

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

ESTATE OF JOHN ROSCILLO by	:	
NANCY ROSCILLO, ADMINISTRATRIX	:	
and NANCY ROSCILLO	:	
	:	
v.	:	CIVIL NO. 1:97CV151
	:	
STRATTON CORPORATION	:	
_____	:	

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

Now that you have heard the evidence and the 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 you 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 plaintiffs or defense counsel and that 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.

Evidence in the Case

Statements and arguments of counsel are not evidence in the case. When, however, 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 the plaintiff or defense counsel has asked a witness a question which contains an assertion of fact, you may not consider the assertion of fact in the question as evidence of that fact. These assertions of fact 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 it 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 lead the jury to draw from facts which have been established by the evidence in the case.

Credibility of Witnesses -- Discrepancies in Testimony

You, as jurors, are the sole judges of the credibility of the witnesses, including expert 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 cause the jury 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 one witness, or 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.

Written and Video Depositions

During the trial of this case, certain testimony has been presented to you by way of a written deposition and a video deposition, 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 testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented in writing under oath or on a video recording played on a television set. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present and testified from the witness stand.

Verdict -- Unanimous -- Duty to Deliberate

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.

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 a plaintiff's claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a claim 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.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

Respondeat Superior

The defendant in this case is a corporation, Stratton Corporation. A corporation can only act 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 or her employment. For the purposes of your deliberations, you should consider the act or omission of an employee of Stratton Corporation to be the act or omission of the Stratton Corporation itself.

Negligence

The Estate of John Roscillo is proceeding against Stratton Corporation on a theory of negligence. To prevail on its negligence claim, the plaintiff must prove both of the following by a preponderance of the evidence: First, that Stratton Corporation was negligent; and second, that Stratton Corporation's negligence was a proximate or legal cause of the damage sustained by the plaintiff.

The mere fact that an accident happened standing alone, does not permit the jury to draw an inference that the accident was caused by anyone's negligence. "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 plaintiff alleges he was a passenger of the defendant, which was operating a bus. I instruct you as a matter of law that a business which operates a bus under these circumstances is referred to as a common carrier. This relationship requires the defendant to exercise the utmost care to see that no injury occurs to its passengers. Keep in mind, however, that a carrier is not an insurer of its

passengers. Its liability, if any, for injuries to its passengers is based on a theory of negligence, and the plaintiff bears the burden of proving by a preponderance of the evidence that the defendant actually breached its duty of care.

Thus, you should find defendant Stratton Corporation liable for plaintiff's injuries if you determine that the defendant failed to exercise the highest degree of care which is required. In determining whether the defendant was negligent, conduct of its employees must be judged by the situation then existing, measuring their care by what careful persons exercising the highest degree of care for the safety of passengers would have done under similar circumstances. If you find that the conduct of the defendant measured up to that standard, then it was not negligent and you must return a verdict for the defendant against the plaintiff. If, on the other hand, you find that the defendant's conduct did not measure up to that standard, then it was negligence and you must go on to consider the question of proximate cause.

Proximate Cause

You may not award damages for any injury from which John Roscillo may have suffered unless he has established by a preponderance of the evidence in the case that such injury was proximately caused by the accident in question.

An injury or damage is proximately caused by an act, or a failure to act, whenever it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the injury or damage, and that the injury or damage was either a direct result of a reasonably probable consequence of the act or omission. If you find that any injury sustained by John Roscillo was proximately caused by some individual or entity other than Stratton Corporation, then you should return a verdict in favor of the defendant.

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

Comparative Negligence

As part of its defense to this suit, the defendant has raised the defense of comparative negligence. Defendant Stratton Corporation claims John Roscillo was himself negligent and that his own negligence, if any, was the cause of his injuries.

Just as the plaintiff bore the burden of proof in showing that the defendant was negligent, so here the defendant bears the burden of proving by a preponderance of the evidence that the plaintiff was also negligent. The elements of the defendant's claim are similar to those of the plaintiff's claim of negligence. Thus, before you may conclude that the plaintiff was contributory negligent, you must be persuaded by a preponderance of the evidence that the plaintiff had himself a duty to act reasonably and to exercise the due care which a prudent person would exercise under the same or similar circumstances, that he breached that duty, and that he suffered injury and that his negligence, if any, was a proximate cause of the injuries which he suffered.

Should you conclude that both the defendant and the plaintiff were negligent, and that the negligence of both contributed to the injuries suffered by the plaintiff, then it will be your job to ascribe a percentage of responsibility to each of the parties. That is, you must determine what percentage of the accident is a result of the defendant's

negligence and what percentage is a result of the plaintiff's.
Those percentages must add up to 100 percent.

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

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

Plaintiff must prove, by a preponderance of the evidence, that the defendant's negligence was a proximate cause of John Roscillo's injuries. When this Court speaks of the proximate cause of an injury, it means that cause, which in a natural and continuous sequence, unbroken by an efficient intervening cause, produces the injury and without which the result would not have occurred.

Damage is proximately caused by an act, or 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 plaintiffs also must prove, by a preponderance of the evidence, the amount of damages to which he or she is entitled. You may include only the damages a plaintiff has

proven with reasonable certainty. You may not award speculative damages or damages based on sympathy.

Personal Injury Damages

You should consider the following elements of damage as to John Roscillo.

A. General personal injury damages: Any bodily injury sustained by the plaintiff and any resulting pain and suffering, disability or physical impairment, disfigurement, mental anguish, inconvenience, loss of ability to engage in recreational activities, and loss of capacity for the enjoyment of life experienced in the past. There is no exact standard for measuring such damage. The amount should be fair and just in light of the evidence.

B. Medical Expenses: The reasonable value or expense of hospitalization and medical and nursing care and treatment necessarily or reasonably obtained by the plaintiff in the past.

In this case, the plaintiff claims that medical expenses incurred by Mr. Roscillo are \$15,988.97.

Loss of Consortium

If you should find that John Roscillo is entitled to recover damages, you must also consider the damages, if any, sustained by his wife. As plaintiff's spouse, she is entitled to recover for the loss of companionship she has suffered up to the time of his death due to the injuries sustained by her husband. In computing this amount, if any, you should consider the impact of the injury on all aspects of the plaintiffs' marital relationship, including any loss of his services, comfort, society and attentions in the past.

Taxes

If you award damages to the plaintiffs, that sum will not be subject to federal and state taxation. Therefore, you should not add any sum to your verdict as compensation for income taxes.

Election of Foreperson

I will select _____ to act as your foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in court.

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

[Form of special verdict read.]

You will note that each of these interrogatories or questions calls for a "Yes" or "No" answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

Verdict Forms - Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

Conclusion

To return a verdict, all jurors must agree to the verdict. In other words, your verdict must be unanimous.

Upon retiring to the jury room your foreperson will preside over your deliberations and be your spokesperson here in Court.

When you have reached a unanimous verdict, your foreperson should sign and date the verdict form.

If, during your deliberations, you should desire to communicate with the Court, please reduce your message or question to writing, signed by the foreperson, and pass the note to the Marshal. He will then bring the message to my attention. I will then respond as promptly as possible, either in writing or by having you return to the courtroom so that I may address your question orally. I caution you, with regard to any message or question you might send, that you should never specify where you are in your deliberations or your numerical division, if any, at the time.