

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

DEAN KENT, :
 :
 Plaintiff, :
 :
 v. : Docket No. 2:99-CV-189
 :
 :
 JARED KATZ, individually and in :
 his capacity as a Colchester :
 police officer, :
 :
 Defendant. :

JURY CHARGE

Members of the Jury:

The Plaintiff in this case is Dean Kent, represented by Adele Pastor and Thomas Nuovo. The Defendant is Jared Katz, represented by Joseph Farnham. Now that you have heard the evidence and the arguments, it becomes my duty to instruct you on the law. It is your duty to accept these instructions of law and apply them to the facts as you determine them.

As I mentioned at the beginning of the trial, Mr. Kent asserts that the Defendant, former Colchester police officer Jared Katz, violated his civil rights under the federal Constitution. Mr. Kent brings this claim under the civil rights law which provides a remedy for individuals who have been

deprived of their constitutional or statutory rights under color of state law. The Plaintiff also has a number of state common law claims against the defendant. The Plaintiff asserts that he was unlawfully arrested; that excessive force was used against him by the Defendant; and that Defendant committed battery upon him. The Defendant denies these claims.

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" and instruct you on how to assess it, including how to judge the credibility of the witnesses.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. You are not to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any party. All parties expect that you will carefully consider all of the evidence, follow the law as it is now being given to you and reach a just verdict regardless of the consequences.

EVIDENCE

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

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses --

something she or he has seen, felt, touched, or heard. Direct evidence may also be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer, on the basis of reason, experience and common sense, from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

CREDIBILITY OF WITNESSES

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

evidence in the case supports or contradicts their testimony; and the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

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

EXPERT WITNESSES

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in the case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record.

Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence. When the attorneys for the Plaintiff and the Defendant stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

TESTIMONY OF LAW ENFORCEMENT OFFICERS

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

either greater or lesser weight to the testimony of a witness merely because he or she is a law enforcement officer.

BURDEN OF PROOF

This is a civil case and as such the Plaintiff has the burden of proving every element of his claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents. It is a matter of quality, not quantity. Preponderance of the evidence is evidence that is more convincing and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim or defense is more likely so than not so. In determining whether any fact at issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

PLAINTIFF'S CLAIMS UNDER 42 U.S.C. § 1983

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

In this case, Mr. Kent claims damages alleged to have been

sustained by him as the result of a deprivation under color of state law of a right secured by the Constitution of the United States and by a federal statute protecting the civil rights of all persons within the United States.

Specifically, the Plaintiff alleges that while the Defendant was acting under color of the authority of the State of Vermont as a member of the Colchester Police Department, the Defendant subjected the Plaintiff to a deprivation of the Plaintiff's rights and privileges to be free from an unlawful arrest and the excessive use of force during the course of an arrest.

Under the United States Constitution, a person has the right to be free from arrest without probable cause. In addition, a person has the right to be free from the use of unreasonable force when being arrested, even if such arrest is otherwise made in accordance with due process of the law. Section 1983 of Title 42 of the United States Code provides that the Plaintiff may seek damages in this Court against any person or persons who, under color of state law or custom, subject him to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution of the United States.

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

- (1) that at the time of the incident, the Defendant was

acting under color of the authority of the State of Vermont.

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

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

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

UNLAWFUL ARREST

Under the United States Constitution, no person may be arrested without due process of law. In other words, a person may not be arrested without probable cause for such an arrest. This means that a police officer must have knowledge or reasonably trustworthy information of facts and circumstances that would lead a reasonable person who possesses the same official expertise as the officer to conclude that the person being arrested has committed or is about to commit a crime, whether in the officer's presence or otherwise.

Defendant Katz has introduced the Vermont District Courts

docketing statement for Dean Kents DWI charge resulting from his arrest on June 20, 1996. That document indicates that the Vermont District Court Judge found probable cause for the offense of DWI.

Vermont law provides for judges to review an officer's affidavit to determine if the officer has alleged sufficient facts to support a charge of DWI. The documents the judge reviews are all provided by the officer and the State's Attorney and no information from the defendant unless the officer includes it. If the officer's affidavit states sufficient facts to support a charge of DWI, the judge finds that as a preliminary matter, probable cause has been established and the matter is set for arraignment of the defendant at which time the defendant receives the officer's affidavit and sees it for the first time. The defendant can file motions to challenge the judge's preliminary finding of probable cause which Mr. Kent did.

The Vermont District Court set Mr. Kent's motions for hearing to determine if probable cause existed for the charge after the court heard Mr. Kent's evidence disputing the facts as stated by Officer Katz. No hearing was held since Mr. Kent decided to accept a plea agreement and he pled no contest to careless and negligent operation based on an affidavit provided by one of his witnesses, Robert Miller.

In Vermont, a person shall not operate, attempt to operate, or be in actual physical control of any vehicle on a highway, when the person is under the influence of intoxicating liquor. It is undisputed and the Court finds that the Plaintiff had operated a vehicle on a highway at the time he first encountered the Defendant.

A person is under the influence of intoxicating liquor when his or her full mental or physical faculties or mental or physical abilities are diminished, impaired, or affected in the slightest degree by intoxicating liquor. Being under the influence of intoxicating liquor may be proven by evidence of observable behavior indicating that the person has consumed alcohol and ceased to retain full control over his or her faculties of mind and body. Observable behavior is evidence which describes the condition of the person as the witness personally observed him or her, such as his manner of driving and walking, his or her speech, the condition of his or her eyes, odor of breath, and any other physical appearance or conduct or mental condition which would reasonably tend to prove the vehicle operator's condition. The witness making any such observations need not be a physician or have special scientific training. A lay witness is qualified to testify on the basis of his or her observations to express an opinion about the state of the driver's sobriety.

In Vermont, every person who operates any vehicle on a highway is deemed to have given consent to an evidentiary test of that person's breath for the purpose of determining the person's alcohol concentration or the presence of other drugs in the blood. The test shall be administered at the discretion of a law enforcement officer. The evidentiary test shall be required of a person when a law enforcement officer has reasonable grounds to believe that person was operating a vehicle while under the influence of intoxicating liquor. However, such a person has the right to refuse to take such a test.

EXCESSIVE FORCE

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

The Plaintiff claims that he was subjected to excessive force by the Defendant when the Defendant arrested him. You first must determine whether the Defendant committed the alleged acts. To determine whether the acts caused the Plaintiff to suffer the loss of a federal right, you must determine whether the amount of force used to effect the arrest was that which a reasonable officer would have employed in effecting the arrest under similar circumstances. In making this determination, you

may take into account the severity of the crime at issue, whether the Plaintiff posed an immediate threat to the safety of the Defendant or others, and whether the Plaintiff actively resisted arrest or attempted to evade arrest by flight.

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

PLAINTIFF'S CLAIMS UNDER STATE LAW

Plaintiff also claims that Defendant violated state law because Defendant unlawfully arrested Plaintiff and used excessive force during the arrest. The instructions regarding the unlawful arrest and excessive force claims under state law are the same as described in the above paragraphs on unlawful arrest and excessive force.

BATTERY

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

Battery is the unlawful or unwarranted use of force upon

another.

A person is liable for battery if:

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

A police officer is privileged to commit battery when the battery consists of force reasonably necessary to lawfully take a person into custody. Therefore, you may only find the Defendant liable for battery to the Plaintiff if you find the Defendant intended to inflict, and did inflict, a harmful and unwarranted contact upon the Plaintiff and that such contact was in excess of the appropriate and reasonable force that an officer would use to lawfully take a person into custody.

PROXIMATE CAUSE

If you find the Defendant violated state law or Plaintiff's federal constitutional rights by unlawfully arresting the Plaintiff, using excessive force against the Plaintiff during the arrest, or committing battery upon the Plaintiff then you must proceed to consider the question of whether the Defendant's acts were the proximate cause of damages to the Plaintiff.

Proximate cause means there must be a sufficient causal connection between the act or omission of a defendant and any injury or damage to the Plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about

or causing injury. If an injury was a direct result or a reasonably probable consequence of a defendant's act or omission, it was proximately caused by the act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

AFFIRMATIVE DEFENSE: QUALIFIED IMMUNITY

At the time of the incidents giving rise to the lawsuit, it was clearly established law that Mr. Kent had the right to be free from unlawful arrest, excessive force and battery. Even if you find that Defendant did violate Mr. Kent's rights as described above, Defendant still might not be liable to Mr. Kent. This is so because the Defendant may be entitled to what is called qualified immunity under both federal and state law. If you find that he is entitled to such immunity, you may not find him liable.

Defendant may be entitled to qualified immunity under federal and state law if, at the time he violated Mr. Kent's rights as stated above, he neither knew nor should have known that his actions were contrary to federal or state law. The simple fact that the Defendant acted in good faith is not enough to bring him within the protection of this qualified immunity.

Nor is the fact that Defendant is unaware of the law. The Defendant is entitled to qualified immunity only if he did not know that what he did was in violation of federal or state law and if a competent public official could not have been expected at the time to know that the conduct was in violation of state law.

In deciding what a competent official would have known about the legality of the Defendant's conduct, you may consider the nature of the Defendant's official duties, the character of his official positions, the information which was known to the Defendant or not known to him, and the events confronting him. You must ask yourself what reasonable officials in the Defendant's situation would have believed about the legality of the Defendant's conduct. You should not, however, consider what the Defendant's subjective intent was, even if you believe it was harmful to the Plaintiff. You may also use your common sense. If you find that a reasonable official in the Defendant's situation would believe his conduct to be lawful, then this element will be satisfied. Moreover, if you find that reasonably competent police officers could disagree about the legality of the Defendant's actions, then the Defendant is entitled to qualified immunity.

The Defendant has the burden of proving that he neither knew nor should have known that his actions violated the law. If the

Defendant convinces you by a preponderance of the evidence that he neither knew nor should have known that his actions violated the law, then you must return a verdict for the Defendant, even though you may have previously found that the Defendant in fact violated Mr. Kent's rights.

DAMAGES

The fact that I am about to instruct you as to the proper measure of damages does not reflect any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are given for your guidance in the event you find in favor of the Plaintiff by a preponderance of the evidence in accordance with the other instructions.

In reaching your verdict, carefully consider the evidence presented against the Defendant. You may assess damages against the Defendant only if you find the Defendant is liable for claims outlined above.

Please keep in mind the following general principles as you make your deliberations. In making any award of damages, it is not necessary that the Plaintiff prove the exact amount of his damages with absolute certainty. Nevertheless, any damages you award may not be based on sympathy, speculation, or guesswork because only actual damages are recoverable. Remember that the Plaintiff has the burden of proving damages by a preponderance of

the evidence. In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

COMPENSATORY DAMAGES

If you should find that the Defendant is liable for the above allegations, then you must determine an amount that is fair compensation for the Plaintiff's damages.

You may award compensatory damages for emotional pain and suffering if you find that the Plaintiff has proven by a preponderance of the evidence that such injuries were caused by Defendant's allegedly wrongful conduct. No evidence of monetary value of such intangible things as pain and suffering has been, or need be, introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these elements of damages. Any award you make should be fair in light of the evidence presented at trial.

An injury or harm to Mr. Kent that is not the result of unlawful conduct does not entitle him to damages. Similarly, Mr. Kent is not entitled to damages for conduct that does not cause harm or injury. Among the elements of injury and harm which you should consider are: (1) physical harm to the Plaintiff during the incident; and (2) the emotional and mental distress caused by

injuries resulting from the incident.

PUNITIVE DAMAGES

If you should find that the Defendant is liable for the Plaintiff's injuries, then you have the discretion to award, in addition to compensatory damages, punitive damages. You may award punitive damages if the Plaintiff proves that the Defendant's conduct was wanton and reckless, not merely unreasonable. An act is wanton and reckless if it is done in such a manner, and under such circumstances, as to reflect utter disregard for the potential consequences of the act on the safety and rights of others. The purpose of punitive damages is to punish a Defendant for shocking conduct and to set an example in order to deter him and others from committing similar acts in the future. Punitive damages are intended to protect the community and to be an expression of the jury's indignation at the misconduct.

The awarding of punitive damages is within your discretion -
- you are not required to award them. Punitive damages are appropriate only for especially shocking and offensive misconduct. If you decide to award punitive damages, you must use sound reason in setting the amount -- it must not reflect bias, prejudice, or sympathy toward any party. But the amount can be as large as you believe necessary to fulfill the purpose

of punitive damages. In this regard, you may consider the financial resources of the Defendant in fixing the amount of punitive damages.

UNANIMOUS VERDICT

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree.

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement, if you can do so without violence to your individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- the judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

NOTES

You may have taken notes during the trial for use in your

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

CLOSING INSTRUCTIONS

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

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

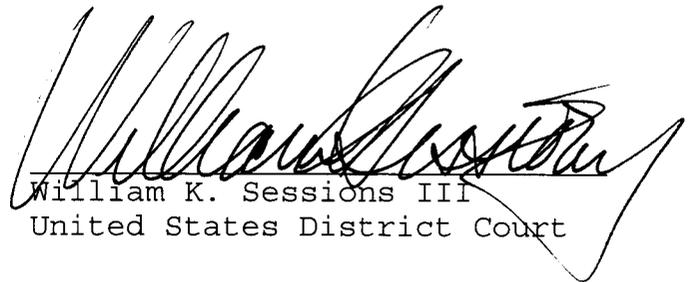
A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign the special verdict, when completed.

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through the

Courtroom Security Officer signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject related to the merits of the case other than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject related to the merits of the case.

Dated at Burlington, Vermont this 23rd day of October,
2003.



William K. Sessions III
United States District Court