

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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	:	
SAMUEL SMALL,	:	
	:	
Plaintiff,	:	
	:	
v.	:	Case No.: 09-CV-1912 (RA)
	:	
THE CITY OF NEW YORK, EMMANUEL	:	
BAILEY, TYRONE SIMON, IAN FEINSTEIN,	:	
and MARCO VILLACIS,	:	
	:	
Defendants.	:	
-----	X	

JURY INSTRUCTIONS

Draft as of May 26, 2021

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I. GENERAL INSTRUCTIONS

A. Introductory Remarks

Members of the jury, you have now heard all of the evidence in the case as well as the final arguments of the parties. You have paid careful attention to the evidence, and I am confident that you will act together with fairness and impartiality to reach a just verdict in the case.

Now it is time for me to instruct you as to the law that governs the case. There are three parts to these instructions. First, I'm going to give you some general instructions about your role, and about how you are to decide the facts of the case. Most of these instructions would apply to just about any trial. Second, I'll give you some specific instructions about the legal rules applicable to this particular case. Third, I'll give you some final instructions about procedure.

Listening to these instructions may not be easy. It is important however that you listen carefully and concentrate. I ask you for patient cooperation and attention. You'll notice that I'm reading these instructions from a prepared text. It would be more lively, no doubt, if I just improvised. But it's important that I not do that. The law is made up of words, and those words are very carefully chosen. So when I tell you the law, it's critical that I use exactly the right words.

Because my instructions are lengthy, I have provided each of you with a copy of them, not only so that you can follow them as I read them now, but also so that you can have them with you for reference as you deliberate. Nonetheless, feel free to just listen for now.

B. Role of the Court

My duty at this point is to instruct you as to the law. It is your duty to accept these instructions of law and to apply them to the facts as you determine them. With respect to legal matters, you must take the law as I give it to you. If any attorney has stated a legal principle different from any that I state to you in my instructions, it is my instructions that you must follow. You must not substitute your own notions or opinions of what the law is or ought to be.

C. Role of the Jury

As members of the jury, you are the sole and exclusive judges of the facts. You evaluate the evidence. You determine the credibility of the witnesses. You resolve such conflicts as there may be in the testimony. You draw whatever reasonable inferences you decide to draw from the facts as you have determined them, and you determine the weight of the evidence.

Do not conclude from any of my questions or any of my rulings on objections or anything else I have done during this trial that I have any view as to the credibility of the witnesses or how you should decide the case.

It is your sworn duty, and you have taken the oath as jurors, to determine the facts. Any opinion I might have regarding the facts is of absolutely no consequence.

D. Role of Counsel

It is the duty of the attorneys to object when the other side offers testimony or other evidence that the attorney believes is not properly admissible. It is my job to rule on those objections. Therefore, why an objection was made or why I ruled on it the way I did is not your concern. You should draw no inference from the fact that an attorney objects to any evidence. Nor should you draw any inference from the fact that I might have sustained or overruled an objection.

The personalities and the conduct of counsel in the courtroom are not in any way at issue. If you formed reactions of any kind to any of the lawyers in the case, favorable or unfavorable, whether you approved or disapproved of their behavior as advocates, those reactions should not enter into your deliberations.

During the course of the trial, I may have had to correct the presentation of an attorney, for example, to ask them to rephrase a question. You should draw no inference against him or her or the client. It is the duty of the attorneys to advocate on behalf of their clients.

From time to time, the lawyers and I had conferences out of your hearing. These conferences involved procedural and other legal matters, and none of the events relating to these conferences should enter into your deliberations at all.

E. Sympathy or Bias

Under your oath as jurors you are not to be swayed by sympathy or prejudice. Your verdict must be based solely upon the evidence developed at this trial, or the lack thereof. It must be clear to you that once you let fear or prejudice or bias or sympathy interfere with your thinking, there is a risk that you will not arrive at a true and just verdict.

It would be improper for you to consider any personal feelings you may have about one of the parties' race, religion, national origin, gender or age, sexual orientation, disability or physical appearance. It would be equally improper for you to allow any feelings you might have about the nature of the claim against the defendants to influence you in any way. The parties in this case are entitled to a trial free from prejudice and bias. Our judicial system cannot work unless you reach your verdict through a fair and impartial consideration of the evidence.

F. All Persons Equal Before the Law

In reaching your verdict, you must remember that all parties stand equal before a jury in the courts of the United States. You should consider and decide this case as a dispute between parties of equal standing before the law, and of equal worth. All persons and entities deserve fair, impartial, and conscientious consideration by you. You have heard the testimony of law enforcement officers and other prison officials. The fact that a party or witness may be or have been employed as a corrections officer does not mean that his or her testimony is deserving of any more or less consideration or greater or lesser weight than that of any other witness. You have also heard the testimony of a witness who was a pretrial detainee. The fact that a party or witness

was a pretrial detainee also does not mean that his testimony is deserving of more or less consideration or greater or lesser weight than that of any other party or witness. It is your decision, after reviewing all the evidence, whether to accept or reject all or parts of the testimony of these witnesses, as you would any other witness, and to give to that testimony whatever weight you find it deserves. All parties expect that you will fairly and impartially 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.

G. Burden of Proof

As this is a civil case, the plaintiff, Mr. Small, has the burden of proving his claims by a preponderance of the evidence. This means that the plaintiff must prove by a preponderance of the evidence each and every disputed element of his claim. If you find that the plaintiff has failed to establish a claim by a preponderance of the credible evidence, you must decide against him on that claim. By “credible evidence,” I mean such testimony, exhibits, or other evidence admitted at this trial that you find worthy of belief.

What does a “preponderance of the evidence” mean? 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 claim has been proved 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.

If you find that the credible evidence on a given issue is evenly divided between the parties—that it is equally probable that one side is right as it is that the other side is right—then you must decide that issue against the party having this burden of proof. That is because the party

bearing this burden must prove more than simple equality of evidence—the party must prove the element at issue by a preponderance of the evidence. On the other hand, the party with this burden of proof need prove no more than a preponderance. So long as you find that the scales tip, however slightly, in favor of the party with this burden of proof—that what the party claims is more likely true than not true—then that element will have been proved by a preponderance of the evidence.

In this case, the plaintiff has the burden of proving each element of his claim.

One final note on the burden of proof: some of you may have heard of “proof beyond a reasonable doubt.” As I told you at the beginning of the trial, “beyond a reasonable doubt” is the standard of proof in a criminal trial. It does not apply to a civil case such as this and you should put it out of your mind.

H. What Is and Is Not Evidence

In determining the facts, you must rely upon your own recollection of the evidence. The evidence in this case is the sworn testimony of the witnesses, and the exhibits received in evidence.

Testimony consists of the answers that were given by the witnesses to the questions. Please remember that questions alone are never evidence; only answers given—in the context of the questions asked—are evidence. Testimony that I may have stricken or excluded is not evidence and may not be considered by you in rendering your verdict. Also, if certain testimony was received for a limited purpose, you must follow the limiting instructions I gave you, and use the evidence only for the purpose I indicated.

The only exhibits that are evidence in this case are those that were received in evidence. Exhibits marked for identification but not admitted are not evidence, nor are materials that were used only to refresh a witness’s recollection.

As I told you at the start of this case, statements and arguments by lawyers are not evidence, because the lawyers are not witnesses. What they have said to you in their opening statements and

in their summations is intended to help you understand the evidence to reach your verdict. However, if your recollection of the facts differs from the lawyers' statements, it is your recollection that controls.

Similarly, any statements that I may have made do not constitute evidence. It is for you alone to decide the weight, if any, to be given to the testimony you have heard and the exhibits you have seen.

Finally, this means, of course, that anything you may have heard or read in the news media or anything outside of this courtroom may play no role in your deliberations. Your decision in this case must be made solely on the evidence presented at trial.

I. Direct and Circumstantial Evidence

Generally, there are two types of evidence that you may consider in reaching your verdict. One type of evidence is direct evidence. Direct evidence is testimony by a witness about something he knows by virtue of his or her own senses—something he has seen, felt, touched, or heard. For example, if a witness testified that when he or she left the house this morning, it was raining, that would be direct evidence about the weather.

Circumstantial evidence is evidence from which you may infer the existence of certain facts. For example, assume that when you came into the courthouse this morning the sun was shining and it was a nice day. Assume that the courtroom blinds were drawn and you could not look outside. As you were sitting here, someone walked in with an umbrella, which was dripping wet. Then a few minutes later another person entered with a wet raincoat. Now, you cannot look outside of the courtroom and you cannot see whether or not it is raining. So you have no direct evidence of that fact. But on the combination of facts that I have asked you to assume, it would be reasonable and logical for you to conclude that it had been raining.

That is all there is to circumstantial evidence. You infer on the basis of reason, experience, and common sense from one established fact the existence or non-existence of some other fact.

As you can see, the matter of drawing inferences from facts in evidence is not a matter of guesswork or speculation. An inference is a logical, factual conclusion which you might reasonably draw from other facts that have been proven. Many material facts—such as what a person was thinking or intending—can rarely be proved by direct evidence.

Circumstantial evidence is as valuable as direct evidence. The law makes no distinction between direct and circumstantial evidence.

There are times when different inferences may be drawn from the evidence. The plaintiff asks you to draw one set of inferences. The defendants asks you to draw another. It is for you, and for you alone, to decide what inferences you will draw.

J. Witness Credibility

You have had the opportunity to observe the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

You should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, the impression the witness made when testifying, the relationship of the witness to the controversy and the parties, the witness's bias or impartiality, the reasonableness of the witness's statement, the strength or weakness of the witness's recollection viewed in the light of all other testimony, and any other matter in evidence that may help you decide the truth and the importance of each witness's testimony.

You should also consider the degree to which the witness had an opportunity to observe the facts he or she testified about, and whether the witness's recollection of the facts stands up in light of the other evidence in the case.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given and all of the other evidence in the case. How did the witness appear? Was the witness candid, frank, and forthright; or, did the witness seem to be evasive or suspect in some way? How did the way the witness testified on direct examination compare with how the witness testified on cross-examination? Was the witness consistent or contradictory? Did the witness appear to know what he was talking about? Did the witness strike you as someone who was trying to report his or her knowledge accurately? These are examples of the kinds of common sense questions you should ask yourselves in deciding whether a witness is, or is not, truthful.

In passing upon the credibility of a witness, you may take into account any inconsistencies or contradictions as to material matters in his or her testimony. You should also take into account any evidence that the witness who testified may benefit in some way from the outcome in this case. Likewise, you should note any evidence of hostility or affection that the witness may have towards one of the parties. Such bias or interest in the outcome creates a motive to testify falsely. It is your duty to consider whether the witness has permitted any such bias or interest to color his or her testimony and bear that factor in mind when evaluating the credibility of the testimony.

This is not to suggest that every witness who has an interest in the outcome of a case will testify falsely. It is for you to decide to what extent, if at all, the witness's interest has affected or colored his or her testimony.

If you find that any witness has willfully testified falsely as to any material fact, you have the right to reject the testimony of that witness in its entirety. On the other hand, even if you find that a witness has testified falsely about one matter, you may reject as false that portion of his or her testimony and accept as true any other portion of the testimony which you find credible or which you may find corroborated by other evidence in this case. A witness may be inaccurate,

contradictory, or even untruthful in some aspects, and yet be truthful and entirely credible in other aspects of his or her testimony.

The ultimate question for you to decide in passing upon credibility is: did the witness tell the truth before you? It is for you to say whether his or her testimony at this trial was truthful in whole or in part.

K. Prior Inconsistent Statement

You have heard evidence that certain witnesses may have made statements on earlier occasions which counsel argue are inconsistent with their trial testimony. Evidence of a prior inconsistent statement by someone who is not a plaintiff or a defendant is not to be considered by you as affirmative evidence in determining liability. Evidence of any such prior inconsistent statements was placed before you for the limited purpose of helping you decide whether to believe the trial testimony of the witness who may have contradicted himself or herself. If you find that a witness made an earlier statement that conflicts with that witness's trial testimony, you may consider that fact in deciding how much of the trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; whether the witness had an explanation for the inconsistency; and whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so how much, if any, weight to be given to the inconsistent statement in determining whether to believe all or part of the witness's testimony.

Where, however, the witness is the plaintiff or a defendant, and who by a prior statement has admitted some fact or facts against his or her interest, then such statement, if knowingly made,

may be considered as evidence of the truth of the fact or facts admitted by that party, as well as for the credibility of the party as a witness. Again, how much, if any, weight to be given to the prior statement is up to you.

L. All Available Witnesses or Evidence Need Not Be Produced

The law does not require any party to call as witnesses all persons who may have been present at any time or place involved in the case, or who may appear to have some knowledge of the matters at issue in this trial. You should not draw any negative inference against any party with respect to any issue in dispute based on their failure to produce a witness. Nor does the law require any party to produce as exhibits all papers and things mentioned in the evidence in the case.

The weight of the evidence is not necessarily determined by the number of witnesses testifying to the existence or nonexistence of any fact. You may find that the testimony of one witness as to any fact is more probative or compelling than the testimony of a larger number of witnesses to the contrary.

M. Multiple Defendants

There are multiple defendants in this case. You should consider each claim and each defendant separately. You should consider the evidence against each defendant separately as to each claim and ask with respect to each defendant as to each claim whether the plaintiff has proved the elements of the claim you are considering by a preponderance of the evidence. Each defendant is entitled to a fair consideration of the evidence relating to that defendant, and is not to be prejudiced by any finding you make for or against the other defendant

II. SUBSTANTIVE INSTRUCTIONS

I will turn now to my instructions on the substantive law to be applied to this case.

A. Section 1983 Generally

The plaintiff, Samuel Small, brings his claims in this case under a federal statute entitled 42 U.S.C. §1983, or Section 1983 for short. Section 1983 is a statute that provides a remedy for individuals who have been deprived of federal rights under color of state law. Here, Mr. Small alleges that he was denied his Fourteenth Amendment rights because (1) the individual defendants failed to protect him from the assaults he alleges he experienced on October 14 and 15, 2006, and March 9, 2009; (2) the City adopted a policy, practice, or custom that allowed those assaults to occur; and/or (3) the City failed to train its employees in order to prevent these assaults.

To establish a Section 1983 claim, the plaintiff must prove, by a preponderance of the evidence, each of the following three elements:

First, the plaintiff must prove that the defendants were acting under color of state law at the time of the incidents. This element is not contested. There is no dispute that the defendants were acting as correction officers at all times relevant to this case.

Second, the plaintiff must prove that the defendants' conduct deprived him of a right secured by the Constitution of the United States, that is, the right to be protected from an attack by other inmates.

Third, the plaintiff must prove that the defendants' acts were the proximate cause of injuries sustained by the plaintiff.

With respect to each defendant, if you find that any of the essential elements of the plaintiff's claim have not been proven by a preponderance of the evidence, you must return a verdict for that defendant.

I will now explain the two contested elements—elements two and three—in greater detail.

B. Deprivation of a Right

The second element that the plaintiff must prove by a preponderance of the evidence is that the defendant you are considering deprived the plaintiff of a federal right. In order for the plaintiff to establish this second element, he must show the following by a preponderance of the evidence: (1) the defendant you are considering acted in the manner that the plaintiff alleges; and (2) that defendant's conduct caused the plaintiff to suffer the loss of a federal right.

The plaintiff brings separate claims against the individual defendants and the City. First, the plaintiff claims that the individual defendants failed to protect him from attacks by other inmates, in violation of his constitutional rights. Second, the plaintiff claims that the City failed to protect him by adopting a policy, practice, or custom of allowing widespread gang violence and by failing to train its employees to prevent attacks like the ones the plaintiff suffered. I will now explain each of these claims to you in more detail.

1. Failure to Protect — Individual Defendants

Mr. Small claims that Warden Bailey failed to protect him by not acting on information about a risk of violence against him by other inmates who were gang affiliated. He claims that Correction Officers Feinstein, Simon, and Villacis failed to protect him by not intervening when they witnessed him being assaulted by other inmates on March 9, 2009.

The Constitution requires prison officials to take reasonable measures to guarantee the safety of the inmates.¹ That extends to protecting inmates from violence at the hands of other

¹ *Farmer v. Brennan*, 511 U.S. 825, 832 (1994). Although *Farmer* involved claims under the Eighth Amendment rather than the Fourteenth Amendment, because a detainee's rights are "at least as great as the Eighth Amendment protections available to a convicted prisoner," *City of Revere v. Mass. Gen. Hospital*, 463 U.S. 239, 244 (1983),

inmates.² However, not every injury suffered by one inmate at the hands of another imposes constitutional liability on a correction officer.³

To establish a constitutional violation based on an individual defendant's failure to protect, the plaintiff must prove that defendant acted with deliberate indifference. In this context, a showing of deliberate indifference requires two things: (1) that the plaintiff was incarcerated under conditions posing a substantial risk of serious harm,⁴ and (2) that the defendants acted intentionally, or recklessly failed to act with reasonable care to mitigate the risk even though they knew, or should have known, that the conditions posed an excessive risk to health or safety.⁵ An act is intentional if it is done knowingly. That is, if it is done voluntarily and deliberately and not because of mistake, accident, negligence or any other innocent reason. An act is reckless if it is done with a conscious disregard of its known probable consequences.

In determining whether the defendants acted with the requisite knowledge or recklessness, you should remember that while witnesses may see and hear and so be able to give direct evidence of what a person does or fails to do, there is no way of looking into a person's mind. Therefore, you have to depend on what was done and what the people involved said was in their minds and your belief or disbelief with respect to those facts. Evidence that a risk was obvious or otherwise must have been known to a defendant may be sufficient for a fact finder to conclude that the defendant was actually aware of the risk.⁶

these principles articulated in *Farmer* apply here. See *Estate of Rodriguez v. Simon*, 2007 U.S. Dist. LEXIS 55982 (D. Vt. 2007) (“[I]t is appropriate to apply Eighth Amendment caselaw to pre-trial detainees alleging deliberate indifference and gross negligence.”); *Cuoco v. Moritsugu*, 222 F.3d 99, 106 (2d Cir. 2000) (noting Eighth Amendment standards apply to claims by pre-trial detainees under Fourteenth Amendment).

² *Id.* at 833.

³ From Judge Peck's Jury Charge in *Bradshaw v. City of New York*, 17 Civ. 1199.

⁴ *Hayes v. N.Y.C. Dep't of Corr.*, 84 F.3d 614, 620 (2d Cir. 1996).

⁵ *Darnell v. Pineiro*, 849 F.3d 17, 30, 35 (2d Cir. 2017); see *Taylor v. City of New York*, No. 16-CV-7857 (NRB), 2018 U.S. Dist. LEXIS 52308, 2018 WL 1737626, at *11 (S.D.N.Y. Mar. 27, 2018) (“Although Darnell involved a Fourteenth Amendment challenge to a prisoner's conditions of confinement, its holding applies with equal measure to failure to protect claims.”).

⁶ *Brock v. Wright*, 315 F.3d 158, 164 (2d Cir. 2003)

Additionally, because Mr. Small has accused Defendants Simon, Feinstein, and Villacis of failing to intervene during a physical altercation, in order to prove that these defendants acted with deliberate indifference, the plaintiff must show that these defendants had a realistic opportunity to intervene and prevent the harm but failed to do so.⁷

2. **Failure to Protect — New York City**

To hold a city liable under Section 1983 for the unconstitutional actions of its employees, the plaintiff is required to prove two elements by a preponderance of the evidence: (1) the city has an unconstitutional policy, practice, or custom, and (2) that policy, practice, or custom caused a deprivation of the plaintiff's rights.⁸

Constitutional Violation: I am going to take these elements out of order and begin with the deprivation of constitutional rights. If you find that the plaintiff has failed to prove by a preponderance of the evidence that any of the City employees alleged to have been involved in the October 14, October 15, or March 9 assaults committed an act violating the plaintiff's constitutional rights, then your inquiry must end.⁹ This does not mean that you must find the individual defendants liable before you find the City liable.¹⁰ There are numerous reasons why you may find the individual defendants not liable that have no bearing on the claims against the City. But if you find that no constitutional violation has occurred, you cannot find the city liable in this case.¹¹

⁷ In the context of failure to intervene in harm imposed by another state actor, this is a three-part test, requiring "(1) the officer had a realistic opportunity to intervene and prevent the harm; (2) a reasonable person in the officer's position would know the victim's constitutional rights were being violated; and (3) the officer does not take reasonable steps to intervene." *Jean-Laurent v. Wilkinson*, 540 F. Supp. 2d 501, 512 (S.D.N.Y. 2008). This test has been applied in several case where the assailant was another inmate, but in those instances, only the first and third element were applied and not the second. *See, e.g., Vickers-Pearson v. City of New York*, 18-CV-8610 (KPF), 2020 U.S. Dist. LEXIS 175815 (S.D.N.Y. Sept. 24, 2020); *Velez v. City of New York*, 17-CV-9871 (GHW), 2019 U.S. Dist. LEXIS 128836, 2019 WL 3495642 (S.D.N.Y. Aug. 1, 2019).

⁸ *Wray v. City of N.Y.*, 490 F.3d 189, 195 (2d Cir. 2007)

⁹ *Askins v. Doe*, 727 F.3d 248, 253–54 (2d Cir. 2013)

¹⁰ *Id.* at 254.

¹¹ *Id.*

Unconstitutional Policy, Practice, or Custom: You must next determine whether the plaintiff has proven the existence of an unconstitutional policy, practice, or custom. A city need not have formally adopted or announced the practice or custom for it to be “official.” In some instances, a city’s inaction may rise to the level of an official policy, practice, or custom.¹² That is because the law treats a city’s “policy of inaction” in the face of known constitutional violations as the functional equivalent of a decision by the city itself to violate the Constitution.¹³ In order to find that inaction constitutes an official policy, practice, or custom, you must first find that the city has failed to act in the face of known constitutional violations and that its inaction was the result of a conscious choice rather than mere negligence.¹⁴

Persistent and Widespread Practice: One specific type of actionable inaction is failure to act in the face of persistent and widespread unconstitutional conduct by a subordinate municipal employee (or employees). You may find that such a practice or custom existed if the unconstitutional conduct was so persistent and widespread that the policymaking officials of the city either knew of it or should have known of it. Municipal liability is established in this way only if the plaintiff has established that the unconstitutional conduct was so manifest so as to imply that senior policymakers effectively endorsed the behavior.¹⁵ A single action by a lower-level employee does not suffice to show an official practice or custom, absent proof that the city was deliberately indifferent to this action.¹⁶

¹² *Cash v. County of Erie*, 654 F.3d 324, 334 (2d Cir. 2011).

¹³ *Connick v. Thompson*, 563 U.S. 51, 61–62 (2011).

¹⁴ *Id.*; *Lucente v. Cty. of Suffolk*, 980 F.3d 284, 297–98 (2d Cir. 2020).

¹⁵ *Lucente v. Cty. of Suffolk*, 980 F.3d 284, 297–98 (2d Cir. 2020).

¹⁶ *Amnesty Am. V. Town of W. Hartford*, 361 F.3d 113, 117 (2d Cir. 2014).

Failure to Train: Another specific type of actionable inaction is failure to train.

Municipal liability may be premised on a failure to train employees if inadequate training reflects deliberate indifference to the constitutional rights of the city's inhabitants.¹⁷ We discussed deliberate indifference already in regard to Mr. Small's claims against the individual officers. But with respect to municipal liability, the standard differs slightly. To prove that a city acted with deliberate indifference in this context, the plaintiff must show: (1) that a policymaker knows to a moral certainty that employees will confront a given situation; (2) that the situation either presents the employee with a difficult choice of the sort that training or supervision will make less difficult or that there is a history of employees mishandling the situation; and (3) that the wrong choice by the employee will frequently cause the deprivation of a citizen's constitutional rights.¹⁸ Ordinarily, this showing requires proof of a pattern of similar constitutional violations by untrained employees.¹⁹ However, proof of such a pattern is not necessary where the unconstitutional consequences of failing to train are so patently obvious that a city should be liable under Section 1983 without proof of a pre-existing pattern of violations.²⁰ The plaintiff must also identify a specific deficiency in the city's training program, not just a general failure to provide training.²¹

Causation: Finally, you must determine whether the plaintiff has shown by a preponderance of the evidence that the city's policy, practice, custom, or lack thereof—or its

¹⁷ *City of Canton v. Harris*, 489 U.S. 378, 392 (1989).

¹⁸ *Walker v. City of New York*, 974 F.2d 293, 297-98 (2d Cir. 1992).

¹⁹ *Connick v. Thompson*, 563 U.S. 51, 62 (2011).

²⁰ *Id.* at 64.

²¹ *Amnesty Am. v. Town of W. Hartford*, 361 F.3d 113, 129 (2d Cir. 2004).

failure to train its employees—caused the constitutional violation at issue. I will instruct you on causation momentarily.²²

C. **Proximate Cause**

Now that I have instructed you on the different constitutional violations alleged, I will instruct you on the final element of a Section 1983 claim: proximate cause. The plaintiff must prove is that the acts of the defendants were a proximate cause of the harm he sustained.

Proximate cause means that there must be a sufficient causal connection between the acts or omissions of a defendant and any injury or damage sustained by the plaintiff. An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury, that is, if the injury or damage was a reasonably foreseeable consequence of that defendant's act or omission. If an injury was a direct result or reasonably probable consequence of a defendant's act or omission, it was proximately caused by such act or omission. In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act or omission is a proximate cause.

In order to recover damages for any injury, the plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the conduct of that defendant. If you find that defendant has proved, by a preponderance of the evidence, that the plaintiff's injury would have occurred even in the absence of the alleged unlawful conduct of the defendant you are considering, you must find that defendant did not proximately cause the plaintiff's injury.

²² *Cash v. County of Erie*, 654 F.3d 324, 342 (2d Cir. 2011) (rejecting a challenge to a jury instruction that did not include a separate instruction on cause because “‘proximate cause,’ although derived from tort law, fairly describes a plaintiff’s causation burden with respect to a municipal liability claim under § 1983”).

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

A defendant is not liable if the plaintiff's injury was caused by a new or independent source of an injury which intervenes between the act or omission of that defendant and the plaintiff's injury and which produces a result which was not reasonably foreseeable by that defendant.

D. **Damages**

I will now instruct you on the law for measuring damages.

The fact that I am instructing you as to the proper measure of damages does not indicate any view of mine as to which party is entitled to your verdict in this case. Instructions as to the measure of damages are given for your guidance only in the event that you should find in favor of the plaintiff in accordance with my other instructions.

If you do find that damages should be awarded, you should not take into consideration attorneys' fees or court costs, which will be decided by the Court. If you make any award of damages, such award is not subject to federal income taxes and you should not consider such taxes in determining the amount of damages, if any.

The verdict form I will give you will assist you in recording the determinations, if any, that you make as to damages.

1. **Compensatory and Nominal Damages**

If you find in favor of the plaintiff on his claims, then—with one exception I will discuss shortly—you must determine an amount that is fair compensation for his injuries. This type of damages is known as "compensatory damages." You may award compensatory damages only

for injuries that the plaintiff proved were caused by a defendant's wrongful conduct. The damages that you award must be fair compensation—no more and no less—for the loss, if any, which resulted from the defendant's wrongful conduct. The purpose of these damages is to make the plaintiff whole—to put him in the same position that he would have been in had there been no violation of his rights. The purpose is not to punish the defendants.

Compensatory damages may include damages for the physical injury, pain and suffering, mental anguish, shock, and discomfort that the plaintiff has suffered because of a defendant's conduct. In assessing compensatory damages, you may include an amount for pain, suffering, and emotional distress—past, present and future—that you determine to be reasonable compensation in the light of all the evidence in this case. Keep in mind that in order to recover damages for pain and suffering, the plaintiff must present credible evidence with respect to his suffering and corroboration that a defendant's impermissible conduct caused this suffering. To satisfy the requirement, the plaintiff does not need to provide evidence from a medical expert.

There is no exact standard for determining the precise amount of damages for pain and suffering. An award you make must be fair and reasonable in light of the evidence at trial. An award must not be based only on speculation or sympathy.

Although there are multiple defendants in this case, it does not follow that if you find one to be liable, they all are liable. Each defendant is entitled to fair, separate and individual consideration of the case against him on each claim, without regard to your decision as to the other defendants and the other claims. Furthermore, the plaintiff is only entitled to recover once for any injuries. For example, if the plaintiff were to prevail on two claims and establish that his injury for those claims was worth \$100, you could not award him \$100 in compensatory damages on each claim. He is only entitled to be made whole, not to recover more than he lost.

If you find in favor of the plaintiff on any of his claims, but do not award compensatory damages, then you must award “nominal damages.” Nominal damages are awarded as recognition that the plaintiff’s rights have been violated. If you find after considering all the evidence presented, that, with respect to any claim, the plaintiff’s rights were violated, but that the plaintiff has failed to prove by a preponderance of the evidence that he suffered any actual damages as a result of the violation, you must award the plaintiff nominal damages.

You may also award nominal damages, if, upon finding that some injury resulted from the deprivation of the plaintiff’s rights, you find that you are unable to compute monetary damages except by engaging in pure speculation and guessing. You may not award both nominal and compensatory damages to the plaintiff for a violation of Section 1983. Either he experienced actual damages, in which case you must award damages, or else he did not experience actual damages, in which case you must award nominal damages. Nominal damages may only be awarded for a token sum, not to exceed one dollar.

2. Punitive Damages

Whether or not you award the plaintiff actual damages, if you find in favor of the plaintiff, you may also, in your discretion, make an award of punitive damages against the individual defendants. Please note that the law does not allow you to award punitive damages against the City of New York, only the individual defendants.

Punitive damages are awarded, in the discretion of the jury, to punish a defendant for extreme or outrageous conduct, and to deter or prevent a defendant and others like him from committing such conduct in the future.

You may award punitive damages if you find that the acts or omissions of an individual defendant was done maliciously or wantonly. An act or failure to act is maliciously done if it is prompted by ill will or spite towards the injured person. An act or failure to act is wanton if

done with a reckless or callous disregard for the rights of the injured person. The plaintiff has the burden of proving, by a preponderance of the evidence, that an individual defendant acted maliciously or wantonly with regard to the plaintiff's rights.

If you find by a preponderance of the evidence that an individual defendant acted with malicious intent to violate the plaintiff's federal rights, or if you find that an individual defendant acted with a callous or reckless disregard of the plaintiff's rights, then you may award punitive damages against that defendant. An award of punitive damages, however, is discretionary; that is, if you find that the legal requirements for punitive damages are satisfied, then you may decide to award punitive damages, or you may decide not to award them.

In making this decision, you should consider the underlying purpose of punitive damages. Punitive damages are awarded in the jury's discretion to punish a defendant for outrageous conduct or to deter him and others like him from performing similar conduct in the future. Thus, in deciding whether to award punitive damages, you should consider whether an individual defendant may be adequately punished by an award of actual damages only, or whether the conduct is so extreme and outrageous that actual damages are inadequate to punish the wrongful conduct. You should also consider whether actual damages, standing alone, are likely to deter or prevent that defendant from similar wrongful conduct in the future, if it was in fact wrongful, or whether punitive damages are necessary to provide deterrence. Finally, you should consider whether punitive damages are likely to deter or prevent other persons from performing wrongful acts similar to those an individual defendant may have committed.

If you decide to award punitive damages, these same purposes should be kept in mind as you determine the appropriate sum of money to be awarded as punitive damages. That is, in fixing the sum to be awarded, you should consider the degree to which the defendant should be

punished for his wrongful conduct, and the degree to which an award of one sum or another will deter the defendant or persons like him from committing wrongful acts in the future.

III. DELIBERATIONS OF THE JURY

Ladies and gentlemen of the jury, that concludes the substantive portion of my instructions to you. You are about to go into the jury room and begin your deliberations. I will now give you a few final instructions on those deliberations.

A. Selection and Duties of Foreperson

Before you begin deliberating, you should by your own vote select one of you to sit as your foreperson. The foreperson doesn't have any more power or authority than any other juror, and his or her vote or opinion doesn't count for any more than any other juror's vote or opinion. The foreperson is merely your spokesperson to the court. He or she will send out any notes, and when the jury has reached a verdict, he or she will notify the marshal that the jury has reached a verdict, and you will come into open court and give the verdict.

B. Right to See Exhibits and Hear Testimony; Communication with the Court

All of the exhibits admitted into evidence will be sent to the jury room with you on a computer drive. If you want any of the testimony read, you may request that. Please remember that it is not always easy to locate what you might want, so be as specific as you possibly can be in requesting portions of the testimony. If you want any further explanation of the law as I have explained it to you, you may also request that.

Your requests for testimony—in fact any communications with the Court—should be made to me in writing, signed, dated, and timed by your foreperson, and given to one of the marshals. In any event, do not tell me or anyone else how the jury stands on any issue until after a unanimous verdict is reached and announced in open court by your foreperson.

C. Notes

Some of you have taken notes periodically throughout this trial. I want to emphasize to you, as you are about to begin your deliberations, that notes are simply an aid to memory. Notes that any of you may have made may not be given any greater weight or influence than the recollections or impressions of other jurors, whether from notes or memory, with respect to the evidence presented or what conclusions, if any, should be drawn from such evidence. All jurors' recollections are equal. If you can't agree on what you remember the testimony was, you can ask to have the transcript read back.

D. Duty to Deliberate; Unanimous Verdict

Shortly, you will retire to decide the case. You must base your verdict solely on the evidence and these instructions as to the law, and you are obliged on your oath as jurors to follow the law as I instruct you, whether you agree or disagree with the particular law in question.

It is your duty as jurors to consult with one another and to deliberate with a view to reaching an agreement. Each of you must decide the case for himself or herself, but you should do so only after a consideration of the case with your fellow jurors, and you should not hesitate to change an opinion when convinced that it is erroneous. Discuss and weigh your respective opinions dispassionately, without regard to sympathy, without regard to prejudice or favor for either party, and adopt that conclusion which in your good conscience appears to be in accordance with the truth.

Again, your verdict must be unanimous, but you are not bound to surrender your honest convictions concerning the effect or weight of the evidence for the mere purpose of returning a verdict or solely because of the opinion of other jurors. Each of you must make your own decision about the proper outcome of this case based on your consideration of the evidence and your

discussions with your fellow jurors. No juror should surrender his or her conscientious beliefs solely for the purpose of returning a unanimous verdict.

Remember at all times, 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.

If you are divided, do *not* report how the vote stands and if you have reached a verdict do not report what it is until you are asked in open court.

E. Verdict Form

Your verdict will take the form of a special verdict comprising your answers to written questions. Your answer to each question must reflect your unanimous verdict on each question. I will give you the verdict form with the questions for you to answer and you will retire to deliberate your decision.

You should answer every question except where the verdict form indicates otherwise. You should also proceed through the questions in the order in which they are listed.

F. Return of Verdict

After you have reached a verdict, your foreperson will fill in the form that has been given to you, you will all sign and date it, and your foreperson will advise the marshal outside your door that you are ready to return to the courtroom.

I will stress that each of you must be in agreement with the verdict which is announced in court. Once your verdict is announced by your foreperson in open court and officially recorded, it cannot ordinarily be revoked.

IV. CONCLUSION

In conclusion, ladies and gentlemen, I am sure that if you listen to the views of your fellow jurors, if you apply your own common sense, and if you follow my instructions on the law, you will reach a fair verdict here.