (here set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence).]

[9] The plaintiff denies that [summarize affirmative defense(s)].

[10] [The defendant further denies that the plaintiff was injured or sustained damages (to the extent claimed).]

[11] Turning now to Count II of the complaint the issues to be decided by you under that Count are as follows:

[12] The plaintiff claims that he was injured and sustained damage and that the conduct of the defendant was willful and wanton in one or more of the following respects:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to willful and wanton conduct which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[13] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[14] The defendant [denies that he did any of the things claimed by the plaintiff,] denies that he was willful and wanton [in doing any of the things claimed by the plaintiff,] [denies that any claimed act or omission on the defendant's part was a proximate cause of the plaintiff's claimed injuries].

[15] [The defendant claims that the plaintiff was contributorily willful and wanton (in one or more of the following respects):

> (*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory willful and wanton conduct which have not been withdrawn or ruled out by the court and are supported by the evidence*.)]

[16] [The defendant further claims that one or more of the foregoing was [a] [the] proximate cause of the plaintiff's injuries.]

[17] The plaintiff [denies that he did any of the things claimed by defendant,] [denies that he was willful and wanton] [in doing any of the things claimed by defendant,] [to the extent claimed by defendant,] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[18] [The defendant also sets up the following affirmative defense(s):

> (*Set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by evidence*).]

[19] [The plaintiff denies that (summarize affirmative defense(s)).]

[20] The defendant further denies that the plaintiff was injured or sustained damages [to the extent claimed].

Instruction [6] and [16] revised August 2023.

Notes on Use

This instruction should be used where the case is submitted to the jury on charges of negligence in one or more counts, and on charges of willful and wanton conduct in another count or counts.

Poole v. City of Rolling Meadows, 167 Ill.2d 41, 656 N.E.2d 768, 212 Ill.Dec. 171 (1995), held that a plaintiff's contributory negligence is a damage-reducing factor if the defendant's willful and wanton conduct was "reckless," but not if it was "intentional." Therefore, if plaintiff's only claim is that defendant's conduct was the intentional form of willful and wanton, this instruction should not be used. If plaintiff claims intentional willful and wanton conduct in addition to other claims, this instruction should be modified accordingly.

Whether a plaintiff's contributory willful and wanton conduct bars the plaintiff's recovery or reduces the total amount of damages to which the plaintiff would otherwise be entitled was a question left open by the court in Poole. This instruction, with modifications, can be used whichever way the court rules on this issue.

All "special defenses" which must be pleaded under the notice requirements of §2-613(d) of the Illinois Civil Practice Law (735 ILCS 5/2-613(d)) are not necessarily "affirmative defenses" in the sense that they bar recovery. Although §2-613(d) (as amended in P.A. 84-624, effective 9/20/85) refers to contributory negligence as an "affirmative defense," it does not bar the cause of action, but mitigates damages and therefore is treated in paragraph [5] and not in paragraph [8].

Only affirmative defenses that bar recovery should be set forth under paragraphs [8] and [18] of this instruction. Other defenses that do not bar recovery, such as a claim that the plaintiff failed to mitigate damages, should be set forth in a separate paragraph, with the plaintiff's denials in a following paragraph.

20.02 Issues Made By the Pleadings--Negligence--One or More Defendants--Counterclaim

Each party to this suit claims to be entitled to damages from the other: the plaintiff, under his complaint, and the defendant [Defendant C] under his counterclaim.

[10] The plaintiff claims that he was injured and sustained damage, and that the defendant[s] [was] [were] negligent in one or more of the following respects:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the complaint as to the negligence of the defendants which have not been withdrawn or ruled out by the court and are supported by the evidence. If there is more than one defendant and the allegations of negligence are different as between them, use a form such as:*

"Defendant C, in [e.g., failing to keep a proper lookout]."

"Defendant D, in_____."]

[11] The plaintiff further claims that one or more of the foregoing was a proximate cause of his injuries.

[12] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff] [and denies that any claimed act or omission on the part of the defendant was a proximate cause of the plaintiff's claimed injuries].

[13] The defendant[s] claim[s] that the plaintiff was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to the plaintiff's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[14] The defendant[s] further claim[s] that one or more of the foregoing was [a] [sole] proximate cause of the plaintiff's injuries.

[15] The plaintiff [denies that he did any of the things claimed by defendant(s),] denies that he was negligent [in doing any of the things claimed by defendant(s),] [to the extent claimed by defendant(s),] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[16] The defendant [Defendant C] also sets up the following affirmative defense[s]:

Defendant [Defendant C] claims

> [*here set forth in simple form without undue emphasis or repetition those affirmative defenses in the answer which have not been withdrawn or ruled out by the court and are supported by the evidence*].

[17] The plaintiff denies that [summarize affirmative defense[s]].

[18] The defendant[s] further den[ies] [y] that the plaintiff was injured or sustained damages [to the extent claimed].

[19] The defendant [Defendant C] counterclaims that he was injured and sustained damage, [and that the plaintiff was negligent in one or more of the ways previously mentioned] [and that Defendant D was negligent in one or more of the following ways]:

> [*Set forth in simple form without undue emphasis or repetition those allegations of the counterclaim against Defendant D which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[20] The plaintiff [denies] [and Defendant D each deny] [that he (they) did any of the things claimed in the counterclaim] [that he was (they were) negligent] [in doing or omitting to do any of the things claimed in the counterclaim,] [to the extent claimed] [and] claims that [defendant's] [Defendant C's] injury or damage was proximately caused [solely] by the negligence of [defendant] [Defendant C].

[21] The plaintiff claims that defendant [Defendant C] was contributorily negligent [in one or more of the following respects:]

> [*Set forth in simple form without undue emphasis or repetition those allegations of the answer as to defendant's contributory negligence which have not been withdrawn or ruled out by the court and are supported by the evidence*.]

[22] The plaintiff further claims that one or more of the foregoing was [a] [the] proximate cause of defendant's [Defendant C's] injuries.

[23] The defendant [Defendant C] [denies that he did any of the things claimed by the plaintiff,] denies that he was negligent [in doing any of the things claimed by the plaintiff,] [to the extent claimed by the plaintiff,] [and denies that any claimed act or omission on his part was a proximate cause of his claimed injuries].

[24] [(The plaintiff) (and) (Defendant D) further set(s) up the following affirmative defense(s):

The plaintiff (and) (Defendant D) claim(s)

> (*Summarize in simple form and without undue emphasis or repetition any affirmative defenses alleged in the answer to*

the counterclaim that are supported by the evidence).]

[25] [The defendant(s) (Defendant C) (denies) (deny) that (summarize affirmativedefense[s]).]

[17] The plaintiff [denies] [and Defendant D each deny] that [Defendant C] was injured or sustained damages [to the extent claimed].

Instruction [5] and [13] revised August 2023.

Notes on Use

In a wrongful death or survival action, substitute "decedent" or decedent's name in place of"plaintiff" whenever appropriate.

See Notes on Use and Comment to IPI 20.01.