

grade crossing in Putnam, New York. Plaintiffs allege that Defendant failed to provide adequate warning of the approaching train and that this failure resulted in the wrongful death of Mr. MacFarlane. Defendant denies wrongdoing and contends that Amtrak provided sufficient warning of the approaching train.

ROLE OF THE COURT, THE JURY AND COUNSEL

You have listened carefully to the testimony presented to you. Now you must pass upon and decide the factual issues of this case. You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw such inferences as may be warranted by the facts as you find them. I shall shortly define the word "evidence" and instruct you on how to assess it, including how to judge the credibility of the 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 ought to be, it would be a violation of your sworn duty as judges of the facts to base a verdict upon anything but the evidence in the case.

Nothing I say in these instructions is to be taken as an

indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts. That is your function.

You are to discharge your duty as jurors in an attitude of complete fairness and impartiality. You should appraise the evidence deliberatively and without the slightest trace of sympathy, bias or prejudice for or against any 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 regardless of the consequences.

EVIDENCE

You have seen and heard the evidence produced in this trial and it is the sole province of the jury to determine the facts of this case. The evidence consists of the sworn testimony of the witnesses, any exhibits admitted into evidence, and all the facts admitted or stipulated. I would now like to call to your attention certain guidelines by which you are to evaluate the evidence.

There are two types of evidence which you may properly use in reaching your verdict. One type of evidence is direct evidence. 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 be in the form of an exhibit where the fact to be proved is the exhibit's existence or condition.

Circumstantial evidence is evidence which tends to prove a disputed fact by proof of other facts. You infer on the basis of reason and experience and common sense from one established fact the existence or non-existence of some other fact.

Circumstantial evidence is of no less value than direct evidence for it is a general rule that the law makes no distinction between direct evidence and circumstantial evidence but requires that your verdict must be based on all the evidence presented.

CREDIBILITY OF WITNESSES

You as jurors are the sole judges of the credibility of the witnesses and the weight of their testimony. You do not have to accept all the evidence presented in this case as true or accurate. Instead, it is your job to determine the credibility or believability of each witness. You do not have to give the same weight to the testimony of each witness since you may accept or reject the testimony of any witness in whole or in part. In weighing the testimony of the witnesses you have heard, you should consider their interest, if any, in the outcome of the case; their manner of testifying; their candor; their bias, if any; their resentment or anger, if any; the extent to which other evidence in the case supports or contradicts their testimony; and

the reasonableness of their testimony. You may believe as much or as little of the testimony of each witness as you think proper.

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 the side offering the most witnesses. 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 may have a different point of view regarding various occurrences. Innocent misrecollection or failure of recollection is not an uncommon experience. It is for you to weigh the effect of any discrepancies in testimony, considering whether they pertain to matters of importance, or unimportant details, and whether a discrepancy results from innocent error or intentional falsehood. You should attempt to resolve inconsistencies if you can, but you also are free to believe or disbelieve any part of the testimony of any witness as you see fit.

EXPERT WITNESSES

In this case, I have permitted certain witnesses to express their opinions about matters that are in issue. A witness may be permitted to testify to an opinion on those matters about which he or she has special knowledge, skill, experience and training. Such testimony is presented to you on the theory that someone who is experienced and knowledgeable in the field can assist you in understanding the evidence or in reaching an independent decision on the facts.

In weighing this opinion testimony, you may consider the witness' qualifications, his or her opinions, the reasons for testifying, as well as all of the other considerations that ordinarily apply when you are deciding whether or not to believe a witness' testimony. You may give the opinion testimony whatever weight, if any, you find it deserves in light of all the evidence in the case. You should not, however, accept opinion testimony merely because I allowed the witness to testify concerning his or her opinion. Nor should you substitute it for your own reason, judgment and common sense. The determination of the facts in this case rests solely with you.

TESTIMONY AND ARGUMENTS EXCLUDED

I caution you that you should entirely disregard any testimony that has been excluded or stricken from the record.

Likewise, the arguments of the attorneys and the questions asked by the attorneys are not evidence in the case. The evidence that you will consider in reaching your verdict consists only of the sworn testimony of witnesses, the stipulations made by the parties and all exhibits admitted into evidence. When the attorneys for the plaintiff and the defendants stipulate or agree as to the existence of a fact, you must accept the stipulation as evidence and regard that fact as proved.

Anything you have seen or heard outside the courtroom is not evidence, and must be entirely disregarded. You are to consider only the evidence in the case. But in your consideration of the evidence, you are not limited merely to the statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify. You are permitted to draw, from facts which you find have been proved, such reasonable inferences as you feel are justified in light of your experiences.

BURDEN OF PROOF

This is a civil case and as such the plaintiff has the burden of proving every element of his claim by a "preponderance of the evidence." The phrase "preponderance of the evidence" means the evidence of greater weight, logic, or persuasive force. It does not mean the greater number of witnesses or documents.

It is a matter of quality, not quantity. Preponderance of the evidence is evidence that is more convincing and produces in your minds a belief that what is sought to be proved is more likely true than not. In other words, to establish a claim or a defense by a "preponderance of the evidence" means proof that the claim or defense is more likely so than not so. In determining whether any fact at issue has been proved by a preponderance of the evidence, you may consider the testimony of all the witnesses, regardless of who called them, and all the exhibits received in evidence, regardless of who may have produced them.

CORPORATION ENTITLED TO TREATMENT AS A PERSON

The defendant in this case, Amtrak, is a corporation. The fact that a corporation is involved must not affect your decision in any way. A corporation and all other persons are equal before the law and must be dealt with as equals in a court. You should consider and decide this case as an action between persons.

NEGLIGENCE

In their complaint, Plaintiffs allege that Defendant's negligence caused Mr. MacFarlane's death. Negligence is the failure to use ordinary care under the circumstances of the case. Ordinary care is that care which reasonably prudent persons use in conducting their own affairs, to avoid injury to themselves or

their property, or the persons or property of others. When deciding whether ordinary care was exercised in a given case, the conduct in question must be viewed in the light of all the surrounding circumstances as shown by the evidence in the case. When the defendant is a corporation like Amtrak in this case, it can be negligent through the acts or omissions of its employees and agents acting in the course of their duties.

In order to prove that Defendant was negligent, Plaintiffs must prove by a preponderance of the evidence each of the following elements:

1. Defendant owed Plaintiffs a duty;
2. Defendant breached that duty;
3. Defendant's breach of duty was a proximate cause of Mr. MacFarlane's death.

The first element of negligence is duty. As a matter of law, Defendant owed Mr. MacFarlane a duty to exercise ordinary care to give timely and adequate warning of the train's approach.

The second element is breach of duty. In order to decide whether Defendant breached its duty to Plaintiffs, you must determine from the evidence presented whether Defendant failed to use ordinary care, as I have defined that term, in sounding the train whistle when it did.

The last element is proximate cause. In order to find Defendant liable for Mr. MacFarlane's death, you must conclude

that Defendant's negligence was a proximate cause of the death. A legal or proximate cause of a death means that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the death. A death is proximately caused by an act or a failure to act when it appears from the evidence in the case that the act or omission played a substantial part in bringing about or actually causing the death.

The law recognizes that there may be more than one proximate cause of a death. Multiple factors may operate at the same time, or independently, to cause the death and each may be a proximate cause. Plaintiffs are required to show that Defendant's negligence was a proximate cause of Mr. MacFarlane's death, but are not required to show that it was the only proximate cause.

VIOLATION OF A SAFETY STATUTE

In this case, Plaintiffs allege that Defendant violated a safety statute and that this violation was a proximate cause of Mr. MacFarlane's death. In this case, a safety statute required Defendant to begin sounding the whistle at least 80 rods (approximately 1320 feet) before the grade crossing and continue sounding the whistle at intervals, until the train had completely crossed the grade crossing.

If you find the Defendant violated the safety statute, then I instruct you as a matter of law that Plaintiffs have made out a

prima facie case of negligence against Defendant. In other words, if you find Defendant violated a safety statute, you are to presume that Defendant was negligent and did not exercise ordinary care. However, Defendant may introduce evidence to rebut this presumption by showing that they were not negligent despite having violated the safety statute or that the violation of the safety statute was justified. If Defendant fails to rebut the presumption of negligence, you must find that Defendant is negligent as a matter of law.

The fact that Defendant violated a safety statute is not enough to entitle Plaintiffs to recovery. Plaintiffs must still show by a preponderance of the evidence that Defendant's negligence was a proximate cause of Mr. MacFarlane's death.

PASSENGER'S DUTY OF CARE

In this case, Defendant alleges that Mr. MacFarlane was negligent in his role as a passenger in the pickup truck. The burden is on Defendant to prove by a preponderance of the evidence that Mr. MacFarlane was negligent.

As a matter of law, a passenger must take ordinary care for his own safety. He must act as a prudent person would act in the same situation. But he is not held to the same degree of watchfulness as is the driver, nor is he bound to anticipate that the driver will omit the exercise of proper care. He is not

excused from all responsibility, but he may rely upon the driver's watchfulness, according to circumstances, without forfeiting his right of recovery.

It is your job, as the jury, to decide whether Mr. MacFarlane exercised ordinary care as a passenger in the pickup truck. If you find that Mr. MacFarlane was negligent—that he failed to use ordinary care as a passenger—then you must decide whether Defendant has proven by a preponderance of the evidence that Mr. MacFarlane's negligence was a proximate cause of his death.

COMPARATIVE NEGLIGENCE

If you find by a preponderance of the evidence that both Defendant and Mr. MacFarlane were negligent and that Defendant's negligence and Mr. MacFarlane's negligence were both proximate causes of the accident, then you must consider the issue of comparative negligence. You must apportion the fault between Mr. MacFarlane and Defendant. Weighing all the facts and circumstances, you must determine what percentage of the accident is a result of Mr. MacFarlane's negligence and what percentage is a result of Defendant's negligence. In your verdict you will state what percentages you find. The total of those percentages must equal one hundred percent. For purposes of comparative negligence, the negligence of any other individual is not relevant.

DRIVER'S NEGLIGENCE

In this case, Defendant alleges that the driver of the pickup truck, Gregory Kean, was negligent in his operation of the vehicle. The burden is on Defendant to prove that Mr. Kean was negligent by a preponderance of the evidence. As a matter of law, the driver of a vehicle has a duty to have his car under reasonable control so as to avoid injury to other travelers on the road. Reasonable control requires that the speed of the car shall be reasonable under the circumstances.

Under Vermont law, when the driver of a vehicle is confronted with a sudden peril through no fault of his own, he is not required to exercise the same degree of care as when he has time for reflection, for the law recognizes that a person brought face-to-face with an unexpected danger may fail to use the best judgment, may omit some precaution he could have taken, or may not choose the best available method of meeting the dangers of the situation. Under such circumstances, he is not negligent if he acts as a reasonably prudent person would under the circumstances.

Defendant also alleges that Mr. Kean violated a safety statute. That statute requires a driver, when approaching a railroad grade crossing, to reduce speed to a safe limit and to proceed cautiously and carefully with the vehicle under complete control.

As discussed above, if you find Mr. Kean did violated the safety statute, then I instruct you as a matter of law that Defendant has made out a prima facie case of negligence against Mr. Kean. In other words, if you find Mr. Kean violated a safety statute, you are to presume that Mr. Kean was negligent and did not exercise ordinary care. However, Plaintiffs may introduce evidence to rebut this presumption by showing that Mr. Kean was not negligent despite having violated the safety statute or that the violation of the safety statute was justified. If Plaintiffs fail to rebut the presumption of negligence, you must find that Mr. Kean is negligent as a matter of law.

It is your job, as the jury, to decide whether Mr. Kean was negligent in his operation of the pickup truck. If you find that Mr. Kean was negligent, then you must decide whether Defendant has proven by a preponderance of the evidence that Mr. Kean's negligence was a proximate cause of Mr. MacFarlane's death.

EFFICIENT INTERVENING CAUSE

Defendant alleges that both Mr. MacFarlane and Mr. Kean were negligent and that Mr. MacFarlane's negligence and Mr. Kean's negligence were each proximate causes of the accident. As discussed, the law recognizes that there may be multiple proximate causes of a death. However, the law also recognizes a concept called "efficient intervening cause." Under Vermont law,

a new and independent event or force which breaks the chain of causal connection between the original wrong and the accident becomes an "efficient intervening cause" and is considered to be the responsible cause of the injury or death.

If you find that either Mr. MacFarlane or Mr. Kean were negligent, then you must determine whether the Defendant has proven by a preponderance of the evidence that the negligence was the efficient intervening cause of Mr. MacFarlane's death. Because Mr. Kean is not a party in this case, the issue of his alleged negligence is only relevant if you determine that it was an efficient intervening cause of Mr. MacFarlane's death. In contrast, Mr. MacFarlane's alleged negligence is relevant to your determinations of comparative negligence and efficient intervening cause, if you reach those determinations.

DAMAGES

The fact that I am about to instruct you as to the proper measure of damages does not reflect any view of mine as to which party is entitled to your verdict. Instructions as to the measure of damages are given for your guidance in the event you find in favor of the Plaintiffs by a preponderance of the evidence in accordance with the other instructions.

In reaching your verdict, carefully consider the evidence presented against the Defendant. You may assess damages against

the Defendant only if you find the Defendant is liable for claims outlined above.

Please keep in mind the following general principles as you make your deliberations. In making any award of damages, it is not necessary that the Plaintiffs prove the exact amount of their damages with absolute certainty. Nevertheless, any damages you award may not be based on sympathy, speculation, or guesswork because only actual damages are recoverable. Remember that the Plaintiffs have the burden of proving damages by a preponderance of the evidence. In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

Under Vermont law, when the death of a person is caused by a wrongful act or negligence of a person or corporation, that person or corporation is liable to the decedent's spouse and next of kin for monetary damages resulting from the death. The measure of damages includes out-of-pocket expenses, such as funeral bills, as well as loss of expected economic benefits such as money or household services. You may also consider Mr. MacFarlane's life expectancy of approximately 15 years.

In addition, Plaintiffs allege that they have suffered grief, mental anguish and loss of love and companionship as a

result of Defendant's conduct. If Plaintiffs have proved these injuries by a preponderance of the evidence, then under Vermont law you may make an award of damages to compensate Plaintiffs for these injuries. The measure of damages should be equivalent to reasonable compensation for the injuries suffered by Plaintiffs which were proximately caused by Defendant. No definite standard is prescribed by law by which to determine the amount of such damages. It is within your discretion to determine the proper amount of damages to be awarded to the Plaintiffs to compensate their injuries. You may consider the physical, emotional and psychological relationship between Mr. MacFarlane and his family, the living arrangements of the family, the harmony of family relations, and the commonality of interests and activities.

UNANIMOUS VERDICT

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary that each juror agree.

It is your duty as jurors to consult with one another, and to deliberate with a view toward reaching an agreement, if you can do so without violence to your 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

reexamine 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 your fellow jurors or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges -- the judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

NOTES

You may have taken notes during the trial for use in your deliberations. These notes 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

I have selected _____ to act as your foreperson. The foreperson will preside over your deliberations, and will be your spokesperson here in Court.

A copy of this charge will go with you into the jury room for your use.

A verdict form has been prepared for your convenience. You will take this form to the jury room. Each of the interrogatories or questions on the 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 the special verdict, when completed.

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 related to 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 related to the merits of the case.

Dated at Burlington, Vermont this 12 day of December,
2003.



William K. Sessions III
United States District Court