

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

KEVIN DRAKE and LORI DRAKE,	:	
individually and as next friend :	:	
of J.D.	:	
Plaintiffs,	:	
	:	Case No. 2:13-cv-234
v.	:	
	:	
ALLERGAN, INC.	:	
	:	
Defendant.	:	

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is 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.

The Plaintiffs in this case are Kevin Drake and Lori Drake. They are suing on behalf of their son, J.D. The Drakes are represented by Ray Chester, Andrew Edge, Jessica Palvino and Leo Bisson. The Defendant is Allergan, Inc., which I will refer to as "Allergan." Allergan is represented by Philip Beck, Christopher Landgraff, Steven Derringer, Rebecca Horwitz, Daniel Taylor, and Matthew Byrne.

I will first give you general instructions applicable to a case of this type. I will then address the law that specifically applies to this case.

**ROLE OF THE COURT, THE JURY, AND COUNSEL**

Now that you have listened carefully to the testimony that has been presented to you, you must consider and decide the fact issues of this case. You are the sole and exclusive judge of the facts. You weigh 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. Shortly, I will define "evidence" for you and tell you how to weigh it, including how to evaluate the credibility or, to put it another way, the believability of the witnesses.

You are not to single out one instruction alone as stating the law, but you 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 to base a verdict upon any other view of the law than that given in the instructions I am about to give you, just as 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 should 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 evaluate the evidence deliberately 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**

As I have said earlier, it is your duty to determine the facts, and in so doing you must consider only the evidence I have admitted in the case. Statements and arguments of counsel are not evidence. When, however, the attorneys on both sides stipulate or agree as to the existence of a fact, you must accept the stipulation and regard that fact as proved.

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 so doing to call your attention to certain facts or inferences that might otherwise escape your notice. But it is your own recollection and interpretation of the evidence that controls in the case. What the lawyers say is not binding upon you.

The evidence includes any stipulated facts, the sworn testimony of the witnesses, and the exhibits admitted in the record. Any evidence as to which an objection was sustained and any evidence that I ordered stricken from the record must be entirely disregarded.

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 the light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts that have been established by the testimony and evidence in the case.

#### **Direct and Circumstantial Evidence**

The law recognizes two types of evidence: direct and indirect or circumstantial. An example of direct evidence is when people testify to what they saw or heard themselves; that is, something which they have knowledge of by virtue of their senses. Indirect or 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. As a general rule, 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.

**Witness Credibility**

You, as jurors, are the sole judges of the credibility of the witnesses and the importance of their testimony. It is your job to decide how believable each witness was in his or her testimony. 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 may help you decide the truth and the importance of each witness's testimony. Consider each witness's knowledge, motive and state of mind, and 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 he or she 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 interest he or she may have in the outcome of the case, or any bias for or against any party; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; and people naturally tend to forget some things or remember other things inaccurately. 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 should 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. The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate, and otherwise trustworthy.

**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 or 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's qualifications, his or her opinions, 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's 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.

**Deposition Testimony**

During the trial of this case, certain testimony has been presented to you by way of video deposition, consisting of sworn

recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case. Such testimony is entitled to the same consideration and is to be judged as to credibility, and weighed, and otherwise considered by the jury, in the same way as if the witness had been present and had testified from the witness stand. In other words, you must evaluate that testimony in the same manner you would evaluate the testimony of any other witness.

#### **CORPORATIONS**

Allergan is a corporation. The fact that a corporation is involved must not affect your decision in any way. A corporation is entitled to the same fair trial as a private individual. All persons, including corporations and other organizations, stand equal before the law, and are to be dealt with as equals in a court of justice. Of course, when a corporation is involved in a case, it may act only through human beings as its agents or employees.

#### **BURDEN OF PROOF**

Because this is a civil case, the parties bear the burden of proving certain facts by a "preponderance of the evidence." To prove something by a preponderance of the evidence means to prove that something is more likely true than not true. A preponderance of the evidence means the greater weight, or logic, or persuasive force of the evidence. It does not mean

the greater number of witnesses or documents. It is a matter of quality, not quantity.

In determining whether any fact in issue has been proven 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 in evidence, regardless of who may have produced them.

I now turn to the law you must follow in evaluating each party's specific claims.

#### **NEGLIGENCE**

The Drakes claim that Allergan was negligent in promoting Botox for the treatment of pediatric spasticity. Negligence is the failure to use ordinary care under the circumstances of the case. Ordinary care is that care which reasonably careful persons or businesses use in conducting their own affairs to avoid injury to themselves or their property, or the persons or property of others. When deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case.

When the defendant is a corporation, they are liable for the negligent acts or omissions of their employees and agents acting in the course of their duties. In order to prove that

Allergan was negligent, the Drakes must prove by a preponderance of the evidence each of the following elements:

1. Allergan owed J.D. a duty to conform to a certain standard of conduct so as to protect J.D. from an unreasonable risk of harm,
2. Allergan breached that duty by failing to conform to the standard of conduct required, and
3. Allergan's conduct was a proximate cause of J.D.'s injury.

The first element of negligence is duty. Duty, as it is understood in the law, means a legal obligation to do or not do some act, depending on the particular circumstances of the case. In general, a "duty" in negligence cases may be defined as an obligation to conform to a particular standard of conduct towards another. Here, Defendant, acting through its agents and employees, had a duty to conform to a standard of conduct of a reasonable entity of like experience and knowledge of the situation and its dangers.

In light of this standard of conduct, Allergan had a duty to exercise the same care a reasonable pharmaceutical company would have in the same circumstances, taking into account the foreseeable risk of injury caused by its actions. The duty owed by a drug manufacturer to a physician is to exercise due care in disseminating information about its product in order to avoid reasonably foreseeable risks.

Keep in mind that under Vermont law the duty of care increases proportionately with the foreseeable risks of the operations involved. Thus, as the risk of harm increases, the duty of care to prevent injury is correspondingly increased.

The second element is breach of duty. In order to decide whether Allergan breached its duty to J.D., you must determine from the evidence presented whether Allergan failed to use ordinary care, as I have defined that term, in their activities (if any) promoting Botox to Dr. Benjamin for the treatment of pediatric spasticity.

The last element is proximate cause. A proximate cause of an injury means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury. An injury is proximately caused by an act or failure to act when 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.

The law recognizes that there may be more than one proximate cause of an injury. Multiple factors may operate at the same time, or independently, to cause the injury and each may be a proximate cause. The Drakes are required to show that Allergan's negligence caused J.D.'s injuries, but they are not required to show that Allergan's negligence was the only proximate cause.

**CONSUMER FRAUD**

Plaintiffs claim that Allergan violated Vermont's Consumer Fraud Act. The Consumer Fraud Act makes it illegal for a seller to commit any unfair or deceptive acts or practices in its business. A seller is a person regularly and principally engaged in a business of selling goods or services to consumers.

The first question for you to consider is whether Allergan committed any unfair or deceptive acts or practices in this case. In order to establish a deceptive act or practice under the Vermont Consumer Fraud Act, the Drakes must prove three elements by a preponderance of the evidence:

1. Allergan made representations or omissions, in Vermont, that were likely to mislead, directly or indirectly, consumers,
2. The consumers interpreted the message reasonably under the circumstances, and
3. The misleading effects were material, meaning likely to affect the consumer's conduct or decision regarding the product.

A representation or omission is likely to mislead, directly or indirectly, customers if it has the tendency or capacity to deceive a reasonable consumer. You must evaluate the transaction in light of the overall impression left by Allergan's communications.

In order to succeed in this claim, the Drakes must also prove by a preponderance of the evidence that J.D. sustained an injury that was proximately caused by an unfair or deceptive act, as defined by the Vermont Consumer Fraud law. You may refer to my previous instruction for the definition of proximate cause.

**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. Instruction as to the measure of damages is given for your guidance if you find in favor of any of the Drakes in accordance with the other instructions.

As explained above, the Drakes have made claims against Allergan for negligence and consumer fraud. If you decide for the Drakes on any question of liability, then you will need to determine the amount of damages suffered by the Drakes. If you decide for Allergan on the questions of liability, then you will have no occasion to consider the question of damages.

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 Drakes prove the exact amount of their 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 Drakes have 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**

In an ordinary case such as the one before you, damages are awarded on a theory of compensation. An award of compensatory damages is intended to put the Plaintiffs in the same position that they were in prior to the incident at issue here. Thus, the Drakes are entitled to recover for all damages that are a natural consequence of Allergan's conduct, including items such as past and future pain and suffering and lost enjoyment and past and future medical expenses.

As with other elements of their claims, Plaintiffs have the burden of proving by a preponderance of the evidence the amount of damages that they have suffered. The parties have agreed that J.D.'s past medical expenses total \$28,881.35, though there is no agreement about whether J.D.'s medical conditions were caused by his Botox injections. Where the amount of the Drakes' remaining alleged damages are capable of being calculated in

dollars and cents, they must demonstrate the amount of their losses in dollars and cents. However, where the Drakes' claimed damages may not be reduced to dollars and cents, such as with assertions of lost enjoyment and pain and suffering, they need not demonstrate the exact dollar and cent value of J.D.'s injuries. Nevertheless, the Drakes are still required to submit evidence of such a quality that you are capable of reasonably estimating the extent of their loss.

Under no circumstances may you award damages that are speculative or conjectural. You are further instructed that any natural feelings of sympathy for any party must be set aside during your deliberations. Such feelings are not properly a factor for consideration in this matter.

In determining the damages, if any, that the Drakes have suffered as a result of their injuries, you should consider the following items:

**1. Pain and Suffering and Mental Anguish:** the Drakes allege that J.D. has suffered pain and suffering and mental anguish as a result of Allergan's conduct. The Drakes also allege that J.D.'s parents, Kevin and Lori Drake, have suffered pain and suffering and mental anguish. If the Drakes have proved such injury by a preponderance of the evidence, then you may make an award of damages to compensate Plaintiffs for this element.

The measure of damages to be awarded to the Drakes for pain and suffering and mental anguish should be equivalent to reasonably compensate them for any pain, discomfort, fears, anxiety, humiliation, and any other mental and emotional distress they suffered that was proximately caused by Allergan. No definite standard is prescribed by law to fix reasonable compensation for lost enjoyment and emotional distress. In making an award for lost enjoyment and emotional distress you shall exercise your authority with calm and reasonable judgment and the damages you fix shall be just and reasonable in light of the evidence.

You may award Plaintiffs a sum you deem appropriate to compensate them for any pain and suffering J.D. has endured as a result of his injuries, including any: (1) disability, (2) disfigurement, (3) physical impairment, and (4) emotional distress. You may also award the Drakes a sum to compensate Kevin and Lori Drake for any emotional distress they have suffered as a result of J.D.'s injuries. You may also include an amount to compensate the Plaintiffs for any future pain and suffering which you find they are reasonably likely to experience.

**2. Past and Future Medical Expenses:** The parties have agreed that J.D.'s medical expenses to date total \$28,881.35, though there is no agreement about whether J.D.'s medical conditions

were caused by his Botox injections. Plaintiffs also claim that they will continue to incur expenses for J.D.'s medical care. If you find by a preponderance of the evidence that Allergan is liable to Plaintiffs for such damages, then you should award the Drakes the reasonable and necessary medical expenses they are reasonably certain to incur in the future. These include doctor's bills, hospital bills, and other bills of a medical nature which are a proximate result of the accident.

You may only award Plaintiffs damages for injuries that were actually caused by J.D.'s Botox injections. You may not award Plaintiffs any damages for pain and suffering or medical expenses that are attributable to J.D.'s preexisting medical conditions, including his cerebral palsy. In other words, you may not award Plaintiffs any damages for costs they would have incurred or pain and suffering they would have experienced anyway due to J.D.'s preexisting medical conditions.

If you find that J.D.'s existing conditions did get worse, you should give J.D. compensation only for the difference in the condition caused by the Botox injections. If you cannot make that decision or if you find J.D. would have been in the same condition as now even without the existing physical problem, you can award compensation to J.D. based on the entire condition. Some people are more susceptible to injury than others. You must award damages based upon injuries suffered by this

Plaintiff, even if you believe others may not have been hurt like J.D. if they had gone through the Botox injections.

You should be aware that if you award the plaintiffs compensatory damages, these damages will not be subject to federal or state income taxation. The Plaintiffs will have the full use of whatever amount the jury awards. Consequently, you should not add any sum to your award of damages to compensate for income taxes.

**Net Present Value of Future Economic Loss**

If you should find that the Drakes are entitled to a verdict, and further find that the evidence in the case establishes a reasonable likelihood of future medical expenses, then you must determine the present value in dollars of such future damage, since the award of future damages necessarily requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that the Drakes will in effect be reimbursed in advance of the loss, and so will have the use of money that they would not have received until some future date but for the verdict.

In order to make a reasonable adjustment for the present use, interest free, of money representing a lump-sum payment of anticipated future loss, the award is to be discounted, or reduced to its present value, by taking (1) the interest rate or

return that the Drakes could reasonably be expected to receive on an investment of the lump-sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained. These damages are deducted from the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return if invested at such rate of interest over such future period of time. Include in the verdict an award for only the present value - the reduced amount - of anticipated future loss.

The requirement to discount to present value applies to future medical expenses only. If you should find that the Drakes are entitled to damages for future pain and suffering, then such award is not subject to any reduction for the present use of such money.

#### **Punitive Damages**

Plaintiffs are also seeking punitive damages from Allergan. Again, the fact that I am instructing you regarding the standards for an award of punitive damages should not be viewed by you as any indication of the Court's assessment of the merits of this claim. These instructions are given only for your guidance in determining whether you feel that an award of punitive damages is appropriate.

Punitive damages differ from compensatory damages in that punitive damages are awarded not to compensate the Drakes for

any injuries they may have suffered, but instead to punish Allergan for malicious or wanton conduct and to deter Allergan and others from acting in the same way. Such damages are not recoverable as a matter of legal right. Punitive damages may be awarded only when liability of the defendant for actual damages has been established. Awarding punitive damages is within your discretion - you are not required to award such damages.

In order to award punitive damages, you must find that:

1. Allergan's conduct was not merely wrongful, but was outrageously reprehensible, and
2. Allergan acted with actual malice.

In the event that you conclude that an award of punitive damages is appropriate, you may award them only on a proper showing that the acts of Allergan are more than wrongful or unlawful. Punitive damages are appropriate when a defendant's actions have the character of outrage frequently associated with a crime.

In order to recover an award for punitive damages, the Drakes must also persuade you by a preponderance of the evidence that Allergan's conduct resulted from actual malice, that is Allergan's conduct was motivated by personal ill will toward the Drakes, or that Allergan's conduct showed a reckless or wanton disregard of the Drakes' rights. In making this determination, your focus should not be on the particular acts that Allergan

committed, but instead on the nature of its alleged conduct in committing them. In order to find actual malice based on reckless and wanton disregard of Plaintiffs' rights, you must find that Allergan acted or failed to act in conscious and deliberate disregard of a known, substantial and intolerable risk of harm to the Plaintiffs, with the knowledge that the acts or omissions were substantially certain to result in the threatened harm.

In this case the Defendant, Allergan, is a corporation. Before you award punitive damages against Allergan, you must find that the allegedly malicious or wanton acts supporting punitive damages were committed by an officer or director of Allergan, or by someone acting under their direction. Alternatively, you may award punitive damages against Allergan if you find that these acts were committed by an employee of the corporation and the Drakes have shown by a preponderance of the evidence that an officer or director either directed the acts, participated in them, or subsequently ratified them. In determining the amount of punitive damages to award, if any, you may consider evidence of the financial condition or net-worth of Allergan.

If you find that punitive damages are warranted in this case, in fixing the amount of such an award you may only consider evidence of conduct that has a direct nexus to J.D.'s

injuries. You may not consider evidence of conduct that has no direct connection to the specific harm J.D. suffered.

**Damages under the Vermont Consumer Fraud Act**

If you find Allergan liable on the Drakes' claim under the Vermont Consumer Fraud Act, then you should follow this separate instruction concerning damages. Only certain categories of damages are recoverable on a claim brought under the Act. If you find in favor of the Plaintiffs on this claim, you may only award economic damages. These include damages for medical expenses. You should apply the instructions concerning these categories in the instruction on compensatory damages above. You may not award damages for pain and suffering for a violation of the Vermont Consumer Fraud Act.

**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 wrong. 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 other jurors. Your notes should remain in the jury room and will be collected at the end of the case.

**CLOSING INSTRUCTIONS**

I have selected \_\_\_\_\_ 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 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 for 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. Bear in mind also that you are not to reveal to any person – not even to the Court – how the jury stands, numerically or otherwise, on the questions before you, during your deliberations.

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, in the District of Vermont this 17th day of November, 2014.

/s/ William K. Sessions III  
William K. Sessions III  
District Court Judge