

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

OWEN MILNE,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No. 2:05-cv-323
	:	
VOLKSWAGEN AG and VOLKSWAGEN	:	
OF AMERICA, INC.	:	
	:	
Defendants.	:	

JURY CHARGE

Members of the Jury:

The Plaintiff in this case is Owen Milne. Mr. Milne is represented by Larry Coben and Emily Joselson. The Defendants are Volkswagen AG and Volkswagen of America, Inc. (collectively "VW"). VW is represented by David Barry and Andrew Levin.

This case stems from a car accident that took place in Lebanon, New Hampshire on December 24, 2002. Mr. Milne is suing VW on a theory of strict products liability and claims that the 1999 VW Jetta was defectively designed. Mr. Milne seeks compensation for damages that he has suffered as a result of his injuries. VW denies that its product was defective or caused Mr. Milne's injuries.

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judges of the facts.

You pass upon the weight of 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. I shall shortly define the word "evidence" and instruct you on how to assess it, including how to judge the credibility of the 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 ought to be, 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 is to 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 appraise the evidence deliberatively 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

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits admitted into evidence, and all the facts admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. 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 be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

LIMITED PURPOSE OF ARTICLES

During the trial, you have heard witnesses refer to and read from various articles. This was for the limited purpose of allowing you to evaluate the testimony of the witnesses that were testifying. You may not consider this evidence for any other purpose.

STATEMENTS OF VEHICLE MANUFACTURERS

You have heard testimony and seen documents reflecting the position of certain vehicle manufacturers regarding the design of their vehicles. This evidence was introduced because it formed the basis for a witness's opinion, and you may not consider this evidence for any other purpose.

CREDIBILITY OF WITNESSES

You as jurors are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness since you may accept or reject the testimony of any witness in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any; the extent to which other

evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

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 the side offering the most witnesses. 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 may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

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.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked

by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence. When the attorneys for Mr. Milne and VW stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in his or her testimony. Do not assume that I hold any opinion on matters related to my questions.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

BURDEN OF PROOF

This is a civil case and as such Mr. Milne has the burden of proving every element of his claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the

evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. Preponderance of the evidence is evidence that is more convincing and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim or defense is more likely so than not so. In determining whether any fact at issue has been proven by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of which party called them, and all the exhibits received in evidence, regardless of which party may have produced them.

CORPORATION ENTITLED TO TREATMENT AS A PERSON

Defendants in this case are corporations. The fact that a corporation is involved must not affect your decision in any way. A corporation and all other persons are equal before the law and must be treated as equals in a court. You should consider and decide this case as an action between persons.

STRICT PRODUCTS LIABILITY

In order to prevail upon his claim of strict products liability against VW, Mr. Milne must prove by a preponderance of the evidence each of the following elements:

1. that the 1999 VW Jetta or some component of it was in a

defective condition when manufactured and sold by VW;

2. that a defect, if any, made the 1999 VW Jetta unreasonably dangerous to users such as Mr. Milne;

3. that the 1999 VW Jetta was in substantially the same condition at the time of the accident as it was when it left the hands of VW; and

4. that a defect, if any, in the 1999 VW Jetta was a proximate cause of the injuries suffered by Mr. Milne.

DESIGN DEFECT; UNREASONABLY DANGEROUS

Mr. Milne must prove by a preponderance of the evidence that there was some defect in the 1999 VW Jetta when it was sold by VW. A product is in a defective condition and unreasonably dangerous to the user if it has a propensity for causing physical harm beyond that which would be contemplated by the ordinary consumer possessing the ordinary and common knowledge of the community as to the product's characteristics.

In cases involving allegedly defective, unreasonably dangerous products, a defendant, such as VW, may be liable even though you may find that VW was not negligent and exercised all reasonable care in the design, manufacture and sale of the 1999 VW Jetta. Similarly, under strict products liability law, a defendant may not be liable even if you find that it did not exercise all reasonable care in designing a product. A product is not defective or unreasonably dangerous merely because it is

possible to be injured while using it. VW is not required to guarantee that no one will be hurt using the 1999 VW Jetta. There is no duty for a manufacturer to produce a product that is "accident-proof." What the manufacturer is required to do is to make a product that is free from defective and unreasonably dangerous conditions.

In determining whether the 1999 VW Jetta was defectively designed and unreasonably dangerous, you may consider the following:

Crashworthiness

"Crashworthiness" is the protection that a motor vehicle provides drivers and passengers against injury in the event of an accident. Since accidents are a foreseeable part of motor vehicle use, manufacturers have a legal duty to design cars that are crashworthy - vehicles that provide a reasonable degree of safety protection in the event of an accident. Under Vermont law, a product is defective if it fails to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner.

Alternative Designs

Evidence of alternative designs available in 1999 that, had they been adopted, would have prevented or reduced Mr. Milne's injuries is one factor to consider in determining if the 1999 VW Jetta was unreasonably dangerous. It is not enough for

Mr. Milne to show that VW might have designed a safer product; if the 1999 VW Jetta as designed was safe for ordinary use, then it was not defectively designed. In evaluating the adequacy of the design in guarding against unreasonable risks, you should consider the gravity of the danger posed by the product's design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, and the adverse consequences to the product and to the consumer that would result from an alternative design. Another relevant factor in determining whether an alternative design was feasible at the time of manufacture is the manufacturer's ability to eliminate or reduce the allegedly unsafe character of the product without impairing its usefulness.

Industry and Government Standards

You may also consider standard industry practice at the time of the product's design and manufacture. However, such compliance is not conclusive. Evidence that all product designers in the industry balance the competing factors in a particular way is relevant to the determination of the product's design. Similarly, you have heard testimony regarding the 1999 VW Jetta's compliance with Federal Motor Vehicle Safety Standards. Again, compliance with these standards is not conclusive evidence that a product was safely designed or not defective. The 1999 VW Jetta's compliance with federal standards

is one piece of evidence that you may consider along with all of the other evidence presented on the issue of the 1999 VW Jetta's defective design.

CONDUCT OF OTHERS

Because this is a strict products liability case, you should only consider whether the 1999 VW Jetta was defectively designed and unreasonably dangerous. Therefore, in your deliberations, you should not consider the actions of any other person in the accident at issue here, such as the actions of any other driver or Mr. Milne.

PROXIMATE CAUSE

A legal or proximate cause of an injury means a cause which, in a natural or continuous sequence, unbroken by any efficient 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. Mr. Milne is required to show that the design defect was a proximate cause of his injuries, but he is not required to show that it was the only proximate cause.

Only if you find that Mr. Milne has proven that the 1999 VW Jetta had an unreasonably dangerous defect, and that the defect was a proximate cause of his injuries, should you go on to determine the amount of his damages.

INSTRUCTION ON DAMAGES

As explained above, Mr. Milne claims that VW is strictly liable to him as a result of the 1999 VW Jetta's defective design. If you decide for VW on the question of liability, you will have no occasion to consider the question of damages.

The fact that I am instructing you about the proper measure of damages is no indication of my view of the case. Rather, I give you these instructions for guidance if you find in favor of Mr. Milne from a preponderance of the evidence presented in the case and according to the other instructions I have given you.

In reaching your verdict in this case, you must carefully consider the evidence presented against VW. You may assess damages against VW only if you find VW liable for Mr. Milne's injuries under the theory of strict products liability that I have described above.

If you find that Mr. Milne is entitled to recover on his claim of strict products liability, then the law provides that he is to be fully and fairly compensated for all of the injuries and losses that he has suffered. This means that you may award the amount of money you determine to be full, fair and reasonable

compensation for all of Mr. Milne's injuries and losses.

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 Mr. Milne in the same position he was in prior to the accident at issue here. Thus, Mr. Milne is entitled to recover for all damages that are a natural consequence of VW's conduct, including items such as past and future pain and suffering and lost enjoyment, loss of earning capacity, and past and future medical expenses.

As with the other elements of his claim, Mr. Milne has the burden of proving by a preponderance of the evidence the amount of damages that he has suffered. Where the amount of Mr. Milne's damages are capable of being calculated in dollars and cents, such as lost earning capacity, Mr. Milne must demonstrate the amount of his losses in dollars and cents. However, where Mr. Milne's claimed damages may not be reduced to dollars and cents, such as with assertions of lost enjoyment and pain and suffering, Mr. Milne need not demonstrate the exact dollar and cent value of his injuries. Nevertheless, Mr. Milne is still required to submit to the jury evidence of such a quality that the jury is capable of reasonably estimating the extent of his loss. Under no circumstances may you award damages that are speculative or conjectural. You are further instructed that any natural

feelings of sympathy for Mr. Milne 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 Mr. Milne has suffered as a result of his injuries, you should consider the following items:

Lost Earning Capacity

Mr. Milne alleges that as a result of his injuries proximately caused by VW, he has sustained a loss of past and future earning capacity from the date of the accident. If you find that Mr. Milne's earning capacity has been diminished as a result of his injuries, then you should include an award for past and future lost earning capacity.

Mr. Milne must prove his loss of earning capacity by a preponderance of the evidence. You may take into account a number of factors, including: Mr. Milne's earnings prior to the injury; the condition of his health and the extent of his injury; his probable future earnings and prospects for advancement prior to the injury, and the extent to which the injury has diminished those prospects; his age, employment history, and business and professional experience; his skill or ability in his work or profession; and any other circumstances that might affect Mr. Milne's earning capacity. Keep in mind that future prospects that are speculative or merely possible are not to be considered

in awarding damages. You also should have in mind that a certain injury to one person may have entirely different consequences to another. The evidence in each individual case must justify the award, and your award must be complete, fair, and reasonable in light of all the circumstances.

If you find that Mr. Milne is entitled to an award for diminution of past and future earning capacity, then you should calculate that amount for the period that Mr. Milne will suffer such diminution.

Lost Enjoyment, Pain, and Suffering

In this case, Mr. Milne alleges that he suffered lost enjoyment and mental distress as a result of VW's conduct. If Mr. Milne has proved such injury by a preponderance of the evidence, then you may make an award of damages to compensate Mr. Milne for this element.

The measure of damages to be awarded Mr. Milne for lost enjoyment and emotional distress should be equivalent to reasonably compensate him for any pain, discomfort, fears, anxiety, humiliation, and any other mental and emotional distress suffered by him which was proximately caused by VW. No definite standard is prescribed by law to fix reasonable compensation for lost enjoyment and emotional distress. In making an award for lost enjoyment and emotional distress you shall exercise your authority with calm and reasonable judgment and the damages you

fix shall be just and reasonable in light of the evidence.

You may award Mr. Milne a sum you deem appropriate to compensate him for the pain and suffering he has endured as a result of his injuries, including any: (1) disability, (2) disfigurement, (3) physical impairment, (4) and emotional distress. You may also include an amount to compensate Mr. Milne for any future pain and suffering which you find he is reasonably likely to experience.

Whatever Mr. Milne is entitled to recover in the future due to his injuries must be included in the amount he recovers now. You must determine the total amount of Mr. Milne's damages and place this amount on the Special Verdict Form.

Past and Future Medical Expenses

Mr. Milne claims that he has incurred and will continue to incur expenses for medical care. If you find by a preponderance of the evidence that VW is liable to Mr. Milne for such damages, then you should award Mr. Milne the reasonable and necessary medical expenses he has incurred, including any reasonable and necessary medical expenses which he is reasonably certain to incur in the future. These include all doctor's bills, hospital bills, expenses for medical appliances, pharmacy bills, services, adaptive equipment, and other bills of a medical nature which are a proximate result of the accident.

The fact that some medical services, such as transportation

to and from the hospital, or care at home, may have been provided to Mr. Milne for free by friends or relatives, does not prevent Mr. Milne from recovering the reasonable value of such services.

LIFE EXPECTANCY

According to the *Census Bureau Vital Statistics of the United States*, a person 29 years of age has a life expectancy of 49.4 years. This is merely an estimate of the probable average remaining length of life of all persons of this age. You may consider this estimate in determining the amount of damages for any future losses that you award Mr. Milne.

PRESENT VALUE OF FUTURE ECONOMIC LOSSES

If you should find that Mr. Milne is entitled to a verdict, and further find that the evidence in the case establishes either: (1) a reasonable likelihood of future medical expenses, or (2) a reasonable likelihood of future loss of earning capacity, then you must determine the present value in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that Mr. Milne will in effect be reimbursed in advance of the loss, and so will have the use of money that he would not have received until some future date but for the verdict.

In order to make a reasonable adjustment for the present

use, interest free, of money representing a lump-sum payment of anticipated future loss, the award is to be discounted, or reduced to its present value, by taking (1) the interest rate or return that Mr. Milne could reasonably be expected to receive on an investment of the lump-sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained.

These damages are deducted from the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time. Include in the verdict an award for only the present value - the reduced amount - of anticipated future loss.

The requirement to discount to present value applies to future lost earning capacity and future medical expenses only. If you should find that Mr. Milne is entitled to damages for future pain and suffering, then such award is not subject to any reduction for the present use of such money.

TAXATION

If you award Mr. Milne damages, these damages will not be subject to federal or state income taxation. Mr. Milne will have the full use of whatever amount the jury awards. Consequently, you should not add any sum to your award of damages to compensate for income taxes.

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 erroneous. 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 have taken 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

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 Special Verdict Form 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 the Special Verdict Form, 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.

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, Vermont this 6th day of February, 2009.

/s/ William K. Sessions III
William K. Sessions III
Chief Judge