

UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

GWENDA McCARTY and
DENNIS McCARTY

v.

BAY STATE ELEVATOR COMPANY

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Civil No.: 97-CV-323

JURY INSTRUCTIONS

Members of the Jury:

You have heard the evidence in this case. You, the jury, are the judges of the facts. Do not consider any statement that I have made in the course of the trial or make in these instructions of law as an indication that I have any opinion about the facts of this case. It is your duty to follow the law as I give it to you. You will not be faithful to your oath as jurors if you return a verdict that contradicts this law.

You have heard the closing arguments of the attorneys. Statements and arguments of the attorneys are not evidence. Their only purpose is to help you understand the evidence and the parties' claims.

You are not to be guided by sympathy, prejudice or public opinion. The parties expect you to reach a just verdict, regardless of the consequences.

This case should be considered and decided by you as a dispute between persons of equal standing in the community. A corporation is entitled to the same fair trial as a private

individual.

Soon, I will give you a verdict sheet containing questions you must answer. Answer each question based on the facts as you find them. Do not decide who you think should win the case and then answer the questions accordingly. Your answers and verdict must be unanimous.

Burden of Proof

Since this is a civil case, the plaintiffs must prove their case by a preponderance of the evidence. A preponderance of evidence means that amount of evidence which persuades you that a fact is more likely true than not true. In determining whether any fact has been proven by a preponderance of evidence, you may consider:

- (1) the testimony of all the witnesses - regardless of which side called them;
- (2) all exhibits received into evidence - regardless of which side presented them; and
- (3) the admissions and stipulations read into the record.

If you are satisfied that the plaintiffs have proven all elements of their claims, then you must find in their favor. On the other hand, if you find the plaintiffs did not prove all elements of their claims, you must find for the defendant.

Credibility of Witnesses

You, as jurors, are the sole judges of the believability of

witnesses and the weight to be given to their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Nor do you have to give the same weight to each witness's testimony, since you may accept or reject part or all the testimony of any witness.

In judging the testimony of the witnesses, you should consider;

- (1) their interest, if any, in the outcome of the case;
- (2) their manner of testifying;
- (3) their candor and honesty;
- (4) their bias, if any;
- (5) their resentment or anger toward the defendant, if any;
- (6) the extent to which other evidence in the case supports or contradicts their testimony;
- (7) the reasonableness of their testimony.

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

The number of witnesses called by each side is not an important consideration. You may find testimony of a small number of witnesses or a single witness more believable than the different testimony of a large number of witnesses.

Differences or conflicts in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to not believe the witness. Two or more persons may hear or see things differently, or may have different perceptions about their observations. Your job is to weigh the effect of any

difference in testimony, considering whether the difference is about an important or unimportant detail, and whether the difference is an innocent error or is false. You should also try to resolve any differences in the testimony if you can. However, as the fact finders, you may believe or not believe any part of the testimony of any witness.

Expert Witnesses

Some of the testimony you heard was given by expert witnesses. These witnesses are persons who, by education, training or experience, have developed expertise beyond the level of the average person in some field. They are allowed to state opinions on matters within the area of their expertise and the reasons for those opinions.

You are not required to accept an expert's opinion. Rather, you should consider each expert opinion and give it the weight you think it deserves. As with the testimony of any witness, you must decide whether it is believable. If you decide or conclude:

- (1) the opinion is not based on sufficient education, training and experience;
- (2) the reasons given by an expert in support of his or her opinion are not sound;
- (3) the expert's testimony is outweighed by other evidence;
or
- (4) the expert is biased,

then, you may disregard the opinion entirely or in part.

Use of Deposition Testimony

During this trial, some testimony has been presented to you by videotapes. These videos contain deposition testimony. A deposition consists of sworn recorded answers to questions asked of the deposed witness, in advance of trial, by one or more of the attorneys from each side. The testimony of a witness who, for some reason, cannot be present to testify from the witness stand may be presented by videotape with the witness under oath. You are to give this videotaped deposition testimony the same consideration you would give to the testimony of a witness who takes the witness stand and testifies in your presence.

Duty to Deliberate; Unanimous Verdict Requires

Remember at all times that you are the impartial judges of the facts in this case. Your sole interest is to seek the truth from the evidence in the case.

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 re-examine your own views, and change your opinion, if convinced it is erroneous. However, do not surrender your honest conviction regarding the weight or effect of evidence solely because of the opinion of other jurors or for the mere purpose of returning a verdict.

Your verdict must represent the considered judgment of each of you. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

Respondeat Superior

The defendant in this case is a 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 any employee of the corporation to be the act or omission of the corporation itself.

INSTRUCTIONS OF LAW

Mr. and Mrs. McCarty seek damages from Bay State Elevator Company for the claimed injuries to Gwenda McCarty. You, the jury, must decide whether Bay State is liable for the injuries and losses sustained by Gwenda McCarty. If you find Bay State is liable, you must also decide the amount of damages for which Bay State is responsible, if any. Dennis McCarty has also asserted a claim for what is known in the law as loss of consortium.

Gwenda McCarty's claim for damages is based on two distinct theories of law: (1) negligence and (2) strict liability. I will now instruct you on the elements of each theory. To prevail under either theory, Gwenda McCarty must prove to you, by a

preponderance of the evidence, all the elements of that theory.

If you find for Gwenda McCarty on either theory, you will then be asked to consider and apportion the respective degree(s) of fault, if any, attributable to each party.

Negligence

Gwenda McCarty has two negligence claims.

First: Gwenda McCarty claims that Bay State negligently designed, manufactured and installed the dumbwaiter. This claim will be referred to hereinafter as the "negligent design" claim.

Second: Gwenda McCarty claims that Bay State negligently maintained and serviced the dumbwaiter. This claim will be referred to hereinafter as the "negligent maintenance" claim.

Negligence is the failure to use ordinary care under the circumstances of the case. Ordinary care is that care which reasonably prudent persons use in conducting their own affairs, to avoid injury to themselves or their property, or the persons or property of others. In deciding whether ordinary care was used in a given case, the conduct in question must be looked at by you while considering all of the surrounding circumstances.

The mere fact that an accident happened does not mean that someone was negligent. Rather, to find Bay State was negligent, you must determine from the evidence that Bay State failed to use ordinary care. In deciding this, Bay State's conduct should be compared against the standard of conduct for a reasonably prudent manufacturer and provider of maintenance services.

In order to prove Bay State was negligent under either negligence claim, Gwenda McCarty must prove by a preponderance of the evidence all of the following four elements for each claim:

- (1) Bay State owed Gwenda McCarty a duty to exercise reasonable care;
- (2) Bay State breached that duty and, therefore, was negligent;
- (3) Gwenda McCarty suffered injuries; and
- (4) Bay State's negligence was a proximate cause of her injuries.

In regard to the negligent design claim, a manufacturer has a duty to exercise reasonable care to see its product is free of any potentially dangerous defects in the design and manufacture of the product which would result in an unreasonable risk of causing physical harm. A breach of this duty constitutes negligence.

In regard to the negligent maintenance claim, a provider of maintenance services has a duty to exercise reasonable care in maintaining and servicing its product to see that the product is free of any potentially dangerous defects that would result in an unreasonable risk of causing physical harm. A breach of this duty constitutes negligence.

If you find that the dumbwaiter was not defective or was properly maintained, then Bay State owed no further duty to Gwenda McCarty. If this is your finding, your verdict on the negligence claims must be in favor of the defendant, Bay State.

However, if you find the dumbwaiter was defective or was improperly maintained, and Bay State knew or should have known of the defect or improper maintenance, then Bay State owed Gwenda McCarty a duty of ordinary care to protect her from that danger.

If you find that Bay State breached either of its duties to Gwenda McCarty to exercise reasonable care to protect her, you must then decide if either breach was a proximate cause of her injuries.

Strict Liability

Gwenda McCarty also claims that Bay State was strictly liable for her injuries. Strict products liability means that a manufacturer is liable for injuries resulting from a defective product that is used by a consumer. Gwenda McCarty has the burden of proving that the product is defective, and that the defect was the proximate cause of her harm.

A defective product is one that is unreasonably dangerous. That is, the product is dangerous to an extent beyond the level expected by the ordinary consumer, with the ordinary knowledge common to the community about the product's characteristics.

To be successful with a claim of strict product liability, Gwenda McCarty must first show Bay State manufactured and sold a dumbwaiter, which at the time of its manufacture and sale was in a defective condition unreasonably dangerous to its users. It is not necessary for you to find Bay State knew or should have known of the dumbwaiter's potential for causing injury.

Second, she must show the dumbwaiter was expected to and did reach the user without substantial change in its condition.

Third, she must show the defective condition, if any, was a substantial factor in causing her injuries. It is up to you to determine, based on the evidence presented in the case, whether the defects in the dumbwaiter, if any, were a substantial factor in causing Gwenda McCarty's injuries.

The mere fact that an accident has occurred does not mean Bay State is liable. However, Bay State was required to deliver a product which was free from defective and unreasonably dangerous conditions. Likewise, Bay State is not responsible if someone else alters, removes, changes or modifies its product unless such alteration, removal, change or modification is foreseeable.

Keep in mind during your deliberations that a product is not unreasonably dangerous or defective even if it is possible to make the product safer. A manufacturer is not required to produce an accident-safe product or make its product safer if the danger is open and obvious and a matter of common knowledge. A manufacturer is not an insurer and is not liable for every injury arising from the use of its product.

Proximate Cause

Under both the negligence theory and the strict liability theory, Gwenda McCarty must prove the allegedly defective dumbwaiter or the allegedly negligent maintenance of the

dumbwaiter was a proximate cause of her injuries. An injury is proximately caused by a defective product or negligent behavior when it appears from the evidence that a product or behavior played a substantial part in bringing about or actually causing the injury, and the injury was either a direct result or a reasonably probable consequence of the defective condition of the product or the negligent behavior. Thus, proximate cause is that cause which, in a natural and continuous sequence, unbroken by any interruption, causes the injury and without which the injury would not have occurred.

This does not mean that the law recognizes only one proximate cause or the conduct of only one person. Many factors or things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause the injury. In such a case, each factor, thing or person may also be a proximate cause.

Efficient, Intervening Cause

As a defense to all of the McCartys' claims, Bay State claims that another factor or force caused Gwenda McCarty's injuries. Specifically, Bay State alleges that co-employees and/or the employer itself, Gill Odd Fellows Home, came between Bay State's actions and the accident that resulted in Gwenda McCarty's injuries. This is known as an "efficient, intervening cause." Bay State has the burden of proving this defense by a preponderance of the evidence.

The concept of efficient, intervening cause applies where a new act occurs which becomes the proximate cause of the injury. The alleged negligence of the co-employees and/or employer is a new and independent force if it comes between the original wrong and Gwenda McCarty's injuries. The co-employees' and/or employer's negligence is not an intervening cause if Bay State, as a reasonable manufacturer and maintainer of dumbwaiters, should have foreseen that the negligence of the co-employees and/or the employer would occur. It is for you to determine (a) whether Bay State should have foreseen the alleged negligence of the co-employees and/or employer, and (b) whether the negligence of the co-employees and/or employer is an efficient, intervening cause of Gwenda McCarty's injuries.

If you find the negligence of the co-employees and/or employer was both (1) the proximate cause of Gwenda's injuries and (2) an efficient, intervening cause of Gwenda's injuries in that it was not foreseeable by Bay State, then Bay State is not responsible for Gwenda McCarty's injuries and your verdict should be for Bay State on all of Gwenda McCarty's claims.

Comparative Negligence

As a second defense to the McCartys' claims, Bay State claims Gwenda McCarty was comparatively negligent. If you find that a preponderance of the evidence supports Gwenda McCarty's claims of negligence and/or strict liability, then you must consider the comparative negligence defense raised by Bay State.

To succeed with this defense, Bay State must prove each of the following elements by a preponderance of the evidence:

- (1) that Gwenda McCarty was negligent in the care of herself;
- (2) the negligence of Gwenda McCarty was a proximate cause of her injuries.

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

If you find that Gwenda McCarty was negligent and that her negligence was a proximate cause of her injuries, then you must assess the percentage by which her negligence contributed to her injuries. You should indicate this percentage in the appropriate place on the Special Verdict Form, which I will provide you. In other words, if you find that Gwenda McCarty's injuries were due partly to her own negligence, then you would fill in the percentage as your finding on the special verdict form.

Loss of Consortium

Dennis McCarty has also asserted a claim in this case for loss of consortium. He alleges that, as a result of Gwenda

McCarty's injuries, he has lost affection, conjugal society, assistance, companionship, comfort, services and support. This is called a claim for loss of consortium.

Dennis McCarty's loss of consortium claim is derivative of Gwenda McCarty's claims against Bay State. In other words, Dennis McCarty may only recover for his claim if his wife, Gwenda McCarty, prevails on one of her claims against Bay State. If Gwenda McCarty prevails, you may also consider damages proximately flowing to Dennis McCarty.

In considering loss of consortium, you may consider any evidence relating to the stability of the marriage and the extent and nature of care and companionship between Dennis and Gwenda McCarty. You may also consider Gwenda McCarty's decreased ability to participate in home and family affairs, her decreased ability to provide income and companionship, and any other relevant evidence bearing on her changed role in and participation with home and family.

Dennis McCarty must prove his damages by a preponderance of the evidence. Accordingly, you may not guess or speculate as to the amount of damages suffered. You may only arrive at an amount you feel reflects the actual damages he has suffered or is likely to suffer in the future.

Damages

The fact that I will instruct you about the proper measure of damages is no indication of my view of the case. Rather, I

give you these instructions for guidance if you find in favor of the McCartys from a preponderance of the evidence presented in the case and according to the other instructions I have given you.

If you find the McCartys are entitled to recover on either or both of Gwenda McCarty's liability theories, then the law provides that they are to be fully and fairly compensated for all the injuries and losses they have suffered. This means you may award the amount of money you determine to be full, fair and reasonable compensation for all their injuries and losses. This will be the McCartys only opportunity to recover damages from Bay State.

In determining the damages suffered by the McCartys, if any, as a result of Gwenda McCarty's injuries, you should consider the following items:

- (a) medical expenses - you may award a sum reimbursing Gwenda McCarty for all past medical expenses she has incurred and for those she will likely incur in the future;
- (b) lost earnings and benefits -- you may award any earnings and benefits Gwenda McCarty has lost up to the date of this trial;
- (c) pain and suffering -- you may award Gwenda McCarty a sum you deem appropriate to compensate her for the pain and suffering she has endured as a result of her injuries, including any (i) disability, (ii)

disfigurement, (iii) physical impairment, and (iv) emotional distress. You may also include an amount to compensate Gwenda McCarty for any future pain and suffering which you find she is reasonably likely to experience.

Whatever the McCartys are entitled to recover in the future on account of Gwenda McCarty's injuries must be included in the amount they recover now. Even if you find Gwenda McCarty was at fault, you must still determine the total amount of the McCartys' damages and place this amount on the Special Verdict form. Do not reduce the damages by any percentage of fault you assign to Gwenda McCarty. I will do that reduction calculation, if necessary.

Damages Calculations

To the extent that you award any future damages, including future pain and suffering, you should determine what amounts will be needed in the future for reasonable compensation. Then, you need to determine what present sum, if prudently invested, will produce or match those future compensation needs as they arise. You may also include in your award for future damages an amount to compensate for inflation.

If you should award damages for medical expenses or pain and suffering to the McCartys, you should know that there will not be any state or federal taxes due to the government. Therefore, you

should not include any amount in your damages figure to compensate for taxes.

Damages Not to be Punitive

If you find the McCartys are entitled to damages, you are not to include or add any sum meant to punish Bay State or meant to serve as an example or warning to other manufacturers. Likewise, you may not include any sum to compensate the McCartys for court costs or attorneys' fees.

Conclusion

Your verdict must represent the considered judgment of each of you. Also, your verdict must be unanimous.

In reaching your verdict, 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 surrendering your individual judgments. Each of you must decide the case for yourself, but only after an impartial consideration of all the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous, or that another point of view is sounder. However, do not surrender your honest convictions solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

I will select _____ to act as your

foreperson. The foreperson will preside over your deliberations and will be your spokesperson here in Court.

A Special Verdict form has been prepared for your convenience. You will take this form to the jury room. The answer to each question on the form must be the unanimous answer of the jury. The foreperson will write the unanimous answer of the jury in the space provided opposite each question. Upon completion, the foreperson will date and sign the Special Verdict form.

If, during your deliberations, you should desire to communicate with the Court, please put your message or question in writing, signed and dated by the foreperson, and pass the note to the court security officer. He will then bring the note to my attention. I will 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 that you should never indicate where you are in your deliberations or your numerical division, if any, at the time.