

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Berge M. Heede and
Sandra K. Heede
Plaintiffs,

v.

Caleb Hurst-Hiller
Defendant.

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: File No. 2:03-CV-12
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JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law.

The plaintiffs in this case are Berge and Sandra Heede. On January 20, 2000, a vehicle driven by Caleb Hurst-Hiller collided with the Heedes' vehicle. Caleb Hurst-Hiller has admitted negligent operation of his vehicle and legal responsibility for any injuries the Heedes may have suffered as a result of the accident. The Heedes now seek a determination of damages.

General Instructions

It is your duty as jurors to apply the law that I give you to the facts that you find from the evidence. Your final role is to consider and decide the fact issues of the case. You are the sole and exclusive judges of the facts. You weigh the evidence, resolve conflicts in the evidence, determine the credibility of witnesses, and if warranted, draw inferences from the facts as you find them. Shortly, I will define the word "evidence" for you and instruct you on how to assess it, including how to weigh the credibility or believability of witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in these instructions and anything other than the evidence presented in this case. Even though counsel may have mentioned a principle of law during their

arguments, you must only consider the law as given to you in these instructions when reaching your verdict.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact. Except for instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your findings of fact. I recognize that a judge can have significant influence on a jury. If you think you have perceived some opinion of how I think this case should be decided, I want you not to consider that at all. I am merely the judge here. It is my responsibility to rule on the objections made by counsel and upon the law. It is your sole responsibility to decide the facts and apply the law to those facts.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should weigh the evidence calmly and deliberately and without the slightest trace of sympathy, bias, or prejudice for or against either party. All parties expect that you will carefully consider all of the

evidence, follow the law as it is now being given to you and reach a just verdict.

All Persons Equal Before the Law

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

Evidence

"Evidence" includes in-court sworn testimony of the witnesses given both on direct and cross-examination, out of court testimony read from a deposition or shown in a videotape, interrogatories and exhibits admitted into the record, facts judicially noticed by me and facts that have been stipulated. Depositions are testimony of a witness given under oath before trial. A stipulation occurs when all parties agree that certain facts are true.

As I have stated earlier, it is your duty to determine the facts, and in doing so, you may consider only the evidence I have admitted. Any evidence that I

have instructed you to consider for a limited purpose must be considered only for that limited purpose.

Although the lawyers may call your attention to certain facts or inferences that might otherwise go unnoticed, the lawyers' statements, objections, and arguments are not evidence in the case. Likewise, when an attorney seeks an objection or requests a conference at the bench, you should draw no inference either positive or negative from such actions. In the final analysis, it is your recollection and interpretation of the evidence that controls in this case, not any statement or implication that I or the lawyers have made in reference to the evidence.

While you should not speculate or guess about evidence not admitted into the record, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts as they have been established by the evidence in the case. However, in arriving at your verdict, you may not consider any

personal knowledge or information pertaining to the facts of this case that you had acquired prior to or during this case that have not been admitted into evidence.

Evidence: Direct and Circumstantial

The law recognizes two types of evidence: direct and circumstantial. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses - something she or he has seen, felt, touched or heard. Direct evidence may also consist of a physical object or document which in your mind establishes a particular fact. Circumstantial evidence is evidence that does not directly prove a fact but points to the existence of that fact. Using reason, experience, and common sense, you infer the existence or non-existence of some fact from established facts. For example, if you go to bed at night and there is no snow on the ground, and there is snow the next morning, you could reasonably infer that it snowed during the night even though you did not see it snow. The law makes no distinction between the weight to be given to either

direct or circumstantial evidence, but a verdict must be based on all evidence presented.

Stipulations

The parties can, and have in this case, stipulated to certain facts which they have admitted are true. A stipulation of facts is an agreement among the parties that a certain fact is true. You must regard such agreed facts as true. Thus, you must find the following facts to be established, regardless of the evidence or testimony you have heard or seen, and include them in your deliberations and decisions.

1. On January 20, 2000, Caleb Hurst-Hiller was operating a Nissan Pathfinder west on Route 11 between Springfield and Londonderry, Vermont. At the same time, Berge Heede was operating a Lincoln Town Car east on Route 11. His wife, Sandra Heede, was in the passenger seat. Route 11 is a two-lane state highway.

2. As a result of the negligent operation of the Nissan Pathfinder by Caleb Hurst-Hiller, his car left the westbound lane, crossed into the travel lane of the Heedes and collided with the vehicle driven by Berge Heede. Caleb Hurst-Hiller has admitted negligent

operation of the Nissan Pathfinder and legal responsibility for any injuries Berge and Sandra Heede may have suffered as a result of that accident.

Therefore, the only issue left for your determination is the amount of damages to be awarded the Heedes.

Credibility of Witnesses

As jurors, you are the sole judges of the credibility or believability of the witnesses. It is your responsibility to determine the weight to be given to the testimony of each witness. You do not have to accept all the evidence presented in this case as true or accurate. In weighing the testimony you can take into account the witness's ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias, or prejudice the witness may have; the witness's relationship to the parties; the extent to which other evidence supports or contradicts the witness's testimony; and the reasonableness of the witness's testimony.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single

witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of that party.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently or have a different point of view regarding the same occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and whether the discrepancy results from innocent error or intentional falsehood. After making your own judgment, you will give the testimony of each witness such weight, if any, that you think it deserves. You may accept or reject the testimony of any witness in whole or in part.

Expert Witnesses

The rules of evidence ordinarily do not permit

witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. As with ordinary witnesses, you should determine each expert's credibility from his or her demeanor, candor, any bias, and possible interest in the outcome of the trial. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

Credibility of Witnesses: Police Officers

In this case, you have heard the testimony of Trooper Graham, a member of the Vermont State Police. A police officer's testimony should be considered by you just as any other evidence in the case. In evaluating this credibility, you should use the same guidelines you apply to the testimony of any other witness at this trial. In no event should you give either greater or lesser credence to the testimony of any witness because he is a police officer.

Unanimous Verdict and Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if

convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges - judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Instructions of Law

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

Burden of Proof

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his or her claim by a preponderance of the evidence.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact or claim has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

Proximate Causation

Plaintiffs have the burden of proving by a preponderance of the evidence that the defendant's negligence was a cause of their injuries. The legal term for this element is "proximate cause." You may not award damages for any injury from which plaintiffs may have suffered or may now be suffering unless they have established by a preponderance of the evidence in the case that such injury was proximately caused by the defendant's negligence.

A legal or proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by any intervening cause, produces the injury. An injury is proximately caused by an act or a failure to act when it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury.

The law recognizes that there may be more than one proximate cause of an injury. Multiple factors may operate at the same time, or independently, to cause the injury and each may be a proximate cause. Plaintiffs are required to prove by a preponderance of the evidence

that the defendant's breach of duty was a proximate cause of their injuries, but is not required to show that it was the only proximate cause.

As I will discuss more later, the defendant argues that the plaintiffs suffered from some physical ailments prior to the accident, which is sometimes called a "pre-existing condition." When considering the issue of proximate cause, it is not relevant that plaintiffs' physical condition prior to the accident may have made them more susceptible to injury or made their injuries greater. The question for you to determine is whether the plaintiffs' injuries were proximately caused by the defendant's negligence.

Compensatory Damages Generally

We now come to the damages portion of the Court's charge. The amount of damages the plaintiffs shall recover, if any, is solely a matter for you to decide. The fact that I will instruct you in the proper measure of damages should not be considered as an indication of any view of mine as to what your verdict should be in this case. Instructions I give as to the measure of damages are given only for your guidance, in the event

that you should find that plaintiffs have proven, by a preponderance of the evidence, that the defendant's negligence was a cause of their injuries.

In cases such as the one before you, damages are awarded on a theory of compensation. Compensatory damages are intended to put the plaintiffs in the same position they were in prior to the accident. Thus, plaintiffs are entitled to recover for all damages that are a natural consequence of the accident, including such items as past and future medical expenses, permanent physical injury, impairment of capacity to enjoy life, pain and suffering, and emotional injury.

The burden is on the plaintiffs to prove by a preponderance of the evidence the amount of damages each of them has suffered. Certain claimed damages such as pain and suffering, permanent physical injury, impairment of capacity to enjoy life, and emotional injury are not susceptible to precise monetary calculation. The plaintiffs must prove, by a preponderance of the evidence, the amount of damages to which they are entitled. You may include only the damages the plaintiff has proven by a preponderance of the evidence. You may not award speculative damages or

damages based on sympathy. You may award damages to Plaintiffs for each item or element of damages which Plaintiffs have established, but you should be careful not to award damages for one item or element which duplicates an award for another item or element. Difficulty in computing damages, however, does not preclude you from assessing damages if there is evidence from which an estimation may be made with reasonable certainty.

Damages: Aggravation of Pre-existing Condition

The law provides that a defendant takes each plaintiff as he finds them. In other words, a defendant is not relieved of responsibility just because the plaintiffs might have been more likely to be injured than the average person. This is true even though the plaintiffs' injuries may have resulted from the worsening of a preexisting physical condition.

In calculating the plaintiffs' damages, keep in mind that plaintiffs cannot recover for any physical ailment or disability that existed before the accident. They can only recover for damages due to enhancement or

aggravation of a pre-existing condition, and not the condition itself.

In this case, defendant contends that the plaintiffs did suffer from a preexisting condition, and that any award should take these conditions into account. Defendant bears the burden of proving such condition by a preponderance of the evidence. If you find that the plaintiffs did suffer from physical ailments, and you further find that the accident aggravated these conditions so as to cause additional suffering and disability, then you may award plaintiffs a sum of damages which fairly compensates them for such additional disability or pain resulting from such aggravation. The defendant argues that the plaintiffs had a pre-existing condition which would have inevitably worsened, and that some or all of the plaintiffs' injuries would have occurred regardless of the accident. Again, the defendant has the burden of proving this by a preponderance of the evidence. If you find this to be the case, then you should discount the plaintiffs' damages to reflect the proportion of damages the plaintiffs would have suffered had the accident not occurred. In essence, the plaintiffs should be

compensated by you to the extent you find they were further disabled by the defendant's negligence.

Medical Expenses

In this case, the plaintiffs claim that they have incurred and will continue to incur medical expenses. If you find by a preponderance of the evidence that the defendant is liable to the plaintiffs for such damages, then you should award the plaintiffs the reasonable and necessary medical expenses incurred by them, including any reasonable and necessary medical expenses which they are reasonably certain to incur in the future. These include all doctor's bills, hospital bills, expenses for medical appliances, medications, and other bills of a medical nature which are a proximate result of the accident.

Pain and Suffering

The law permits the plaintiffs to be reasonably compensated for any pain and mental anguish proximately caused by the accident. No definite standard is prescribed by law to fix reasonable compensation for pain and suffering. In making an award for pain and suffering, you shall exercise your discretion with calm

and reasonable judgment and the damages you fix should be just and reasonable in light of the evidence.

Damages: Permanent Physical Injury

In assessing damages, the law allows you to award the plaintiffs a sum which will reasonably compensate them for any permanent injuries caused by the accident. A permanent injury is one that can be reasonably expected for the duration of a person's life. Damages for permanent injury is a separate element of damages to compensate the plaintiffs for the duration of a person's life.

Mitigation of Damages

The law imposes a general duty to mitigate, or minimize, damages. What this means is that a person who has been injured has a duty to take protective or preventive measures in an effort to reduce the harm or prevent its further increase.

The burden is on the defendant to prove by a preponderance of the evidence that plaintiffs have failed to mitigate their damages. If you find that plaintiffs could reasonably have avoided some of the damages claimed by taking any reasonable action with

respect to injuries, you must reduce your award of damages to plaintiffs, if any, by an amount equal to those damages that the plaintiffs could have avoided.

Notes

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

Closing Instructions

When you begin your deliberations, you shall first select a foreperson. The foreperson will preside over deliberations, and will be your spokesperson here in Court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room.

Each of the interrogatories or questions on the special verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign it.

Verdict Forms- Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

Communications with the Court

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer, signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching on

the merits of the case other than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person - not even to the Court - how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.