

UNITED STATES DISTRICT COURT  
DISTRICT OF VERMONT

THOMAS MILLARD and REBECCA :  
MILLARD :

v. :

Civil No. 1:97CV305

BURTON J. HONNEY :  
\_\_\_\_\_ :

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

The only issues you are required to consider in this matter are the amount of the damages plaintiff Thomas Millard has sustained as a result of an automobile accident. In addition, if you award Thomas Millard damages, then you also must consider Rebecca Millard's loss of consortium claim.

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 plaintiff 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 the parties 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.

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. 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, 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.

### Video Depositions

During the trial of this case, certain testimony has been presented to you by way of video depositions, consisting of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. The 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 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.

### 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 Thomas Millard must prove, by a preponderance of the evidence, that the defendant's negligence was a proximate cause of his 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.

This does not mean that the act or omission must be the only cause. On the contrary, many factors or things, 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.

The plaintiffs also must prove, by a preponderance of the evidence, the amount of damages to which ~~his~~<sup>HE</sup> 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 plaintiff Thomas Millard.

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 or to be experienced in the future. 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.

C. Lost earnings, lost time, lost earning capacity: Any earnings lost in the past and any loss of ability to earn money in the future.

### Pre-existing Condition

In an action for damages for personal injuries caused by negligence, the injured person, such as plaintiff Thomas Millard, is entitled to full compensation for all damages proximately resulting from a defendant's act, even though his injuries may have been aggravated by reason of his pre-existing physical condition, or became more serious than they would have had the plaintiff been in robust health. The defendant cannot invoke the previous condition of the plaintiff for the purpose of escaping the consequences of his own negligence or reducing the damages for which he is liable.

When one violates the duty, imposed by law, of exercising due care not to injure others, he may be compelled to respond in damages for all the injuries inflicted by reason of violation of such duty, even if a particular injury may have been aggravated by or might not have happened at all except for the peculiar physical condition of the person injured. The right of a person suffering from a disease, who is injured by reason of the negligence of another, to recover for all damages proximately resulting from the negligent act, includes the right to recover for any aggravation of that existing condition.

Where such pre-existing condition is shown, the rule is that the defendant is subject to liability for harm to the plaintiff although the underlying physical condition of the plaintiff is not known to the defendant and the accident makes the injury greater than that which the defendant as a reasonable

person should have foreseen as a probable result of his or her conduct. Under this rule, which has sometimes been referred to as the "thin skull" doctrine, the tortfeasor takes his victim as he finds him.

So, if you find that any underlying condition of the plaintiff was made worse, plaintiff Thomas Millard is entitled to receive such sums as will adequately and fully compensate him for the enhancement and aggravation of the pre-existing condition. The defendant is not responsible for those injuries which would have happened properly from the original condition. However, the defendant must pay in damages for such part of the condition as his negligence caused, and if there can be no apportionment, or it cannot be said with certainty that the condition would have existed apart from the injury, then the defendant is responsible for all the damages sustained. In other words, where the plaintiff's injuries and damages cannot be apportioned or divided from any injuries related solely to the underlying, pre-existing condition, then the defendant is deemed to be responsible for all such injuries <sup>AND</sup> damages that you find the plaintiff has suffered.

### Life Expectancy

If any part of your award to plaintiff Thomas Millard is for future damages, you may consider his life expectancy. The mortality tables received in evidence, which show Thomas Millard's life expectancy as 25.2 years, may be considered in determining how long the plaintiff may be expected to live. Such tables are not binding on you but may be considered together with other evidence in the case of bearing on the plaintiff's age, health, occupation and physical condition, before and after the injury, in determining the probable length of his life.

### Collateral Source Rule

You are not to concern yourself with any benefits or payments which you may think the plaintiff has received as a result of his injuries. It is not of any consequence or relevant to the case before you whether his medical bills have been paid or by whom. You may not consider whether any damages you may award will go to the plaintiff or to reimburse others.

### Loss of Consortium

If you should find that plaintiff Thomas Millard 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 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 and in the future.

Election of Foreperson

I will select JANN MORISSETTE 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 call for a "Yes" or "No" answer. The answer to each question must be the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, 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.

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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.