UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

CALEB ROEPE, Plaintiff	:	
v.	:	Civil No. 1:95CV293
RUTLAND HOSPITAL, INC., d/b/a RUTLAND REGIONAL MEDICAL CENTER, and ERIC G. HARTMANN, M.D., Defendants	:	

CHARGE TO THE JURY

General Introduction--Province of the Court and Jury

MEMBERS OF THE JURY:

Plaintiff Caleb Roepe claims he was injured by Dr. Eric Hartmann, an Emergency Department physician, and Rutland Regional Medical Center when it is alleged Dr. Hartmann improperly treated him after a skiing accident. Dr. Hartmann and Rutland Regional Medical Center both deny they were negligent in their care of plaintiff.

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.

Multiple Defendants

Although there are two defendants in this action, it does not follow from that fact alone that if one is liable, both are liable. Each defendant is entitled to a fair consideration of his or its own defense, and is not to be prejudiced by the fact, if it should become a fact, that you find against the other defendant. Unless otherwise stated, all instructions given you govern the case as to each defendant.

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.

Evidence -- 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 -- 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 defendants 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 defendants. 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 plaintiff 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.

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.

Evidence -- Inferences Defined

You are to consider only the evidence in the case. However, 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.

Evidence -- Charts and Summaries

Certain charts and summaries have been shown to you to help explain the facts disclosed by the books, records and other documents which are in evidence in this case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or summaries are only used as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

WITNESSES

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 any witness may be discredited, or as we sometimes say, "impeached," by showing that he or she previously made statements under oath 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.

Opinion Evidence--Expert Witnesses

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. 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.

Witnesses -- Use of Witness Depositions

During the trial of this case, certain testimony has been presented to you by way of video and written depositions, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The sworn testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented through the reading aloud of his or her written deposition, or on a video recording played on a television set. Such testimony, which is different from testimony introduced to show prior inconsistent statements, is entitled to the same consideration, and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present and had testified from the witness stand.

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.

NEGLIGENCE

Negligence -- Malpractice Defined

During the course of this trial, you may have heard the term "malpractice". You are instructed that this is merely a term commonly used to describe simple negligence in the provision of medical care or treatment. In other words, to find the defendants liable for malpractice it is not necessary that you find the defendants committed some grievous, reckless, intentional or even grossly careless act.

Defendants are liable to plaintiff, if plaintiff has shown by a preponderance of the evidence that defendants either lacked the degree of knowledge or skill, or failed to exercise the degree of care ordinarily exercised by a reasonably skillful, careful, and prudent professional engaged in similar practice under the same or similar circumstances whether or not within the state of Vermont, and that plaintiff's injury is the proximate result of this lack of knowledge or skill or failure to exercise the proper degree of care.

In other words, plaintiff must show by a preponderance of the evidence,

1) what the proper standard of care is for similarly situated emergency medicine doctors and

community hospital emergency departments in April, 1993

2) that defendants departed from that standard of care, and

3) that the departure for the appropriate standard of care is the proximate cause of plaintiff's injuries.

Negligence -- Standard of Care

In determining whether or not each defendant was negligent, you must determine whether he or it exercised the degree of skill or care of the ordinary average practitioner of his or her speciality. Outstanding knowledge, skill and care are not required. A mere error in judgment, made in the proper exercise of judgment, is not professional negligence.

In this case, the standard by which the conduct of each defendant is to be judged is whether or not he or it possessed the knowledge and exercised the skill and care of a reasonably careful physician or hospital during the period in question in the same or similar circumstances.

In determining whether defendants have met the applicable standard of care, you are not bound or limited by the standard of care accepted or established with respect to any particular geographical area or locality, but you may consider only whether defendants have acted with due care having in mind the standards and recommended practices and procedures of their profession, and the training, experience and professed degree of skill of the average practitioner of such profession, and all other relevant circumstances.

Negligence -- Conduct of Physician or Hospital Determined at Time of Treatment

In determining whether each defendant was negligent in his or its treatment, you should consider the circumstances as were presented to defendants at the time they acted. The measure of performance is not to be determined by knowledge each acquired after they acted or by the ultimate result. In short, a defendant's actions must be considered in light of the facts and circumstances that existed at the time he or it rendered the treatment.

CAUSATION

Causation -- Proximate Cause

The next element the plaintiff must prove by a preponderance of the evidence is proximate cause. You may not award damages for any injury from which the plaintiff may have suffered or may now be suffering unless he has established by a preponderance of the evidence in the case that such injury was proximately caused by the defendants.

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 Caleb Roepe was proximately caused by some individual other than Dr. Hartmann or the hospital, then you should return a verdict in favor of the defendants.

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.

Causation -- Intervening Cause

As an affirmative defense, Dr. Hartmann and the hospital claim they are not liable for their alleged injury to Mr. Roepe because the allegedly negligent subsequent acts or failure to act of Dr. Fisher were an intervening cause of some or all of plaintiff's injuries.

Under Vermont law, an efficient, intervening cause must be a new and independent force or agency breaking the chain of causal connection between the original wrong and the result. Whether or not the negligence of a third person may or may not amount to such intervening cause turns on the issue of whether or not some negligent act or intervention was something the original actor had a duty to anticipate. If Dr. Hartmann or the hospital was bound to foresee such intervention as a consequence of their own alleged negligence, the defendants cannot properly claim that the actions of Dr. Fisher constituted an efficient, intervening cause which absolves the defendants from liability.

Accordingly, even if (1) you find Dr. Hartmann or the hospital was negligent in their treatment of the plaintiff; and (2) you find that some or all of the plaintiff's injuries were caused by Dr. Fisher's acts, then you may still find defendants liable for plaintiff's injuries if you further find that Dr. Fisher's actions were not an efficient, intervening

cause--that is, that a reasonably prudent person, in the position of Dr. Hartmann or the hospital, would or should have foreseen an act of the kind committed by another individual as a probable consequence of defendants' negligence.

However, if you find that a reasonably prudent person would not have foreseen the actions of the kind committed by Dr. Fisher as a probable consequence of defendants' negligence, then neither Dr. Hartmann nor the hospital is responsible for some or all of plaintiff's injuries and your verdict should be for defendants.

RESPONDEAT SUPERIOR LIABILITY: MASTER-SERVANT

Respondeat Superior

The law in Vermont is that an employer is responsible for the negligent acts of its employees so long as the duties carried out were within the scope of the employee's employment.

The test is whether the employee is acting for the employer in doing what he is doing with the knowledge of the employer, with its assent and by its direction, either expressed or implied. To constitute the relation of employer and employee, it is not necessary that there is a written agreement between them and the relationship can be implied based on the circumstances.

If plaintiff proves by a preponderance of the evidence that Dr. Hartmann was negligent, then you must decide whether he was acting within the scope of his employment at Rutland Regional Medical Center. If you determine Dr. Hartmann was acting with the Hospital's knowledge, assent and at its direction, then you must find the Hospital liable on the theory of respondeat superior.

DAMAGES

Damages -- 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 plaintiff from a preponderance of the evidence in the case in accordance with the other instructions.

Damages -- Generally

In you find defendants were negligent, and that such negligence caused or contributed to plaintiff's injuries, then you should award full, fair and adequate compensation to plaintiff. This award may include compensation for the past and future medical expenses incurred for doctor's bills, x-rays, hospitalization, medicines, medical care and attention, past and future pain and suffering, loss of enjoyment of life, and disfigurement.

Damages -- Medical Expenses

With regard to medical expenses, plaintiff is entitled to recover the reasonable value, not exceeding the cost to him, of any expenses incurred for medical treatment made necessary by the negligence of the defendants. These costs cover all expenses from the time following the negligent act to the present.

Damages -- Pain and Suffering

If you find that negligence by the defendants caused Caleb Rope's injuries, you may include in your verdict an award for the injuries you find he suffered and for conscious pain and suffering which you find to have been caused by the defendants' negligence. You may also include in your verdict an award for the future pain and suffering which you find plaintiff has established he will suffer.

In determining the amount of damages, you may consider the nature and extent of the injury, the suffering caused by the injury, and the duration of that suffering, or its expected duration. You may also consider the age, habits, health and condition of plaintiff before the injury as compared with his condition afterward. You may consider the plaintiff's use of medicine to relieve his pain and also the effects of that medicine.

Damages -- Loss of Enjoyment

You may award plaintiff compensation for the loss or impairment of his capacity to enjoy life as the result of his injuries. Plaintiff is entitled to be compensated for the loss of such pleasures as those that result from participation in exercise, recreation, travel and other pleasures commonly associated with daily activities.

Damages -- Physical Disfigurement

You may award damages to reasonably compensate plaintiff for the physical disfigurement he suffered which was proximately caused by the defendants' negligence.

Damages -- Income Tax Effects of Award

In the event you determine to award plaintiff a sum of money, you are further instructed that the award is not subject to any deductions for federal or state income taxes.

VERDICTS

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.

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.

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 form, 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

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.