

COPY

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

MARIAN R. CANEDY	:	
	:	
v.	:	Civil No. 1:93CV382
	:	
LIBERTY MUTUAL INSURANCE COMPANY:	:	
_____	:	

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

On June 30, 1991, the plaintiff, Marian R. Canedy, was visiting Manchester, Vermont. There is no dispute that, while crossing the street, the plaintiff was involved in an accident with an automobile driven by Arlene Litwack and was seriously injured. The plaintiff alleges that the accident was Arlene Litwack's fault. In the event plaintiff Marian Canedy proves her case by a preponderance of the evidence, the defendant, Liberty Mutual Insurance Company, is responsible for compensating her for her injuries.

Liberty Mutual denies the plaintiff's allegation that the accident was Arlene Litwack's fault. Specifically, Liberty Mutual claims the plaintiff herself was negligent. The company also disputes the nature and degree of plaintiff's injuries.

Now that you have heard the evidence and arguments, it becomes my duty to give you the instructions of the Court as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts as you find

them from the evidence in the case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and the law stated by the Court in these instructions, you are to be governed by the Court's instructions.

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, but rather yours.

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you 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 as it is now being given to you, and reach a just verdict, regardless of the consequences.

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.

Likewise, a corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

Evidence in the Case

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

Unless you are otherwise instructed, the evidence in the case always consists of the sworn testimony of the witnesses, regardless of who may have called them; and all exhibits received in evidence, regardless of who may have produced them; and all facts which may have been admitted or stipulated.

Any evidence as to which an objection was sustained by the Court, and any evidence ordered stricken by the Court, must be entirely disregarded.

Questions Not Evidence

If a lawyer has asked a witness a question which contains an assertion of fact, you may not consider the lawyer's assertion as evidence of that fact. The lawyer's statements are not evidence.

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.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

Inferences Defined

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited 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 seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense suggest are probably true, based on the facts which have been established by the evidence in the case.

Opinion Evidence -- Expert Witness

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 -- 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, 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 tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor or manner while on the stand. Consider the witness' ability to observe the matters as to which the witness has testified, 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 give you cause to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and 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 will 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.

Credibility of Witnesses -- Inconsistent Statements

The testimony of a witness may be discredited, or as we sometimes say, "impeached," by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. The earlier inconsistent or contradictory statements are admissible only to discredit or impeach the credibility of the witness and not to establish the truth of these earlier statements made somewhere other than here during this trial, unless the witness has adopted, admitted or ratified the prior statement during the witness' testimony in this trial. It is the province of the jury to determine the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Use of Deposition Testimony

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of trial by one or more of the attorneys for the parties in the case. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath, or on a video recording played on a television set. Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in so far as possible, in the same way as if the witness had been present, and had testified from the witness stand.

You are reminded there is one video tape which plaintiff presented through the testimony of Mr. Lucas, which was introduced not as a reconstruction of the accident, but for other purposes.

Verdict -- Unanimous -- 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 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 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 and Preponderance of the Evidence

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. If the proof should fail to establish any essential element of plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

As to certain affirmative defenses which I will discuss later in these instructions, however, the burden of establishing the essential facts is on the defendant. If the proof should fail to establish any essential element of a defendant's affirmative defense by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

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, claim or affirmative defense 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.

Negligence

Plaintiff Marian Canedy is proceeding against the defendant on a theory of negligence. To prevail on her negligence claims, the plaintiff must prove both of the following by a preponderance of the evidence: First, that Arlene Litwack was negligent; and second, that Arlene Litwack's negligence was a proximate or legal cause of the damage sustained by the plaintiff.

"Negligence" is the breach of a legal duty to exercise ordinary or due care which a prudent person would exercise under the same or similar circumstances. Negligence may consist of omitting to do something a reasonably prudent person would do or doing something which a reasonably prudent person would not do under the same or similar circumstances.

In general, a "duty" in negligence cases may be defined as an obligation to conform to a particular standard of conduct toward another. Here, a motor vehicle operator is required to watch out for persons and property in or near the highway. However, she is not necessarily negligent merely because she fails to look ahead continually and uninterruptedly. Rather, under the law, the legal duty that Arlene Litwack owed to the plaintiff was the duty not to drive her motor vehicle in a manner which would unreasonably or unnecessarily expose the plaintiff to injury. At regular crossings where pedestrians usually cross, the driver of a motor vehicle is required to be

more vigilant in keeping a look out for pedestrians than at points between crossings.

Furthermore, you may find a Vermont statute relevant in this case when you consider whether Arlene Litwack was negligent under the circumstances of this case as you find them. Under 23 V.S.A. § 1053, every driver of a vehicle is required to exercise due care to avoid colliding with any pedestrian upon any roadway, shall give warning by sounding the horn when necessary, and must exercise proper precaution upon observing any obviously confused or incapacitated person on the roadway.

Note that safety rules, such as 23 V.S.A. § 1053 and another which I will later relate to you, are not hard and fast, nor absolute in application to all circumstances. They are merely guides to the main issue of whether an actor's conduct meets the standard required of a prudent person under similar circumstances.

If you find that Arlene Litwack was not negligent, that ends your deliberations, and you must enter a verdict in Liberty Mutual's favor. If, on the other hand, you decide that Arlene Litwack was negligent, then you must determine whether her negligence was a proximate, or legal, cause of the plaintiff's injuries.

Proximate Cause

You may not award damages for any injury from which plaintiff Marian Canedy may have suffered or may now be suffering unless she has established by a preponderance of the evidence in the case that such injury was proximately caused by the accident in question.

An injury or damage is proximately caused by an act, or a failure to act, whenever 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 or damage, and that the injury or damage was either a direct result or a reasonably probable consequence of the act or omission. If you find that any injury sustained by Marian Canedy was proximately caused by some individual or entity other than Arlene Litwack, then you should return a verdict in favor of the defendant.

This does not mean, however, that the law recognizes only one proximate cause of an injury or damage, consisting of only one factor or thing, or the conduct of only one person or entity. On the contrary, many factors or things, or the conduct of two or more persons, may operate either independently or together, to cause injury or damage; and in such a case, each may be a proximate cause.

Comparative Negligence

Defendant Liberty Mutual claims Marian Canedy was comparatively negligent. If a preponderance of the evidence does not support Marian Canedy's claim that Arlene Litwack was negligent, then your verdict should be for the defendant. However, if a preponderance of the evidence does support the plaintiff's claim, then you must consider the comparative negligence defense raised by Liberty Mutual.

To prevail on this defense, Liberty Mutual must prove each of the following elements by a preponderance of the evidence: First, the plaintiff was also negligent; and second, the plaintiff's negligence was the proximate or legal cause of her injury.

As you can see, these elements mirror those which you have already considered when determining whether Arlene Litwack was negligent. Accordingly, in making your determination on the issue of comparative negligence, you should refer to the definitions of "negligence," "duty," and "proximate cause" which I have already given you.

As was the case when you considered whether Arlene Litwack was negligent, there are several safety statutes which you may consider, when you assess whether plaintiff Marian Canedy was also negligent.

Under 23 V.S.A. § 1051(b), no pedestrian may suddenly leave a curb or other place of safety and walk or run into the

path of a vehicle which is so close that it is impossible for the driver to yield.

You may consider whether Marian Canedy failed to conform her conduct to this statute in determining whether her own negligence contributed to the accident which occurred in this case.

If you find that Arlene Litwack's negligence caused or contributed to Marian Canedy's injury, then you must assess a percentage of fault to the defendant. You will do that by indicating, on the special verdict form, what percentage of fault of the plaintiff's injury is attributable to the defendant.

Moreover, if you also find Marian Canedy's own negligence cause or contributed to her own injury, then you must also assess a percentage of fault to the plaintiff. You will do this by indicating the percentage of plaintiff's negligence, if any, on the special verdict form. Note that the total of all such fault or negligence must be one hundred percent.

If you find that the plaintiff's comparative negligence is greater than 50%, then the plaintiff cannot recover anything, and you must enter a verdict for the defendant. In other words, if you determine that Marian Canedy was more than 50% comparatively negligent, then she will recover nothing and your verdict is for the defendant, Liberty Mutual Insurance Company.

However, if the plaintiff's negligence is 50% or less, then the plaintiff is entitled to recover from the defendant.

Finally, if you assess a percentage of fault to the defendant then, disregarding any fault on the part of the plaintiff, you must determine the total amount of plaintiff's damages. I will provide you with instructions relating to the proper measure of damages, if any, that you may award.

In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to the plaintiff. The Court will compute the plaintiff's final recovery, if any, on the basis of the percentages of fault that you assess.

Effect of Instruction as to Damages

The fact that I will instruct you as to the proper measure of damages should not be considered as intimating any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance, in the event you should find in favor of the plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

Damages

If you should find for the plaintiff and against the defendant as to any of plaintiff's claims, then you must consider the issue of damages.

The amount of damages the plaintiff shall recover, if any, is solely a matter for you to decide. The purpose of damages is to compensate a plaintiff fully and adequately for all injuries and losses caused by a defendant's negligence. In other words, the purpose of awarding damages is to place the injured person in the position he or she occupied immediately before the injury occurred, as nearly as can be done with an award of money damages.

The plaintiff must prove, by a preponderance of the evidence, the amount of damages to which she is 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.

In this case, Marian Canedy seeks to recover past and future compensatory damages for her injury, pain and suffering, loss of enjoyment of life, lost wages, disfigurement, disability, physical impairment, and emotional damages.

You also may include in you verdict a sum that will justly, fully and adequately compensate the plaintiff for permanent injury or disability, if any, that you may find. In evaluating such permanent injury or disability, you should taken into consideration the age of the plaintiff, which the parties

have stipulated is 46 years today, and her ability to lead a normal life, and her life expectancy, which the parties have stipulated is 34.9 years as of today.

The plaintiff, Marian Canedy, has only one day in court to recover damages for her injuries. She cannot institute another action at a later date against this defendant to recover for her damages that might accrue at some future time.

The plaintiff has only one action for her injury, therefore it follows that whatever she is entitled to recover in the future on account of her injuries must be included in the amount she recovers now.

Medical Damages

With regard to medical expenses, if you find for the plaintiff, then she is entitled to recover her past medical expenses, which the parties have stipulated are \$48,099.17.

You may also award as damages a sum of money as compensation for the reasonable value or expense of medical care and treatment to be reasonably obtained in the future.

Aggravation of Existing Condition

If you find for plaintiff, you should compensate her for any aggravation of any disease or physical defect, if any, from which she already was suffering prior to the accident at issue. If you find there was such an aggravation, you should determine, if you can, what portion of the plaintiff's condition resulted from the aggravation and make allowance in your verdict only for the aggravation. However, if you cannot make that determination, or if it cannot be said that the condition would have existed apart from the injury, you should consider and make allowance in your verdict for the entire condition.

Reduction of Future Damages to Present Value

In the event you award future damages, any such award necessarily requires that payment be made now for a loss that plaintiff will not actually suffer until some future date. Insofar as your award is for future damages, you should adjust to present worth such sum as you find is to be needed in the future so that the portion of the award for future damages, when prudently invested and saved, will match the compensation needs as they arise in the future.

If you make any award for future medical expenses, future pain and suffering, or future mental anguish, then you should adjust or discount the award to present value in the same manner.

Damages Not Punitive

If you should find the plaintiff is entitled to a verdict, in fixing the amount of your award, you may not include in, or add to an otherwise just award, any sum for the purpose of punishing any defendant, or to serve as an example or warning for others. Nor may you include in your award any sum for court costs or attorney's fees.

Effect of Taxes

If you award any damages to plaintiff, you should know the only portion of the award subject to state or federal income tax is that portion attributable to lost wages. Therefore, should you award any damages other than those attributable to lost wages, you should not include in your verdict any amount to compensate for taxes.

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

[Form of special verdict read.]

You will note that each of these interrogatories or questions call for a "Yes" or "No" answer. The answer to each question must be 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, when completed.

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.

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 Marshal. He will then bring the message to my attention. I will then 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.

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

MARIAN R. CANEDY :
 :
 v. : CIVIL NO. 1:93CV382
 :
 LIBERTY MUTUAL INSURANCE COMPANY :
 _____ :
 :

VERDICT FORM

1. Was there negligence on the part of Arlene Litwack which was a legal cause of loss or damage to the plaintiff, Marian Canedy?

_____ yes _____ no

If your answer to question 1 is "no," then your verdict is for the defendant, Liberty Mutual Insurance Company, and your deliberations are completed. You should have the foreperson sign and date the verdict form.

If your answer to question 1 is "yes," then proceed to question 2.

2. Was there negligence on the part of the plaintiff, Marian Canedy, which was a legal cause of the plaintiff's loss or damage?

_____ yes _____ no

If your answer to question 1 is "yes," and your answer to question 2 is "no," then proceed to question 4. If your answer to question 1 is "yes," and your answer to question 2 is "yes," then proceed to question 3.

3. State the percentages of comparative negligence that you find. Note that these percentages must equal 100%.

Plaintiff Marian Canedy	_____	%
Arlene Litwack	_____	%
Total	<u>100</u>	%

If you have found plaintiff Marian Canedy more than 50% negligent, then your verdict is for the defendant, and you have completed your deliberations. You should have the foreperson sign and date this verdict form.

If you have found Arlene Litwack at least 50% negligent, then proceed to question 4.

4. State the total damages to which you find plaintiff Marian Canedy is entitled.

Past lost wages \$ _____

Future lost wages \$ _____

Past medical expenses \$ _____

Future medical expenses \$ _____

Pain and suffering,
emotional damages,
disfigurement,
disability,
physical impairment,
and loss of
enjoyment of life \$ _____

TOTAL DAMAGES \$ _____

Note: do not reduce your damages award if you have found plaintiff Marian Canedy comparatively negligent in question 3. The Court will do the calculations.

Foreperson

Date