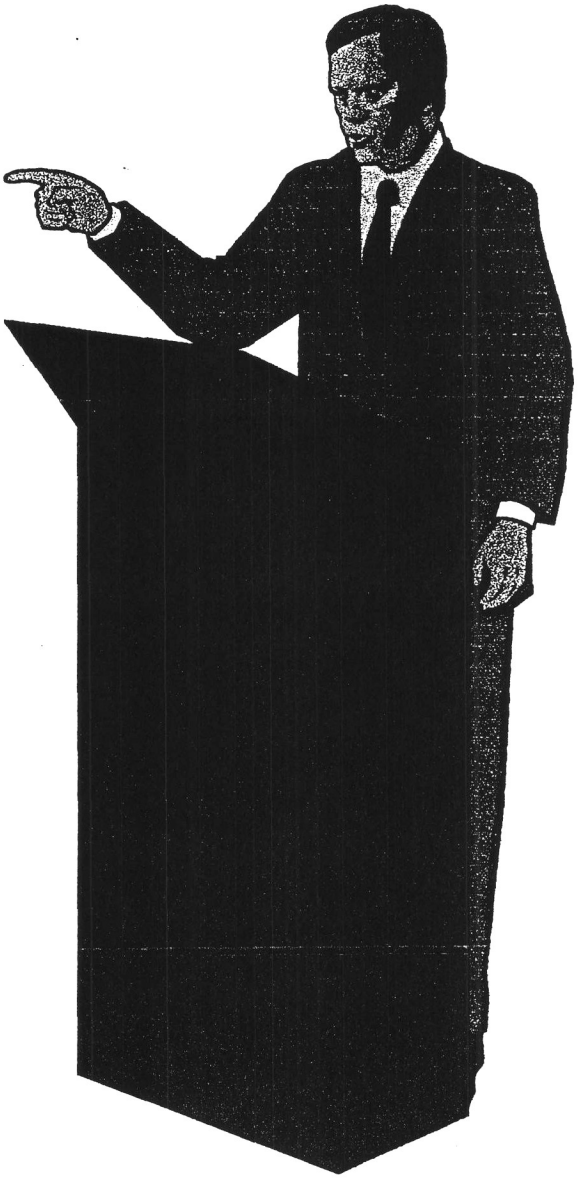
Civil Jury Charges



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8/22/2005

CIVIL JURY CHARGES

Perhaps the most important technical duty of a trial judge is the preparation of the charge on the law for the jury. I will limit my comments to the charge conference and the format of the civil pattern jury charges.

THE CHARGE CONFERENCE

See exhibits "A", "B", "C" and "D" attached.

PATTERN JURY INSTRUCTIONS FOR CIVIL CASES

The North Carolina Conference of Superior Court Judges, by and through the Civil Subcommittee of the Committee on Pattern Jury Instructions, has prepared three binders of jury instructions which may be used as a guide for trial judges in North Carolina. These pattern jury instructions draw together in explicit language a set of basic materials for quick and successful use on short notice. These pattern charges are written to be readily understood by most jurors in North Carolina. These instructions do not eliminate the need to tailor each charge to the given situation. The instructions are intended to state the law applicable in typical fact situations. In some instances the facts may call into play alternative rules of law or special rules, exceptions, or defenses which make the pattern instruction partially or totally inapplicable.

USE OF BRACKETS, PARENTHESES, FOOTNOTES, AND TYPESTYLES

For purposes of clarity and consistency, the Civil Pattern Jury Committee has used the following rules in editing its instructions:

1. The words to be spoken by the judge to the jury are in boldface type.

2. Directions as to facts that the judge must fill in are set out in parentheses and are italicized.

3. An attempt has been made to reduce the use of personal pronouns. However, when used, personal pronouns are italicized to indicate that although the masculine form is used another choice might be made. Examples and certain notes which deserve particular attention are also italicized.

4. Alternative words or phrases are indicated in brackets. For example: The defendant was [a retailer] [a wholesaler] [a distributor]. . . . In this instance, only the appropriate word is to be used. Although explanatory footnotes are sometimes added, the judge must often

determine from the context whether choices in brackets are mutually exclusive.

5. Optional language is contained in parentheses.

6. Other suggestions or warnings are given in headnotes or footnotes.

There is a model contract action charge in the N.C.P.I.-Civil Book 500.00. If you use this model charge in a contract case, you must remember that it is to be tailored to fit the particular case you are trying. This is especially true in cases involving contracts because of the enormous number of possible variations in the facts involved in contract cases. Do not blindly follow this model contract pattern jury instruction.

The Pattern Jury Instruction Book for Motor Vehicle Negligence (The Blue Binder) contains a model motor vehicle negligence charge and verdict sheet at Civil 100.00. Again, do not blindly follow this pattern jury instruction. This is only to guide you in a general style that has in the past met with favor in the appellate courts.

N.C.G.S. section 1A-1, Rule 51(a) was amended effective July 1, 1985, to read as follows: "In charging the jury in any action governed by these rules, a judge shall not give an opinion as to whether or not a fact is fully or sufficiently proved and shall not be required to state, summarize or recapitulate the evidence, or to explain the application of the law, to the evidence. If the judge undertakes to state the contentions of the parties, he shall give equal stress to the contentions of each party." Thus, I would advise you not to state, summarize or recapitulate the evidence in any jury charge. The mandate should be limited to a summary of the elements of the applicable law.

I have served on the Civil Pattern Jury Committee for the last 21 years, the last six years as Chairman. If you have any questions in connection with the Civil Pattern Jury Instructions or Civil Jury Instructions in general as you go about your duties as a trial judge in North Carolina, do not hesitate to telephone me for help.

Exhibit "A"

THE CHARGE CONFERENCE

General.

A. General Rule. A charge conference, or as G.S. Rules, General Rule of Practice for Superior and District Courts Rule 21 calls it, a "Jury Instruction Conference," must be held in every jury trial-civil and criminal.

B. When held. The charge conference is held at close of all the evidence. Judge may hold it at any earlier time, if reasonable to do so (such as when jury has been excused for the day and all the remaining evidence to be presented in the case does not raise any new issues).

C. How conducted. Must be conducted out of the presence of the jury. May be conducted in chambers.

D. Who attends. Attorneys of record, criminal defendants and unrepresented civil parties must be given opportunity to attend.

E. Court Reporter. G.S. 15A-1231(b) requires charge conference in criminal cases to be recorded. State v. Clark, 71 N.C. App. 55 (1984). Rule 21, General Rules of Practice requires the requests and objections of counsel and the court's rulings thereon in all jury trials to be placed in the record. Better practice in all cases is to have the complete charge conference recorded.

F. Duties of the judge.

1. Inform counsel on the record of all instructions that judge proposes to give the jury. In criminal cases, this includes offenses and lesser offenses, defenses and portions of instructions tendered that jury will be instructed on. In civil cases, this includes the issues that will be submitted.

2. Give counsel opportunity on the record to object to any of th court's proposed instructions.

3. Give counsel opportunity on the record to request any additional instructions.

4. Rule on the record on all objections of counsel to court's proposed instructions and issues.

5. Rule on the record on all requests for instructions made by counsel.

6. Cause all written requests for instructions which are tendered by counsel to the court to be marked and filed with the clerk Note the ruling of the court on each such written request (i.e., *"Granted"*, *"Denied"*, *"Denied as tendered but given in substance"*), and date and sign or initial it.

7. Conclude the charge conference by inquiring of all the participants: *"Is there anything further?"*

8. At the conclusion of the charge and prior to the beginning of the jury deliberations, give counsel an opportunity on the record to make objections and state reasons therefor outside the hearing of the jury and in accord with N.C.P.I., Criminal 101.35. Anytime thereafter that instructions are given to the jury, counsel should be afforded an opportunity to be heard on the record outside hearing of the jury and, if requested, outside presence of the jury.

Exhibit "B"

I. Practical Suggestions.

A. Conduct the charge conference with an eye on Appellate Rule 10(b)(2 which requires counsel to object to an instruction prior to the beginning of jury deliberations or waive the right to assign as error any portion of the charge or omission therefrom. See State v Clark, 71 N.C. App. 55 (1984).

B. Always have the court reporter record the charge conference.

C. Begin charge conference by saying on the record: "*Counsel, we are now convened for the purposes of a charge conference, pursuant to Rule 21 of the General Rules of Practice.*" Then state for the record who is present and that it is being held out of the presence of the jury.

D. In criminal cases, begin the charge conference by asking counsel fo the defendant what possible verdicts he contends should be submitted, and what defenses he contends are present.

E. In civil cases, begin the conference by asking counsel what issues he contends should be submitted.

F. When you plan to use a pattern instruction, say, for example: "*I shall instruct the jury as to the substantive offense substantially in accord with N.C.P.I., Criminal 260.10; as to their function as a jury substantially in accord with Pattern Instruction Criminal 101.05,*" etc., without reading into the record all of the words of the pattern instruction.

EXHIBIT "C"

NEW JUDGES' SCHOOL

CREATING JURY CHARGES

By Robert H. Hobgood, Superior Court Judge

EXAMPLE 1

A 2003 Ford sedan was being driven west on a two lane highway by A, age 36, with a 28 year old passenger, B. C was driving a 2002 Hummer east on the same highway. The Hummer was going 70 miles per hour on a road with a posted speed limit of 55 miles per hour. The Hummer crossed the center line of the highway and struck the 2003 Ford sedan. All laws of physics apply.

Driver A suffers a concussion, punctured lung, scarring on her forehead and a broken leg. An orthopedic surgeon testifies on video deposition as an expert that in his opinion A has suffered a permanent injury to her leg in that it healed two inches shorter than her uninjured leg.

B escapes injury, as does C.

A sues C. C was the owner and operator of the Hummer.

EVERYONE: What are the issues?

TEAM ONE: Prepare the jury charge from the beginning through Issue Number One.

TEAM TWO: Prepare the jury charge from Issue Number Two to the end.

EXAMPLE 2

Same facts as Example 1 except passenger B died in the accident.

TEAM ONE:

What type of action can be brought under these new facts?

Who are the parties?

TEAM TWO:

What are the issues arising out of these new facts?

EVERYONE:

Put together a jury charge for these new facts.

EXAMPLE 3

EVERYONE:

Same facts as Example 1 except that C, the driver of the Hummer, was charged with and convicted of driving while impaired.

Does that justify a punitive damages issue?

First consider the ruling in Eatmon v. Andrews, 161 N.C. App. 536(2003).
{588 S.E.2d 566} "To prevail on a claim for punitive damages plaintiff must show that defendant's established negligence which proximately caused his injury reached a higher level than ordinary negligence; that it amounted to wantonness, willfulness, or evidenced a reckless indifference to the consequences of the act." Moose v. Nissan of Statesville, 115 N.C. App. 423, 428, 444 S.E.2d 694, 697 (1994) (internal citations omitted). Such gross negligence can be established where a defendant is intoxicated. Byrd v. Adams, 152 N.C. App. 460, 462, 568 S.E.2d 640, 642 (2002) .
In Byrd, evidence was offered that defendant 'fell asleep' while driving and did not wake up until after his vehicle rear- ended plaintiff's car, crossed over the interstate median and the opposite lanes of travel, and crashed into a tree. Byrd, 152 N.C. App. at 463, 568 S.E.2d at 643 . In addition, the defendant conceded that he had consumed two beers and taken three prescription drugs prior to the incident. Id. After the crash, the defendant left the scene, and went to a nearby house where he called the police. Byrd, 152 N.C. App. at 461, 568 S.E.2d at 641 . The police picked up defendant and returned him to the scene about twenty-five minutes after the accident. Id. At that time, a state trooper gave defendant an Alco-Sensor test, which indicated defendant's blood-alcohol level was below the legal limit. The test is not a legal screening device, but is simply used to measure any alcohol concentration. Id. The trial court, however, granted summary judgment in defendant's favor on the issue of punitive damages. Despite the test result, this Court reversed, holding that the evidence, taken in the light most favorable to the plaintiff, "could have allowed a jury to possibly recognize and estimate defendant's alleged impairment," sufficiently to justify a finding of gross negligence and an award of punitive damages. Byrd, 152 N.C. App. at 464, 568 S.E.2d at 643 .
Here, as in Byrd, the evidence presented a question for the jury on punitive damages. Defendant caused a collision after consuming two twelve ounce beers and admitted having fled the scene to avoid taking the Breathalyzer. Defendant spent the entire night at a hotel {161 N.C. App. 539} before contacting the police, and as a result no blood alcohol content was ever obtained. Drawing all inferences of fact in plaintiff's favor, the evidence is sufficient to present a jury question on the plaintiff's punitive damages claim. Thus, the court erred in directing a verdict for the defendant.
Reversed in part and judgment vacated in part; remanded for trial on punitive damages.

But compare McNeill v. Holloway, 141 N.C. App. 109 (2000):

In the case before us, the only evidence of wanton conduct due to driving while intoxicated comes from the testimony of plaintiff and of the officer investigating the collision. Both plaintiff and the officer testified that they smelled alcohol on the breath of defendant at the scene of the collision. Plaintiff further described some slurring of defendant's speech. The officer testified that he formed an opinion {141 N.C. App. 114} that defendant's physical abilities "may be appreciably impaired" (emphasis added), and that his opinion was based on the odor of alcohol on defendant's breath and the results of certain psycho-physical tests performed by defendant, but that he could not remember what tests were performed or how well defendant had actually performed them.
In granting defendant's motion for a directed verdict on the issue of punitive damages, the trial court found that the plaintiff has produced evidence from which the jury could find that the defendant had a moderate odor of alcohol about his breath immediately after the accident, that he was given field sobriety tests by the officer. The officer does not remember which tests or how he performed, except that he assumes that he would have failed them. That other than the odor of alcohol, and the "failure," quote-unquote of the psycho-physical tests, he has no recollection of -- in regard to the defendant's state of sobriety, and in fact says that, "In my opinion he had consumed a sufficient amount of alcohol that his physical abilities may be appreciably impaired." That there is no evidence of any conviction of the defendant. That there is no evidence of any Breathalyzer. That there is no evidence as to how much alcohol was consumed by the defendant. That there are no affidavits from any witnesses or testimony from any witnesses about the defendant's impairment other than opinion of the officer. That there was no evidence of any reckless and wanton driving, other than edging out at a stop sign too far into traffic and being hit by the plaintiff. There is no evidence as to the defendant's physical characteristics such as his face or eyes or being unsteady on his feet.

Under N.C. Gen. Stat. § 1D-15 , enacted in 1995, punitive damages may now be awarded only if a plaintiff can prove willful or wanton conduct (or fraud or malice) by clear and convincing evidence. We hold that plaintiff failed to carry his burden of proof that any intoxication of defendant while driving rose to the level of willful or wanton conduct. The trial court did not err in granting defendant's motion for a directed verdict on the issue of punitive damages and the judgment of the trial court is affirmed.

There are two different burdens of proof in a punitive damages case. Under General Statute 1D-15(b) the aggravating factor(s) of fraud, malice, and/or willful or wanton conduct must be proven by clear and convincing evidence. The other elements of punitive damages must be proven by the greater weight of the evidence. See N.C. Pattern Instruction Civil 810.96.

Under General Statute 1D-15(a) punitive damages may be awarded only if the claimant proves that the defendant is liable for compensatory damages **and** an aggravating factor (fraud, malice and/or willful or wanton conduct) was present and was related to the injury for which compensatory damages were awarded.

In a jury trial, the court shall instruct the jury with regard to subdivisions (1) and (2) of G.S. 1D-35.

All nine things listed in G.S. 1D-35(2) that a jury **may** consider in determining the amount of punitive damages to award are listed in N.C. Pattern Instruction Civil 810.98.

The "purposes of punitive damages" referred to in G.S. 1D-35(1) which a jury **must** consider in determining the amount of punitive damages to award are also in N.C. Pattern Instruction Civil 810.98.

Punitive damages may be awarded to punish a defendant for egregiously wrongful acts and to deter the defendant and others from committing similar acts. G.S. 1D-1.

Punitive damages shall not exceed three times the amount of compensatory damages or $250,000, whichever is greater. **If a trier of fact returns a verdict for punitive damages in excess of the maximum amount, the trial court shall reduce the award and enter judgment for punitive damages in the maximum amount.** G.S. 1D-25(b).

The provisions of G.S. 1D-25(b) shall not be made known to the tried of fact through any means, including voir dire, the introduction into evidence, arguments, or instructions to the jury. G.S. 1D-25(c).

G.S. 1D-25(b) shall not apply to a claim for punitive damages for injury or harm arising from the defendant's operation of a motor vehicle if the actions of the defendant in operating the motor vehicle would give rise to an offense of driving while impaired. G.S. 1D-26.

Upon motion of a **defendant**, the issues of liability for compensatory damages and the amount of compensatory damages, if any, shall be tried **separately** from the issues of liability for punitive damages, if any. Evidence relating solely to punitive damages **shall not be admissible** until the trier of fact has determined that the defendant is liable for compensatory damages and has determined the amount of compensatory damages. The same trier of fact that tried the issues relating to compensatory damages shall try the issues relating to punitive damages. G.S. 1D-30.