100 OPENING

Members of the jury, (this case) (these cases) will now be submitted to you in the form of a special verdict consisting of _____ questions. Your duty is to answer those questions which, according to the evidence and my instructions, it becomes necessary for you to answer to arrive at a completed verdict. It then becomes my duty to direct judgment according to law and according to the facts as you have found them.

Evidence is defined as follows:

1. testimony of witnesses given in court, both on direct and cross-examination, regardless of who called the witness;
2. deposition testimony presented during the trial;
3. exhibits admitted by me regardless of whether they go to the jury room; and
4. any facts to which the lawyers have agreed or stipulated or which I have directed you to find.

Anything you may have seen or heard outside the courtroom is not evidence. You are to decide the case solely on the evidence offered and received at trial. You are to be guided by my instructions and your own sound judgment in considering the evidence in (this case) (these cases) and in answering these questions.

You should not concern yourselves about whether your answers will be favorable to one party or to the other nor with what the final result of this lawsuit may be.

COMMENT

This instruction was originally approved in 1960 and revised in 1984, 1986, 1996, and 2000. The comment was revised in 1984, 1986, 1996, 2000, and 2012.

The special verdict is authorized by Wis. Stat. § 805.12; the five-sixths verdict by § 805.09(2).

The issue of telling the jury the effect of its findings is one that has frequently been discussed by the Wisconsin Supreme Court. Cases on this issue date back to at least 1890. Throughout the years, the court has not deviated from the position that it is improper for a trial judge to tell the jury the effect of its verdict. In Anderson v. Seelow, 224 Wis. 230, 271 N.W. 844 (1937), the court said:

> . . . . The sole purpose of a special verdict is to get the jury to answer each question according to the evidence, regardless of the effect or supposed effect of the answer upon the rights of the parties as to recovery. To inform them of the effect of their answer in this respect is to frustrate this purpose. . . .

Similarly, in Blahnik v. Dax, 22 Wis.2d 67, 125 N.W.2d 364 (1963), the court held that a jury should not be instructed as to the effect of the apportionment of negligence upon the jury award. The court stated:

> We have consistently held that, "'[i]t is reversible error for the trial court by instruction to the jury to inform the jury expressly or by necessary implication of the effect of an answer or answers to a question or questions of the special verdict upon the ultimate right of either party litigant to recover or upon the ultimate liability of either party litigant.'" To instruct the jury on the effect of its apportionment of negligence upon the ultimate recovery would be such an error.
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> Our holding is based on the fundamental separation of the questions in the special verdict on the issues of liability from those of damages. If the trier is persuaded that a preponderance, however narrowly, favors a finding of negligence, he is then to award the full damages proved. The trier of fact is not to discount damages because of his view of the degree of fault in the defendant's conduct. Conversely, he is not to increase damages because the defendant's conduct was especially wanton and irresponsible. Neither is the trier of fact to temper his findings as to negligence by any consideration of the extent of the damages suffered.

In McGowan v. Story, 70 Wis.2d 189, 234 N.W.2d 325 (1975), the court was asked to alter this position in cases involving the comparative negligence law. In its decision, the court recognized that "where multiple parties are involved the effect of a jury's apportionment of negligence and the impact of the comparison of negligence between negligent tortfeasors can be complex indeed." Although it recognized this inherent problem, the court refused to allow the jury to be instructed on the effect of Wis. Stat. § 895.045 on its verdict. It stated:

> Under our system of jurisprudence, the jury is the finder of fact and it has no function in determining how the law should be applied to the facts found. It is not the function of a jury in a case between private parties on the determination of comparative negligence to be influenced by sympathy for either party, nor should it attempt to manipulate the apportionment of negligence to achieve a result that may seem socially desirable to a single juror or to a group of jurors.
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> Moreover, under the Wisconsin comparative negligence law, where multiple parties are involved the effect of a jury's apportionment of negligence between negligent tortfeasors can be complex indeed. It is occasionally apparent that these complexities are not understood by lawyers and try the deliberative faculties of judges.

> While we recognize the validity of the problem posed by the plaintiff, there is no evidence that the remedy of advising a jury of the effect of its answers would not result in jury confusion and create a situation more to be deplored than that which presently exists.
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> We suggest that the jury should be admonished, and impressed, that its function in a negligence case is fact-finding only and that it is not its role to usurp the legislative function under the comparative negligence law or the judicial function in interpreting the comparative negligence law. It is the role of the judge, acting under the law, and not the jury, to implement the general policies of the comparative negligence statute. We decline to consider the change in the jury function proposed by the plaintiff.

The most recent expression of the court's position on this issue is set forth in Delvaux v. Vanden Langenberg, 130 Wis.2d 464, 387 N.W.2d 430 (1986). On appeal, the plaintiffs argued that failing to inform the jury of the ultimate legal effect of its verdict "blindfolds" the jury. Further, the plaintiffs argued that "it is basically unfair to litigants to have some juries which, by virtue of a knowledgeable juror or jurors, are appraised of the legal effect of the verdict, while other juries, without the benefit of a legally knowledgeable juror, are left to reach a verdict without the knowledge of its ultimate legal effect."

The supreme court rejected these arguments, stating:

> Plaintiffs' arguments overlook the function given to juries in this jurisdiction and ignore case precedent. The members of the jury are not to concern themselves about whether the verdict answers will be favorable to one party or to the other party, nor should a jury be concerned "with what the final result of [the] lawsuit may be." Wis JI-Civil No. 100. Olson v. Williams, 270 Wis. 57, 71, 70 N.W.2d 10 (1955). The jury is a finder of fact; its charge does not include its applying the relevant law to the facts of the case, which is the function of the court. Indeed, the law applicable to a given set of facts is irrelevant to the function of finding those facts; to instruct the jury on matters irrelevant to its charge would disserve the jury's proper task and enlarge the scope of the jury's function beyond that of fact finder.
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> If it is true, as plaintiffs assert, that some juries will be knowledgeable about the ultimate effect of their verdicts while other juries will not be C thereby arguably subjecting a litigant's success or demise to the happenstance constituency of a particular jury C then the solution is to more emphatically instruct the members of a jury that its sole function is strictly that of fact finder. See McGowan v. Story, 70 Wis.2d 189, 198-99, 234 N.W.2d 325 (1975). To inform all juries of the effect of a special verdict in comparative negligence cases solely in the interest of uniformity of knowledge merely substitutes one problem for another. Informing a jury of the verdict's legal effect enlarges the function of the jury well beyond that of fact finder and into the domain of the court. It is the duty of the jury to find the facts and the duty and domain of the court to determine the legal rights of the parties after the return of the verdict. Vanderbloemen v. Suchosky, 7 Wis.2d 367, 374, 97 N.W.2d 183 (1959); see also McGowan, 70 Wis.2d at 199.

For further cases which discuss advising the jury of the effects of its verdict, see Shawver v. Roberts Corp., 90 Wis.2d 672, 280 N.W.2d 226 (1979); McGowan v. Story, supra at 196; Vanderbloemen v.

Suchosky, 7 Wis.2d 367, 373, 97 N.W.2d 183 (1959); Bailey v. Bach, 257 Wis. 604, 608, 610, 44 N.W.2d 631, 634 (1950); Nelson v. Pauli, 176 Wis. 1, 11, 186 N.W. 217, 221 (1922).

Instructions to the jury can be given by the court either before or after closing arguments of counsel. Wis. Stat. § 805.13(4).

Exhibits. The reference to exhibits in the instruction serves as a cautionary note to jurors so they do not disregard exhibits that were admitted into evidence but were not allowed in the jury room. For an instruction when a summary exhibit has been used, see Wis JI-Civil 103.

Taking care not to comment on the evidence, a judge may choose to inform the jury which exhibits have been admitted and which have not.

The decision on whether to allow exhibits in the jury room has long been recognized as being a matter of trial court discretion. Milwaukee Tank Works v. Metals Coating Co., 196 Wis. 191, 194, N.W. (1928), Wunderlich v. Palatine Fire Ins. Co., 104 Wis. 382, 80 N.W. 467 (1899). But note the language of Payne v. State, 199 Wis. 615, 629-30, 227 N.W. 258 (1929), the court stated, in part:

> While it is held that the matter of permitting exhibits to be taken to the jury room is a matter resting within the discretion of the trial court (cite omitted), attention should be paid to the nature of the exhibits. Generally there could be no harm in permitting a jury to refresh its memory with reference to the contents of a written instrument by an examination of the instrument. Where, however, the testimony bearing on one side of a controversy is in the form of a deposition or other written statement, and the testimony on the other resting entirely on parole evidence given in court, it is obvious that to permit a jury to take the written portion of the testimony to the jury room, compelling them to rely on their memories for the testimony on the other side, gives one side of the controversy an undue advantage, and it would seem plain that such exhibits should not be permitted to be taken to the jury room. 2 Thompson, Trials (2d ed) § 2578.