

1 OLIVER V. LEMA, ET AL

2 05-CV-167T

3 June 7, 2006

4

5 THE COURT: Ladies and gentlemen, at this time  
6 it's my duty to explain to you what the rules of law  
7 are that apply in this case. And as I've told you  
8 before, it's your duty to apply these rules as I  
9 explain them.

10 And it's important to remember that when you  
11 consider what I'm about to tell you, you ought to  
12 consider my explanation of the law in its entirety. In  
13 other words, don't pick out one or two points and  
14 consider those to the exclusion of everything else. In  
15 order to apply the law fairly, you've got to consider  
16 everything I'm about to tell you in context.

17 Now, as you know, this is a suit brought by  
18 Robert Oliver against John Lema and Keith Medeiros.  
19 And since Mr. Oliver is the party who brought this  
20 suit, he's known as the Plaintiff. So if I use the  
21 term "Plaintiff," I'm talking about Mr. Oliver.

22 And since Officer Lema and Officer Medeiros are  
23 the individuals against whom suit has been brought,  
24 they are the Defendants. So if I use the term  
25 "Defendants," I'm talking about Officers Lema and/or

1 Medeiros.

2           Since we have two Defendants here, it's  
3 important to bear in mind that each Defendant is  
4 entitled to your separate verdict. In other words, you  
5 ought to consider the evidence against each Defendant  
6 separately, and just because you may find one Defendant  
7 liable or not liable doesn't automatically mean that  
8 you should find the other Defendant liable or not  
9 liable. You ought to look at the evidence against each  
10 Defendant individually.

11           And since there are two claims in this case, one  
12 claim is the claim of excessive force and the other is  
13 a claim of battery, since there are two claims, you  
14 should also look at each claim separately and the  
15 evidence that pertains to that claim. And you need to  
16 make a determination as to whether the Plaintiff has  
17 proven his case against each officer with respect to  
18 each of the two claims.

19           Just because you find that one of the officers  
20 may or may not be liable on one claim, that doesn't  
21 necessarily, again, mean that that officer  
22 automatically is or is not liable on the other claim.

23           Now, as you know, this case arises out of events  
24 that occurred on April 10th of 2002 when Officers Lema  
25 and Medeiros went to arrest Mr. Oliver for what's been

1 referred to as a domestic assault.

2 And Mr. Oliver, as I said, is making two claims  
3 against each of the officers. The first claim is that  
4 the officers violated his constitutional rights by  
5 arresting him or the manner in which they arrested him,  
6 I should say; and the second claim he's making is that  
7 in the course of arresting him, they committed what's  
8 called a battery on him.

9 And Officers Lema and Medeiros deny that they  
10 used the kind of force alleged by Mr. Oliver, they deny  
11 that they violated any of his constitutional rights,  
12 and they also deny that they committed a battery on  
13 him.

14 Now, I'm going to take each of those claims  
15 separately, and I'll explain to you a little bit more  
16 about what the claim consists of and what things  
17 Mr. Oliver must prove in order to prevail on the claim.

18 Since Mr. Oliver is the one who's making these  
19 claims, the law imposes on him the responsibility or  
20 the burden of proving the claims.

21 It's not up to the two officers to come in here  
22 and disprove these things. It's up to the Plaintiff to  
23 prove the things that he's claiming.

24 And the law requires that he prove these things  
25 by what's called a fair preponderance of the evidence,

1 and I will explain to you a little later exactly what  
2 that means, what it means to prove something by a fair  
3 preponderance of the evidence.

4 But before I get to that, let me focus on what  
5 the two claims are and what things Mr. Oliver must  
6 prove in order to prevail on those claims.

7 As I said, the first claim is a claim that the  
8 officers violated Mr. Oliver's constitutional rights by  
9 using excessive force against him. And this I'll call  
10 an excessive force claim. This excessive force claim  
11 is based on a federal statute that is known as the  
12 federal Civil Rights Act. It's found at Section 1983  
13 of Title 42 of the United States Code, and it allows a  
14 person to bring a lawsuit and seek damages for what the  
15 person bringing the suit claims was a violation of his  
16 or her constitutional rights.

17 And I'll read to you, first of all, the relevant  
18 portion of the statute. The statute says, "Every  
19 person who under color of any statute, ordinance,  
20 regulation, custom or usage of any state subjects or  
21 causes to be subjected any citizen of the United States  
22 to the deprivation of any rights, privileges or  
23 immunities secured by the Constitution shall be liable  
24 to the party injured."

25 Now, in order to prevail on this kind of a

1 claim, what's called a Section 1983 claim, the  
2 Plaintiff, Mr. Oliver, must prove three things or what  
3 the law refers to as elements. He has to prove three  
4 things by a fair preponderance of the evidence.

5 The first thing he has to prove is that Officer  
6 Lema and/or Officer Medeiros violated one of  
7 Mr. Oliver's constitutional rights, they violated some  
8 constitutional right of his.

9 The second thing that he has to prove is that,  
10 in doing so, in violating this constitutional right,  
11 the officers acted under color of state law.

12 And the third thing he has to prove is that he  
13 suffered some injury or loss that was proximately  
14 caused by the alleged violation.

15 Let me take the "under color of law" requirement  
16 because that's really not an issue in this case. A  
17 police officer is said to act under color of state law  
18 when he acts pursuant to the authority conferred upon  
19 him by state law as a police officer.

20 Now, in this case the parties agree that at all  
21 relevant times the Defendants were acting under color  
22 of state law. They were acting pursuant to their  
23 duties as police officers or in their capacities as  
24 Bristol police officers. So that's really not an  
25 issue.

1           The issues in this case are did the officers  
2           violate some constitutional right of Mr. Oliver's and,  
3           if so, has Mr. Oliver proven that he sustained some --  
4           that the injuries or losses that he's claiming were  
5           proximately caused by that violation.

6           Now, the constitutional right that Mr. Oliver is  
7           claiming was violated in this case was his right under  
8           the Fourth Amendment to the United States Constitution  
9           not to be subjected to an unreasonable seizure.

10           A police officer who lawfully arrests a person  
11           is permitted to use whatever force is reasonable under  
12           the circumstances in order to effect the arrest or, to  
13           put another way, in order to secure the person, in  
14           order to protect the officer against the risk of --  
15           some risk of injury that might be posed by the  
16           individual being arrested and in order to prevent the  
17           person being arrested from fleeing or from interfering  
18           in some way with the officers attempting to make the  
19           arrest.

20           The use of excessive force against a person  
21           who's being arrested is considered to be unreasonable  
22           seizure. So the officer's permitted to use reasonable  
23           force for the purposes that I mentioned; but if the  
24           officer uses excessive force or an unreasonable amount  
25           of force, then that would constitute a violation of the

1 Fourth Amendment. That would be an unreasonable  
2 seizure within the meaning of the Fourth Amendment.

3 The test for determining whether the use of  
4 force by a police officer in making an arrest violates  
5 a person's Fourth Amendment rights depends, as I've  
6 said, on whether what the officer did was reasonable  
7 under the circumstances.

8 The question is not whether there was another  
9 way to have done it or even a better way to have done  
10 it. The question is whether the way the officers did  
11 it was reasonable under the circumstances.

12 And in making that determination, you have to  
13 consider the facts and the circumstances as they  
14 appeared at the time that the incident occurred and not  
15 on how they may now appear given the benefit of 20/20  
16 hindsight, which we all have after the fact.

17 And you also have to make allowances to the  
18 extent that officers sometimes have to make  
19 split-second decisions under circumstances that may be  
20 rapidly changing or may not be entirely clear.

21 So, in other words, the test is not what now may  
22 appear to be reasonable in the calm atmosphere of the  
23 courtroom after having an opportunity to think about it  
24 and deliberate and maybe learn additional facts that  
25 were not known to the officers at the time the arrest

1 was performed; but, rather, the test is what was  
2 reasonable in the context of the information that was  
3 available to the officers at the time they acted and  
4 the circumstances that confronted them at that time.

5 Now, in order to establish that the Defendants  
6 used excessive force, the Plaintiff must show that what  
7 they did was not objectively reasonable.

8 And the test of objective reasonableness is,  
9 what would a reasonable police officer have done under  
10 the same or similar circumstances or, to put it another  
11 way, would a reasonable officer have acted in the same  
12 way or could a reasonable officer have acted in the  
13 same way as the Defendants acted.

14 And there are a number of factors that you can  
15 consider in making that judgment. One is the nature of  
16 the offense for which Mr. Oliver was being arrested.  
17 What's reasonable -- what is a reasonable amount of  
18 force to arrest a person, to use in arresting a person  
19 may depend in part on what that person -- why that  
20 person is being arrested, what that person is alleged  
21 to have done.

22 If what that person is alleged to have done  
23 suggests that this person is a dangerous person or has  
24 done something very bad and is facing a severe penalty  
25 or is a threat to flee, that would -- that might be one



1 set of circumstances.

2 On the other hand, if the person -- if the  
3 person's being arrested for a minor offense and it's  
4 clear that the person is not going to flee and is not  
5 presenting a risk to anyone, that might call for a much  
6 different degree of force.

7 The second factor that you may consider is, as  
8 I've indicated, whether and to what extent the person  
9 being arrested might present a risk of harm to the  
10 officers. It doesn't mean the person has to directly  
11 threaten the officers, but to what extent are the  
12 officers justified in believing that this person could  
13 present some kind of a risk to them.

14 A third -- another factor to consider is whether  
15 the individual being arrested is offering any  
16 resistance. Again, it's one thing if an individual's  
17 resisting arrest. More force may be required than if  
18 the individual passively submits.

19 Another consideration, of course, is the degree  
20 of force that was used, did the officers use a  
21 tremendous amount of force that created a severe injury  
22 or a risk of severe injury to the individual being  
23 arrested or was the force much less in degree.

24 And the ultimate factor, I guess, or one of the  
25 ultimate factors is, was the amount of force used

1 proportional and appropriate under the circumstances.  
2 When you balance all of those things, was the amount of  
3 force used reasonable under the circumstances.

4 Now, I've told you during the trial, and I want  
5 to just repeat this, that there was evidence about the  
6 report that was made to the officers as to what  
7 Mr. Oliver was alleged to have done, the reason he was  
8 being arrested, what offense he supposedly committed.

9 And as I told you, that evidence you can  
10 properly consider for the purpose of determining  
11 whether the force used by the officers was reasonable.  
12 That would be a factor in making that decision.

13 As I said before, the seriousness of what it is  
14 that Mr. Oliver supposedly did the officers were  
15 certainly entitled to take into account in determining  
16 how they were going to effect this arrest.

17 But as I also told you, you should not consider  
18 those reports as evidence that Mr. Oliver actually did  
19 those things. You haven't heard from the source -- you  
20 haven't heard the sources of those reports testify. So  
21 you shouldn't conclude that Mr. Oliver necessarily must  
22 have done the things that were reported.

23 So keep that distinction in mind. You can  
24 consider that for purposes of determining whether the  
25 officers acted reasonably, but you shouldn't conclude

1 that Mr. Oliver actually did those things. That's not  
2 a matter for you to determine. That would be  
3 determined on another occasion.

4 Also, bear in mind that the fact that Mr. Oliver  
5 may have been injured during the course of the arrest  
6 doesn't necessarily prove that the amount of force used  
7 was excessive.

8 An individual can be injured in the course of an  
9 arrest even though the amount of force used was no more  
10 than what was reasonable.

11 So the focus here is not -- should not be  
12 entirely on what injuries, if any, did Mr. Oliver  
13 sustain but, rather, was the force used by the officers  
14 reasonable under the circumstances.

15 Now, the second claim, as I told you, that  
16 Mr. Oliver has made here is what's called a battery  
17 claim. I'm sure you've heard the term "assault and  
18 battery." They're two distinct concepts that are  
19 sometimes mixed up with one another.

20 This is a battery claim. The claim is that  
21 Officers Lema and/or Medeiros used a degree of force on  
22 Mr. Oliver that not only rose to a level of an unlawful  
23 seizure within the meaning of the Fourth Amendment, but  
24 it also amounted to a battery against him.

25 Now, battery is defined as an intentional

1 physical contact made with another person without that  
2 person's consent that is not legally permitted, that  
3 the person making the contact has no legal right to  
4 make, and that is harmful or offensive to a person of  
5 ordinary sensibilities.

6 In order to prevail on his battery claim,  
7 Mr. Oliver must prove three things or elements that are  
8 a little different from the elements he has to prove to  
9 establish his reasonable -- I mean his excessive force  
10 claim, but they're very similar. They're different,  
11 but they're similar.

12 The first thing that Mr. Oliver has to prove is  
13 that the officers made an unpermitted bodily contact  
14 with him without his consent. Here, there's no  
15 question there was bodily contact made. The real  
16 question is whether it was unpermitted.

17 Second, the Plaintiff must prove that the  
18 officers acted intentionally. Third, they must prove  
19 that the contact was physically harmful or would have  
20 been offensive to a person of ordinary sensibilities.

21 There's a fourth thing he must prove, and that  
22 is that the alleged battery proximately caused the  
23 injuries or losses that he's seeking to recover for.

24 As I previously stated, when a police officer  
25 arrests an individual, the officer is permitted to use

1       whatever force is reasonably necessary to effect the  
2       arrest. So the mere fact that in the course of making  
3       a lawful arrest a police officer makes contact with the  
4       person that the person may not have agreed to or the  
5       person may find offensive doesn't make it a battery if  
6       the officer used only that amount of force that was  
7       reasonably necessary to effect the arrest.

8               I have told you what the two claims are and what  
9       things Mr. Oliver must prove in order to prevail on  
10      each of those claims, and I've also -- I think I've  
11      told you, if I haven't, I'll tell you now, that in  
12      order to prevail on either of those claims, Mr. Oliver  
13      must prove every one of the elements that relates to  
14      that claim.

15             If he's failed to prove any one of those things,  
16      then you should return a verdict for the Defendant on  
17      that claim. On the other hand, if he has proven all of  
18      those things, then you should return a verdict in favor  
19      of Mr. Oliver.

20             I told you that one of the things Mr. Oliver  
21      must prove in connection with each claim is that he  
22      suffered some loss or injury that was proximately  
23      caused by the use of excessive force or by the battery,  
24      and so I need to define for you what it means to --  
25      what "proximate cause" means, what it means when we say

1       that something proximately caused injuries or loss.  
2       You can probably take a pretty good guess at what it  
3       means, but I don't want you to guess.

4               An act or an event is considered a proximate  
5       cause of an injury or a loss if the act or event  
6       produced the injury or loss in the ordinary course of  
7       events.

8               A Defendant's conduct cannot be the proximate  
9       cause of a Plaintiff's loss or injury unless the loss  
10      or injury would not have occurred but for the  
11      Defendants' act.  If the loss or injury would have --  
12      the loss or injury must be one that would not have  
13      occurred but for the Defendants' act.

14              So to put it another way, the Plaintiff,  
15      Mr. Oliver in this case, has to show that but for the  
16      Defendants' conduct here, he would not have suffered  
17      the loss or injury in question.

18              If the injury would have occurred regardless of  
19      what the Defendants did, then their conduct could not  
20      have been the proximate cause of the injuries.  So to  
21      put it as simply as I know how, there has to be a  
22      direct causal connection between what the Defendants  
23      are alleged to have done and the injuries or losses  
24      that the Plaintiff is claiming.

25              That brings me to the question of damages.  In

1 discussing damages with you, I don't mean to suggest in  
2 any way that you should or should not find the  
3 Defendants liable with respect to either of the two  
4 claims that have been asserted against them. That's up  
5 to you to decide whether the Defendants are responsible  
6 or liable for any injuries or losses that Mr. Oliver  
7 may have sustained as a result of what happened during  
8 the course of this arrest.

9           You get to the question of damages only if you  
10 decide that the Defendants are responsible, that is to  
11 say that they either used excessive force in arresting  
12 Mr. Oliver or they committed a battery upon him.

13           And it's only if you answer those two questions  
14 in the affirmative do you get to the question of  
15 damages. If you find that they're not liable, then you  
16 don't need to consider the question of damages.

17           But I want to discuss the damages with you so  
18 that if you do determine the Defendants are liable or  
19 either one of them is liable on either of these claims,  
20 you will know what the legal principles are that govern  
21 an award of damages.

22           Damages, like any of the other elements of the  
23 Plaintiff's claim, have to be proven by a fair  
24 preponderance of the evidence. You can't award damages  
25 based on guesses or speculation. You've got to base

1 any award of damages on the evidence that's been  
2 presented as to what damages the Plaintiff sustained as  
3 a proximate result of the Defendants' acts and what  
4 would be fair and reasonable compensation for those  
5 damages.

6 The type of damages the Plaintiff is claiming in  
7 this case are what are called compensatory damages.  
8 And as the term implies, compensatory damages are  
9 designed to compensate a Plaintiff for an actual loss  
10 or injury that the Plaintiff has sustained.

11 The measure of compensatory damages is the  
12 amount that would fairly compensate the Plaintiff for  
13 whatever losses or injuries the Plaintiff has proven he  
14 has sustained as a direct or proximate result of what  
15 the Defendants did.

16 If you find either of the Defendants liable in  
17 this case, you could award the Plaintiff damages, or  
18 the types of damages the Plaintiff is claiming are  
19 compensation for loss of earnings or earning capacity.  
20 That's one of the types of damages that he's claiming.

21 And the measure of damages for loss of earnings  
22 or earning capacity is basically the difference between  
23 the amount that the Plaintiff would have been capable  
24 of earning if he had not been injured as opposed to the  
25 amount that he is capable of earning or was capable of



1       earning after sustaining the injuries in question. In  
2       other words, what's the difference between those two  
3       amounts, that would be the amount of the -- the amount  
4       of loss of earning capacity that he would have  
5       suffered.

6               And, again, in order to be awarded damages for  
7       loss of earnings or earning capacity, the Plaintiff has  
8       to present evidence that proves by a fair preponderance  
9       what damages or loss he actually sustained.

10              If you find either Defendant liable in this  
11       case, you also may award the Plaintiff damages for any  
12       bodily injuries and/or any pain and suffering that you  
13       find he may have proven he sustained as a result of the  
14       Plaintiff's -- the Defendants' conduct.

15              Unlike some other kinds of damages, damages for  
16       pain and suffering and bodily injuries are not  
17       susceptible of precise calculation. You can't measure  
18       them objectively. You can't take out a calculator and  
19       add up numbers.

20              You have to base your decision on the nature,  
21       extent and duration of whatever bodily injuries or pain  
22       and suffering the Plaintiff has proven that he has  
23       sustained here.

24              And any suggestion, there were some suggestions  
25       made to you by one of the attorneys as to how you

1 should or might go about calculating that, that's not  
2 binding on you in any way. What the attorneys may have  
3 suggested is not binding on you.

4 It's up to you and you alone to decide what  
5 amount, if any, would be appropriate and would  
6 compensate the Plaintiff fairly for any bodily injuries  
7 or any pain and suffering that you find he's sustained.

8 There's been some evidence in this case that  
9 Mr. Oliver was suffering from a physical condition,  
10 cerebral palsy, before this incident occurred and that  
11 that obviously had some effect on his physical  
12 condition.

13 The extent to which he was afflicted by cerebral  
14 palsy and whether or not some of the things that he's  
15 claiming are attributable to the cerebral palsy as  
16 opposed to the consequences of this arrest, those are  
17 matters for you to decide; but you should keep in mind  
18 a couple of points here.

19 First of all, to the extent that the Defendants  
20 did anything or are liable for conduct that may have  
21 aggravated Mr. Oliver's condition or that produced  
22 injuries or consequences independent of his condition,  
23 the Defendants would be responsible to that extent.

24 The Defendants would not be responsible for any  
25 impairments that Mr. Oliver has that were purely the

1 result of the preexisting cerebral palsy. The  
2 Defendants are not responsible for his cerebral palsy.  
3 They're only responsible to the extent that they may  
4 have exacerbated his condition or may have caused new  
5 injuries to him.

6 Now, I told you what the Plaintiff has to prove  
7 in order to establish that the Defendants are liable to  
8 him for either excessive force or battery; and I've  
9 also told you how to or what principles you have to  
10 apply in determining what damages should be awarded, if  
11 any, to Mr. Oliver if he has proven that the Defendants  
12 are liable. And I previously told you that Mr. Oliver  
13 has to prove these things by a fair preponderance of  
14 the evidence. I promised you I would tell you what  
15 that meant, and I'll tell you now.

16 Proving something by a fair preponderance of the  
17 evidence basically means proving it by the greater  
18 weight of the evidence or, to put it another way, to  
19 prove that what it is that the person is claiming is  
20 more likely so than not so.

21 Now, the best way that I know to explain what is  
22 meant by proving something by a fair preponderance of  
23 the evidence is to ask you to envision the scales of  
24 justice. I'm sure you've seen the caricature of the  
25 blindfolded Lady Justice who's holding the scales in

1 front of her that have the two counterbalancing arms.

2 I think they're called apothecary scales.

3 Those are the old-fashioned scales where if you  
4 wanted to weigh an item, you put the item that you  
5 wanted to weigh on one side and you put premeasured  
6 weights on the other side and when the scale came into  
7 balance, you added up the premeasured weights and that  
8 told you how much the item weighed. That's the kind of  
9 scale I'm talking about.

10 In order to determine whether the Plaintiff has  
11 proven any fact or point by a fair preponderance of the  
12 evidence, what you should do is take all of the bits of  
13 evidence that have been presented to you that support  
14 the Plaintiff's position on that particular point or  
15 claim, whether it be testimony of witnesses, any  
16 exhibits, you take all those bits of evidence that  
17 support the Plaintiff's claim and you put them on the  
18 Plaintiff's side of the scale.

19 Then you take all the bits of evidence that have  
20 been presented that support the Defendants' position on  
21 that particular point. You put those on the  
22 Defendants' side of the scale, and then you see what  
23 happens to the scale.

24 If you determine that the scale tips in favor of  
25 the Plaintiff, no matter how slightly it tips, if it

1 tips in favor of the Plaintiff, the Plaintiff has  
2 proven that point by a fair preponderance of the  
3 evidence because the evidence on the Plaintiff's side  
4 outweighs the evidence on the Defendants' side.

5 On the other hand, if after you go through that  
6 exercise you determine that the scale tips in favor of  
7 the Defendants or the scale is evenly balanced, it  
8 doesn't tip one way or the other, then the Plaintiff  
9 has failed to prove that point to you by a fair  
10 preponderance of the evidence because the Plaintiff's  
11 evidence does not outweigh the Defendants' evidence.

12 Now you know what it is the Plaintiff has to  
13 prove, and you know the standard of proof to be  
14 applied, the fair preponderance of the evidence  
15 standard. The next question is, how do you determine  
16 whether the Plaintiff has proven the things that he has  
17 to prove by a fair preponderance of the evidence.

18 Well, as I've said, you've got to base that  
19 decision on the evidence that's been presented, which  
20 consists primarily of the testimony of the witnesses  
21 and what is in the exhibits.

22 I don't recall now if any of the lawyers  
23 stipulated to any facts. I don't remember that they  
24 did; but if they did, you can consider that as well.

25 So let's take the testimony of the witnesses

1 first. Your principal task in reviewing the testimony  
2 of the witnesses is to determine the witness's  
3 credibility or, to put it another way, how much weight  
4 the testimony of each witness deserves on that scale I  
5 was talking about.

6           And in making that decision, there are a number  
7 of factors that you ought to consider. One is the  
8 witness's opportunity or lack of opportunity to have  
9 accurately observed the things that the witness  
10 testified to. In other words, was the witness in a  
11 good position to have accurately seen, heard or  
12 otherwise observed what it is that the witness told you  
13 or did it appear to you that the witness's ability to  
14 know these things or see these things was really not  
15 that good.

16           The second factor is the witness's memory. The  
17 witness might have been in a very good position to have  
18 accurately seen or heard these things; but unless the  
19 witness has a clear and accurate recollection of what  
20 it is that the witness saw or heard, the witness's  
21 testimony may not be entitled to that much weight.

22           So it's up to you to ask yourselves whether the  
23 witness did seem to have a clear and accurate memory or  
24 whether the witness's memory was maybe not so clear.

25           A third factor to consider is the witness's

1 appearance on the stand. One reason we ordinarily  
2 require witnesses to come in and testify in person as  
3 opposed to having somebody tell you what somebody  
4 outside of the courtroom that you may never have seen  
5 told them is that it gives you a chance to size up the  
6 person who is the source of the information.

7           And from your observation of the person as they  
8 testify and answer questions, you can make some  
9 judgments as to how credible this person is, how much  
10 weight this person's testimony deserves on that scale.

11           Another factor to keep in mind is the  
12 probability or improbability of what the witness said.  
13 Just because a witness testified that a particular  
14 thing was or was not so and nobody directly  
15 contradicted the witness, that doesn't mean that you  
16 have to accept everything a witness said at face value.

17           If what the witness told you seems to be highly  
18 improbable or impossible, you don't have to accept the  
19 witness's testimony simply because the witness said it  
20 and nobody disputed it, or if you conclude that the  
21 witness was lying or mistaken, you don't have to accept  
22 the witness's testimony.

23           A final consideration or factor is whether the  
24 witness has anything to gain or lose by the outcome of  
25 this case.

1           Now, that doesn't mean, of course, that just  
2           because a witness may have a stake in the outcome that  
3           you ought to disregard the witness's testimony or to  
4           automatically discount what the witness said because,  
5           by their very nature, lawsuits usually involve the  
6           participants in the incident and they may have some  
7           interest in what your decision is.

8           But you can certainly consider the witness's  
9           interest in the outcome in deciding what weight to give  
10          to that witness's testimony.

11          Now, as you know, some of the witnesses in the  
12          case were police officers, and that shouldn't make any  
13          difference in your assessment of their credibility.  
14          The fact that an individual is a police officer doesn't  
15          automatically mean that you ought to give more or less  
16          weight to that individual's testimony.

17          It's not the position that an individual holds  
18          but, rather, it's your assessment of that witness's  
19          credibility that's what counts.

20          I believe there are a couple of occasions during  
21          the trial when the lawyers attempted to show that a  
22          witness on some previous occasion said something  
23          different from what the witness said during the course  
24          of his testimony or her testimony.

25          That's called -- let me put it another way. A



1 witness can be impeached; that is to say, the witness's  
2 credibility can be challenged or undermined by showing  
3 that on some previous occasion the witness said  
4 something that was inconsistent with the testimony the  
5 witness gave at trial.

6 And it's up to you to decide whether you think  
7 that on some prior occasion the witness did say  
8 something inconsistent and, if so, whether or to what  
9 extent you think the witness's testimony should be  
10 discounted for that reason.

11 You don't expect people to say exactly the same  
12 thing in exactly the same words every time they are  
13 asked a question; but if they're giving answers that  
14 are significantly different, that might be a reason to  
15 discount their testimony.

16 Keep in mind, too, that in deciding which way  
17 that scale tips, it's not the number of witnesses who  
18 testify on either side of the issue that -- that's  
19 determinative but, rather, it's the quality of their  
20 testimony.

21 So you can have -- one witness can testify on  
22 one side of the issue. Two or three witnesses could  
23 testify on the other. That doesn't necessarily mean  
24 that the scale tips in favor of the two or three  
25 witnesses.

1           If you think that the one witness was a very  
2           credible witness and the two or three witnesses were  
3           not so credible for whatever reason, you may find that  
4           the events were as related by the one witness.

5           In addition to the witnesses, you will have with  
6           you in the jury room -- you won't have the witnesses in  
7           the jury room; but in addition to the testimony of the  
8           witnesses, you will be able to consider the exhibits  
9           that will be with you in the jury room in reaching your  
10          decision.

11          You should consider the exhibits like the  
12          testimony of the witnesses in light of all of the  
13          evidence that's been presented during the trial.

14          In other words, just as you don't have to accept  
15          the testimony of a witness at face value, you don't  
16          have to accept an exhibit at face value.

17          You should look at the exhibit and evaluate it  
18          in the context of all of the evidence that's been  
19          presented and give it whatever weight on that scale you  
20          think it deserves.

21          Now, I've told you that in making your decision  
22          you can only consider the evidence that is properly  
23          before you, but that doesn't mean that you're strictly  
24          limited to the testimony of the witnesses and the  
25          contents of the exhibits.

1           You can draw from the testimony or the exhibits  
2           any additional inferences or conclusions as may be  
3           warranted under the circumstances. To put it another  
4           way, any fact that has to be proven in a case can be  
5           proven in either of two ways.

6           It can be proven by direct evidence, which means  
7           the direct observation or the testimony of a witness  
8           who claims to have directly observed the fact or an  
9           exhibit that is the thing that is being asserted, or it  
10          can be proven by what's called circumstantial evidence.

11          Proving something by circumstantial evidence  
12          means to prove through direct evidence the existence of  
13          two facts, two or more facts, from which the existence  
14          or nonexistence of a third fact may be reasonably  
15          inferred.

16          And, again, let me give you an example that I  
17          think probably explains it a little better than I can  
18          do with words.

19          Suppose on some winter night before you go to  
20          bed you look out the window and the ground is bare.  
21          The next morning you wake up, and there's a foot of  
22          snow on the ground. If somebody asked you whether it  
23          snowed last night, your answer would be yes, I would  
24          assume.

25          Suppose you had to come into court and prove

1       that it snowed last night. How would you go about  
2       doing that? Well, you could do that in one of two  
3       ways. You could find someone who was awake when the  
4       snowflakes were falling, and they could testify that  
5       they actually observed the snowflakes falling from the  
6       sky.

7               That would be an example of proving that it  
8       snowed by direct evidence, the testimony of a witness  
9       who claims to have directly observed the snowflakes  
10      falling.

11             If you could not find someone who was awake when  
12      the snowflakes were falling, you could testify yourself  
13      as to two facts from your direct observation. Fact  
14      number one, before you went to bed, the ground was  
15      bare. Fact number two, when you woke up, there was a  
16      foot of snow on the ground.

17             You can prove those two facts by direct  
18      evidence. And from those two facts, it is certainly a  
19      reasonable inference that it snowed last night. That  
20      would be an example of proving it by circumstantial  
21      evidence.

22             Now, there's a word of caution here that there's  
23      a big difference between proving something by  
24      circumstantial evidence and guessing. Proof by  
25      circumstantial evidence is permitted. Guessing is not.

1           And the difference between the two is that when  
2           you prove -- in order to prove something by  
3           circumstantial evidence, you must first establish the  
4           underlying facts through the direct evidence; and,  
5           secondly, the inference to be drawn from those facts  
6           must be a reasonable inference.

7           So in my example, if someone asked you if it was  
8           going to snow next Wednesday night, it would not be  
9           reasonable to infer from those facts that it's going to  
10          snow next Wednesday night.

11          So keep in mind that any fact can be proven  
12          either by direct or circumstantial evidence, but there  
13          are -- there's a difference between proving something  
14          by circumstantial evidence and just guessing.

15          Now, I've told you that it's up to you to  
16          determine the facts in this case. That's not my  
17          function. If during the course of this trial I've said  
18          or done anything that has led you to draw some  
19          conclusion as to what you think my view of the facts  
20          may be, I can tell you that I have not intended to make  
21          any such suggestion and you shouldn't be concerned  
22          about what you might think I might think the facts of  
23          the case are. It's up to you and you alone to decide  
24          the facts.

25          You've heard -- there have been occasions during

1 the trial where the attorneys have objected. I told  
2 you at the beginning that that shouldn't influence the  
3 weight you give to the evidence.

4 If I allowed the evidence in, you can consider  
5 it for whatever value you think it has. It doesn't  
6 matter if anybody objected to it.

7 I will add at this time that an attorney has a  
8 right, even a responsibility, to object when the  
9 attorney thinks that evidence being offered by the  
10 opposing attorney is not proper, it doesn't satisfy the  
11 requirements of the rules of evidence.

12 And you shouldn't penalize the attorney or the  
13 attorney's client just because the attorney may have  
14 objected to evidence at various times during the trial.

15 I hope that it goes without saying that neither  
16 bias in favor of any person or group or cause,  
17 prejudice against any person or group or cause or  
18 sympathy of any type should play any role whatsoever in  
19 your deliberations.

20 Your function here is to look at the evidence  
21 objectively, that means impartially, to determine from  
22 that evidence what the facts are, what happened or  
23 didn't happen, and to apply to the facts the law as I  
24 have explained it to you. That's all that either side  
25 in this case is entitled to or expects.

1           I'm going to ask the lawyers to approach the  
2 side bar for a minute to tell me if they think I have  
3 forgotten to tell you something I should have told you  
4 or misstated anything I did tell you. So excuse us for  
5 a moment.

6           (Bench conference held on the record)

7           THE COURT: Does the Plaintiff have any  
8 objections to the charge?

9           MR. McKENNA: No.

10          THE COURT: Defendant?

11          MR. DeSISTO: No.

12          THE COURT: The clerk's getting the verdict form  
13 in a minute, and I'll show it to you before I send it  
14 in with the jury.

15          MR. McKENNA: We only have one exhibit, but that  
16 will be going to the jury room, I assume.

17          (End of bench conference)

18          THE COURT: Now, ladies and gentlemen, in order  
19 to reach a -- return verdicts in this case, all of you  
20 must agree as to what the verdicts should be. You  
21 cannot return a verdict either for the Plaintiff or the  
22 Defendant on any of these claims unless you are  
23 unanimous, you agree what the verdict should be.

24          When you go into the jury room, there are two  
25 things you should keep in mind. I know they seem to be

1 in conflict, but one of them or one thing you should  
2 keep in mind is that you ought to listen with an open  
3 mind to what the other jurors have to say.

4 If you initially disagree with them, you should  
5 listen to them with an open mind and you should be  
6 humble enough to change your opinion if after listening  
7 to what the other jurors have to say you become  
8 convinced that you are incorrect and they're correct.

9 On the other hand, you should each recognize  
10 that you have an independent responsibility to vote for  
11 the verdict that you think is the correct verdict based  
12 on the evidence that's been presented and the law as  
13 I've explained it to you even if after listening with  
14 an open mind to the -- what the other jurors have to  
15 say you remain convinced that you're correct.

16 And you should have the courage to stick to your  
17 convictions even if all of the other jurors should  
18 disagree with you, even if you're the only one.

19 I know, as I said, those things sound like they  
20 conflict; and to some extent I guess they do. But my  
21 experience over the years has been that jurors have  
22 generally been able to come back with unanimous  
23 verdicts without doing violence to either of those  
24 principles, and I'm confident you will, too. But if  
25 you can't, we'll cross that bridge when we get to it.



1           When you go into the jury room, the first thing  
2           that you need to do is select a foreman or forelady.  
3           That would be a person who will have three basic  
4           responsibilities.

5           First, that person will have the responsibility  
6           of moderating your deliberations, making sure they're  
7           conducted in an orderly manner and that anyone who  
8           wishes to express an opinion has a fair chance to do  
9           that.

10          The second responsibility will be to complete  
11          and sign the verdict form that will be sent in in a  
12          couple of minutes. It's a simple form. It just asks  
13          you to check the box if you find for the Plaintiff or  
14          the Defendant on each of the claims and, if you find  
15          for the Plaintiff on any of the claims, what's the  
16          amount of damages to be awarded.

17          So that's the foreman's job to fill out that  
18          form and sign it, bring it back into the courtroom  
19          after you've reached a unanimous verdict, and the clerk  
20          will take it from you.

21          The third thing the foreman may or may not have  
22          to do is, if you should have to communicate with me for  
23          any reason, the communication should be in the form of  
24          a brief note from the foreman or forelady explaining  
25          what your question or problem is. You give it to the

1 security officer who will be outside your door. He'll  
2 give it to me. I'll discuss it with the lawyers, and I  
3 will try to respond as promptly and helpfully as I  
4 properly can.

5 And I emphasize the word "properly" because, as  
6 I've told you, there are some things I cannot properly  
7 do to help you. You're the judges of the facts. I  
8 can't help you in determining what the facts are.  
9 That's something you have to do on your own.

10 But if there's anything else that I can do to  
11 help you, I certainly will try to. I don't mean to  
12 suggest that I expect you're going to have any  
13 questions or problems; but if you do, it may be  
14 comforting to know that you can at least ask for my  
15 help.

16 I also should mention promptly because I have  
17 other cases that I'm dealing with while you're  
18 deliberating, so I may not be able to get back to you  
19 immediately. So please be patient if you don't hear  
20 from me right away as soon as you tell me what your  
21 question or problem is.

22 As far as your hours are concerned, they're  
23 whatever you want them to be. We're almost to the end  
24 of the usual court day, so maybe one thing you should  
25 talk about is -- I don't know how long it will take you

1 to reach verdicts. If you can reach a verdict this  
2 afternoon, that's fine.

3 There's no time limit. You should take as much  
4 time as you think is necessary to fairly decide this  
5 case. And at the end of the day, if you haven't  
6 reached a unanimous verdict, you have the option of  
7 either coming back tomorrow or if you want to stay  
8 late, let me know; but if that's your decision, please  
9 tell me pretty soon because I need to make arrangements  
10 for staffing the building after the usual hours. So  
11 that's another thing to think about.

12 Is there anything else, counsel, before the jury  
13 is sent out?

14 MR. DeSISTO: No, your Honor.

15 MR. McKENNA: No. Thank you, your Honor.

16 THE COURT: I'll ask the security officer to  
17 come forward, then, and the clerk will administer the  
18 oath.

19 (Court security officer sworn)

20 THE COURT: One final note, ladies and  
21 gentlemen. If you tell me that you want to come back  
22 tomorrow, I'll just have the clerk excuse you; but  
23 before we do that, I want to make sure that you  
24 understand that you should not discuss -- you should  
25 stop your deliberations when you leave, don't do any

1 research or don't get any information about the case,  
2 and when you return tomorrow morning, do not begin  
3 deliberating again until I've brought you back into the  
4 courtroom and verified that everyone is here.

5           And certainly don't start discussing it in small  
6 groups because if not all of you are present, you  
7 defeat the purpose of the collective decision. The  
8 case is now in your hands. You may return to the jury  
9 room to begin your deliberations.

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