

FILED

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Matthew Thelen
CLERK

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHERYL EVANS,

Plaintiff,

vs.

BRYAN DEN HARTOG,

Defendant.

CIV. 16-5060-KES

**FINAL
INSTRUCTIONS
TO THE JURY**

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VERDICT FORM

FINAL INSTRUCTION NO. 1 – INTRODUCTION AND DEFINITIONS

Members of the jury, the instructions I gave at the beginning of the trial and during the trial remain in effect. I now give you some additional instructions.

You have to follow all of my instructions – the ones I gave you earlier, as well as those I give you now. Do not single out some instructions and ignore others, because they are all important. This is true even though I am not going to repeat some of the instructions I gave you at the beginning of the trial.

You will have copies of all of the instructions in the jury room. Remember, you have to follow all instructions, no matter when I give them, whether or not you have written copies.

I have not intended to suggest what I think your verdict should be by any of my rulings or comments during the trial.

FINAL INSTRUCTION NO. 2 – BURDEN OF PROOF

In civil actions, the party who has the burden of proving an issue must prove that issue by the greater convincing force of the evidence.

Greater convincing force means that after weighing the evidence on both sides there is enough evidence to convince you that something is more likely true than not true. In the event that the evidence is evenly balanced so that you are unable to say that the evidence on either side of an issue has the greater convincing force, then your finding upon the issue must be against the party who has the burden of proving it.

In determining whether or not an issue has been proved by the greater convincing force of the evidence, you should consider all of the evidence bearing upon that issue, regardless of who produced it.

You have probably heard the phrase “proof beyond a reasonable doubt.” That is a stricter standard than “more likely true than not true.” It applies in criminal cases, but not in this civil case; so put it out of your mind.

FINAL INSTRUCTION NO. 3 – IMPEACHMENT

In Preliminary Instruction No. 3, I instructed you generally on the credibility of witnesses. I now give you this further instruction on how the credibility of a witness can be “impeached” and how you may treat certain evidence.

A witness may be discredited or impeached by contradictory evidence; by a showing that the witness testified falsely concerning a material matter; or by evidence that at some other time the witness said or did something, or failed to say or do something, that is inconsistent with the witness’s present testimony. If earlier statements of a witness were admitted into evidence, they were not admitted to prove that the contents of those statements were true. Instead, you may consider those earlier statements only to determine whether you think they are consistent or inconsistent with the trial testimony of the witness, and therefore whether they affect the credibility of that witness.

If you believe that a witness has been discredited or impeached, it is your exclusive right to give that witness’s testimony whatever weight you think it deserves.

FINAL INSTRUCTION NO. 4 – EXPERT TESTIMONY

A witness may qualify as an expert and give an opinion on a matter at issue if the witness has special knowledge, skill, experience, training, or education concerning the matter on which the expert testifies. In deciding the weight to give to the opinion, you should consider the expert's qualifications, credibility, and reasons for the opinion. You are not bound by the opinion. If you decide that the reasons for the expert's opinion are unsound, or that other evidence outweighs the opinion, you may disregard the opinion entirely.

FINAL INSTRUCTION NO. 5 – NEGLIGENCE – ELEMENTS

Ms. Evans claims that Dr. Den Hartog acted negligently in his post-operative management of Ms. Evans when a complication arose after her knee surgery. To establish that Dr. Den Hartog is liable for negligence, Ms. Evans must prove the following two elements by the greater convincing force of the evidence:

One, that Dr. Den Hartog was negligent;

Negligence is the failure to use reasonable care. It is the doing of something that a reasonable physician would not do, or the failure to do something that a reasonable physician would do, under facts similar to those shown by the evidence. The law does not say how a reasonable physician would act under the facts similar to those shown by the evidence. That is for you to decide.

- (1) Dr. Den Hartog has the duty to possess that degree of knowledge and skill ordinarily possessed by board certified orthopedic surgeons of good standing engaged in the same field of specialization in the United States.
- (2) Dr. Den Hartog also has the duty to use that care and skill ordinarily exercised under similar circumstances by board certified orthopedic surgeons in good standing engaged in the same field of specialization in the United States and to be diligent in an effort to accomplish the purpose for which he is employed.

A failure to fulfill either (1) or (2) is negligence.

The fact that an unfortunate or bad condition resulted to the patient does not alone prove that the defendant was negligent, but it may be considered, along with other evidence, in determining the issue of negligence.

You must decide whether the defendant possessed and used the knowledge, skill, and care that the law demands of a board certified orthopedic surgeon based on the testimony and evidence of members of the profession who testified as expert witnesses.

And two, that the negligence was a legal cause of Ms. Evans's injuries.

A legal cause is a cause that produces a result in a natural and probable sequence, and without which the result would not have occurred.

A legal cause does not need to be the only cause of a result. A legal cause may act in combination with other causes to produce a result.

The term "legal cause" means an immediate cause which, in the natural or probable sequence, produces the injury complained of. For legal cause to exist, the harm suffered must be a foreseeable consequence of the act complained of. In other words, liability cannot be based on mere speculative possibilities or circumstances and conditions remotely connected to the events leading up to an injury. Dr. Den Hartog's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of Ms. Evans's injury.

The legal cause need not be the only cause, nor the last or nearest cause. It is sufficient if it occurs with some other cause acting at the same time, which in combination with it causes the harm. However, for legal cause to exist, you must find that the conduct complained of was a substantial factor in bringing about the harm.

In considering whether conduct is a substantial factor in producing harm to another, the following considerations are important:

- (1) The number of other factors that contributed in producing the harm;
- (2) The extent to which any other factors produced the harm;
- (3) Whether the defendant's conduct created a force or series of forces that were in continuous and active operation up to the time of the harm, or instead created a harmless situation that became harmful only after the operation of other forces for which the defendant is not responsible; and
- (4) Lapse of time.

If either of these elements has not been proved by the greater convincing force of the evidence, then your verdict must be for Dr. Den Hartog.

FINAL INSTRUCTION NO. 6 – ACTUAL DAMAGES

If you decide for Ms. Evans on the question of liability on her claim for negligence, you must then fix the amount of money that will reasonably and fairly compensate her for any of the following elements of loss or harm proved by the evidence to have been legally caused by Dr. Den Hartog's conduct, whether such loss or harm could have been anticipated or not, namely:

- (1) disability or disfigurement; and
- (2) the pain and suffering, mental anguish and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future.

Whether any of these elements of damages has been proved by the evidence is for you to determine. Your verdict must be based on evidence and not upon speculation, guesswork, or conjecture.

The law allows damages for detriment reasonably certain to result in the future. By their nature, all future happenings are somewhat uncertain. The fact and cause of the loss must be established with reasonable certainty. Once future detriment is established, the law does not require certainty as to the amount of such damages. Thus, once the existence of such damages is established, recovery is not barred by uncertainty as to the measure or extent of damages, or the fact that they cannot be measured with exactness. On the

other hand, an award of future damages cannot be based on conjecture, speculation, or mere possibility.

FINAL INSTRUCTION NO. 7 – MORTALITY TABLE

According to the mortality table, the life expectancy of a 55 year old white female is 84 years of age.

The court takes judicial notice of this fact, which is now evidence for you to consider.

You should note the restricted significance of this evidence. Life expectancy shown by the mortality table is merely an estimate of the probable average length of life of all persons of a given age in the United States. It is an estimate because it is based on a limited record of experience.

Because it reflects averages, the table applies only to one who has the same health and exposure to danger as the average person that age.

Therefore, in connection with the mortality table evidence, you should also consider other evidence bearing on life expectancy. For example, you should consider the occupation, health, habits, and activities of the person whose life expectancy is in question.

FINAL INSTRUCTION NO. 8 – DUTIES DURING DELIBERATIONS

In conducting deliberations and returning your verdict, there are certain rules you must follow.

First, when you go to the jury room, you must select one of your members as your foreperson. That person will preside over your discussions and speak for you here in court.

Second, it is your duty, as jurors, to discuss this case with one another in the jury room. You should try to reach an agreement if you can do so without violence to individual judgment, because a verdict must be unanimous.

Each of you must make your own conscientious decision, but only after you have considered all the evidence, discussed it fully with your fellow jurors, and listened to the views of your fellow jurors.

Do not be afraid to change your opinions if the discussion persuades you that you should. But do not come to a decision simply because other jurors think it is right, or simply to reach a verdict. Remember at all times that you are not partisans. You are judges—judges of the facts. Your sole interest is to seek the truth from the evidence in the case.


Third, if you need to communicate with me during your deliberations, you may send a note to me through the marshal or court security officer, signed by one or more jurors. I will respond as soon as possible either in

writing or orally in open court. **Remember that you should not tell anyone—including me—how your votes stand numerically.**

Fourth, your verdict must be based solely on the evidence and on the law which I have given to you in my instructions. The verdict must be unanimous. Nothing I have said or done is intended to suggest what your verdict should be—that is entirely for you to decide.

Finally, the verdict form is simply the written notice of the decision that you reach in this case. You will take this form to the jury room, and when each of you has agreed on the verdict, your foreperson will fill in the form, sign and date it, and advise the marshal or court security officer that you are ready to return to the courtroom.

Dated January 12, 2018.


KAREN E. SCHREIER
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
WESTERN DIVISION

CHERYL EVANS,

Plaintiff,

vs.

BRYAN DEN HARTOG,

Defendant.

Civil No. 16-5060-KES

VERDICT FORM

Complete this form by placing a "X" or "√" on the appropriate line and fill in the blanks, if applicable.

We, the jury, unanimously find as follows:

NEGLIGENCE	
1.	On the issue of liability for Negligence: <div style="margin-left: 20px;">_____ Ms. Cheryl Evans</div> <div style="margin-left: 20px;">_____ Dr. Bryan Den Hartog</div>
	If you answered Ms. Cheryl Evans, please proceed to question 2.
	If you answered Dr. Bryan Den Hartog, please sign and date the verdict form.

NEGLIGENCE- ACTUAL DAMAGES	
2.	<div style="display: flex; justify-content: space-between;"> <div> If you found in favor of Ms. Cheryl Evans on question 1, assess the amount of actual damages that she is entitled to in a single amount. State the amount, or, if none, write the word "none." </div> <div> \$ _____ Amount of damages </div> </div>
	Once completed, please sign and date the verdict form.

January _____, 2018

Foreperson