

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

WILLIAM B. WASHINGTON II	:	
Plaintiff,	:	
	:	NO. 2:97-CV-174
v.	:	
	:	
THOMAS JACQUES and	:	
JOHN UNDERHILL,	:	
Defendants.	:	

JURY INSTRUCTIONS

The Plaintiff in this case is William Washington, represented by Thomas Carlson and Lisa Shelkrot. The defendants are Thomas Jacques and John Underhill, represented by Assistant Attorney General 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. Washington asserts that the Vermont State Troopers, defendants Thomas Jacques and John Underhill violated his civil rights under the federal Constitution. He brings this claim under the civil rights law which provides a remedy for individuals who have been deprived of their constitutional or statutory rights under color of state law. The plaintiff also brought claims of assault and battery against the defendants. The plaintiff asserts that excessive force was used against him by the defendants, and the defendants deny this claim.

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the

credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" and instruct you on how to assess it, including how to judge the credibility 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 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 deliberatively 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

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits admitted into evidence, and all the facts admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses -- something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts.

You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact. Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

CREDIBILITY OF WITNESSES

You as jurors are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness since you may accept or reject the testimony of any witness in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any; the extent to which other evidence in the case supports or contradicts their testimony; and the reasonableness of

their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of the side offering the most witnesses. 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 may well hear or see things differently, or may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

EXPERT WITNESSES

You have heard expert testimony. An expert is allowed to express an opinion on those matters about which the expert 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, opinions, reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether to believe a witness' testimony. You may give the expert's testimony whatever weight, if any, you find it deserves in light of all the evidence in this case. You should not, however, accept the expert's testimony merely because he or she 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.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record. Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence. When the attorneys for the plaintiff and the defendants stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

During the course of the trial I occasionally asked questions of a witness in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on matters related to my questions.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely 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 you feel are justified in light of your experiences.

TESTIMONY OF LAW ENFORCEMENT OFFICERS

Law enforcement officers have testified in this case. The testimony of a law enforcement officer should be considered by you just as any other witness in the case, and in evaluating his or her credibility you should use the same guidelines which you apply to the testimony of any witness. You should not give either greater or lesser weight to the testimony of a witness merely because he or she is a law enforcement officer.

BURDEN OF PROOF

This is a civil case and as such the plaintiff has the burden of proving every element of his claim 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. Preponderance of the evidence is evidence that is more convincing 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" means proof that the claim is more likely so than not so. In determining whether any fact at issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

If, after considering all of the evidence, you are satisfied that the plaintiff has carried his burden of proof on each element of his claims, then you must find for the plaintiff on that claim. If, after such consideration, you find the testimony of both parties

to be in balance or equally probable, then the plaintiff has failed to sustain his burden and you must find for the defendant(s).

Plaintiff's civil rights claim

42 U.S.C. 1983 -- EXCESSIVE FORCE

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

In this case, Mr. Washington claims damages alleged to have been sustained by him as the result of a deprivation under color of state law of a right secured by the Constitution of the United States and by a federal statute protecting the civil rights of all persons within the United States.

Specifically, the plaintiff alleges that while the defendants were acting under color of the authority of the State of Vermont as members of the Vermont State Police, they subjected him to a deprivation of his rights and privileges to be free from the excessive use of force during the course of an arrest.

Under the United States Constitution, a person has the right to be free from the use of unreasonable force when being arrested, even if such arrest is otherwise made in accordance with due process of law. Section 1983 of Title 42 of the United States Code provides that the plaintiff may seek damages in this Court against any person or persons who, under color of state law or custom, subject him to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution of the United States.

Therefore, in order to prove his claim, the burden is on the plaintiff to establish, by a preponderance of the evidence, each of the following elements:

(1) that at the time of the incident, both defendants were acting under color of the authority of the State of Vermont.

The Court finds as a fact that at the time of the arrest in this case, the defendants were acting under color of state law. Consequently, the plaintiff has met the first element of his claim.

(2) that the defendants performed acts that deprived Mr. Washington of one or more of his constitutional rights, as defined and explained by the Court in these instructions, by using excessive force against Plaintiff during the course of the arrest.

(3) that the defendants' acts were the proximate cause of damages sustained by Plaintiff.

Personal involvement of defendants in the alleged constitutional deprivations is a prerequisite to an award of damages under Section 1983. You may not hold the defendants liable for the actions of another. It is the plaintiff's burden to prove that the defendants had personal responsibility for the alleged constitutional deprivation in order for that particular defendant to be liable for damages. Further, a violation of a state law or departmental regulation does not necessarily constitute a violation of the federal Constitution.

EXCESSIVE FORCE

Every person has the right not to be subjected to unreasonable or excessive force while being arrested. A law enforcement official may only employ the amount of force necessary under the circumstances to make the arrest.

The plaintiff claims that he was subjected to excessive force by the defendants when the defendants arrested him. You first must determine whether the defendants

committed the alleged acts. To determine whether the acts caused the plaintiff to suffer the loss of a federal right, you must determine whether the amount of force used to effect the arrest was that which a reasonable officer would have employed in effecting the arrest under similar circumstances. In making this determination, you may take into account the severity of the crime at issue, whether the plaintiff posed an immediate threat to the safety of the defendants or others, and whether the plaintiff actively resisted arrest or attempted to evade arrest by flight.

You do not have to determine whether the defendants had less intrusive alternatives available. The defendants are only required to act reasonably. If you find that the amount of force used was greater than a reasonable person would have employed, the plaintiff will have established the claim of loss of a federal right.

PROXIMATE CAUSE

If you find defendants used excessive or unreasonable force in arresting the plaintiff, you must proceed to consider the question of whether the defendants' acts were the proximate cause of damages to the plaintiff.

Proximate cause means there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage to the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or causing injury. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by the 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.

ASSAULT

Mr. Washington further claims damages alleged to have been sustained by him as the result of an assault by the defendants.

An assault occurs when a person is put in imminent apprehension of an offensive or harmful contact. For the defendants to be liable to the plaintiff for an assault, you must find, first, that the defendants made an intentional and unlawful threat to injure the plaintiff; second, that the defendants had an apparent ability to commit injury to the plaintiff; and third, that the defendants made a display of force that put the plaintiff in apprehension of immediate bodily injury.

I further instruct you that a police officer lawfully taking a person into custody is privileged to commit an assault provided that the force threatened is reasonably necessary for the officer to take a person into custody. An officer is therefore liable for injury or damages from the threat of force only when the force threatened is disproportionate to the situation as the officer viewed it and which the police officer knows is disproportionate in light of the circumstances. Thus, for the plaintiff to recover damages from the defendants, you must find that the defendants intentionally threatened force in excess of what was reasonably necessary to take a person into custody

BATTERY

Mr. Washington further claims damages alleged to have been sustained by him as the result of a battery committed by the defendants.

Battery is the unlawful or unwarranted use of force upon another.

A person is liable for battery if:

1. he intends to cause a harmful or offensive contact with another; and
- 2 a harmful contact with another results.

As with assault, a police officer is privileged to commit battery when the battery consists of force reasonably necessary to lawfully take a person into custody.

Therefore, you may only find the defendants liable for battery to the plaintiff if you find the defendants intended to inflict, and did inflict, a harmful and unwarranted contact upon the plaintiff and that such contact was in excess of the appropriate and reasonable force that an officer would use to lawfully take a person into custody.

DAMAGES

The fact that I am about to instruct you as to the proper measure of damages does not reflect any view of mine as to which party is entitled to your verdict.

Instructions as to the measure of damages are given for your guidance in the event you find in favor of the plaintiff by a preponderance of the evidence in accordance with the other instructions.

In reaching your verdict, carefully consider the evidence presented against the defendants. You may assess damages against the defendants only if you find the defendants are liable under the civil rights claim or the assault and battery claims 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 the plaintiff prove the exact amount of his damages with absolute certainty. Nevertheless, any damages you award may not be based on sympathy, speculation, or guesswork because only actual damages are recoverable. Remember that the Plaintiff 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 any or all defendants are liable for a civil rights violation under section 1983 or for the assault or battery allegations, then you must determine an amount that is fair compensation for the plaintiff's damages.

You may award compensatory damages for emotional pain and suffering if you find that the plaintiff has proven by a preponderance of the evidence that such injuries were caused by defendants' allegedly wrongful 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.

An injury or harm to Mr. Washington that is not the result of unlawful conduct does not entitle him to damages. Similarly, Mr. Washington is not entitled to damages for conduct that does not cause harm or injury.

Among the elements of injury and harm which you should consider are: (1) the reasonable expense for property damaged or destroyed; (2) physical harm to the Plaintiff during the incident; and (3) the emotional and mental distress caused by injuries resulting from the incident.

NOMINAL DAMAGES

If you find, after considering all the evidence presented, that the defendants violated Mr. Washington's rights or committed an assault or battery upon plaintiff but that he suffered no injury as a result of this violation, you must award Mr. Washington "nominal damages." "Nominal damages" are awarded as recognition that the Plaintiff's rights have been violated. You would award nominal damages if you conclude that the only injury that Mr. Washington suffered was the deprivation of his civil rights, without any resulting physical, emotional, or financial damage.

You must also award nominal damages if, upon finding that some injury resulted from a given unlawful act, you find that you are unable to compute monetary damages except by engaging in pure speculation and guessing.

You may not award both nominal and compensatory damages to Mr. Washington; either he was measurably injured, in which case you must award compensatory damages; or else he was not, in which case you may award nominal damages.

Nominal damages may not be awarded for more than a token sum, usually one dollar.

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.

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement if you can do so without violence to your 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 your fellow 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.

NOTES

You have taken notes during the trial for use in your deliberations. These notes may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

CLOSING INSTRUCTIONS

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A copy of this charge will go with you into the jury room for your use.

A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the 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.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the Courtroom Security Officer signed by your foreperson. 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 related to the merits of the case other 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 related to the merits of the case.

Dated: Burlington, Vermont
April _____, 1999.

William K. Sessions III
United States District Court Judge