

FILED

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CLERK, U.S. DISTRICT COURT
SOUTHERN DISTRICT OF IOWA

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
DAVENPORT DIVISION

KENNETH MICHAEL BOWEN and
NANCY R. BOWEN,

Plaintiffs,

v.

BURLINGTON NORTHERN AND
SANTA FE RAILWAY COMPANY,
a Delaware Corporation,

Defendant.

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3:00-CV-90009

FINAL JURY INSTRUCTIONS

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**FINAL INSTRUCTION NO. 1
EXPLANATORY**

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, and during, trial are not repeated here.

The instructions I am about to give you now as well as those I gave you earlier are in writing and will be available to you in the jury room. Again, all instructions, whenever given and whether in writing or not, must be followed.

FINAL INSTRUCTION NO. 2
JUDGE'S OPINION

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 may have asked questions of witnesses or the lawyers in order to clarify certain matters. Do not assume that I hold any opinion on the matters to which my questions related.

**FINAL INSTRUCTION NO. 3
NEGLIGENCE CLAIM**

The Plaintiffs must prove all of the following propositions:

1. The Defendant was negligent in one or more of the following ways:
 - a. It failed to properly inspect, repair, or maintain the crossing per Final Instruction No. 6;
 - b. It failed to sound the train's horn or whistle or ring the train's bell prior to reaching the crossing per Final Instruction No. 7;
 - c. It failed to slow down or stop for a hazard at the railroad crossing per Final Instruction No. 8;
 - d. It failed to maintain a proper lookout for persons who were using the crossing per Final Instruction No. 9.
2. That Plaintiffs were damaged.
3. The negligence was a proximate cause of damage to the Plaintiffs.
4. The amount of Plaintiffs' damage.

If the Plaintiffs have failed to prove any of these propositions, neither Plaintiff is entitled to recover damages. If the Plaintiffs have proved all of these propositions, then you will consider the defense of comparative fault as defined in Instruction No. 12 before determining the amount of their damages in accordance with the other instructions of this Court.

FINAL INSTRUCTION NO. 3A
ACCIDENT DOES NOT CONSTITUTE OR RAISE PRESUMPTION OF NEGLIGENCE

The mere fact an accident occurred or a party was injured does not mean a party was negligent.

FINAL INSTRUCTION NO. 4
DEFINITION OF NEGLIGENCE

Negligence means the failure to use ordinary care. Ordinary care is the care which a reasonably careful person would use under similar circumstances. Negligence is doing something a reasonably careful person would not do under similar circumstances, or failing to do something a reasonably careful person would do under similar circumstances.

FINAL INSTRUCTION NO. 5
DEFINITION OF PERSON

The word "person" as used in these instructions means an individual or corporation.

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FINAL INSTRUCTION NO. 6
DUTY TO MAINTAIN THE CROSSING

When a railway company constructs a private crossing, it has a duty to keep and maintain it in sufficient repair to accomplish the purposes for which it was intended.

A violation of this duty is negligence.

FINAL INSTRUCTION NO. 7
DUTY TO SOUND HORN, SOUND WHISTLE, OR RING BELL

A train crew approaching a private crossing has a duty to sound a horn or whistle or ring a bell in advance of the crossing in order to avoid injury to persons who are using the crossing only if, considering the location and circumstances surrounding the crossing, a reasonable train crew in the same or similar situation would give such a warning in order to protect persons using the crossing from injury.

The "circumstances surrounding the crossing" that you may consider include, among other things, whether the access to the crossing was limited; the purpose and use of the crossing; the speed of the train; and the visibility of oncoming trains.

A violation of this duty is negligence.

**FINAL INSTRUCTION NO. 8
DUTY TO SLOW DOWN OR STOP**

If you find that Plaintiff was in a position of peril on the private crossing at issue in this lawsuit and if you find that Defendant's train crew failed to apply the train's brakes when they knew that Plaintiff was in such a position, Defendant has breached its duty to use reasonable care to avoid injury to Plaintiff.

Such a breach is negligence.

FINAL INSTRUCTION NO. 9
DUTY TO MAINTAIN A PROPER LOOKOUT

A train crew has a duty to maintain a proper lookout for possible dangers to persons at private crossings. A "proper lookout" is the lookout a reasonable train crew would keep in the same or a similar situation. It means more than looking and seeing. It includes being aware of the operation of the train in relation to other objects which were seen or which could have been seen in the exercise of ordinary care.

A violation of this duty is negligence.

FINAL INSTRUCTION NO. 10
DEFINITION OF PROXIMATE CAUSE

The conduct of a party is a proximate cause of damage when it is a substantial factor in producing damage and when the damage would not have happened except for the conduct.

“Substantial” means the party’s conduct has such an effect in producing damage as to lead a reasonable person to regard it as a cause.

FINAL INSTRUCTION NO. 11
INDUSTRY CUSTOMS

You may have received evidence regarding industry customs relating to railroad crossings. A failure to act in conformity with custom, though not conclusive on the issue of negligence, is one of the factors along with all the other evidence which you may consider in determining whether Defendant was negligent.

**FINAL INSTRUCTION NO. 12
COMPARATIVE FAULT**

The Defendant claims that the Plaintiff was at fault through his negligence. The grounds for negligence have been explained to you in other instructions.

Defendant must prove both of the following propositions:

1. Plaintiff Kenneth Michael Bowen was at fault. In order to prove fault, the Defendant must prove Plaintiff was negligent in one or more of the following ways:
 - a. In failing to look and listen for a train at a time and place where he could have stopped his vehicle if a train was seen or heard.
 - b. In failing to have his vehicle under such reasonable control as to stop, if necessary, to avoid a collision with a train.
2. Plaintiff's fault was a proximate cause of the Plaintiff's damage.

If the Defendant has failed to prove either of these propositions, the Defendant has not proved its defense. If the Defendant has proved both of these propositions, then you will assign a percentage of fault against Plaintiff and include Plaintiff's fault in the total percentage of fault found by you in answering the special verdicts.

FINAL INSTRUCTION NO. 13
MOTOR VEHICLE DRIVER'S DUTY

The driver of a motor vehicle has the duty to exercise reasonable care in approaching and proceeding through a railroad crossing. "Ordinary care" includes:

- (1) looking and listening for a train in sufficient time to stop the motor vehicle;
- (2) maintaining such control over the vehicle as to allow it to stop if necessary to avoid a collision with a train.

A violation of the duty to exercise reasonable care is negligence.

FINAL INSTRUCTION NO. 14
USE OF SEATBELT

There has been evidence that Plaintiff Kenneth Michael Bowen did not have a seatbelt fastened when he was removed from his vehicle. Whether or not he was wearing a seatbelt at the time of the collision is not a matter for you to take into consideration. Nor are you to assign any percentage of fault to Kenneth Michael Bowen on account of his wearing or not wearing a seatbelt.

FINAL INSTRUCTION NO. 15
PLAINTIFF KENNETH MICHAEL BOWEN'S DAMAGES

If you find Plaintiff Kenneth Michael Bowen is entitled to damages, it is your duty to determine the amount of those damages. In doing so, you shall consider the following items:

1. The reasonable value of medical and other related expenses from the date of injury to the present time.
2. The present value of future medical and other related expenses.
3. The reasonable value of lost wages from the date of the injury to the present time.
4. The present value of loss of future earning capacity. Loss of future earning capacity is the reduction in the ability to work and earn money generally, rather than in a particular job.
5. Loss of function of the body from the date of injury to the present time.
6. The present value of future loss of function of the body.
7. Physical pain and suffering and mental pain and suffering from the date of injury to the present time. Physical pain and suffering may include, but is not limited to, bodily suffering or discomfort. Mental pain and suffering may include, but is not limited to, mental anguish or loss of enjoyment of life.
8. The present value of future physical pain and suffering and future mental pain and suffering.

The amounts, if any, you assess for loss of function of the body in the past and future, for physical pain and suffering and mental pain and suffering in the past and future, and for loss of earning capacity cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the Defendant as proved by the evidence.

In addition, a party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage.

**FINAL INSTRUCTION NO. 16
LOSS OF SPOUSAL CONSORTIUM**

“Spousal consortium” is the fellowship of a husband and wife and the right of each to the intangible benefits of company, cooperation, affection, the aid of the other in every marital relationship, general usefulness, industry and attention within the home and family. It does not include loss of financial support from the injured spouse, nor mental anguish caused by the spouse’s injury.

If you find Plaintiff Nancy R. Bowen is entitled to recover damages, you shall consider the following items:

1. The reasonable value of loss of spousal consortium which Michael Bowen would have performed for Nancy Bowen from the date of the injury until the present time.
2. The present value of the future loss of spousal consortium which would have been performed by Michael Bowen in the future.

Damages for loss of spousal consortium are limited in time to the shorter of Michael Bowen’s or Nancy Bowen’s normal life expectancy.

In determining the value for loss of spousal consortium, you may consider:

1. The circumstances of Michael Bowen’s life.
2. His age at the time of his injury.
3. His health, strength, character, and life expectancy.
4. Michael Bowen’s capabilities and efficiencies in performing the duties of a spouse.
5. Michael Bowen’s skills and abilities in providing instructions, guidance, advice, and assistance.
6. Nancy Bowen’s respective needs.
7. All other facts and circumstances bearing on the issue.

The amount you assess for loss of spousal consortium, past and future, cannot be measured by any exact or mathematical standard. You must use your sound judgment based upon an impartial consideration of the evidence. Your judgment must not be exercised arbitrarily, or out of sympathy or prejudice, for or against the parties. The amount you assess for any item of damage must not exceed the amount caused by the Defendant as proved by the evidence.

In addition, a party cannot recover duplicate damages. Do not allow amounts awarded under one item of damage to be included in any amount awarded under another item of damage. Similarly, damages awarded to one party shall not be included in any amount awarded to another party.

FINAL INSTRUCTION NO. 17
MORTALITY TABLES

Standard Mortality Tables indicate that the normal life expectancy of a person who is the same age as Plaintiff Michael Bowen is 18.99 years. Those tables also indicate that the normal life expectancy of a person who is the same age as Plaintiff Nancy Bowen is 22.05 years. You may take this evidence into consideration in determining the life expectancies of Michael and Nancy Bowen. You may also take this evidence into consideration in determining the shorter of the two life expectancies of Michael and Nancy Bowen in determining Nancy Bowen's claim for loss of consortium.

FINAL INSTRUCTION NO. 18
FUTURE DAMAGES

Future damages must be reduced to present value. "Present value" is a sum of money paid now, in advance, which, together with interest earned at a reasonable rate of return, will compensate the Plaintiffs for future losses.

FINAL INSTRUCTION NO. 19
"QUOTIENT" VERDICT

In arriving at the amount of damages, if any you find, you may not return what is known as a "quotient verdict," that is, your verdict cannot be arrived at by setting down the estimate of each juror as to damages and agreeing in advance that the average of such estimates shall stand as the verdict of the jury.

**FINAL INSTRUCTION NO. 20
DUTY TO DELIBERATE**

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, 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.

Dated this _____ day of October, 2001.

**ROBERT W. PRATT
U.S. DISTRICT JUDGE**