United States District Court
District of Rhode Island

Russell Corkum, Plaintiff,	:	
vs.	:	C.A. No. 08-99 S
Thomas Ng, M.D., Defendant.	:	

JURY INSTRUCTIONS

Duty of Jury to Find Facts and Follow Law

Members of the jury, now that you have heard all the evidence and the arguments of the attorneys, it is my duty to instruct you on the law that applies to this case.

It is your duty to find the facts from all the evidence in the case. To those facts you will apply the law as I give it to you. You must follow the law as I give it to you whether you agree with it or not. You must not be influenced by any personal likes or dislikes, opinions, prejudices, or sympathy. That means that you must decide the case solely on the evidence before you. You will recall that you took an oath promising to do so at the beginning of the case.

In following my instructions, you must follow all of them and not single out some and ignore others; they are all equally

important. Also, you must not read into these instructions or into anything the court may have said or done as giving any suggestion as to what verdict you should return - that is a matter entirely up to you.

What Is Evidence

I want to review with you what you can consider as evidence for making your decision. The evidence from which you are able to decide what the facts are consists of:

1. the sworn testimony of witnesses; and

2. the exhibits which have been received into evidence.

What Is Not Evidence

Certain things are not evidence, and you may not consider them in deciding what the facts are. I will list them for you:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they have said in their openings statements and closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory controls.

2. Questions and objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

4. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received at trial.

Direct and Circumstantial Evidence

Evidence may be direct or circumstantial. Direct evidence is direct proof of a fact, such as the testimony of an eye witness. Circumstantial evidence is proof of one or more facts from which you could find another fact.

You should consider both kinds of evidence. As a general rule, the law makes no distinction between the weight to be given to either direct or circumstantial evidence. It is for you to decide how much weight to give to any evidence.

Direct evidence can prove a material fact by itself. It does not require any other evidence. It does not require you to draw any inferences. A witness's testimony is direct evidence when the witness testifies to what she saw, heard, or felt. In other words, when a witness testifies about what is known from her own personal knowledge by virtue of her own senses, what she sees, touches, or hears–that is direct evidence. The only question is whether you believe the witness's testimony. A document or physical object may also be direct evidence when it can prove a material fact by itself, without any other evidence or inference. You may, of course, have to determine the genuineness of the document or object.

Circumstantial evidence is the opposite of direct evidence. It cannot prove a material fact by itself. Rather, it is evidence that tends to prove a material fact when considered together with other evidence and by drawing inferences. There is a simple example of circumstantial evidence that I used at the beginning of this trial that you may recall.

Assume that when you got up this morning it was a nice, sunny day. But when you looked around you noticed that the streets and sidewalks were very wet. You had no direct evidence that it rained during the night. But, on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to infer that it had rained during the night.

Not all circumstantial evidence presents such a clear compelling inference; the strength of the inferences arising from circumstantial evidence is for you to determine. It is for you to decide how much weight to give to any evidence.

Inference from circumstantial evidence may be drawn on the basis of reason, experience, and common sense. Inferences may not, however, be drawn by guesswork, speculation, or conjecture.

The law does not require a party to introduce direct evidence. A party may prove a fact entirely on circumstantial evidence or upon a combination of direct and circumstantial evidence. Circumstantial evidence is not less valuable than direct evidence.

You are to consider all the evidence in the case, both direct and circumstantial, in determining what the facts are, and in arriving at your verdict.

Deposition Testimony

During the trial, you have heard reference to the terms “examination under oath” and “deposition.” As it applies in this case, these terms mean sworn testimony, under oath, given by a witness before this trial began. To the extent that you have heard reference to and quotations from a “deposition” or “examination under oath,” you may give it the same credibility or weight as live witness testimony, if any, as you think it may deserve.

Credibility of Witnesses

In deciding the facts of this case, you may have to decide which testimony to believe and which testimony not to believe. You may believe everything a witness says, or part of it, or none of it at all. In considering the testimony of any witness, you may take into account:

1. the opportunity and ability of the witness to see or hear or know the things testified to;
2. the witness's memory;
3. the witness's manner while testifying;
4. the witness's interest in the outcome of the case and any bias or prejudice the witness may have;
5. whether other evidence contradicted the witness's testimony; and
6. the reasonableness of the witness's testimony in light of all the evidence.

Witness - Impeachment - Prior Statements

In assessing the credibility of a witness, you may also consider whether, on some prior occasion, the witness made statements that contradict the testimony he or she gave at the time of trial. If you conclude that a witness did, at some prior time, make statements that were materially different from what the witness said during this trial, you may take this into account in assessing the credibility of such witness, or determining the weight that you will give to such witness's testimony.

Witnesses - Number - Weight of Testimony

In evaluating the testimonial evidence, remember that you are not required to believe something to be a fact simply because a witness has stated it to be a fact and no one has contradicted what that witness said. If, in the light of all of the evidence, you believe that the witness is mistaken or has testified falsely or that he or she is proposing something that is inherently impossible or unworthy of belief, you may disregard that witness' testimony even in the absence of any contradictory evidence.

You should also bear in mind that it is not the number of witnesses testifying on either side of a particular issue that determines where the weight of the evidence lies. Rather, it is the quality of the witnesses' testimony that counts.

Thus, just because one witness testifies on one side of an issue and one witness testifies on the other side does not necessarily mean that you must consider the evidence evenly balanced. If you feel that one of the witnesses was more credible than the other, for whatever reason, you may find that the weight of the evidence lies on the side of that witness.

Similarly, just because there may be more witnesses testifying on one side of an issue than on the other does not mean that the weight of the evidence lies in favor of the greater number of witnesses. Once again, it is the credibility or quality of the testimony that determines where the weight of the evidence lies.

Witnesses - Expert Witnesses

During this trial, you have heard testimony from witnesses who claim to have specialized knowledge in a technical field. Such persons are sometimes referred to as expert witnesses. Because of their specialized knowledge, they are permitted to express opinions which may be helpful to you in determining the facts.

Since they do have specialized knowledge, the opinions of expert witnesses, whether expressed personally or in documents which have been admitted into evidence, should not be disregarded lightly.

On the other hand, you are not required to accept such opinions just because the witnesses have specialized knowledge.

In determining what weight to give to the testimony of a so-called expert witness, you should apply the same tests of credibility that apply to the testimony of any other witness. That is to say, you may consider such things as the witness':

-- opportunity to have reviewed the facts about which he or she testified; and

-- apparent candor or lack of candor.

In addition, you may take into account:

-- the relative qualifications of the expert witnesses; and

-- the accuracy of the facts upon which the witness's opinions were based.

In short, you should carefully consider the opinions of expert witnesses, but they are not necessarily conclusive.

Burden of Proof

The law imposes on the Plaintiff the responsibility or burden of proving his claim. It is not up to the Defendant to disprove the claim. Furthermore, the Plaintiff must prove the things he claims by what is called a fair preponderance of the evidence, which I will now define in more detail.

Burden of Proof - Fair Preponderance

I have just told you that the burden of proof in this case is on the party making the claim in question, and in a few minutes I am going to describe in detail just what the Plaintiff must prove in order to prevail on his claim.

The Plaintiff must prove his claim by what the law refers to as "a fair preponderance of the evidence" which is another way of saying that the party must prove them by "the greater weight of the evidence."

To put it another way, you must be satisfied that the evidence shows that what the party making a claim is claiming is "more probably true than not."

Do not confuse the burden of proving something by a fair preponderance of the evidence with the burden of proving something beyond a reasonable doubt. As most of you probably know or have heard, in a criminal case the prosecution must prove the defendant is guilty beyond a reasonable doubt. That is a very stringent standard of proof. However, this is not a criminal case. Therefore, in order to prevail, the Plaintiff need not prove his claim beyond a reasonable doubt; he need only prove it by a fair preponderance of the evidence.

Perhaps the best way to explain what is meant by a fair preponderance of the evidence is to ask you to

visualize an old fashioned scale with two counter balancing arms and use it to mentally weigh the evidence with respect to the claim being made by the Plaintiff.

If, after you have heard all the evidence relevant to the claim, you determine that the scale tips in favor of the Plaintiff, no matter how slightly it may tip, then the Plaintiff has sustained his burden of proving that particular claim to you by a fair preponderance of the evidence because he has made the scale tip in his favor.

If, on the other hand, you determine that the scale tips in favor of the Defendant, or that the scale is so evenly balanced that you cannot say whether it tips one way or the other, then the Plaintiff has failed to prove his claim by a fair preponderance of the evidence because he has not made the scale tip in his favor.

Specific Claims

I am now going to instruct you on the specific law that applies to this case. The law will guide you as to the factual determinations you must make. You must accept the law that I give you, whether you agree with it or not.

In this case, the Plaintiff asserts two claims. The first is that the Defendant committed medical malpractice by failing to perform the surgical procedure in question in accordance with the standard of care owed to the Plaintiff. The second is that the Defendant failed to obtain the Plaintiff's informed consent for that procedure, because he did not adequately explain the material risks of surgery and the alternative treatments available. I will address each claim in turn.

Medical Malpractice elements

The first claim is that the Defendant committed malpractice, or negligence, in connection with the Plaintiff's surgery. As I mentioned at the beginning of trial, the thrust of the claim is that the Defendant was negligent in performing that procedure. In broad terms, then, when we speak of a claim for medical malpractice, we are really talking about an allegation of negligence by a physician. In general, negligence means a failure to exercise reasonable care for the safety of another. Negligence may result from not doing something that a reasonably prudent person would have done, or from doing something that a reasonably prudent person would not have done under the same or similar circumstances.

More specifically, there are four elements to a medical malpractice (or medical negligence) claim. The Plaintiff must show by a preponderance of the evidence that:

(1) the Defendant had a duty to exercise that degree of skill ordinarily employed by the average medical professional in his specialty acting in the same or similar circumstances;

(2) the Defendant failed to act in accordance with that duty — in other words, he breached his duty or deviated from it;

(3) the Plaintiff suffered an injury or injuries as a result of the breach of duty to him; and

(4) the injury or injuries were proximately or directly caused by that breach of duty.

I am now going to explain each of these elements in more detail.

Duty & Standard of Care

Plaintiff must first define the duty that the Defendant owed to the Plaintiff as his doctor. This requires comparing the Defendant's conduct against a standard of accepted conduct.

When treating patients, physicians are required by law to conform their conduct to an accepted standard of care. Specifically, the physician must use the degree of care and skill that is expected of a reasonably competent practitioner in the same class to which he belongs, acting in the same or similar circumstances, having due regard for the state of scientific knowledge at the time of treatment.

In defining the standard of care, you can compare a doctor's conduct to other doctors engaged in the same type of practice — in this case, thoracic surgery. Here, the parties agree that the relevant standard of care pertains to performing a thorascopic bilateral sympathectomy in 2005. The standard required thoracic surgeons to perform that procedure in a reasonable manner at that time.

Breach / Deviation from Duty

The second element to be proved is that the Defendant deviated from the accepted standard of care. Such a deviation may result from either an act or an omission, meaning the failure to take an action that should have been taken. You must determine whether the Defendant did what a reasonably competent medical professional would have done under similar circumstances. In other words, you must decide whether the Defendant performed the surgery in a reasonable manner in light of the standard of care that I just described. The Defendant's conduct should be judged based on the information available to him at the time of treatment.

The fact that a doctor chooses a treatment that later proves to be unsuccessful does not necessarily mean there was a breach of the standard of care, if the treatment selected was appropriate based on the information then available to a reasonably prudent doctor in like circumstances.

In addition, the fact that a surgical procedure resulted in certain side effects or complications on a particular patient does not, by itself, mean that the surgeon was negligent.

Injury

The third element to be proved is that the Plaintiff suffered harm. I will say more about damages a little later. For now, all you need to understand is that the Plaintiff must establish that he has experienced an injury or injuries.

Proximate Cause - General

The fourth and final element to be established is causation. If you find that the Defendant deviated from the standard of care and that the Plaintiff suffered an injury, the next question is whether the Defendant's deviation caused that injury. You must determine whether the Defendant's breach of duty is the "proximate cause," meaning the direct cause, of the injury.

Proximate cause may be established by showing that a result would not have occurred but for the defendant's negligence, and that the result was the natural and probable consequence of that negligence. In medical malpractice cases, whether treatment caused an injury involves questions of technical expertise. Thus, a plaintiff must establish causation using expert testimony. Absolute certainty about causation is not required. Rather, an expert must merely state that the Defendant caused the injury in question to a reasonable degree of medical certainty.

Proximate Cause – Preexisting Conditions

For some plaintiffs, the injuries they experience may result, in part, from a preexisting condition. This does not necessarily prevent finding that a defendant's negligence, if a jury finds him negligent, also caused the plaintiff harm. For instance, it may be found that a defendant's negligence contributed to a plaintiff's preexisting injury; also, a defendant can aggravate, or make worse, a prior condition. In that case, the defendant's act or omission may be a proximate cause of harm.

It is not a defense to negligence that a defendant's actions only aggravated an earlier condition, or that the defendant was weak or unusually vulnerable to the injury sustained. On the other hand, for the Plaintiff to recover he must show that some specific injury or damage he sustained resulted directly from the Defendant's negligence, and not simply that he has some non-specific damages that cannot be causally connected to the Defendant's negligence.

Failure to Obtain Informed Consent

The Plaintiff's second claim is that the Defendant failed to obtain the Plaintiff's informed consent to the treatment provided. Doctors have a duty to disclose to their patients the material risks of, and alternatives to, any proposed treatment. This is completely separate and distinct from the responsibility to skillfully diagnose and treat patients. Here, the Plaintiff asserts that he did not knowingly consent to the surgery he received, because the Defendant failed to provide material information about the procedure.

There are three elements to this claim. The Plaintiff must show by a preponderance of the evidence that:

(1) the Defendant failed to advise the Plaintiff of the material risks of the surgery he received, as well as the alternatives available to him;

(2) one or more undisclosed material risks of the surgery did in fact occur; and

(3) the Defendant's failure to disclose the material risks was the proximate cause of the injury resulting from one or more of those risks; that is, the Plaintiff would not have undergone the surgery if informed of the material risks and alternatives.

I will address each element in turn.

Nondisclosure of Known Material Risks and Alternatives

The Plaintiff must first show that the Defendant did not tell the Plaintiff about one or more known material risks of the proposed surgery, and alternative treatments. In determining what constitutes a known material risk, you should consider that a physician has a responsibility to know the material risks of a surgical procedure that are generally known to the other competent physicians who practice in the same specialty as the Defendant at the time of the procedure.

To prevail on this element, the Plaintiff must demonstrate that the information provided by the doctor was unreasonably inadequate under the circumstances. A patient has a right to determine what is to be done with his or her own body. Therefore, for any contemplated treatment, doctors must disclose what is to be done, the known material risks involved, and the viable alternatives. However, it is not necessary that a physician tell a patient any and all of the possible risks and dangers.

Rather, the law requires that a doctor disclose only the known material risks of a procedure. In determining whether a risk was "material," you must consider the significance a reasonable person, in what the physician knows or should know is the patient's position, would

attach to the risk in deciding whether or not to submit to the treatment. Among the factors which bear on the materiality of the risks of a procedure are the severity of the risk and the likelihood of its occurrence. So, a very small chance of a very serious condition may be significant. The question of materiality, then, is one for you to decide, using your common sense and life experience, as to what a reasonable person in the patient's position would consider to be information significant in making a decision as to whether to have the procedure or not.

Occurrence of Undisclosed Risk

The second element is straightforward. If you find that the Defendant did not disclose one or more material risks of the surgery, the Plaintiff must then show that one or more of those risks did, in fact, occur.

Proximate Cause

The third element requires the Plaintiff to demonstrate that the Defendant's failure to disclose material risks and alternatives proximately caused his injury. The question of proximate cause for this claim is different than for the medical malpractice claim. Here, the Plaintiff can establish proximate cause by demonstrating that he would have elected different treatment if informed of the material risks of the proposed surgery and viable alternatives to it.

Damages - Introductory

I will now turn to the question of damages. In discussing damages, I do not, in any way, mean to suggest an opinion that the Defendant is legally responsible or liable for the damages being claimed. That is a matter for you to decide.

Since I do not know how you are going to decide the case, I am instructing you about damages only so that if you find that the Defendant is liable, you will know what principles govern an award of damages.

You are instructed on damages in order that you may reach a sound and proper determination of the amount you will award as damages, if any, in the event that you find the Defendant is liable. You need to consider the question of damages only if you find that the Defendant is liable. If you do not find liability, no award of damages can be made.

Since damages are an element of the Plaintiff's claim, damages must be proven. The burden of proof as to the existence and extent of damages is on the party claiming to have suffered those damages and is the same as to the other elements of his claim - a fair preponderance of the evidence. In other words, you may make an award for damages only to the extent that you find damages have been

proven by the evidence. You may not base an award of damages or the amount of any such award on speculation or guesses. You must base any award of damages on the evidence presented and on what you consider to be fair and adequate compensation for such damages as you find have been proven.

Damages - Compensatory - Personal Injury - Pain & Suffering

If you find the Defendant liable to the Plaintiff either for malpractice in performing the surgery, or for failing to obtain his informed consent, then you may award the Plaintiff damages for any bodily injuries and for any pain and suffering he experienced as a result of the Defendant's wrongful conduct. Pain and suffering can result from either physical or emotional harm.

Any amount awarded for bodily injuries or pain and suffering should be based upon your consideration of the nature, extent and duration of such injuries and such pain and suffering.

It is difficult to measure bodily injuries and pain and suffering in terms of money. Nevertheless, you may not speculate or guess as to what constitutes fair compensation for bodily injuries or for pain and suffering.

Any award must be based on the evidence and what in your considered judgment constitutes fair and adequate compensation for such injuries and pain and suffering as have been proved.

The determination of that amount, if any, is solely for you the jury to make. Suggestions of the attorneys as to how that amount might be computed are not binding upon you. You may, however, consider them if you find them helpful.

Selection of Foreman and Duty to Deliberate

When you begin your deliberations, you should elect one member of the jury as your foreperson. The foreperson will preside over the deliberations and speak for you here in court. You will then discuss the case with your fellow jurors to reach agreement if you can do so. Your verdict must be unanimous. Each of you must decide the case for yourself, but you should do so only after you have considered all of the evidence, discussed it fully with the other jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinion during the course of the deliberations if the discussion persuades you that should. Do not come to a decision simply because other jurors think it is right.

Communications with the Court

If it becomes necessary during your deliberations to communicate with me, you may send a note through the marshal, signed by the foreperson. No member of the jury should ever attempt to contact me except by a signed writing; and I will communicate with any member of the jury on anything concerning the case only in writing, or here in open court.

Return of Verdict

A verdict form has been prepared for you by the Court. After you have reached unanimous agreement on a verdict, your foreperson will fill in the form that has been given to you, sign and date it, and advise the Court that you are ready to return to the courtroom.

Verdict - Unanimity Required

In order to return a verdict in this case, all of you must agree as to what that verdict will be. You cannot return a verdict for either party unless your decision is unanimous.

Therefore there are two things that you should keep in mind during the course of your deliberations.

On the one hand, you should listen carefully as to what your fellow jurors have to say and should be open minded enough to change your opinion if you become convinced that it was incorrect.

On the other hand, you must recognize that each of you has an individual responsibility to vote for the verdict that you believe is the correct one based on the evidence that has been presented and the law as I have explained it. Accordingly, you should have the courage to stick to your opinion even though some or all of the other jurors may disagree as long as you have listened to their views with an open mind.

Jury Recollection Controls – Rehearing Testimony

If any reference by the court or by counsel to matters of evidence does not coincide with your own recollection, it is your recollection which should control during your deliberations.

Occasionally, juries want to rehear testimony. Understand that in a short trial, generally, your collective recollection should be sufficient for you to be able to deliberate effectively. However, if you feel that you need to rehear testimony, I will consider your request. However keep in mind that this is a time-consuming and difficult process, so if you think you need this, consider your request carefully and be as specific as possible.

Copy of Instructions

I have instructed you on the law that governs your deliberations. **[As I mentioned at the beginning,]** I will send into the jury room a written copy of my instructions. You are reminded, however, that the law is as I have given it to you from the bench; and the written copy is merely a guide to assist you.