

1 THE COURT: Ladies and Gentlemen, this is the
2 time when it's my duty to explain to you the principles
3 of law that apply in this case, and it's your duty to
4 apply the law, as I explain it to you to the facts as
5 you determine the facts to be.

6 So I'm the judge of the law, you're the judges
7 of the facts, and hopefully if we both do our
8 respective jobs, you will return a verdict that is
9 fair, just and appropriate.

10 As you know, this is a suit that has been
11 brought by Brenda Hogan and RIPAWS, a corporation that
12 she established, against Captain Walter Barlow and the
13 City of East Providence. And since Ms. Hogan and
14 RIPAWS are the ones who brought this suit, they're
15 referred to as the Plaintiffs. So if I use the term
16 Plaintiffs, I'm talking about Ms. Hogan and RIPAWS.

17 And since Captain Barlow and the City of
18 East Providence are the ones against whom the suit has
19 been brought, they are the Defendants, so if I use the
20 term Defendants, I'm referring to them.

21 And I should mention that the reason the City of
22 East Providence is a Defendant in the case is because
23 it was the employer of Captain Barlow, and the law says
24 that an employer is responsible for the acts of its
25 employees to the extent that those acts were committed

1 during the course of the employee's employment and in
2 the course of carrying out the employee's duties.

3 Now, since there are two Defendants, I should
4 point out that each Defendant and each Plaintiff, for
5 that matter, is entitled to your separate consideration
6 of the evidence. So that you need to make separate
7 determinations as to whether either of the Plaintiffs
8 is entitled to recover any money here and, similarly,
9 whether either Defendant is liable to pay any money.

10 And simply because you may find that one
11 Plaintiff is entitled to recover or not entitled to
12 recover, you shouldn't therefore conclude that the
13 other Plaintiff also must be. And the same with the
14 Defendants, just because you find that one Defendant is
15 liable, you shouldn't find the other Defendant
16 automatically liable or not liable, as the case may be.
17 You've got to look at each claim against each Defendant
18 and the evidence that pertains to that claim.

19 Now, since the Plaintiffs are the ones who are
20 making these claims, the law imposes on them the
21 responsibility or the burden of proving the claims.
22 It's not up to the Defendants to come in here and prove
23 that they're not liable; that is to say, the Defendants
24 don't have to disprove the claims. It's up to the
25 Plaintiffs who are making the claims to prove those

1 claims.

2 And the Plaintiffs have to prove those claims by
3 what's called a fair preponderance of the evidence, and
4 I'll explain to you a little later exactly what that
5 means, what the nature of that burden is.

6 But right now I want to focus on what it is that
7 the Plaintiffs have to prove in order to prevail on
8 their claim. And this case, as you know, is a
9 defamation case. That's what it's about. And
10 defamation consists of wrongfully making false
11 statements about another person that seriously harms
12 that person's reputation in the eyes of others and/or
13 that deters others from dealing with or associating
14 with that person.

15 Defamatory statements that are made orally are
16 called slander, and defamatory statements that are made
17 in writing are referred to as libel. Now, although
18 you've heard evidence in this case about certain verbal
19 statements that may have been made by Captain Barlow
20 about Ms. Hogan or others, this case involves only the
21 type of defamation that is known as libel because it's
22 based on written statements contained in two documents
23 that are in evidence and will be with you in the jury
24 room.

25 Now, the first is a letter to the editor of the

1 "East Providence Post" that was published I believe on
2 April 10, 2003, and that's Exhibit No. 7, I believe.
3 And the other writing or document is a letter that
4 allegedly was posted by e-mail, and that's in evidence
5 I think as Exhibit No. 6.

6 So your first task is to determine whether any
7 statements that Captain Barlow may have made in those
8 documents defamed the Plaintiffs. And in order to
9 prevail on their defamation claims, the Plaintiffs have
10 to prove basically five things or what the law refers
11 to as elements, five elements, and the Plaintiff has to
12 prove each and every one of these elements in order to
13 be entitled to a verdict in her favor-- or in their
14 favor.

15 The first thing the Plaintiffs have to prove is
16 that Captain Barlow made written statements about them,
17 about Ms. Hogan or RIPAWS, that were defamatory.

18 The second thing the Plaintiffs have to prove is
19 that those statements were false. The third thing the
20 Plaintiffs have to prove is that Captain Barlow caused
21 those statements to be published or, to put it another
22 way, to be communicated or disseminated to others.
23 Fourth, the Plaintiffs have to prove that Captain
24 Barlow had no privilege or duty to publish or
25 communicate those statements.

1 And fifth and finally, the Plaintiffs must prove
2 that Captain Barlow bears some degree of fault or blame
3 for making the statement and for its effect on their
4 reputations.

5 Now, a statement is not defamatory simply
6 because it criticizes a Plaintiff. Even if the
7 criticism is harsh criticism or you may view it as
8 harsh criticism or even if the criticism may be unfair,
9 such criticism is not defamatory.

10 For a statement to be defamatory, it has to rise
11 to a level above being merely critical, even unfairly
12 critical, and that's especially true when the
13 statements are made with respect to matters of public
14 concern or in response to comments that a Plaintiff or
15 some individual associated with the Plaintiff may have
16 made.

17 The law allows some latitude for individuals to
18 make statements that may be critical of others, but it
19 doesn't confer a license to make statements that are
20 harmful to a person's reputation when the speaker knows
21 or should know that the statements are false.

22 In deciding whether a statement conveys a
23 defamatory meaning, you ought to look at the words used
24 in their ordinary sense, you ought to consider them
25 within the context in which the statement was made, and

1 you ought to give the words their plain and ordinary
2 meaning.

3 In order to be considered defamatory, a
4 statement must purport to be a statement of fact. An
5 opinion, a statement which clearly is expressing an
6 opinion, is not a defamatory statement, again, no
7 matter how harsh or unfair or unwarranted it may seem.

8 But expressions of opinion could be defamatory
9 if they indicate or imply that they're based on some
10 facts that haven't been disclosed by the speaker. In
11 other words, if the speaker, in expressing an opinion,
12 implies that this opinion is based on some facts that
13 would be defamatory, even though the facts aren't
14 stated, then the opinion could be considered
15 defamatory.

16 But the general rule, as I say, is that the
17 statement has to be a statement of fact in order to be
18 defamatory because everybody is entitled to express
19 opinions.

20 A statement is considered defamatory if it
21 ascribes to a Plaintiff characteristics that would
22 adversely affect the Plaintiff's business to conduct
23 his or her profession or if it accuses a Plaintiff of
24 conduct that is criminal.

25 Now, any statements made by Captain Barlow

1 cannot be said to have defamed either Ms. Hogan or
2 RIPAWS unless the statements referred to them. The
3 Plaintiffs don't have to show that the statements
4 specifically refer to them by name, but they must show
5 that other persons would reasonably understand the
6 statements to refer to them in particular.

7 And it's up to you to decide whether
8 Captain Barlow made statements that are defamatory;
9 that is to say, whether they fit into one of the
10 categories that I've mentioned, they either amount to a
11 statement that the Plaintiff has engaged in conduct
12 that is criminal, committed some kind of crime, or
13 whether the statements are such that they would clearly
14 harm a Plaintiff in the conduct of the Plaintiff's
15 business.

16 So you need to decide whether the statements are
17 defamatory and whether the statements refer to the
18 Plaintiffs; that is to say, whether someone reading
19 those statements would say, yes, this is the-- this
20 statement refers to Ms. Hogan or RIPAWS.

21 If a Defendant makes an allegedly defamatory
22 statement only to the Plaintiff, the Plaintiff would
23 not be defamed because there would be no damage to the
24 Plaintiff's reputation in the eyes of the other persons
25 because the other person wouldn't have known of the

1 statement.

2 So, consequently, in order for a Defendant to be
3 liable for defamation, it must be shown that the
4 Defendant improperly published or communicated the
5 allegedly defamatory statement or statements to third
6 persons.

7 Now, there are some circumstances under which a
8 Defendant has a privilege or a duty to communicate the
9 statements to third persons, and in those cases, the
10 Defendant would not be liable for defaming the
11 Plaintiff in the eyes of those persons to whom the
12 statement was communicated.

13 And one of those circumstances occurs when the
14 statements relate to a public figure or a matter of
15 public interest because the law recognizes the
16 importance of encouraging individuals to come forward
17 and speak up on matters that are of public interest,
18 matters that the public needs to know about or wants to
19 know about because they may be affected.

20 But that privilege does not apply where the
21 Defendant acts maliciously; that is to say, where the
22 Defendant acts willfully for the purpose of injuring
23 the Plaintiff's reputation or with reckless disregard
24 for the facts and the injury that's likely to result to
25 the Plaintiff's reputation.

1 Now, as I previously stated, in order to
2 establish that Captain Barlow is liable for defamation,
3 the Plaintiffs must prove that he bears some degree of
4 fault or blame for making the statements in question.
5 And before I expand on that, let me just go back a
6 moment to the City of East Providence. I've been
7 talking about Captain Barlow and whether he's liable.
8 I told you that the City could be liable if Captain
9 Barlow made defamatory statements during the course of
10 and in connection with his employment.

11 So in order for the City to be-- the City is
12 only liable if Captain Barlow is liable. The City
13 can't be liable for defamation if Captain Barlow did
14 not commit defamation, so I just want to make that
15 point clear. The City isn't necessarily liable just
16 because Captain Barlow may be, but it can't be liable
17 unless he's liable.

18 So getting back to the fault, I told you that in
19 order to establish that Captain Barlow is liable for
20 defamation, the Plaintiffs have to prove that he bears
21 some degree of fault or blame for making the statements
22 in question.

23 To put it another way, the Plaintiff has to show
24 one or more of three things. The Plaintiff either has
25 to show that Captain Barlow knew that the statements

1 were false and defamatory and that he deliberately made
2 them, or the Plaintiffs have to prove that he made the
3 statements with reckless disregard as to whether or not
4 they were accurate and as to what effect, what adverse
5 effect they might have on the Plaintiff's reputation,
6 or the Plaintiff-- another way the Plaintiff could do
7 this is by proving that Captain Barlow was negligent
8 in failing to determine whether the statements were
9 true or false, not simply wrong, but negligent,
10 blameworthy.

11 All right. I'm going to turn now to the
12 question of damages. I've told you what it is that the
13 Plaintiffs have to prove in order to establish that the
14 Defendants are liable for defamation.

15 Now, the next question is: If you decide that
16 the Plaintiffs are liable for defamation, how do you
17 approach the question of damages? And I want to
18 emphasize that we're discussing damages only so that if
19 you decide that the Plaintiffs are liable, you will
20 know what legal principles apply in determining the
21 amount of damages, if any, to be awarded. I don't want
22 to suggest to you, by discussing damages, that I'm
23 indicating that you ought to find the Defendants
24 liable. That's entirely up to you.

25 If you find the Defendants are not liable, you

1 don't even get to the question of damages. But if you
2 find that they are liable for defaming the Plaintiffs,
3 then it's important for you to understand the
4 principles that govern any award of damages.

5 The first thing I would say about damages is
6 that damages must be proven. Damages should not be
7 awarded based on guesses or speculation. The Plaintiff
8 has the burden of proving damages-- or the Plaintiffs
9 have the burden of proving damages, just as they have
10 the burden of proving any other element of their case,
11 and they've got to prove what damages, if any, they
12 sustained as a result of the alleged defamation by a
13 fair preponderance of the evidence. And I'll get to
14 that in a minute.

15 In this case, there are three types of damages
16 that you might consider awarding if you're satisfied
17 that the Plaintiffs have proven the Defendants are
18 liable for defamation. One is what's called
19 compensatory damages, the second is what's called
20 nominal or exemplary damages, and the third is what's
21 called punitive damages. Now, I'll treat each of those
22 separately.

23 As to compensatory damages, as the term implies,
24 compensatory damages are intended to compensate a
25 Plaintiff for an actual loss or injury that the

1 Plaintiff has suffered as a result of the Defendant's
2 improper conduct. In this case, damage to the
3 Plaintiffs' reputations, what damages have the
4 Plaintiffs proved that they sustained to their
5 reputations as a result of the alleged defamation?

6 And the measure of compensatory damages is the
7 amount of money that, in your judgment, would fairly
8 and reasonably compensate a Plaintiff for whatever
9 injuries or damages or losses the Plaintiff has proven
10 to have sustained as a result of the Defendant's
11 conduct.

12 You can't award compensatory damages just for
13 the violation of some legal right. There has to be--
14 compensatory damages are designed to compensate for an
15 actual loss or injury that the evidence shows was
16 sustained.

17 The second type of damages is nominal damages,
18 and again, you can probably guess what that is by the
19 name. Nominal damages are essentially symbolic. Their
20 purpose is to prove a point or indicate a right that
21 the Plaintiff can prove was violated when a Plaintiff
22 is unable to prove that he or she or it sustained any
23 actual loss or injury.

24 In other words, nominal damages are a substitute
25 for compensatory damages. They may be awarded when

1 there was a wrong, the Defendants are liable but the
2 Plaintiff has failed to prove any actual damages.

3 And if you do determine that compensatory
4 damages should be awarded, it should be in a nominal
5 amount, such as \$1. That's generally what nominal
6 damages consist of. And I want to caution you that you
7 cannot award both compensatory and nominal damages on
8 any one claim. It's either one or the other. If you
9 find that there are actual damages and there should be
10 an award of compensatory damages, then you award
11 compensatory.

12 If you find that the Defendants are liable but
13 there are no actual damages, then you would award
14 nominal damages. But you don't want to award both.

15 The third type of damages is called punitive
16 damages, and that may be awarded in addition to either
17 compensatory or nominal damages. And the purpose of
18 punitive damages, as again the term implies, is not to
19 compensate a Plaintiff for some actual loss or injury,
20 but rather it is to punish a Defendant for outrageous
21 misconduct, and its purpose is to deter the Defendant
22 or any others from engaging in that kind of conduct in
23 the future.

24 You're not required to award punitive damages
25 even if you find the Defendants liable. Whether

1 punitive damages should be awarded is entirely a matter
2 for you to decide. I'll try to give you some
3 principles to consider in making that decision.

4 In order to award punitive damages, before you
5 even get to determining what the amount ought to be, in
6 order to award punitive damages, you must be convinced
7 that the evidence proves that the Defendant acted
8 maliciously, that their conduct was so willful,
9 reckless or wicked that it amounted to criminality. So
10 it's a pretty high bar. Mere negligence, even gross
11 negligence is not sufficient to justify an award of
12 punitive damages. A Defendant's conduct must be
13 intentional and malicious.

14 An act is done maliciously if it is prompted by
15 ill will or spite or grudge either toward the Plaintiff
16 individually or toward all persons in a group to which
17 the Plaintiff belongs. An act is done recklessly if
18 it's done with callous disregard or indifference to the
19 rights of others and the consequences of the act.

20 Now, in a defamation case such as this where a
21 Defendant contends that it is not liable because the
22 statements in question are true, the assertion of truth
23 as a defense constitutes what amounts to a
24 republication of the statement, in other words, it's a
25 recommunication of the defamatory statement.

1 So, consequently, if you find that the
2 statements were false and defamatory, you may but
3 you're not required to consider the assertion of truth
4 as a defense as evidence of malice. If you find that
5 the statements were false and defamatory and the
6 Defendant has repeated them here but still claim that
7 they're true, you can consider that as a factor in
8 determining whether the Defendant acted maliciously
9 and, therefore, might be liable for punitive damages.

10 Now, if you decide that the conduct of the
11 Defendant was malicious or reckless and was
12 sufficiently outrageous or extraordinary as to warrant
13 punitive damages, you must then determine the amount of
14 punitive damages to be awarded.

15 Now, there's no precise standard that applies
16 here. I can't give you any magical formula for making
17 that decision, but I can identify for you a number of
18 factors that you ought to consider.

19 First, because the award is punishment, it must
20 bear some relation to the character of the Defendant's
21 act. The more evil the motive or the more outrageous
22 the conduct, the greater the punitive damages would be
23 called for to punish for that act. And conversely, the
24 less evil the motive or the less outrageous the
25 conduct, the less an award of punitive damages should

1 be. So punitive damages, one of the considerations is
2 that punitive damages should be commensurate with the
3 degree of the misconduct.

4 The second factor you may consider is that an
5 award of punitive damages should bear some relation to
6 the nature and extent of the harm sustained by the
7 Plaintiff as a result of the Defendant's actions. The
8 greater the harm, the more the damages the Plaintiff
9 has shown, the greater the award of punitive damages
10 might be.

11 And conversely, again, the lesser the harm, the
12 Plaintiffs haven't shown that they were harmed to any
13 significant extent, the smaller the award of punitive
14 damages should be. So, again, the award should reflect
15 the level of harm sustained as a result of the alleged
16 defamation in this case.

17 The third factor to consider is the Defendant's
18 financial resources. Since one of the purposes of
19 punitive damages is to punish the Defendant, a wealthy
20 Defendant may well be required to pay more in punitive
21 damages than a person of modest means because a smaller
22 amount may have much more of a punitive effect on
23 someone who doesn't have a great deal of resources than
24 it would on someone who's extremely wealthy.

25 And the fourth factor you should consider is the

1 need to deter the Defendant or others from engaging in
2 similar conduct in the future. How much of an award is
3 necessary to accomplish that purpose.

4 And remember, you're not required to award
5 punitive damages even if you find the Defendants
6 liable, but if you decide that punitive damages ought
7 to be awarded, you have to assess them individually
8 against each Defendant.

9 Now, I've told you what it is that the
10 Plaintiffs have to prove here, and I've also told you
11 that the Plaintiffs have to prove these things by a
12 fair preponderance of the evidence, and I promised I
13 would tell you what that means. This is the time I'll
14 tell you.

15 To prove something by a fair preponderance of
16 the evidence essentially means to prove it by a greater
17 weight of the evidence, or another way to put it is to
18 prove that what it is the Plaintiff is contending is
19 more probably so than not so.

20 Now, I don't confuse the burden of proof by a
21 fair preponderance of the evidence with the burden of
22 proving something beyond a reasonable doubt. Some of
23 you may know that, in a criminal case, the prosecutor
24 has to prove the Defendant guilty beyond a reasonable
25 doubt. This isn't a criminal case. This is a civil

1 case, and the burden of proof of a Plaintiff is to
2 prove by a greater weight of the evidence what it is
3 that the Plaintiff's claiming here.

4 And I think the best way that I know of to
5 illustrate what it means for the Plaintiff to prove
6 something by a fair preponderance of the evidence is to
7 ask you to imagine that the scales of justice. You've
8 all seen the depiction of Lady Justice, the blindfolded
9 lady who's holding the scales in her hand, the
10 counterbalancing scales. That's the scale I'm talking
11 about.

12 In order to determine whether the Plaintiffs
13 have proven the things that they're required to prove
14 by a fair preponderance of the evidence, what you
15 should do is you should take the particular point or
16 fact that the Plaintiff is trying to prove, search your
17 mind for all of the evidence that's been presented
18 during the trial that attempts to support the
19 Plaintiff's position on that that particular point, put
20 all those things on the Plaintiff's side of the scale
21 and do the same thing with respect to any evidence that
22 you've heard that you think contradicts the Plaintiff's
23 position or supports the Defendant on that point and
24 put that on the Defendant's side of the scale.

25 Then you take a look at the scale and determine

1 what's happened to the scale. If after you do that,
2 you conclude that the scale tips in favor of the
3 Plaintiff, no matter how slightly it tips, if it tips
4 in favor of the Plaintiff, then the Plaintiff has
5 proven that particular point by a fair preponderance of
6 the evidence because the evidence that supports the
7 Plaintiff on that point outweighs the evidence that
8 supports the Defendant's position.

9 On the other hand, if, after you go through that
10 process, you conclude that the scale tips in favor of
11 the Defendant or that the scale is evenly balanced, it
12 doesn't tip one way or the other, then the Plaintiff
13 has failed to prove that point by a fair preponderance
14 of the evidence because the Plaintiff's evidence does
15 not outweigh the Defendant's evidence on that point.
16 So that's what's meant by proving something by a fair
17 preponderance of the evidence.

18 And the next question is: How do you go about
19 determining whether the Plaintiffs have proven the
20 things they have to prove by a fair preponderance of
21 the evidence? And as I've indicated to you, you've got
22 to base that decision on the evidence that has been
23 properly admitted during this trial, which includes the
24 witnesses who have testified and the exhibits that will
25 go with you into the jury room.

1 Now, with respect to the witnesses, your
2 principal task is to assess the credibility of the
3 witnesses, in other words, how much weight do those
4 witnesses deserve on that scale? And in making that
5 judgment, there are, again, a number of factors that
6 you ought to consider, some of them pretty obvious.
7 One is the witness' appearance on the stand.

8 You had a chance to observe the witnesses when
9 they testified, and one reason that the law requires
10 people who to come in and testify personally, rather
11 than have somebody else tell you what somebody you may
12 never have seen told them, is that it not only gives
13 the opposing attorney a chance to cross-examine the
14 person, but it gives you a chance to size the person up
15 and determine whether that person is someone that you
16 think ought to be believed and whose testimony deserves
17 some weight on that scale.

18 Another consideration is the opportunity or lack
19 of opportunity the witness had to have accurately
20 observed the facts about which the witness testified.
21 In other words, was the witness in a good position to
22 have accurately seen or heard the things that the
23 witness told you, or was the witness' ability to know
24 these things something less than reliable?

25 The third factor is the witness' memory. Some

1 of these events occurred some time ago, and you
2 certainly should consider whether, even if the witness
3 was in a good position to have accurately known the
4 facts about which the witness testified, whether the
5 witness' memory was sufficiently reliable so that you
6 can give the witness' testimony some weight.

7 Another factor is the probability or
8 improbability of the witness' testimony. Just because
9 a witness said something and nobody directly
10 contradicted what the witness said doesn't mean that
11 you have to accept what the witness said at face value.

12 If the witness said things that you think are
13 improbable or implausible or that you just don't think
14 could possibly have been so, you don't have to accept
15 the witness' testimony on that point even if nobody
16 contradicted it. You can disregard that testimony.

17 And the final factor is whether the witness had
18 anything to gain or lose from the outcome of this case,
19 was the witness someone who has a stake in your
20 decision. Now, of course that doesn't mean that just
21 because a witness has an interest in the case, will be
22 personally affected by the case, that you should
23 disregard or discount what the witness said because, by
24 their very nature, most cases, the people who have
25 knowledge about the facts in most cases are people who

1 have a stake in the outcome.

2 But it is a factor that you can take into
3 account, especially when what a witness has to say is
4 different from what a witness who has no interest in
5 the outcome of a case, direct or indirect, might have
6 said.

7 Now, you heard testimony from at least one law
8 enforcement officer, and I should mention that you
9 shouldn't give a witness' testimony any greater or
10 lesser weight because of the position the witness
11 holds. Your assessment of a witness' credibility
12 should be based on your judgment as to whether that
13 witness is credible as a person and not on whether that
14 person does or does not hold any particular office or
15 position.

16 I should also mention that, in determining a
17 witness' credibility, you should also be aware that a
18 witness' credibility may be impeached or a witness'
19 credibility may be challenged by showing that on
20 previous occasions the witness made statements that are
21 different from what the witness said at the time of
22 trial. There were several occasions in this case when
23 that was attempted, as you may recall.

24 Now, again, that doesn't mean that-- well, first
25 of all, it's up to you whether to decide that on some

1 previous occasion the witness may have said something
2 that was significantly different from the witness'
3 testimony, and if so, it's up to you to decide how
4 much, if at all, the witness' testimony should be
5 discounted for that reason. The decision isn't
6 automatic. It's a matter, again, of your judgment.

7 And I should also mention that, in determining
8 which way that scale tips, it isn't the number of
9 witnesses who testified on any side of an issue that
10 makes that determination but, rather, it's the quality
11 of the testimony. So you could have one witness who
12 testifies on one side of a question, there might be two
13 or three witnesses who testified on the other side.
14 That doesn't necessarily mean that the scale tips in
15 favor of the version given by the two or three
16 witnesses. If you think that the one witness is a very
17 credible witness and the two or three witnesses are not
18 so credible for whatever reason, you may find that the
19 scale tips in favor of the version of the one witness.

20 I told you you'll have the exhibits with you in
21 the jury room. Keep in mind that, like the testimony
22 of the witnesses, the exhibits are just tools to be
23 used by you in determining the facts. You can and you
24 should look at the exhibits, examine them to whatever
25 degree you think is appropriate, but just because

1 something's been admitted as an exhibit in the case
2 doesn't mean you have to accept it at face value any
3 more than you have to accept the testimony of a witness
4 at face value. You should evaluate the exhibits in the
5 context of all the evidence that's been presented and
6 your common sense.

7 Now, I've mentioned that you can consider only
8 the evidence that's properly before you that's been
9 admitted into evidence, but that doesn't mean that, in
10 determining the facts in the case, that you are
11 strictly limited to the testimony of the witnesses and
12 the contents of the exhibits.

13 In reaching your conclusions, you are permitted
14 to draw from the evidence, the testimony of the
15 witnesses and the contents of the exhibits, any
16 reasonable inference that your common sense, experience
17 and good judgment tell you are appropriate.

18 And the process of proving something through the
19 drawing of inferences is referred to sometimes as proof
20 by circumstantial evidence, I'm sure you've all heard
21 that term.

22 Any fact that has to be proven in a case can be
23 proven in one of two ways, it can be proven by what's
24 called direct evidence, the testimony of someone who
25 claims to have directly observed that fact, or it can

1 be proven by circumstantial evidence, the proof of two
2 or more facts by the direct evidence from which the
3 existence or nonexistence of a third fact can be
4 reasonably inferred.

5 Let me give you an example of that. Suppose on
6 some winter night before you go to bed, you look out of
7 your window and the ground is bare. The next morning
8 you wake up, you look out and there's a foot of snow on
9 the ground.

10 If someone asks you whether it snowed last
11 night, I think your answer would undoubtedly be yes.
12 Suppose you had to come into court and prove that it
13 snowed last night. How would you do that? Well, you
14 could do that one of two ways. You could find someone
15 who was awake when the snowflakes were falling, they
16 could testify that they saw the snowflakes falling.
17 That's proof that it snowed by direct evidence, the
18 direct observation of the person who saw the snowflakes
19 falling.

20 Suppose, though, that you couldn't find someone
21 who was awake when the snowflakes were falling. You
22 could testify as to two facts from your own knowledge,
23 number one, that before you went to bed the ground was
24 bare, number two, when you woke up, there was a foot of
25 snow on the ground, and from those two facts, it is

1 certainly reasonably, I submit, to infer that it snowed
2 last night.

3 That would be an example of proving it by
4 circumstantial evidence, proving two facts from which
5 the existence of a third fact can be inferred.

6 Now, two words of caution here in the use of
7 circumstantial evidence. First of all, the facts from
8 which the inference is drawn must be established by the
9 direct evidence. You can't make up facts or guess as
10 to what other facts might be. You've got to base any
11 inference on facts that are established by the direct
12 evidence, the testimony of the witnesses or what's in
13 the exhibits.

14 The second caution is that the inference that is
15 drawn must be a reasonable inference. So in my
16 example, if someone asked you whether it was going to
17 snow next Tuesday night, it would not be reasonable to
18 infer from the facts that I just gave that it's going
19 to snow next Tuesday. So keep that in mind.

20 Now, I've told you it's up to you to decide the
21 facts in this case. That's not my function, and if
22 I've done or said anything during this trial that has
23 caused you to believe that I was conveying some opinion
24 on my part as to what the facts are, I can tell you
25 that you're wrong and that I certainly did not intend

1 to convey any such opinion, and you shouldn't be
2 concerned anyway with what my opinion might be about
3 the facts because it's your job to decide the facts.

4 There have been times during the trial when the
5 lawyers objected to evidence that was offered by the
6 other lawyer. If I admitted the evidence, you
7 shouldn't give it any less weight because the lawyer
8 objected. And you shouldn't hold it against the
9 lawyers for objecting because that's their job. They
10 have a responsibility to object to any evidence that is
11 offered that they believe doesn't comply with the Rules
12 of Evidence.

13 I hope that it goes without saying that neither
14 bias in favor of any person or group or cause nor
15 prejudice against any person or group or cause or
16 sympathy of any kind should play any role whatsoever in
17 your decision. Your job is to look at the evidence
18 objectively, to determine from the evidence what the
19 facts are and to apply the facts to the law as I have
20 explained it to you. Now, that's all that either side
21 in this case expects or is entitled to.

22 Now, I'm going to give the lawyers an
23 opportunity to come over to the sidebar one more time
24 to tell me if they think that I failed to tell you
25 something I should have told you or that I incorrectly

1 stated something that I did tell you. And I know
2 you're all crossing your fingers that I didn't forget
3 to tell you something else because I know you're
4 anxious to get back to the jury room,

5 All right. Counsel?

6 (Discussion at sidebar)

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

9 MR. HEALY: No, Your Honor. I think I might
10 have one concern, and that is I don't think it's clear
11 as to punitive damages, Judge, I don't know whether
12 punitive damages can be awarded against a municipality.
13 I know that under a 1983 suit, the case is actually a
14 Rhode Island case, Kahns v. The City of Newport, which
15 says you cannot award punitive damages against a
16 municipality. Since this is a State law count, I don't
17 know whether that would be a tenet of State law as
18 well, but I have very strong suspicion, Judge, that it
19 would be. I don't think that the taxpayers of the City
20 are allowed to be punished. In the case of Meyer, I'm
21 not sure if it applies to State law claim because--

22 THE COURT: So what do you suggest I do?

23 MR. HEALY: I suggest-- what would you like to
24 do?

25 THE COURT: I mean I can strike it later if they

1 come back--

2 (End of discussion at sidebar)

3 THE COURT: In order to reach a verdict in this
4 case, Ladies and Gentlemen, all of you must agree as to
5 what the verdict should be. You cannot return a
6 verdict in favor of the Plaintiffs or the Defendants
7 unless you are unanimous.

8 And when you go into the jury room, you ought to
9 keep two principles in mind: One is that you ought to
10 be prepared to listen with an open mind to what the
11 other jurors have to say if they disagree with you, and
12 you should be humble enough to change your opinion if,
13 after listening, you decide that they were correct and
14 you're incorrect.

15 The second principle, which on its face at least
16 seems somewhat inconsistent, is that you have to keep
17 in mind too that you each have an independent
18 responsibility to vote for the verdict that you believe
19 is the correct verdict based on the law as you
20 understand it and the evidence as it was presented.

21 And you have to have the courage to stick to
22 your convictions even if some or all of the other
23 jurors may disagree provided that you listen with an
24 open mind to what they have to say. That's the key.

25 Now, my experience over the years has been that

1 in the vast majority of cases, jurors have no
2 difficulty in reaching-- well, I shouldn't say no
3 difficulty, but not much difficulty in reaching a
4 unanimous verdict without doing violence to either of
5 those principles, and I am confident that you will be
6 the same, but if not, we'll cross that bridge when we
7 get to it.

8 When you go into the jury room, your lunch I
9 think will be waiting for you, so you can set your own
10 schedule for when you want to eat your lunch. The
11 first thing you need to do or should do is to select a
12 foreman or forelady, and that person will have the
13 responsibility-- three responsibilities: One, to be
14 the moderator of your deliberations, to make sure that
15 they're conducted in an orderly fashion and that anyone
16 who wants a chance to speak gets a reasonable chance to
17 do that.

18 Second, when you have reached the unanimous
19 verdict, the foreman or forelady should complete the
20 verdict form, which will go into the jury room in a few
21 minutes, it's a simple form checking a few boxes,
22 filling in a couple of blanks, that's all, and sign the
23 form and bring it back with you into the courtroom when
24 I bring you back to hear the verdict.

25 The third responsibility, which you may or may

1 not have to exercise is, if it's necessary for the jury
2 to communicate with me for any reason, communication
3 should be in the form of a brief note from the foreman
4 or forelady just telling me what your question or
5 problem is, give it to the Security Officer who will be
6 outside of your door, and he'll give it to me, I'll
7 discuss it with the lawyers, and then I will try my
8 best to respond as quickly and help in any way as I
9 properly can, and I emphasize the word properly because
10 there are some things that I can not properly help you
11 to do, and the principal one is I cannot help you to
12 decide the facts in the case. That's entirely your
13 responsibility.

14 But if there are any other things that I can do,
15 I certainly will try to, and I don't mean to suggest I
16 expect that you will have any problems, but it's maybe
17 comforting to know that, if you do, you can ask for
18 help.

19 Now, you will have a tape-recording of my charge
20 to you that you can play in the jury room, and I know
21 that I've thrown a lot at you in a short period of
22 time. But remember that, if you listen to the charge,
23 you need to consider everything I've told you as a
24 whole in the context-- don't pick out one little point
25 to the exclusion of everything else.

1 As far as your hours are concerned, they're
2 pretty much whatever you want them to be. If, by the
3 end of the day, the usual adjournment hour as you know
4 is 4:30, if you have not reached a verdict by that
5 time, you have the choice of either staying late or
6 coming back tomorrow to resume your deliberations. If
7 you wish to stay late, please let me know because there
8 may be some arrangements that have to be made about
9 staffing the building after hours.

10 So I'll have the Clerk check with you later on
11 in the afternoon just to get an idea of where you are.

12 Is there anything else, counsel, before the jury
13 is sent out that I should say to them?

14 MR. DiSISTO: No.

15 MR. HEALY: No, 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 (The Court Security Officer Was Sworn)

20 THE COURT: All right. Ladies and Gentlemen,
21 this case is now in your hands. You may return to the
22 jury room and begin your deliberations.

23

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