

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF RHODE ISLAND

JOHN WHITFIELD

v.

C.A. No. 07-1918

DAVOL, INC., AND C.R. BARD, INC.

JURY INSTRUCTIONS

TABLE OF CONTENTS

1.	<u>PROVINCE OF THE COURT AND JURY</u> .....	1
2.	<u>ALL PERSONS EQUAL BEFORE THE LAW – CORPORATIONS.</u> .....	1
3.	<u>EVIDENCE IN THE CASE</u> .....	2
4.	<u>BURDEN OF PROOF</u> .....	3
5.	<u>“IF YOU FIND”.</u> .....	3
6.	<u>EVIDENCE – DIRECT, INDIRECT OR CIRCUMSTANTIAL</u> .....	4
7.	<u>INFERENCES – DEFINED</u> .....	4
8.	<u>CREDIBILITY OF WITNESSES – DISCREPANCIES IN TESTIMONY</u> .....	5
9.	<u>STIPULATION – DEFINED</u> .....	6
10.	<u>OPINION EVIDENCE – EXPERT WITNESS</u> .....	6
11.	<u>NATURE OF THE PLAINTIFF’S CLAIMS</u> .....	7
12.	<u>MANUFACTURER NOT REQUIRED TO MAKE ACCIDENT-PROOF PRODUCT</u> .	7
13.	<u>“UNREASONABLY DANGEROUS” – DEFINITION</u> .....	8
14.	<u>PRODUCT LIABILITY – DESIGN DEFECT</u> .....	8
15.	<u>PRODUCT LIABILITY – FAILURE TO WARN.</u> .....	8
16.	<u>“LEARNED INTERMEDIARY” RULE</u> .....	9
17.	<u>“NEGLIGENCE” AND “ORDINARY CARE” – DEFINITION</u> .....	9
18.	<u>NEGLIGENT DESIGN AND/OR NEGLIGENT FAILURE TO WARN.</u> .....	9
19.	<u>CONSIDER DAMAGES ONLY IF LIABILITY IS PROVEN</u> .....	10
20.	<u>DAMAGES</u> .....	10
21.	<u>DELIBERATIONS – GENERAL CONSIDERATIONS</u> .....	10

22. VERDICT – UNANIMITY & DUTY TO DELIBERATE ..... 11

23. COMMUNICATIONS BETWEEN COURT AND JURY DURING DELIBERATIONS  
..... 12

1. PROVINCE OF THE COURT AND JURY

Members of the Jury, now that you have heard the evidence and the arguments of counsel, it becomes my duty to give you instructions as to the law applicable to this case.

It is your duty as jurors to follow the law as I shall state it to you, and to apply that law to the facts of the case as you determine those facts to be from the evidence which has been admitted. You are not to single out any one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law stated by me.

Counsel have quite properly referred to some of the governing rules of law in their arguments. If, however, any difference appears to you between the law as stated by counsel and that stated by the Court in these instructions, you are to adhere to the Court's instructions.

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

You must perform your duties as jurors without bias or prejudice as to any party. The law does not permit you to be governed by sympathy, prejudice, or public opinion. All parties expect that you will carefully and impartially consider all the evidence, follow the law as it is now being given to you, and reach a just verdict, regardless of the consequences.

2. ALL PERSONS EQUAL BEFORE THE LAW – CORPORATIONS

This case should be considered and decided by you as an action between persons of equal

standing in the community, of equal worth, and holding the same or similar stations of life. A corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

### 3. EVIDENCE IN THE CASE

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

In determining the facts in this case, you are to consider only the evidence that properly has been put before you. It is the Court's duty, during the course of trial, to pass upon the admissibility of proffered evidence, that is, to decide whether or not you should consider it. The evidence the Court has admitted is properly before you for your consideration; the evidence the Court has refused to admit is not a proper subject for your deliberations and you must not consider it.

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

The fact that the Court admitted evidence over objection should not influence you in determining the weight you should give such evidence. Nor should statements made by counsel, either for or against the admission of such evidence, influence your determination of the weight

you will give the evidence, if admitted. In other words, you should determine the weight you will give such evidence on the basis of your own consideration of it and without regard to the Court's ruling or the statements of counsel concerning the admissibility of such evidence.

Nor should you permit objection by counsel to the admission of evidence, or the rulings of the Court, to create any bias or prejudice in your minds with respect to counsel or the party he or she represents. It is the duty of counsel to protect the rights and interests of his client, and in the performance of that duty he may freely object to the admission of proffered evidence and should not, in any manner, be penalized for doing so.

#### 4. BURDEN OF PROOF

In these instructions, you are told that your verdict depends on whether or not you believe certain propositions of fact submitted to you. The burden is upon the party who relies upon any such proposition to cause you to believe that such proposition is more likely to be true than not true. In determining whether or not you believe any proposition, you must consider only the evidence and the reasonable inferences derived from the evidence. If the evidence in the case does not cause you to believe a particular proposition submitted, then you cannot return a verdict requiring belief of that proposition.

#### 5. "IF YOU FIND"

When I use the expression "if you find," I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

6. EVIDENCE – DIRECT, INDIRECT OR CIRCUMSTANTIAL

As I told you at the beginning of this case, there are two types of evidence from which you may properly find the truth as to the facts of a case. One is direct evidence—such as the testimony of an eyewitness. The other is indirect or circumstantial evidence—the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

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

7. INFERENCES – DEFINED

You are to consider only the evidence in the case. In your consideration of the evidence, however, you are not limited to the bald statements of the witnesses. In other words, you are not limited to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proven, such reasonable inferences as seem justified in light of your experience.

Inferences are deductions or conclusions which reason and common sense lead you to draw from facts which have been established by the evidence in this case. Inferences may not be based on speculation or conjecture.

8. CREDIBILITY OF WITNESSES – DISCREPANCIES IN TESTIMONY

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves. You may be guided by the appearance and conduct of the witnesses, the manner in which the witness testified, the character of the testimony given, or by evidence contrary to the testimony given.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness's intelligence, motive, state of mind, and demeanor or manner while on the stand. Consider the witness's ability to observe the matters as to which he or she has testified, and whether he or she impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case—including statements that he or she may have made on some prior occasion.

Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause you to discredit such testimony. Two or more persons witnessing an incident or a transaction may see or hear it differently; innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.



After making your own judgment, you will give the testimony of each witness such weight, if any, as you may think it deserves. You may, in short, accept or reject the testimony of any witness in whole or in part. Also, the weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or non-existence of any fact. You may find that the testimony of a small number of witnesses as to any fact is more credible than the testimony of a larger number of witnesses to the contrary.

The testimony of a witness may be discredited or impeached by showing that he or she previously made statements which are different than or inconsistent with his or her testimony here in court. These statements may be used to impeach the credibility of that witness. It is within your province to assess the credibility, if any, to be given the testimony of a witness who has made prior inconsistent or contradictory statements.

#### 9. STIPULATION – DEFINED

The evidence in this case includes facts to which the lawyers have agreed or stipulated. A stipulation means simply that the plaintiff and the defendants accept the truth of a particular proposition or fact. Since there is no disagreement, there is no need for evidence apart from the stipulation. You may give this evidence whatever weight you choose.

#### 10. OPINION EVIDENCE – EXPERT WITNESS

While the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions, there is an exception as to those persons whom we refer to as “expert witnesses.”

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

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves, whether it was based on personal observations or on hypothetical questions. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

#### 11. NATURE OF THE PLAINTIFF'S CLAIMS

The plaintiff in this case is John Whitfield; the defendants in this case are Davol, Inc. and C.R. Bard, Inc. In this case, the parties have agreed that Davol, Inc. and C.R. Bard, Inc. may be treated as one entity. The plaintiff claims that he has suffered injuries caused by the CK Patch designed, manufactured and sold by the defendants. The plaintiff has raised three separate claims against the defendants: product liability for design defect, product liability for inadequate warning for the CK Patch and negligence.

#### 12. MANUFACTURER NOT REQUIRED TO MAKE ACCIDENT-PROOF PRODUCT

A manufacturer does not have a duty to design a product in such a way as to render it wholly incapable of producing an injury. What a manufacturer is required to do is to make a

product that is free from defective and unreasonably dangerous conditions.

13. "UNREASONABLY DANGEROUS" – DEFINITION

The term "unreasonably dangerous" is not specifically defined in the law, so you, the jury, should apply your collective intelligence and experience to all of the facts, evidence and circumstances presented by the parties in this case.

14. PRODUCT LIABILITY – DESIGN DEFECT

Your verdict must be for the plaintiff if you believe:

First, defendants sold in the course of defendants' business the CK Patch which was placed in plaintiff, and

Second, the CK Patch was then in a defective condition unreasonably dangerous when put to a reasonably anticipated use, and

Third, the CK Patch was used in a manner reasonably anticipated, and

Fourth, such defective condition as existed when the CK Patch was sold directly caused or directly contributed to cause damage to plaintiff.

15. PRODUCT LIABILITY – FAILURE TO WARN

Your verdict must be for plaintiff if you believe:

First, defendants sold in the course of defendants' business the CK Patch which was placed in plaintiff, and

Second, the CK Patch was then unreasonably dangerous when put to a reasonably anticipated use without knowledge of its characteristics, and

Third, defendants did not give an adequate warning of the danger, and

Fourth, the product was used in a manner reasonably anticipated, and

Fifth, the lack of adequate warning directly caused or directly contributed to cause damage to plaintiff.

#### 16. "LEARNED INTERMEDIARY" RULE

A manufacturer of a medical device has a duty to properly warn only the physician of the danger associated with the medical device. The physician acts as a learned intermediary between the manufacturer and the patient. A warning to the physician is deemed a warning to the patient; a manufacturer need not communicate directly with the ultimate user of the medical device.

#### 17. "NEGLIGENCE" AND "ORDINARY CARE" – DEFINITION

The term "negligent" or "negligence" as used in these instructions means the failure to use that degree of skill and learning ordinarily used under the same or similar circumstances by an expert in defendants' business.

The phrase "ordinary care" as used in these instructions means that degree of care, skill and learning that an ordinarily careful expert in defendants' business would use under the same or similar circumstances.

#### 18. NEGLIGENT DESIGN AND/OR NEGLIGENT FAILURE TO WARN

Your verdict must be for plaintiff if you believe:

First, defendants designed and labeled the CK Patch, and

Second, the CK Patch was defective in design and/or lacked adequate warnings, and

Third, defendants failed to use ordinary care to design the CK Patch to be reasonably safe and/or to adequately warn of the risk of harm from the CK Patch, and

Fourth, defendants' failure to use ordinary care in the design and/or warnings of the CK Patch directly caused or contributed to cause damage to plaintiff.

#### 19. CONSIDER DAMAGES ONLY IF LIABILITY IS PROVEN

I now turn to the question of damages. In doing so, the Court does not intend to indicate that it is of the opinion that the defendants are liable. You are instructed on damages in order that you may reach a sound and proper determination of the amount you will award in the event that you find that the defendants are liable. You need consider the question of damages only if you find that the plaintiff has proven one or more of his claims; if you find that the defendants are not liable, you cannot award damages.

#### 20. DAMAGES

If you find in favor of plaintiff, then you must award plaintiff such sum as you believe will fairly and justly compensate plaintiff for any damages you believe plaintiff sustained that were directly caused or directly contributed to as a result of defendants' negligence, defective design and/or inadequate labeling.

#### 21. DELIBERATIONS – GENERAL CONSIDERATIONS

Ladies and Gentlemen, in a moment I will dismiss you so that you may commence your

deliberations. However, before I do that I need to give you some instructions about the procedures you must use in the course of your deliberations.

As I said at the beginning of my instructions, it goes without saying that prejudice, sympathy, or compassion should not be permitted to influence you in the course of your deliberations. From what I have said I do not and did not mean to imply that you should approach your consideration of this case in an intellectual vacuum. You are not required to put aside or to disregard your experiences and observations in the ordinary, everyday affairs of life. Indeed, your experiences and observations in the ordinary, everyday affairs of life are essential to your exercise of reasonably sound judgment and discretion in the course of your deliberations; it is your right and duty to consider the evidence in the light of such experience and observations.

## 22. VERDICT – UNANIMITY & DUTY TO DELIBERATE

In order for you to return a verdict, your decision must be a unanimous decision, that is, all nine of you must concur in the decision. You cannot return a verdict, either for the plaintiff or for the defendants, unless and until you are in unanimous agreement as to what your verdict shall be.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide this case for yourself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Discuss and weigh

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

Again, each of you must make your own decision about the proper outcome of this case based on your consideration of the evidence and your discussions with your fellow jurors. No juror should surrender his or her conscientious beliefs solely for the purpose of returning a unanimous verdict.

23. COMMUNICATIONS BETWEEN COURT AND JURY DURING DELIBERATIONS

During your deliberations, if you need further instruction or assistance by the Court in any way, I ask that, through your foreperson, you reduce such requests or questions as you may have to writing. The foreperson may then hand such written requests or questions to the officer in whose charge you will now be placed. The officer will then bring such written request to me and I will have you brought into the courtroom and will attempt to fulfill your request or answer the question as the case may be. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court.

Finally, you are never to reveal to any person -- not even to the Court -- how you stand, numerically or otherwise, on the questions before you, until you have reached a unanimous verdict.