4.00

INSTRUCTIONS RECOMMENDED NOT TO BE GIVEN

4.01 Flight From the Scene As Evidence of Negligence

The committee recommends that no instruction on "flight from the scene as evidence of negligence" be given.

Heading, Non-recommended instruction, and Comment revised February 2023.

Comment

The committee recommends that no instruction be given on the subject of flight from the scene. As in the case of admissions, this is peculiarly a subject of argument for the jury. Moreover, an instruction of this type would unduly single out particular evidence.

As of July 1, 2023, the Illinois Legislature amended certain statutes replacing "accident" with "crash" to clarify that not all crashes are accidental. Crash encompasses all types of motor vehicle impacts and collisions, including, but not limited to, an impact or collision caused by negligence, willful and wanton conduct, or an intentional act. P.A. 102-0982. The IPI Committee recommends use of the term "collision" or "incident" in lieu of the term "crash."

4.02 Witness Need Not Be Believed

The committee recommends that no instruction that the "witness need not be believed" be given.

Comment

This instruction was formerly IPI 2.02.

It has been common to instruct juries that "they are not bound to believe anything to be a fact simply because a witness has stated it to be so provided that they believe the witness is mistaken or has testified falsely."

Instructions informing a jury that certain witnesses need not be believed have been held harmless error by Illinois courts. *Village of Des Plaines v. Winkelman*, 270 Ill. 149, 110 N.E. 417 (1915); *Devaney v. Otis Elevator Co.*, 251 Ill. 28, 95 N.E. 990 (1911); *Aldridge v. Morris*, 337 Ill.App. 369, 374; 86 N.E.2d 143, 145-146 (2d Dist.1949).

It is recommended that no instruction of this type be given. Determination of credibility of witnesses is solely within the province of the jury and it is superfluous to inform them that certain witnesses need not be believed. The standards for assessing credibility of witnesses are adequately set forth in IPI 1.01 [4]. In *Hackett v. Ashley*, 71 Ill.App.3d 179, 389 N.E.2d 246, 27 Ill.Dec. 434 (3d Dist.1979), the court noted that the IPI committee recommendation is persuasive.

4.03 Inherently Improbable Testimony

The committee recommends that no "inherently improbable testimony" instruction be given.

Comment

This instruction was formerly IPI 2.03.

It has been the practice of some trial attorneys to offer an instruction to the effect that the jury need not believe "inherently improbable testimony." This type of charge is somewhat argumentative and is quite unnecessary because the same proposition is necessarily implied in IPI 1.01[3] which tells the jurors that they are the triers of fact and that they have a right to consider the evidence in the light of their own observations and experiences.

The subject of improbable testimony can be most adequately covered by counsel in argument and should not be the subject of a charge to the jury.

4.04 Witness Willfully False

The committee recommends that no instruction on the willfully false witness be given.

Comment

This instruction was formerly IPI 2.04.

Instructions have been given which inform the jurors that the testimony of a witness who has knowingly and willfully sworn falsely on a material issue may be disregarded unless it has been corroborated by other credible evidence. Some courts have required that the witness' testimony be accompanied by an appropriate instruction defining matter material to the issue. *McManaman v. Johns-Manville Prods. Corp.*, 400 Ill. 423, 81 N.E.2d 137 (1948); *Schneiderman v. Interstate Transit Lines*, 401 Ill. 172, 81 N.E.2d 861 (1948); *McQuillen v. Evans*, 353 Ill. 239, 187 N.E. 320 (1933).

It is recommended that an instruction of this type not be given. The instruction is argumentative, invades the province of the jury, and suggests the court's belief that a witness has sworn falsely. It emphasizes the issue of false testimony, which is a matter solely within the province of the jury. Again, determination of a witness' credibility is the subject of standards outlined in IPI 1.01[4] on credibility of witnesses.

The matter of testimony which is knowingly or willfully false is not to be confused with impeachment by prior inconsistent or contradictory statements, which is adequately covered by IPI 1.01[4].

4.05 Party Competent As a Witness

The committee recommends that no instruction on the "party competent as a witness" be given.

Comment

This instruction was formerly IPI 2.05.

Instructions that the jury should consider the interest of a particular litigant in the outcome of the lawsuit in determining his credibility as a witness have been given.

It is error to single out the interest of a party when there are individuals on both sides of the case. *Hartshorn v. Hartshorn*, 179 Ill.App. 421, 423-425 (2d Dist.1913) (two individuals); *Engstrom v. Olson*, 248 Ill.App. 480, 487 (2d Dist.1928) (two individuals); *Gaffner v. Meier*, 336 Ill.App. 44, 48-49; 82 N.E.2d 818, 820 (4th Dist.1948) (individual and partnership); *Doellefield v. Travelers Ins. Co.*, 303 Ill.App. 123, 125-126; 24 N.E.2d 904, 904-906 (2d Dist.1940) (individual plaintiff, corporate and individual defendants). The court may properly refuse such an instruction. *Purgett v. Weinrank*, 219 Ill.App. 28, 32-33 (2d Dist.1920). However, the improper use of such an instruction may not be reversible error if the prevailing party's case is supported by the clear preponderance of the evidence. *Wicks v. Wheeler*, 157 Ill.App. 578, 582 (2d Dist.1910) (two individuals).

On the other hand, a defendant corporation may single out the plaintiff's interest. *Chicago & E.I.R. Co. v. Burridge*, 211 Ill. 9, 13-15; 71 N.E. 838, 839-840 (1904) (individual plaintiff, railroad defendant; error to refuse defendant's instruction as to plaintiff's interest in the outcome of the suit); *West Chicago Street Ry. Co. v. Dougherty*, 170 Ill. 379, 382; 48 N.E. 1000, 1001 (1897) (same). The court may modify such an instruction by appending a clause that this same test applies to all witnesses. *Dickerson v. Henrietta Coal Co.*, 158 Ill.App. 454, 457-558 (4th Dist.1910), *aff'd*, 251 Ill. 292, 96 N.E. 225 (1911), which relies on *Henrietta Coal Co. v. Martin*, 221 Ill. 460, 470; 77 N.E. 902, 905 (1906) (not squarely in point). If it is used, the plaintiff may use a counter-balancing instruction. *Bower v. Chicago Consol. Traction Co*., 156 Ill.App. 452, 456 (1st Dist.1910); *Ellguth v. Blackstone Hotel*, 340 Ill.App. 587, 596; 92 N.E.2d 502, 506 (1st Dist.1950), *aff'd*, 408 Ill. 343, 97 N.E.2d 290 (1951).

It is recommended that no separate instruction be given on the subject of the credibility of a party, even when tendered by a corporate party. IPI 1.01[4], which adequately covers the interest of party witness, should be given. The varying emphases to be placed upon any particular witness' testimony are best explained by argument of counsel.

4.06 One Witness Against a Number

The committee recommends that no "one witness against a number" instruction be given.

Comment

This instruction was formerly IPI 2.08.

Juries have sometimes been told that preponderance is not determined simply by the number of witnesses and that the testimony of one credible witness may be entitled to more weight than the testimony of many others who may be less credible. Instructions of this type are often tendered by the party having a lesser number of witnesses.

The Illinois Supreme Court has held that it is for the jury to determine to what extent each witness is credible, and that it is error to give an instruction on that subject which is worded in such a way that, under the circumstances of the case, the jury might readily infer the court believed the witnesses for one side to be more credible than the witnesses for the other side. *Walsh v. Chicago Rys. Co.*, 294 Ill. 586, 595; 128 N.E. 647, 650 (1920).

It is recommended that an instruction covering this subject matter not be given, because it tends to emphasize, minimize, or single out the testimony of certain witnesses.

See *Walsh v. Chicago Rys. Co.*, 294 Ill. 586, 595; 128 N.E. 647, 650 (1920); *Lyons v. Joseph T. Ryerson & Son*, 242 Ill. 409, 90 N.E. 288 (1909); *Tri-City Ry. Co. v. Gould*, 217 Ill. 317, 75 N.E. 493 (1905); *Johnson v. Farrell*, 215 Ill. 542, 74 N.E. 760 (1905); *Keller v. Hansen*, 14 Ill.App. 640 (1st Dist.1884).

4.07 Credibility of Special Categories of Witnesses and Weight of Evidence

The committee recommends that no instructions on the credibility of special categories of witnesses be given.

Comment

This instruction was formerly IPI 2.09.

Although instructions of this type have been approved, the committee recommends that no instruction be given as to credibility of special categories of witnesses, such as employees, experts, and lawyers. See the Comment at 4.08 *infra*, as to expert witnesses. These seem to be simply matters of fact for the jury and do not involve legal rules. Unless we are to allow the judge to comment in detail on each witness, it seems wiser to leave these matters to be argued to the jury by counsel.

The court in *Department of Pub. Works & Bldgs. v. Tinsley*, 120 Ill.App.2d 95, 256 N.E.2d 124 (5th Dist.1970), stated that due to the IPI committee's recommendation that an instruction on this subject should not be given a tendered instruction on this subject was properly refused.

In *Stach v. Sears, Roebuck & Co.*, 102 Ill.App.3d 397, 429 N.E.2d 1242, 57 Ill.Dec. 879 (1st Dist.1981), the court cited with approval the committee's comments to this instruction in holding that the trial court properly refused to give an instruction to the effect that the testimony of an attorney on behalf of his own client is to be given little weight. In affirming the committee's position that instructions such as former IPI 2.09 should not be given, it stated that "unless we are to allow the judge to comment in detail on each witness, it seems wiser to leave these matters to be argued to the jury by counsel."

4.08 Weighing Expert Testimony

The committee recommends that no instruction on "weighing expert testimony" be given.

Comment

This instruction was formerly IPI 2.10.

Expert testimony is commonplace in modern jury trials. There is no good reason why the weight of expert testimony should be subject to criteria different from that for other witnesses. Accordingly, the committee recommends that no special instructions on the subject be given. *Neville v. Chicago*, 191 Ill.App. 372 (1st Dist.1915). IPI 1.01[4] is a sufficient guide to the jury in this respect. This is a subject which is peculiarly within the province of argument of counsel. Malpractice cases are an exception to this principle. In malpractice cases jurors must accept the standard supplied by expert witnesses. See IPI 105.01.

4.09 Hospital and Business Records

The committee recommends that no instruction be given concerning hospital and business records.

Comment

This instruction was formerly IPI 2.12.

The committee recommends that no instruction be given on this subject, because it singles out a portion of the evidence for improper emphasis.

4.10 Impeachment By Proof of Bad Reputation For Truth and Veracity

The committee recommends that no instruction on "impeachment by proof of bad reputation for truth and veracity" be given.

Comment

This instruction was formerly IPI 3.03.

Although a witness may be impeached by proof of his bad reputation for truth and veracity, *Frye v. President, etc., of Bank of Ill.*, 11 Ill. 367, 378-79 (1849), an instruction on the subject would result in undue emphasis upon this essentially collateral issue and, therefore, should not be given. The matter can best be treated by argument of counsel.

4.11 Standard of Conduct for Child--Violation of Statute or Ordinance

[Withdrawn]

Comment

Former IPI 10.06 is now the last paragraph of IPI 10.05.

4.12 Care Required For Safety of Child

The Committee recommends that no instruction on the care required for the safety of a child be given.

Comment

The law recognizes the lack of judgment, caution, and discretion of children and requires that an adult reasonably guard against these tendencies. *Johnson v. City of St. Charles*, 200 Ill.App. 184 (2d Dist.1916). The law requires that an adult use ordinary care to ascertain a child's evident purpose, for example, that a three-year old probably intends to cross a streetcar track if he approaches it. *Liska v. Chicago Rys. Co.*, 318 Ill. 570, 580; 149 N.E. 469, 474 (1925). However, to state, as some instructions do, that one must anticipate the ordinary behavior of children and exercise greater care for their protection and safety appears to be an argument about what constitutes ordinary care under the circumstances rather than a rule of law. Therefore, the Committee recommends that this type of instruction not be given.

4.13 Duty of One In Imminent Peril and Responsibility of The Person Causing the Perilous Situation

The Committee recommends that no instruction either on the duty of one in imminent peril or the responsibility of the person causing the perilous situation be given.

Comment revised February 2023.

Comment

An instruction which states that the law does not require a person to act with deliberation and care in the face of an unexpected danger not caused by his own negligence should not be given for three reasons. First, it is argumentative. Second, it states a simple and obvious fact about human behavior. Third, except in the most obvious case when no juror would need to be reminded of the proposition, it will probably lead to reversible error. For example, the court has held in *Moore v. Daydif*, 7 Ill.App.2d 534, 536-37, 130 N.E.2d 119, 121 (2d Dist.1955), that a sudden emergency instruction was erroneous when the lead car swerved off to the right to avoid a pedestrian whom defendant, in a following car, then saw and hit with his right fender. *See also*: *Reese v. Buhle*, 16 Ill.App.2d 13, 20; 147 N.E.2d 431, 435 (1stDist.1957) (error to give a sudden emergency instruction when plaintiff emerged from between two stopped trucks at crosswalk and was hit by defendant); *Minnis v. Friend*, 360 Ill. 328, 337; 196 N.E. 191, 195 (1935) (sudden appearance of a fire engine at an intersection must be anticipated; therefore, the court properly refused to give an unexpected danger instruction); *Andes v. Lauer*, 80 Ill.App.3d 411, 414; 399 N.E.2d 990, 992; 35 Ill.Dec. 701, 703 (3d Dist.1980).

A companion instruction that the person who negligently causes a sudden emergency is responsible for injury caused by reasonable attempts on the part of the imperiled person to extricate himself which caused injury should not be given. The subject is adequately covered by an ordinary instruction on proximate cause, and this type of instruction is argumentative, painfully obvious, and likely to be reversed.

See Comment to IPI 4.14 on the non-recommended "unavoidable accident/collision/incident" instruction.

4.14 Unavoidable Accident/Collision/Incident

The Committee recommends that no "unavoidable accident/collision/incident" instruction be given.

Heading, Non-recommended instruction, and Comment revised February 2023.

Comment

As of July 1, 2023, the Illinois Legislature amended certain statutes replacing "accident" with "crash" to clarify that not all crashes are accidental. Crash encompasses all types of motor vehicle impacts and collisions, including, but not limited to, an impact or collision caused by negligence, willful and wanton conduct, or an intentional act. P.A. 102-0982. The IPI Committee recommends use of the term "collision" or "incident" in lieu of the term "crash."

In Illinois when there is *any* evidence tending to prove that the plaintiff's injury was caused by negligence, it is reversible error to instruct on "unavoidable accident." *Wolpert v. Heidbreder*, 21 Ill.App.2d 486, 158 N.E.2d 421 (3d Dist.1959); Annotation, *Instructions on Unavoidable Accident, Or the Like, In Motor Vehicle Cases*, 65 A.L.R.2d 12 (1959); Cook v. Hoppin, 783 F.2d 684, 693 (7th Cir.1986).

The legal definition of "accident" was stated in *Cornwell v. Bloomington Business Men's Ass'n*, 163 Ill.App. 461 (3d Dist.1911), which held that it was improper to give this instruction in an action to recover for burns sustained when the plaintiff, while attending a Fourth of July fireworks demonstration, was struck by a misfired skyrocket. The issues were whether the plaintiff assumed the risk by attending the exhibition, whether he was contributorily negligent in crossing a rope to keep spectators away from the firing area, and whether the defendant was negligent in securing the rocket to the firing rack. The court defined "accident," as follows:

> "An accident, as defined by legal authorities, for which no liability exists is one which is the result of an unknown cause or is the result of an unusual and unexpected event happening in such an unusual manner from a known cause that it could not be reasonably expected or foreseen and that it was not the result of any negligence."

163 Ill.App. at 467.

Laymen do not have an understanding of this technical meaning of "accident" but understand it to mean any occurrence producing injury not implying deliberate or intentional fault. Used in this sense, a jury can only be misled when informed that a defendant is not responsible for the consequences of an "accident." This is true even though "accident" is ostensibly qualified by the term "unavoidable."

In view of the very limited area of factual situations in which this instruction is proper, and the possibilities of prejudice arising from the giving of this instruction where it is not proper, the criticism contained in *Williams v. Matlin*, 328 Ill.App. 645, 649, 66 N.E.2d 719, 721 (1st Dist.1946), is pertinent. There, the court said:

> "We agree with the statement of the Third Division of this Court in *Rzeszewski v. Barth*, 324 Ill.App. 345, 356; 58 N.E.2d 269, that the giving of this instruction should be discouraged. It is only when there is evidence tending to show that the plaintiff was injured through accident alone not coupled with negligence that the giving of such instruction is permissible. *Streeter v. Humrichouse*, 357 Ill. 234, 244; 191 N.E. 684.

> When proper, it merely tells the jury what should be known to the man on the street. Moreover, in practically every case, as here, the jury is instructed that it should find the defendant not guilty unless the plaintiff proves by the preponderance of the evidence, among other things, that the defendant was guilty of negligence proximately and directly causing the injuries complained of."

For these reasons, the Committee recommends that no instruction be given on this subject and that the matter be left to the argument of counsel.

4.15 Evenly Balanced Evidence

The committee recommends that no "evenly balanced evidence" instruction be given.

Comment

An instruction which discusses preponderance of the evidence with the jury in terms of "if the evidence is evenly balanced, then the jury shall find for the defendant," illustrates the type of instruction this work seeks to avoid. This is the typical slanted instruction, i.e., an instruction which, while acknowledging a principle of law, seeks to minimize or maximize its effects to the advantage of one side of the litigation.

The history of this instruction is an account of the development, in this State, of the practice of giving a slanted instruction on each side of a proposition and of its final abandonment by the courts. At one time, the courts approved an instruction on behalf of the plaintiff that, if the evidence preponderated in his favor "although but slightly," he was entitled to recover. *Hancheft v. Haas*, 219 Ill. 546, 548; 76 N.E. 845, 846 (1906); *Chicago City Ry. Co. v. Bundy*, 210 Ill. 39, 48; 71 N.E. 28, 31 (1904). To counteract the thrust of this statement, there was the approved "evenly balanced" instruction. *Chicago Union Traction Co. v. Mee*, 218 Ill. 9, 14; 75 N.E. 800, 801 (1905); *Koshinski v. Illinois Steel Co.,* 231 Ill. 198, 203; 83 N.E. 149, 150-151 (1907).

Eventually, the courts began to recognize that instructions of this kind are argumentative and misleading, and therefore tend to confuse the jury, who look to the court for disinterested guidance. First, the "although but slightly" instruction was condemned. *Wolczek v. Public Serv. Co*., 342 Ill. 482, 496; 174 N.E. 577, 583 (1930); *Molloy v. Chicago Rapid Transit Co*., 335 Ill. 164, 166 N.E. 530 (1929). Then *Hughes v. Medendorp*, 294 Ill.App. 424, 431; 13 N.E.2d 1015, 1018 (3d Dist.1938), applied the censure against the "slight preponderance" instruction to the "evenly balanced" instruction. *See also Goertz v. Chicago & N.W. Ry. Co*., 19 Ill.App.2d 261, 153 N.E.2d 486 (1st Dist.1958) (instruction properly refused).

While it is true the plaintiff should recover if there is the slightest preponderance of the evidence in his favor, and that he should fail to recover if there is the slightest lack of preponderance, the answer to the question which a trial judge must continually ask himself, "Will stating the law in these terms aid the jury?" is an emphatic "No!" What the Illinois Supreme Court said in *Teter v. Spooner*, 305 Ill. 198, 211, 137 N.E. 129, 135 (1922), states the case against all slanted instructions. "If there is a perceptible preponderance of the evidence it is sufficient, but it would not be proper for the court to give an instruction to the jury that a perceptible preponderance of the evidence was sufficient, any more than that a clear preponderance of the evidence was required. The effect of the adjectives is merely to confuse the jury and invite them to minimize or maximize the weight of the evidence on one side or the other. Such instructions ought not to be given."

Moreover, the history of the "evenly balanced" instruction teaches us that this type of error dies hard, as witness the defense of the "evenly balanced" instruction in *Alexander v. Sullivan*, 334 Ill.App. 42, 48; 78 N.E.2d 333, 336 (3d Dist.1948).