

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

MARTIN BOMBARD,	:	
	:	
Plaintiff,	:	
	:	Case No. 2:13-cv-58
v.	:	
	:	
RICHARD VOLP,	:	
	:	
Defendant.	:	

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. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

The Plaintiff in this case is Martin Bombard. Bombard is represented by Mary Kehoe. The Defendant is Richard Volp. Volp is represented by Pietro Lynn. Bombard asserts that Volp, a Burlington police officer, violated his civil rights under the federal Constitution. Bombard brings this claim under the civil rights law which provides a remedy for individuals who have been deprived of their constitutional or statutory rights under color of state law. Bombard also has two state common law claims against Bombard, namely Bombard asserts that Volp was negligent and committed a battery upon him. Volp denies these claims.

I will first give you general instructions applicable to a case of this type. I will then address the law that specifically applies to this case.

ROLE OF THE COURT, THE JURY, AND COUNSEL

Now that you have listened carefully to the testimony that has been presented to you, you must consider and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You weigh the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. Shortly, I will define "evidence" for you and tell you how to weigh it, including how to evaluate the credibility or, to put it another way, the believability of the witnesses.

You are not to single out one instruction alone as stating the law, but you 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 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 the instructions I am about to give you, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions should be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should evaluate the evidence deliberately and without the slightest trace of sympathy, bias, or prejudice for or against any 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, regardless of the consequences.

EVIDENCE

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation and regard that fact as proved.

The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in so doing to call your attention to certain facts or inferences that might otherwise escape your notice. But it is your own recollection and interpretation of the evidence that

controls in the case. What the lawyers say is not binding upon you.

The evidence includes any stipulated facts, the sworn testimony of the witnesses, and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in the 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 that have been established by the testimony and evidence in the case.

DIRECT AND CIRCUMSTANTIAL EVIDENCE

The law recognizes two types of evidence: direct and indirect or circumstantial. An example of direct evidence is when people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Indirect or circumstantial evidence consists of proof of facts and circumstances from which in terms of common experience, one may reasonably infer the ultimate fact sought to be established.

Such evidence, if believed, is of no less value than direct evidence. As a general rule, the law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

WITNESS CREDIBILITY

You, as jurors, are the sole judges of the credibility of the witnesses and the importance of their testimony. It is your job to decide how believable each witness was in his or her testimony. You may be guided by the appearance and conduct of the witness, or by the manner in which the witness testifies, or by the character of the testimony given, or by evidence to the contrary of the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which may help you decide the truth and the importance of each witness's testimony. Consider each witness's knowledge, motive and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she 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 interest he or she may have in the outcome of the case, or any bias for or

against any party; 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 such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and people naturally tend to forget some things or remember other things inaccurately. Innocent misrecollection, like 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 should give the testimony of each witness such weight, if any, as you may think it deserves. You may, in short, 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 to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary. The test is not which side brings the greater

number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

TESTIMONY OF LAW ENFORCEMENT OFFICERS

Law enforcement officers have testified in this case. The testimony of a law enforcement officer should be considered just as any other witness in the case, and in evaluating his or her credibility you should use the same guidelines which you apply to the testimony of any witness. You should not give either greater or less weight to the testimony of a witness merely because he or she is a law enforcement officer.

EXPERT WITNESSES

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience or 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's qualifications, his or her opinions, 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's testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in the case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

BURDEN OF PROOF

Because this is a civil case, the Plaintiff bears the burden of proving the elements of his claims by a "preponderance of the evidence." Likewise, the Defendant has the burden of proving any affirmative defenses he may have by a preponderance of the evidence. To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. A preponderance of the evidence means the greater weight, or logic, or persuasive force of the evidence. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity.

In determining whether any fact in issue has been proven by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received in evidence, regardless of who may have produced them.

I now turn to the law you must follow in evaluating the specific claims in this case.

FIRST CLAIM: 42 U.S.C. § 1983

Bombard brings his first claim under a federal statute, 42 U.S.C. § 1983. This federal civil rights law provides a remedy for individuals who have been deprived of their constitutional rights by any person acting under color of state law.

Specifically, Bombard alleges that while Volp was acting under color of the authority of the State of Vermont as a member of the Burlington Police Department, Volp subjected Bombard to a deprivation of his rights and privileges to be free from the use of excessive force during the course of an arrest. Under the United States Constitution, a person has the right to be free from the use of unreasonable force when being arrested, even if such arrest is otherwise made in accordance with due process of the law.

Therefore, in order to establish his claim under Section 1983, Bombard must establish, by a preponderance of the evidence, each of the following three elements:

- 1) At the time of the incident Volp was acting under color of the authority of the State of Vermont;
- 2) Volp committed acts that deprived Bombard of one or more of his constitutional rights, as defined and explained by

the Court in these instructions, by using excessive force against Bombard in the course of the arrest; and

3) Volp's acts were the proximate cause of damages sustained by Bombard.

The first element of Bombard's claim is that the conduct complained of was committed by Volp acting under color of state law. The Court finds as a fact that at the time of the arrest in this case, Volp was acting under color of state law. Consequently, Bombard has met the first element of his claim.

As for the second element, Bombard alleges that Volp's use of force against him deprived him of his rights under the Fourth Amendment to the United States Constitution. The Fourth Amendment protects persons from being subjected to excessive force while being arrested. In other words, a law enforcement official may only employ the amount of force reasonably necessary under the circumstances to make the arrest.

In this case, Bombard claims that he was subjected to excessive force when Volp arrested him. You must first determine whether Volp committed the alleged acts. To determine whether Volp's acts caused Bombard to suffer the loss of a federal right, you must determine whether the amount of force used to effect the arrest was that which a reasonable officer would have employed in effecting the arrest under similar circumstances. In making this determination, you may take into

account such factors as the severity of the crime at issue, whether Bombard posed an immediate threat to the safety of Volp or others, and whether Bombard actively resisted arrest or attempted to evade arrest by flight. You need not consider just these factors but may consider any other evidence you find relevant.

However, you do not have to determine whether Volp had less intrusive alternatives available. Volp is only required to act reasonably. The determination of reasonableness should be made from the perspective of a reasonable officer on the scene rather than with the 20/20 vision of hindsight. If you find that the amount of force used was greater than a reasonable police officer would have employed, Bombard will have established the claim of loss of a federal right.

The third element which Bombard must prove is that Volp's acts were a proximate cause of injuries sustained by Bombard. Proximate cause means that there must be a sufficient causal connection between an act or omission of a defendant and any injury or damage to the plaintiff. A proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury without which the result would not have occurred. An act or omission is a proximate cause of an injury if it was a substantial factor in bringing about or causing that injury. If

an injury was a direct result or reasonably probable consequence of a defendant's act or omission, it was proximately caused by the act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

SECOND CLAIM: NEGLIGENCE

Bombard claims that Volp was negligent. In order to prevail on his claim for negligence Bombard must prove, by the preponderance of the evidence, each of the following elements:

1. Volp owed a legal duty to protect Bombard from an unreasonable risk of harm,
2. Volp breached that duty,
3. Volp's conduct was the proximate cause of Bombard's injuries, and
4. Bombard suffered actual damages.

"Duty" means a legal obligation to do or not do some act or an obligation to conform to a particular standard of conduct toward another. A person breaches that duty when he acts unreasonably under the circumstances.

You may refer to my previous instruction for a description of proximate cause.

THIRD CLAIM: BATTERY

Bombard claims Volp committed a battery. A battery is an intentional act that results in harmful contact with another. A person is liable for battery if:

1. He intends to cause a harmful or offensive contact with another; and
2. A harmful contact with another results.

A police officer is not liable for battery when the battery consists of force reasonably necessary to lawfully take a person into custody. Therefore, you may only find Volp liable for battery to Bombard if you find that Volp intended to inflict, and did inflict, a harmful and unwarranted contact upon Bombard and that such contact was in excess of the appropriate and reasonable force that an officer would use to lawfully take a person into custody. Bombard must prove this claim by a preponderance of the evidence.

AFFIRMATIVE DEFENSE: COMPARATIVE NEGLIGENCE

As part of his defense to Bombard's claims, Volp has raised the defense of comparative negligence. Volp claims that Bombard was himself negligent and that his own negligence, if any, was the cause of his injuries.

Just as Bombard bears the burden of proving that Volp was negligent, so here Volp bears the burden of proving by a preponderance of the evidence that Bombard was also negligent. The elements of Volp's claims are the same as for Bombard's

claim of negligence. Thus, before you may conclude that Bombard was comparatively negligent, you must find by a preponderance of the evidence that Bombard owed himself a duty to act reasonably, that he breached that duty, that he suffered injury, and that his negligence, if any, was a proximate cause of the injuries which he suffered.

Should you conclude that both Bombard and Volp were negligent and that the negligence of both contributed to the injuries suffered by Bombard, then it will be your job to ascribe a percentage of responsibility to each of the parties. Those percentages must, of course, add up to one hundred per cent.

DAMAGES

The fact that I am about to instruct you as to the proper measure of damages does not reflect any view of mine as to which party is entitled to your verdict. Instruction as to the measure of damages is given for your guidance if you find in favor of Bombard in accordance with the other instructions.

As explained above, Bombard has made claims against Volp under Section 1983 for violating his right to be free from excessive force, for negligence, and for battery. If you decide for Bombard on any question of liability, then you will need to determine the amount of damages he suffered. If you decide for

Volp on all of the questions of liability, then you will have no occasion to consider the question of damages.

Please keep in mind the following general principles as you make your deliberations. In making any award of damages, it is not necessary that Bombard prove the exact amount of his damages with absolute certainty. Nevertheless, any damages you award may not be based on sympathy, speculation, or guesswork because only actual damages are recoverable.

Remember that Bombard has the burden of proving damages by a preponderance of the evidence. In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

COMPENSATORY DAMAGES

In an ordinary case such as the one before you, damages are awarded on a theory of compensation. An award of compensatory damages is intended to put the Plaintiff in the same position that he was in prior to the incident at issue here. Thus, Bombard is entitled to recover for all damages that are a natural consequence of Volp's conduct, including items such as past and future medical expenses, past and future pain and suffering, and any disability, disfigurement, and loss of enjoyment he has suffered or may suffer in the future.

As with other elements of his claims, Bombard has the burden of proving by a preponderance of the evidence the amount of damages that he has suffered. Where the amount of damages is capable of being calculated in terms of dollars and cents such as medical expenses, Bombard must demonstrate the amount of his loss in dollars and cents. However, where Bombard's claimed damages may not be reduced to dollars and cents, such as with assertions of pain and suffering, Bombard need not demonstrate the exact dollar and cent value of his injuries. Nonetheless, Bombard is still required to submitted to the jury evidence of such a quality that the jury is capable of reasonably estimating the extent of Bombard's loss.

Under no circumstances may you award damages that are speculative or conjectural. You are further instructed that any natural feelings of sympathy for any party must be set aside during your deliberations. Such feelings are not properly a factor for consideration in this matter.

In determining the damages, if any, that Bombard may have suffered as a result of his injuries, you should consider the following types of compensatory damages and no others:

1. The reasonable value of medical care and supplies that Bombard reasonably needed and actually received as well as the present value of the care and supplies that he is reasonably certain to need and receive in the future.

The parties have already agreed that the medical and dental bills Bombard has already incurred were reasonable and necessary. Volp has stipulated to the amount of Bombard's expenses without admitting any liability. You cannot infer that he has admitted to any wrongdoing from this stipulation. These bills amount to \$17,746.87.

2. Any physical, mental, or emotional pain and suffering Bombard has experienced and is reasonably certain to experience in the future. There is no particular formula to calculate this compensation. Any award should be fair and reasonable in light of all the evidence.
3. Any disability, disfigurement, and loss of enjoyment of life that Bombard has experienced and is reasonably certain to experience in the future. There is no particular formula to calculate this compensation. Any award should be fair and reasonable in light of all the evidence.

You may award Bombard damages for any future damages which he has proved that he is reasonably certain to sustain in the future. In making an award for future damages, I instruct you that you must reduce such an award to its present worth. The present worth of an award is defined as that amount of money which, if put an interest-bearing account, would amount to the

sum of money you find Bombard would be entitled to in the future as a result of the injury.

If you find in favor of Bombard but find that Bombard has failed to prove compensatory damages you must return a verdict for Bombard in the amount of one dollar (\$1.00).

MITIGATION

The law imposes a general duty to mitigate, or minimize, damages. This means 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 its further increase.

In this case, Volp argues that any award made to Bombard should be reduced by Bombard's failure to mitigate his damages. The burden is on Volp, not Bombard, to prove this claim by a preponderance of the evidence. If you find that Bombard could reasonably have avoided some of the damages claimed by taking any reasonable action, either with respect to the injuries, economic damage, or any other portion of damages proved by Bombard, you must reduce your award of damages to Bombard, if any, by the amount equal to those damages that Bombard could have avoided.

TAXATION

If you should conclude that Bombard is entitled to an award of damages, I instruct you that such an award would not be subject to federal or state income taxation. Consequently, you

should not add any sum to such an award to compensate for presumed income taxation effects.

UNANIMOUS VERDICT

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree.

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement, if you can do so without violence to your 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 reexamine your own views and change your opinion if convinced it is wrong. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

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

NOTES

You may have taken notes during the trial for use in your deliberations. These notes 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 other jurors. Your notes should remain in the jury room and will be collected at the end of the case.

CLOSING INSTRUCTIONS

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A copy of this charge will go with you into the jury room for your use.

A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided for each question, and will date and sign the special verdict, when completed.

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 related

to the merits of the case other than in writing, or orally here in open Court. Bear in mind also that you are not to reveal to any person – not even to the Court – how the jury stands, numerically or otherwise, on the questions before you, during your deliberations.

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 related to the merits of the case.

Dated at Burlington, in the District of Vermont this 13th day of May, 2015

/s/ William K. Sessions III
William K. Sessions III
District Court Judge