

## MATERIALS FOR TEACHING PLAIN ENGLISH: THE JURY INSTRUCTIONS IN PALSGRAF, REVISITED

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As some legal writing professionals have recognized, jury instructions can be a useful tool for teaching the importance of writing in plain English.<sup>1</sup> In addition, the close study of jury instructions teaches that writing in plain English requires more than mechanically applying a well-known set of rules, such as “use the active voice” and “favor short sentences.” It also requires sophisticated judgment in determining how to explain complex legal concepts as simply as possible.

The drafter of jury instructions must decide how to convey the meaning of legal doctrines to lay people. This can be a daunting task. The drafter must explain concepts not only simply, but also with the precision that the law demands. To understand the degree of difficulty, try drafting jury instructions that define such terms as “proximate cause,” “preponderance of the evidence,” and “beyond a reasonable doubt.”

In this article, I offer materials that a legal writing teacher can use for a class in plain English. I take the jury instructions given in a case known to all students of tort law, *Palsgraf v. The Long Island Railroad Company*.<sup>2</sup> After each paragraph of the actual instructions, I offer my best effort at a redraft in plain English. Students can compare the

two versions to decide why I made the revisions that I did and to offer suggestions for improving upon my work. I then offer some notes for prompting further classroom discussion.

### The Jury Instructions in *Palsgraf*

**The Original Instruction:** Gentlemen, in this case there is no dispute of facts. Everybody says that on the day in question the plaintiff was on the platform of this railroad company, the defendant, and while she was thus upon the platform some fireworks fell from the hand of a passenger who was entering a car, which was then in motion, to the platform or the track, an explosion occurred, and that subsequently the plaintiff developed a nervousness which still persists and which, according to her claim, will persist for some time in the future.

**Redraft:** Members of the jury, both Mrs. Palsgraf and the Long Island Railroad Company agree on what happened on August 24, 1924. While Mrs. Palsgraf was standing on the railroad company’s platform, a passenger boarded a moving train and some fireworks fell from his hand onto the platform or the train track. There was an explosion. Afterward, Mrs. Palsgraf developed a nervousness that she still has and expects to have for some time.

**The Original Instruction:** There was no duty upon the part of the defendant to examine each passenger as he entered the platform to see what was in any package he might be carrying. The plaintiff herself carried a package, and she might just as well complain if a uniformed man had come up to her and insisted upon her opening her package and showing him what she had in it. No such duty devolves upon the railroad company in this case, and no negligence can be predicated upon the failure of the defendant to stop a passenger while moving across its platform

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<sup>1</sup> See Nancy L. Schultz & Louis J. Sirico, Jr., *Legal Writing and Other Lawyering Skills* 263–71 (3d ed. 1998); Ellen Platt, *Jury Instructions: An Underutilized Resource*, 7 *Perspectives: Teaching Legal Res. & Writing* 90 (1999).

<sup>2</sup> 248 N.Y. 339, 162 N.E. 99 (N.Y. 1928). The record of the case, including the jury instructions used in this article,

appears as an appendix to Austin Wakeman Scott & Sidney Post Simpson, *Cases and Other Materials on Civil Procedure* 891–940 (1951). For a discussion of the record, see John T. Noonan, Jr., *Persons and Masks of the Law* 111–51 (1976). I have written about the case before. See Louis J. Sirico, Jr., *Cardozo’s Statement of Facts in Palsgraf, Revisited*, 6 *Perspectives: Teaching Legal Res. & Writing* 122 (1998).

and examining what he might have with him. If every passenger was examined who was entering a railway or trolley car or subway train, and searched for what he might have upon him, none of us would be able to get anywhere. The purpose of railroad travel is that we can get some place. That is not what the plaintiff claims was the negligence of the defendant that caused her injury.

**Redraft:** First, I want to explain to you what Mrs. Palsgraf is not claiming. She is not claiming that the railroad has a duty to find out what every passenger has in every package that he or she is carrying. If every passenger entering a railway or trolley car or subway train had to be searched, none of us would be able to get anywhere.

**The Original Instruction:** She claims that the guard upon the platform, the station platform, and the guard upon the train platform, were careless and negligent in the way they handled this particular passenger after he came upon the platform and while he was boarding the train, and that is the question that is submitted to you for your consideration. Did those men omit to do something which ordinarily prudent and careful train men should not omit to do? Or did they do something which an ordinarily prudent and careful officer in charge of a railway train in the station platform should not have done? If they did, and the plaintiff met with her injuries through the careless act upon the part of the trainmen of the defendant, then she would be entitled to recover. If they were not at fault, if they did nothing which ordinarily prudent and careful employees should do in regard to passengers moving upon their trains, then there can be no liability. If they omitted to do the things which prudent and careful trainmen do for the safety of those who board their trains, as well as the safety of those who are standing upon the platform waiting for other trains, and that the failure resulted in the plaintiff's injury, then the defendant would be liable.

**Redraft:** Mrs. Palsgraf is claiming that the guard on the station platform and the guard on

the train platform were careless and negligent in the way that they handled this particular passenger. She is claiming that because the guards failed to act with ordinary care in how they handled this passenger, Mrs. Palsgraf was injured and developed a nervous condition. Here is the question that you must answer: Did those guards fail to do something that ordinarily careful guards should have done to protect people like Mrs. Palsgraf standing upon the platform waiting for other trains? If the guards failed to do something that ordinarily careful guards should have done to protect the safety of people like Mrs. Palsgraf and if the guards' failure caused Mrs. Palsgraf's injury, then the railroad owes Mrs. Palsgraf money as compensation for her injury. On the other hand, if the guards did what ordinarily careful guards should have done to protect the safety of people like Mrs. Palsgraf, then the railroad owes Mrs. Palsgraf no money.

**The Original Instruction:** You should first discuss the question of the liability of the defendant, under the rules that I have given you, and if you should find the defendant guilty of no negligence, then your verdict would be for the defendant and you would not be concerned with the question of the amount of the plaintiff's injury.

**Redraft:** When you meet, you should first reach an answer to this question: Did the guards do what ordinarily careful guards should have done to protect the safety of people like Mrs. Palsgraf? If you answer yes, then you have found in favor of the railroad, and you have finished your work.

**The Original Instruction:** If you should find, under the rules that I have given you, that the defendant is liable, then you would pass to the question of the amount that the plaintiff is entitled to recover.

**Redraft:** However, if you decide that the guards failed to do what ordinarily careful guards should have done to protect the safety of Mrs. Palsgraf, then you must decide how much money the railroad owes Mrs. Palsgraf.

**The Original Instruction:** If you reach that point in your discussion, you will give her a

sum which will fully and fairly compensate her for the pain and suffering which came to her as a result of any physical injuries—bodily injuries—she may have sustained, and which she has endured from that time down to the present time; and if you find from the evidence that she will suffer in the future, then, such sum as you shall say will compensate her for that future suffering, and in addition to that such sum as she lost in earnings during the time that she was incapacitated, and such reasonable sum as she was required to pay for medicines and medical attendance. Those are the elements or items which go to make up her claim for damages, but first settle the question of liability before you discuss the question of damages at all.

**Redraft:** If you decide that the railroad owes Mrs. Palsgraf money, you must decide how much money would fully and fairly compensate her for the injury she has suffered. The money should compensate her for any pain and suffering that she may have suffered from the time of the incident down to the present time. If you find that she will suffer in the future, then the amount of money that you decide upon should also compensate her for future suffering. The money should compensate her for two additional costs: first, the amount she lost in wages during the time that she could not work; second, the money she had to pay for medicines and doctor's bills. Thus, if you decide to award Mrs. Palsgraf any money, the amount should cover past and future pain and suffering, lost pay, and medical costs.

**The Original Instruction:** The burden of proof is upon the plaintiff. She must satisfy you by a fair preponderance or greater weight of the testimony that the accident happened solely through the fault of the defendant, through its trainmen or platform-men in the control of passengers going upon its trains.

**Redraft:** If you decide in favor of Mrs. Palsgraf, you must do so based on the testimony of the witnesses in this trial. You may find for Mrs. Palsgraf only if you decide that, on the whole, the testimony in her favor is stronger—the testimony that the accident happened solely because of the

fault of the railroad's guards in charge of controlling the passengers going on its trains.

**The Original Instruction:** The plaintiff and defendant are both interested. The plaintiff is seeking money and the defendant is seeking to avoid paying money, and each has that interest, which is apparent.

**Redraft:** Omit this part of the instruction.

### Notes for Further Discussion

1. What are the primary techniques used in translating these jury instructions into plain English?

2. The revised version defines a number of legal terms, including “negligence,” “liability,” “burden of proof,” and “preponderance of the evidence.” In the revision, are the definitions both understandable and accurate? Should the revision include the legal terms of art?

3. After Judge Burt Jay Humphrey gave the jury instructions, the attorney representing the Long Island Railroad Company made this request: “I ask your Honor to charge the jury that if they find that the defendant's servants were assisting the passenger upon the train and in so doing knocked a bundle from his hand, that that act of the servants is not the proximate cause of the plaintiff's injuries.” The judge declined to give the requested instruction. Suppose the judge had agreed to give an instruction on proximate cause. Please draft the instruction. As you may know, different courts and commentators vary in how they would define causation with respect to notions of duty and foreseeability. Whatever wording you choose reflects one of several viewpoints. For an interesting discussion of the rhetorical implications of the various formulations, see Walter Probert, *Torts and Language*, 48 Fla. L. Rev. 841, 846–55 (1996).

4. Both the original and revised versions of the jury instructions contain a fair amount of repetition. How much of the repetition is justified?

5. Does either version of the jury instructions seem to favor one litigant over the other? If so, how? If so, how would you revise the instructions to make them more neutral?

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