

**I. FUNCTION OF THE JUDGE
II. FUNCTION OF COUNSEL
III. FUNCTION OF THE JURY**

I. FUNCTION OF THE JUDGE

Members of the jury, you are about to begin your final duty, which is to decide the fact issues in this case. Before you do that, I will instruct you on the law. It was obvious to me throughout the trial that you faithfully discharged your duty to listen carefully to all the evidence and to observe each of the witnesses. I now ask you to give me that same close attention, as I instruct you on the law.

My function as the judge in this case has been to see that this trial was conducted fairly, orderly and efficiently. It was also my responsibility to rule on what you may consider as evidence, and to instruct you as I am doing now on the law that applies to this case.

It is your duty as jurors to accept the law as I state it to you. You should consider all my instructions as a whole. You may not ignore any instruction, or give special attention to any one instruction. You must follow the law as I give it to you whether you agree with it or not.

If it takes me a bit longer to explain some aspects of the law than others, or if I repeat myself, you are not to give that portion of the

instructions more weight or importance than other parts. It simply means that some things take a bit longer to explain than others or there might be some common areas of overlap in the law.

Georgia v. Brailsford, 3 U.S. (3 Dall.) 1, 4 (1794) (Jay, C.J.) (judge determines law, while jury decides facts); *Commonwealth v. Wilson*, 381 Mass. 90, 118-19 (1980) (judge must be the trial's "directing and controlling mind"); *Commonwealth v. Sneed*, 376 Mass. 867, 870 (1978) (judge must instruct on applicable law, and may state evidence and discuss possible inferences neutrally); *Pfeiffer v. Salas*, 360 Mass. 93, 99-101 (1971), citing G. L. c. 231, § 81 (judge cannot charge jury with respect to matters of fact, but he "may state the testimony and the law; judge must instruct in language understandable to jurors from all walks of life); *Commonwealth v. Brady*, 357 Mass. 213, 214-15 (1970) (questions of law are for judge); *Commonwealth v. Carson*, 349 Mass. 430, 435 (1965) (judge must state applicable law correctly); *Commonwealth v. Anthes*, 5 Gray 185, 208-09, 221, 236 (1855) (jury must follow law as stated by judge); *Commonwealth v. Porter*, 10 Metc. 263, 286-87 (1845) (judge must superintend trial, rule on evidence and instruct on law); *Commonwealth v. Knapp*, 10 Pick. 477, 495 (1830) (questions of admissibility of evidence are for judge); *Commonwealth v. Carney*, 31 Mass. App. Ct. 250, 254 (1991) (approving charge not to use judge's questions or statements to determine how judge feels case should be decided, since judge has no right to interfere with jury's duty to find the facts and determine where the truth lies).

II. FUNCTION OF COUNSEL

It was the duty of both attorneys in this case to object when the other side offered evidence which that attorney believed was not admissible under our rules of evidence. They also had an obligation to ask to speak to me at sidebar about questions of law, which the law requires me to rule on out of your hearing.

The purpose of such objections and sidebar conferences is not to keep relevant information from you. It is just the opposite: the purpose is to make sure that what you do hear is relevant to this case,

and that the evidence is presented in a way that gives you a fair opportunity to evaluate its worth.

You should not draw any inference, favorable or unfavorable, to either attorney or (his / her / their) client for objecting to proposed evidence or requesting sidebar conferences. That is the function and responsibility of the attorneys in this case.

SUPPLEMENTAL INSTRUCTION

- 1. Reprimand of Counsel. During the course of this trial, I have had occasion to admonish or reprimand an attorney. You are to draw no inference against the attorney or (his / her / their) client because of that. It is the duty of the attorneys to offer evidence, to object, and to argue to you on behalf of their side. It is *my* function to exclude evidence or argument that is inadmissible under our rules, and to admonish attorneys when I feel that is necessary for an orderly trial. You should draw no inference from that. It is irrelevant whether you like an attorney or whether you**

believe I do or do not like an attorney. The issue is not which attorney is more likeable; the issue is whether the plaintiff has proved (his / her / their / its) case.

III. FUNCTION OF THE JURY

Your function as the jury is to determine the facts of this case. You are the sole and exclusive judges of the facts. You alone will determine what evidence to accept, how important any evidence is that you *do* accept, and what conclusions to draw from all the believable evidence. You must apply the law as I give it to you to the facts as you determine them to be, in order to decide whether the plaintiff has proved (his / her / their / its) case.

You should determine the facts based solely on a fair consideration of the evidence. You are to be completely fair and impartial, and are not to be swayed by prejudice, sympathy, or personal likes or dislikes, toward either side. You are not to allow yourselves to be influenced because the claims might be popular or unpopular with the public.

As I previously instructed you, you must not allow bias – whether held consciously or subconsciously – to interfere with your ability to fairly evaluate the evidence, apply the law as I instruct you, or render a fair and impartial verdict based on the evidence before you.

You are not to decide this case based on what you may have read or heard or seen outside of this courtroom. You are not to engage in any guesswork about any unanswered questions that remain in your mind, or to speculate about what the “real” facts may or may not be if they were not introduced into evidence in this case.

You should not consider anything I have said or done during the trial—in ruling on motions or objections, or in comments to the attorneys, or in questions to witnesses, or in setting forth the law in these instructions—[indeed, do not even consider my tone of voice] as any indication of my opinion as to how you should decide the case. If you believe that I have expressed or hinted at any view about the facts of this case, please disregard it. I have no opinion about the facts or what your verdict ought to be; that is solely, exclusively, and

constitutionally your duty and responsibility.

Commonwealth v. Smith, 387 Mass. 900, 909-10 (1982) (verdict must be based on evidence and not sympathy); *Commonwealth v. Fitzgerald*, 376 Mass. 402, 424 (1978) (verdict may not be based on sympathy for victim or general considerations); *Commonwealth v. Clark*, 292 Mass. 409, 411 (1935) (jury should be both impartial and courageous); *Commonwealth v. Anthes*, 5 Gray 185, 197-98 (1855) (jury's judgment is conclusive of facts in case); *Commonwealth v. Carney*, 31 Mass. App. Ct. 250, 254 (1991) (approving charge not to use judge's questions or statements to determine how judge feels case should be decided, since judge has no right to interfere with jury's duty to find the facts and determine where the truth lies); *Commonwealth v. Ward*, 28 Mass. App. Ct. 292, 296 (1990).

Optional

No juror is better qualified to determine the truth of the facts in controversy or to deliberate upon a verdict solely because of that juror's occupation or reputation.

G.L. c. 234A, § 70 provides that this instruction must be given upon motion of either party or whenever the court deems it appropriate. *Commonwealth v. Oram*, 17 Mass. App. Ct. 941, 942-43 (1983).

NOTE

1. Implicit bias instructions. On September 29, 2021, the Supreme Judicial Court promulgated two model jury instructions on implicit bias to "be given at all criminal and civil trials, during the preliminary charge following empanelment and during the final charge prior to deliberations." The SJC "recommended that trial judges use the language of the Instructions unless the judge determines that different language would more accurately or clearly provide comparable guidance to the jury or better promote the fairness of the trial." In March of 2019, prior to the release of the SJC's instructions, the District Court Committees on Racial and Ethnic Fairness and Criminal Proceedings collaborated to issue three instructions with language about implicit bias to be given at empanelment, in preliminary instructions after empanelment, and in final instructions on evaluating the evidence. The language within this instruction is modeled on District Court Model Instructions 1.100, 1.120 and 2.120. The trial judge should evaluate, with input from the parties, whether to use the SJC's proposed model Instructions, these District Court instructions or a combination of the two. The SJC's instructions are available on mass.gov: [Supreme Judicial Court Model Jury Instructions on Implicit Bias | Mass.gov](https://www.mass.gov/info-details/supreme-judicial-court-model-jury-instructions-on-implicit-bias).