MERCIER V. LAMBROU

9:95-CV-285

Now that you have heard the evidence and the arguments, it becomes 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.

Your final role here is to pass upon and decide the fact 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" for you and instruct you on how to assess it, including how to appraise the credibility or, to put it another way, the believability, of witnesses.

You are not to consider any one instruction that I give you as alone stating the law, but you should take into consideration all of my instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the Court. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions I am in the process of providing, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything other than the evidence in the case.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence calmly and deliberatively and without the slightest trace of sympathy, bias, or prejudice for or against either party.

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. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. 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. In the final analysis, however, it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

Do not assume from anything I have said during the course of the trial that I have any opinion concerning any of the issues in this case. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your own findings as to the facts. I recognize that a judge can have considerable influence upon a jury. If you think that you have gleaned some opinion as to how I think this case should be decided, I want you not to consider it at all. I am merely the judge here. I am passing on the objections; I am passing upon the law. You are the judges of the facts. It is your decision and not mine.

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 which have been established by the testimony and evidence in the case.

The law recognizes two types of evidence--direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. 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. 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.

In a civil action such as this, the burden is on the Plaintiff to prove every essential element of his claim by a "preponderance of the evidence." A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has more convincing force and produces in your minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a "preponderance of the evidence" merely means to prove that the claim is more likely so than not so.

In determining whether any fact in issue has been proved 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. If the proof should fail to establish any essential element of the Plaintiff's claim by a preponderance of the evidence, you should find for the Defendants as to that claim.

In this case, the Plaintiff claims that the Defendant was negligent and that such negligence was a legal cause Plaintiff's injuries. Specifically, he alleges that Defendant Lambrou acted negligently by failing to operate a vehicle with due care.

In order to prevail on his claims, the Plaintiff must prove by a preponderance of the evidence:

1. That the Defendant was "negligent;" and
2. That such negligence was a "legal cause" of injuries sustained by the Plaintiff.

"Negligence" is the failure to use reasonable care. Reasonable care is that degree of care which a reasonably careful person would use under like circumstances. Negligence may consist either in <u>doing</u> something that a reasonably careful person would <u>not</u> do under like circumstances, or in <u>failing</u> to do something that a reasonably careful person <u>would</u> do under like circumstances.

Negligence is a "legal cause" of injury if it directly and in natural and continuous sequence produces, or contributes substantially to producing such injury, so it can reasonably be said that, except for the negligence, the loss, injury, or damage would not have occurred. Negligence may be a legal cause of injury even though it operates in combination with the act of another, some natural cause, or some other cause, if the other cause occurs at the same time as the negligence and the negligence contributes substantially to producing such injury.

Plaintiff alleges that Defendant Lambrou acted negligently by failing to operate his vehicle with due care. I instruct you that under the laws of this state, an automobile driver is required to have his car "under reasonable control so as to avoid injury to other travelers" on the road. "Reasonable control requires that the speed of the car shall be reasonable under the circumstances.

. . . The test of control is the ability to stop quickly and easily, and when this result is not accomplished, an inference is warranted that the car was running too fast, or that a proper effort to control the car was not made." Vermont law also provides that pedestrians and automobile drivers have equal and reciprocal rights in the use of the highway.

A driver must also drive at such a speed that his vehicle can be stopped within the distance that he or she can see ahead. This rule is subject to the circumstances of the time and place, but it has particular application when driving at night or when observation in obscured.

Additionally, Plaintiff bases his negligence claim in part on allegations that Defendant Lambrou failed to comply with a statute designed to protect public safety. Specifically, Plaintiff claims that he failed to comply with the following section of the Motor Vehicles Law:

> section 1053: Every driver of a vehicle shall exercise due care to avoid colliding with any pedestrian upon any roadway, shall give warning by sounding the horn when necessary, and shall exercise proper precaution upon observing any . . . obviously confused or incapacitated person upon a roadway;

If you find that the statute is one designed to protect the public safety and Defendant Lambrou did violate it, then I instruct you that as a matter of law, Plaintiff has made out a prima facie case of negligence against Defendant Lambrou. Put another way, if you find that Defendant Lambrou violated a safety statute, you may presume that he was negligent and did not exercise ordinary care. It is Defendant Lambrou's right, of course, to introduce evidence designed to show that in fact the statute was not violated, or that the violation was reasonable under the circumstances.

In any event, the mere fact that Defendant Lambrou violated a safety statute is not enough to entitle Plaintiff to recovery. Plaintiff is required to show by a preponderance of the evidence that he suffered injury, and that Defendant Lambrou's negligence was a legal cause of the injury. If Defendant Lambrou's violation of a safety statute was a legal cause of injury to the Plaintiff, then you may find for the Plaintiff.

If a preponderance of the evidence does not support the Plaintiff's claim, then your verdict must be for the Defendant. If, however, a preponderance of the evidence does support the Plaintiff's claim, you will then consider the defense raised by the Defendant.

The Defendant contends that the Plaintiff was himself negligent and that such negligence was legal cause of the accident. This is a defensive claim, and the burden of proving it by a preponderance of the evidence is upon the Defendant who must establish:

1. That the Plaintiff was negligent; and
2. That such negligence was a legal cause of the accident.

Defendant also claims that Plaintiff failed to comply with a statute designed to protect public safety. Specifically, Defendant claims that he failed to comply with the following section of the Vermont Motor Vehicles Law:

> section 1055: (a) Where public sidewalks are provided no person may walk along or upon an adjacent roadway.
> (b) Where public sidewalks are not provided any pedestrian walking along and upon a highway shall, when practicable, walk only on the left side of the roadway or its shoulder facing the direction of possible oncoming traffic.

If you find that the statute in question is one designed to protect the public safety and Plaintiff did violate it, then I instruct you that as a matter of law, Defendant has made out a prima facie case of negligence against Plaintiff. Put another way, if you find that Plaintiff violated a safety statute, you may presume that he was negligent and did not exercise ordinary care. It is Plaintiff's right, of course, to introduce evidence designed to show that in fact the statute was not violated, or that the violation was reasonable under the circumstances.

In any event, the mere fact that Plaintiff violated a safety statute is not enough to entitle Defendant to the defense. Defendant is required to show by a preponderance of the evidence that Plaintiff's negligence was a legal cause of the injury. If Plaintiff's violation of a safety statute was a legal cause of the accident, then you may find in favor of the Defendant's defense.

If you find in favor of the Defendant on this defense, that will not prevent recovery by Plaintiff. It only reduces the amount of Plaintiff's recovery. In other words, if you find that the accident was due partly to the fault of the Plaintiff, that his own negligence was, for example, 10% responsible for his own injury, then you would fill in that percentage as your finding on the special verdict form I will explain in a moment. Such a finding would not prevent the Plaintiff from recovering; the Court will merely reduce the Plaintiff's total damages by the percentage that you insert. Of course, by using the number 10% as an example, I do not mean to suggest to you any specific figure at all. If you find that the Plaintiff was negligent, you might find 1% or 99%.

If the evidence proves negligence on the part of the Defendant was a legal cause of injury to the Plaintiff, you should award the Plaintiff an amount of money that will fairly and adequately compensate him for such injury, including any damage the Plaintiff is reasonably certain to experience in the future.
In arriving at the total damages, you must not consider the percentages of negligence but must simply report the total amount of Plaintiff's damages.

In determining Plaintiff's damages you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just, and reasonable compensation for all of Plaintiff's damages, no more and no less. Damages cannot be based on speculation because it is only actual damages--what the law calls compensatory damages--that are recoverable. Compensatory damages, however, are not restricted to actual loss of time or money; they include both the mental and physical aspects of injury, tangible and intangible.

You may consider awarding damages for the following items:

-- financial losses due to any earnings lost in the past;

-- any resulting pain and suffering, and mental anguish or emotional distress experienced in the past, present, or future; and

-- the reasonable value or expense of medical care, past and future.

Plaintiff has a general duty to mitigate his damages. This means that he is required to make all reasonable efforts to improve and alleviate his condition and that failing to do so, he may not recover for conditions that he should have improved or alleviated. You should not include in your award any damages that Plaintiff reasonably could have mitigated.

Of course, the fact that I have given you instructions concerning the issue of the Plaintiff's damages should not be interpreted in any way as an indication that I believe the Plaintiff should, or should not, prevail in this case.

Now, I have said that you must consider all the evidence.

That does not mean, however, that you must accept all the evidence as true or accurate. I instructed you that one of your principal functions during the trial would be to observe the witnesses and to determine their credibility.

You are the sole judges of the credibility, or believability, of witnesses and the weight to be given to their testimony. In weighing the testimony of witnesses, you should consider their relation to the Plaintiff or to the Defendant, their interest, if any, in the outcome of the case, their candor and manner of testifying, their opportunity to gather or acquire knowledge concerning their testimony, their fairness and intelligence, and the extent to which they have been supported or contradicted by other credible evidence. You may accept or reject the testimony of any witness in whole or in part.

The weight of the evidence is not determined by the number of witnesses testifying as to the existence or nonexistence of any fact. You may find that the testimony of a smaller number of witnesses to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

Now, one factor to be considered in assessing credibility is any interest a witness may have in the outcome of the trial. In appraising a witness' credibility, you may take into consideration the fact of the witness' interest. It by no means follows, however, because a person has a substantial interest in the outcome, that the person is not capable of telling a straightforward or truthful story. It is for you to decide to what extent, if at all, an interest in the outcome of the case has affected a witness's testimony.

You may also consider any demonstrated bias, prejudice, or hostility of a witness toward a party in determining the weight to be accorded to that witness's testimony.

A witness may be discredited or "impeached" by contradictory evidence, by a showing that the witness testified falsely concerning a material matter, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present testimony.

You should keep in mind, of course, that a simple mistake by a witness does not necessarily mean that the witness was not telling the truth as he or she remembers it, because people naturally tend to forget some things or remember other things inaccurately. So, if a witness has made a misstatement, you need to consider whether that misstatement was simply an innocent lapse of memory or an intentional falsehood; and that may depend on whether it has to do with an important fact or with only an unimportant detail.

If you believe that any witness has been so impeached, then it is your exclusive province to give the testimony of that witness such credibility or weight, if any, as you may think it deserves.

The rules of evidence provide that if scientific, technical, or other specialized knowledge might assist the jury in understanding the evidence or in determining a fact in issue, witnesses qualified as experts by knowledge, skill, experience, training, or education may testify and state their opinions concerning such matters.

You should consider each expert opinion received in evidence in this case and give it such weight as you may think it deserves. 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 that the opinion is outweighed by other evidence, then you may disregard the opinion entirely.

You have heard a physician testify to statements made by a patient for the purpose of diagnosis or treatment. You may not consider those statements as evidence of the truth of the facts stated; you may consider them only to show the information upon which the physician based his opinions.

When you retire to the jury room, how you go about your business is entirely up to you. I suggest to you, however, that as your first order of business, you select a foreperson whose duty it will be to preside over your deliberations and to be your spokesperson here in court. You can go about selecting your foreperson by vote or whichever way you want to do it.

The foreperson has no greater voice or vote than any other juror, but sees that some order is established in the manner in which you proceed and is your spokesperson in court.

If during your deliberations you should desire to communicate with the Court, please reduce your message or question to writing signed by your foreperson and pass the note to the marshal who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, that with regard to any message or question you might send, you should never state or specify your numerical division at the time.

A form of verdict has been prepared for your convenience. You will take the verdict form into the jury room, and when you have reached unanimous agreement, you will have the foreperson fill in the verdict form, date and sign it. You will then return to the courtroom where the verdict will be read, and each of you will be asked individually if that is your verdict.

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous as to each Defendant.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement if you can do so without violence to individual judgment. Each of 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 you are convinced that it is erroneous. But do not surrender your honest conviction as to the weight or effect of the 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--judges of facts. Your sole interest is to seek the truth from the evidence in the case.