

1           THE COURT: Now, Ladies and Gentlemen, at this  
2 time, it's my responsibility to explain to you the law  
3 that applies in this case. And, as I have previously  
4 told you, it's your duty to apply the law as I explain  
5 it to you to the facts as you determine the facts to  
6 be.

7           So you're the judges of the facts. I'm the  
8 judge of the law. And we if we both do our jobs, then  
9 you ought to be able to return a fair and just verdict  
10 in this case.

11           Now, as you know, this is a suit brought by  
12 Marissa Theroux -- or Theroux, I guess, I'm sorry --  
13 Marissa Theroux against Gregory Estrada and Marten  
14 Transport, Ltd. It's a corporation.

15           And since Marissa is the party bringing the  
16 suit, I may refer to her from time to time as the  
17 Plaintiff. And since Mr. Estrada and Marten are the  
18 parties against whom the suit has been brought, I may  
19 refer to them as the Defendants.

20           Now, I should point out at the outset here that,  
21 as I said, Marten Transport is a corporation, but that  
22 shouldn't have any bearing on your deliberations. A  
23 corporation is a fictional person in the eyes of the  
24 law and should be treated by you just the same as any  
25 individual. So the fact that Marten is a corporation

1 should not affect your decision in this case in any  
2 way. You treat them the same way as you treat  
3 Ms. Theroux and Mr. Estrada.

4 Now, as I think you probably are also aware,  
5 Ms. Theroux has brought this suit to recover for  
6 injuries that she says she sustained in a collision  
7 between the car that she was driving and the truck, the  
8 tractor trailer rig that was being driven by  
9 Mr. Estrada.

10 And Ms. Theroux claims that Mr. Estrada is  
11 liable because the collision was caused by negligence  
12 on the part of Mr. Estrada and that Marten Transport is  
13 liable because it was the owner of the tractor trailer  
14 and Mr. Estrada was driving it both with Marten's  
15 consent and in the course of his employment by Marten.  
16 And I'll have a little more to say about that in a few  
17 minutes.

18 The Defendants deny that Mr. Estrada was  
19 negligent. They dispute the extent of the injuries and  
20 losses claimed by Ms. Theroux, and they also claim that  
21 the accident was caused in whole or in part by  
22 Ms. Theroux's own negligence.

23 Now, the law imposes on any party that makes a  
24 claim the responsibility or the burden of proving what  
25 that party claims. It's not up to the other party to

1       come in and disprove what's being claimed. But,  
2       rather, it's up to the party making a claim to prove  
3       that claim, and the party has a responsibility of  
4       proving what it claims by what's called a fair  
5       preponderance of the evidence.

6               And I will explain that in a little more detail  
7       later. But right now, I want to focus on exactly what  
8       it is that Ms. Theroux has to prove in order to prevail  
9       on her claim against the Defendants.

10              In order to prevail on her negligence claim, and  
11       that's what Ms. Theroux is claiming, is that  
12       Mr. Estrada was negligent, in order to prevail on that  
13       claim, Ms. Theroux must prove three things or what the  
14       law refers to as elements.

15              First, she has to prove that Mr. Estrada was  
16       negligent in his operation of the tractor trailer.

17              Second, she has to prove that Mr. Estrada's  
18       negligence proximately caused the collision.

19              And, third, she has to prove that the collision  
20       proximately caused the injuries and losses that she is  
21       claiming, for which she seeks compensation.

22              Now, let me define the term negligence for you  
23       because that's obviously central to this case.  
24       Negligence is a failure to use reasonable care under  
25       circumstances where there is a legal duty or obligation

1 to do so.

2 And reasonable care is that degree of care that  
3 a reasonably careful or reasonably prudent person would  
4 have used under the same or similar circumstances.

5 Negligence may consist of doing something that a  
6 reasonably prudent or reasonably careful person would  
7 not have done under the same or similar circumstances,  
8 or it may consist of not doing something that a  
9 reasonably prudent or reasonably careful person would  
10 have done under the same or similar circumstances.

11 In other words, a person is deemed to be  
12 negligent if that person fails to exercise the same  
13 degree of care that a reasonably prudent or reasonably  
14 careful person would have exercised under the same or  
15 similar circumstances.

16 Now, the fact that Mr. Estrada is a professional  
17 truck driver does not mean that the standard of care  
18 applicable to him is any different from the standard of  
19 care applicable to Ms. Theroux. A truck driver is  
20 subject to the same standard of care as any other  
21 motorist. The standard of care applicable to a truck  
22 driver is neither greater nor lesser than the standard  
23 of care attributable to any other driver of a vehicle  
24 on the highways.

25 Now, the State of Rhode Island has enacted a

1 number of statutes regulating the manner in which  
2 vehicles may be operated on the public highways, and  
3 these statutes are sometimes referred to as rules of  
4 the road.

5           And there are a few that you should be aware of  
6 in deciding this case, and I should point out that the  
7 reason you may find them helpful is that the rules of  
8 the road may be considered by you as evidence -- or I  
9 should say violation of the rules of the road may be  
10 considered by you as evidence that the person who  
11 violated the rule was negligent.

12           It's not necessarily conclusive. In other  
13 words, just because somebody may have violated a rule  
14 of the road doesn't automatically mean that you have to  
15 find them negligent, but it certainly is a factor that  
16 you may consider in determining whether that person was  
17 negligent. And you should consider it along with all  
18 of the other evidence that's been presented to you.

19           And there are several rules of the road that may  
20 have some application in this case, depending, of  
21 course, on what you find the facts to be.

22           Now, one of the rules, and I'll read right from  
23 the statute on this one, one of the rules is that,  
24 "Whenever any roadway has been divided into two or more  
25 clearly marked lanes for traffic, a vehicle shall be

1 driven as nearly as practical entirely within a single  
2 lane and shall not be moved from the lane until the  
3 driver has first ascertained that the movement can be  
4 made with safety."

5 I'm sure that doesn't come as any news to you,  
6 but that's what the -- that's one of the rules of the  
7 road that may be applicable here.

8 Another statute says that, "The driver of a  
9 vehicle intending to turn left across a lane of  
10 on-coming traffic shall yield the right-of-way to any  
11 vehicle approaching from the opposite direction, which  
12 is within or so close to the area of the turn as to  
13 constitute an immediate hazard. The driver having so  
14 yielded and having given a signal when and as required  
15 may make the left turn, and the drivers of all other  
16 vehicles approaching the area of the turn from the  
17 opposite direction shall yield the right-of-way to the  
18 vehicle making the left turn."

19 Under Rhode Island law, you should also know  
20 that the owner of a motor vehicle is liable for the  
21 negligent acts of anyone driving that motor vehicle  
22 with the owner's consent. In other words, the driver  
23 is deemed to be the agent of the owner, as long as the  
24 owner gave consent for the driver to be driving the  
25 vehicle, and because the driver is deemed to be the

1 agent, the owner is liable to the same extent as the  
2 driver may be. The owner is responsible for what the  
3 driver does.

4 So if you find that Mr. Estrada was negligent,  
5 Marten Transportation would be liable to the same  
6 extent as Mr. Estrada.

7 In determining whether either Mr. Estrada was  
8 negligent and/or Ms. Theroux was also negligent, bear  
9 in mind that the operator of a vehicle on a public  
10 highway is not required to anticipate negligence on the  
11 part of other drivers. A person operating a motor  
12 vehicle is entitled to base his or her conduct on the  
13 assumption that other people driving on the highways  
14 are going to exercise reasonable care. So that a  
15 driver is not expected to know or anticipate that  
16 someone -- another driver may do something negligent or  
17 out of the ordinary.

18 I've told you that, in order to prevail on her  
19 negligence claim, Ms. Theroux must prove not only that  
20 Mr. Estrada was negligent but, also, that Mr. Estrada's  
21 negligence was a proximate cause of the collision and  
22 the injuries or losses that Ms. Theroux is claiming.  
23 And so let me try to explain to you what is meant by  
24 the term proximate cause.

25 A party's conduct is considered the proximate

1 cause of an accident or a loss or an injury if that  
2 conduct produced the loss or injury in the natural  
3 course of events.

4 A party's conduct is not a proximate cause of an  
5 accident or loss or injury if the loss or injury would  
6 have occurred anyway. There has to be a connection, a  
7 causal connection, between the alleged negligence and  
8 the loss or injury that is claimed to have resulted  
9 from it.

10 Another way to put it is there has to be a  
11 showing that, but for the negligence of the party  
12 against whom the claim is being made, the accident  
13 wouldn't have occurred. It's the but-for test.

14 All right. I'm going to turn now to the  
15 question of damages, which is the third thing that I  
16 told you that Ms. Theroux would have to prove in order  
17 to prevail.

18 And, in discussing damages, I want to make it  
19 clear that I'm not suggesting any opinion on my part as  
20 to whether Mr. Estrada is or is not liable here,  
21 whether he was or was not negligence -- negligent,  
22 rather. I am instructing you on damages only so that,  
23 if you find that Mr. Estrada was negligent, you will  
24 know what the rules are that govern any award of  
25 damages that ought to be made to Ms. Theroux.



1           If you find in favor of the Defendants; that is  
2           to say, if you find that Mr. Estrada was not negligent  
3           at all, you don't even reach the question of damages.  
4           You should return a verdict for the Defendants, and  
5           that's the end of it.

6           But if you find that Mr. Estrada was negligent  
7           to some extent, then you need to consider the question  
8           of damages. And damages, like any other element of the  
9           Plaintiff's case, have to be proven, and they have to  
10          be proven by a fair preponderance of the evidence.

11          So, in other words, the burden is on Ms. Theroux  
12          to prove to you by the evidence that's been presented  
13          what damages or losses she has sustained as a result of  
14          this collision.

15          Now, you can't base an award of damages on  
16          speculation or guesses. You've got to base it on the  
17          evidence that has been presented and on what you  
18          consider, in the exercise of your sound judgment, what  
19          you consider to be fair and adequate compensation for  
20          the injuries and/or losses that Ms. Theroux has proven.

21          And the measure of damages to be awarded, if  
22          any, very generally stated, is the amount that would  
23          fairly and reasonably compensate Ms. Theroux for any  
24          injuries or losses that she has sustained as a result  
25          of negligence on the part of Mr. Estrada.

1           In this case, as you've already heard, there are  
2           five kinds of damages or five elements of damages that  
3           Ms. Theroux is claiming. The first is physical  
4           injuries, the second is pain and suffering, the third  
5           is scarring, the fourth is medical expenses, and the  
6           fifth is loss of earnings.

7           And I'm going to take those one at a time and  
8           elaborate a little bit on how you would go about  
9           determining what amount of damages, if any, should be  
10          awarded in each of those categories.

11          Any amount awarded for bodily injuries or for  
12          pain and suffering should be based on your  
13          consideration of the nature, extent and duration of  
14          those injuries and that pain and suffering. In other  
15          words, how severe were the injuries? How long will she  
16          feel the effects of those injuries? And, with respect  
17          to pain and suffering, what was the magnitude of the  
18          pain and suffering? How long will it continue?

19          And, in that regard, you can consider whether  
20          Ms. Theroux has proven that her injuries are permanent  
21          in nature and/or that, in the future, she will continue  
22          to endure pain and suffering as a result of those  
23          injuries.

24          So you can award damages for what you find the  
25          evidence shows will be the nature, extent and duration

1 of those injuries and/or that pain and suffering.

2 And, in making that calculation, at least with  
3 respect to the future effects of injuries or future  
4 pain and suffering, you can consider how long  
5 Ms. Theroux is likely to live. So, if you find that  
6 some of those injuries or some of that pain and  
7 suffering is permanent and is going to last the rest of  
8 her life, you can consider how long she's likely to  
9 live.

10 And, as you've heard, there are life expectancy  
11 tables that are in evidence, and I believe the parties  
12 have agreed that Ms. Theroux's life expectancy is  
13 54.7 years. So you can take that as a fact, for  
14 whatever value you find that it has in making your  
15 calculations.

16 If you find that Mr. Estrada is liable, you can  
17 also award Ms. Theroux damages for any scar or scars  
18 that she has as a result of Mr. Estrada's negligence.  
19 And for the purpose, again, of calculating the damages  
20 to be awarded for a scar, you should view the scar in  
21 the same way as you would bodily injuries; that is to  
22 say, you should consider the nature of the scar, the  
23 extent of the scar, and its permanency.

24 If you find that Mr. Estrada is liable, you also  
25 may award Ms. Theroux damages for any reasonable

1 expenses that she necessarily incurred for medical care  
2 and treatment for any injuries that were caused by  
3 Mr. Estrada's negligence. And there are medical bills  
4 and other things in the file that will assist you in --  
5 or I shouldn't say the file -- in evidence that will  
6 assist you in making that determination.

7 Now, if you find Mr. Estrada liable, you also  
8 may award Ms. Theroux damages for any loss of earnings  
9 that she has proven she sustained as a result of the  
10 injuries. And, again, I believe the parties have  
11 agreed -- and correct me if I'm wrong, Gentlemen -- the  
12 parties have agreed that Ms. Theroux did lose \$8,300 in  
13 earnings as a result of the injuries that she  
14 sustained.

15 Now, that doesn't mean of course that  
16 Mr. Stewart agrees that Mr. Estrada's responsible for  
17 that, but they do agree as to what the amount of lost  
18 earnings is.

19 In considering the question of damages, you must  
20 also consider whether and to what extent Mr. Estrada  
21 has proven that the collision and/or Ms. Theroux's  
22 injuries may have been caused by Ms. Theroux's own  
23 negligence or, legal jargon, by her comparative  
24 negligence.

25 Comparative negligence is negligence on the part

1 of a Plaintiff that causes or contributes to the  
2 injuries or losses being claimed by that Plaintiff.

3 In other words, a Plaintiff whose own negligence  
4 was partially responsible for the injuries or losses  
5 claimed may still recover damages for those injuries or  
6 losses, but the amount that she may recover is reduced  
7 by the percentage of responsibility that she bears for  
8 causing those injuries or losses.

9 And let me give you an example, and this is  
10 purely a hypothetical example. I don't want you to  
11 infer anything from this. This is just an example to  
12 illustrate for you how the calculation should be made  
13 when a jury finds that a Plaintiff was comparatively  
14 negligent.

15 Let's assume that we have a case in which a  
16 Plaintiff has sustained damages in the amount of  
17 \$100,000, just to use a round number. And let's assume  
18 that the jury found that the Defendant was 75%  
19 responsible, the Defendant's negligence was 75%  
20 responsible for causing those injuries, and the  
21 Plaintiff's own negligence was 25% responsible.

22 In that case, the jury should award the  
23 Plaintiff damages in the amount of \$75,000, and the way  
24 that the jury would arrive at that is, taking the total  
25 damages of \$100,000 and -- I suppose you can look at it

1 in either of two ways -- allocating 75% of it as being  
2 the responsibility of the Defendant and, therefore,  
3 multiplying the hundred thousand by 75%, which yields  
4 \$75,000, or you could also look at it in terms of  
5 taking the Plaintiff's share of responsibility, 25%,  
6 multiplying that by the hundred thousand, that's  
7 \$25,000, and subtracting the Plaintiff's share of  
8 damages or the share -- the portion of the damages for  
9 which the Plaintiff is responsible from the total  
10 damages.

11 Either way, you end up with \$75,000 in that  
12 example. And, again, I want to stress that that's just  
13 a hypothetical example to help you understand how the  
14 process of allocating damages in a case where the  
15 Plaintiff may be partly at fault, how that process  
16 works. I'm not trying to suggest to you that this has  
17 any application to this case.

18 Now, I've told you that the -- I've told you  
19 that -- what each side must prove here, that -- I've  
20 told you what it is that Ms. Theroux must prove in  
21 order to prevail on her claim, and I've told you that  
22 she has the burden of proving those things by a fair  
23 preponderance of the evidence, and I've told you what  
24 it is that Mr. Estrada would have to prove in order to  
25 establish that Ms. Theroux was at least partly

1 responsible for the accident.

2 So now the question is: How -- what is meant by  
3 proving something by a fair preponderance of the  
4 evidence?

5 Well, basically, what it means is that it means  
6 that a party has to prove what they're claiming by the  
7 greater weight of the evidence, or to put it another  
8 way, they have to prove that what it is they're  
9 claiming is more likely so than not so.

10 Some of you may have been jurors in a criminal  
11 case or you may watch television where they have  
12 portrayals of criminal cases, and you know that, in a  
13 criminal case, the prosecutor has to prove the  
14 Defendant guilty beyond a reasonable doubt.

15 Well, this isn't a criminal case. This is a  
16 civil case, and there's a different standard of proof  
17 in a civil case. In a civil case, as I've said, the  
18 burden on a party making a claim is to prove that claim  
19 by a fair preponderance of the evidence or by the  
20 greater weight of the evidence.

21 Now, the best way I know to illustrate what that  
22 means is to ask you to think of the scales of justice.  
23 I'm sure you've seen the depiction of Lady Justice, the  
24 blind-folded woman who's holding a scale in front of  
25 her, one of those old-fashioned apothecary scales with

1 its counterbalancing arms. Well, that's the kind of a  
2 scale I want you to think about.

3 If you take any claim that is made by a party in  
4 a case that they have to prove by a fair preponderance  
5 of the evidence, in order to determine whether they  
6 have proven that by a fair preponderance of the  
7 evidence, what you need to do is search through your  
8 minds for all of the evidence that has been presented  
9 that supports that claim and put all those bits of  
10 evidence on the Plaintiff's side of the scale.

11 And then search your minds for all the evidence  
12 that's been presented that favors the other party or  
13 that's contrary to the claim being made by that party  
14 and put all of that evidence on the other side of the  
15 scale, in this case, on the Defendants' side of the  
16 scale.

17 And after you've done that, you then need to  
18 determine which way the scale tips. If you find, after  
19 you've gone through that process, that the scale tips  
20 in favor of the Plaintiff, then the Plaintiff has  
21 proven that claim by a fair preponderance of the  
22 evidence. Why? Because the evidence supporting the  
23 Plaintiff's claim outweighs the evidence to the  
24 contrary.

25 On the other hand, if you determine, after you



1 go through that process, that the scale tips in favor  
2 of the Defendant or that the scale is evenly balanced,  
3 it doesn't tip one way or the other, then the Plaintiff  
4 has failed to prove that particular claim by a fair  
5 preponderance of the evidence because the evidence  
6 supporting her claim does not outweigh the contrary  
7 evidence.

8 So that's what's meant by proving something by a  
9 fair preponderance of the evidence.

10 And the same would apply with respect to the  
11 claim by Mr. Estrada that Ms. Theroux was  
12 contributorily or comparatively negligent.

13 Now, I've told you what it is that must be  
14 proven in this case and what the standard of proof is.  
15 The next question is: How do you go about determining  
16 whether, in Ms. Theroux's case, whether she has proven  
17 her claim by a fair preponderance of the evidence?

18 Well, as I've indicated to you before, you've  
19 got to base that decision on the evidence that has been  
20 properly admitted in to evidence. And that evidence  
21 came from two principal sources, the testimony of the  
22 witnesses and what's in the exhibits that will go with  
23 you into the jury room.

24 And there have also been some stipulations or  
25 agreements between the lawyers, I mentioned a couple of

1       them in connection with the lost earnings and some  
2       other -- I forget what the other -- life expectancy.

3               There are things that you have heard during the  
4       trial that weren't evidence, and I remind you again  
5       that what the lawyers said is not evidence. And there  
6       was at least one occasion that I can recall where an  
7       answer was given, I think it was by Mr. Rickard, that I  
8       struck and told you to disregard. That's not properly  
9       evidence before you.

10              Now, as to the evidence that is properly before  
11       you, specifically I'll start with the testimony of the  
12       witnesses, your principal task in evaluating the  
13       testimony of the witnesses is to determine how much  
14       weight each witness' testimony should get on that scale  
15       that I talked about, in other words, to assess the  
16       credibility of the witness.

17              And in determining how much weight the testimony  
18       of any witness deserves, there are several factors that  
19       you should consider.

20              One is the opportunity, or lack of opportunity,  
21       that the witness had to have accurately observed the  
22       facts about which the witness testified. In other  
23       words, was the witness in a good position to have seen,  
24       heard or observed what it is that the witness told you,  
25       or was the witness' ability to observe impaired in some

1 way or deficient in some way?

2 The second factor is the reliability or  
3 unreliability of the witness' memory.

4 This accident occurred back in October of 2005,  
5 so it was over four years -- three years ago. And even  
6 though a witness may have been in a good position to  
7 have seen what happened, you have to also consider  
8 whether the witness' memory is good enough to accurately  
9 relate to you what it is the witness may have seen.

10 The third factor is the witness' appearance on  
11 the stand, and one reason why we generally require  
12 witnesses to come in and testify in person, rather than  
13 have somebody tell you what the witness told them is  
14 that it gives you a chance to size up the witness and  
15 make some judgments as to how believable you think the  
16 witness' testimony is.

17 Another factor is the probability or  
18 improbability of the witness' testimony. Just because a  
19 witness told you that a particular thing was so or that  
20 the incident occurred in a particular way and nobody  
21 was in a position to directly contradict what the  
22 witness said, that doesn't mean that you automatically  
23 have to accept that testimony at face value.

24 You can exercise your common sense here, and if  
25 the -- what the witness said just, in your view, could

1 not possibly have been correct, that the witness must  
2 be mistaken or must have been shading the truth, you  
3 don't have to accept the witness'testimony just because  
4 nobody directly contradicted it.

5 And, finally, you should consider whether the  
6 witness has anything to gain or lose by the outcome of  
7 the case.

8 Now, of course that doesn't mean that just  
9 because a party may have a stake in the outcome of the  
10 case that you should automatically discount or  
11 disregard that witness'testimony because, by the very  
12 nature of cases like this, the people who usually are  
13 the primary witnesses are the ones who are involved in  
14 the case, the Plaintiff and the Defendant.

15 So you shouldn't disregard the testimony of  
16 someone just because they have a stake in the outcome.  
17 But it's a factor that you can consider, especially  
18 when there is an impartial witness who may say  
19 something different from the testimony of an interested  
20 witness.

21 Now, you should also bear in mind that the  
22 credibility of a witness may be undermined or impeached  
23 or attempts may be made to undermine it or impeach it  
24 by showing that, on a previous occasion, the witness  
25 made statements that were different from or

1 inconsistent with the witness'testimony during the  
2 trial. And there were several attempts made by the  
3 lawyers to do that.

4 Now, again, whether a witness did or didn't say  
5 something on a previous occasion that was materially  
6 different from what the witness testified to is up to  
7 you to decide, and even if the witness did, you  
8 shouldn't automatically disregard or discount the  
9 witness'testimony just because of that.

10 You need to -- but it certainly is a factor that  
11 you can take into account. You may choose to disregard  
12 the testimony entirely or to discount it depending on  
13 how significant you think the disparity is and what you  
14 may think were the reasons for the disparity.

15 Now, you've heard testimony from this -- during  
16 this trial from three witnesses who were presented to  
17 you as expert witnesses, people with expertise in the  
18 field of accident reconstruction and I guess mechanical  
19 operation of trucks and automobiles.

20 Now, ordinarily, we don't allow witnesses to  
21 express opinions, we limit witnesses to their  
22 testifying about the facts, and we leave it to you as  
23 jurors to draw whatever conclusions you think are  
24 appropriate from those facts.

25 But in the case of -- when we get into subjects

1       that may involve some scientific learning or  
2       principles, the law makes allowance for that and  
3       assumes that the testimony of someone who has some  
4       training and knowledge in the field might be helpful to  
5       you in reaching your conclusions, so we allow those  
6       individuals to express opinions.

7                You're not required to accept the opinion of  
8       someone who claims to be an expert in a field just  
9       because that person may have some background in the  
10      field.

11              In fact, in this case, you would have difficulty  
12      accepting the opinions of all the experts because they  
13      had conflicting opinions.

14              So you should look at their testimony in the  
15      same way as you would the testimony of any other  
16      witness, and you ought to consider, among other things,  
17      the quality of their credentials, how well qualified  
18      were they, their knowledge of the facts, do they have  
19      complete knowledge of the facts upon which their  
20      opinions were based, were the facts on which their  
21      opinions were based accurate, so the same kinds of  
22      tests that you apply to the testimony of any other  
23      witness, and you would give their testimony the same --  
24      whatever weight you think it's entitled to.

25              In evaluating where the weight of the evidence

1 lies, remember that it's not the number of witnesses  
2 that testifies on a particular point but, rather, it's  
3 the quality of the testimony. So you could have two or  
4 three witnesses who testified that it happened this way  
5 and only one or two witnesses who testified, no, it  
6 happened the other way. That doesn't mean that you  
7 need to accept the testimony of the two or three  
8 witnesses. If you find that the testimony of the other  
9 witnesses was more credible for whatever reason, you  
10 may accept their version of what happened. So it's not  
11 quantity but the quality that governs.

12 You also will have the exhibits with you in the  
13 courtroom. You can examine them to your heart's  
14 content. But bear in mind, again, that just because  
15 something has been admitted in to evidence as an  
16 exhibit doesn't mean that you have to accept it at face  
17 value. You should look at the exhibits in the same way  
18 as you look at the testimony of the witnesses; that is  
19 to say, in the context of all of the evidence that's  
20 been presented during the course of the trial.

21 Now, I've told you that you can consider only  
22 the evidence that is properly before you, but that  
23 doesn't mean that you are strictly limited to the  
24 statements made by the witnesses or what's in the  
25 exhibits.

1           In reaching your decision, you are permitted to  
2 draw from facts that have been proven by the evidence,  
3 such reasonable inferences or conclusions as you think  
4 are justified, based on your common sense and  
5 collective experience.

6           In the process of -- well, let me put it another  
7 way. Any fact can be proven in one of two ways. It  
8 can be proven by direct evidence; that is to say, by  
9 the testimony of a witness who claims to have directly  
10 observed that fact or by an exhibit that shows the  
11 matter itself, or it can be proved by what's called  
12 circumstances evidence.

13           And proving something by circumstantial evidence  
14 means proving two or more facts by direct evidence from  
15 which the existence of a third fact can be reasonably  
16 inferred.

17           Now, let me give you, again, an example that I  
18 hope will illustrate a little better than how I've  
19 trying to explain it what that means.

20           Assume that on some winter night before you go  
21 to bed, you look out the window and the ground is bare.  
22 When you wake up in the morning, there's a foot of snow  
23 on the ground. Now, if someone asks you whether it  
24 snowed last night, your answer would undoubtedly be  
25 yes.



1           But if you had to come into court and prove that  
2           it snowed last night, how would you go about doing it?  
3           Well, there are two ways you could do it. One is you  
4           could find someone who was awake when the snowflakes  
5           were falling, they could come in and testify that they  
6           actually saw the snowflakes falling from the sky. That  
7           would be an example of proving that it snowed by direct  
8           evidence, the direct observation of someone who claimed  
9           to have witnessed the snowflakes falling.

10           Now, if you couldn't find somebody who was awake  
11           when the snowflakes were falling, you could seek to  
12           prove that it snowed by means of circumstantial  
13           evidence. You could testify as to two facts. Based on  
14           your direct observation, you could testify that before  
15           you went to bed the ground was bare, when you woke up,  
16           there was a foot of snow on the ground. You could  
17           prove those two things by your direct observation,  
18           direct evidence.

19           And from those two facts, it is certainly  
20           reasonable to infer that it snowed last night. That  
21           would be an example of proving it by circumstantial  
22           evidence.

23           Now, a couple of words of caution. In order  
24           to -- circumstantial -- there's a difference between  
25           proving something by circumstantial evidence and

1 speculating or guessing. The former is allowed, and  
2 the latter is not.

3 And the difference lies in the fact that, in  
4 order to prove something by circumstantial evidence,  
5 there are two conditions that have to be satisfied.

6 First, the facts on which the inference is based  
7 must have been established by direct evidence. And the  
8 second is that the inference that is drawn from those  
9 facts must be a reasonable inference.

10 So, in my example, the two facts, the ground was  
11 bare, a foot of snow on the ground, both established by  
12 direct evidence, the inference, it must have snowed,  
13 reasonable inference.

14 If someone asked you whether it was going to  
15 snow next Thursday night, it would not be reasonable to  
16 infer from those facts that it would or would not snow  
17 next Thursday night. That's not a reasonable inference  
18 to draw from those facts.

19 Now, I've told you that it's up to you to  
20 determine the facts in this case. That's not my  
21 function. And if I have said or done anything during  
22 the course of the trial that you think amounted to an  
23 expression or implied an expression of an opinion on my  
24 part as to what the facts are, I can tell you that I  
25 certainly did not intend to convey any such impression,

1 and you shouldn't be concerned about what you might  
2 think my view of the facts is because that's entirely  
3 up to you to decide.

4           There have been a couple of occasions during the  
5 trial, thankfully not too many in this case, where the  
6 lawyers objected to evidence that was offered by the  
7 opposing lawyer. Now, that shouldn't play any role in  
8 your decision. The lawyers have a right, actually, a  
9 responsibility to object to evidence that they believe  
10 is improper, that doesn't meet the rules of evidence  
11 requirements, and the fact that a lawyer may have  
12 objected should not cause you to give the evidence any  
13 less -- any less weight if it was admitted, nor should  
14 you penalize the lawyer or, more importantly, the  
15 lawyer's client because the lawyer may have objected to  
16 evidence.

17           I hope that it goes without saying that neither  
18 bias in favor of any person or group or cause or  
19 prejudice against any person, group or cause, or  
20 sympathy for anyone or any cause should have any --  
21 should not have any role in your deliberations.

22           Your job is, pure and simple, to review the  
23 evidence that's been presented, to determine from that  
24 evidence what the facts are and to apply to the facts  
25 the law as I have explained it to you. That's all that

1 either party in this case expects or is entitled to.

2 All right. I'm going to ask the lawyers to  
3 approach the sidebar briefly to give them a chance to  
4 tell me if they think I have neglected to tell you  
5 something I should have told you or misstated anything  
6 that I did tell you.

7 All right, counsel, would you approach?

8 (Discussion at sidebar)

9 THE COURT: Do you have any objection to the  
10 charge?

11 MR. O'CONNOR: No.

12 MR. STEWART: No, Your Honor.

13 THE COURT: Have you both seen the verdict form  
14 and the interrogatories?

15 MR. O'CONNOR: Yes.

16 MR. STEWART: Yes, they're fine. Thank you.

17 (End of discussion at sidebar)

18 THE COURT: Now, in order to return a verdict in  
19 this case, Ladies and Gentlemen, all of you must agree  
20 as to what that verdict should be. You cannot return a  
21 verdict for either the Plaintiff or the Defendants  
22 unless you are unanimous in your opinion.

23 Now, when you go into the jury room, there are a  
24 couple of things that you need to keep in mind during  
25 the course of the deliberations. The first is that you

1 should approach the deliberations with an open mind,  
2 and you ought to be prepared to change your opinion if,  
3 after listening to what the other jurors have to say,  
4 if they disagree with you and you listen carefully to  
5 what they have to say, if you become convinced that  
6 they're correct and you were incorrect. You need to be  
7 open-minded enough and humble enough to do that.

8 On the other hand, you also have to keep in mind  
9 that each of you has an independent responsibility to  
10 vote for the verdict that you believe is the correct  
11 verdict based on the evidence as you understand it and  
12 the law as I have explained it to you, and you should  
13 have the courage to stick to your convictions even if  
14 other jurors or all of the other jurors disagree with  
15 you, provided you have listened with an open mind to  
16 what they have to say and you remain convinced that you  
17 are correct.

18 I know those two things are in conflict, or at  
19 least theoretically in conflict, but my experience has  
20 been that the vast majority of jurors are able to reach  
21 unanimous verdicts without doing violence to either of  
22 those principles, and I'm convinced you will be able  
23 to, also. But if you can't, well, we'll cross that  
24 bridge when we get to it.

25 Now, when you go into the jury room, the first

1 thing you should do is select a foreperson, and that  
2 individual will have three responsibilities:

3 The first will be to act as the moderator of the  
4 deliberations, to see that they're conducted in an  
5 orderly fashion and that any juror who wants to express  
6 himself or herself has a fair opportunity to do that.

7 The second responsibility will be to complete  
8 the verdict and interrogatory forms that will go into  
9 the jury room with you. And let me say a word of  
10 explanation about them. I would suggest that you  
11 complete the interrogatory form first. By  
12 interrogatories, I mean questions, there's a series of  
13 I think it's five questions that are designed to help  
14 lead you step by step through the process that I have  
15 explained, and I hope it's helpful to you. I think  
16 generally it is helpful to jurors.

17 It asks you to, first of all, determine whether  
18 Ms. Theroux has proven that Mr. Estrada was negligent.  
19 If so, what are the amount of damages that Ms. Theroux  
20 has sustained? If she wasn't at all responsible, how  
21 much would she be entitled to? And it next asks  
22 whether -- do you think that Mr. Estrada has shown that  
23 Ms. Theroux was also negligent and partly responsible,  
24 and if that's your conclusion, then how do you allocate  
25 the percentages of responsibility between them?

1           And then how do you apportion -- or what  
2           percentage of the damages that Ms. Theroux has  
3           sustained is she entitled to recover from the  
4           Defendants? So I think that'll be helpful to you,  
5           going through that interrogatory form.

6           But, in any event, the foreman should complete  
7           that form and sign it and complete the verdict form,  
8           which follows from the interrogatory form and sign  
9           that.

10           And the third responsibility of the foreman  
11           would be to act as the spokesperson for the jury if  
12           there's any reason for you to communicate with me. And  
13           I don't mean to suggest that I expect that you will  
14           need to communicate with me, but if you do, if you have  
15           any questions or problems that I can properly help you  
16           with, you should write me a note, tell me what your  
17           question or problem is, I'll take it up with the  
18           attorneys, and I will respond as quickly as I can.

19           Now, I emphasized the word properly when I said  
20           that if it was something I could properly help you with  
21           because there are some things I cannot properly help  
22           you with. As I've told you, you're the judges of the  
23           facts. I can't help you in deciding what the facts  
24           are. That's your job. But if there are other issues,  
25           I certainly would do my best to help. They may range

1 from it's too hot in here to something else. I don't  
2 know.

3 You'll have a recording of my charge to you, the  
4 explanation I just gave you, which you can play in the  
5 jury room if you want to refresh your memory as to any  
6 of the points that I've made. But remember that my  
7 charge, my explanation should be considered in its  
8 entirety. Don't pick out one or two little parts of it  
9 and focus on them to the exclusion of everything else.

10 As far as your deliberations are concerned,  
11 there should be lunch waiting for you when you get into  
12 the jury room. You can deliberate during -- while  
13 you're eating if you want, or you can eat and then  
14 deliberate.

15 And, as you know, we normally adjourn at 4:30.  
16 If you don't have a verdict by then, you would have the  
17 choice of staying late or coming back on Tuesday.  
18 That's entirely up to you. I'll have the Clerk check  
19 with you in midafternoon because, for planning  
20 purposes, we need to know, if you do want to stay late,  
21 we need to make some arrangements.

22 There's no timeframe on your deliberations. You  
23 should take as much time as is necessary to fairly  
24 decide this case, whatever time that is.

25 If it is necessary for you to write me a note



1 for any reason, please don't indicate on the note what  
2 the status of your deliberation is. I don't want to  
3 know that six of you are in favor of one side and two  
4 of the other. We don't want to know those things.  
5 Just tell me what the question or problem is.

6 All right. Is there anything else, counsel,  
7 before I send the jury out?

8 MR. STEWART: No, sir.

9 MR. O'CONNOR: No.

10 THE COURT: All right. I'll ask the Security  
11 Officer to come forward, and the Clerk will administer  
12 the oath.

13 (Security Officer Was Sworn)

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

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