

JURY INSTRUCTIONS IN NEGLIGENCE CASES

HON. JOHN F. MOLLOY*

If this article has any central theme it will be that good law does not necessarily make good jury instruction. By "good law," I am referring to statements of our own Arizona Supreme Court, which lawyers are prone to lift out of an opinion and place before a jury. You will notice that I have included *all* statements of our Supreme Court as "good law." I find that by so regarding all statements emanating from our five justices I am in less hot water than otherwise.

All trial lawyers appreciate the necessity of jury instructions being correct. In the State of Illinois, a committee appointed by the Supreme Court of Illinois in 1956 to draft pattern jury instructions in civil actions determined that over a twenty-five year period 38% of all civil cases reversed in the State of Illinois were reversed in whole or in part by reason of errors in instruction.¹

Our own Supreme Court has taken a firm view upon necessity of proper instructions, often construing improper instructions as prejudicial error. A count of the cases reversed in the five years immediately preceding February 21, 1964, however, will indicate that perhaps the situation is not as bad as many of us might believe. In these five years, there have been only twelve actions involving negligence which were reversed because of improper instructions.² In these twelve cases, however, there are no less than 28 reversible errors in the giving of instructions.

Giving glaring emphasis to the importance of proper jury instruction in negligence cases is the recent case of *Alires v. Southern Pac. R.R.*³ The first trial of this action resulted in jury verdicts for the defendant. On appeal, a new trial was ordered because of improper jury instruction. In early April, 1964, this case was retried in the Superior Court of Maricopa County and resulted in jury verdicts for the plaintiffs in the total sum of \$375,000.00!

The Illinois Supreme Court Committee on Jury Instructions submitted in November of 1960 a set of pattern jury instructions which

* Judge of the Superior Court of Pima County, Tucson, Arizona. B.A. 1939, University of Arizona; member State Bar of Arizona.

¹ *Foreword to ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL* at xi (1961).

² *Egurrola v. Szychowski*, 388 P.2d 242 (Ariz. 1964); *Trojanovich v. Marshall*, 388 P.2d 149 (Ariz. 1963); *Alires v. Southern Pac. Co.*, 93 Ariz. 97, 378 P.2d 913 (1963); *Mills v. Charles Roberts Air Conditioning Appliances*, 93 Ariz. 176, 379 P.2d 455 (1963); *Mitchell v. Colquette*, 93 Ariz. 211, 379 P.2d 757 (1963); *Ieronimo v. Hagerman*, 93 Ariz. 357, 380 P.2d 1013 (1963); *Deering v. Carter*, 92 Ariz. 329, 376 P.2d 857 (1962); *Gilbert v. Quinet*, 91 Ariz. 29, 369 P.2d 267 (1962); *Coyner Crop Dusters v. Marsh*, 91 Ariz. 371, 372 P.2d 708 (1962); *Reichardt v. Albert*, 89 Ariz. 322, 361 P.2d 934 (1961); *Layne v. Hartung*, 87 Ariz. 88, 348 P.2d 291 (1960); *Michie v. Calhoun*, 85 Ariz. 270, 336 P.2d 370 (1959).

³ 93 Ariz. 97, 378 P.2d 913 (1963).

have been made mandatory by rule of the Supreme Court when applicable.⁴

By itself appointing this Committee, and by giving official sanction to its work product, the Supreme Court of Illinois has mandated much confusion out of the jury instruction law of that state. The work product of the Arizona Bar Committee on jury instructions submitted in 1959, to which reference will be made in this article from time to time, has considerably less authority. There are those who will question the power of a judicial body to "legislate" proper jury instructions. Most lawyers, however, are willing to forego their philosophical objections in this regard in order to have more certainty in the field of law which so desperately needs more certainty. In passing, the author would like to pay tribute to the work of the Arizona State Bar Committee, chaired by Mr. James H. O'Connor and reported by the Honorable Morris K. Udall. The "Uniform Jury Instructions" submitted by them have been of invaluable assistance to the administration of justice in this State.

The Illinois set of instructions is a radical departure from jury instructions with which Arizona lawyers are used to dealing. The Illinois Committee dedicated itself, from the beginning of its work (which included meeting at least two full days per month for four years), to making instructions: 1. "conversational"; 2. "understandable"; 3. "un-slanted"; and 4. "accurate." They also set themselves up certain policies of "veto," that is, types of instructions to which they would not give approval. These were: 1. negative instructions; 2. instructions that singled out certain evidence for comment; 3. instructions which could only be given in exceptional cases; and 4. instructions which "particularized," the Committee preferring to rely upon "good general instructions."

In our state, we have been going through an evolution in the field of instructions. In 1931, when *Lacy v. State*⁵ was decided, the form of hypothetical instructions was considered to be "the only practical one in order to make an understandable and clear declaration of the law applicable to the facts." In 1938, *Western Truck Lines v. Berry*⁶ cites *Lacy v. State* with approval and holds hypothetical instructions to be "permissible." In 1943, *Pearson v. Harrington*⁷ encourages each side to propose lengthy hypotheticals posing the facts in a light favorable to their respective contentions.

Since then, decisions have evolved away from hypothetical instruction. By 1957, *Wolfswinkel v. Southern Pac. R.R.*⁸ tells us that hypotheticals, in the field of common law negligence, are "at best—dangerous."

⁴ ILL. SUP. CT. R. 25-1 (a).

⁵ 38 Ariz. 60, 297 Pac. 872 (1931).

⁶ 52 Ariz. 38, 78 P.2d 997 (1938).

⁷ 60 Ariz. 354, 137 P.2d 381 (1943).

⁸ 82 Ariz. 33, 307 P.2d 1040 (1957).

*Coyner Dusters v. Marsh*⁹ says the same, and also adds a word of censor about "abstract and verbose" instructions. There is a definite suggestion in *Coyner* that the Arizona Supreme Court wants instructions simple enough so that the average layman will be able to grasp them.

Taken together, these Arizona decisions lead us in somewhat the same direction as the goals and vetoes that the Illinois Supreme Court Committee set up for itself.

Another evolution pertains to the Arizona Supreme Court's attitude in the area of what it takes to have a record on appeal. Rule 51, Rules of Civil Procedure, says in part: "No party may assign as error the giving or the failure to give an instruction unless he objects thereto before the jury retires."

In 1947, our Supreme Court was of the mind to cite this rule and firmly decline to consider any error in the giving of instructions not properly raised.¹⁰ In recent years the court is more inclined to talk about "fundamental error" which can be raised, as was done in *Michie v. Calhoun*,¹¹ without any objection having been made in the lower court. (In the *Michie* case the trial court had wrongfully instructed that the negligence of a deceased father should be attributed to a surviving mother in a death action brought for the death of a son.)

This evolution appears to have swung the full course of the pendulum in *Trojanovich v. Marshall*,¹² which reversed on the controversial doctrine of *Layton v. Rocha*.¹³ (*Layton* had held that the trial court *may* use "may" and *should* use "should" but *must not* use "must" in talking about plaintiff's contributory negligence.) The Supreme Court in *Trojanovich* reversed because the trial court said "the plaintiff may not" recover if contributorily negligent, the error being raised on the court's own motion!

In considering the problem of Arizona jury instructions, we should always keep in mind that ours is one of the few states having a constitutional prohibition against the trial court charging juries with respect to matters of fact and against commenting thereon.¹⁴ A study indicates that there are only four other states in the Union with similar constitutional prohibitions.¹⁵

⁹ 91 Ariz. 371, 372 P.2d 708 (1962).

¹⁰ *Kauffroath v. Wilbur*, 66 Ariz. 152, 185 P.2d 522 (1947); *Ruth v. Rhodes*, 66 Ariz. 129, 185 P.2d 304 (1947).

¹¹ 85 Ariz. 270, 336 P.2d 370 (1959).

¹² 388 P.2d 149 (Ariz. 1963).

¹³ 90 Ariz. 369, 363 P.2d 444 (1962).

¹⁴ ARIZ. CONST. art. 6, § 27.

¹⁵ NEV. CONST. art. 6, § 120; S.C. CONST. art. 5, § 26; TENN. CONST. art. 6, § 9; WASH. CONST. art. 4, § 16.

A clear definition of what is meant by this inhibition is somewhat lacking in our law. An early case upon the subject, *Reid v. Topper*,¹⁶ had indicated that the trial court may not discuss possible inferences from the facts and instruct the jury as to which ones they "should" draw. Later cases have indicated that the court should not "single out" any particular evidence and give it "undue emphasis."¹⁷

In this connection, it seems to the writer that whenever the judge singles out any piece of evidence and tells the jury what they may infer from it, there is the possibility of a violation of this constitutional inhibition. All evidence admitted at a trial is admitted for *some* purpose, that is, some inference material to the issues can be drawn from it, else it should not have been admitted. If the court selects out any one or more of such items, but less than all items of evidence, and advises the jury as to why it was admitted, or what they may infer from it, it seems that some special emphasis is necessarily given to the evidence so selected.

With this introduction, let us examine a few particular instructions commonly given to juries in negligence cases in Arizona, to ascertain how they withstand examination in the light of our constitutional prohibition against comment and the evolutionary changes which may be ahead.

First, let us look at a stock instruction commonly used throughout the state on proximate cause, which reads, with minor variations from trial court to trial court, as follows:

The proximate cause of any injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. It is the efficient cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or through intermediate agencies or through conditions created by such agencies.

The above is an almost verbatim quote from at least a dozen Arizona Supreme Court decisions, the latest being *Alires v. Southern Pac. R.R.*¹⁸ If any jury instruction can lay claim to being "good law," this one can. What a pity the average juror cannot understand the instruction!

Our "good law" in this field of proximate cause is adopted from our sister state of California. Dean Prosser, in commenting upon this magic language similarly encanted throughout the State of California, had this to say:

¹⁶ 32 Ariz. 381, 259 Pac. 397 (1927).

¹⁷ Quotes are from *State v. Eisenstein*, 72 Ariz. 320, 235 P.2d 1011 (1951).

¹⁸ 93 Ariz. 97, 378 P.2d 913 (1963).

There are probably few judges who would undertake to say just what this means, and fewer still who would expect it to mean anything whatever to a jury. The first sentence was lifted by a California opinion long since from Shearman and Redfield on Negligence, a text written for lawyers and not expected to be comprehensible to laymen, and none too good a text at that. The second, which was borrowed from a casual sentence of the United States Supreme Court, complicates the puzzle of "proximate" by adding the enigma of "efficient," and points out that one thing can set another in operation, if that needs pointing out. The third appears to be chiefly a safeguard against California decisions which have said that it is error to instruct that the causation must be "direct." With this guidance the jury is handed all of the issues discussed above that may be involved in the particular case, wrapped up in one package, and permitted to retire to the privacy of its deliberations. Is it any wonder that it throws the whole thing out of the window, and proceeds to decide only whether it thinks that by rights the defendant ought to pay for the plaintiff's damages? Is that instruction really any more enlightening than the "approximate cause" which has been held to be error, but on two occasions has actually been uttered by justices of the Supreme Court of California itself?¹⁹

The Illinois Pattern Instruction on this topic may or may not be good law in Arizona, but most jurors will understand it. The instruction, together with the note governing its use, reads as follows:

When I use the expression "proximate cause," I mean that cause which, in natural or probable sequence, produced the injury complained of. [It need not be the only cause, nor the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time, which in combination with it, causes the injury.]*

*Note on Use

This instruction in its entirety should be used only when there is evidence of a concurring or contributing cause to the injury or death (other than acts or omissions of the plaintiff). In cases where there is no evidence of a concurring or contributing cause, the short version without the bracketed material may be used.²⁰

Some will come to the defense of the magic formula used in Arizona and California and suggest that if there are phrases in the incantation that need to be explained, this is the proper remedy rather than change our good law.

¹⁹ Prosser, *Proximate Cause in California*, 38 CALIF. L. REV. 369, 424 (1950); supporting citations have been omitted from the quotation.

²⁰ ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 15.01 (1961).

Few will disagree that the words "unbroken by any efficient intervening cause" need some kind of explanation, even for lawyers. In cases in which I have thought there might be evidence of an intervening cause, the writer has given an instruction designed to be the "good law" of *Salt River Valley Water Users' Ass'n v. Cornum*²¹ as follows:

When it appears that the conduct of two or more persons, acting independently and at different times, created or contributed to the circumstances out of which injury resulted, the question arises whether there has been an efficient intervening cause so as to break the chain of causation set up by the previous conduct. The question arises only when there has been previous negligent conduct which has ceased to operate in a dynamic way with the results of such conduct being at rest in a static condition. If there is superimposed upon such a condition the negligence of some other person, or persons, then the first negligent conduct may not be a proximate cause of the injurious result but rather a remote cause thereof. The legal test to be used to determine whether or not there has been an efficient intervening cause, so as to break the chain of proximate causation, is to determine whether or not the original actor foresaw or by the exercise of reasonable care should have foreseen that the subsequent negligent conduct, which resulted in the injury, might occur. If there was such foreseeability and if the other criteria of proximate cause are present, both the negligent conduct of the first actor and that of the second actor are proximate causes of the accident. Absent such foreseeability, the conduct of the first actor is a remote cause and there would be no liability imposed on such a person for the injury that thus resulted.

I suggest that it takes at least a high-school course in physics to understand this "clarifying" instruction. Unfortunately, a high-school degree is not a prerequisite to be a juror. And even if you have had high-school physics, after ten or fifteen years away from it, being a housewife, or a shipping clerk, one might still not know what some of the words meant, much less how to put them together. Combine this with the fact that this instruction would be interspersed with thousands of other words which jurors find difficult to understand and we are in the realm of sheer confusion.

But beyond this objection of being uncommunicative, as far as average jurors are concerned, I suggest that this may be an example of giving law to the jury which really has little pertinency to the jury's function.

In this field of intervening cause Prosser advocates a very strong role for the court in this language:

It is the exclusive function of the court to declare the existence

²¹ 49 Ariz. 1, 63 P.2d 639 (1937).

or non-existence of rules which restrict the actor's responsibility short of making him liable for harm which his negligent conduct is a substantial factor in bringing about, and to determine the circumstances to which such rules are applicable.²²

The *Restatement of Torts* expresses the Prosser view.²³

It is interesting to note that our Supreme Court has never yet held it proper to instruct a jury on this complicated concept of intervening cause. In *Salt River Valley Water Users' Ass'n v. Cornum*, discussed *supra*, Judge Alfred C. Lockwood held there was no question for the jury to decide. In the *Cornum* case, the plaintiff was walking by the side of a road when there was an automobile collision in the street beside him. One of the automobiles careened off another car and headed for the plaintiff. The plaintiff, seeing the vehicle approaching him, attempted to flee but his pants leg was caught by a wire protruding from a guy wire attached to a powerpole of the defendant, Salt River Valley Water Users' Association. He was thus held until the car hit him and his leg was badly mangled, both by the car and the guy wire. Under these facts, Judge Lockwood held as a matter of law that any negligence of the Salt River Valley Water Users' Association could not be the proximate cause of plaintiff's injury.

The intervening-cause language in the *Cornum* case has been used in two other cases, *Lyric Amusement v. Jeffries*,²⁴ and *MacNeil v. Perkins*.²⁵ In neither of these cases was an instruction on intervening cause approved. Each of these cases considered the evidence in the light of the defendant's contention that its negligence could not, as a matter of law, have been the *proximate cause* of plaintiff's injuries. In both cases, the court, in applying the law of *Salt River Valley Users' Ass'n v. Cornum*, held there was sufficient evidence of causation to go to the jury, without giving approval to any particular language submitting the issue.

If our Supreme Court should take the view of Prosser that this is a matter largely for the court, rather than the jury, then there is little need to struggle in framing jury instructions with "static" and "dynamic conditions," and a legal concept that legal scholars, such as Prosser, have written thousands of words about, with little clarity except for the most learned. Perhaps special interrogatories on particular facts in dispute, or on the concept of reasonable foreseeability, if this be in question, would be the proper method to submit the matter to the jury (as, indeed, the *Restatement of Torts* itself suggests on the subject of proximate cause itself—see Section 434).

²² PROSSER, TORTS 281 (2d ed. 1955).

²³ The above quotation from Prosser is verbatim, RESTATEMENT, TORTS § 453.

²⁴ 53 Ariz. 381, 120 P.2d 417 (1941).

²⁵ 84 Ariz. 74, 324 P.2d 211 (1958).

The Illinois instruction on intervening cause, which is phrased in terms of "proximate cause," may be both good jury instruction and "good law" in our state. It reads as follows:

If you find from your consideration of all the evidence that the defendant was negligent in one of the ways which I have mentioned, as charged by the plaintiff, and that his negligence was a proximate cause of injury to the plaintiff, and you further find that the action of a third person or an outside agency not a party to the suit also was a proximate cause of injury to the plaintiff, then the acts of the third party or of the outside agency are not a defense to the defendant against the claim of the plaintiff. On the other hand, if you find that the proximate cause of injury to the plaintiff was negligence of a third party or outside agency, and that negligence of the defendant did not proximately cause or contribute to cause of the injury to the plaintiff, then the plaintiff is not entitled to recover from the defendant.²⁶

This premise that "good law" does not necessarily make good jury instruction is illustrated also in the so-called "rule" of *Owl Drug v. Crandall*.²⁷ This is the case that said: ". . . where the evidence shows an injury may have resulted from one of several causes, but only one of the causes can be attributed to the defendant's negligence, the plaintiff must fail." If this is good law, it is so in only a special sense. There is no result in life which "may" have been caused by several things. Proof beyond a reasonable doubt is not required on any issue in a civil action, and, even if it were, such proof would not eliminate the possibility that an accident "may" not have been caused by something other than the opposing party's negligence. As to matters at issue in a civil action, a jury must decide on the basis of *probabilities*.²⁸

The *Owl Drug* case concerned a woman who had fallen down three times and in one of the three falls had broken the femur of her leg. Apparently there was *no* evidence from which the jury could deduce that it was any more probable that she had suffered the broken femur in any one of the three falls. In the absence of evidence upon the subject, her proof fails as a matter of law, because under the facts, as determined by the appellate court, it was more probable that the accident occurred in one of the falls for which the defendant was not responsible.

But if this was good law for this case, it is certainly not good law for the average personal injury case. The words quoted in the *Owl Drug* case were the "thinking out loud" of the court, explaining how it

²⁶ ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 12.05 (1961).

²⁷ 52 ARIZ. 322, 80 P.2d 952 (1938).

²⁸ 20 AM. JUR. EVIDENCE § 1250 (1939); 32 C.J.S. EVIDENCE § 1021b (1942); *Hewett v. Industrial Comm'n*, 72 ARIZ. 203, 232 P.2d 850 (1951); *Cook v. Michael*, 330 P.2d 1026 (Ore. 1958).

reached its conclusion that the plaintiff failed in this case to prove proximate cause. The true principal of law involved is stated in a stock instruction on burden of proof—that is, that the plaintiff has the burden of proving that the defendant's negligence was a proximate cause of the accident. The above quote from *Owl Drug*, if given to the jury, can only be confusing and, taken alone, is both bad law and bad jury instruction.

The next instruction I would like to throw out for your consideration is the instruction on unavoidable accident. In the recent case of *Mitchell v. Colquette*²⁹ our Supreme Court held it reversible error to give this instruction in a two-car collision case. It held there was no evidence other than that the accident had been caused by negligence. To give an instruction on unavoidable accident, it seems to the writer, is entirely unnecessary in any case. The jury should be concisely told that if the plaintiff fails to prove that the defendant was negligent, and that this negligence was a proximate cause of the plaintiff's injury, the plaintiff cannot recover. The subject is certainly adequately covered if the judge further instructs by giving Uniform Jury Instruction No. 3 recommended by the State Bar Committee, that . . . "the mere fact that an accident took place considered alone will not support any inference or conclusion that either party was guilty of negligence." The Illinois Committee recommends against ever giving an unavoidable-accident instruction (Illinois Pattern Instruction 12.03). Our Supreme Court had held it proper to give the instruction in a proper case (*McKeever v. Phoenix Jewish Center*),³⁰ but has never yet held it to be error to fail to give it. Let us hope it never does.

Another instruction the writer considers to be "good law" but not good jury instruction is the "sudden emergency" instruction. What a reasonable man would or would not do is the test. Why talk about a special situation that is judicially given the label of "emergency"? Almost every accident is an emergency at one stage of its occurrence; else it would not have occurred. Arizona Uniform Instructions Numbers 2 and 3 tell the jury that the test of negligence is what a reasonable person would or would not do "under the same or similar circumstances" and that different individuals "all exercising ordinary care, might behave differently under the same circumstances."

In California, the failure to give the "sudden emergency" instruction, when deemed applicable, is reversible error (*Emery v. Los Angeles Ry.*).³¹ Also, in California, the giving of the sudden emergency doctrine, when

²⁹ 93 ARIZ. 211, 379 P.2d 757 (1963); Note, 6 ARIZ. L. REV. 161 (1964). On unavoidable accident in general, see Rees, *Unavoidable Accident—A Misunderstood Concept*, 5 ARIZ. L. REV. 225 (1964).

³⁰ 92 ARIZ. 121, 374 P.2d 875 (1962).

³¹ 143 P.2d 112 (1943).

not deemed applicable, is reversible error (*Staggs v. A.T.S. & F. Ry.*)³². If this be the law of Arizona, then indeed any personal injury case is affected with great uncertainty, until the Supreme Court has rendered its august view as to whether or not there is sufficient evidence of "emergency" to merit the instruction.

It is the writer's conception that this doctrine of "sudden emergency" should be left to the psychologists and perhaps the legislators, but has no proper place in jury instructions. The Illinois Committee concurs, and recommends against ever giving the instruction, labeling it "argumentative."³³

The last instruction that I would like to suggest need not be given is the *res ipsa* instruction. Prosser,³⁴ and the Arizona Supreme Court,³⁵ agree that the *res ipsa* doctrine is "simply a rule of circumstantial evidence and gives rise to an inference."

If it be a rule of evidence, in those states not having a prohibition against "singling out" evidence, there would be no error, perhaps, in telling the jury about this rule of evidence. This would be particularly so in California, in which state the absolute right of the court to "make such comment on the evidence and the testimony and credibility of any witness as in its opinion is necessary for the proper determination of the case" is established by the State Constitution.³⁶

Because of the night-day difference between the two respective constitutions, using California authority in the field of jury instruction in Arizona is obviously very dangerous. In a state such as ours, in which courts are constitutionally prohibited from commenting on matters of fact, the giving of rules of evidence to the jury, without giving them *all* applicable rules of evidence, may very well be a "singling out" of evidence.

The author has no quarrel whatsoever with the considerable body of Arizona law which has used the *res ipsa* doctrine as a rule of law for the court to determine whether or not there is sufficient evidence to go to the jury on a question of negligence.³⁷ But the question is raised whether this law is good jury instruction.

The instruction usually given is Arizona Uniform Jury Instruction Number 15, which is quite verbose and confusing to a layman, par-

³² 287 P.2d 817 (1955).

³³ ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 12.02 (1961).

³⁴ PROSSER, TORTS, 199-211 (2d ed. 1955).

³⁵ *McKeever v. Phoenix Jewish Community Center*, 92 Ariz. 121, 374 P.2d 875 (1962); *Drumm v. Simer*, 68 Ariz. 319, 205 P.2d 592 (1949); *Stewart v. Crystal Coca-Cola Bottling Co.*, 50 Ariz. 60, 68 P.2d 952 (1937).

³⁶ CAL. CONST. art. 6, § 19.

³⁷ *Dodson v. Pohle*, 73 Ariz. 186, 239 P.2d 591 (1952), is an example of such a case.

ticularly in that portion thereof which walks the fine line between burden of proof and a presumption.³⁸

It is interesting to note that our own Supreme Court has had difficulty, at times, in seeing any distinction between the burden of proof and this presumption, and our decisions in this field are not completely consistent as to whether the presumption arising from the

³⁸ ARIZ. UNIFORM JURY INSTRUCTION NO. 15 reads:

Ordinarily the mere happening of an accident will not support a finding that there was negligence on the part of any party. This is not always true, however, and the plaintiff in this case relies on an exception to the general rule. The exception is known by lawyers as "res ipsa loquitur." These Latin words means "the thing itself speaks."

The rule of res ipsa loquitur may be used by you in this case if you find that the following four conditions existed with respect to the accident involved:

1. The automobile in which the defendant.....was riding when it collided with the plaintiff's vehicle was in the possession and under the exclusive control of the defendant.....at the time of the accident and during the events leading up to it, (or at the time the cause of injury was set in motion).
2. The circumstances of the accident were of such a type or nature as do not happen in the ordinary course of things if the driver of the defendant's car exercises ordinary and reasonable care under the circumstances for the safety of other persons on the road.
3. The collision was not due to any neglect or fault on the part of the plaintiff.....; and
4. The plaintiff is not in a position to show the particular circumstances which caused the offending agency or instrumentality to operate to his injury, whereas the defendant who was in charge of the automobile may reasonably be expected to know and be able to explain how the accident was caused, or at least be able to show that no failure of duty on his part was a cause.

If you find that these four conditions existed you are permitted, but not required, to infer that the proximate cause of the accident in question was some negligent conduct on the part of the defendant. That inference, if it be drawn by you, is itself a form of evidence. And if no other evidence exists tending to overthrow it, or if the inference either alone or with any other evidence supporting it preponderates over contrary evidence, then you may find that the defendant was negligent. Therefore, if the inference of negligence is drawn by you from the happening of the accident in the manner that it occurred, you should weigh any evidence tending to overcome the inference, bearing in mind that in such situation it is incumbent upon the defendant to rebut the inference by showing that he did, in fact, exercise ordinary care and diligence, or that the accident occurred without being proximately caused by any failure of duty on his part.

The plaintiff's burden of proving negligence on the part of the defendant by a preponderance of evidence is not changed by the rule just mentioned, but the plaintiff may be aided in establishing his case by the inference you are permitted to draw.

In order to find the defendant negligent under the res ipsa loquitur rule, the inference of negligence, if it is drawn by you, and any other evidence in the case which supports it, must have greater weight, and more convincing force in your minds than the opposing explanation offered by the defendant to the effect that he was not negligent. If such a preponderance in plaintiff's favor exists then plaintiff has established negligence on the part of the defendant even though he cannot show specifically how the accident occurred.

res ipsa situation is one that disappears when an explanation has been introduced in evidence.³⁹

Our Supreme Court once said:

We consider next the question of presumptions. There has been much erroneous thinking and more loose language in regard to presumptions. We read of presumptions of law and presumptions of fact, of conclusive presumptions and of disputable presumptions. In truth there is but one type of presumption in the strict legal meaning of the word, and that is merely a general rule of law that under some circumstances, *in the absence of any evidence to the contrary*, a jury is compelled to reach a certain conclusion of fact. But a presumption so declared by the law is only raised by the absence of any real evidence as to the existence of the ultimate fact in question. It is not in and of itself evidence, but merely an arbitrary rule imposed by the law, to be applied in the absence of evidence; whenever evidence contradicting the presumption is offered the latter disappears entirely, and the triers of fact are bound to follow the usual rules of evidence in reaching their ultimate conclusion of fact. As was once said, "Presumptions may be looked on as the bats of the law, flitting in the twilight, but disappearing in the sunshine of actual facts."⁴⁰

If this law applies to the res ipsa doctrine, it is contrary to decisions of our Supreme Court which have held that the res ipsa doctrine is "a rule of circumstantial evidence."

Our Supreme Court has on three occasions approved the giving of a res ipsa instruction, without ever considering whether evidence is being "singled out."⁴² *It has never yet held the giving or the failure to give the instruction to be reversible error.* The writer would believe that the applicable law is sufficiently well covered for the jury's purposes in giving the standard instructions on burden of proof, and circumstantial evidence. Perhaps, in a res ipsa situation, it would be well to omit that portion of Uniform Jury Instruction No. 3 reading as follows: "Secondly, the mere fact that an accident took place considered alone will not support any inference or conclusion that either party was guilty of negligence."

³⁹ In *Drumm v. Simer*, 68 Ariz. 319, 322, 205 P.2d 592 (1949), the court in speaking about the doctrine of res ipsa said: "When rebutted the doctrine no longer applies and the burden then shifts to the plaintiff to prove negligence on the part of the defendant."

⁴⁰ The quotation is from *Seiler v. Whiting*, 52 Ariz. 542, 548, 84 P.2d 452 (1938).

⁴¹ *McKeever v. Phoenix Jewish Community Center*, 92 Ariz. 121, 123; 374 P.2d 875 (1962).

⁴² *Throop v. Young*, 94 Ariz. 146, 382 P.2d 560 (1963), noted in 6 ARIZ. L. REV. (1964); *Tenney v. Enkeball*, 52 Ariz. 416, 158 P.2d 519 (1945); *Pickwick Stages v. Messinger*, 44 Ariz. 174, 36 P.2d 168 (1934).

The giving of a lengthy *res ipsa* instruction would not, it seems, be necessary if the following quotation from a United States Court of Appeals decision (9th) is good law:

The use of the Latin phrase "*res ipsa loquitur*" in this connection may be unfortunate, as suggesting that some exotic doctrine is involved. It is nothing more than a case of circumstantial evidence, where plaintiff has proved enough "to get to the jury," and where the inference of negligence, though not necessarily a required one, is a permissible one on the balance of probabilities.⁴³

It is only fair to the reader, however, to point out that even the Illinois Pattern Instructions suggests a loquation upon the *res ipsa loquitur* doctrine.⁴⁴ However, Illinois does not have our constitutional mandate: "Judges shall not charge juries with respect to matters of fact, nor comment thereon, but shall declare the law."

Very briefly, the author will attempt to summarize the thoughts expressed in this article. Arizona law pertaining to the instruction of juries is evolving. It is evolving away from hypothetical instruction and away from the "abstract and verbose." In recent years, the Supreme Court has been more prone to correct errors in the instruction of juries without objection having been made to the trial court in the settlement of instructions, and even on its own motion on appeal. The trial lawyer is thus put to his mettle. He cannot rely upon the ignorance of his opponent. Pattern jury instructions given the blessing of the Supreme Court may be the solution to these problems that the bench and bar would wish to adopt, following the Illinois example.

Throughout the article there is the one thought that the author has hoped to convey to the reader and that is the lifting of language out of an Arizona Supreme Court decision will not necessarily give a trial lawyer a good jury instruction. In some of these opinions we have the "thinking out loud" of the court, which was never intended to be jury instruction. Also, there are areas of our law which have no pertinency to the jury's function. Whether or not the particular instructions the author has singled out will eventually be held to be legal verbiage which should not be given to the jury is a matter of conjecture. The author would be satisfied with his batting average if future decisions would eliminate, out of the six stock instructions singled out in this article for attack, at least three from the mass of language thrown at a typical Arizona jury called to try a negligence case.

⁴³ *Siebrand v. Gossnell*, 234 F.2d 81, 87 (1956).

⁴⁴ ILLINOIS PATTERN JURY INSTRUCTIONS—CIVIL § 22.01 (1961).