

Wrongful Conviction Claims

< *The Judge must instruct the jury on clear and convincing evidence. See Model Instruction on Clear and Convincing Evidence.*>

PLF has filed this case against the Commonwealth of Massachusetts for wrongful conviction. To prove his/her claim, PLF must prove to you by clear and convincing evidence that seven [six, five] things are true:

1. S/he was convicted of a felony, in this case, [name felony];
2. S/he did not plead guilty;
3. S/he was sentenced to prison for at least 1 year and has served all or some of that sentence;
4. A court overturned her/his conviction on grounds that tend to establish her/his innocence;
5. [*only if contested*] S/he was imprisoned solely on the basis of the conviction for [name the offense that is the subject of the claim– referred to below as "offense #1"];
6. S/he was actually innocent of [offense #1] [*if applicable*] and any other felony that arose out of and was reasonably connected to the facts, if any, that supported the [offense #1] charge]; and
7. [*if applicable and contested*] If PLF was guilty of [describe lesser included misdemeanor], s/he served at least ___ years in prison].¹

The first four items are self-explanatory. The parties do not contest [or: I instruct you as a matter of law²] that PLF has proven them.

¹ G.L. c. 258D, § 1.

² The court will almost always resolve the first four issues as a matter of law. See generally *Peterson v. Commonwealth*, 478 Mass. 434, 437-440 (2017) (discussing threshold issues under G.L. c. 258D, § 1(B)) and cases cited. For strategic reasons, however, the plaintiff might wish to put on evidence, particularly regarding element (B)(iv). The judge should fashion a case-specific instruction if the court exercises its discretion to allow the plaintiff to do so as part of his or her affirmative case under G.L. c. 258D, § 1(C)(i), (F). See generally *Gath v. M/A-Com, Inc.*, 440 Mass. 482, 490 (2003) (stipulation of fact does not necessarily preclude introduction

I will describe the last item [last two, three items] in more detail.

(a) Actual Innocence

PLF must prove her/his actual innocence. To do this, s/he must prove [two things] by clear and convincing evidence:

- that s/he did not commit the crime or the crimes charged in the indictment; and
- [*< if applicable >* that s/he did not commit any other felony arising out of or reasonably connected to the facts supporting the indictment or any lesser included felony, namely [name all other felonies at issue.]

Actual innocence is different from a “not guilty” verdict in a criminal case. In a criminal case, the jury will vote “not guilty” if the government did not prove a person’s guilt beyond a reasonable doubt. Here, however, the government has no burden to prove guilt. PLF cannot win simply by showing that the government lacked enough proof to prove s/he was guilty beyond a reasonable doubt at a criminal trial.

Instead, PLF must convince you by clear and convincing evidence that s/he actually did not do what the [offense #1] charge alleges. S/he does not, however, have to prove who, if anyone, actually committed that crime [those crimes]. [Although you heard testimony about alleged bad acts on earlier or later occasions, PLF does not have to prove that s/he was innocent of any of those other matters.]

(1) Definition of Crimes

Let me instruct you on the definition of each of the crimes at issue.³ I will keep my descriptions of the crimes brief. If you decide during your

of evidence, in the court’s discretion). Accord, M.S. Brodin & M. Avery, Handbook of Massachusetts Evidence § 4.1.1, at 115 (2016) (“If an issue is material to the case, the fact that the issue is conceded by the opponent, or there is an offer to stipulate, does not render the evidence inadmissible.”).

³ At this point, the judge may want to describe each of the crimes that the jury may need to consider, instead of reserving some descriptions for the issues discussed below.

deliberation that you need further explanation, I can give that to you upon request.

[Elements of Offense #1]

PLF must prove by clear and convincing evidence that at least one of these things did not occur.

[Elements of Offense #2, 3, etc., if applicable]

PLF must prove by clear and convincing evidence that at least one of these things did not occur.

< if there are additional criminal law issues, such as joint venture, conspiracy, identification, etc.> [Insert instruction on joint venture, conspiracy, identification, etc.

In these instructions and on the verdict slip, whenever I refer to the [offense #1] charge, I am referring to [all of these three concepts, namely] the basic definition of [offense #1], [*if applicable*] the concept of joint venture, and the definition of conspiracy].

(2) Verdict Slip

That brings me to question 1 on the verdict slip, which asks: "Is [PLF] innocent of the charge of [offense #1]) on [date] in [city or town], Massachusetts?"

If, PLF has shown by clear and convincing evidence that at least one or more of the [four] elements of the [offense #1] charge I have just defined did not happen, then s/he is actually innocent of the charge of [describe crime]. In that case, you will answer question 1 "yes" and move on to question 2. If not, you answer "no" and follow the instructions.

< Insert Any Applicable Instructions (see below) on Additional Liability Issues.

- *Instruction (c) Was plaintiff actually innocent of any other felony that arose out of and was reasonably connected to the facts of offense #1? charge];*
- *Instruction (d) Was plaintiff imprisoned solely on the basis of the conviction for offense #1?*
- *Instruction (e) Was plaintiff guilty of a lesser-included misdemeanor for which PLF did prison time.>*

(b) Compensatory Damages

That brings me to the question of compensation. If PLF has proved her/his erroneous conviction claim by clear and convincing evidence, then s/he must prove the what amount of money would fairly compensation her/him for any damages or harm that resulted from the erroneous conviction. The fact that I am instructing you on compensation or damages does not mean that I have any opinion on the correct answers to the prior questions. That is up to you.

PLF has the burden of proof on this issue, but s/he does **not** have to prove the damages by clear and convincing evidence. Instead, s/he is entitled to damages that s/he **probably** suffered. This is a lower burden than proving something by clear and convincing evidence. On the question of compensation, s/he must prove that, more likely than not, s/he suffered the damages s/he claims resulted from the erroneous conviction. If PLF suffered damages because of the erroneous conviction, then you must determine what amount of money will fairly compensate her/him for that harm or injury. If you award damages, you must award an amount sufficient to compensate PLF, but you may not award any additional amount to punish the Commonwealth.

The law gives you some guidance in awarding damages. You should consider any income PLF would have earned but for her/his incarceration; the particular circumstances of PLF's trial and other proceedings; the length and conditions under which PLF served prison time; and any other factors

you, the jury, find appropriate under the circumstances in order to compensate PLF fairly and reasonably.

The law does not tell you what other factors you may find appropriate. There is no special formula for assessing PLF's damages.

Working together, as the jury, you must use your wisdom, judgment and sense of justice to translate into dollars an amount that will fairly and reasonably compensate PLF for the particular type of harm you find s/he suffered because of an erroneous conviction. PLF must present enough evidence for you to decide, more likely than not the amount of her/his damages. However, the law does not require any witness to express an opinion about the amount of such damage. PLF may prove damages by direct evidence, indirect evidence or both.

So let's turn to question __, which asks: "What total amount of money will fully and fairly compensate PLF for his damages because of the erroneous conviction?" You will consider the period of time during which PLF was incarcerated solely because of her/his conviction on the [offense #1] charge. [IF APPLICABLE: You must not award any damages for the [stipulated period, if any] [period, if any] during which s/he was serving a concurrent (or overlapping) sentence for both the [offense #1] charge and the [offense #2] offense.]

In awarding damages, you should consider at least three areas: PLF's loss of liberty, any emotional distress and psychological damage, and any loss of earnings that PLF may have suffered from the incarceration resulting from the erroneous conviction. I will now describe the three areas of damages in more detail.

(1) Loss of Liberty

First, you should compensate PLF for her/his loss of liberty because of the erroneous conviction. PLF is entitled to damages only for the period during which s/he was imprisoned solely because of [offense #1]. S/he is entitled to full and fair compensation for that loss of freedom. [As I said, though,

s/he is not entitled to compensation for [time period], when s/he would have been in prison anyway.]

(2) Pain and Suffering

Next, you should consider any pain and suffering that PLF sustained from the date of her/his erroneous conviction(s) on [offense #1] [IF APPLICABLE: and so excludes the [state months, years] period when s/he was also serving a sentence for the [offense #2] offense.] There are two kinds of pain and suffering - physical pain and suffering and mental pain and suffering. For physical pain and suffering, you should consider any physical injuries to [PLF's] body.

Mental pain and suffering includes any and all nervous shock, anxiety, embarrassment, or mental anguish resulting from the erroneous conviction. You should take into account any past, present and probable future mental suffering. Also, if the erroneous conviction caused PLF to lose enjoyment of activities such as work, play, family life or otherwise, then you should award damages for that reduction in the enjoyment of life. When considering emotional distress, you may consider, among other things, the following factors:

- The nature and character of the alleged harm;
- The severity of the harm;
- The length of time PLF has suffered and reasonably expects to suffer; and
- Whether PLF has attempted to mitigate the harm, for instance by counseling or by taking medication.

< *if there is evidence of a pre-existing condition* > If PLF suffered from a preexisting medical [mental] condition, you may not award damages for that pre-existing condition itself. However, you should compensate PLF for any worsening of an existing condition that resulted from the erroneous conviction. You should ask yourself: did the erroneous conviction worsen

PLF's preexisting condition? If so, then you may award damages only for the worsening.^{4]}

Taking into consideration the nature of the injuries, you must determine a fair and reasonable figure to compensate PLF.

(3) Loss of Earnings

Finally, you should award PLF any income that s/he has lost because of the erroneous conviction. To determine loss of earning capacity, you may ask a number of questions, including:

- What did PLF do until her/his incarceration, including her/his occupation?
- What were PLF's earnings before and after the incarceration?
- What education, capacity, training, experience, health and habits did PLF have?
- What talents, skills, intelligence and industry did PLF have?
- What were PLF's interests?

You must consider PLF's own earning capacity, not that of an average person in her/his position. You may not, however, consider anything that is speculative. Rather, you must decide what is reasonably likely.

If you find that PLF will suffer any lost earning damages in the future, you should also award damages for that future loss, but, again, you must reduce that number to present value as of [date]. You cannot, of course, award lost earnings for any period after PLF would likely have retired or stopped working.

When you have determined the amount, if any, of damages for each of these three areas, namely loss of liberty, pain and suffering and lost

⁴ In some cases, this question may require expert testimony. If so, and the parties have presented expert testimony, the judge should instruct: "In answering this question, you must rely on the expert testimony to resolve the medical issues. You cannot rely upon your own understanding as a lay person of medical principles."

earnings, you add them all up and write the total, in words and numbers, in response to question __.

(4) Future Damages:

If PLF has proven [with reasonable medical probability] that, more likely than not, in the future, s/he will suffer any [pain and suffering, medical expenses, lost earning capacity] because of the wrongful incarceration, you should award damages for that future harm. [If you find that PLF will suffer damages throughout her/his lifetime, you may consider life expectancy tables in evidence, to determine how long s/he will live.] There will be no future trial to evaluate any future damages that PLF may suffer. You must keep in mind that any judgment in this case will be paid in a lump sum and may be invested and earn money. Therefore, if you award future damages, you must reduce that portion of the damages to its value as of [year], when PLF filed this case.

[FUTURE EARNING CAPACITY: Of course, you do not award any damages for earnings in any year after s/he would have retired or lost any earning capacity even if the incident had not occurred.]

(5) Damages – Concluding Remarks

I'll conclude with a few general instructions about all types of damages that I have mentioned in this case.

First, sometimes there is an element of uncertainty in proving one or more area of damage. That does not necessarily prevent you from awarding full and fair compensation. It is true that the evidence must make it possible for you to determine damages in a reasonable manner. However, we leave the amount of damages to your judgment, as members of the jury, sometimes with little evidence.⁵ Even so, you may not determine the plaintiff's

⁵ See, e.g., *Wing v. Durkee*, 10 Mass. App. Ct. 924 (1980) ("The finder of fact on a question of damages may proceed to some extent on "estimate and judgment, sometimes upon meager evidence."); see also *Cross v. Sharaffa*, 281 Mass. 329 (1933).

damages by guessing. It is enough if the evidence allows you to draw fair and reasonable conclusions about the extent of the damages.

[Second, the law allows the lawyers to suggest an amount of damages in their closing arguments, but you should understand that any suggestions the lawyers make are not evidence and do not set any sort of standard or floor or ceiling for the amount of damages. It is up to you to evaluate the damages, based on the evidence and your own judgment.]

Finally, once you have calculated damages for [past, present, and future] [pain and suffering, medical expenses, lost earning capacity], you should add each of these areas of damages to arrive at a total award. The total sum must not exceed fair compensation for the entire injury. You must avoid duplication or double counting of any elements of damages. When you have made your determination on the amount of damages, using the instructions I have just given, you should write down an amount both in numbers and in words.

INSERTS – ADDITIONAL LIABILITY ISSUES

(c) <if there is an issue whether a second offense arose out of or was reasonably connected to offense #1>

I instruct you that, when s/he was convicted of [offense #1], PLF was also convicted of a second crime, [offense #2]. I am going to refer to the conviction for [offense #2] charge as "the ["firearms", "false application," etc.] offense." Because of this additional conviction, PLF must show by clear and convincing evidence that [at least one of] the following statement[s] is true:

- < *If plaintiff claims actual innocence on offense #2*> PLF was actually innocent of [insert name of offense #2]; or

- PLF's conviction for ["offense #2"] did **not** arise out of and was **not** reasonably connected to the facts, if any, that supported [offense #1] charge.⁶

< *If there is no claim of actual innocence on offense #2* > Because PLF pled guilty to [does not contest her/his guilt on] the [name of offense #2] offense, you don't have to decide any question of innocence to answer question X. PLF does not claim that her/his conviction for [offense #2] was erroneous.

Instead, on question 2, you will consider whether her/his [conviction, guilty plea] on the [offense #2] offense arises out of or is reasonably connected to the facts supporting the indictment for [offense #1].]

< *If plaintiff claims actual innocence on offense #2* > PLF claims that s/he was actually innocent on] the [offense #2] charge. To decide that question, you should use the same instructions on actual innocence that I just gave you concerning actual innocence on the [offense #1] offense.

If you find that PLF has not proven her/his innocence on [offense #2], you must consider whether her/his [conviction, guilty plea] of [offense #2] arises out of or is reasonably connected to the facts supporting the indictment for [offense #1].]

< *in all cases raising the connection and relatedness of offenses #1 and #2* > To answer this question, you must consider the relationship, if any, between the facts the Commonwealth used to support the [offense #1] charge and the facts the Commonwealth used to support the [offense #2] offense.

First, you ask: does the [offense #2] offense **arise out of** the facts supporting the [offense #1] charge. The phrase "arise out of" means that the [offense #2] offense "originates from, grows out of, flows from or has a connection with" the [offense #1] charge.⁷ The [offense #2] charge arises out of the [offense #1] charge if the facts supporting the [offense #2]

⁶ G.L. c. 258D, § 1(c)(vi).

⁷ See *Commerce Insurance Company, Inc. v. Theodore*, 65 Mass. App. Ct. 471 (2006).

offense originate from, grow out of, flow from or have a connection with the [offense #1] charge. If so, then you answer question 2, "yes." If not, then you still need to consider another question.

That second question asks: is the [offense #2] offense **reasonably connected** to the facts, if any, supporting the [offense #1] charge? This question really has three parts. You start by looking at whatever facts, if any, supported the [offense #1] charge. Then you ask whether those facts have a connection to the [offense #2] offense. If so, then you must assess whether the connection is reasonable. For this purpose, "reasonable" means that the connection is logical and meaningful, rather than far-fetched, trivial or insubstantial.

[When PLF pled guilty to the [offense #2] offense, he admitted all 3 parts of that crime.]

< if there is no claim of actual innocence on offense #2 > That brings me to question 2, which asks: "If your answer to Question 2B is "no," did PLF prove that her/his conviction for [insert name of other crime resulting in a conviction, i.e. "offense #2"] did NOT arise out of and was NOT reasonably connected to any facts that supported the [offense #1] charge?"

< if there is a claim of actual innocence on offense #2 > That brings me to question X, which has two parts. Question XA asks: "Was PLF actually innocent of [insert name of other crime resulting in a conviction, i.e. "offense #2"]" If PLF has not proven her/his actual innocence on [offense #2], then you must answer Question XB, which asks: "If your answer to Question XA is "no," did PLF prove that her/his conviction for [insert name of other crime resulting in a conviction, i.e. "offense #2"] did NOT arise out of and was NOT reasonably connected to any facts that supported the [offense #1] charge?"

< in all cases raising the connection and relatedness issue > If PLF has proven by clear and convincing evidence that her/his conviction for the [offense #2], did not arise out of, and was not reasonably connected to, facts supporting the [offense #1] charge, then you will answer "no" to question

___ and move on to question __. Otherwise, of course, you answer "yes" and follow the instructions on the verdict slip.

(d) Solely Incarcerated

Next, PLF must prove that s/he was incarcerated for some period solely because of her/his conviction on [offense #1]. You must consider whether PLF's imprisonment on [offense #1] overlapped with imprisonment for any other crime. In other words, you ask: when PLF served her/his prison sentence for that offense, was s/he also serving another prison sentence at the same time for a different crime?

Here, in addition to the sentence on [offense #1], [the Commonwealth claims that] PLF also served a prison sentence for [describe offense for the other committed sentence]. You must determine whether, for some overlapping period, PLF was serving sentences for both these crimes at the same time. You do this in two steps. First, ask: during what period of time did the [other] conviction, by itself, require PLF's imprisonment? Then, you compare that period with the dates of PLF's sentence on the [offense #1] convictions.

If PLF's sentence on [offense #1] overlapped with her/his sentence on [describe offense], s/he cannot receive any compensation for that overlapping period. PLF can only obtain compensation if s/he was in prison solely because of her/his sentence on [offense #1] for at least some period of time.

< If the parties contest whether any period of sole incarceration existed >

The parties disagree whether, at any time, PLF was incarcerated solely because of her/his conviction on [offense #1]. You will have to decide whether PLF's imprisonment on [offense #1] overlapped completely with her/his imprisonment on [other offense(s)] or whether s/he served at least some portion of her/his sentence solely because of her/his conviction on [offense #1].

< if the parties contest only the duration of the sole incarceration >

The parties agree that PLF served time solely because of her/his erroneous conviction(s) for at least the time from [time period]. PLF contends that s/he served a prison sentence solely because of the erroneous convictions for a longer period, namely [period]. The Commonwealth disagrees. You will have to resolve that dispute. If PLF has proven that s/he served at least some time in prison solely because of the erroneous conviction, you will need to determine the number of days on which s/he was in prison solely because of the conviction on [offense #1]

< applicable to all cases involving the "sole incarceration" issue > The parties have agreed to some facts that should help focus your deliberations. They agree that [recite parties' stipulation, which should at least cover the date, duration and underlying crime for each sentence of incarceration, potential good time and, hopefully, parole eligibility dates].

< Optional instructions on sentencing law > There are also some rules of law that will help you answer this question. I instruct you that the PLF's sentence on [other committed charge]] ended on [date]. While PLF could have been released from prison before that date, s/he could not possibly have been serving a sentence on [offense #1] after that date].

< If the start date of plaintiff's parole is at issue > Whether PLF obtained release before her/his sentence ended depends on whether the Parole Board would have granted her/him parole. [describe parole factors, if appropriate]]

Based on these facts and the law, you must determine whether PLF was solely incarcerated for [offense #1] for some time period beyond [state stipulated period]. If so, you must identify that time period.

Question __ asks: "Was PLF incarcerated for some time period solely because of her/his conviction on [Offense #1]? If so, please state the start and end dates of that time period."

If PLF has proven by clear and convincing evidence that s/he was incarcerated solely because of her/his erroneous conviction(s) for at least some period of time, you answer question __ "yes." Then you should write in the time period when s/he was incarcerated solely because of the erroneous conviction on the charges of [offense #1]. Otherwise, you answer "no."

(e) Guilty of Lesser Included Misdemeanor⁸

The parties dispute whether PLF served at least __ years in prison for the crime of [name of lesser-included misdemeanor]. If PLF was guilty of [name of lesser included misdemeanor], s/he must show by clear and convincing evidence that /he served at least __ [sum of maximum sentence for the misdemeanor, plus one year] years in prison. The verdict slip covers this issue in question __, which asks: "Was PLF was guilty of [misdemeanor] and, if so, did s/he serve at least __ years in prison?"

The definition of [name of lesser included misdemeanor] includes the following things:

[Define misdemeanor. See Instructions, Part __ or Model Criminal Instructions for Use in the Massachusetts District Courts]

It is for you to decide whether PLF was guilty of [misdemeanor] and, if so, whether s/he served at least __ years in prison.

< *If the court has instructed on "solely incarcerated"* > I also want to clarify something that could be confusing. This question __ about [identify misdemeanor] has nothing to do with question __, which, as I mentioned earlier, addresses possible overlapping sentences. Keep in mind that PLF

⁸ G.L. c. 258D, § 1(c)(vii) requires the plaintiff to establish that: "to the extent that he is guilty of conduct that would have justified a conviction of any lesser included misdemeanor arising out of or reasonably connected to facts supporting the indictment or complaint, that he has served the maximum sentence he would have received for such lesser included misdemeanor and not less than one additional year in a prison." The trial judge should determine the issues of law, namely what lesser included misdemeanor(s) are at issue and should calculate the number equal to the maximum sentence plus one additional year.

was never convicted or sentenced for [identify misdemeanor], so there was no overlapping sentence on that offense. Therefore, you should not deduct anything related to [misdemeanor] from your calculations of the time that PLF served because of the wrongful conviction. Nor should you deduct anything from any of your damages calculations because of this issue.