UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CHARLES E. OLANYK	:	
	:	Civil No. 1:04CV133
v.	:	
	:	
JOHN R. BOOKWALTER, M.D.	:	

CHARGE TO THE JURY

Now that you have heard the evidence and arguments, it becomes my duty to instruct you as to the applicable law.

It is your duty as jurors to follow the law, and not question it, and to apply that law to the facts as you find them from the evidence in the case.

The lawyers may have referred to some of the rules of law in their arguments. If, however, any difference appears between the law as stated by the lawyers and the law stated by the Court in these instructions, you are to follow the Court's instructions.

Nothing I say in these instructions is an indication that I have any opinion about the facts of the case. It is not my function to determine the facts, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. You are not to be governed by sympathy, prejudice or public opinion.

All parties expect that you will carefully and impartially consider all of the evidence, follow the law, and reach a just verdict, regardless of the consequences.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. However, when the attorneys on both sides stipulate or agree as to the existence of a fact, you must, unless otherwise instructed, accept the stipulation and regard that fact as proved.

The evidence in the case consists of the sworn testimony of the witnesses, admitted exhibits, and any stipulated facts.

Any evidence to which an objection was sustained or stricken by the Court must be disregarded.

Evidence--Direct, Indirect, or Circumstantial

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence--such as the testimony of an eyewitness. The other is indirect or circumstantial evidence --the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

There is no distinction between direct or circumstantial evidence. You may find the facts by a preponderance of all the evidence in the case, both direct and circumstantial.

Consideration of Learned Treatise

Portions of a published medical textbook have been read into evidence during this trial. For the purposes of this case, that textbook has been established as a reliable authority on the treatment of burns. While you may not consult the textbook itself during your deliberations, any portions of the textbook that have been read into the record as evidence may be considered during your deliberations, as you would consider other evidence introduced by the parties.

Video Deposition

Some of the testimony before you is in the form of a videotaped deposition. A deposition is simply a procedure where the attorneys for one side may question a witness or adversary party under oath before a court stenographer prior to trial. You may consider the testimony of a witness given at a deposition using the same standards you would use to evaluate the testimony of a witness given at trial.

Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witness, the manner in which the witness testifies, by the character of the testimony given, or by contrary evidence.

You should carefully scrutinize all the testimony, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is believable. Consider each witness' intelligence, motive and state of mind, and demeanor or manner. Consider the witness' ability to observe the matters to which the witness testifies, and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case, any bias or prejudice, the manner in which each witness might be affected by the verdict, and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit their testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently, which 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.

You may give the testimony of each witness such weight, if any, you think it deserves, and accept or reject the testimony of any witness in whole or in part.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying. You may find that the testimony of a small number of witnesses is more credible than the testimony of a larger number of witnesses to the contrary.

Expert Witnesses

You have heard expert witnesses express their opinions. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence. You should not, however, accept opinion testimony merely because the witness was allowed to testify concerning his or her judgment, nor should you substitute it for your own reason, judgment and common sense. The determination of the facts rests solely with you.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. All of you must agree with the verdict. 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, without violence to individual judgment. You must 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 reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction solely because of the opinion of 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.

INSTRUCTIONS OF LAW

Now I will give you instructions concerning the law that applies to this case. You must follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

You determine the facts in this case. By these instructions, I am not indicating how you should decide any question of fact.

Burden of Proof and Preponderance of the Evidence

The burden is on the plaintiff in a civil action to prove every essential element of his claim by a preponderance of the evidence. In this case, it is the plaintiff's burden of proof to prove every essential element of his medical malpractice 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.

A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence. In determining whether a fact, claim or defense has been proven by a preponderance of the evidence, you may consider the relevant testimony of witnesses, regardless of who may have called them, and relevant exhibits in evidence, regardless of who may have produced them.

Medical Malpractice Claim

This case is a medical malpractice case. The term "medical malpractice" is a legal term which simply means a claim of professional medical negligence in the care or treatment of a patient. The claim is that Dr. Bookwalter failed to exercise the proper degree of care and skill which he owed to his patient, Charles Olanyk.

The law requires plaintiff to prove the following three elements to establish the defendant's liability:

First, the standard of care, that is, the degree of knowledge or skill possessed or the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in a similar practice under the same or similar circumstances;

Second, the defendant either lacked the degree of knowledge or skill or failed to exercise this degree of care; and

Third, as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care, the plaintiff suffered injuries that he otherwise would not have suffered.

When determining the standard of care that Dr. Bookwalter owed Mr. Olanyk, you should understand that the duty imposed by law on every person providing medical care is to exercise

that degree of care which would be expected of a reasonably prudent health care provider under similar circumstances. The standard of care in a medical malpractice case is measured in terms of the degree of knowledge or skill possessed, or in the alternative, the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent health care professional engaged in a similar practice under the same or similar circumstances.

If there were alternate courses of treatment available to a physician, any one of which is medically acceptable and proper under the circumstances that existed at the time in question, then there is no negligence in using one rather than the other. To hold a physician liable, it must be shown that the course which he pursued was against the course recognized as correct by reasonably prudent practitioners in the profession. Thus, if you find that under the circumstances of this case Dr. Bookwalter met the standard of his profession, then he was not negligent regardless of the result of his treatment of Mr. Olanyk.

Lastly, in this particular case, it is alleged that Dr. Bookwalter is a specialist in general surgery. It is generally accepted that a physician who holds himself out to be a specialist is bound to bring to the discharge of his professional duties that degree of skill, care, and learning

ordinarily possessed by specialists of his kind at the time. A specialist is not required to have the knowledge of a specialist in another field.

Proximate Cause

A breach of one's duty is of no legal significance unless it is the proximate cause of damage. A "proximate cause" is a cause which, unbroken by any intervening cause, produces the damage, and without which the damage would not have occurred.

This does not mean the law only recognizes one proximate cause of injury or damage. On the contrary, many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage. All that is necessary is that the defendant's conduct was a substantial contributing cause of the plaintiff's injury.

Compensatory Damages

If you decide for the plaintiff on the question of liability, you will next consider the question of damages.

The fact that I am about to instruct you as to the proper measure of damages should not be considered as my opinion as to liability. Instructions as to the measure of damages are given for your guidance in the event you find in favor of the plaintiff by a preponderance of the evidence in accordance with other instructions.

Damages which Mr. Olanyk may recover are those that will fairly and justly compensate him for injuries sustained as a direct result of Dr. Bookwalter's negligent conduct. You may award compensatory damages only for those injuries which you find Mr. Olanyk has proven by a preponderance of the evidence.

You may not simply award damages for any injury suffered by the plaintiff -- you must award damages only for those injuries that are a direct result of actions by the defendant and that are a direct result of defendant's negligence.

The plaintiff is entitled to be compensated for past and future damages proximately caused by the defendant's conduct. The plaintiff in this case seeks compensation for: past expenses for medical care (In this regard, the parties have stipulated that the plaintiff has incurred $360,966.88 in costs for past medical services), lost earnings, damages for

mental anguish and pain and suffering, damages for lost enjoyment of life, and damages for permanent physical impairment.

However, damages must not be based on speculation or sympathy. They must be based only on the evidence presented at trial.

Finally, Mr. Olanyk has only one day in court to recover damages for his injuries. He cannot institute another action at a later date against Dr. Bookwalter to recover for the damages that might accrue at some future time. Therefore, it follows that whatever he is entitled to recover in the future on account of his injuries must be included in the amount he recovers now.

Damages in Lieu of Interest

If you award Mr. Olanyk compensatory damages, you may, in your discretion, award additional damages in the form of interest, for the money he otherwise would have been able to earn (that is, lost earnings) if the money had been timely paid to him. The amount awarded in lieu of interest shall not exceed twelve (12%) per year, the legal rate of interest in Vermont, and this amount shall be calculated from April 14, 2001, through the date of your award.

No Exemplary Damages

In fixing the amount of your award, if any, you may not include in, or add to, an award, any sum for the purpose of punishing Dr. Bookwalter, or to serve as an example or warning to others. Nor may you include in any award any sum for court costs or attorney's fees.

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 preventative measures in an effort to reduce the harm or prevent it from increasing further.

In this case, the defendant claims the plaintiff failed to mitigate his damages. The burden is on the defendant to prove this defense by a preponderance of the evidence. If you find that the plaintiff could have avoided some of the damages by taking reasonable action, you must reduce your award of damages, if any, by an amount equal to those damages that you find the plaintiff could have avoided.

Election of a Foreperson

I will select _____ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

A verdict form has been prepared for your convenience. You will take this form to the jury room. I direct your attention to the verdict form.

Your foreperson will indicate the unanimous answer of the jury in the space provided for each question and, when completed, will date and sign it.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the court security officer. He will then bring the message to my attention. I will respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.