UNITED STATES DISTRICT COURT
DISTRICT OF VERMONT

DAVID FENTON

v.

RICHARD GRAY

Civil No. 1:97CV97

CHARGE TO THE JURY

GENERAL INSTRUCTIONS

General Introduction -- Province of the Court and Jury

MEMBERS OF THE JURY:

This case arises out of an automobile accident that occurred on March 10, 1996 in South Londonderry, Vermont. Prior to the accident, the plaintiff, David Fenton, was driving north on Route 100 in South Londonderry. The defendant, Richard Gray, was driving west on Thompsonburg Road in South Londonderry. The two vehicles collided in the intersection of Route 100, Thompsonburg Road, and Middletown Road.

The parties dispute who was at fault in this accident. The plaintiff contends that the defendant was negligent when he failed to stop or yield to oncoming traffic before entering the intersection. It is undisputed that the defendant did not stop and did not see plaintiff's vehicle before entering the intersection. The defendant contends that the stop sign at the intersection was turned around so that it faced in the opposite direction and was not visible to him as he approached the intersection. It is undisputed that the stop sign was twisted to some extent, but the parties disagree as to whether an ordinarily observant person should have seen the stop sign. The

defendant further contends that the plaintiff was negligent in attempting to turn off Rt. 100 onto to Middletown Road without regard for potential oncoming traffic.

Finally, the plaintiff contends that he suffered injuries and damages as a result of the accident. The defendant disputes the nature and extent of the injuries and damages.

Now that you have heard the evidence and 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 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 counsel and the law 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.

All Persons Equal Before the Law

This case should be considered and decided by you as an action between persons of equal standing in the community, of equal worth, and holding the same or similar stations in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

Evidence 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, 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 a lawyer has asked a witness a question which contains an assertion of fact, you may not consider the lawyer's assertion as evidence of that fact. The lawyer's statements 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 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 suggest are probably true, based on the 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. As with ordinary witnesses, you should determine each expert's credibility from his or her demeanor, candor, any bias, and possible interest in the outcome of the trial. 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 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 give you cause 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 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.

If a person is shown to have knowingly testified falsely concerning any important or material matter, you obviously have a right to distrust the testimony of such an individual concerning other matters. You may reject all of the testimony of that witness or give it such weight or credibility as you think it deserves.

An act or omission is "knowingly" done if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

Verdict -- Unanimous -- Duty to Deliberate

The verdict must represent the considered judgment of each juror. 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.

As to the affirmative defense of comparative negligence which I will discuss later in these instructions, however, the burden of establishing the essential facts is on the defendant. If the proof should fail to establish any essential element of the defendant's affirmative defense by a preponderance of the evidence in the case, the jury should find for the plaintiff 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 fact, claim or affirmative defense 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.

Negligence

Plaintiff David Fenton is proceeding against defendant Richard Gray on a theory of negligence. Specifically, he contends that the defendant was negligent in failing to stop or yield to oncoming traffic prior to entering the intersection. To prevail on his negligence claim, the plaintiff must prove both of the following by a preponderance of the evidence: First, that Richard Gray was negligent; and second, that Richard Gray'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 defendant as a motor vehicle operator had the duty not to drive his motor vehicle in a manner which would unreasonably or unnecessarily expose the plaintiff to injury.

You may find a Vermont safety statute relevant to whether the defendant was negligent under the circumstances of this case as you find them. Vermont Statutes Annotated, Title 23, Section 1021(a) requires the driver of any vehicle to "obey the instructions of any official traffic-control device applicable to him." Subsection (b) of this section further states that this rule may not be enforced "if at the time and place of the alleged violation, an official sign is not in approximately proper position and sufficiently legible to be seen by an ordinarily observant person." In this particular case, it is for you to determine whether, given the position of the stop sign as you find it, the stop sign was in approximately proper position and sufficiently legible to be seen by an ordinarily observant person.

The violation of a safety regulation or statute such as this is evidence of negligence. It is not, however, conclusive on the issue of negligence, but may be considered together with all other circumstances in determining negligence.

If you find that the defendant Richard Gray was not negligent, that ends your deliberations, and you must enter a verdict in defendant's favor. If, on the other hand, you decide that the defendant was negligent, then you must determine whether his negligence was a proximate, or legal, cause of the plaintiff's injuries.

Proximate Cause

You may not award damages for any injury from which the plaintiff David Fenton may have suffered or may now be suffering unless he has established by a preponderance of the evidence in the case that such injury was proximately caused by the defendant's negligence.

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 or a reasonably probable consequence of the act or omission. If you find that any injury sustained by David Fenton was proximately caused by some individual or entity other than the defendant Richard Gray, 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.

As I will discuss more later, the defendant argues that the plaintiff suffered from some physical ailments prior to the accident, which we sometimes call a "pre-existing

condition." When considering the issue of proximate cause, it is not relevant that plaintiff's physical condition prior to the accident may have made him more susceptible to injury or made his injuries greater. The question for you to determine is whether the plaintiff's injuries were proximately caused by the defendant's negligence.

Comparative Negligence

Defendant Richard Gray claims that the plaintiff David Fenton was comparatively negligent. Specifically, the defendant argues that the plaintiff acted negligently in attempting to turn off Rt. 100 onto Middletown Road without regard for potential oncoming traffic. If a preponderance of the evidence does not support David Fenton's claim that Richard Gray was negligent, then your verdict should be for the defendant. However, if a preponderance of the evidence does support the plaintiff's claim, then you must consider the comparative negligence defense raised by the defendant.

To prevail on this defense, defendant must prove each of the following elements by a preponderance of the evidence: First, the plaintiff was also negligent; and second, the plaintiff's negligence was the proximate or legal cause of his injury.

As you can see, these elements mirror those which you have already considered when determining whether Richard Gray was negligent. Accordingly, in making your determination on the issue of comparative negligence, you should refer to the definitions of "negligence," "duty," and "proximate cause" which I have already given you.

If you find that defendant Richard Gray's negligence caused or contributed to plaintiff's injury, then you must assess a percentage of fault to the defendant. You will do that

by indicating, on the special verdict form, what percentage of fault of the plaintiff's injury is attributable to the defendant.

Moreover, if you also find plaintiff David Fenton's own negligence caused or contributed to his own injury, then you must also assess a percentage of fault to the plaintiff. You will do this by indicating the percentage of plaintiff's negligence, if any, on the special verdict form. Note that the total of all such fault or negligence must be one hundred percent.

If you find that the plaintiff's comparative negligence is greater than 50%, then the plaintiff cannot recover anything, and you must enter a verdict for the defendant. In other words, if you determine that David Fenton was more than 50% comparatively negligent, then he will recover nothing and your verdict is for the defendant Richard Gray.

However, if the plaintiff's negligence is 50% or less, then the plaintiff is entitled to recover from the defendant.

Finally, if you assess a percentage of fault to the defendant then, disregarding any fault on the part of the plaintiff, you must determine the total amount of plaintiff's damages. I will provide you with instructions relating to the proper measure of damages, if any, that you may award.

In determining the total amount of plaintiff's damages, you must not reduce such damages by any percentage of fault you may assess to the plaintiff. The Court will compute

the plaintiff's final recovery, if any, on the basis of the percentages of fault that you assess.

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

If you should find for the plaintiff and against the defendant as to any of plaintiff's claims, then you must consider the issue of damages. The amount of damages the plaintiff shall recover, if any, is solely a matter for you to decide. The purpose of damages is to compensate a plaintiff fully and adequately for all injuries and losses caused by a defendant's negligence. 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.

The plaintiff must prove, by a preponderance of the evidence, the amount of damages to which he is entitled. You may include only the damages the plaintiff has proven by a preponderance of the evidence. You may not award speculative damages or damages based on sympathy.

In calculating plaintiff's damages, keep in mind that the plaintiff cannot recover for any physical ailment or disability that existed before the accident. He can only recover for damage due to enhancement or aggravation of a pre-existing condition, and not the condition itself.

As I mentioned earlier, the defendant contends that the plaintiff suffered from such a pre-existing condition, and that any award to plaintiff should take such a condition into account. The defendant bears the burden of proving a pre-existing condition by a preponderance of the evidence. If you

find that the plaintiff did suffer from a pre-existing condition, and you further find that the accident aggravated this condition so as to cause additional suffering and disability, then you may award the plaintiff a sum of damages which fairly compensates the plaintiff for such additional disability or pain resulting from such aggravation.

The defendant argues that the plaintiff had a pre-existing condition which would have inevitably worsened, and that some or all of the plaintiff's injuries would have occurred regardless of the accident. Again, the defendant has the burden of proving this by a preponderance of the evidence. If you find this to be the case, then you should discount the plaintiff's damages to reflect the proportion of damages the plaintiff would have suffered had the accident [redacted] not occurred. In essence, the plaintiff should be compensated by you to the extent you find he was further disabled by the defendant's negligence.

Personal Injury Damages

Keeping in mind my instructions on the purpose of damages and on defendant's claim of pre-existing condition, you should consider the following elements of damage as to the plaintiff David Fenton:

(1) General personal injury damages:

The plaintiff first seeks to recover past and future compensatory damages for his injury, pain and suffering, loss of enjoyment of life, disfigurement, disability or physical impairment, and emotional damages.

You also may include in your verdict a sum that will justly, fully and adequately compensate the plaintiff for permanent injury or disability, if any, that you may find. In evaluating such permanent injury or disability, you should take into consideration the age of the plaintiff, which the parties have stipulated is 41 years as of today, and his ability to lead a normal life, and his life expectancy, which the Court has found to be 34 years as of today.

(2) Medical expenses:

Finally, if you find for the plaintiff, then he is entitled to recover his past medical expenses. The plaintiff has the burden to prove, by a preponderance of the evidence, that any medical expenses claimed were necessary, fair and reasonable.

You may also award as damages a sum of money as compensation for the reasonable value or expense of medical care and treatment to be reasonably obtained in the future.

The plaintiff has only one day in court to recover damages for his injuries. He cannot institute another action at a later date against this defendant to recover for his damages that might accrue at some future time.

The plaintiff has only one action for his injury, therefore it follows that whatever he is entitled to recover in the future on account of his injuries must be included in the amount he recovers now.

Reduction of Future Damages to Present Value

In the event you award future damages, any such award necessarily requires that payment be made now for a loss that plaintiff will not actually suffer until some future date. Insofar as your award is for future damages, you should adjust to present worth such sum as you find is to be needed in the future so that the portion of the award for future damages, when prudently invested and saved, will match the compensation needs as they arise in the future.

Effect of Taxes

If you award damages to the plaintiff, that sum will not be subject to federal and state taxation. 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.]

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.