

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

Deborah McCaffrey and	:	
Francis Baker,	:	
Plaintiffs,	:	
	:	
v.	:	Civil Action No. 2:99-CV-169
	:	
Shaw's Supermarket, Inc.,	:	
Defendant.	:	

CHARGE TO THE JURY

Members of the Jury:

Now that you have heard the evidence and the arguments, it is 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 the facts you find from the evidence. Your final role here is to pass upon and decide the fact issues of the 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 will shortly define the word "evidence" for you and instruct you on how to assess it, including how to weigh the credibility or, to put it another way, the believability, of witnesses.

You are not to consider any one instruction that I give you as alone stating

the law, but you should take into account all of 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 is or ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given here in these instructions and anything other than the evidence presented in the case.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should weigh the evidence calmly and deliberately and without the slightest trace of sympathy, bias, or prejudice for or against either party.

This case should be considered and decided by you as an action between persons of equal standing in the community, and holding the same or similar stations in life. A corporation is entitled to the same fair trial at your hands as is a private individual. The law is no respecter of persons, and all persons, including corporations, stand equal before the law and are to be dealt with as equals in a court of justice.

When a corporation is involved, of course, it may act only through natural persons as its agents or employees; and, in general, agents or employees of a corporation may bind the corporation by their acts and declarations made while acting within the scope of their authority delegated to them by the corporation, or within the scope of their duties as employees of the corporation. In this regard, you

should consider any act or omission of Shaw's employees such as Ed Richard and Shaw's agent Dan Girard to be the act or omission of Shaw's.

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. Except for my instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your findings of fact. I recognize that a judge can have significant influence on a jury. If you think you have gleaned some opinion of how I think this case should be decided, I want you not to consider that at all. I am merely the judge here. I am passing on the objections and upon the law. You are the judges of fact. It is your decision and not mine.

As I have said earlier, it is your duty to determine the facts, and in doing so, you may consider only the evidence I have admitted in the case. The term "evidence" includes the sworn testimony of the witnesses and the exhibits admitted in the record.

Remember that any statements, objections, or arguments made by the lawyers are not evidence in the case. The function of the lawyers is to point out those things that are most significant or most helpful to their side of the case, and in doing so, to call your attention to certain facts or inferences that might otherwise go unnoticed. In the final analysis, however, it is your own recollection and

interpretation of the evidence that controls the case. What the lawyers say is not binding on you.

While you should consider only the evidence in the case, you are permitted to draw such reasonable inferences from the testimony and exhibits as you feel are justified in light of the common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts as have been established by the testimony and evidence in the case.

The law recognizes two types of evidence. direct and circumstantial. Direct evidence is provided when, for example, people testify to what they saw and heard themselves; that is, something which they have knowledge by virtue of their senses. Circumstantial evidence consists of proof of facts and circumstances from which, in terms of common experience, one may reasonably infer the ultimate fact sought to be established. Such evidence, if believed, is of no less value than direct evidence. The law makes no distinction between direct and circumstantial evidence, but simply requires that you find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

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 witness 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's intelligence, motive, state of mind, demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified and whether the witness impresses you as having an accurate recollection of these matters. Consider also any relationship 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 the testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently. 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.

A witness may be discredited or impeached by contradictory evidence, or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness's present

testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have the right to distrust such witness's testimony in other particulars and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

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

After making your judgment, you must give the testimony of each witness the weight, if any, that you may think it deserves.

Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of a 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.

In a civil action such as this, the burden is on Deborah McCaffrey to prove every essential element of her claim by a preponderance of the evidence. A preponderance of the evidence means such evidence as, when considered and compared with that opposed to it, has a more convincing force and produces in your

minds a belief that what is sought to be proved is more likely true than not true. In other words, to establish a claim by a preponderance of the evidence merely means to prove that the claim is more likely so than not so.

In determining whether a fact in issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who may have called them, and all the exhibits received into evidence regardless of who may have produced them. If the proof should fail to establish an essential element of Deborah McCaffrey's claim by a preponderance of the evidence, you should find for the Defendant as to that claim.

In this case, Deborah McCaffrey claims that the Defendant was negligent and that such negligence was a legal cause of her damages. Specifically, she alleges that the Defendant was negligent in allowing an unreasonably dangerous or unsafe condition in the front of its store, the unreasonably unsafe condition being ice on the curb in front of the store.

In order to prevail on her claim, Deborah McCaffrey must prove by a preponderance of the evidence:

1. That the Defendant was "negligent"; and
2. That such negligence was the legal or proximate cause of her damages.

The mere fact that the accident happened, standing alone, does not permit

you 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 either in doing something a reasonably careful person would not do in the same or similar circumstances or not doing something a reasonably careful person would do in same or similar circumstances.

To recover, Deborah McCaffrey has the burden of proving that she fell on the Defendant's premises, that those premises were in an unreasonably dangerous condition, and that the Defendant either knew of the unreasonably dangerous condition, or that the condition existed for a sufficient length of time prior to her fall so that in the exercise of ordinary care, the Defendant should have discovered the condition and that the Defendant failed to take reasonable steps to remedy the condition or failed to give fair warning of its existence.

The Defendant's duty is more than a passive one: Vermont law provides that a company, such as the Defendant, that invites the public in to do business, has a duty to keep its store in a safe and suitable condition, so that customers will not be unnecessarily or unreasonably exposed to danger.

Therefore, Deborah McCaffrey must prove each of the following essential elements of their case by a preponderance of the evidence:

1. That ice at the entrance to the store was an unreasonably dangerous or

unsafe condition;

2. That the defendant knew, or with the exercise of reasonable care, should have known, that there was a dangerous condition.
3. That the Defendant failed to take reasonable steps within a reasonable time to make the entrance appropriately safe for its customers;
4. That the unreasonable condition was the proximate cause of her injuries.

Someone is "unreasonably exposed to danger" where the condition of the premises has a tendency to cause injury beyond the degree ordinarily to be expected by a reasonably prudent and knowledgeable user. Ice at the entrance to a store is unreasonably dangerous when its likelihood of causing injury is beyond that ordinarily expected to be safely negotiated by the use of ordinary care.

Negligence is the "legal cause" of damage if it directly and in a natural and continuous sequence produces, or contributes substantially to producing such damage, so it can reasonably be said that, except for the negligence, the loss, injury or damage would not have occurred. Negligence may be a legal cause of damage even though it operates in combination with the act of another, some natural cause, or some other cause if such other cause occurs at the same time as the negligence and if the negligence contributes substantially to producing such damage.

A proximate cause of damage is defined as a cause which, unbroken by any intervening cause, produces the damage, and without which the damage would not have occurred.

This does not mean that the law recognizes only one proximate cause of

injury or damage, consisting of only one factor or theory, or the conduct of only one person. On the contrary, many factors and things, or the conduct of two or more persons, may operate at the same time, either independently or together, to cause injury or damage; in such a case, each may be a proximate cause. If any one of them played a substantial part in bringing about or causing the injury and was attributable to the Defendant, then you should find Defendant liable and calculate the amount of damages.

If a preponderance of the evidence does not support Deborah McCaffrey's claims, then your verdict should be for the Defendant. If, however, a preponderance of the evidence does support her claim, you will then consider the defense of comparative negligence raised by the Defendant.

The Defendant contends that it was not negligent, but if you should find that it was negligent, the Defendant asserts that Deborah McCaffrey was herself negligent and that such negligence was the legal cause of her own injury. This is a defensive claim and the burden of proving that claim by a preponderance of the evidence is upon the Defendant.

To establish the defense of comparative negligence, the Defendant must prove the following:

- (1) Deborah McCaffrey failed to act with reasonable, ordinary care.

Ordinary care is that care which reasonably prudent persons exercise in the

management of their own affairs, in order to avoid injury to themselves or their property, or the persons or property of others. Because the amount of care exercised by a reasonably prudent person varies in proportion to the danger that person encounters, it follows that the amount of caution and care required in the use of ordinary care will also increase.

(2) Deborah McCaffrey's failure to use ordinary care was the proximate cause of the harm. A person's failure to use ordinary care is a proximate cause if that failure was a substantial factor in bringing about the harm.

Should you conclude that both Deborah McCaffrey and the Defendant contributed to the injuries suffered by Ms. McCaffrey, then it will be your job to ascribe a percentage of responsibility to each of the parties. That is, you must determine what percentage of the accident is a result of Shaw's liability, and what percentage is the result of Deborah McCaffrey's fault. You may allocate the responsibility any way you feel appropriate. For example, you may find that one party is entirely responsible for the injuries in question. In the alternative, you may find that the parties share the responsibility for the injuries according to percentages designated by you. Note that your percentages must add up to 100 percent.

If you find that Deborah McCaffrey's comparative negligence is greater than 50%, then the Plaintiffs cannot recover anything, and you then must enter a verdict for the Defendant. In other words, if you decide that Deborah McCaffrey was more

than 50% at fault, then the Plaintiffs will recover nothing and your verdict will be for the Defendant. However, if her negligence is 50% or less the cause of the injury, then the Plaintiffs are entitled to recover from the Defendant. Before you allocate responsibility for the injuries, you, of course, must first consider the law that I have instructed you on and find that the parties have established the essential elements of their claims and sustained their burdens of proof as the Court has described them.

If the evidence proves negligence on the part of the Defendant was a proximate cause of Plaintiffs' damages, you should award an amount of money that will fairly and adequately compensate them for such damage.

The amount of damages recovered by the Plaintiffs, if any, is a decision that you alone are to make. 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 Plaintiffs must prove, by a preponderance of the evidence, the amount of damages to which they are entitled. You may include only the damages the Plaintiffs have proven by a preponderance of the evidence. You may not award speculative damages or damages based on sympathy.

Deborah McCaffrey seeks to recover past and future medical expenses, compensatory damages for her physical injuries, 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 about to be experienced in the future.

You may include in your verdict a sum that will justly, fully and adequately compensate Deborah McCaffrey for any permanent injuries and disabilities, if any, that you may find. In evaluating a permanent injury or disability, you should take into consideration the age of Deborah McCaffrey, her ability to lead a normal life, and her individual life expectancy.

In calculating damages, keep in mind that Deborah McCaffrey may not recover for any physical ailment or disability that existed before the accident. She may only recover for damage due to intensification or aggravation of a pre-existing condition and not the condition itself.

You are not to take into consideration any payments or benefits which you may think Deborah McCaffrey has received as a result of her injuries. It is not of any consequence or relevance to the case before you whether medical bills have been paid or by whom. You may not consider whether any damages you may award will go to the Plaintiffs or to reimburse others.

If you should find that Deborah McCaffrey is entitled to recover damages,

you must also consider the damages, if any, sustained by her husband Francis Baker. As Ms. McCaffrey's spouse he is entitled to recover for the loss of companionship he has suffered due to the injuries sustained by his wife. In computing this amount, if any, you should consider the impact of any injury on all aspects of the Plaintiffs' marital relationship, including the loss of services, comfort, society, conjugal relations and attentions in the past and in the future.

The Plaintiffs have only one time in court to recover damages for their injuries. Whatever they are entitled to recover in the future on account of their injuries must be included in the amount they recover now.

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

Of course, the fact that I have given you instructions concerning the issue of the Plaintiffs' damages should not be an indication that I believe the Plaintiffs should, or should not prevail in this case.

You have been permitted to take notes during trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They 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.

I have selected _____ to act as your foreman. The foreperson has no greater voice or vote than any other juror, but sees that some order is established in the manner in which you proceed and is your spokesperson here in court.

If during your deliberations you should desire to communicate with the Court, please reduce your message in a question to writing signed by your foreman and pass the note to the court security officer who will bring it to my attention. I will then respond as promptly as possible, either in writing or by having you returned to the courtroom so that I can address you orally. I caution you, however, that with regard to any message or question that you might send, you should never state or specify your numerical division at the time.

A form of the verdict has been prepared for your convenience. You will take the verdict form into the jury room, and when you have reached an unanimous agreement, you will have the foreperson fill out the verdict form, date and sign it. You will then return to the courtroom where the verdict will be read, and each of you will be asked individually if this is your verdict.

The verdict must represent the considered judgment of each juror. In order to

return a verdict, it is necessary that each juror agree to it. In other words, your verdict must be unanimous as to each claim.

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.

It is your duty as jurors to consult with one another and to deliberate in an effort to reach agreement. Each of you must 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 you are convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of the evidence solely because of the opinion of your fellow jurors or 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.