

INSTRUCTION NO. 1

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 must, of course, continue to follow the instructions I gave you earlier, as well as those I give you now. You must not single out some instructions and ignore others, because all are important. This is true even though some of those I gave you at the beginning of the trial are not repeated here.

The instructions I am about to give you now are in writing and will be available to you in the jury room. I emphasize, however, that this does not mean they are more important than my earlier instructions. Again, all instructions, whenever given and whether in writing or not, must be followed.

INSTRUCTION NO. 2

Neither in these instructions nor in any ruling, action, or remark that I have made during the course of this trial have I intended to give any opinion or suggestion as to what your verdict should be.

During this trial I have occasionally asked questions of witnesses in order to bring out facts not then fully covered in the testimony. Do not assume that I hold any opinion on the matters to which my questions related.

INSTRUCTION NO. 3

You are the sole judges of all facts and credibility of witnesses. In deciding what testimony to believe, you may consider:

- (1) the witnesses' ability and opportunity to observe;
- (2) their intelligence;
- (3) their memories;
- (4) their manner while testifying;
- (5) whether they said or did something different at an earlier time;
- (6) their qualifications and experience;
- (7) any apparent interest, bias, or prejudice they may have; and
- (8) the reasonableness of their testimony in light of all the evidence in the case.

INSTRUCTION NO. 4

In weighing the evidence in this case, you have a right to consider the common knowledge possessed by all of you, together with the ordinary experiences and observations in your daily affairs of life.

INSTRUCTION NO. 5

The credibility of a witness may be attacked by introducing evidence that on some former occasion the witness made a statement inconsistent with the witness's testimony in this case on a matter material to these issues. You may consider evidence of this kind in connection with all the other facts and circumstances in evidence in deciding the weight to give to the testimony of that witness.

INSTRUCTION NO. 6

During the trial, certain evidence was presented to you by deposition. The witness testified under oath at the deposition, just as if the witness were in court, and you should consider this testimony together with all other evidence received.

INSTRUCTION NO. 7

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.

INSTRUCTION NO. 8

Each party claims to be entitled to damages from the other; the plaintiff Richard Krone under the plaintiff's complaint, and the defendant City of Deadwood under the counterclaim.

Krone claims to have been injured and sustained damages as a legal result of the negligence of City of Deadwood in the operation of its trolley, and such negligence was the legal cause of the accident in which Krone claims to have been injured.

City of Deadwood denies these claims.

City of Deadwood has alleged, as an affirmative defense, that Krone was contributorily negligent and such negligence was the legal cause of the accident in which Krone claims to have been injured.

By way of counterclaim, City of Deadwood claims to have sustained damage as a legal result of the negligence of Krone in the operation of his motorcycle, and such negligence was the legal cause of the accident in which City of Deadwood's trolley was damaged.

Krone denies these claims.

Krone has alleged, as an affirmative defense, that City of Deadwood was contributorily negligent and such negligence was the legal cause of the accident in which City of Deadwood claims to have been injured.

INSTRUCTION NO. 9

In civil actions, the party who has the burden of proving an issue must prove that issue by 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 this action, the plaintiff has the burden of proving the following issues:

1. that defendant City of Deadwood operated its trolley negligently;
2. that defendant City of Deadwood's negligence was a legal cause of injury to plaintiff Richard Krone;
3. the amount of money necessary to compensate him for damage caused by the accident.

With respect to defendant City of Deadwood's counterclaim, plaintiff Richard Krone has the burden of proving that defendant City of Deadwood was contributorily negligent.

To prevail on its counterclaim, the defendant City of Deadwood has the burden of proving these issues:

1. that plaintiff Richard Krone operated his motorcycle negligently;

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2. that plaintiff Richard Krone's negligence was a legal cause of injury to defendant City of Deadwood;
3. the nature and extent of damages to its property and related expenses;

With respect to the defense against plaintiff Richard Krone's claim, the defendant City of Deadwood has the burden of proving that plaintiff Richard Krone was contributorily negligent in causing the accident.

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

The driver of the trolley was the employee of City of Deadwood. Since City of Deadwood is a public corporation it would be legally responsible for the acts of its driver.

INSTRUCTION NO. 10

Each party to this action claims to be entitled to damages from the other, the plaintiff under the complaint, and the defendant, as counterclaimant, under the counterclaim. The burden is on each party to prove by greater convincing force of the evidence that the other was negligent, and that such negligence was a legal (proximate) cause of the collision in question.

The issues to be determined by you are these:

First, was either party to the action negligent?

Second, was the negligence of either a legal (proximate) cause of injury to the other?

If you find that neither one was negligent, then neither may recover. If you find that one, or both, were negligent, but that the accident was not the legal result of the negligence of either, then again, neither may recover.

As indicated in this instruction, you should first determine the question of liability before you undertake to fix an amount that would compensate for damage (if any) found to have been suffered.

INSTRUCTION NO. 11

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

INSTRUCTION NO. 12

A legal cause, sometimes called proximate 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.

INSTRUCTION NO. 13

The term 'legal cause' or 'proximate 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. The negligent party's conduct must have such an effect in producing the harm as to lead reasonable people to regard it as a cause of the other party's injury.

INSTRUCTION NO. 14

Contributory negligence is negligence on the part of a plaintiff which, when combined with the negligence of a defendant, contributes as a legal cause in the bringing about of the injury to the plaintiff.

INSTRUCTION NO. 15

A party who is contributorily negligent may still recover damages if that contributory negligence is slight, or less than slight, when compared with the negligence of the other party. The term 'slight' means small when compared with the negligence of the other party.

In determining this issue you must determine the answer to two questions:

1. Whether the both parties are negligent; and
2. If both are negligent, whether the complaining party's negligence is
 - a. 'slight' or less than 'slight', or
 - b. more than 'slight' in comparison with the other party's negligence

In answering the second question you must make a direct comparison between the conduct of the complaining party and the other party.

If you find the complaining party's contributory negligence is more than slight when compared with the negligence of the other party, then the complaining party is not entitled to recover any damages.

If you find the complaining party's contributory negligence is slight, or less than slight, when compared with the negligence of the other party, then the complaining party is entitled to recover damages. However, the complaining party's damages must be reduced in proportion with the amount of the complaining party's contributory negligence.

INSTRUCTION NO. 16

A person operating a vehicle on a public highway has a duty to exercise reasonable care under the circumstances to keep such lookout for other users of the highway and to maintain control of the vehicle so as to be able to stop the vehicle or otherwise avoid an accident within that person's range of vision.

INSTRUCTION NO. 17

The driver of a vehicle may assume that other drivers using the highways will obey the laws of the road until said driver knows, or in the exercise of reasonable care should know, otherwise.

INSTRUCTION NO. 18

Statutes in the state of South Dakota provide:

Drivers of vehicles proceeding in the opposite directions shall pass each other to the right, each giving to the other at least one-half of the main-traveled portion of the roadway as nearly as possible.

On a roadway divided into lanes, a vehicle shall be driven as nearly as practicable entirely within a single lane and may not be moved from such lane until the driver has first ascertained that such movement can be made with safety.

These statutes set the standard of care of a reasonable person. If you find that either party violated one or more of these, such violations are negligence.

INSTRUCTION NO. 19

If you decide for the plaintiff on the question of liability you must then fix the amount of money which will reasonably and fairly compensate the plaintiff for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by the defendant's conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. The pain and suffering, and loss of capacity of the enjoyment of life experienced in the past and reasonably certain to be experienced in the future as a result of the injury.
2. The reasonable value of necessary medical care, treatment, and services received.
3. The earnings the plaintiff has lost, if any, from any source from the date of the injury until the date of trial.
4. The aggravation of any pre-existing ailment or condition.

With respect to the defendant's counterclaim, if you decide for the defendant on the question of liability, you must then fix the amount of money which will reasonably and fairly compensate the defendant for any of the following elements of loss or harm suffered in person or property proved by the evidence to have been legally caused by

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the plaintiff's conduct, taking into consideration the nature, extent, and duration of the injury, whether such loss or harm could have been anticipated or not, namely:

1. The reasonable expense of necessary repairs to the damaged trolley.
2. Other reasonable expenses related to the accident, including tow truck costs, additional personnel time, and additional costs.

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

INSTRUCTION NO. 20

If you find that plaintiff Richard Krone had an injury prior to the conduct of defendant City of Deadwood at issue in this case, you may not award damages for any previous or subsequent injuries or conditions unrelated to defendant City of Deadwood's conduct.

However, if you find that defendant City of Deadwood's conduct caused an aggravation of plaintiff Richard Krone's pre-existing injury, you may award damages for that aggravation. Before awarding these damages, plaintiff Richard Krone must prove that the conduct of defendant City of Deadwood was a substantial factor in bringing about the harm alleged.

An aggravation of a pre-existing injury is a worsening of that pre-existing injury.

INSTRUCTION NO. 21

In conducting your 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 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.

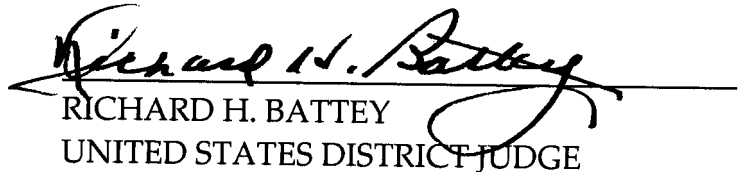
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Remember that you should not tell anyone — including me — how your votes stand numerically.

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 this 25^{*th*} day of October, 2007.


RICHARD H. BATTEY
UNITED STATES DISTRICT JUDGE