

CIVIL & FAMILY

Death On The Tracks

A mystery answered, a record set in \$11 million wrongful death award

BY THOMAS SCHEFFEY

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Police never arrested anyone in the death of James Robert S. Avery, a Metro-North railroad flagman from Hamden who was mysteriously killed by a slow freight about an hour after midnight July 18, 1997.

But in a civil trial in federal court last month, a Bridgeport jury returned the largest wrongful death verdict in Connecticut history, giving its own \$10.83 million answer to why he died.

From police reports, a detective's investigation, depositions and body language at trial, a convincing picture emerged of no innocent accident, but an explosively violent confrontation.

The plaintiff's lawyers in *Avery v. Metro-North and Massachusetts Electric Construction Co.* are New Haven's Cahill & Goetsch. The case was tried by George J. Cahill, Jr. and the firm's brand new associate, Scott E. Perry.

On the deadly night, Metro-North employee Avery was supervising a crew of four Massachusetts Electric workers, and having a tough time of it. He was concerned that they were pressing the bucket of their cherry-picker too hard against the overhead lines.

Words were exchanged. Possibly blows.

Soon after, a freight engine rolled through Stamford at about 20 mph on its way to Mount Vernon, N.Y. If anyone saw it strike Avery, they haven't yet admitted it.

The engineer testified at trial that he would have seen Avery if he were standing upright near the track. He was wearing a reflective orange safety vest.

Grim Discovery

Instead, the first report of Avery's body was at 5:50 a.m., when commuter trains began to run. Two of the electric workers, John Lonnborg and Mark Hodkoski, had accounts



Oru Nadler

George J. Cahill found more facts than the police did in the death of James Avery.

that changed in the retelling, says Cahill.

Never satisfactorily explained, he says, was how Lonnborg suffered a fractured right ring finger. He said he stumbled in a hole, and that his co-workers could corroborate it. But the hole was never found, and the story was not confirmed, says Cahill.

In a deposition at the Cahill Goetsch law firm, Lonnborg angrily stated that Avery "didn't know his [expletive deleted] job" and had told railroad police at the time that Avery was "a pain in the ass." And at trial, when called to raise his right hand to take the witness oath, Lonnborg rapidly raised it as if he were about to strike Cahill—body language that spoke volumes, the lawyer said.

"I was pretty sure the jury was going to go our way, as soon as the evidence came out," says Cahill. Indeed, at the end of the plaintiffs' case, co-defendant Metro-North, represented by Ryan, Ryan, McCaghey & DeLuca, settled for an undisclosed figure. "It seemed prudent to get out of the line of fire," said Charles DeLuca, who represented Metro-North at trial.

Newcomer Perry handled important direct examination of the medical examiner, Dr. Malca Shah, who testified that the train struck Avery's head from the rear. The impact created a pattern of skull tissue low

on the train's plow guard, as if Avery had not been standing when hit. His jaw was broken, and the body was found 69 feet from the point of impact, between the rails.

Avery's jaw might have been broken by the train, says Perry, but the fact that the brunt of the force was to the back of his head made it reasonable for a jury to infer that Avery's jaw had been broken long before the train hit.

"Why was an experienced, expert flagman on the tracks and close to the ground when the train came through?" asks Goetsch. "It doesn't make sense."

Key stories changed. Electrical worker Hodkoski originally told police he saw no trains pass at all that night, but at trial he testified he could see the freight engine clearly and even identify the engineer, Cahill notes.

After the freight passed, it left Avery's body some 70 feet from where the electrical workers were installing power poles for the Stamford center island platform project.

Punitive Jury

The jury concluded that the contractor was 100 percent liable for Avery's damages. It awarded \$1.25 million in lost compensation and a like amount for death alone. University of Connecticut economics professor Arthur Wright provided damages testimony for the plaintiffs.

The largest component was \$7.25 million for the destruction of Avery's capacity to enjoy life's activities.

From those figures, the jury added the maximum levels of exemplary damages allowed under the statutory formula, and found the contractor 100 percent liable for negligent conduct, apportioning no fault to Avery.

The civil discovery process produced more factual investigation than the original railroad police investigation, which Metro-North Police told Cahill was a closed file. Metro-North spokesman Tom Kelly did not respond to calls for comment.

Says Cahill: "We certainly did not claim that Lonnborg attempted in any way to kill Jim Avery."

But in light of the civil findings, Goetsch said, "It seems to me a negligent manslaughter investigation might be in order." ■

Federal jury awards \$11m in rail flagman's death

By THANE GRAUEL

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BRIDGEPORT — A federal court jury that heard a lawsuit brought by the family of a Metro-North flagman killed by a train in 1997 has handed down what appears to be the largest wrongful-death award in state history.

The U.S. District Court jury Wednesday awarded nearly \$11 million and found the Massachusetts Electric Construction Co. 100 percent responsible in the July 18, 1997, death of James Robert Avery of Hamden.

"No amount of money can make up for the loss of my son, Jim," said Robert Avery of Hamden. He said the verdict "protects Jimmy's daughter, Corey, as he would have done had he lived."

Metro-North had been a defendant in the suit, but settled the case late last week for an undisclosed sum, leaving the Boston-based contractor the sole defendant. A Metro-North spokesman reached Wednesday confirmed the settlement, but could not comment further.

The suit was brought by Avery's estate and the award, minus legal and attorney fees, goes to Corey Avery, who is 11 and lives with her mother in West Haven. Her parents were divorced.

Avery was killed while working as a flagman while Boston-based Massachusetts Electric Construction installed poles for the Stamford Center Island Platform project.

Charles Goetsch of Cahill and Goetsch in New Haven, which represents Avery's estate, said his firm argued that a confrontation between Avery and a member of the work crew led to his death on the tracks.

James Robert Avery of Hamden was killed while working as a flagman while Boston-based Massachusetts Electric Construction installed poles for the Stamford Center Island Platform project.

"We used circumstantial evidence, photographs and statements to explain to the jury how an excellent flagman with a good safety record was run over by a locomotive on a live track," he said.

The Metropolitan Transportation Authority investigated the death, but did not bring any charges.

The contractor's lawyer claimed in court papers that Avery was negligent by failing to carry a flashlight, lantern or strobe light and by walking on an electrified track. Metro-North's lawyers denied any wrongdoing in court papers.

During court proceedings last week, George Cahill and Scott Perry, who tried the case for Avery's estate, questioned Mark Hodkoski and John Lonnborg, members of the construction crew, about events that led up to an exchange of angry words.

Avery became upset with members of the crew because he thought they were leaning construction equipment too hard against overhead power, signal and communication lines, according to testimony.

While questioning Lonnborg,

Cahill got the crew member to admit he thought Avery was "a pain in the [expletive deleted]" and didn't know "his [expletive deleted] job."

Avery had "threatened to shut the job down," because the crew was not listening to him, Cahill charged in court.

Avery never got the chance. Moments after the 1:30 a.m. argument, he was struck by a slow-moving Metro-North locomotive hauling a flatbed car from Stamford to Mount Vernon, N.Y. His body was not found until 6 a.m.

As a flagman, it was Avery's duty to warn trains of the construction crew's position and ensure the crew did not venture too close to active rails.

The lawsuit claimed the locomotive that struck Avery never sounded its horns, continued through the work site without receiving a hand signal to proceed and also dimmed its lights. It charges the Massachusetts Electric crew was negligent by not following Avery's commands and arguing with him.

Calls for comment from Electric Construction and its lawyer, Thomas Kelsey of Glastonbury, were not returned, so it is not known if they plan to appeal the verdict.

Goetch checked with the Connecticut Trial Lawyers Association and said the \$11 million appears to be the highest wrongful-death award ever in Connecticut. He said it is for the loss of Avery's life, his actual death, the loss of his lifetime's earnings, punitive damages and attorney fees.

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