

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Ralph W. Jones,	:	
Plaintiff,	:	
	:	
v.	:	No. 2:96-CV-400
	:	
Michael O'Neil, Brian Brogioli,	:	
Defendants.	:	

JURY CHARGE

Members of the Jury:

The Plaintiff in this case is Ralph Jones, represented by Mitchell Pearl. The Defendants are Michael O'Neil and Brian Brogioli, represented by Timothy Tomasi and Joseph Winn.

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.

As I mentioned at the beginning of the trial, Mr. Jones has brought his claim under the legal theory of violation of his civil rights. The Defendants deny these claims.

The theory requires proof of different elements. Later I will instruct you on the theory. First, I would like to give you some general instructions.

Role of the Court, the Jury and Counsel

You have listened carefully to the testimony that has been presented to you. Now you must pass upon and decide the fact issues of this case. You are the sole and exclusive judge 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 the witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and

impartiality. You should appraise the evidence deliberately and without the slightest trace of sympathy, bias or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

Evidence in the Case

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. 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, you must accept the stipulation and regard that fact as proved.

As I mentioned, 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.

The evidence includes any stipulated facts, the sworn testimony of the witnesses and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

Also, during the course of the trial, I may have occasionally made comments to the lawyers, asked questions of a witness, or admonished a witness concerning the manner in which he or she responded to the questions of counsel. Do not assume from anything I have said 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.

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.

Direct and Circumstantial Evidence

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.

The following anecdote is a simple example of circumstantial evidence. Assume that when you came into the courthouse this morning the sun was shining and

it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella that was dripping wet. Then a few minutes later another person also entered with a wet umbrella. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts which I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining. That is all there is to circumstantial evidence.

Such evidence, if believed, is of no less value than direct evidence. As a general rule, 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.

Burden of Proof

This is a civil case and as such Mr. Jones has the burden of proving every element of his claims by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. In other words, 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. 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 after considering all of the testimony you are satisfied that Mr. Jones has carried his burden of proof on each element of his claim, then you must find for Mr. Jones on that claim. If, after such consideration you find the testimony of both parties to be in balance or equally probable, then Mr. Jones has failed to sustain his burden and you must find for the Defendants.

Witness Credibility

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 that tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive

and state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to Mr. Jones or the Defendants; any interest he or she may have in the outcome of the case; 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 cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and people naturally tend to forget some things or remember other things inaccurately. 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 should 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. The test is not which side

brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

A witness may be discredited or impeached by contradictory evidence; or 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.

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

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

Expert Witness

You have heard expert medical testimony in this case. An expert is allowed to express her opinion on those matters about which she has special knowledge and training. Expert testimony is presented to you on the theory that someone who is experienced in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing the expert's testimony, you may consider the expert's qualifications, his or her opinions, his or her reasons for testifying, as well as all of the other considerations that normally apply when you are deciding whether or not to believe a witness's testimony. You may give the expert testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept this witness's testimony merely because he is an expert. Nor should you substitute it for your own reason, judgment, and common sense. The determination of the facts in this case rests solely with you.

Prior Conviction Testimony

The testimony of a witness may be discredited or impeached by evidence showing that the witness has been convicted of a crime. Prior conviction of a crime is one of the circumstances that you may consider in determining the credibility of that witness. It is the sole and exclusive right of the jury to determine the weight to be given any prior conviction as impeachment and the weight to be given to the testimony of anyone who has previously been convicted of a crime.

It is now my duty to give you instructions on the legal theories that apply to this case.

Civil Rights Claim – 42 U.S.C. § 1983

Mr. Jones asserts that the Defendants violated his civil rights under the Untied

States Constitution. A person may sue for an award of money damages against anyone who, under color of any state law or custom, violates his or her rights under the Constitution of the United States. The constitutional right that Mr. Jones claims the Defendants violated is the constitutional right to be free from the use of excessive force during a lawful arrest. Under the Constitution, a citizen has the right not to be subjected to unreasonable force while being arrested by a law enforcement officer even though the arrest is otherwise proper.

As I mentioned earlier, Mr. Jones has the burden of proving each and every element of his civil rights claim by a preponderance of the evidence. If you find that any one of the elements of Mr. Jones's claim has not been proven by a preponderance of the evidence, you must return a verdict for the defendants.

To establish a claim under civil rights law, Mr. Jones must prove each of the following elements by a preponderance of the evidence:

First, that the defendants acted under color of law and authority of the State of Vermont;

Second, that this conduct deprived Mr. Jones's right to be free from unreasonable force; and

Third, that the Defendants' acts were the proximate cause of the injuries and consequent damages sustained by Mr. Jones.

I shall now examine each of the three elements in greater detail.

In this case, the parties have agreed that the Defendants acted under color of

state law and you must accept that fact as proven.

The second element of Mr. Jones's claims is that he was deprived of a federal right by the Defendants. In order for Mr. Jones to establish the second element, he must show the following by a preponderance of the evidence: first, that the defendants committed the acts alleged by Mr. Jones; second, that those acts caused Mr. Jones to suffer the loss of a right under the United States Constitution; and third, that, in performing the acts alleged, the Defendants acted intentionally or recklessly.

An act is intentional if it is done knowingly, that it is done voluntarily and deliberately and not because of mistake, accident, or other innocent reason. An act is reckless if done in conscious disregard of its known probable consequences.

The Fourth Amendment to the United States Constitution protects persons from being subjected to excessive force while being arrested. In other words, a law enforcement officer may only employ the amount of force necessary under the circumstances to make the arrest. Every person has the constitutional right not to be subjected to unreasonable or excessive force while being arrested by law enforcement officers, even though such arrest is otherwise proper. That being said, a law enforcement officer has the right to use such force as is necessary under the circumstances to complete the arrest.

Mr. Jones claims that he was subjected to excessive force by the Defendants when they arrested him. You must determine whether the force used in making the arrest was unnecessary, unreasonable, or excessively violent. The force used in

making the arrest was unnecessary, unreasonable or excessively violent if the Defendants exceeded that degree of force that a reasonable and prudent law enforcement officer would have applied in making the arrest under the same circumstances. It is up to you to determine the degree of force that a reasonable and prudent officer would have applied in taking Mr. Jones into custody under the circumstances of this case. If you find that the amount of force used was greater than a reasonable and prudent law enforcement officer would have employed, Mr. Jones has established the element of excessive force.

Some of the things you may want to consider in determining whether the Defendants used excessive force are the extent of the injury suffered, the need for the application of force, the relationship between the need and the amount of force used, the threat reasonable perceived by the Defendants, whether Mr. Jones actively resisted arrest, and any efforts made by the Defendants to temper the severity of any force they might have used. Injuries which result from, for example, an officer's use of force to overcome resistance to being taken into custody do not involve constitutionally protected interests.

The reasonableness of a particular use of force must be judged from the perspective of a reasonable officer at the scene, rather than with the 20/20 vision of hindsight. The reasonableness of a particular use of force must allow for the fact that police officers are often forced to make split-second judgments – in circumstances that are tense, uncertain, and rapidly evolving – about the amount of force that is necessary

in a particular situation.

The third element that Mr. Jones must prove is that the Defendants' acts were a proximate cause of the injuries sustained by Mr. Jones. Proximate cause means that there must be a sufficient causal connection between the act or omission of a Defendant and any injury or damage sustained by Mr. Jones. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of the defendant's act or omission. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause. This does not mean that the act or omission must be the only cause. On the contrary, many things or factors, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage and in such a case each may be a proximate cause.

Finally, liability for a civil rights violation must be assessed against each Defendant based upon his own individual conduct. So, to hold a Defendant liable under the civil rights laws, you must determine that Mr. Jones has proven all three elements of his claim against that individual Defendant by a preponderance of the evidence.

Damages

If you decide for the Defendants on the question of liability, you will have no occasion to consider the question of damages.

The fact that I am about to 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 find in favor of Mr. Jones by a preponderance of the evidence in the case in accordance with the other instructions.

In reaching your verdict in this case, you must carefully consider the evidence presented against the Defendants. You may assess damages against the Defendants only if you find the Defendants liable under the claim I have outlined above.

Please keep in mind the following general principles as you make your deliberations. In making any award of damages, it is not necessary that Mr. Jones prove the exact amount of his damages with absolute certainty. Nevertheless, the damages you award, if you do so, may not be based on sympathy, speculation, or guesswork, because it is only actual damages which are recoverable. Remember that Mr. Jones has the burden of proving damages by a preponderance of the evidence.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

Compensatory Damages

If you should find for Mr. Jones, then you must determine an amount that is fair compensation for Mr. Jones's actual damages. These damages are called compensatory damages. The purpose of compensatory damages is to make Mr. Jones whole – that is, to compensate him for any damage that he suffered. The award is intended to put Mr. Jones in the same position he would have been in had the Defendants' actions not occurred.

You may award compensatory damages only for injuries that Mr. Jones proves by a preponderance of the evidence were caused by the Defendants' allegedly wrongful conduct. The damages that you award must be fair compensation for all of Mr. Jones's damages, no more and no less. You should not award compensatory damages for speculative injuries, but only for those injuries that Mr. Jones has actually suffered or that he is reasonably likely to suffer in the future.

You shall award damages only for those injuries that you find that Mr. Jones has proven by a preponderance of the evidence, and which are the direct result of unlawful conduct by the Defendants. That is, you must award actual damages for only those injuries that are a direct result of conduct by the Defendants which violated Mr. Jones's federal rights.

Keep in mind, however, that compensatory damages are not limited to expenses that Mr. Jones may have directly incurred because of his injury. If you find for Mr. Jones, he is entitled to compensatory damages for any medical expenses and other

costs, as well as for any physical or emotional injury, pain and suffering, mental anguish, and discomfort that he has suffered because of the Defendants' conduct. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

If you find for Mr. Jones, your award of compensatory damages should be guided by dispassionate common sense. Actual damages must not be based on speculation or sympathy, but on evidence presented at trial. Computing damages may be difficult, but you must not let that difficulty lead you to engage in arbitrary guesswork. On the other hand, the law does not require that Mr. Jones prove the amount of his losses to a mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

Punitive Damages

In addition to compensatory damages, the law permits the jury to award punitive damages, which punish the wrongdoer for some extraordinary misconduct and serve as an example or warning to others not to engage in such conduct.

If you find from a preponderance of the evidence in the case that Mr. Jones is entitled to a verdict for compensatory damages, and you further find that the act or omission of the Defendants that proximately caused actual damage to the plaintiff was

maliciously, or wantonly, or oppressively done, then you may, in your discretion, add to the award amount of compensatory damages such amounts you shall unanimously agree to be proper as punitive damages.

An act or failure to act is “maliciously” done if prompted or accompanied by ill will, or spite, or grudge, either toward the injured person individually or toward all persons in one or more groups or categories of which the injured person is a member.

An act or failure to act is “wantonly” done if done in reckless or callous disregard of, or indifference to, the rights of one or more persons, including the injured person.

An act or failure to act is “oppressively” done if done in a way or manner that injures or damages or otherwise violates the rights of another person with unnecessary harshness or severity, as by misuse or abuse of authority or power, or by taking advantage of some weakness, disability, or misfortune of another person.

Punitive damages are not mandatory, even when such damages can be awarded. Whether or not to make an award of punitive damages is a matter exclusively within the province of the jury, if you unanimously find, from a preponderance of the evidence in the case that the conduct which proximately caused actual damage to Mr. Jones was maliciously, wantonly, or oppressively done. But you must bear in mind that such extraordinary damages may be allowed only if you should first unanimously award Mr. Jones a verdict for compensatory damages.

The law does not require you to award punitive damages; however, if you

decide to award them, you must use sound reason in setting the amount of the damages. The amount of an award of punitive damages must not reflect bias, prejudice, or sympathy toward any party. The amount can be as large as you believe necessary to fulfill the purposes of punitive damages. If you decide to award punitive damages, you must assess each Defendant individually based on his own conduct.

Unanimous Verdict

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

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 jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – the judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

Closing Instructions

You will select a 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.

Each of the interrogatories or questions on the special verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

Communications with the Court

If it becomes necessary during your deliberations to communicate with the Court, you may send a note signed by your foreperson through the Courtroom Security Officer. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching the merits of the case otherwise than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person – not even to the

Court – how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

Jury's Responsibility

Finally, 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 an intimation as to what verdict I think you should reach. What the verdict shall be is your sole and exclusive duty and responsibility.