

United States District Court
District of Vermont

LAURIE M. MUMLEY, as Administrator :
of the Estate of Randolph Mumley :
v. : Civil No. 1:96-CV-261
LENCO INDUSTRIES, INC. :

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

In this case, plaintiff Laurie Mumley claims the defendant Lenco Industries, Inc. is responsible for her husband Randy Mumley's death in a single-vehicle accident involving an armored truck in which Randy Mumley was riding as a passenger. The defendant does not dispute that the accident occurred, that Randy Mumley was killed in the accident, and that the defendant manufactured the armored truck and sold it to Randy Mumley's employer. The defendant does, however, deny that it is responsible for Randy Mumley's death.

The plaintiff alleges (1) the truck as manufactured and sold by the defendant was defective and unreasonably dangerous; (2) the defendant was negligent in its design and manufacture of the truck; and (3) the defendant breached its implied warranty of merchantability with respect to the truck.

The defendant alleges that the truck was not defective, that the defendant was not negligent in its design and manufacture of the truck, and that the defendant did not breach its implied warranty of merchantability. The defendant

further alleges that if any defect did exist in the truck, it was not a substantial factor in causing the death of Randy Mumley. The defendant further alleges, as affirmative defenses, that (1) poor maintenance of the truck was an efficient, intervening cause of Randy Mumley's death, and (2) Randy Mumley's own negligence was a proximate cause of his death.

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. 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.

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 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.

Respondeat Superior

The defendant in this case is a corporation, Lenco Industries, Inc. A corporation can act only through its officers, employees and agents, and is liable for the acts and omissions of an employee who is acting within the scope of his employment. For the purposes of your deliberations, you should consider the act or omission of any employee of Lenco Industries, to be the act or omission of Lenco Industries.

Strict Products Liability -- Defective Condition

The first theory alleged by the plaintiff is called "strict liability." Laurie Mumley claims the defendant is strictly liable for her husband's injuries because it manufactured and sold an armored truck that was defective or unreasonably dangerous, either by design or manufacture.

To prevail on this claim, the plaintiff must first establish that the defendant Lenco Industries manufactured and sold an armored truck which at the time of its manufacture and sale was in a defective condition unreasonably dangerous to its user, Randy Mumley. A product is in a "defective condition unreasonably dangerous to the user" if it is unreasonably dangerous to the user and may cause physical harm beyond that expected by the ordinary user who has ordinary knowledge of its characteristics in connection with its ordinary use. It is not necessary for you to find the defendant knew or should have known of the product's potential for causing injury.

Second, the plaintiff must show that the armored car was expected to and did reach the user without substantial change in its condition.

Third, the plaintiff must show that the defective condition, if any, was a substantial factor in causing Randy Mumley's death. You should keep in mind that the plaintiff does not argue, and need not prove, that a defect in the truck caused this accident. Rather, the plaintiff claims that the alleged defects caused the truck to break apart during the accident and

resulted in the death of Randy Mumley. The defendant denies the existence of any defect, and further claims that the alleged defects were not a substantial factor in causing Randy Mumley's death because he was killed by injuries suffered inside the cab of the truck. It is for you to determine, based on the evidence presented in the case, whether the defects in the truck, if any, were a substantial factor in causing the death of Randy Mumley.

You should be aware that, as well as denying that the alleged defects were a substantial factor in causing Randy Mumley's death, the defendant also raises an affirmative defense of efficient, intervening cause. I will instruct you on the law of that defense in a moment; but for now, I instruct you that if you find in favor of the defendant on the affirmative defense of efficient, intervening cause, you must find against the plaintiff on this claim.

You should also keep in mind that the law does not create absolute liability on the defendant Lenco Industries as the manufacturer and seller of the armored truck. The mere fact that an accident has occurred does not automatically mean the defendant is liable. However, the defendant was required to deliver a product which was free from defective and unreasonably dangerous conditions.

Negligence

As a second theory upon which to hold the defendant liable, the plaintiff alleges the defendant's negligence caused her husband's death. The plaintiff alleges that the defendant negligently designed the truck in a way that made it susceptible to corrosion, and negligently used defective welds in the manufacture of the truck. To prevail on this claim, the plaintiff must prove: (1) the defendant was negligent, and (2) the defendant's negligence was a proximate cause of Randy Mumley's death.

"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, the defendant has a duty to design and manufacture an armored truck which is reasonably safe for its intended purpose and is free from hidden defects which may foreseeably cause harm to its users.

If you find the defendant breached its duty, you must also consider whether that breach was a proximate cause of Randy Mumley's death. 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.

The plaintiff need not show that the defendant's negligence was the only proximate cause of Randy Mumley's death.

The law recognizes that there may be more than one proximate cause of an injury or damage. 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. If you find that the defendant's negligence, if any, was not a proximate cause of Randy Mumley's death, then you should return a verdict in favor of the defendant on this claim.

Again, you should be aware that, with respect to plaintiff's negligence claim, the defendant raises an affirmative defense of efficient, intervening cause. I will instruct you on the law of that defense in a moment; but for now, I instruct you that if you find in favor of the defendant on the affirmative defense of efficient, intervening cause, you must find against the plaintiff on this claim.

Breach of Implied Warranty of Merchantability

The third theory by which plaintiffs seek to hold the defendant liable is called "breach of the implied warranty of merchantability." The implied warranty of merchantability is a warranty imposed by law on sellers of goods, meaning that when goods are sold, they must be of merchantable quality -- that is, of fair quality and reasonably safe for the normal use for which the product is made and sold. In other words, goods when sold must be fit for the ordinary purposes for which the goods are used to be considered "merchantable." The ultimate user of the product must use ordinary care, but is not obligated to observe latent defects.

The warranty is intended to protect the immediate buyer and also any ultimate user of the goods who is likely to be injured by the use of an unfit product. In this case, Randy Mumley was the "ultimate user" of the armored truck that was manufactured and sold by the defendant.

If you find that the defendant did not breach its implied warranty of merchantability, that is, if you find that the armored truck at issue was reasonably fit for the ordinary purpose for which it was intended, then you must find for the defendants on this claim.

If, however, you find the defendant breached its implied warranty of merchantability, then you must consider whether that breach was a proximate cause of Randy Mumley's death. In so doing, you should refer to the definition of

"proximate cause" that I have already given you with respect to the negligence claim.

Efficient, Intervening Cause

As a defense to plaintiff's claims, the defendant maintains that another factor or force caused Randy Mumley's death. Specifically, the defendant alleges that poor maintenance of the vehicle intervened between the defendant's alleged acts or omissions in manufacturing and designing the vehicle and the accident that resulted in Randy Mumley's death. This is an affirmative defense, known as "efficient, intervening cause," which the defendant has the burden of proving by a preponderance of the evidence.

The efficient, intervening cause concept is applicable where, notwithstanding an original wrongful act, a new act occurs which becomes the proximate cause of the injury. The alleged poor maintenance of the vehicle is an efficient, intervening cause if it is a new and independent force that breaks the chain of causal connection between the original wrong and the ultimate result of Randy Mumley's death. Poor maintenance of the vehicle is not an intervening cause if the defendant, as a reasonable manufacturer of armored trucks, should have foreseen poor maintenance. It is for you to determine whether the defendant should have foreseen the alleged poor maintenance of the vehicle, and whether poor maintenance of the vehicle is an efficient, intervening cause of Randy Mumley's death.

If you find (1) poor maintenance of the vehicle was a proximate cause of Randy Mumley's death and (2) poor maintenance

of the vehicle was an efficient, intervening cause of Randy Mumley's death in that it was not foreseeable, then the defendant is not responsible for Randy Mumley's death and your verdict should be for the defendant on all three claims.

Comparative Negligence

As a second affirmative defense, defendant Lenco Industries claims Randy Mumley was comparatively negligent. If you find that a preponderance of the evidence supports the plaintiff's claims of strict liability and/or negligence, then you must consider the comparative negligence defense raised by the defendant.

To prevail on this defense, the defendant must prove each of the following elements by a preponderance of the evidence: First, Randy Mumley was negligent; and second, Randy Mumley's negligence was a proximate cause of his death.

As you can see, these elements mirror those which you have already considered when determining whether Lenco Industries was negligent. Accordingly, in making your determination on the issue of comparative negligence, you should refer to the definitions of "negligence" and "proximate cause" which I have already given you. With respect to the definition of "duty," I instruct you that Randy Mumley had a duty to exercise reasonable care for his own safety.

If you find that Randy Mumley was negligent and that his negligence was a proximate cause of his death, then you must assess the percentage by which his negligence contributed to his death. You should indicate this percentage in the appropriate place on the special verdict form, which I will explain in a moment. In other words, if you find that Randy Mumley's death

was due partly to his own negligence, then you would fill in the percentage as your finding on the special verdict form. The Court will reduce the plaintiff's total damages by the percentage that you insert.

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 in favor of the plaintiff and against the defendant on one or more of plaintiff's claims of strict liability, negligence, or breach of implied warranty, then you must consider the issue of 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.

If the defendant's wrongful act or negligence caused the death of Randy Mumley, then the plaintiff, as his surviving spouse, is entitled under the law to recover such damages as you find are just, with reference to the pecuniary injuries that the plaintiff has suffered as a result of her husband's death. The term "pecuniary injuries" does not limit the plaintiff's recovery to purely economic losses. In determining the damages suffered by the plaintiff, if any, as a result of her husband's death, you should consider the following elements:

(1) funeral expenses incurred by the plaintiff as a result of Randy Mumley's death;

(2) financial loss, past and future, suffered by the plaintiff as a result of the loss of her husband's support and services;

In evaluating the plaintiff's past and future loss of support and services, you should consider the amount of Randy Mumley's probable income that he would have contributed to the

plaintiff's support over the course of his anticipated working career. In determining any future loss, you may consider the joint life expectancy of the plaintiff and Randy Mumley. The parties have stipulated that Randy Mumley's life expectancy was 44 years at the time of his death, and that the plaintiff's life expectancy is 48 years at the present time.

(3) non-economic damages.

Along with her financial losses, the plaintiff may recover an amount for the non-economic damages she suffered as a result of the death of her husband. These damages include the loss of her husband's comfort and companionship, and the loss of his care, nurture and protection. Obviously, these non-economic damages are not subject to exact computation. It is for you to decide what amount, if any, is fair and just as compensation for the plaintiff's loss. Among the types of evidence you may consider in reaching your decision are the physical, emotional, and psychological relationship between Randy and Laurie Mumley, the harmony of that relationship, and the extent to which they shared interests and activities. Again, in evaluating any future loss, you may consider the joint life expectancy of the plaintiff and Randy Mumley.

The plaintiff has only one action to recover for the death of her husband. Whatever she is entitled to recover in the future on account of her husband's death must be included in the amount she recovers now.

If you have found Randy Mumley comparatively negligent, you should not reduce your damages by any percentage of responsibility that you assigned to Randy Mumley. The Court will perform that calculation.

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.

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 the 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 those damages are not subject to income tax and therefore 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.]

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 court security officer. 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.