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Rethinking Jury Instructions: Fact-Finding v. Legal Theory?

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Introduction

Topics

Anglo-American jury instructions
Comprehensibility issues
Lecture approach (legal doctrine, legal definitions) vs. *Kentucky approach* (fact-finding)
Definitions, presumptions (problems/examples)
Principles for rewriting instructions

Anglo-American jury instructions

At trial, judges are experts on *law*, while jurors are generally experts on *facts*.
Under the *lecture approach*, jurors are instructed in legal doctrines and legal definitions. Failure to understand either can lead to wrong conclusions.
Under the *Kentucky approach*, jurors focus on narrow questions of fact (emphasizing parties' respective burdens of proof & their contentions). (Does this approach raise constitutional issues?)

Comprehensibility issues

Anglo-American jury instructions present large problems of comprehensibility.
Rewriting according to broad plain language principles increases comprehension.
Modification of the timing and method of delivery of jury instructions can be helpful (and “roadmaps” & narrative examples help reduce difficulties with abstract concepts).

Three Criteria for a Good (Criminal) Jury Instruction (Solan 2001)

“In order to assess the quality of a jury instruction, it is first necessary to decide what makes a good jury instruction good. Let us say that at a minimum any good criminal jury instruction must meet the following three criteria: First, **it must accurately convey the law to the jury**. Second, **it must do so comprehensibly**. Third, **it must not contain subliminal messages that undermine the presumption of innocence.**” [emphasis added]

Three Criteria for a Good Jury Instruction (Solan 2001, as modified by Dumas)

In order to assess the quality of a jury instruction, it is first necessary to decide what makes a good jury instruction good. Let us say that at a minimum any good jury instruction must meet the following three criteria: First, **it must accurately convey the law to the jury**; that is, it must be **precise**. Second, **it must do so comprehensibly**; that is, it must be **clear**. Third, **it must not contain subliminal messages that undermine constitutionally required presumptions (innocence, burden of proof, etc.)**.

Lecture approach (legal doctrine, legal definitions) vs. Kentucky approach (fact-finding)

Lecture approach: courts treat jury instruction as a compulsory mini-law school (legal doctrines, legal (and other) definitions)

Kentucky approach: courts seek to assist jurors to resolve narrow questions of fact (rather than to contribute to jurors' broad knowledge of sometimes random information about the law); instructions focus on parties' respective burdens of proof and their contentions; the point is to enable jurors to perform their *fact-finding function*, rather than to harmonize sometimes disparate legal texts

Legal doctrines

General (function of judge, jury)

burden of proof (preponderance of the evidence & proof beyond a reasonable doubt)

Civil cases

Criminal cases (presumption of innocence, etc.)

Definitions

Legal definitions

Legal terms present at least three kinds of problems for lay persons.

terms of art

terms with important legal significance, but *no generally accepted explicit definitions*

undefined terms with legal meanings

Terms of Art

“a word or phrase having a special meaning in a particular field, different from or more precise than its customary meaning” (Clapp 427).

Ex: *diversity of citizenship, federal question*

Lay persons, unfamiliar with their legal sense, might assume that they understand the terms. Judges and lawyers would understand them differently. Legal definitions are available in legal dictionaries, but a lay person might not know that a special sense is intended. (And of course dictionaries are not usually available to jurors.)

Terms with Important Legal Significance but no Generally Accepted Explicit Definitions

Ex: *aggravation, mitigation, knowingly, reasonable doubt* These terms play an important role in criminal cases, especially capital cases. Legal dictionaries offer general definitions, often quoting appellate opinions. The concept of *aggravation*, as it is relevant to criminal law, is defined in Black's 7th under *aggravated* as “made worse or more serious *by circumstances such as* violence, the presence of a deadly weapon, or the intent to commit another crime” [emphasis added] (p.65). Clapp offers a similar definition, then adds that “[t]he precise circumstances that elevate an offence to the status of an aggravated offense vary from state to state [example omitted]” (p. 21).

Undefined Legal Terms

Undefined legal and other terms (with nonexplicit definitions) such as *knowingly* may appear in jury instructions. Jurors are usually forbidden to use dictionaries, and judges seldom define terms for jurors. Such terms, left undefined, occasionally give rise to judicial reversal, as in a May 19, 2003, opinion in Tennessee.

Reversal for Failure to Define

In *State of Tennessee v. Robert F. Smythers* (No. E2001-02806-CCA-R3-CD, Court of Criminal Appeals of Tennessee at Knoxville, 2003 Tenn. Crim. App., LEXIS 433, May 19, 2003, Filed), “Defendant was indicted for first degree premeditated murder and a Monroe County jury convicted him of the lesser-

included offense of second degree murder. The trial court sentenced him to twenty years' incarceration. ... [T]he Defendant argues ... (4) that the trial court erred in instructing the jury regarding first degree murder and second degree murder. After a careful review of the jury instructions ..., which fail to define “knowingly,” we reverse the judgment of the trial court and remand for a new trial.”

Significance of *knowingly*

Second degree murder is defined ... as “[a] knowing killing of another.”” [citation omitted] The trial court in this case instructed the jury as follows:

Second degree murder. Any person who commits second degree murder is guilty of a crime.

For you to find the defendant guilty of this offense, the state must have proven beyond a reasonable doubt the existence of the following essential elements: ... (2) that the defendant acted knowingly. ... nowhere in the instructions was the jury given a definition of “knowingly” or “knowing.”

Failure to Define *knowingly*

The trial court correctly and completely instructed the jury as to the essential elements of first degree murder, including definitions of "intentional" and "premeditation." Correct and complete instructions were also provided for the offenses of criminally negligent homicide and reckless homicide. However, with regard to second degree murder and voluntary manslaughter, the latter requiring either intentional or knowing conduct, see *id.* § 39-13-211(a), the failure to define "knowingly" resulted in an incomplete jury charge in this case. [A motion to rehear was filed by the Attorney General's office; the court refused to grant the motion. The Assistant Attorney General recommended that the State appeal to the state Supreme Court. The State has about 40 days left to file as of 7/7/03.]

Reasonable Doubt

Reasonable doubt and due process: Due process guarantees acquittal to defendants if there is a *reasonable doubt* as to their guilt. In all criminal cases, “jurors must use the reasonable doubt standard as a filter to sift the evidence and determine whether to acquit or convict” (Power 1999:46) Thus, jurors are responsible for enforcing due process.

Due Process

Since the jury applies the *reasonable doubt* requirement, the jury is in fact responsible for enforcing a constitutional guarantee. Few factual questions require juries to enforce constitutional rights. When they do so in criminal cases, the stakes are very high. [Power 1999.]

What's the problem?

If jury instructions defined *reasonable doubt* adequately, there would be no problem. But definitions vary widely among jurisdictions: “There is not just a split among the circuits, there is a nationwide crazy quilt two layers deep—with state courts as well as federal circuits in profound disagreement.” (Power 1999:46)

Another Problem: Unusual Vocabulary: *captious*

“Reasonable doubt is that doubt engendered by an investigation of all the proof in the case and an inability, after such investigation, to let the mind rest easily as to the certainty of guilt. Reasonable doubt does not mean a **captious**, possible or imaginary doubt. Absolute certainty of guilt is not demanded by the law to convict of any criminal charge, but moral certainty is required, and this certainty is required as to every proposition of proof requisite to constitute the offense.” TENNESSEE PATTERN JURY INSTRUCTIONS: CRIMINAL § 2.03 (4th ed. 1995). [emphasis added; since changed—the word **captious** has been removed]

Criteria for Defining *Reasonable Doubt*

1. Moral Certainty (or “abiding conviction” —this one is on its way out)
2. Analogy Approach (“the kind of doubt that would make a reasonable person hesitate to act”)
3. “firmly convinced/real possibility” standard (Federal Judicial Center Instruction—next slide)

Federal Judicial Center (FJC) Instruction

Proof beyond a reasonable doubt is proof that leaves you firmly convinced of the defendant’s guilt. There are very few things in this world that we know with absolute certainty, and in criminal cases the law does not require proof that over-comes every possible doubt. If, based on your consideration of the evidence, you are firmly convinced that the defendant is guilty of the crime charged, you must find him guilty. If, on the other hand, you think there is a real possibility that he is not guilty, you must give him the benefit of the doubt and find him not guilty. (Federal Judicial Center, Pattern Criminal Jury Instructions 28-29 (1988) (instruction 21), as cited in Power 1999: 81.)

FJC Instruction: A Critique

The “firmly convinced” language has generally been found to be “a correct and comprehensible statement of the reasonable doubt standard” (U.S. v. Conway, 73 F.2d 975,980 (10th Cir. 1995), as cited in Power 1999:84). But the “real possibility” language” has been criticized, partly because the instruction does not distinguish between a “possibility” and “a real possibility” and perhaps shifts the burden of proof (U.S. v. Porter, 821 F.2d 968,973 (4th Cir. 1987), as cited in Power 1999:84).

Alternatives to Definitions: 1. “Say nothing.”

1. Really “say nothing.” (At least 2 federal circuits & 9 states disapprove of reasonable doubt instructions.)
2. Say as little as possible (use “airy strings of words”: “If you have reasonable doubt, you should ...”).
3. Assume that reasonable doubt is self-defining.

Alternatives to Definitions: 2. “Say everything.”

Judges sometimes say as much as possible on the assumption that an occasional correct statement will trump a bad instruction. (If instructions as a whole are correct, there will seldom be reversal for error [the error will be deemed *harmless error*].)

Deficiencies in Definitions

1. Lack of definitions
2. Incomprehensible definitions
3. Inconsistent definitions
4. Failure of trial judges to answer jurors’ questions about definitions
5. Timing/method of delivery of instructions (“obstructionist” process).

Suggestions for Improving Definitions

1. Clarify the relationship between law and fact (due process and *reasonable doubt*.)
2. Accept that some metaphysical concepts (*reasonable doubt*) probably cannot be explicitly explained and adopt a simple, uniform standard (“*reasonable doubt* is doubt based on reason, not imagination”).
3. Avoid unusual, vocabulary items (*captious*).
4. Deliver instructions earlier than after closing argument (so lawyers can address issues of definition).
5. Answer some jurors’ questions.

Presumption Problems

re **innocence**: instructions might favor the government's circumstantial evidence and disfavor that of the defendant (Solan 2001:468)

re **burden of proof**: the Ga. S. Ct. struggled recently with a medical malpractice instruction stating that Ga. law presumes that medical services were "performed in an ordinarily skillful manner, and the burden is on the Plaintiffs to show a want of due care, skill, and diligence." *Beach v. Lipham*, No. S02C0721 (Sup. Ct. Ga. July 26, 2002).

The Georgia Medical Malpractice Presumption

Question: Did the inclusion of the following presumption charge in the jury instructions in the case at issue have the effect of misleading the jury by causing them to think that the plaintiff's burden in the case was greater than a preponderance of the evidence?

Presumption charge: "In this state the law is such where there is a presumption that medical, surgical, and nursing services were performed in an ordinarily skillful manner, and the burden is on the Plaintiffs to show a want of care, skill, and diligence."

Conclusion: the inclusion of the following presumption charge in the jury instructions in the case at issue is almost certain to have had the effect of misleading individual jurors by causing them to think that the plaintiff's burden in the case was greater than a preponderance of the evidence.

Ga. S.Ct. Conclusion

[T]he court of appeals did not err in approving the use of the standard jury instruction on the presumption that medical services [***10] are performed in an ordinarily skillful manner The instruction [*305] is a correct statement of the substantive law in Georgia.... It does not suggest to jurors that they must hold the plaintiff to a standard of proof other than the preponderance of the evidence. ... [T]he challenged instruction is appropriate in medical negligence cases because physicians and nurses, like other professionals, are held to a higher standard of care than ordinary negligence; they must exercise the degree of care generally employed by other members of their profession. The charge helps ensure that jurors, who are not trained in medicine, judge the actions of medical professionals based on the evidence of witnesses who do have the requisite training Finally, as one sentence in a twenty-page charge, the charge did not impose undue emphasis on the plaintiffs' burden to prove the defendants' lack of due care or impose a double burden of proof on plaintiffs. Instead, the charge as a whole consistently stated that the plaintiffs had the burden to prove their case by the preponderance of the evidence. n14

But: "Despite our approval of the instruction here, we acknowledge that the pattern charge may be confusing to jurors because they are not told how much weight to give the presumption or how much rebuttal evidence is required. n15 **The fact that the instruction is a correct statement of law does not mean that it is the clearest statement of the law, especially for jurors without legal training.** n16 Since an important goal of a jury charge is to explain the law in 'simple, straightforward, and understandable language,' n17 we conclude that the wording of the presumption charge needs to be revised." [emph. added]

A Concurrence: Because a charge on the presumption of due care is redundant to the standard charge on the plaintiff's burden of [***19] proof and unnecessarily creates the opportunity for confusion and error, I would disapprove of the giving of such a charge. However, because the charge in this case was one sentence of an otherwise complete and appropriate charge on the plaintiff's burden of proof, and because the evidence of the appellees' negligence was weak, I conclude that any error in charging on the presumption of due care was harmless. n14 -- Sears, Presiding Justice, concurring specially.

And a Dissent: Such a charge misleads the jury into believing that a plaintiff must do more than satisfy the applicable burden of proof by a preponderance of the evidence but must also overcome the legal presumption that the medical professionals performed their duties in an ordinarily skillful manner. ... Nor can I agree with the special concurrence that the giving of the charge was harmless error. The potential to mislead the jury into imposing a double burden of proof or, at the very least, confusing the jury by failing to tell them how the presumption may be overcome, results in error in any case ... The prejudicial impact ... is

especially apparent in cases such as this where in opening and closing statements counsel for the medical professionals emphasized both the burden of proof and the burden of overcoming the presumption. ... I would find that [***24] the presumption charge is susceptible to more than one interpretation and improperly leaves the jury to consider whether the charge is simply redundant and unnecessary or imposes an additional burden of proof on the plaintiff. Because there is no way for this or any other court to determine which interpretation juries will apply, I dissent.-- Hunstein, Justice, dissenting

Conclusion: Principles for Rewriting Instructions

- Satisfy constitutional requirements (constitutional law)
- Satisfy all jurisdictional requirements (statutory and case law)
- Acknowledge (explicitly or otherwise) the relationship between law and fact.
- State jurors' responsibilities clearly and unambiguously in such a way that instructions do not undermine crucial presumptions/burdens.
- Consider full context.

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