

Jury Instructions

Gerardi v. Conlin et al.

09-cv-288 M

I. GENERAL INSTRUCTIONS

Now that you have heard all of the evidence and the arguments of counsel, it is my job to instruct you on the law that is applicable to this case.

I will send a written copy of my instructions into the jury room.

1. PROVINCE OF THE COURT AND JURY

It is your duty as jurors to follow the law as I shall state it to you. It is your duty to apply that law to the facts of the case as you determine those facts to be from the evidence in this case. You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

You are not to be concerned with the wisdom of any rule of law stated by me.

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. Also, nothing that I have said or done during the trial is to be taken as an indication that I have any

opinion about the facts of the case. I do not. It is not my function to determine the facts, but rather it is your function to do so.

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 -- and the law -- 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.

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. All parties are entitled to the same fair trial at your hands. All parties stand equal before the law, and are to be dealt with as equals in a court of justice.

2. EVIDENCE IN THE CASE

In determining the facts in this case, you are to consider only the evidence that has been properly put before you. Evidence that the court admits in full is properly before you for your consideration; evidence that this court has stricken or refused to admit is not a proper subject for your deliberations and should not

be given consideration by you. Admitted evidence will be available to you in the jury room for consideration during your deliberations.

It is the duty of counsel to protect the rights and interests of his or her client, and in the performance of that duty he or she freely may make objections to the admission of proffered evidence and should not, in any manner, be penalized for doing so.

3. PREPONDERANCE OF THE EVIDENCE

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of her claims by a preponderance of the evidence. If the proof should fail to establish any essential element of the plaintiff's claims by a preponderance of the evidence in this case, you should find for the defendants as to that claim. None of the defendants have any obligation to disprove that which the plaintiff asserts or claims.

To establish by "a preponderance of the evidence" means to prove that something is more probably true than not true. In other words, if you were looking at opposite ends of a scale, the plaintiff's evidence would have to make one end of the scale tip somewhat to her side.

When I say in these instructions that a party has the burden of proof on any proposition, or 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. This rule does not, of course, require proof to an absolute certainty or even a near certainty.

4. EVIDENCE – DIRECT, INDIRECT OR CIRCUMSTANTIAL

There are two types of evidence from which you may properly find the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – that is, 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.

5. INFERENCES

In your consideration of this evidence, 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 allowed to make reasonable inferences from the evidence. Let me give you an example of an inference. If your mailbox was empty when you left home this morning, and you find mail in it when you go home tonight, you may infer that the mailman delivered the mail. Now, obviously, you didn't see the mailman deliver the mail, but from the fact that it was empty this morning and is filled tonight, you can properly infer that the letter carrier came in the interim and delivered the mail. That is all that we mean by an inference. You are permitted to draw reasonable inferences that seem justified in light of your experience, from facts that you find have been proven.

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

6. CREDIBILITY OF WITNESSES

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 to the contrary of the testimony given. You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence that 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 she or he 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.

After making your own judgment, you may accept or reject the testimony of any witness in whole or in part.

7. OPINION EVIDENCE—EXPERT WITNESS

While the rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions, an exception exists 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, and may also state their reasons for the opinion.

If testimony from an expert witness is to have any evidentiary value, it must speak in terms of “probabilities” rather than mere “possibilities.” Although absolute certainty is not required, the conclusions of an expert must be reached to a reasonable degree of medical certainty – that is, to a medical probability. In order for an expert’s opinion to be considered by you, it must have substantial probative value and not be based on speculation, conjecture, or surmise.

You should give each expert opinion such weight as you may think it deserves, whether it was based on personal observations or on hypothetical questions. If you conclude that the reasons given in support of the expert’s opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

II. CASE-SPECIFIC INSTRUCTIONS

8. NATURE OF THE PLAINTIFF'S CLAIM

This is a civil case brought by Susan Gerardi and her sister. Ms. Gerardi has two claims: medical negligence and lack of informed consent. She alleges that the defendants in this case, The Westerly Hospital, Dr. William Conlin, and Lisa Ahava, a physician's assistant at The Westerly Hospital, committed medical negligence against their mother, Joanne Rebeiro, and that negligence caused her death. Plaintiff also alleges that Mrs. Rebeiro lacked informed consent to her treatment because the defendants failed to disclose to her all material risks and/or alternative treatments. The defendants deny these allegations.

The defendants in this case do not claim that Joanne Rebeiro or her daughters are responsible for her injuries and death. Therefore, you are not to consider whether anything Mrs. Rebeiro or her daughters did or did not do caused or contributed to her injuries and death.

You will be asked to determine whether the defendants are liable for any alleged negligence and if so, how much money to award Ms. Gerardi and the

estate in damages. Each claim of negligence against each defendant must be considered separately applying the instructions of law that I provide to you.

9. NEGLIGENCE CLAIMS

In order to prove her negligence claim against each or any of the defendants, the plaintiff must prove, by a preponderance of the evidence in the case, the following:

First, that each or any of the defendants was negligent; and,

Second, that such negligence was a proximate cause of Joanne Rebeiro's injuries, death, and damages sustained.

10. NEGLIGENCE—DEFINED

Negligence is the doing of some act that a reasonably prudent person would not do, or the failure to do something that a reasonably prudent person would do. To prevail in a negligence action, the plaintiff must introduce competent evidence to establish that each or any of the defendants breached a duty of care that they owed to the plaintiff and that the breach of that duty was a proximate cause of the harm or injury about which the plaintiff complains.

11. DUTY OF CARE – MEDICAL SERVICE PROVIDER

When a medical service provider agrees to provide medical treatment to a patient, he/she assumes a general duty of care to that patient to exercise professional skill in all aspects of the patient's treatment. The duty of care stems from the professional relationship between the medical service provider and the patient. When I refer to professional skill I mean technical skill, professional judgment, and diligence commensurate with that degree of expertise expected of a reasonably competent medical service provider practicing in the same field.

Within the broad context of his or her general duty, the medical service provider also owes more specific duties to the patient. He or she must exercise professional skill in making a diagnosis and in determining what is the appropriate treatment given that diagnosis.

If a medical service provider as an aid to diagnosis, does not avail himself or herself of a particular test or does not conduct a particular examination or does not consult certain records or consult with a specialist, that omission can be considered by you as evidence of negligence, if, in light of the evidence as a whole, you believe that other medical service providers in the exercise of the

appropriate degree of care would have ordered the particular test or consulted records or consulted with others in the same or similar circumstances.

In this case, the plaintiff alleges that the defendants failed to properly diagnose Joanne Rebeiro's medical condition, that is, that the defendants failed to exercise professional skill in determining the particular condition from which Mrs. Rebeiro was suffering and the failure or failures proximately caused Mrs. Rebeiro's death.

A medical service provider is not expected to guarantee a correct result and/or successful treatment. The fact that a person has suffered a bad result, in and of itself is not evidence of negligent treatment. However, a medical service provider is expected to use professional skill in attempting to arrive at a correct diagnosis and in attempting to develop and implement a plan that provides proper medical management of the patient's condition. Whether the medical service provider has exercised the requisite level of professional skill in doing so must be measured against the recognized standard of care for reasonably competent medical service providers practicing in the same field acting in the same or similar circumstances.

12. STANDARD OF CARE

The law requires that a medical service provider, whether it be a doctor, physician's assistant, or hospital, exercise the same degree of professional judgment, diligence and technical skill that is to be expected of a reasonably competent medical practitioner in the same class to which he/she belongs. In other words, a medical service provider's conduct must be consistent with that of a reasonably competent medical service provider practicing in the same field and acting in the same or similar circumstances given the state of scientific knowledge at the time of the diagnosis and treatment. We call this the recognized standard of care. The recognized standard of care may vary with the circumstances.

It is for you, the jury, to determine from the evidence presented at trial what the recognized standard of care was for each provider at the time in question. Once you have determined from the trial evidence what was the recognized standard of care against which the provider is to be measured, you must then consider whether or not his/her conduct fell short of that standard.

In this case, the plaintiff alleges that PA Lisa Ahava was negligent and that such negligence was a proximate cause of Mrs. Rebeiro's death. You must evaluate PA Lisa Ahava's conduct in light of what you find to be the degree of care and skill that was expected of a reasonably competent physician's assistant, acting in the same or similar circumstances in July of 2006.

The plaintiff also alleges that Dr. Conlin was negligent and that such negligence was a proximate cause of Mrs. Rebeiro's death. You must evaluate Dr. Conlin's conduct in light of what you find to be the degree of care and skill that was expected of a reasonably competent emergency room physician acting in the same or similar circumstances in July of 2006.

The plaintiff also alleges that The Westerly Hospital was negligent and that such negligence was a proximate cause of Mrs. Rebeiro's death. To the extent that a hospital provides care through its employee physician's assistants and doctors, you must evaluate The Westerly Hospital's conduct in light of what you find to be the degree of care and skill that was expected of a reasonably competent hospital acting in the same or similar circumstances in July of 2006.

If you find that PA Ahava and/or Dr. Conlin and/or The Westerly Hospital failed to act in conformity with what you find to be the recognized standard of care and you find that any of the defendants' negligence was a proximate cause of Mrs. Rebeiro's death, then your verdict must be for the plaintiff. If you find, however, that PA Ahava's and/or Dr. Conlin's and/or The Westerly Hospital's conduct conformed with what you find to be the recognized standard of care then you must find that defendants were not negligent and your verdict must be for the defendants.

13. RESPONDEAT SUPERIOR

Generally, one person is not legally responsible for the conduct of another except under certain circumstances. Only where a special relationship exists between the two, such as an employer/employee relationship, will one be responsible for the conduct of the other. In this case, it is undisputed that Physician's Assistant, Lisa Ahava and Dr. Conlin were employees of the defendant The Westerly Hospital. If you find that Mrs. Rebeiro's death was proximately caused by either Ms. Ahava's or Dr. Conlin's negligence in their

care and treatment of her, then the hospital is legally responsible for his or her negligence.

14. PROXIMATE CAUSE

In addition to proving that each or any of the defendants breached the recognized standard of care, a plaintiff must also prove by a preponderance of the evidence that the breach was a proximate cause of the injury or death sustained. Thus, in this case, the plaintiff must prove that Mrs. Rebeiro's injuries and death were proximately caused by the alleged negligent acts and/or omissions of any or all of the defendants.

An injury or death is proximately caused by an act, or a failure to act, whenever it appears that the act or omission played a substantial part in bringing about or causing the injury or death, and that the injury or death was either a direct result of or a reasonably probable consequence of the act or omission. The plaintiff must prove that the injury or death would not have occurred but for each defendants' acts, and the defendants' acts must be shown to have been a direct, rather than a remote, cause of the injury.

I do not mean to suggest, however that there may be only one proximate cause for a given injury or death. Indeed, many factors and things or the conduct of two or more persons may operate at the same time, either independently or together, to cause injury or death. In such a case, each may be considered as a proximate cause of the result.

A finding of proximate cause cannot be based on conjecture or speculation. Proximate cause must be proven as to each defendant that you find to be negligent. If you find that a defendant was negligent but that that particular defendant's negligence was not a proximate cause of the plaintiff's injury, then your verdict will be for that defendant.

15. INFORMED CONSENT

A physician's assistant or emergency room doctor also has a duty to disclose to the patient all known material risks and viable alternatives to a proposed treatment or surgical procedure. This duty also requires the physician to communicate those risks and alternatives to the patient in a manner sufficient to allow the patient to make an informed decision about the treatment/procedure.

When we use the term “material” risks, we refer to the significance that a reasonable person would attach to a particular risk in deciding whether to submit or not to submit to the treatment based on what the medical practioners knew or should have known was his/her patient’s position.

There are several elements to the plaintiff’s claim, each of which must be proved before defendant Lisa Ahava, P.A. and/or defendant Dr. William Conlin can be held liable for negligently failing to disclose known material risks to Mrs. Rebeiro.

The plaintiff must prove by a preponderance of the evidence that:

- a) the defendants did not disclose the known material risks to the plaintiff;
- b) an undisclosed known material risk did in fact occur; and
- c) the plaintiff would have chosen an alternate course of treatment if advised of that risk; and
- d) the specific injury or harm for which the plaintiff claims damages was a proximate result of the occurrence of that risk.

You as the jury decide whether the physician's assistant and/or doctor disclosed enough information to enable the patient to make an intelligent choice concerning a proposed course of treatment.

16. DAMAGES

I will now turn to the question of damages. In so doing, this Court does not intend to indicate that it is of the opinion that any defendant is liable or that plaintiff is owed damages. If you find that The Westerly Hospital, Dr. Conlin, and Lisa Ahava, P.A. are not liable, you will not consider the question of damages.

The plaintiff brings this action on behalf of her mother Joanne Rebeiro's estate. The plaintiff alleges that the estate has sustained damages as a proximate result of the defendants' negligence and Mrs. Rebeiro's death. Just as she has the burden of proving liability by a preponderance of the evidence, the plaintiff must prove her damages by a preponderance of the evidence.

Damages are defined in the law as that amount of money that will compensate an injured party for the harm or loss sustained. These damages are referred to as compensatory damages. The rationale behind compensatory

damages is to restore a person to the position he/she was in prior to the harm or the loss. Compensatory damages, then, is the amount of money that will replace, as near as possible, the loss or harm proximately caused by a defendant's negligence.

The damages you award must not be oppressive or unconscionable, and you may assess only such damages as will fairly and reasonably compensate plaintiff insofar as the same may be computed in money. You must confine your deliberations to the evidence, and you must not indulge in guesswork, speculation or conjecture.

I will now discuss the type of damages sought by plaintiff in this case.

17. COMPENSATORY DAMAGES – WRONGFUL DEATH

The plaintiff seeks to be compensated for the death of Joanne Rebeiro resulting from the negligence complained of. If you find that each or any of the defendants breached the duty of care they owed to Mrs. Rebeiro and the breach proximately caused Mrs. Rebeiro's death, you must consider whether and, if so, in what amount, the plaintiff is entitled to recover for money damages from each or any of the defendants for wrongful death.

18. COMPENSATORY DAMAGES--PAIN AND SUFFERING

The plaintiff also seeks to be compensated for the conscious pain and suffering that Joanne Rebeiro endured as a result of the negligence complained of.

I will define pain and suffering for you. Pain means physical pain, the kind resulting from a physical impact or injury. It includes what we ordinarily think of as physical pain as well as discomfort, stiffness, and restriction of bodily motion that is caused by the pain or discomfort brought about by moving. Pain must be conscious pain, that is, something that Mrs. Rebeiro was aware of. The law does not allow a jury to award damages for pain to a person while that person was unconscious.

Suffering, on the other hand, can be equated with what we sometimes call the mental anguish that arises from physical pain or injury to the body.

An award for pain and suffering must be fair and reasonable. It must be grounded in the evidence and not based upon speculation or conjecture. Your award for pain and suffering should be based on the evidence that has been

presented to show just how much pain and suffering Joanne Rebeiro endured as a result of the defendants' negligence.

There is no particular formula by which to compute damages for pain and suffering. There are no objective guidelines by which you can measure the money equivalent of this injury; the only real measuring stick, if it can be so described, is your collective and enlightened conscience. You alone are the sole judges of what, if anything, should be awarded for pain and suffering.

III. FINAL PROCEDURAL INSTRUCTIONS

Ladies and Gentleman, 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; and it is your right and duty to consider the evidence in the light of such experience and observations.

During your deliberations, you must not communicate with or provide any information to anyone outside of the jury room by any means about this case. You may not use any electronic device or media, such as the telephone, a cell phone, or computer. You may not communicate to anyone any information about this case or to conduct any research about this case until I accept your verdict. In other words, you cannot talk to anyone on the phone, correspond with anyone, or electronically communicate with anyone about this case. You can only discuss the case in the jury room with your fellow jurors during deliberations.

Now, in order for you to return a final verdict, your decision must be unanimous. That means that you cannot return a verdict unless and until all eight of you are in unanimous agreement as to the verdict.

Therefore, in the course of your deliberations and in your consideration of the evidence, you should exercise reasonable and intelligent judgment. It is not required that you yield your conviction simply because a majority holds to the contrary view, but in pursuing your deliberations you should keep your minds reasonably open to conviction with respect to the point in dispute so that you will not be precluded or prevented from achieving a unanimous verdict by mere stubbornness. It is your right to maintain your conviction. Each vote of each juror is as important as the vote of any other juror, and you need not give up your sincerely held conviction simply because a majority holds to the contrary.

I am designating juror _____, as the Foreperson of this jury.

it will be your responsibility to organize the group and facilitate organized and healthy deliberations. The Foreperson's opinion, voice, or vote, however, is no more meaningful than any other juror.

When you are in the jury room, you will be given a verdict form. When you have reached a verdict, the Foreperson will fill out that form and sign it. Once the verdict form is complete, you will inform the Court Security Officer.

[REVIEW OF VERDICT FORM]

If in the course of your deliberations you should deem it necessary to be further instructed or assisted by the Court in any way, the Foreperson should reduce such request or question to writing, sign it, and give it to the Court Security Officer in whose charge you will now be placed. The officer will then bring such written request to me and I, in consultation with the attorneys, will determine an appropriate response. Other than the method outlined, please do not attempt to communicate privately or in any other way with the Court or with anyone outside the jury room.