

UNITED STATES DISTRICT COURT  
FOR THE  
DISTRICT OF VERMONT

Julie A. Magnan, Executrix  
of the Estate of :  
David L. Magnan :  
Plaintiff, :  
v. : File No. 2:03-CV-6  
A.D. Transport Express, Inc. :  
Defendant. :  
:

JURY CHARGE

Members of the Jury:

Now that you have heard the evidence and the arguments, it is my duty to instruct you on the law.

The plaintiff in this case is Julie Magnan as executrix of her husband's estate. Mrs. Magnan's husband David was killed in a motor vehicle accident that occurred in North Platte, Nebraska, on January 31, 2002. The accident involved a vehicle driven by Mr. Magnan and truck owned by A.D. Transport. The parties have agreed that A.D. Transport is liable for the accident. Mrs. Magnan now seeks a determination of damages.

### General Instructions

It is your duty as jurors to apply the law that I give you to the facts that you find from the evidence. Your final role is to consider and decide the fact issues of the case. You are the sole and exclusive judges of the facts. You weigh the evidence, resolve conflicts in the evidence, determine the credibility of witnesses, and if warranted, draw inferences from the facts as you find them. Shortly, I will define the word "evidence" for you and instruct you on how to assess it, including how to weigh the credibility or believability of witnesses.

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 the Court. Regardless of any opinion you may have as to what the law is or ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in these instructions and anything other than the evidence presented in this case. Even though counsel

may have mentioned a principle of law during their arguments, you must only consider the law as given to you in these instructions when reaching your verdict.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact. Except for instructions to you on the law, you should disregard anything I may have said during the trial in arriving at your findings of fact. I recognize that a judge can have significant influence on a jury. If you think you have perceived some opinion of how I think this case should be decided, I want you not to consider that at all. I am merely the judge here. It is my responsibility to rule on the objections made by counsel and upon the law. It is your sole responsibility to decide the facts and apply the law to those facts.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should weigh the evidence calmly and deliberately and without the slightest trace of sympathy, bias, or prejudice for or against either party. All parties

expect that you will carefully consider all of the evidence, follow the law as it is now being given to you and reach a just verdict.

**All Persons Equal Before the Law**

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 in life. All persons stand equal before the law, and are to be dealt with as equals in a court of justice.

Likewise, a corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, stand equal before the law, and are to be dealt with as equals in a court of justice.

**Evidence**

"Evidence" includes in-court sworn testimony of the witnesses given both on direct and cross-examination, out of court testimony read from a deposition or shown in a videotape, interrogatories and exhibits admitted into the record, facts judicially noticed by me and facts that have been stipulated. Depositions are

testimony of a witness given under oath before trial. A stipulation occurs when all parties agree that certain facts are true.

As I have stated earlier, it is your duty to determine the facts, and in doing so, you may consider only the evidence I have admitted. Any evidence that I have instructed you to consider for a limited purpose must be considered only for that limited purpose. Although the lawyers may call your attention to certain facts or inferences that might otherwise go unnoticed, the lawyers' statements, objections, and arguments are not evidence in the case. Likewise, when an attorney seeks an objection or requests a conference at the bench, you should draw no inference either positive or negative from such actions. In the final analysis, it is your recollection and interpretation of the evidence that controls in this case, not any statement or implication that I or the lawyers have made in reference to the evidence.

While you should not speculate or guess about evidence not admitted into the record, you are permitted to draw such reasonable inferences from the testimony

and exhibits as you feel are justified in light of common experience. In other words, you may make deductions and reach conclusions which reason and common sense lead you to draw from the facts as they have been established by the evidence in the case. However, in arriving at your verdict, you may not consider any personal knowledge or information pertaining to the facts of this case that you had acquired prior to or during this case that have not been admitted into evidence.

**Evidence: Direct and Circumstantial**

The law recognizes two types of evidence: direct and circumstantial. Direct evidence is when a witness testifies about something she or he knows by virtue of their own senses - something she or he has seen, felt, touched or heard. Direct evidence may also consist of a physical object or document which in your mind establishes a particular fact. Circumstantial evidence is evidence that does not directly prove a fact but points to the existence of that fact. Using reason, experience, and common sense, you infer the existence or non-existence of some fact from established facts. For

example, if you go to bed at night and there is no snow on the ground, and there is snow the next morning, you could reasonably infer that it snowed during the night even though you did not see it snow. The law makes no distinction between the weight to be given to either direct or circumstantial evidence, but a verdict must be based on all evidence presented.

### Stipulations

The parties can, and have in this case, stipulated to certain facts which they have admitted are true. A stipulation of facts is an agreement among the parties that a certain fact is true. You must regard such agreed facts as true. Thus, you must find the following facts to be established, regardless of the evidence or testimony you have heard or seen, and include them in your deliberations and decisions.

1. On January 31, 2002, Kenneth Henson was operating a tractor-trailer east on Interstate 80 in the State of Nebraska. At the same time David Magnan was operating a Saturn car west on Interstate 80. Interstate 80 is a four-lane highway with two eastbound and two westbound lanes separated by a grassy median.

As a result of the negligent operation of the tractor-trailer by Kenneth Henson, it left the eastbound lane, crossed the grassy median, and collided with the vehicle driven by David Magnan.

David Magnan died at the scene as a result of severe head injuries suffered in the collision. Defendant A.D. Transport has admitted it is legally responsible for Kenneth Henson's negligent operation of the tractor-trailer and the resulting death of David Magnan.

Therefore, the only issue left for your determination is the amount of damages to be awarded the Estate of David Magnan.

#### Credibility of Witnesses

As jurors, you are the sole judges of the credibility or believability of the witnesses. It is your responsibility to determine the weight to be given to the testimony of each witness. You do not have to accept all the evidence presented in this case as true or accurate. In weighing the testimony you can take into account the witness's ability and opportunity to observe; the manner and conduct of the witness while testifying; any interest, bias, or prejudice the witness



may have; the witness's relationship to the parties; the extent to which other evidence supports or contradicts the witness's testimony; and the reasonableness of the witness's testimony.

The weight of the evidence is not determined by the number of witnesses testifying. You may find the testimony of a small number of witnesses or a single witness about a fact more credible than the different testimony of a larger number of witnesses. The fact that one party called more witnesses and introduced more evidence than the other does not mean that you should necessarily find the facts in favor of that party.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit such testimony. Two or more persons may well hear or see things differently or have a different point of view regarding the same occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail and

whether the discrepancy results from innocent error or intentional falsehood. After making your own judgment, you will give the testimony of each witness such weight, if any, that you think it deserves. You may accept or reject the testimony of any witness in whole or in part.

### Expert Witnesses

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses." Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, 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.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. As with ordinary witnesses, you should determine each expert's credibility from his or her demeanor, candor, any bias, and possible interest in the outcome of the trial. If you should decide that the opinion of an expert witness is not based upon

sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

#### Use of Deposition Testimony

During the trial of this case, certain testimony has been presented to you by way of deposition, consisting of sworn recorded answers to questions asked of the witness in advance of trial by one or more of the attorneys for the parties in the case. The testimony from the witness stand may be presented in writing under oath, or on a video recording played on a television set. Such testimony is entitled to the same consideration as testimony presented by live witnesses, and is to be judged as to credibility and weighed as much as possible, in the same way as if the witness had been present and had testified from the witness stand.

#### Unanimous Verdict and Duty to Deliberate

The verdict must represent the considered judgment of each juror. To return a verdict, it is necessary that each juror agree. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. You must each decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to re-examine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of the other jurors, or for the mere purpose of returning 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.

#### Instructions of Law

It is now my duty to give you instructions concerning the law that applies to this case. It is your duty as jurors to follow the law as stated in these instructions. You must then apply these rules of law to the facts you find from the evidence.

It is the sole province of the jury to determine the facts in this case. By these instructions, I do not intend to indicate in any way how you should decide any question of fact.

#### Burden of Proof

The burden is on the plaintiff in a civil action, such as this, to prove every essential element of his or her claim by a preponderance of the evidence.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

Stated another way, to establish a fact by a preponderance of the evidence means to prove that the fact is more likely true than not true. A preponderance of the evidence means the greater weight of the

evidence. It refers to the quality and persuasiveness of the evidence, not to the number of witnesses or documents. In determining whether a fact or claim has been proven by a preponderance of the evidence, you may consider the relevant testimony of all witnesses, regardless of who may have called them, and all the relevant exhibits received in evidence, regardless of who may have produced them.

#### Damages

When I refer to "plaintiff" in the following instruction on damages, I mean Mrs. Magnan and her children.

The plaintiff must prove, by a preponderance of the evidence, the amount of damages to which she and David Magnan's estate are entitled. You may include only the damages the plaintiff has proven by a preponderance of the evidence. You may not award speculative damages or damages based on sympathy.

The plaintiff is entitled under the law to recover such damages as you find are just, with reference to the pecuniary injuries that the plaintiff suffered as a result of David Magnan's death. The term "pecuniary

injuries" does not limit the plaintiff's recovery to purely economic losses. In determining the damages suffered by the plaintiff as a result of David Magnan's death, you should consider the following elements.

(1) Financial loss, past and future, suffered by the plaintiff as a result of David Magnan's support and services. In evaluating the plaintiff's past and future loss of support and services, you should consider the amount David Magnan would have contributed to the plaintiff's support over the course of his anticipated working career. In determining the duration of any future loss, you may also consider the life expectancy of David Magnan.

(2) Non-economic damages. Along with financial losses, the plaintiff may recover an amount for the non-economic damages that plaintiff suffered as a result of the death of David Magnan. These damages include the loss of David Magnan's comfort, companionship, society, counsel, and the loss of his care, nurture, and protection. As an aid to determining damages, you may consider the physical, emotional, and psychological relationship between David Magnan and his spouse and children, the living arrangement of the family, the

harmony of family relations, and the commonality of interests and activities. Obviously, these non-economic damages are not subject to exact computation. It is for you to decide what amount is fair and just as compensation for the plaintiff's loss. Among the types of evidence you may consider in reaching your decision are the physical, emotional, and psychological bonds between plaintiff and David Magnan, and the extent to which they shared interests and activities. However, you may not award damages based on Mrs. Magnan's and her children's grief or anguish resulting from David Magnan's death.

During her testimony, Mrs. Magnan testified that she was injured in the accident on January 31, 2002. The injuries suffered by Mrs. Magnan herself in the accident are not an issue for your consideration in this case and you are not to include in your computation of damages an amount to compensate Mrs. Magnan for her physical injuries.

During her testimony, Mrs. Magnan also testified that she experienced fear and anxiety from the time she first saw the tractor-trailer until the time of impact between the vehicles. You may not award damages for any fear,



suffering, or anxiety experienced by Mrs. Magnan from the time she first saw the tractor-trailer until the time of impact between the vehicles.

You may, however, consider the loss of any comfort, support and services that Mr. Magnan would have provided to Mrs. Magnan during her recuperation.

(3) Funeral Expenses. You shall award plaintiff funeral expenses in the amount of \$15,936.89.

The law also permits the Plaintiff, as the Executrix of David Magnan's estate, to seek damages on behalf of the estate for pre-impact fear and terror David Magnan experienced prior to his death. You may not award damages for pre-impact fear or terror that Mrs. Magnan may have experienced. To recover damages on behalf of David Magnan, plaintiff must prove by a preponderance of the evidence that he experienced pre-impact fear and terror.

#### Damages - Present Worth of Future Loss

If you have calculated David Magnan's net projected earnings as I have instructed you, you must then ascertain the present worth in dollars of such future earnings, since the award of future damages necessarily

requires that payment be made now for a loss that will not actually be sustained until some future date.

Under these circumstances, the result is that Mrs. Magnan will in effect be reimbursed in advance of the loss, and so will have the use of money which she would not have received until some future date, but for the verdict.

In order to make a reasonable adjustment for the present use, interest-free, of money representing a lump sum payment of anticipated future loss, the law requires that you discount, or reduce to its present worth, the amount of the anticipated future loss, by taking (1) the interest rate or return which plaintiff could reasonably be expected to receive on an investment of the lump sum payment, together with (2) the period of time over which the future loss is reasonably certain to be sustained; and then reduce, or in effect deduct from, the total amount of anticipated future loss whatever that amount would be reasonably certain to earn or return, if invested at such rate of interest over such future period of time; and include in the verdict an award for only the present worth - the reduced amount - of the total anticipated future loss.

### Tax Consequences

Because David Magnan could only contribute to the plaintiff that portion of his future earnings that would be left after taxes, you must adjust his projected income by deducting the taxes that would have to be paid on that income.

### Personal Consumption

You must also reduce David Magnan's projected earnings by the amount that he would have consumed personally, because only his net resources after his personal expenditures and the payment of income taxes would have been available for contribution to the plaintiff.

Plaintiff's expert economist, Mr. Heaps, has provided a calculation of plaintiff's economic losses. His calculations of plaintiff's losses have already deducted for taxes Mr. Magnan would have paid and expenses he would have incurred for personal expenditures. As I instructed you earlier, you may give an expert's opinion such weight as you may think it deserves. However, in your calculation of losses, you need not do a separate

calculation of taxes that would have been paid and personal expenses that would have been incurred.

**Any Damages Recoverable Must Be Awarded in This Case**

The plaintiff has only one action to recover for the death of David Magnan. Whatever plaintiff is entitled to recover for losses that will occur in the future on account of his death must be included in the amount plaintiff recovers now.

**Notes**

You have been permitted to take notes during the trial for use in your deliberations. You may take these notes with you when you retire to deliberate. They may be used to assist your recollection of the evidence, but your memory, as jurors, controls. Your notes are not evidence, and should not take precedence over your independent recollections of the evidence. The notes that you took are strictly confidential. Do not disclose your notes to anyone other than your fellow jurors. Your notes should remain in the jury room and will be collected at the end of the case.

### Closing Instructions

When you begin your deliberations, you shall first select a foreperson. The foreperson will preside over deliberations, and will be your spokesperson here in Court.

A form of special verdict has been prepared for your convenience. You will take this form to the jury room.

Each of the interrogatories or questions on the special verdict form requires the unanimous answer of the jury. Your foreperson will write the unanimous answer of the jury in the space provided opposite each question, and will date and sign it.

### Verdict Forms- Jury's Responsibility

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

### Communications with the Court

If it becomes necessary during your deliberations to communicate with the Court, you may send a note through

the Courtroom Security Officer, signed by your foreperson. No member of the jury should ever attempt to communicate with the Court by any means other than a signed writing, and the Court will never communicate with any member of the jury on any subject touching on the merits of the case other than in writing, or orally here in open Court.

You will note that all other persons are also forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person - not even to the Court - how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.