

Winter 1996

## Converse Instructions under MAI

Elwood L. Thomas

Follow this and additional works at: <https://scholarship.law.missouri.edu/mlr>



Part of the [Law Commons](#)

---

### Recommended Citation

Elwood L. Thomas, *Converse Instructions under MAI*, 61 Mo. L. REV. (1996)

Available at: <https://scholarship.law.missouri.edu/mlr/vol61/iss1/8>

This Article is brought to you for free and open access by the Law Journals at University of Missouri School of Law Scholarship Repository. It has been accepted for inclusion in Missouri Law Review by an authorized editor of University of Missouri School of Law Scholarship Repository. For more information, please contact [bassettcw@missouri.edu](mailto:bassettcw@missouri.edu).

# Converse Instructions Under MAI\*

*Elwood L. Thomas\*\**

## I. THE FUNCTION OF THE CONVERSE INSTRUCTION

To anyone who has a general working knowledge of any jury instruction system in which the jury returns a general verdict, the function of the verdict director is obvious. It is the key instruction which specifies those elements which the jury must find in order to return a verdict for the plaintiff. Likewise, the functions of most other instructions such as cautionary instructions, the burden of proof instruction, the damage instruction, and the form of verdict are fairly obvious. All of these instructions are ancillary to the verdict director, but each performs a necessary function in guiding the jury through its deliberations to a verdict.

Unlike these instructions, the function of a converse instruction is not so obvious, and it is certainly not essential in the package of instructions which goes to the jury. If the verdict director says, "Your verdict must be for plaintiff if you believe plaintiff sustained damage," what does it add to the jury's understanding to further instruct that "Your verdict must be for defendant unless you believe plaintiff sustained damage?"<sup>1</sup> The true converse instruction incorporates and thereby points to one or more elements of the verdict director and reiterates the obvious result of the plaintiff failing to prove one or more of the elements of his verdict director. Thus, it is obvious

---

\* Editors Note: This article is reprinted as it originally appeared in an earlier volume of the *Missouri Law Review*. See 42 MO LAW REV. 175 (Spring 1977).

\*\* Henry S. Geyer Professor of Law, University of Missouri-Columbia; A.B. 1954, Simpson College; J.D. 1957, Drake University. The author has served as a member of the Missouri Supreme Court Committee on Jury Instructions since January, 1976, and as Reporter of the Committee since December, 1976. The views expressed in this article are those of the author and carry neither the approval nor the demurrer of the MAI Committee.

1. It is argued by some that without a converse instruction, there is really no specific direction anywhere in the instructions telling the jury that if plaintiff does not carry his burden of proof, defendant wins. MAI No. 3.01, the primary burden of proof instruction, states, "If the evidence in the case does not cause you to believe a particular proposition submitted or if you are unable to form a belief as to any such proposition, then you cannot return a verdict requiring belief of that proposition." It is true that when coupled with the verdict director, this tells the jury that plaintiff cannot win unless he carries his burden of proof but does not tell the jury that in such event, defendant wins. It is possible that defendants would be more willing to forego the use of a converse instruction if MAI No. 3.01 were changed to make it clearer that defendant wins if the plaintiff fails to meet his burden of proof.

that the court could send a complete and logical set of instructions to the jury without including a converse instruction. In this respect, converse instructions are "excess baggage" in the package of instructions which goes to the jury.<sup>2</sup> The MAI<sup>3</sup> system acknowledges this fact by making the use of converse instructions optional with the defendant.

For an instruction that is nonessential, defendants have jealously protected their right to use a converse of the plaintiff's verdict directing instruction, and it is clear that they are entitled to such an instruction.<sup>4</sup> Under MAI, the instructions make a heavy impact on the nature of the closing argument. This is true because the general approach of MAI is to submit only ultimate issues of fact. Thus, the instructions form only a skeleton of the law of the case, and it is left to the lawyers in closing argument to expand and flesh out the law applicable to the case. The plaintiff will inevitably emphasize to the jury his verdict director which begins, "Your verdict must be for plaintiff if you believe: (the various elements of plaintiff's case)." Since the instructions come from the judge who stands apart from the lawyers' obvious role as advocates, the instruction in which the judge tells the jury the circumstances under which they must find for the plaintiff takes on special significance. It is understandable that defendants have viewed it as very important that they also have an instruction in which the judge states, "Your verdict must be for defendant . . . ."

Despite this understandable desire for an instruction which speaks specifically of a defendant's verdict, many well respected defense lawyers elect not to use converse instructions. If the defendant's major contention is that the plaintiff has failed to meet his burden of proof on each of the various elements of his case, this argument can be presented to the jury very effectively by arguing from the plaintiff's verdict director. On the other hand, if the defendant relies primarily on the failure of plaintiff's evidence on one particular element of his case, then a converse instruction can be used effectively to highlight this element. For example, if the defendant contends that the plaintiff is a malingerer, then a converse instruction which converses damages can be very helpful in marshalling the language of the judge behind the defendant's contention that plaintiff was not really injured.

The MAI rules for the use of converse instructions are unbelievably technical. This is caused in part because these rules have developed largely on a case by case basis. The insistence of defendants upon making the maximum use of converse instructions has produced a continually evolving

---

2. How To Use This Book, "Converse Instructions," MAI p. LI.

3. MISSOURI APPROVED JURY INSTRUCTIONS (2d ed. 1969) [hereinafter cited as MAI].

4. *Frazier v. Ford Motor Company*, 365 Mo. 62, 276 S.W.2d 95 (Mo. 1955) (en banc). See discussion at MAI No. 33.01.

and changing series of guidelines for the use of converse instructions. The efforts of the Supreme Court Committee on Jury Instructions<sup>5</sup> and the court to give the defendant his converse instruction without upsetting the desired balance by allowing him to use too many converse instructions have resulted in an almost unintelligible series of rules about how many converse instructions a defendant may use.<sup>6</sup> The option of the defendant to converse as much or as little of the verdict director as he wishes has produced case decisions which may entrap both the wary and the unwary.<sup>7</sup> It is the purpose of this article to pull together the procedures and rules in the use of converse instructions which have developed in the twelve years under MAI. To some extent, this article will tell the reader how to use converse instructions. Of equal or greater importance is the hope that the reader will develop a sense for recognizing those cases in which the use of a converse instruction should be avoided. The adage that "discretion is the better part of valor" is a ringing truth when it comes to preparing jury instructions, and with respect to converse instructions, discretion often calls for no instruction at all. Finally, it is possible that this compilation of the intricacies of the use of converse instructions will serve as the catalyst for the bench and bar to reconsider whether converse instructions really merit inclusion in the MAI system.

## II. FOUR TYPES OF CONVERSE INSTRUCTIONS UNDER MAI

MAI provides for four different types of converse instructions. These are:

1. "If you do not believe" introduction:<sup>8</sup>

Your verdict must be for defendant *if you do not believe* (some or all of the propositions submitted in plaintiff's verdict director).

2. "Unless you believe" introduction:<sup>9</sup>

Your verdict must be for defendant *unless you believe* (some or all of the propositions submitted in plaintiff's verdict director).

---

5. The Supreme Court Committee on Jury Instructions, which is appointed by Order of the Supreme Court of Missouri, formulates Instructions, Notes on Use and Committee Comments. These are submitted to the court and become part of the MAI after approval and adoption by the court.

6. See text accompanying notes 54 through 71 *infra*.

7. See text accompanying notes 40 through 48 *infra*.

8. MAI No. 33.02.

9. MAI No. 33.03 and 33.04.

3. Affirmative converse:<sup>10</sup>

Your verdict must be for defendant *if you believe* (some ultimate issue which, if true, would defeat plaintiff's claim).

4. General converse:<sup>11</sup>

Your verdict must be for defendant (unless you believe)(if you do not believe) each proposition submitted to you in Instruction Number \_\_\_\_\_ (here insert number of plaintiff's verdict directing instruction).

The "if you do not believe" form and the "unless you believe" form are the true converse instruction forms in that one of these phrases is combined with language from the verdict director to instruct the jury that if the plaintiff's evidence fails on the elements so specified, the verdict must be for the defendant. Since the true converse instruction is used in the vast majority of cases, this article will consider first the principles and problems involved in the use of this format. The general converse and the affirmative converse will be discussed in subsequent sections.

### III. PREPARING THE TRUE CONVERSE INSTRUCTION

#### *A. Combine the Appropriate Preliminary Phrase with Language from the Verdict Director*

MAI is designed as a system of mandatory rather than optional instructions. This result is mandated by rule 70.01(b)<sup>12</sup> which states that if a MAI instruction is applicable to the case being tried, such instruction must be used. Thus, it is understandable that in drawing instructions most lawyers first look to MAI to see if it contains an instruction usable in their case. If it does, it is used in the form shown. Thus, it is natural to think of MAI as a form book of the highest order.

Having developed this procedure for drawing instructions, it is not surprising that many lawyers called upon to draw a converse instruction follow the same procedure by turning to chapter 33 of MAI and selecting what appears to be an appropriate converse instruction. It is the writer's view that this is the wrong approach to use in drawing converse instructions. Unlike the other portions of MAI, the converse instructions set forth chapter 33 are not mandatory instructions but should be thought of as examples of the manner in which the appropriate introductory phrase can be combined with language of the verdict director being conversed. Once the appropriate introductory

---

10. MAI No. 33.05.

11. MAI No. 33.13.

12. MO. SUP. CT. R. 70.01(b).

phrase has been selected ("if you do not believe" or "unless you believe"), the only form from which to select language for the rest of the converse instruction is the verdict director itself. This approach is dictated by the General Comment on converse instructions found at MAI No. 33.01 which requires that the appropriate introductory phrase be "followed by one or more propositions submitted by the verdict directing instruction and in substantially the same language used in the verdict directing instruction."<sup>13</sup>

The use of the verdict director as the only form from which the converse instruction should be drawn is not only mandated by the General Comment but is also a surefire method of avoiding a whole series of unrelated errors which can innocently arise in a converse instruction taken directly from MAI rather than from the language of the verdict director being conversed. For example, in *Snyder v. Chicago, Rock Island and Pacific Railroad*,<sup>14</sup> the plaintiff submitted a FELA verdict director (MAI no. 24.01) which submits causation by stating:

Fifth, such negligence directly resulted in whole or in part in injury to plaintiff.

To converse causation, the defendant selected MAI No. 33.03(5) which is a converse instruction of causation as submitted in a regular negligence case. This converse instruction reads:

Your verdict must be for defendant unless you believe defendant was negligent and that plaintiff sustained damage as a direct result thereof.

This converse instruction is erroneous for two reasons: first, it talks in terms of damage instead of injury as submitted in the verdict director; second, it omits the "in whole or in part" language.

In response to the defendant's argument that the instruction should be approved since it was patterned after MAI No. 33.03(5), the court stated:

The test of the propriety of the second method converse instruction is not that it conforms to a given pattern, however extraneous, but that it is prefaced: *unless you believe* followed by one or more propositions submitted by the verdict director and *in substantially the same language*

---

13. See first sentence of the text under the heading "First Method" and under the heading "Second Method," MAI, p. 349.

14. 521 S.W.2d 161 (Mo. App., D.K.C. 1973).

used in the verdict director . . . . The failure of defendant to comply with this mandatory requirement was error. . . .<sup>15</sup>

The narrow holding of this case that it is erroneous to use a regular negligence converse instruction against a FELA verdict director is noteworthy. However, the case is most important because it demonstrates that this error would never have been made if the defendant had used the verdict director as the form for the converse instruction and used MAI merely as an example rather than the source of the instruction.

There are many other examples of errors which can be avoided by using the verdict director as the source of language for the converse instruction. For example, when the plaintiff submits on negligence per se, the verdict director does not require a finding that the defendant's conduct was negligent.<sup>16</sup> It is reversible error for the defendant to converse this verdict director with MAI No. 33.03(2) which is designed for conversing negligence and which states, "Your verdict must be for defendant unless you believe that defendant was negligent."<sup>17</sup> While the inappropriateness of this converse instruction in this situation is obvious upon thoughtful consideration, it is understandable that a defendant could be led into this error if he attempted to select an appropriate converse instruction from those presented in the book. If the verdict director had been used as the form for the converse, negligence would not be conversed because it is not mentioned in the verdict director.

In at least two cases<sup>18</sup> where the verdict director submitted failure to use ordinary care (such as in MAI No. 22.03—Invitee Injured), defendants have injected reversible error into a case by using an instruction from MAI which converses negligence, a term which is not mentioned in an ordinary care verdict director. Such an error could not occur in a converse instruction drawn in the language of the verdict director.

The wrongful death verdict director<sup>19</sup> differs from a personal injury verdict director<sup>20</sup> in that it submits the issue of whether the decedent died rather than submitting the question of whether the plaintiff sustained damage.

15. *Id.* at 165.

16. *See* MAI No. 17.17 and 17.18.

17. *Oventop v. Bi-State Development Agency*, 521 S.W.2d 488 (Mo. App., D. St. L. 1975).

18. *Frogge v. Nyquist Plumbing & Ditching Co.*, 453 S.W.2d 913 (Mo. En Banc 1970); *Brewer v. Swift & Co.*, 451 S.W.2d 131 (Mo. En Banc 1970); *But see Demko v. H & H Inv. Co.*, 527 S.W.2d 382 (Mo. App., D. St. L. 1975) (where conversing negligence when the verdict director submitted failure to use ordinary care was error but was not prejudicial because negligence in the converse instruction was defined as being the failure to use ordinary care.)

19. MAI No. 20.01.

20. MAI No. 17.01 and 17.02.

The difference in the instructions reflects the fact that nominal damages are presumed in a wrongful death case. If a defendant in a wrongful death case uses an instruction from MAI which converses damages,<sup>21</sup> he will be in error because he is in violation of the rule that damages are presumed in a wrongful death case.<sup>22</sup> It is interesting to note that a defendant who is in total ignorance of this presumption of nominal damages in a wrongful death case could nevertheless draw an accurate converse instruction by simply using the verdict director as the form for the converse instruction because the verdict director does not use the word "damages".

In *Denny v. Mathieu*<sup>23</sup> the plaintiff submitted against the defendant employer based upon the negligence of the employer's employee, a truck driver. The defendant selected a converse instruction from MAI stating that "Your verdict must be for defendant unless you believe defendant was negligent." Since the defendant was the employer and was not even present at the time of the accident, this converse instruction was erroneous. The error resulted from referring to the defendant rather than to the employee by name in the converse instruction. This is the kind of error which can easily slip into a set of instructions through oversight. It is also the kind of error which can easily be avoided by simply using the verdict director as the source of the converse instruction since the verdict director will refer to the negligence of the proper person.

Each of the mistakes demonstrated by the foregoing cases could slip by the watchful eye of any lawyer under the pressure of trial. It is remarkable that such diversity of error can be avoided by such a simple rule: Use the verdict director to draw the converse. It will be a significant accomplishment if this article helps the reader realize that many errors can be successfully avoided by this simple procedure of using the verdict director as the source of language for the converse instruction.

### *B. Selecting the Appropriate Connecting Term*

The various specifications and elements contained in the verdict directing instruction will be submitted either in the conjunctive (connected with "and") or in the disjunctive (connected with "or") depending upon which is required by the substantive law. If a defendant elects to converse more than one specification or element of the verdict director, he is faced with the problem of which connecting term (and vs. or) to use in the converse instruction. The rule applied in this situation is that the same connecting term as is used in the

---

21. MAI No. 33.02(3), (4) or (5); MAI No. 33.03(3), (4) or (5); or MAI 33.04(2), (3) or (4).

22. *Aubuchon v. LaPlant*, 435 S.W.2d 648 (Mo. 1968).

23. 452 S.W.2d 114 (Mo. En Banc 1970).



verdict director is always used in the converse instruction. The rule is a specific application of the principle that the converse instruction should be patterned after the verdict director. It also reflects the fact that under the MAI system, the converse instruction is a direct incorporation of the verdict director in that the converse tells the jury that "Your verdict must be for defendant unless you believe (certain elements of the verdict director)." If the connecting term were to be altered in the converse instruction, then when the jury reads the converse as an incorporation of the verdict director they may conclude that the verdict director is disjunctive when in fact it is conjunctive or vice versa. So long as the converse instruction is viewed as a direct reference to the verdict director, it makes sense that the converse instruction should use the verdict director language including the same connecting terms. Thus, in conversing a conjunctive submission from the verdict director, the defendant should use the connecting term "and" in the converse instruction. In conversing a disjunctive submission from the verdict director, the defendant should use the connecting term "or" in the converse instruction.

The application of this rule is fairly obvious in the case of the disjunctive submission. If the verdict director submits that "defendant either failed to keep a careful lookout *or* drove at an excessive speed," the converse instruction must state, "Your verdict must be for defendant unless you believe defendant either failed to keep a careful lookout *or* drove at an excessive speed." If the converse instruction requires the jury to find for the defendant "unless you believe lookout *and* speed," this would be error because the plaintiff is entitled to recover if the evidence shows either specification; he is not required to prove both.

The rationale for the rule is not as obvious in the case of conjunctive submissions. If the verdict director submits that the verdict must be for plaintiff if the evidence shows that defendant was negligent *and* plaintiff was thereby damaged, then the converse instruction would state that "Your verdict must be for defendant unless you believe defendant was negligent *and* plaintiff was thereby damaged." Suppose the converse instruction states "Your verdict must be for defendant unless you believe defendant was negligent *or* plaintiff was thereby damaged." This is incorrect because it is ambiguous. If the jury interprets this to say that "Your verdict must be for defendant unless you believe defendant was negligent *or unless you believe* plaintiff was thereby damaged" the instruction will be a correct statement of the law and would be proper. However, if the jury reads the converse instruction as a direct incorporation of the verdict director, then they will read it to say that "Your verdict must be for the defendant unless you believe that defendant was negligent *or* that plaintiff was thereby damaged."<sup>24</sup> This latter interpretation

---

24. The improper interpretation is present if the converse instruction is read as it should be, as a direct reference to the plaintiff's verdict director and, in effect, as an

is wrong because it does not conform to the correct substantive law. However, it is not prejudicial because the error favors the plaintiff and is detrimental to the defendant. Thus, if a defendant uses "or" in conversing a conjunctive submission, he is probably not running any serious risk of reversal. But, he is giving an instruction which is ambiguous and which may be read by the jury to ease the plaintiff's burden of proving every element of his case.

Both the court and the committee have vacillated in applying this rule when conversing conjunctive submissions. The indecision of the court is illustrated by the following cases. In *Young v. Grotzky*<sup>25</sup> the supreme court approved a converse instruction in the disjunctive which conversed conjunctive submissions in the verdict director. The court suggested by way of dicta that the converse instruction would have been improper if it had used the conjunctive "and". In *Wims v. Bi-state Development Agency*<sup>26</sup> the defendant correctly followed the rule in conversing a conjunctive submission. The trial court granted the plaintiff's motion for new trial on the ground that the converse instruction was confusing and misleading. The supreme court reversed the trial court and approved the converse instruction, but the reasoning is strained. The case is noteworthy because of the court's failure to rely directly upon the basic rule that the converse instruction should use the same connecting term as is used in the verdict director. The indecision of the committee is demonstrated in Instruction Number 4 in the set of illustrative instructions at MAI No. 35.06 where "or" is used as a connecting term in conversing conjunctive elements of the plaintiff's verdict directing instruction. The confusion displayed by the court and the committee is generated by the failure to consistently recognize that the converse instruction is designed to be a direct incorporation of the language of the verdict director and, as such, it must use the exact language of the verdict director.

Failure to use the same connecting term in the converse instruction as is used in the verdict director is clearly reversible error when conversing disjunctive submissions. It appears to be the preferred but not the required

---

incorporation of the language of the verdict director. On the other hand, if the converse instruction is read as somehow setting up certain propositions which, if their disbelief is established, will allow the defendant to prevail, then conversing a conjunctive submission with "or" in the converse instruction seems appropriate. This dilemma as to how the converse instruction should be viewed is discussed in the text accompanying notes 27 through 30 *infra*. The failure to recognize that the converse instruction is a direct incorporation of the language of the verdict director is the underlying problem both in selecting the correct connecting term and in understanding the limitation on the use of the "if you do not believe" format when conversing a disjunctive submission.

25. 459 S.W.2d 306 (Mo. 1970).

26. 484 S.W.2d 323 (Mo. 1972) (en banc).

procedure for conversing conjunctive submissions. The MAI approach of using the same connecting term in both the converse and verdict directing instruction is clearly the better approach to the problem because it is a simple mechanical method of achieving an accurate unambiguous statement of the law in the converse instruction. It manifests the general proposition that the converse instruction is a direct incorporation of the verdict director and that the language must be taken from the verdict director itself.

*C. Selecting the Appropriate Introductory Phrase  
("if you do not believe" vs. "unless you believe")*

MAI provides for two types of true converse instructions. One uses the introductory phrase "if you do not believe," and the other uses "unless you believe." The "unless you believe" format is the universal instruction since it can be used in conversing any type of verdict directing instruction. Under the MAI rules, the "if you do not believe" instruction is prohibited when conversing a disjunctive submission.<sup>27</sup>

Both the reason for providing more than one type of instruction as well as the rationale for limiting the use of the "if you do not believe" format are far from clear. The General Comment at MAI 33.01<sup>28</sup> explains the limited use of the "if you do not believe" method with an example in which the plaintiff submits in the verdict director that "defendant could have stopped or swerved and thereby have prevented the injury." This submission allows the plaintiff to recover if the injury could have been avoided by either stopping or swerving; the plaintiff need not show both. If this instruction is conversed by stating, "Your verdict must be for defendant if you do not believe defendant could have avoided the injury by stopping or swerving," the jury is likely to read the converse to mean that defendant wins if the jury decides that the injury could have been avoided by stopping but not by swerving. This would be incorrect because the plaintiff's theory in submitting in the disjunctive is that he can prevail by showing either. To be a correct statement of the law the converse must be interpreted to state that "Your verdict must be for defendant if you do not believe that the injury could have been avoided by swerving nor do you believe that the injury could have been avoided by stopping."

If the "unless you believe" converse is used it will state that "Your verdict must be for defendant unless you believe that the injury could have

---

27. See Notes on Use, MAI No. 33.02; Converse Instructions—General Comment under the heading "Disjunctive Submissions," MAI No. 33.01; How To Use This Book under the heading "Converse Instructions," MAI p. LII.

28. See Converse Instructions—General Comment under the heading "Disjunctive Submissions," MAI No. 33.01

been avoided by stopping or swerving." The more likely reading of this instruction tells the jury that the plaintiff wins if either alternative is applicable while the verdict would be for defendant only if neither stopping nor swerving would have been successful to avoid the injury.

Why does the "if you do not believe" format give an incorrect result when combined with a disjunctive submission? A true converse instruction is not an independent defense instruction in the sense that it does not set forth a state of belief which the jury must reach before the defendant gets a verdict. Quite the contrary, a true converse instruction embodies the defendant's right to try his case on the failure of the plaintiff to meet the burden of proof with respect to one or more of the elements of his case. As such, a true converse instruction simply points the jury's attention to some aspect of the plaintiff's verdict director and on behalf of the defendant says, "I win if you do not believe this part of plaintiff's verdict director."

The MAI rules for drafting converse instructions are fully consistent with this characteristic of a true converse instruction. By requiring that the instruction be drafted using the same connecting terms and the same language as the verdict director, the converse instruction actually consists of an introductory phrase followed by an incorporation of some or all of the verdict director. The key to analyzing the converse instruction under MAI is realizing that the converse instruction is designed to refer the reader to the verdict director and that, in fact, the body of the converse instruction is simply an extract from the verdict director.

Consider the following simplified instructions for purpose of analysis:

Verdict Director:  
your verdict must be for  
plaintiff if you believe:  
(a), or  
(b)

Converse:  
your verdict must be for  
defendant if you do not believe:  
(a), or  
(b)

This converse instruction is a verbal optical illusion. View it as an instruction which tells what the defendant must cause the jury to disbelieve if he is to win. In this light, defendant wins if the jury disbelieves either (a) or (b). Now change your perspective. Look at the converse instruction as an incorporation of the verdict director. Viewed in this manner, it says defendant wins if plaintiff has not caused you to believe either of the elements submitted in plaintiff's verdict director which are (a) or (b). The intended interpretation is that defendant can win only if the jury lacks belief of both propositions. In order for this interpretation to result, the converse instruction must strike the reader as the embodiment of the verdict director.

The trouble with the "if you do not believe" format is that it appears to be in the nature of an independent defense instruction. On the other hand, the "unless you believe" format emphasizes the absence of belief rather than a

requisite state of disbelief. As such, it is more likely to strike the reader as a direct reference to the verdict director because it says in effect that "your verdict must be for defendant unless you believe (some or all of the verdict director)." The MAI rules for converse instructions would have to be designed differently if the converse instruction was to operate as an independent defense rather than as a reference to the verdict director. For one thing, in such event the converse instruction would have to use the connecting term opposite that used in the verdict director. There is a direct relationship between the problems under MAI relating to the selection of the connecting term and the fact that the converse instruction is not always perceived as a direct reference to the verdict director. It is not mere accident that "if you do not believe" type instructions have been involved in all of the situations where the court and the committee have deviated from using the same connecting term in both the verdict director and the converse instruction.<sup>29</sup>

The "if you do not believe" format has the same potential defect when used to converse a conjunctive submission. If the plaintiff submits on negligence and damages, a converse which says "Your verdict must be for defendant if you do not believe negligence and damages" is incorrect if it is read to say that "Your verdict must be for defendant only if you do not believe negligence and if you do not believe damages." The defendant is entitled to win if the jury does not believe one of the elements even if it believes the other. This construction results from viewing the converse instruction as setting forth propositions which, if disbelief is established, will allow the defendant to prevail. On the other hand, the instruction is accurate if it is perceived to say, "Your verdict must be for defendant if you do not believe all of the elements of plaintiff's verdict director which includes negligence and damages." To the extent that the "if you do not believe" format can be misconstrued when used to converse a conjunctive submission, the misconstruction is detrimental to the defendant and would not afford the plaintiff a basis for objection. This may account for the fact that the MAI rules prohibit the "if you do not believe" format when conversing disjunctive submissions while allowing it at the defendant's option in the case of conjunctive admissions. In the long run, it would probably be advisable to eliminate the "if you do not believe" format from the MAI system.<sup>30</sup> It is doubtful that it offers any real advantage over the more usable "unless you believe" instruction, and the system would probably be better off without the complexity which accompanies the "if you do not believe" instruction. In the

---

29. See text accompanying notes 24 through 26 *supra*.

30. At the very least, it is ironic that the limited use introductory phrase "if you do not believe" is denominated in MAI as the "First Method" while the universal "unless you believe" introductory phrase is relegated to the position of "Second Method."

absence of this basic change in the system, defendants would be well advised to avoid the use of the "if you do not believe" format except when conversing a single element from the plaintiff's verdict director. In conversing more than one element, the rule prohibits the use of this method if the elements are submitted in the disjunctive, and the potential adverse ambiguity against the defendant should discourage its use when conversing elements submitted in the conjunctive.

*D. Modifying the Converse Instruction Where Plaintiff Submits Alternative Theories in Separate Verdict Directing Instructions*

In certain situations, the plaintiff will be entitled to submit alternative theories of recovery which will require the use of more than one verdict directing instruction. For example, it is not uncommon for a plaintiff to assert both regular negligence<sup>31</sup> and humanitarian negligence<sup>32</sup> against a defendant. Since these cannot be combined in a single verdict directing instruction, the plaintiff will be entitled to two verdict directors. The plaintiff's theory of recovery is that if he sustains his burden of proof on either regular negligence or humanitarian negligence, he is entitled to recover; he is not required to be successful under both to obtain a verdict.

If the defendant were allowed to converse the regular negligence instruction by stating, "Your verdict must be for defendant unless you believe (some or all of the regular negligence directing instruction)," this instruction would be erroneous. The defendant is not necessarily entitled to a verdict if the plaintiff fails on his regular negligence cause of action; plaintiff may still obtain a verdict on his humanitarian theory of recovery. In such a case, the converse instruction should be modified by changing the word "verdict" to "finding" and by inserting in the introductory phrase of the converse instruction a direct reference to the number of the verdict director being conversed.<sup>33</sup> Thus, the instruction conversing the regular negligence verdict director will read, "Your *finding* must be for defendant under Instruction Number \_\_\_\_ (insert the number of the regular negligence verdict director) unless you believe (some or all of the propositions contained in the regular negligence verdict director)." In most situations, the defendant will be entitled to an additional converse instruction conversing the verdict director which submitted humanitarian negligence. This instruction will be modified in a similar manner except that the number of the humanitarian verdict director is

---

31. MAI No. 17.01 and 17.02.

32. MAI No. 17.14 and 17.15.

33. Converse Instructions—General Comment under the heading "Both Primary and Humanitarian Negligence Submitted," MAI 33.01; *Payton v. Bi-State Development Agency*, 417 S.W.2d 522 (St. L. Mo. App. 1967).

inserted in the introductory phrase, and the instruction will incorporate some or all of the propositions contained in the humanitarian verdict directing instruction.

Other reoccurring situations in which alternative theories of recovery are submitted in separate verdict directing instructions include: submissions on regular negligence<sup>34</sup> and negligence per se;<sup>35</sup> submissions on wrong side of the road<sup>36</sup> or the rear-end doctrine,<sup>37</sup> along with some additional specifications of negligence,<sup>38</sup> and submissions against an employer based upon his independent negligence and upon his respondeat superior liability for the acts of his employee.<sup>39</sup> If a defendant is entitled to more than one converse instruction in any of these situations, they must be modified in the manner indicated above or reversible error will result.

*E. Determining How Much (or How Little)  
of the Verdict Director to Converse*

As a general rule, the defendant has the option to converse as much or as little of the verdict director as desired. In drafting his converse instruction, he uses the appropriate introductory phrase for the converse instruction followed by all paragraphs of the verdict director, a single paragraph of the verdict director or some combination of the various paragraphs of the verdict director.

In terms of strategy, many trial lawyers try to use the converse instruction to highlight the single element or, in some instances, the two elements where the plaintiff's evidence is weakest. For example, if the defendant claims that the plaintiff is a malingerer it would be appropriate to converse the damages paragraph of the verdict director. In a case where the injuries are substantial but the liability is questionable, a defendant normally would not choose to converse damages.

A converse of the complete verdict director could be used in a case where the defendant wants to argue that the plaintiff has the burden of proof on all of the elements of the verdict director and to suggest that plaintiff may have

34. MAI No. 17.01 and 17.02.

35. MAI No. 17.17 and 17.18.

36. MAI No. 17.13 (Supp. 1976).

37. MAI No. 17.16 (Supp. 1976).

38. It is not clear to the writer, in view of the changes in the Wrong Side of the Road instruction (MAI No. 17.13) and the Rear End Collision instruction (MAI No. 17.16) as required by the 1976 MAI Pocket Parts, whether these specifications can be submitted in the disjunctive along with other specifications of negligence in a single verdict director or whether separate verdict directing instructions are required.

39. MAI No. 18.01.

failed on any one of those. However, many defense counsel prefer in this situation to elect not to use a converse instruction and to simply make this argument from the verdict director itself.

It is clear that the defendant may converse all or any lesser number of the paragraphs of a verdict director which are submitted in the conjunctive.<sup>40</sup> The rule is that you can converse any single conjunctive element, and this rule is not altered by the fact that several conjunctive elements are contained in a single paragraph of a verdict director. For example, the products liability verdict director<sup>41</sup> includes:

Second, the product, as manufactured, was defective and therefore dangerous when put to a use reasonably anticipated, and

. . .

This single paragraph contains two elements: that the product is defective *and* dangerous. In *Lietz v. Snyder Mfg. Co.*<sup>42</sup> the court approved a converse instruction to the effect that "Your verdict must be for defendant unless you believe the product, as manufactured, was defective."

In conversing disjunctive submissions, there is an important limitation on defendant's right to converse whatever he desires. This limitation is that if the defendant elects to converse any element of a disjunctive submission, he is required to converse all elements of the disjunctive submission.<sup>43</sup> For example, if the plaintiff submits that "defendant either failed to keep a proper lookout *or* drove at an excessive speed," it would be error to use a converse instruction merely stating that "Your verdict must be for defendant unless you believe defendant failed to keep a proper lookout." Such an instruction deprives the plaintiff of the opportunity to obtain a verdict based on the alleged excessive speed even though the evidence fails with respect to the lookout specification. A proper converse of these disjunctive submissions would state, "Your verdict must be for defendant unless you believe defendant either failed to keep a proper lookout *or* drove at an excessive speed." This rule does not require that the defendant always converse the disjunctive submission. The requirement is that *if* he converses *any* element of the disjunctive submission, he must converse all such disjunctive submissions. Defendant may elect to converse other submissions in the verdict director, and so long as he does not converse any of the disjunctive specifications, he is free

---

40. How To Use This Book under the heading "Converse Instructions" at MAI p. LI.

41. MAI No. 25.04.

42. 475 S.W.2d 105 (Mo. 1972).

43. Notes on Use, MAI No. 33.04.



to converse as much or as little of the remainder of the verdict director as he wishes.

The question of what must be conversed when conversing a verdict director containing disjunctive submissions has been complicated and left uncertain by the case of *Davis v. St. Louis Southwestern Railroad Co.*<sup>44</sup> This is a FELA case where plaintiff was injured while working on a railroad handcar. The verdict director<sup>45</sup> was unique in that it submitted in a single verdict directing instruction for the negligence of two different persons (the employer and the employee). Because of this, paragraph second of the verdict director, which would normally submit the general standard of negligence for a single person, submitted two general negligence standards in the alternative—one for the employer and another for the employee. The defendant elected to converse this second paragraph. To do so he should have drafted a "Not in MAI" converse instruction by selecting the appropriate introductory phrase and using the exact language from the second paragraph of the plaintiff's verdict director. This would have caused the converse to cover the general negligence standard for both persons involved. Unfortunately, the defendant made the mistake of using MAI No. 33.02(2) which states, "Your verdict must be for defendant if you do not believe that defendant was negligent." This converse was clearly erroneous because it conversed only the general negligence standard of the employee. It deprived the plaintiff of the opportunity to win on the employee's negligence which was one of the alternative theories for recovery.

The case would cause no problem if the court had simply stated that the converse instruction was a misdirection because of the unusual nature of the verdict director and the failure of the defendant to incorporate in his converse instruction the specific language of the portion of the verdict director being conversed. Instead, the opinion attempted to base the decision on the

44. 444 S.W.2d 485 (Mo. 1969). The author wishes to disclose that he has previously been employed and has rendered an opinion to a law firm involved in litigation now pending on appeal in which it is claimed that the *Davis* opinion is significant.

45. Plaintiff's verdict director in *Davis* read as follows:

"Your verdict must be for the plaintiff if you believe:

"First, defendant failed to provide reasonably safe methods of work,

or

"Second, defendant's employee other than plaintiff dropped the brake beam on the hammer handle, and

"Third, defendant in the respect submitted in paragraph First was negligent, or defendant's employee other than plaintiff in the respect submitted in paragraph Second was negligent, and

"Fourth, such negligence directly resulted in whole or part in injury to plaintiff."

cautionary note contained in the Notes on Use at MAI No. 33.02. This cautionary note states:

*Caution.* This form, using the introduction, "if you do not believe" is *not* suitable for conversing multiple negligent acts submitted in the disjunctive. For such converse instruction use the form similar to Converse Instruction 33.04(5).

MAI No. 33.04(5) is an example of an "unless you believe" type instruction conversing three disjunctive specifications of negligence. This cautionary note was intended to prohibit the use of the "if you do not believe" type of instruction in a situation where disjunctive submissions are being conversed.<sup>46</sup> The second sentence refers anyone who wishes to converse a disjunctive submission to the "unless you believe" type of instruction contained in MAI 33.04. This cautionary note should not have been applied to the converse instruction used in *Davis* because the defendant in *Davis* did not attempt to converse the disjunctive specifications of negligence; he only conversed the general negligence paragraph.

Unfortunately, the opinion in *Davis* interprets this cautionary note to require any defendant who converses the general negligence paragraph of a verdict director containing disjunctive specifications of negligence to also converse all such disjunctive specifications of negligence.<sup>47</sup> It seems clear that the court read into the cautionary note matters which were not intended to be included. MAI No. 33.04 contains five approved instructions designed solely for conversing verdict directors containing disjunctive submissions. The bold letter heading for MAI 33.04 makes it clear that these instructions are specifically provided for use in conversing verdict directors containing disjunctive submissions.<sup>48</sup> Two of those instructions [MAI No. 33.04(1) and 33.04(4)] converse the general negligence paragraph of a disjunctive verdict director without conversing any of the disjunctive submissions. If the *Davis* opinion were to be applied literally, the use of both these instructions would be reversible error.

The discussion in *Davis* concerning the necessity of conversing all aspects of a disjunctive submission was not without merit in that case because the general negligence paragraph in that verdict director in fact contained a disjunctive submission. Likewise, the proposition that it was inadequate to use

---

46. See text accompanying notes 27 through 30 *infra*.

47. 444 S.W.2d at 489.

48. The bold letter heading to MAI No. 33.04 states "Five Instructions Conversing Verdict Directing 17.02 Using 'Unless You Believe' Introduction." Verdict Directing 17.02 is the required MAI instruction for submitting multiple negligent acts in the disjunctive.

a simple general negligence converse instruction in the *Davis* case was certainly correct because the defendant in *Davis* was not conversing a simple general negligence paragraph. Read in this light, the opinion should be limited to the facts of that case. It should not be applied to invalidate a converse instruction by a defendant who elects to converse only the general negligence paragraph of a verdict director which also contains disjunctive submissions of negligence.

The rule should be clarified to provide, as it did before *Davis*, that the only time a defendant is required to converse more of the verdict director than he might otherwise elect is in the situation where he elects to converse some aspect of the disjunctive submission; having elected to converse some of the disjunctive submission, he is required to converse all of the disjunctive submission. Absent a clarifying decision by the court or some change in the Notes on Use to clear up the problem, anyone who elects to converse the general negligence paragraph of a verdict director containing disjunctive submissions should also converse all of the disjunctive submissions. In time, it is probable that some unwilling pioneer will clear away the debris left by the wake of the *Davis* opinion.

#### F. *Conversing an Erroneous Verdict Director*

In Missouri, either party is allowed to raise objections to instructions for the first time in the Motion for New Trial.<sup>49</sup> It is standard operating procedure for counsel to quietly but confidently sandbag at trial on any possible error in the opponent's instructions except in those situations where the suspected error in the opponent's instruction is so significant that its impact on the jury will outweigh the advantage of having built-in error in the case as insurance for a new trial. If the error is in the plaintiff's verdict director, the defendant may be concerned about using the same language in his converse instruction, fearing that on appeal the plaintiff will contend that the use of the same language in the converse instruction somehow cures the error in the verdict director. The defendant's concern should be shortlived. Rule 70.01(f)<sup>50</sup> provides, in part that "[t]he request of a converse instruction shall not be deemed to waive any objection to the instruction conversed."

The only holding which has even hinted at any inroad into this rule is *Fowler v. Laclède Gas Company*<sup>51</sup> where the failure to define a term in the verdict director was deemed to be cured by the failure to define the same term in the converse instruction. The rationale that two wrongs make a right is questionable; in any event the case does not really cast doubt on the

---

49. MO. SUP. CT. R. 70.02.

50. MO. SUP. CT. R. 70.01(f).

51. 488 S.W.2d 934 (Mo. App., D. St. L. 1972).

defendant's right to converse a portion of the verdict director and then later object to the very language conversed.

A slightly different problem arises when the defendant who objects to a portion of the verdict director as being a misstatement of the law, is overruled by the trial court. If the defendant is firm in his belief that the instruction is incorrect, he may want to converse in language which he believes to be a correct statement of the law even though it is different from the language of the verdict director. Having raised the objection, the defendant's strategy no longer involves any hesitance to disclose to opposing counsel and the court his belief that the verdict director is wrong.

In *Smile v. Lawson*,<sup>52</sup> a medical malpractice case, the plaintiff submitted on defendant's failure to *protect* the laryngeal nerves during surgery. The defendant's instruction stated, "Your verdict must be for defendant . . . unless you believe that defendant *severed* plaintiff's . . . laryngeal nerves and that defendant had actual knowledge of this fact and fraudulently concealed this fact from plaintiff and engaged in trickery and deceit to prevent plaintiff from ascertaining the truth of her condition. . . ."<sup>53</sup> The verdict was for defendant; the plaintiff appealed on defendant's instruction. The court affirmed stating that the defendant's instruction was the correct statement of the law while the plaintiff's instruction was too favorable to the plaintiff. The result would seem to be authority for the proposition that a defendant, who is convinced that the verdict director is wrong, can submit his version of the law to the jury in his "unless you believe" instruction. If it turns out that the plaintiff is wrong on the law and the defendant is right, the defendant will not be reversed. It follows, however, that if the court on appeal decides that both the plaintiff's and the defendant's instructions are correct, even though expressed in different language, the defendant will probably lose his verdict because he will have violated the rule requiring the converse instruction to track the language of the verdict director. It would seem that defendant should submit his own version of the law in his converse instruction only in those situations where the difference in the instructions will have a significant impact on the jury and the defendant is confident that he is right on the law and the plaintiff is wrong.

#### IV. HOW MANY CONVERSE INSTRUCTIONS ARE TOO MANY?

Since converse instructions are in a sense "excess baggage" in that they are not essential to a complete logical presentation of the case to the jury, the

---

52. 506 S.W.2d 400 (Mo. 1974).

53. *Id.* at 402. It is interesting that although the defendant's instruction uses the introductory phrase "unless you believe" the court referred to it throughout the opinion as an affirmative defense instruction.

question arises as to how many such instructions the defendant is entitled to add to the bundle. On the one hand, the defendant has the option to refuse to use any converse instructions. On the other hand, the logic of the instructions would not be disrupted if the defendant were allowed to use numerous converse instructions since the only function of the converse instructions is emphasis. Allowing the defendant several converse instructions would merely allow him additional opportunity to emphasize.

Since converse instructions are only an accessory, it is reasonable that there should be some limitation on the number of such instructions the defendant can add to the instruction package. The main argument for having converse instructions is to give the defendant an instruction which parallels the plaintiff's verdict director by stating, "Your verdict must be for the defendant if. . . ." Thus, it is not surprising that the number of converse instructions a defendant may use in a case is directly related to the number of verdict directors in the case.

The original committee rule was a simple mechanical one which allowed one converse instruction for each verdict director.<sup>54</sup> It is unlikely that either the committee or the court ever expected that this simple concept would grow to be one of the most complex problem areas in the MAI system.<sup>55</sup> One of the reasons that it has become so complex is because in multiple-party litigation the limitation on the allowable number of converse instructions is not dependent upon the number of plaintiffs or defendants; the limitation is based solely on the number and the nature of the verdict directing instructions. Thus, it is common that multiple defendants will be required to agree upon and join together in a single converse instruction in order to be within the allowable limitation on the number of converse instructions.

The rules in this area can be summarized as follows:

1. You can never have more converse instructions in the case than verdict directors.
2. If two or more verdict directors submit *common theories of recovery*, you may never have more than one converse instruction directed to any such common theory of recovery.<sup>56</sup>
3. If two verdict directing instructions submit common theories of recovery and one of those instructions contains an additional

54. See the last sentence of the Notes on Use, MAI No. 33.02, 33.03 and 33.04 in the permanent portion of MAI. This has since been modified in the 1976 pocket parts to MAI.

55. See BICKEL, *Jury Instructions—A New Limitation On Conversing Verdict Directors*, 37 Mo. L. Rev. 335 (1972) for a chronological discussion of the cases as they had developed to that point.

56. See Note on Use, MAI No. 33.02, 33.03 and 33.04 (Supp. 1976).

element, then an additional converse instruction is allowable to converse the additional element.<sup>57</sup>

The first rule represents all that is left of the original simple mechanical rule which allowed one converse instruction for each verdict director. It is important to note that the first rule is worded in the negative; it states that if you have more converse instructions than you have verdict directors, you have too many. The rule does not mean that you can always have one converse instruction for each verdict director, and, in fact, there are many situations in which one converse instruction for each verdict director will be too many. Thus, the first rule is only an upper limit; it does not represent a safe harbor within which to operate. Even if you have only one converse instruction for each verdict director in the case, you may still be in violation of the second rule.

The second rule further limits the number of converse instructions to a single converse instruction for any theory of recovery, even though that theory of recovery may be submitted in several verdict directing instructions. One of the problems in applying this second rule is in understanding what is meant by a "common theory of recovery." This phrase does not mean what it sounds like it means because it does not ordinarily involve the complete theory upon which the plaintiff relies for his recovery against a defendant. If two verdict directing instructions have identical paragraphs submitting the same factual element, the element is a "common theory of recovery." Only one converse instruction may be directed to such factual issue regardless of how many parties may have submitted or been submitted against on such an element.

For example, if a plaintiff sues an employee and his employer based on the employee's negligence, two verdict directing instructions will be required. These instructions will be identical except that the verdict director against the employer will contain an additional paragraph submitting scope of employment. The paragraphs in both verdict directors containing the specifications of negligence, the general negligence standard, causation, and damages will be identical because each will involve the conduct of the employee on the occasion in question. All of these identical paragraphs are common theories of recovery, and only one converse instruction may be directed to such common theories.<sup>58</sup> The defendants, even though they may be represented by separate counsel, will be required to agree upon a joint converse instruction which will begin, "Your verdict must be for both defendants unless you believe (followed by the common theories of recovery which the defendants mutually decide to converse)."

---

57. *Id.*

58. *Scheele v. American Bakeries Co.*, 427 S.W.2d 361 (Mo. 1968).

If the employer desires to converse the specifications of negligence and damages while the employee wants to converse only damages, an impasse is met. If they attempt to accomplish their separate goals by using a joint converse instruction conversing damages with the employer using an additional converse instruction conversing the specifications of negligence, the employer will have too many converse instructions. He will have two converse instructions directed to the single verdict director against him. If a disagreement arises because the employee wishes to converse damages while the employer chooses to try the case with no converse instruction, the fact that only the employee submits a converse instruction should not be reversible error. However, it is illogical, and it could be detrimental to the employer because the only converse instruction in the case says, "Your verdict must be for the defendant employee unless you believe that plaintiff sustained damages" without mentioning that in such event the jury's verdict must also be for the employer. Thus, as a practical matter it becomes important in such a case for the defendants to agree upon their converse instruction strategy.

The third rule actually works in conjunction with the second rule in most cases involving common theories of recovery. Thus in the litigation described above against the employee and employer, the employer will be allowed to converse scope of employment in a separate converse instruction in addition to submitting the joint converse with his employee. This is allowed because scope of employment is an additional element contained in the verdict director against the employer which is not contained in the verdict director against the employee.

Two types of cases involving two plaintiffs and one defendant have caused similar problems. When a minor is injured, it is common for the minor to sue for his personal injuries and for his father to join in the suit to recover the medical expenses. In such a case, separate verdict directors are required since there must be a finding that the particular plaintiff was damaged before that plaintiff can recover. Each verdict director will contain identical language except that in paragraph third relating to damages, the minor's verdict director will submit that he was damaged while the father's verdict director will submit that the minor was injured and the father thereby sustained damage.<sup>59</sup> Although both damage paragraphs use similar language, they refer to the damages of different persons. The paragraphs of the verdict directors containing specifications of negligence, the general negligence standard, and causation are "common theories of recovery." If defendant chooses to converse any or all of these, he must do so with one converse instruction directed to both verdict directors.<sup>60</sup>

---

59. MAI No. 31.04.

60. *Watterson v. Portas*, 466 S.W.2d 129 (St. L. Mo. App. 1971); *accord*, *Murphy v. Land*, 420 S.W.2d 505 (Mo. 1967).

It is not as clear how a defendant who wishes to converse damages should proceed. Certainly it would be error to use one converse instruction which stated "Your verdict must be for defendant unless you believe both plaintiffs sustained damage" because if the minor sustained damage, he is entitled to recover even though his father was not damaged. The only alternative is to use two converse instructions one of which would state that "Your verdict must be for defendant against plaintiff minor unless you believe plaintiff minor sustained damage." The other converse would be similar but would substitute "plaintiff father" for "plaintiff minor."

If a defendant decides to converse both damages and some other portion of the verdict director, he is certain to be flirting with error. If he uses two separate converse instructions for damages each of which also contains the converse of the other portion, he will have two converse instructions directed to the portions of the verdict director which are "common theories of recovery." If he uses separate converse instructions for the damage portions and then a third joint converse instruction against the "common theories of recovery," he will have two converse instructions directed to each verdict director and this is almost sure to be error. Until the rules are refined to cover this problem, the defendant will be well advised to choose between conversing damages or conversing the "common theories of recovery." There is just too much risk in trying to converse both.

Even if the defendant chooses to converse only damages and thus to use two separate but similar converse instructions, the question may be asked as to whether he is using two converse instructions against a "common theory of recovery." It may be argued that the damage paragraphs are common theories of recovery simply because they contain some identical language. However, where the identical language refers to the conduct or status of different persons it should not constitute a common theory of recovery.

In *Demko v. H & H Investment Co.*<sup>61</sup> the plaintiff sued for personal injuries sustained in a fall in a parking lot of a restaurant and motel. There were five defendants. The three separate verdict directors against three of the defendants (the lessee of the motel and the lessee and sub-lessee of the restaurant) were similar in that one asserted negligence for "failure to use ordinary care" to make the parking lot reasonably safe and the other two asserted negligence for "failure to use ordinary care in failing either to remove or warn of ice and snow." Each of the three defendants in question gave a separate identical converse instruction stating, "Your verdict must be for [this defendant] unless you believe [this defendant] was negligent."<sup>62</sup> The separate

---

61. 527 S.W.2d 382 (Mo. App., D. St. L. 1975).

62. On plaintiff's alternative argument, the court held that the failure of the defendants to use the same language in the converse instructions as was used in the verdict director was not reversible error in view of the fact that the term "negligence"



verdict directors were required because, although identical language was used, each verdict director referred to the negligence of a different party. The defendants used separate converse instructions for the same reason. It was argued on appeal that all three defendants should have joined in one converse instruction because the three negligence paragraphs used the same language and were therefore "identical theories of recovery."

In the original opinion issued by the St. Louis Court of Appeals, the court held that the use of three converse instructions was error; but on its own motion the court withdrew the first opinion and thereafter issued a second opinion holding that the verdict directors did not constitute "common theories of recovery" since the plaintiff had asserted a separate and distinct theory against each defendant. The court stated, "where a plaintiff asserts a separate theory of liability against multiple defendants where there is no derivative liability existing among the defendants, and plaintiff submits a separate verdict instruction as to each defendant, then each defendant may submit a separate converse instruction."<sup>63</sup> *Demko* should make it clear that several verdict directors containing similar language but referring to the conduct or damages of different persons are not "common theories of recovery."

The other type of case involving two plaintiffs and one defendant in which it is troublesome to draft a converse instruction is a personal injury case involving loss of consortium. The plaintiffs (injured party and spouse) must use separate verdict directing instructions.<sup>64</sup> The spouse's verdict director submits in the damage paragraph that "as a direct result of such negligence plaintiff (injured party) was injured and as a direct result of such injury plaintiff (spouse) sustained damage." The other verdict director merely submits that "as a direct result of such negligence plaintiff (injured party) was damaged." The other portions of both verdict directors are identical and constitute "common theories of recovery."<sup>65</sup> As such, the defendant is limited to one converse instruction against those portions of the verdict directors.

With respect to the damage paragraphs, it is not altogether clear whether the portion of the spouse's verdict director submitting the injured party's injury and the portion of the injured party's verdict director submitting his damage are common theories of recovery. It is obvious that they refer to the

---

in the converse instructions was defined as the failure to use ordinary care which was the term used in the verdict director.

63. 527 S.W.2d at 388.

64. See MAI No. 33.05 and 33.06 which are illustrations of instructions in cases involving loss of consortium.

65. *Scheele v. American Bakeries Co.*, 427 S.W.2d 361 (Mo. 1968); *Wyatt v. Southwestern Bell Telephone Co.*, 514 S.W.2d 366 (Mo. App., D. Spr. 1974); *Joggerst v. O'Toole*, 513 S.W.2d 722 (Mo. App., D. St. L. 1974).

same element but in different language. The Notes on Use<sup>66</sup> which establish the rules on the allowable number of converse instructions, use the wife's claim in a consortium case as an example of the third rule where an additional instruction is allowed to converse an extra element which is submitted in one verdict director but not in the other.

There is almost no limit to the diverse ways in which defendants have erred in conversing in consortium cases. The defendant has too many converse instructions if he uses identical converse instructions to converse identical portions of the verdict directors<sup>67</sup> or if he uses two general<sup>68</sup> converse instructions.<sup>69</sup> If the defendant uses one converse instruction to converse damages in both verdict directors, this is a misdirection because it allows the defendant to prevail unless both plaintiffs are damaged.<sup>70</sup> In *Scheele v. American Bakeries Co.*<sup>71</sup> where husband and wife sued two defendants (employer and employee with scope of employment not in issue), the defendants probably set a record by using four identical converse instructions when they were only entitled to one.

The idea that there should be a limit on the allowable number of converse instructions is certainly justified. In the beginning the limit was expressed in terms of a simple one-for-one mechanical test. Through the case law, this limit has evolved into a very complex and technical rule which defies succinct expression and which is extremely difficult to apply. The whole matter and method of limiting the number of converse instructions should be re-examined. It would appear that the harm in allowing some duplication in converse instructions would be more than outweighed by the benefits of a simple rule which would allow each defendant to submit one separate converse instruction for each verdict director submitted against him. If this be true, then the committee and the court should consider a return to this approach to the problem.

## V. USE OF THE GENERAL CONVERSE

MAI No. 33.13 contains a general converse instruction as follows:

Your verdict must be for defendant (unless you believe) (if you do not believe) each proposition submitted to you in Instruction

---

66. Notes on Use, MAI No. 33.02, 33.03 and 33.04 (Supp. 1976).

67. *Joggerst v. O'Toole*, 513 S.W.2d 722 (Mo. App., D. St. L. 1974).

68. MAI No. 33.13.

69. *Wyatt v. Southwestern Bell Telephone Co.*, 514 S.W.2d 366 (Mo. App., D. Spr. 1974).

70. *Burrow v. Moyer*, 519 S.W.2d 568 (Mo. App., D. St. L. 1975).

71. 427 S.W.2d 361 (Mo. 1968).

No.\_\_\_\_(here insert number of plaintiff's verdict directing instruction).

On first glance, this instruction may appear to be the answer to a defendant's prayer for a safe and easy path through the converse instruction jungle. But looks are deceiving. It has been suggested that this page of the book should be bordered in black to commemorate the many defendants who have ridden it to reversible error.

First, the Notes on Use<sup>72</sup> for this instruction provide that it is not appropriate where the plaintiff has submitted on alternative theories of recovery. If plaintiff submits on excessive speed *or* failure to keep a careful lookout, it is error to use the general converse which says, "Your verdict must be for defendant unless you believe each proposition submitted." The theory of plaintiff's disjunctive submission is that he can win on either lookout or speed; he is not required to prove both. It should be obvious that the general converse instruction is not appropriate in such a case.

However, consider an instruction such as MAI No. 22.03, the verdict director used when an invitee sues a landowner. On its face, it does not appear to contain a disjunctive submission because each paragraph is connected with the conjunctive "and". Look closely, however, at paragraph third. It states, "defendant knew *or* by using ordinary care could have known of this condition, and. . . ." There is a disjunctive submission within this single paragraph. The plaintiff is not required to prove both that defendant had actual knowledge and that he should have known; plaintiff is entitled to recover if he establishes either. The use of the general converse against this verdict director, even though all separate paragraphs are submitted in the conjunctive, is likely to be error. Surprisingly, there are several reported cases involving this type of verdict director where a general converse was used, but apparently no plaintiff has argued that the general converse is error for this reason in this situation.<sup>73</sup>

---

72. Notes on Use, MAI No. 33.13.

73. *Mayberry v. Clarkson Construction Co.*, 482 S.W.2d 721 (Mo. 1972), reversed on other grounds, where the verdict director contained not only actual or constructive knowledge but also submitted failure to warn or barricade; *Wyatt v. Southwestern Bell Telephone Co.*, 514 S.W.2d 366 (Mo. App., D. Spr. 1974), reversed on other grounds, where plaintiff submitted actual or constructive knowledge but the use of the general converse instruction was apparently not questioned because of the disjunctive submission; *Fehlbaum v. Newhouse Broadcasting Corp.*, 483 S.W.2d 664 (Mo. App., D. St. L. 1972) where plaintiff argued unsuccessfully that it was error to have both an affirmative defense and a converse instruction but apparently did not argue that it was error to use the general converse instruction to converse a verdict director which submitted either actual or constructive knowledge.

A further problem arises in the use of the general converse instruction where plaintiff submits on alternative theories in separate verdict directing instructions. The Notes on Use<sup>74</sup> state, "In those very rare cases where plaintiff submits two verdict directing instructions (e.g., humanitarian and primary negligence) the numbers of both verdict directing instructions would be inserted." This would mean that in a case where Instruction Number 3 is the primary negligence verdict director and Instruction Number 5 is the humanitarian negligence verdict director, the converse would state "Your verdict must be for defendant unless you believe each proposition submitted in Instruction Number 3 (and vs. or) Number 5." The Notes on Use do not specify whether to use the two numbers conjunctively or disjunctively.

In *Mayberry v. Clarkson Construction Co.*,<sup>75</sup> the defendant used "and". This was, of course, error because this tells the jury that the defendant wins unless the jury believes all propositions in both the primary and the humanitarian submissions. Since these are alternative theories, plaintiff in fact prevails if the jury believes all propositions in either the primary or the humanitarian submissions. Using "or", so that the converse says "Your verdict must be for defendant unless you believe each proposition submitted in Instruction Number 3 or Number 5," is better as far as this problem is concerned. However, it overlooks the fact that the humanitarian negligence verdict director<sup>76</sup> cannot be conversed with the general converse instruction because it submits that "defendant knew or by using the highest degree of care could have known" and that "at the moment when defendant first knew or could have known of such position of immediate danger. . . ." In *Mayberry* the court said that the general converse "obviously cannot be adapted or modified so as to be used where there are multiple claims by multiple plaintiffs."<sup>77</sup> Until the Notes on Use for the general converse instruction are re-examined, defendants are best advised to avoid use of the general converse where there are alternative theories submitted in separate verdict directors.

As has already been pointed out, in multiple party litigation the general converse instruction involves a high risk of error because of the possibility of having several verdict directors containing some paragraphs which are common theories of recovery. Using the general converse instruction to converse similar verdict directors will result in error no matter how many converse instructions are used. If two such instructions are used, common theories of recovery will be conversed too many times.<sup>78</sup> If only one such

---

74. Notes on Use, MAI No. 33.13.

75. 482 S.W.2d 721 (Mo. 1972).

76. MAI No. 17.14 and 17.15.

77. 482 S.W.2d at 726.

78. *Wyatt v. Southwestern Bell Telephone Co.*, 514 S.W.2d 366 (Mo. App., D. Spr. 1974).

instruction is used, a misdirection will result because the instruction will state that the defendant prevails against both plaintiffs unless both plaintiffs are damaged when, in fact, either plaintiff is entitled to a verdict if that particular plaintiff shows damage.<sup>79</sup> The problem is that the general converse converses everything in the verdict director. Only in the most simple situations may all elements of both verdict directors be safely conversed in the same manner.

When you consider that the general converse instruction cannot be used against any verdict director which contains even a single disjunctive submission, that it will seldom be appropriate in multiple party litigation and that even the Notes on Use contain error as to its use where alternative theories are submitted in separate verdict directors, the one thing that becomes clear is that this instruction must be reserved for only the simplest litigation and must be used with exceedingly great care. Its simple and easy appearance is indeed a trap for the unwary.

## VI. THE AFFIRMATIVE CONVERSE INSTRUCTION

MAI No. 33.05, often referred to as the affirmative converse instruction,<sup>80</sup> provides for a type of converse instruction which differs from any of the others. It allows the defendant in an appropriate case to affirmatively propose an ultimate issue which, if true, will defeat the plaintiff's right to recover. This type of converse instruction takes the following form:

Your verdict must be for defendant if you believe (an ultimate issue which, if true, will defeat the plaintiff's right to recover).

The use of this instruction can best be illustrated with one of the leading cases which approved its use. In *Wilson v. Checker Cab Co.*<sup>81</sup> the plaintiff, a passenger in a taxicab, sought to recover for injuries sustained when she fell while allegedly alighting from the taxicab. She submitted against the cab company on alternative specifications of negligence that the driver either stopped so that plaintiff stepped out onto a patch of ice or started the cab before she had fully alighted. The defendant's theory of the case was that the plaintiff safely emerged from the cab, walked 20 feet from the taxi beyond a safety chain across a fire lane and then fell either by reason of ice or because she was intoxicated. The court approved and affirmative converse instruction

---

79. *Id.*

80. The Affirmative Converse instruction is also referred to as the "Third Method" converse instruction. MAI 33.01, p. 351.

81. 431 S.W.2d 122 (Mo. 1968).

used by the defendant which stated, "Your verdict must be for the defendant if you believe plaintiff fell after she had alighted from the defendant's taxicab and traveled approximately twenty feet from said taxicab."

This type of converse instruction also has been approved where the defense to an action for money had and received was that the money which plaintiff claimed was paid to defendant's agent was really paid to the agent in his individual capacity<sup>82</sup> and in a motor vehicle negligence action for personal injuries where defendant submitted the absence of causation with this type of converse instruction.<sup>83</sup> In *Cline v. Carthage Crushed Limestone Co.*,<sup>84</sup> a common law negligence action, defendant relied on the affirmative defense that plaintiff, although an independent contractor, was performing work on defendant's premises which was within the usual business of the defendant and therefore plaintiff's sole remedy was under the Workmen's Compensation Law.<sup>85</sup> The court approved plaintiff's use of the affirmative converse instruction to set forth that he was an independent contractor repairing an improvement on defendant's premises, which is a statutory exception<sup>86</sup> to the defendant's affirmative defense.

Although the affirmative converse instruction has been approved in the foregoing situations,<sup>87</sup> there have been numerous cases in which its use has resulted in reversible error. Seasoned users of MAI would agree that the affirmative converse can lay an equal claim with that of the general converse<sup>88</sup> in regard to high risk or error lurking beneath a mask of apparent simplicity.

---

82. *Restaurant Industries, Inc. v. Lum's, Inc.* 495 S.W.2d 668 Mo. App., D. St. L 1973).

83. *Sheets v. Dakota Iron Store*, 442 S.W.2d 953 (K.C. Mo. App. 1969).

84. 504 S.W.2d 102 (Mo. 1973).

85. § 287.040(1), RSMo 1959.

86. § 287.040(3), RSMo 1959.

87. *See Williams v. Christian*, 520 S.W.2d 139 (Mo. App., D.K.C. 1974) where plaintiff, who was hit by an automobile while standing on the shoulder of the highway, claimed that she was improperly refused a regular lookout instruction (MAI No. 17.05) and defendant claimed that the lookout instruction was properly refused because it did not hypothesize defendant's version of the facts that plaintiff was standing in the traveled portion of the highway. The court said that the proper way to submit defendant's version of the accident was with an affirmative converse instruction, and, therefore, the regular lookout instruction requested by plaintiff should have been given. *See also Vondras v. Titanium Research & Development Co.*, 511 S.W.2d 883 (Mo. App., D. St. L 1974) where the use of the affirmative converse instruction was not questioned on appeal.

88. *See text accompanying notes 72 through 79 supra.*

By using the affirmative converse, the defendant assumes the burden of proof on the proposition relied upon as a defense.<sup>89</sup> This is inherent in the introductory phrase "if you believe" and is the opposite approach from the true converse instruction which begins with the phrase "unless you believe" or "if you do not believe." The whole thrust of the affirmative converse instruction is contrary to that of a true converse instruction because this instruction does not rely upon the absence of proof of the propositions submitted in the verdict director. By definition this instruction posits an independent state of facts which, if true, will defeat the plaintiff's claim. In reality, it is more like an affirmative defense instruction than a true converse instruction.

The most critical aspect of having taken the burden of proof by the use of this instruction is that the proposition submitted must be supported by independent evidence. Unlike the true converse instruction which requires no evidence and which is proper based merely on the defendant's contention that the plaintiff's evidence was insufficient, it is reversible error for a defendant to use an affirmative converse instruction which is not supported by the evidence.<sup>90</sup> Even though this converse instruction resembles an affirmative defense, it does not require an affirmative defense type insertion<sup>91</sup> in MAI No. 3.01, the Burden of Proof Instruction,<sup>92</sup> and it does not require an affirmative defense tail<sup>93</sup> or the verdict director to refer the jury directly to the affirmative converse instruction.<sup>94</sup>

It goes without saying that the facts hypothesized in the affirmative converse instruction must be sufficient in law to defeat the plaintiff's claim. In *Shepard v. Ford Motor Co.*<sup>95</sup> the plaintiff sought damages in a products liability case contending that the springs on a log trailer separated from its axle when a U-bolt came loose which caused the brakes to fail and caused the truck to collide with plaintiff's car. The defendant claimed that nothing was wrong with the truck until the impact with plaintiff's car which broke the U-bolt. The defendant used an affirmative converse stating, "Your verdict must be for defendant if you believe the U-bolt broke at impact." This instruction was erroneous because the plaintiff was nevertheless entitled to recover if the

---

89. *Koirtoyhann v. Washington Plumbing & Heating Co.*, 471 S.W.2d 217 (Mo. 1971); *Wilson v. Checker Cab Co.*, 431 S.W.2d 122 (Mo. 1968); *Bishop v. Goldschmidt*, 436 S.W.2d 47 (St. L. Mo. App. 1968).

90. *Koirtoyhann v. Washington Plumbing & Heating Co.*, 471 S.W.2d 217 (Mo. 1971); *Bishop v. Goldschmidt*, 436 S.W.2d 47 (St. L. Mo. App. 1968).

91. Notes on Use, para. 1, MAI No. 3.01.

92. *Restaurant Industries, Inc. v. Lum's, Inc.*, 495 S.W.2d 668 (Mo. App., D. St. L. 1973).

93. MAI No. 17.01 and 17.02 (bracketed phrase at the end of each instruction).

94. *Bolman v. Kark Rendering Plant*, 418 S.W.2d 39 (Mo. 1967).

95. 457 S.W.2d 255 (St. L. Mo. App. 1970).

accident occurred because the axle slipped, even though the U-bolt did not break until impact. Thus, the proposition submitted (that the U-bolt broke on impact) did not necessarily defeat plaintiff's claim.

In *Moranz v. Schiller*,<sup>96</sup> an alienation of affections case, the defendant's converse stated, "Your verdict must be for defendant if you believe that plaintiff and not defendant was the cause of the wife withdrawing her affections." This was error because the fact that the defendant did not cause the withdrawal of affection is not a defense to alienation of affections; this fact goes only to the mitigation of damages. Put another way, it is a tort to successfully seek the affection of a wife who has no affection for her husband.

Prior to the adoption of the MAI system, Missouri courts used an instruction known as a "sole cause" instruction. Such an instruction in effect said, "Your verdict must be for defendant if you believe (some named third party) was the sole cause of the occurrence." Such an instruction is accurate because it is the logical consequence of the plaintiff's affirmative obligation to show that the occurrence was the direct result of the defendant's conduct. One of the basic premises of MAI is to submit only the affirmative elements of the plaintiff's case and to avoid the duplication and confusion which is involved in also submitting other propositions which are merely inconsistent with the propositions the plaintiff must prove. Thus, MAI No. 1.03 prohibits the use of a sole cause instruction.<sup>97</sup> However, many affirmative converse instructions, which are authorized by MAI No. 33.05, run a high risk of being sole cause instruction.

The example of the "if you believe" affirmative converse instruction at MAI No. 33.05 states, "Your verdict must be for defendant if you believe that plaintiff was not injured as a result of the collision mentioned in the evidence." In *Sheets v. Dakota Iron Store*<sup>98</sup> the use of this instruction was attacked where the defendant alleged that the plaintiff's claimed injuries were not sustained in the accident in question. The court upheld the use of the instruction primarily on the ground that it was taken directly from MAI and rejected plaintiff's argument that the instruction should have used the term "direct result". It apparently was not argued that this was a sole cause instruction although it seems that any distinction between this instruction and a sole cause instruction is probably a distinction without a difference.

In *Gathright v. Pendegrift*<sup>99</sup> the plaintiff, who was injured in a gas explosion, sued the city, a contractor and a plumber for leaving a gas stove connection unplugged. The court rejected as a sole cause instruction a

---

96. 525 S.W.2d 785 (Mo. App., D. St. L. 1975).

97. 1963 Report To Missouri Supreme Court under the heading "2. Sole Cause Instructions," MAI p. XXVII.

98. 442 S.W.2d 953 (K.C. Mo. App. 1969).

99. 433 S.W.2d 299 (Mo. 1968).



requested instruction by the plumber to the effect that "Your verdict must be for the defendant plumber if you believe that someone other than the defendant plumber tampered with the stove connection after the defendant plumber worked on it." Although not labeled as such, the requested instruction was essentially an affirmative converse instruction as well as a sole cause instruction.

Apparently the court has not been called upon to face up to the question of whether there is really any distinction between an affirmative converse instruction and a sole cause instruction. Until clearer guidelines are provided, defendants should carefully evaluate the likelihood that any affirmative converse instruction they consider using may turn out to be a prohibited sole cause instruction. By the same token, plaintiffs who face an affirmative converse instruction can submit most such cases with the reassuring thought that if the jury does not reward their efforts, they will probably have a credible argument on appeal that the affirmative converse instruction violated the prohibition of MAI No. 1.03 against sole cause instructions.

There is authority that it is error to use the affirmative converse instruction to submit the same issue that is submitted in plaintiff's verdict director on the theory that this can only be done with a true converse instruction. In *Stover v. Patrick*<sup>100</sup> plaintiff submitted against defendant for driving on the wrong side of the road.<sup>101</sup> Defendant used an affirmative converse which stated, "Your verdict must be for defendant if you believe that defendant's motor vehicle skidded from its proper lane of travel onto the wrong side of the road." The court first held that the converse instruction was error because it did not limit its application to non-negligent skidding. This holding was sufficient to dispose of the case, but because it was to be retried, the court expressly considered the further question of whether any affirmative converse instruction would be proper to raise this issue. The only thing being submitted in the affirmative converse was whether the skid was negligent, and negligence of the defendant in being on the wrong side of the road was submitted specifically in the general negligence paragraph of the verdict director. Referring to another case<sup>102</sup> where an affirmative converse instruction was properly used, the court said:

That is not comparable to an instruction submitting only the question of whether movement of defendant's car into the wrong lane was the result of non-negligent skidding (which is what a modified [affirmative converse in

---

100. 459 S.W.2d 393 (Mo. En Banc 1970).

101. MAI No. 17.13. This instruction has since been superseded by MAI No. 17.13 (Supp. 1976) which states, "Defendant's automobile was on the wrong side of the road at the time of the collision."

102. *Wilson v. Checker Cab. Co.*, 431 S.W.2d 122 (Mo. 1968).

this case] would do). It merely converses, but in different language, the very same issue submitted in the verdict directing instruction of whether the driving of the automobile into the wrong lane was negligent. Under MAI 33.01, *this can be done only by a true converse instruction*. Hence, to meet the issue presented by [the verdict director] the proper course would be to submit a true or exact converse under MAI 33.02.<sup>103</sup>

In *Oliver v. Bi-State Development Agency*<sup>104</sup> a six-year-old bus passenger was injured when the rear door of a bus closed on her and pulled her under the bus as it started to move. Plaintiff submitted against the defendant for failure of the driver to keep a careful lookout or for failure to have an inter-lock door device on the bus. The bus company claimed that the plaintiff, who was riding on the bus with her grandmother, got off at the wrong stop and was caught in the door when attempting to reboard the bus as her grandmother called to her.

The defendant used an affirmative converse instruction stating in substance that "Your verdict must be for defendant if you believe that the girl got off the bus, then tried to get back on and at this time the driver was keeping a careful lookout."<sup>105</sup> One of plaintiff's attacks on this instruction was that it involved the use of the affirmative converse instruction to submit the same issues submitted in the verdict director. In holding that the converse instruction was reversible error, the court stated:

MAI 33.05 is not to be used where, as here, there is not an ultimate issue to submit which would defeat plaintiff's claim. It is not to be used to submit as a converse. . . "the two ultimate issues submitted by plaintiff" in substantially the same language as used in plaintiff's verdict director; in such instance MAI 33.01 requires the use of the first or second method, MAI 33.02, 33.03 or 33.04.<sup>106</sup>

---

103. 459 S.W.2d at 396 (Emphasis added).

104. 494 S.W.2d 49 (Mo. 1973).

105. The complete converse instruction in *Oliver* was as follows:

"Your verdict must be for Defendant if you believe:

"First, Plaintiff alighted from Defendant's bus and reached a position of safety on the sidewalk adjacent thereto, and

"Second, Plaintiff thereafter attempted to reboard said bus through its rear exit doors, and

"Third, the operator of said bus was then keeping a careful lookout under the circumstances then and there existing and,

"Fourth, the rear exit doors of said bus were then reasonably suitable and fit for their intended use."

106. 494 S.W.2d at 52.

Both these cases appear to be fairly strong holdings that the affirmative converse instruction cannot be used to submit the same issue as is submitted in the verdict director. On the other hand, there are some indications that such a use is not improper. The example of the affirmative converse at MAI 33.01 submits causation which would surely be part of the plaintiff's submission in his verdict director. This very instruction was approved in *Sheets v. Dakota Iron Store*.<sup>107</sup> The court observed:

The [Notes On Use to the affirmative converse instruction<sup>108</sup>] point out that because of the need for independent evidence to support an affirmative converse and because of the shifting of the burden of proof by the language "if you believe," [the affirmative converse] would rarely be used to converse a specific issue hypothesized by plaintiff. However, it should be pointed out that these notes do not give any hint of impropriety in the use of [MAI 33.05] if the defendant so chooses.<sup>109</sup>

Other cases have disclosed the use of an affirmative converse to submit the very issue submitted in the verdict director but the converse instruction used in these cases were not attacked on this ground.<sup>110</sup> While authority can be marshalled on either side of the issue, it seems clear that a defendant is inviting error if he uses an affirmative converse instruction to submit an issue which is submitted in the verdict director.

When a defendant uses an affirmative converse instruction he assumes the burden of proof, he must have evidence to support the proposition submitted, he must be certain that the facts hypothesized are sufficient in law to bar the plaintiff's recovery, he runs the risk that he is using a prohibited "sole cause" instruction and he must be certain that he is not merely resubmitting the same issue as that submitted in the verdict director. If these problems surrounding affirmative converse instructions are not sufficient to cause the committee and the court to remove this type of instruction from MAI, these problems should at least cause defendant's counsel to take this instruction out of use except in

---

107. 442 S.W.2d 953 (K.C. Mo. App. 1969).

108. Notes on Use, MAI No. 33.05.

109. 442 S.W.2d at 955.

110. *Koirtoyhann v. Washington Plumbing & Heating Co.*, 471 S.W.2d 217 (Mo. 1971) where an affirmative converse instruction, which was used to converse the very acts of negligence submitted in the verdict director, was reversed for lack of evidence to support the submission. No mention of any problem in using the affirmative converse to cover the same issues submitted in the verdict director was made. In *Vondras v. Titanium Research & Development Co.*, 511 S.W.2d 883 (Mo. App. D. St. L. 1974), an affirmative converse instruction was used to converse damages, but the converse instruction was not attacked on appeal because the defendant was the appealing party.

the most unusual situation, *i.e.*, where the affirmative converse instruction will be of significant importance in presenting defendant's contention to the jury and its use has been clearly approved. Certainly MAI No. 33.05 does not merit the use that its simple and innocent appearance invites to one leaping frantically through the pages of MAI at last moment trying to come up with an acceptable converse instruction.

## VII. CONCLUSION

From the standpoint of defendants, there is one fail-safe method for avoiding error in converse instructions—don't use them! If a defendant is unwilling to forego completely the use of converse instructions, the following suggestions will greatly reduce the risk of reversible error:

1. Use the verdict director as the source of the language for the true converse instruction.
2. Do not use the "if you do not believe" format; use the universally acceptable "unless you believe" introductory phrase in the true converse instruction.
3. Do not use a converse instruction in a case where there is more than one verdict director.
4. Do not use the general converse instruction.
5. Do not use the affirmative converse instruction.

From the standpoint of plaintiffs, it is hoped that they were not required to read very far into this article before realizing that a complete understanding of the use of converse instructions should not be reserved for defense counsel. As long as MAI provides for converse instructions, unwary defendants will continue to shower upon needy plaintiffs an abundance of opportunity to obtain a second chance in front of the jury. The important requisite for the plaintiff is to recognize and raise the appropriate contention in his Motion for New Trial. Not only does the plaintiff's best chance for reversal often lie in the defendant's converse instructions, but it may be that converse instructions are at least as vulnerable on appeal as has always been true with respect to the plaintiff's verdict director. Unless the use of converse instructions is either avoided or substantially simplified, they may actually serve in the overall litigation picture as a more useful device for plaintiffs than for defendants.

