

1 CALDERONE V. KENT COUNTY MEMORIAL HOSPITAL

2 02-CV-346ML

3 MARCH 16, 2005

4 THE COURT: Members of the jury, you will recall
5 that when we started this case I told you that there
6 would come a time at the very end of the case that I
7 would give you very detailed instructions on the law
8 which you must follow in deliberating on a verdict.
9 That time has now come.

10 And I know that some people learn -- and for the
11 benefit of you teachers out there, I was a teacher in a
12 past life. And one of the things I learned in that
13 profession is that some people learn better by
14 listening, others learn -- I see the notebooks fold, so
15 you know what I'm going to say. Others learn better by
16 seeing.

17 And so in addition to my giving you these
18 instructions now orally, you'll be provided with a
19 written copy. That's when the notebooks fold. So that
20 if you need to refer to them during the course of your
21 deliberations, you will have them.

22 Now, for those of you who learn it better by
23 hearing, you'll also receive an audio tape and a tape
24 player to play them if you wish to listen to them. But
25 for now I do ask that you give me your close and

1 undivided attention.

2 I'll begin by telling you that at the beginning
3 of the case I told you that Mrs. Calderone brought two
4 claims in this action. One was on her own behalf for
5 loss of consortium, the other was on behalf of the
6 estate of Joseph Calderone.

7 I will tell you that Mrs. Calderone's individual
8 claim for loss of consortium is no longer part of this
9 case; and, therefore, you will not be deliberating on
10 that claim.

11 You should attach no particular significance to
12 the fact that that claim is no longer before you.
13 Instead, concentrate your energies and attention on the
14 other claim, that is, the claim of the estate of
15 Mr. Calderone which I'll describe for you now.

16 Members of the jury, it is your duty as jurors
17 to follow the law as I shall state it to you and to
18 apply that law to the facts of the case as you
19 determine those facts to be from the evidence in this
20 case.

21 You are not to single out one instruction alone
22 as stating the law but must consider the instructions
23 as a whole. Neither are you to be concerned with the
24 wisdom of any rule of law stated by me.

25 Counsel have quite properly referred to some of

1 the governing rules of law in their arguments. If,
2 however, any difference appears to you between the law
3 as stated by counsel and that stated by the Court in
4 these instructions, you are, of course, to be governed
5 by the Court's instructions.

6 Further, nothing I say in these instructions is
7 to be taken as an indication that I have any opinion
8 about the facts of the case or what that opinion is.
9 It is not my function to determine the facts but,
10 rather, yours.

11 You must perform your duties as jurors without
12 bias or prejudice as to any party. The law does not
13 permit you to be governed by sympathy, prejudice or
14 public opinion.

15 All parties expect that you will carefully and
16 impartially consider all the evidence, follow the law
17 as it is now being given to you and reach a just
18 verdict regardless of the consequences.

19 This case should be considered and decided by
20 you as an action between persons of equal standing in
21 the community, of equal worth, and holding the same or
22 similar stations of life.

23 A corporation is entitled to the same fair trial
24 at your hands as a private individual. All persons,
25 including corporations, stand equal before the law and

1 are to be dealt with as equals in a court of justice.

2 The evidence in this case consists of the sworn
3 testimony of the witnesses regardless of who may have
4 called them, all exhibits received in evidence
5 regardless of who may have produced them and all facts
6 which may have been admitted or stipulated.

7 In determining the facts in this case, you are
8 to consider only the evidence that properly has been
9 put before you. It is the duty of the Court during the
10 course of trial to pass upon the admissibility of
11 proffered evidence, that is, to decide whether or not
12 you should consider proffered evidence.

13 Such evidence as the Court admits is properly
14 before you for your consideration. Such evidence as
15 the Court has refused to admit is not a proper subject
16 for your deliberations and should not be given
17 consideration by you.

18 Papers, documents and other objects admitted
19 into evidence by the Court are a part of the evidence
20 properly before you and will be available to you in the
21 jury room for consideration during your deliberations.

22 The fact that the Court admitted evidence over
23 objection should not influence you in determining the
24 weight you should give such evidence, nor should the
25 statements made by counsel either for or against the

1 admission of such evidence influence your determination
2 of the weight you will give the evidence if admitted.

3 In other words, you should determine the weight
4 you will give such evidence on the basis of your own
5 consideration of it and without regard to the ruling of
6 the Court or the statements of counsel concerning the
7 admissibility of such evidence.

8 Nor should you permit objection by counsel to
9 the admission of evidence or the ruling of the Court to
10 create any bias or prejudice in your minds with respect
11 to counsel or the party he represents.

12 It is the duty of counsel to protect the rights
13 and interests of his client; and in the performance of
14 that duty, he freely may make objection to the
15 admission of proffered evidence and should not in any
16 manner be penalized for doing so.

17 The burden is on the Plaintiff in a civil action
18 such as this to prove every essential element of her
19 claim by a preponderance of the evidence.

20 If the proof should fail to establish any
21 essential element of the Plaintiff's claim by a
22 preponderance of the evidence in this case, you should
23 find for the Defendant as to that claim.

24 Neither Defendant has any obligation to disprove
25 that which the Plaintiff asserts or claims.

1 To establish by a preponderance of the evidence
2 means to prove that something is more likely so than
3 not so. In other words, a preponderance of the
4 evidence in the case means such evidence as when
5 considered and compared with that opposed to it has
6 more convincing force and produces in your minds a
7 belief that what is sought to be proved is more likely
8 true than not true. This rule does not, of course,
9 require proof to an absolute certainty or even a near
10 certainty.

11 In determining whether any fact in issue has
12 been proved by a preponderance of the evidence in this
13 case, you may, unless otherwise instructed, consider
14 the testimony of all witnesses regardless of who may
15 have called them and all exhibits received in evidence
16 regardless of who may have produced them.

17 When I say in these instructions that a party
18 has the burden of proof on any proposition or use the
19 expression "if you find," I mean you must be persuaded,
20 considering all the evidence in the case, that the
21 proposition is more probably true than not true.

22 As I told you at the beginning of the case,
23 there are, generally speaking, two types of evidence
24 from which you may properly find the truth as to the
25 facts of this case.

1 One is direct evidence, such as the testimony of
2 an eyewitness. The other is indirect or circumstantial
3 evidence, that is, the proof of a chain of
4 circumstances pointing to the existence or nonexistence
5 of certain facts.

6 As a general rule, the law makes no distinction
7 between direct or circumstantial evidence but simply
8 requires that you find the facts in accordance with a
9 preponderance of all the evidence in the case, both
10 direct and circumstantial.

11 You are to consider only the evidence in the
12 case. In your consideration of the evidence, however,
13 you are not limited to the bald statements of the
14 witnesses. In other words, you are not limited to what
15 you see and hear as the witnesses testify.

16 You are permitted to draw, from facts which you
17 find have been proved, such reasonable inferences as
18 seem justified in light of your experience.

19 Inferences are simply deductions or conclusions
20 which reason and common sense lead you to draw from
21 facts which have been established by the evidence in
22 the case.

23 You, as jurors, are the sole judges of the
24 credibility of the witnesses and the weight their
25 testimony deserves.

1 You may be guided by the appearance and conduct
2 of the witnesses, the manner in which the witness
3 testified, the character of the testimony given or by
4 evidence to the contrary of the testimony given.

5 You should carefully scrutinize all the
6 testimony given, the circumstances under which each
7 witness has testified and every matter in evidence
8 which tends to show whether a witness is worthy of
9 belief.

10 Consider each witness's intelligence, motive,
11 state of mind and demeanor or manner while on the
12 stand. Consider the witness's ability to observe the
13 matters as to which he or she has testified and whether
14 he or she impresses you as having an accurate
15 recollection of these matters.

16 Consider, also, any relation each witness may
17 bear to either side of the case; the manner in which
18 each witness might be affected by the verdict; and the
19 extent to which, if at all, each witness is either
20 supported or contradicted by other evidence in the
21 case, including statements that he or she may have made
22 on some prior occasion.

23 Inconsistencies or discrepancies in the
24 testimony of a witness or between the testimony of
25 different witnesses may or may not cause you to

1 discredit such testimony. Two or more persons
2 witnessing an incident or a transaction may see or hear
3 it differently.

4 An innocent misrecollection, like failure of
5 recollection, is not an uncommon experience. In
6 weighing the effect of a discrepancy, always consider
7 whether it pertains to a matter of importance or an
8 unimportant detail and whether the discrepancy results
9 from innocent error or intentional falsehood.

10 After making your own judgment, you will give
11 the testimony of each witness such weight, if any, as
12 you may think it deserves. You may, in short, accept
13 or reject the testimony of any witness in whole or in
14 part.

15 Also, the weight of the evidence is not
16 necessarily determined by the number of witnesses
17 testifying to the existence or nonexistence of any
18 fact.

19 You may find that the testimony of a small
20 number of witnesses as to any fact is more credible
21 than the testimony of a larger number of witnesses to
22 the contrary.

23 You should apply these same principles in
24 assessing the credibility of all witnesses, including
25 expert witnesses.

1 While the rules of evidence ordinarily do not
2 permit witnesses to testify as to opinions or
3 conclusions, an exception exists as to those persons
4 whom we refer to as expert witnesses.

5 These are witnesses who, by education and
6 experience, have become expert in some art, science,
7 profession or calling and thus may state their opinions
8 as to relevant and material matters in which they
9 profess to be expert and may also state their reasons
10 for the opinion.

11 You should consider each expert opinion received
12 in evidence in this case and give it such weight as you
13 may think it deserves, whether it was based on personal
14 observations or on hypothetical questions.

15 If you should decide that the opinion of an
16 expert witness is not based upon sufficient education
17 and experience or if you should conclude that the
18 reasons given in support of the opinion are not sound
19 or if you feel that it is outweighed by other evidence,
20 you may disregard the opinion entirely.

21 In this case, Drs. Judd Hollander, Joshua
22 Furman, Lone Thanning, David Reed, Kevin O'Donnell and
23 David Gang were presented as expert witnesses.

24 The Plaintiff in this case is Irene Calderone.
25 The Plaintiff brings this action as the executrix of

1 the estate of her deceased husband, Joseph Calderone.

2 The Plaintiff claims that the Defendants, Kent
3 County Memorial Hospital and Dr. John Isaac, were
4 negligent in diagnosing, treating and/or caring for
5 Joseph Calderone and that such negligence was a direct
6 and proximate cause of his death and consequent
7 damages. The Defendants deny Plaintiff's allegations.

8 In order to prove her negligence claim against
9 each Defendant, the Plaintiff must prove by a
10 preponderance of the evidence in the case the following
11 two elements:

12 First, that the Defendant or one of the
13 Defendants' agents or employees was negligent and,
14 second, that such negligence was a proximate cause of
15 Joseph Calderone's death and consequent damages
16 sustained.

17 Generally one person is not legally responsible
18 for the conduct of another except under certain
19 circumstances. Only where a special relationship
20 exists between the two, such as an employer/employee
21 relationship, will one be responsible for the conduct
22 of another.

23 In this case, the Plaintiff alleges that Nurse
24 Susan Hayden, who was known as Susan Bergh in March of
25 2002, was an employee of the Defendant Kent County

1 Memorial Hospital. If you find this to be true, then
2 the hospital is legally responsible for her negligence,
3 if any.

4 In this case, the Plaintiff seeks to hold the
5 Defendant Kent County Memorial Hospital liable for the
6 alleged negligence of a physician, Dr. Barry Mellow.

7 The Plaintiff does not allege that Dr. Mellow
8 was an employee of the hospital. The Plaintiff does
9 allege that Dr. Mellow was an apparent agent of the
10 hospital.

11 The hospital may be held liable for Dr. Mellow's
12 actions if you find that Dr. Mellow was an apparent
13 agent of the hospital.

14 In order to hold the Defendant hospital liable
15 for the negligence of a nonemployee physician, under
16 the doctrine of apparent authority, the Plaintiff must
17 prove three elements by a preponderance of the
18 evidence:

19 First, that the hospital or its agents acted in
20 a manner that would lead a reasonable person to
21 conclude that the physician was an employee or agent of
22 the hospital; two, that the patient actually believed
23 the physician was an agent or servant of the hospital;
24 and three, that the patient thereby relied to his
25 detriment upon the care and skill of the allegedly

1 negligent physician.

2 Negligence is the doing of some act which a
3 reasonably prudent person would not do or the failure
4 to do something which a reasonably prudent person would
5 do when prompted by considerations which ordinarily
6 regulate the conduct of human affairs.

7 To prevail in a negligence action, the Plaintiff
8 must introduce competent evidence to establish that the
9 Defendant or one of the Defendant's agents or employees
10 breached a duty of care that the Defendant, agent or
11 employee owed to the Plaintiff and that the breach of
12 that duty was a proximate cause of the harm or injury
13 about which the Plaintiff complains.

14 When a medical service provider agrees to
15 provide medical treatment to a patient, he or she
16 assumes a duty of care to that patient. The duty of
17 care stems from the professional relationship between
18 the medical service provider and the patient.

19 Where a medical service provider fails to
20 fulfill this duty of care through some act or omission,
21 he or she may be held liable for negligence if that
22 negligence was a proximate cause of some harm to the
23 patient.

24 Generally a medical service provider owes a duty
25 to the patient to exercise professional skill in all

1 the aspects of the patient's treatment.

2 When I refer to professional skill, I mean
3 technical skill and professional judgment and diligence
4 commensurate with that degree of expertise expected of
5 a reasonably competent medical service provider
6 practicing in the same field.

7 Within the broad context of his or her general
8 duty, the medical service provider also owes a more
9 specific duty to the -- also owes more specific duties
10 to the patient.

11 The medical service provider must exercise
12 professional skill in making his or her initial
13 diagnosis and in determining what is the appropriate
14 treatment given that initial diagnosis.

15 As part of this duty of care, a medical service
16 provider should reasonably consider whether to use
17 available scientific means and facilities as an aid to
18 diagnose.

19 When warranted, a physician should employ the
20 scientific advancements and tools of his or her
21 profession that are available to him or her and should
22 employ them with professional skill in endeavoring to
23 make a diagnosis.

24 By scientific advancements, I mean resources
25 such as conducting tests, consulting reports and

1 performing examinations and the like.

2 In this case, the Plaintiff alleges that the
3 Defendants and/or their agents and employees failed to
4 properly diagnosis Joseph Calderone's medical
5 condition, that is, that the Defendants failed to
6 exercise professional skill in determining the
7 particular condition from which Mr. Calderone was
8 suffering.

9 A medical service provider is not expected to
10 guarantee a correct diagnosis. However, he or she is
11 expected to use professional skill in attempting to
12 arrive at a correct diagnosis.

13 Whether the medical service provider has
14 exercised the requisite level of professional skill in
15 doing so must be measured against the recognized
16 standard of care for reasonably competent medical
17 service providers practicing in the same field.

18 If a medical service provider as an aid to
19 diagnose does not avail himself of a particular test or
20 does not conduct a particular examination or does not
21 consult certain records or consult with a specialist,
22 that omission does not necessarily constitute
23 negligence.

24 However, that omission can be considered by you
25 as evidence of negligence if in light of the evidence

1 as a whole you believe that the particular test should
2 have been performed.

3 A medical service provider is not expected to
4 guarantee successful treatment. A medical service
5 provider does not have a duty to cure. The fact that a
6 person has suffered a bad result in and of itself is
7 not evidence of negligent treatment.

8 Although the medical service provider cannot be
9 held liable for negligence merely because the treatment
10 he or she chose later proved to be unsuccessful, he or
11 she is expected to use professional skill in attempting
12 to develop and implement a plan which provides proper
13 medical management of the patient's condition.

14 Whether the medical service provider has
15 exercised the requisite level of professional skill in
16 doing so must be measured against the recognized
17 standard of care for reasonably competent medical
18 service providers practicing in the same field.

19 The law requires that a medical service provider
20 exercise the same degree of professional judgment,
21 diligence and technical skill that is to be expected of
22 a reasonably competent medical practitioner in the same
23 class to which he or she belongs.

24 In other words, a medical service provider's
25 conduct must be consistent with that of a reasonably

1 competent medical service provider practicing in the
2 same field and acting in the same or similar
3 circumstances given the state of scientific knowledge
4 at the time of the diagnosis and treatment. We call
5 this the recognized standard of care.

6 The recognized standard of care may vary with
7 the circumstances. It is for you, the jury, to
8 determine from the evidence presented at trial what the
9 recognized standard of care was for each provider at
10 the time in question.

11 You must determine from all the trial evidence
12 what was the degree of diligence and skill expected of
13 a reasonably competent medical practitioner in the same
14 class to which the practitioner belongs if that
15 practitioner were acting under the same or similar
16 circumstances, including the state of medical science
17 at the time of the incident in this case.

18 Only after you have determined the recognized
19 standard of care will you be able to determine whether
20 the medical service provider breached that standard.

21 Once you have determined from the trial evidence
22 what was the recognized standard of care against which
23 the provider is to be measured, you must then consider
24 whether or not his or her conduct fell short of that
25 standard.

1 In this case, the Plaintiff alleges that Nurse
2 Susan Bergh was negligent and that such negligence was
3 a proximate cause of Mr. Calderone's death.

4 You must evaluate Nurse Bergh's conduct in light
5 of what you find to be the degree of care and skill
6 that was expected of a reasonably competent nurse in
7 the same class to which she belongs acting in the same
8 or similar circumstances in March 2002.

9 The Plaintiff also alleges that Dr. Isaac and
10 Dr. Mellow were negligent and that such negligence was
11 a proximate cause of Mr. Calderone's death.

12 You must evaluate each physician's conduct in
13 light of what you find to be the degree of care and
14 skill that was expected of a reasonably competent
15 physician in the same class acting in similar
16 circumstances in March 2002; that is, you must evaluate
17 Dr. Isaac's conduct in light of what you find to be the
18 degree of care and skill that was expected of a
19 reasonably competent general surgeon acting in similar
20 circumstances in March 2002.

21 Similarly, you must evaluate Dr. Mellow's
22 conduct in light of what you find to be the degree of
23 care and skill that was expected of a reasonably
24 competent emergency room physician acting in similar
25 circumstances in March 2002.

1 Expert testimony is required to establish the
2 recognized standard of care and to establish that a
3 breach of that standard occurred.

4 In addition to proving that a Defendant or one
5 of a Defendant's agents or employees breached the
6 recognized standard of care, the Plaintiff must also
7 prove by a preponderance of the evidence that the
8 breach was a proximate cause of the injury or harm
9 sustained.

10 Thus, in this case, the Plaintiff must prove
11 that Mr. Calderone's death was proximately caused by
12 the negligent conduct alleged.

13 I instruct you that an injury or damage is
14 proximately caused by an act or a failure to act
15 whenever it appears from the evidence in the case that
16 the act or omission played a substantial part in
17 bringing about or causing the injury or damage and that
18 the injury or damage was either a direct result or a
19 reasonably probable consequence of the act or omission.

20 The Plaintiff must prove that the injury or
21 damage would not have occurred but for the Defendant's
22 acts; and the Defendant's acts must be shown to have
23 been a direct, rather than a remote, cause of the
24 injury.

25 In other words, the Plaintiff must prove that

1 but for the Defendant's negligence, no harm or injury
2 would have occurred.

3 I do not mean to suggest, however, that there
4 may be only one proximate cause for a given injury or
5 damage. Indeed, many factors or things or the conduct
6 of two or more persons may operate at the same time
7 either independently or together to cause damage. In
8 such a case, each may be considered a proximate cause
9 of the result.

10 Expert testimony is required to establish that a
11 health service provider's negligence was a proximate
12 cause of a patient's injury.

13 A finding of proximate cause cannot be based on
14 conjecture or speculation. Proximate cause must be
15 proven as to each Defendant that you find to be
16 negligent.

17 If you find that a Defendant was negligent but
18 that that particular Defendant's negligence was not a
19 proximate cause of the Plaintiff's injury, then your
20 verdict will be for that Defendant.

21 I will now turn to the question of damages. In
22 doing so, the Court does not intend to indicate that it
23 is of the opinion that any Defendant is liable.

24 You are instructed on damages in order that you
25 may reach a sound and proper determination of the

1 amount you will award, if any, in the event that you
2 find that a Defendant is liable.

3 You need consider the question of damages only
4 if you find for the Plaintiff as against one or both
5 Defendants. If you find that neither Kent County
6 Memorial Hospital nor Dr. Isaac is liable, you will not
7 consider the question of damages.

8 The Plaintiff brings this action as executrix of
9 the estate of Joseph Calderone. The Plaintiff alleges
10 that the estate has sustained damages as a result of
11 the Defendants' negligence and Mr. Calderone's death.
12 The Plaintiff has the burden of proving that damages
13 were sustained as a proximate result of the negligence.

14 Just as she must prove liability by a fair
15 preponderance of the evidence, the Plaintiff has the
16 burden of proving damages by a fair preponderance of
17 the evidence.

18 Damages are defined in the law as that amount of
19 money that will compensate an injured party for the
20 harm or loss sustained. These damages are referred to
21 as compensatory damages.

22 The rationale behind compensatory damages is to
23 restore a person to the position he or she was in prior
24 to the harm or loss. Compensatory damages, then, is
25 the amount of money which will replace as near as

1 possible the loss or harm proximately caused by a
2 Defendant's negligence.

3 The damages you award must not be oppressive or
4 unconscionable, and you may assess only such damages as
5 will fairly and reasonably compensate Plaintiff insofar
6 as the same may be computed in money.

7 You must confine your deliberations to the
8 evidence, and you must not indulge in guesswork,
9 speculation or conjecture.

10 I will now discuss the type of damages sought by
11 the Plaintiff in this case. The Plaintiff is entitled
12 to be compensated for the conscious pain and suffering
13 that Joseph Calderone endured as a result of the
14 negligence complained of.

15 I will define pain and suffering for you. Pain
16 means physical pain, the kind resulting from a physical
17 impact or injury. It includes what we ordinarily think
18 of as physical pain as well as discomfort, stiffness
19 and restriction of bodily motion that is caused by the
20 pain or discomfort brought about by movement.

21 Pain must be conscious pain, that is, something
22 that the Plaintiff was aware of. The law does not
23 allow a jury -- let me restate that last sentence.
24 Pain must be conscious pain, that is, something that
25 Mr. Calderone was aware of. The law does not allow a

1 jury to award damages for pain to a person while that
2 person was unconscious.

3 Suffering, on the other hand, can be equated
4 with what we sometimes call the mental anguish that
5 arises from physical pain or injury to the body.

6 An award for pain and suffering must be fair and
7 reasonable. It must be grounded in the evidence and
8 not based upon any speculation or conjecture. You may
9 not arbitrarily pick some amount.

10 Your award for pain and suffering should be
11 based on the evidence that has been presented to show
12 just how much pain and suffering Joseph Calderone
13 endured as a result of the Defendants' negligence.

14 There is no particular formula by which to
15 compute damages for pain and suffering. There are no
16 objective guidelines by which you can measure the money
17 equivalent of the injury. The only real measuring
18 stick, if it can be so described, is your collective
19 and enlightened conscience.

20 You should consider all of the facts and
21 circumstances proved at trial, including evidence
22 showing any objective manifestations of pain.

23 You alone are the sole judges of what, if
24 anything, should be awarded for pain and suffering.

25 Now, before I conclude these instructions, I'm

1 going to meet with the lawyers one last time briefly to
2 see whether I've left anything out.

3 So I'm going to ask you to sit quietly and give
4 us just a moment.

5 Counsel, please.

6 (Bench conference held on the record)

7 MR. MOROWITZ: Just to preserve the record, if
8 necessary, I'm going to renew my motion for the
9 insertion of loss of consortium claim.

10 THE COURT: Okay.

11 MR. BARTON: Your Honor, I would only renew my
12 request that the spoliation instruction be given.

13 THE COURT: Let me give my reasons for not
14 giving the jury the spoliation instruction. It seemed
15 to me that the evidence on this point was really a
16 wash, and there was no clear evidence that this was
17 deliberately done. And there's really no substantial
18 evidence that the Defendants were truly prejudiced by
19 the -- by Dr. Thanning's destruction of the aorta.

20 Anything else, Mr. Barton?

21 MR. BARTON: Nothing else, your Honor.

22 THE COURT: Mr. Sarli?

23 MR. SARLI: Your Honor, in keeping with my
24 Rule 50 motion, I object to charging the jury on
25 apparent agency for Dr. Mellow's conduct.

1 THE COURT: While I have you here, I'm going to
2 deny your motion on apparent agency. As I said, I'll
3 be writing an opinion which you probably won't like
4 very much, but maybe at some point somebody will
5 straighten that one out.

6 MR. SARLI: Thank you, your Honor.

7 (End of bench conference)

8 THE COURT: Now, before I let you go, there are
9 just a few more things I need to tell you about your
10 conduct during deliberations.

11 As I said at the beginning of my instructions,
12 it goes without saying that prejudice, sympathy or
13 compassion should not be permitted to influence you in
14 the course of your deliberations.

15 From what I have said, I do not and did not mean
16 to imply that you should approach your consideration of
17 this case in an intellectual vacuum.

18 You are not required to put aside or to
19 disregard your experiences and observations in the
20 ordinary, everyday affairs of life.

21 Indeed, your experiences and observations in the
22 ordinary, everyday affairs of life are essential to
23 your exercise of reasonably sound judgment and
24 discretion in the course of your deliberations, and it
25 is your right and duty to consider the evidence in

1 light of such experience and observations.

2 Now, it is required in order for you to return a
3 verdict that your decision be the unanimous decision of
4 all eight. You cannot return a verdict either for the
5 Plaintiff or for the Defendant unless and until you are
6 in unanimous agreement as to what your verdict shall
7 be.

8 It is your duty as jurors to consult with one
9 another and to deliberate with a view to reaching an
10 agreement. Each of you must decide this for yourself,
11 but you should do so only after a consideration of the
12 case with your fellow jurors, and you should not
13 hesitate to change an opinion when convinced it is
14 erroneous.

15 Your verdict must be unanimous, but you are not
16 bound to surrender your honest convictions concerning
17 the effect or weight of the evidence for the mere
18 purpose of returning a verdict or solely because of the
19 opinion of other jurors.

20 Discuss and weigh your respective opinions
21 dispassionately, without regard to sympathy, without
22 regard to prejudice or favor for either party, and
23 adopt that conclusion which in your good conscience
24 appears to be in accordance with the truth.

25 Again, each of you must make your own decision

1 about the proper outcome of this case based on your
2 consideration of the evidence and your discussions with
3 your fellow jurors. No juror should surrender his or
4 her conscientious beliefs solely for the purpose of
5 returning a unanimous verdict.

6 Now, if in the course of your deliberations you
7 should find it necessary to be further instructed or
8 assisted by the Court in any way, I ask that you reduce
9 such requests or questions as you may have to writing
10 through your foreperson.

11 The foreperson may then hand such written
12 requests or questions to the officer in whose charge
13 you will now be placed. The officer will then bring
14 such written request to me, and I will attempt to
15 fulfill your request or answer the question as the case
16 may be.

17 Other than the method outlined, please do not
18 attempt to communicate privately or in any other way
19 with the Court.

20 Ms. Hertz, I'm appointing you foreperson of this
21 jury. It will be your responsibility to moderate
22 discussion to make sure that each and every one of your
23 fellow jurors has an equal and ample opportunity to
24 voice his or her opinion.

25 It will also be your responsibility to sign any

1 notes asking questions or whatever.

2 Finally, it will also be your responsibility to
3 fill out the verdict form which poses a series of
4 questions and has very simple instructions for you to
5 follow once the jury has reached a unanimous verdict.

6 You'll then sign and date the form; and once
7 you've reached a verdict, you'll be brought here where
8 the verdict will be published; that is, it will be read
9 aloud in the courtroom so that it may be recorded in
10 the record of this case.

11 Members of the jury, bear in mind that you are
12 never to reveal to any person, not even to the Court,
13 how you stand numerically or otherwise on the questions
14 before you until you have reached a unanimous verdict.

15 Jim.

16 (Court security officer sworn)

17 THE COURT: Members of the jury, there is one
18 last instruction I need to give you. Now that you're
19 about to begin your deliberations, you may actually
20 bring those notebooks in with you.

21 However, I remind you, as I did at the beginning
22 of the case, if you elected to take notes, those notes
23 are for your individual use only. They are not to be
24 considered the unofficial record of the proceedings.
25 Remember, Karen is the one who takes the official

1 record.

2 So if you did take notes, you may now use them;
3 but remember they're for your personal and individual
4 use only.

5 You may go out and commence your deliberations.

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