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Jesse Smith and Ella May Smith v. Arrowhead
Freight Lines Limited; Joseph E. Nelson and Mary
Jane Nelson v. Arrowhead Freight Lines Limited :
Brief of Respondent

Utah Supreme Court

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In the Supreme Court of the State of Utah

JESSE SMITH and ELLA MAY
SMITH, his wife,
Plaintiffs and Appellants,

vs.

ARROWHEAD FREIGHT
LINES LIMITED, a corpora-
tion,
Defendant and Respondent.

Case No. 6213

JOSEPH E. NELSON and
MARY JANE NELSON, his
wife,
Plaintiffs and Appellants,

vs.

ARROWHEAD FREIGHT
LINES LIMITED, a corpora-
tion,
Defendant and Respondent.

Case No. 6212

BRIEF OF RESPONDENT

THE FACTS

Before addressing ourselves to the contentions of appellants upon these appeals we take the liberty of presenting the facts in some detail. We do this because we

most earnestly believe that a clear understanding of all of the facts will impel the court to the view that as a matter of law plaintiff's are not entitled to recover. If we should be in error in this contention then a detailed review of the evidence will still make it perfectly clear that plaintiffs were accorded a fair trial and the verdict of the jury should not be disturbed.

These cases arise from a highway collision between a truck of defendant company and a Ford single seated coupe, which occurred between Santaquin and Spring Lake in Utah County on November 17, 1937. The fatal trip, insofar as the occupants of the Ford coupe were concerned, began at Dell's Inn, a small soft drink establishment located on Highway 91 just south of Santaquin. Vaughan Sheffield, Paul Nelson and Don Simmons had resorted to Dell's Inn earlier in the evening and were there visiting when Ramona Smith and Alta Ewell joined them some time after 10:00 o'clock in the evening. (Tr. 7, 16)

Sheffield was possessed of the Ford coupe and at someone's suggestion all five of the persons named decided to ride from the inn over to Payson. It is important to note how the five persons were distributed in the small car. Vaughan Sheffield placed himself in the driver's seat under the steering wheel. He was a full grown and married young man somewhat shorter and stockier than Don Simmons, who testified that he was just under six feet in height. (Tr. 26) Next to Sheffield and at his right sat Alta Ewell, a grown young woman weighing ap-

proximately 160 pounds. (Tr. 12) On Alta Ewell's lap sat Ramona Smith, whose weight was estimated by the witness Ewell at 140 pounds. (Tr. 12) On Alta's right sat Don Simmons and on Simmons' lap was Paul Nelson. The little car was provided with a windshield in front, a window in the door on either side and a window in the back. According to plaintiffs' version, after the passengers took their places in the coupe all windows were tightly closed to keep out the cold and the windshield wiper was put in motion to improve the driver's vision against the rain. (Tr. 8, 17) Thus loaded and thus equipped the party left the inn in the direction of Spring Lake and Payson. The highway led them out of Santaquin in an easterly direction toward the foothills. According to the testimony of Simmons as they proceeded eastward the wind direction was such that the rain was much heavier against the left window and upon the left side of the windshield than against or upon other parts of the coupe. (Tr. 25)

After the highway reached the foothills it turned to the left and took a direction only slightly east of north. In making the turn to the left the coupe ran so far onto the outside of the curve that it went off the cement onto the outside shoulder and almost failed to make the curve. (Tr. 66) It righted itself and came back onto the cement portion of the highway and at a point four hundred feet north of the curve it ran into defendant's southbound truck. The collision resulted fatally to Sheffield, Nelson and Ramona Smith.

An examination of the facts immediately surrounding the collision requires the conclusion, we submit, that the driver of the truck was, as a matter of law, free from any negligence. At the time of the collision the truck was on the righthand or west side of the highway, where it belonged, and the driver did or omitted nothing which contributed to the accident. The case was tried by both sides and submitted to the jury upon the theory that if the truck was on the west or the driver's righthand side of the highway at the time of the collision there could be no recovery by any plaintiff. How stands the record upon that point?

Three persons who were in the collision survived to give their testimony. Alta Ewell and Don Simmons, who were passengers in the coupe, and Alvin Samuelson, the driver of the truck. But more important than the testimony of any survivor was the evidence left upon and near the highway by the vehicles involved.

As heretofore stated, Alta Ewell sat in the middle of the single seat in the coupe. To her left was the driver and on her lap was Ramona Smith and to her right Don Simmons and Paul Nelson. Alta testified that she "couldn't very well see out". (Tr. 12) She saw the body of the truck just the instant before the collision but she did not pretend to say where either of the vehicles was upon the highway at the time of impact. The coupe was so crowded that she could not see out and her testimony shed no light whatsoever upon the cause of the accident.

Don Simmons made more of an effort to be helpful to plaintiffs, but an examination of his testimony will disclose that he created no substantial conflict with the evidence of the defendant. Seated back in the corner as he was with a six foot young man on his lap and two women, one sitting upon the other, crowded against him upon the left, it is extremely doubtful that he could see through the windshield at all. He stated that he looked over Paul Nelson's shoulder, but we contend that the law will not permit any weight to be given to such claim, but even if we assume that he could squirm and stretch in such manner as to permit a fleeting glimpse of the truck before the accident, still he tells nothing which could fasten liability upon the defendant.

Upon direct examination Simmons asserted that he got a glimpse over Paul Nelson's shoulder when the truck was ten yards away, and that the truck was then "three feet over the yellow line". (Tr. 20) But he did not say the truck was over the yellow line to the *east*. Undoubtedly the truck was over the yellow line to the west of the center of the highway and Simmons' statement cannot support an inference to the contrary. But more important, Simmons testified that he did not know whether either the Ford or the truck changed its course after he saw the truck. (Tr. 34) In view of the positive evidence of the truck driver that the Ford coupe suddenly changed its course immediately before the collision and that the point of impact occurred west of the center of the highway, leaves Simmons' testimony insufficient to raise a question of fact as to where the collision occurred.

Samuelson sat alone in the driver's seat of the truck. For some distance immediately before the collision he was driving almost directly south. About four hundred feet south of the collision the highway turns to the west. As he moved southward along the highway Samuelson could see the lights of an automobile approaching the curve from the west. As the automobile, which proved to be the Ford coupe involved, reached the curve it went so far out onto the outer edge of the curve that it left the cement and moved onto the shouder. (Tr. 66) It was then plain to Samuelson that the driver of the Ford was having difficulty in guiding the machine back onto the cement portion of the highway and negotiating the curve to the north. When the Ford finally made the turn so that its lights were facing Samuelson it suddenly moved across from the east side of the highway to the west side. Immediately upon observing that the Ford was not under full control Samuelson pulled his truck to the extreme west side of the highway so that his righthand wheels were running on the edge of the shoulder which bordered the cement strip. (Tr. 67)

After passing suddenly from the east to the west side of the highway the Ford seemed to right itself and moved northwards for a time with its wheels straddling the center line of the cement but tending to get back onto the east side of the highway where it belonged. But this tendency of the Ford to regain its proper side of the highway was only momentary and just before the collision the Ford sharply changed its course to the west and "lurched" into the left end of the front bumper of

the truck. (Tr. 66) From there the Ford jammed along the full twenty-four foot length of the truck and then moved on up the highway and came to rest on the east shoulder in a condition of almost complete demolition. (Tr. 67) Samuelson's testimony is that at the instant of collision his truck was as far over upon the righthand (west) shoulder of the highway as it could be safely driven and that the Ford came into the west side where it had no lawful right to be. (Tr. 66, 67) The testimony of Samuelson in this respect is confirmed by unimpeachable evidence of the marks left upon and near the highway.

The collision under discussion received extraordinary attention from public officers whose duty it was to investigate such occurrences and who went upon the scene in their official capacities for the purpose of careful and impartial inspection. Within a few minutes after the accident Len Huff and Ralph Chapple, traffic officers of Payson City, were at the scene making observations and discovering and noting marks upon the highway. (Tr. 288, 318) Within approximately an hour of the accident a deputy sheriff of Utah County and a member of the State Highway Patrol arrived upon the scene and spent approximately one hour and a half in making minute inspections and investigations of conditions. (Tr. 178, 213) Early on the morning following, the sheriff of Utah County and one of his deputies arrived upon the scene in company with assistant county attorney, Dean Terry. (Tr. 192, 333) These men were followed shortly

by Ralph Smith, chief inspector for the Public Service Commission of Utah, and one of his assistants. (Tr. 283)

All of the officers mentioned went to the scene of the accident in the line of their duty and each was charged with the responsibility of making a careful inspection and observation for the purpose of determining, if possible, the cause of the collision. The testimony of all investigators tells with full accord that the accident occurred on the west side of the highway where the truck had a lawful right to be and where the Ford had no right to be.

Before describing the significant marks upon the highway and adjacent earth, it seems well to briefly describe the highway itself. At the point of the accident the roadway was approximately level and for four hundred feet south and several hundred feet north of the point of impact the road was straight and ran in a direction about north and south. There is a cement strip eighteen feet and two inches wide with a yellow line about three inches wide marking the middle of the strip. On either side of the cement there is a gravel and sand shoulder about four and one-half feet wide and approximately level with the cement strip for a distance of four and one-half feet on either side and sloping from the outer edge at a rate of about one and one-half to one. The shoulders were firm and provided good support for traffic. On the east side of the highway a level was obtained at the time of construction by cutting away the hillside, while on the west side the same level was ac-

complished by means of filling. To the west of the highway the countryside slopes to the west and beyond the shoulder was covered with soft soil. East of the highway the countryside rises to the nearby hills.

The truck involved was a GMC 1937 model weighing about ten tons with its load. Across the front of the truck was a heavy steel bumper about eight inches wide and one-half inch thick. (Tr. 184) The front wheels were the customary single wheels equipped with pneumatic tires. Behind the front wheels there were two sets of dual wheels on either side, the first set of dual wheels being referred to as the drivers and the rear set as the dollies. The wheels on either side were so aligned that the dual wheels on the rear straddled the line of the front wheels when the truck was in forward motion.

An examination of the truck following the accident showed that the initial impact of the Ford upon the truck was upon the extreme left end of the bumper. The bumper was bent back and driven against the left front wheel, turning the wheel in and driving it back against the frame. (Tr. 184) From there the Ford moved on against the front left fender, forcing it back against the cab door. (Tr. 20) The Ford then moved on against and under the left side of the body to the rear wheels. Samuelson could feel first the front end and then the entire side of the truck lift from the highway as the Ford crashed along and against the front corner and left side of the truck. (Tr. 67) The collision destroyed the steering control of the truck and it turned to the right and left the

highway. It came to rest west of the highway in the soft soil at an angle of about forty-five degrees to the highway, while the Ford, reduced to junk as it was, continued its course and traveled northward up the highway until it finally came to rest on or near the shoulder on the east side.

The marks on and near the cement highway leave it perfectly plain where the truck and Ford were with relation to the center of the highway at the instant of impact. At rest after the collision, the right rear wheels of the truck were the nearest part of the truck to the cement strip. The distance between those wheels and the west edge of the cement was sixteen feet. (Tr. 196) The truck, being twenty-four feet long, the front wheels were approximately forty feet west of the west edge of the cement. The left front wheel of the truck, having been cramped in and driven back by the collision, dug or gouged out a conspicuous groove or furrow in the west shoulder and into the soft earth beyond. The furrow referred to could be most plainly traced from the left front wheel back to the left rear wheels, under those wheels and back to and upon the shoulder. (Tr. 185, 186) That furrow or depression, of course, ended at the west edge of the cement but exactly at the edge of the cement where the depression ended there appeared upon the cement a most conspicuous rubber burn or tire mark extending in a curve northward up the west half of the cement in a solid black line for eighteen feet and six inches. Following the black rubber burn from the east end of the furrow referred to onto the pavement it curved to the

north from a northeast-southwest direction to a direction almost north and south. That mark, moving into the pavement from the west edge, never reached or crossed the center line of the highway, but continued its full length upon the west side. The north end of the burn was the nearest point in its entire length to the middle of the highway and that point was five feet and eight inches west of the center of the highway and only three feet six inches east of the west edge of the cement. (Tr. 77, 80, 186, 187, 192, 198, 199, 220, 221, 222, 223, 250, 251, 270, 278, 284, 286, 309, 313, 314, 322, 336, 337)

That the rubber burn on the cement thus described was made by the left front wheel of the truck was demonstrated beyond all reasonable dispute. Ordinarily one seeing a rubber tire burn on the pavement might be left to some speculation as to what tire produced it. But that heavy black mark, five to seven inches in width, could be followed from its northern end on the west side of the highway southerly and westerly over to the west edge of the pavement where it continued, not as a burn but as a deep groove across the shoulder, down the slope of the shoulder, across sixteen feet of soft soil to the left rear wheels, under the rear wheels and approximately twenty-four feet further west to the crippled left front wheel where it ended.

Eight feet north of the north end of the rubber mark which we have just described there began another rubber burn which ran in a northerly direction and which led unerringly to the tire on the left rear wheel of the Ford.

That mark began at a point three feet six inches west of the center of the highway and continued in solid form for about ten feet. From there on it was a broken line to the left rear of the Ford. (Tr. 78, 188, 189, 190, 199, 200, 202, 228, 231, 234, 336, 337, 338) That mark or burn continued, as one followed it northward on the west side of the center line of the highway for a distance of approximately twenty-five feet (Tr. 338) when it curved across the center line and crossed the east half of the cement to the Ford coupe. The total length of that series of rubber burns which led south and west from the Ford to a point three feet six inches west of the center line, was forty-seven feet. In addition to the recurring rubber burns which made up the mark just described there were, along with rubber burns, frequent scratches in the pavement made by contact with metal parts of the Ford as it bounced along. (Tr. 189) Also, there were smears of paint from time to time which were the same color as the paint covering the Ford. (Tr. 210, 343) Just as the first tire mark described was inescapably made by the left front wheel of the truck, so was the second line of tire and paint marks made by the Ford. It is equally beyond any reasonable dispute that both marks began in about the middle of the west half of the pavement. While the north end of the tire burn made by the left front wheel of the truck was eight feet south of the south end of the burn made by the Ford, both burns began in the west half of the pavement and one is impelled to the conclusion that the two vehicles came together on the west

half of the cement at a point at or near where one or the other of these marks commenced.

All of the marks just described were observed on the evening of the accident and carefully noted by city traffic officer Huff of Payson City, by Deputy Sheriff Christensen of Utah County, by State Highway Patrolman Allred and by the truck driver Samuelson and the witness Wiegang, an employee of the defendant. They were carefully noted and observed the following morning and careful measurements were made by Deputy Sheriff Christensen and Assistant County Attorney Terry aided by Sheriff Durnell.

Furthermore, the mark made by the left front wheel of the truck was observed and noted on the night of the accident by Traffic Officer Chapple of Payson and on the following morning by Chief Inspector Smith of the Public Service Commission.

In addition to the marks left on the cement and other marks heretofore described there were some most significant marks along the west shoulder of the highway. Along the shoulder immediately behind the truck most marks that might have been made there were trampled out by curious persons who gathered soon after the accident. (Tr. 251, 253, 271) But beginning on the west shoulder a few feet north of the truck the tracks made by the righthand dual wheels of the truck could be plainly seen along the edge of the shoulder for a distance of approximately fifty feet. This fact was noted and testified to without dispute by City Officers Chapple and

Huff of Payson, State Patrolman Allred, Assistant County Attorney Terry and by Samuelson and Wiegand. (Tr. 226, 227, 235, 272, 278, 78, 84, 303, 325, 329)

Plaintiffs offered as witnesses certain persons who were very briefly at the scene and who were drawn there by curiosity. None of them was there for the purpose of making any investigation and none made any measurements or any record of what he saw. None remained at the scene longer than a few minutes. Some of them failed to see the marks noted and measured by the investigating officers but none denied that such marks were there. Some testified to the presence of other marks upon the highway but such marks could not possibly have been made by either of the vehicles involved in the collision under review. It was contended upon the trial that the position of the truck after the collision justified the contention that certain marks testified to by Lant, Winn and McMillan were made by the truck after the impact and before it left the cement strip. But no such inference can be justified as it is in conflict with undisputed and controlling physical facts. If the truck had been in the position that such an inference would require it would inevitably have extended entirely across the highway with the front end at the west shoulder and the rear end on or over the east shoulder. In such a situation the Ford would have been required to go to the extreme west side of the highway in order to strike the front of the truck and it would have been utterly impossible for it to rub along the side of the truck and continue northward up the highway a

distance of more than forty-seven feet as it actually did. If the inference contended for by appellants were adopted then all the undisputed physical facts appearing after the collision would need to be revised and amended. In such a case the Ford would have run flush into the side of the truck. It would either have stopped at that point or it would have gone under or over the truck. No one contends that any such thing occurred.

A despairing effort was made by appellants to extricate themselves by resort to expert testimony. An engineer was sworn and testified that he had been put into possession of a truck somewhat similar to the one here involved; that he had driven the truck down some highway—not the one here involved—and had been unable to guide it off the highway at the angle at which appellants contend defendant's truck left the highway. Of course, he did not select a highway to drive off where there was a precipitous shoulder and he did not arrange to have a heavily laden Ford collide at high speed with his left front wheel as he began the turn. He frankly admitted upon cross examination that experiments such as he undertook are of no value unless all factors which might influence the result are duplicated. His closing answers upon cross examination are an admission that his experiment was of no value. (Tr. 174)

In view of the foregoing facts defendant requested the court for a directed verdict and it is submitted that such motion should have been granted. If it should have been granted then, as we contend, none of the plaintiffs

was entitled to a verdict from the jury. The motion, having been overruled, the case went to the jury upon instructions which fully and fairly presented plaintiffs' theory of the case and there is no error in the record of which the plaintiffs can fairly complain.

ARGUMENT UPON APPELLANTS' ASSIGNMENTS

Plaintiffs assign error on the part of the trial court in four particulars. Their first assignment of error is that the court refused to give their requested instruction No. 4 in the language requested. An examination of the entire charge to the jury will demonstrate that the jury were fully and fairly charged upon the theory contained in plaintiffs' requested instruction No. 4. The instruction as requested reads as follows:

“You are instructed, members of the Jury, that the Defendant has alleged that Ramona Smith was guilty of contributory negligence. The burden is on the Defendant to establish by a preponderance of the evidence that Ramona Smith was guilty of contributory negligence. That is, negligence which directly contributed to her death. In this connection you are instructed that if the fact that five persons were riding in the Ford coupe at the time of the collision did not directly cause or directly contribute to the collision in which Ramona Smith was killed, then, and in that case, the mere fact that Ramona Smith was riding in a Ford coupe with four other persons would not defeat any right that Plaintiffs Jesse Smith and Ella May Smith may have to recover in this action.”

Our contention was, and now is, that upon all the facts the occupants of the Ford coupe were guilty of contributory negligence as a matter of law, but the court having rejected our contention in that matter fully charged the jury in accordance with plaintiffs' theory.

In plaintiffs' brief only a portion of the court's instruction No. 7 as given is set forth, but having in mind the language of the request we have just quoted it becomes essential to refer to certain parts of the charges actually given. The court's instruction No. 7, to which no exception was taken, reads as follows:

“You are further instructed that it is provided by the laws of the State of Utah, that it shall be unlawful for the driver of any vehicle to drive the same when such vehicle is so loaded, or when there are in the front seat of such vehicle such number of persons, as to obstruct the view of the driver to the front or sides, or to interfere with the driver's control over the mechanism of the vehicle. It is further provided by law that it shall be unlawful for any passenger in any automobile to ride in such position as to interfere with the driver's view ahead or to the sides, or to interfere with the driver's control over the driving mechanism of the automobile.

“And in this connection, you are instructed that it is for the jury to find and determine from all the facts and circumstances shown to exist at the time of the collision herein, whether either of the occupants, to-wit: Paul L. Nelson or Ramona Smith, was guilty of negligence in becoming a passenger in said Ford coupe along with the driver and other occu-

pants therein, and whether or not such negligence contributed in any degree to the collision and to the injuries suffered, as complained of.”

Instruction No. 7 quoted above is based upon 57-7-50 R. S. U. 1933 which, like all similar statutes governing the operation of motor vehicles, is intended to promote the safety of the highways. The section became a part of the statute law of this state after the accident involved in *Balle v. Smith*, 81 Utah 179, 17 Pac. (2d) 224, had taken place.

From the foregoing the court will observe that it was plainly left to the jury to determine not only whether Paul Nelson or Ramona Smith was guilty of negligence in becoming a passenger in the Ford coupe, but also whether such negligence contributed in any degree to the collision and to the injuries suffered. In connection with this subject it is also important to observe the language of the court's instruction No. 9.

“If you find from a preponderance of the evidence that either the said Paul L. Nelson or Ramona Smith, was killed by reason of the negligence of the defendant, as alleged in the Complaints herein, then, in order to defeat the plaintiffs' right of recovery on the ground of contributory negligence, the burden is on the defendant to prove by a preponderance of the evidence that the said Paul L. Nelson or the said Ramona Smith, was guilty of negligence that proximately contributed to his or to her own death. And if upon the issue of contributory negligence, the preponderance of the evidence

is in favor of the plaintiffs, in either case, or if it is equally balanced, you should find such issue in favor of the plaintiff.”

It will be observed that the jury was there instructed that if either Ramona Smith or Paul Nelson was killed as a result of the negligence of the defendant recovery for such death or deaths could only be defeated if the jury further found, first, that they, or either of them, was guilty of negligence, and second, that such negligence proximately contributed to the injury and death.

Again in the court’s instruction No. 11 it is made clear that the jury could not defeat recovery on the grounds of contributory negligence unless such negligence were found to be a proximate cause of the injuries.

In the court’s instruction No. 20 proximate cause is clearly defined by the court. It is well settled that if, upon the hearing, a party’s theory is fully and fairly sent to the jury such a party cannot complain because the exact language proposed in a request for instruction was not followed. The full import of plaintiffs’ request was given in such a way that the jury could not have been misled.

Grow v. U. L. & T. Co.,
37 Utah 41, 106 Pac. 514;

*Cromeenes v. San Pedro, Los Angeles &
Salt Lake Railroad Co.,* 37 Utah 475,
109 Pac. 10;

Credit Men v. Boyle Furniture,
43 Utah 573, 136 Pac. 572;

Jensen v. D. & R. G. Railroad,
(1914) 44 Utah 100, 138 Pac. 1185;

Barlow v. S. L. & U. Ry,
57 Utah 312, 194 Pac. 665.

Plaintiffs second assignment of error is based upon the court's refusal to give plaintiffs' requested instruction No. 3 to the effect that Paul Nelson and Ramona Smith were required to exercise only that degree of care and caution which persons of like age, capacity and experience must reasonably be expected to naturally and ordinarily use in the same situation and under like circumstances. In connection with this request it must be remembered that Paul Nelson was a grown young man twenty years of age and that for a number of years he had been employed in different occupations and at the time of his death was engaged as a prospector. He was a young man of ordinary intelligence and was looked to by the plaintiffs for contributions toward their maintenance and support.

Ramona Smith had become sixteen years of age in June preceding the accident. She had completed part of a high school education and because of her mother's illness was discharging the duties of a grown woman about the house. Both Paul Nelson and Ramona Smith were of stature and weight above the average for grown women and men.

In neither case were plaintiffs entitled to the requested instruction. While we are not unaware of general holdings by this court that the care required of an

infant is to be graduated to his age, nevertheless, upon the record here made there is no authority requiring the giving of the request involved in either case.

It has been generally recognized that children of tender years are so far undeveloped as to be relieved of the charge of negligence; that during another period in their infancy there is rebuttable presumption against their capacity to understand and avoid danger; and that in the later years of infancy there is rebuttable presumption that they are chargeable with the same degree of care as are adults. Ordinarily a child under seven years of age is conclusively presumed not guilty of contributory negligence. Between the ages of seven and fourteen, in the absence of showing to the contrary, an infant is generally assumed not to have the same consciousness of danger and the same judgment in avoiding it as an adult. Above the age of fourteen, in the absence of a showing to the contrary, an infant is generally charged with having attained that development which imposes upon him the same degree of care as an adult. This rule is well stated in Jone's Commentaries on Evidence, volume 1, section 99 (a), pages 477 et seq.

“In cases of torts arising from negligence, too, the age and capacity of the infant charged with the tortious negligence may become matters of importance. For while infants are justly answerable for torts springing from their negligence, when such negligence is shown, it is evident that, in determining the question whether or not there is negligence in the given case, either on the part of the de-

fendant or on that of the plaintiff, the age and capacity of the defendant may be important to consider. Conduct which would be considered negligent on the part of a person of full age might not be so considered in the case of an infant of tender years and immature judgment. And, on the other hand, one dealing with a person of immature capacity may be reasonably required to exercise greater care and diligence than would be demanded of him where he has to do with persons of mature judgment and of ordinary capacity. That which will be negligence on the part of one infant may be proper care on the part of another, depending upon the age, discretion, intelligence, or experience, of the infant. A child of tender years has capacity to exercise only such care and self-restraint as belongs to childhood. Reasonable men are presumed to know this, and must govern themselves accordingly. The caution and care required of others toward the infant are measured by the age, the maturity, the capacity, and intelligence of the child. So that, while in civil actions the law does not fix any arbitrary age when an infant is deemed incapable of exercising judgment and discretion, there are numerous instances in which courts have conclusively presumed children of tender years incapable of *contributory negligence* and have refused to submit the question to the jury. The cases show that this presumption has been indulged in by the court respecting children varying in age from one to seven years. A child, too young to exercise any care or discretion, is clearly as incapable of negligence as it is of crime or sin, and is therefore not answerable to the doctrine of self-defense. There are ages so young (usually under seven) that there is a

conclusive presumption of law, and hence evidence is not admissible to refute the presumption; while there are other ages, usually seven, after reaching which it becomes a *prima facie* presumption only, and may then be rebutted by evidence of unusual natural capacity, physical condition, training, habits of life, experience, surroundings, and the like. This *prima facie* presumption continues in its favor till it reaches another age, usually fourteen, after which the presumption changes, and the burden is then on the infant to show want of capacity or understanding. The question as to whether a child's capacity is such that it may be chargeable with contributory negligence is a question of fact for the jury, unless so young and immature as to require the court to judicially know that it could not contribute to its own injury or be responsible for its acts, or so old and mature that the court must know that, though an infant, yet it is responsible. Where the infant is under fourteen years of age, the burden rests upon the defendant to rebut the legal presumption of incapability of contributory negligence. As to those over fourteen years of age the *prima facie* capability of negligence attaches. Each case must depend upon the intelligence and capacity of the child and the surrounding facts rather than upon any arbitrary rule. It cannot be said on the one hand that a child just past seven years is *sui juris* so as to be charged with negligence, nor, on the other hand, that a child just under that age is wholly incapable of exercising care. It has generally been held that, since there is no exact period fixed by the law at which there is no doubt as to whether the child is *sui juris*, the question of intelligence and ability to exercise care is for the jury under proper in-

structions from the court. But it has been held that, in the absence of proof to the contrary, a child fourteen years of age is presumed to have sufficient capacity to be sensible of danger and to have the power to avoid it."

The point raised by this discussion was directly passed upon in:

Manlove v. Lovelle, (Texas) 235 S. W. 324;

Black v. Grossman, (Pa.) 142 Atl. 316;

Crouch v. Noland, (Ky.) 38 S. W. (2d) 471;

Heflin v. Eastern Railway Co.,
(Texas) 159 S. W. 499;

Railroad Company v. Rodgers, 35 S. W. 243;

Charlton v. 42nd Street Railroad,
80 N. Y. S. 174;

McDonald v. Metropolitan Railroad Co.,
80 N. Y. S. 577;

Koehler v. Syracuse Specialty Mfg. Co.,
42 N. Y. S. 182;

Hilliard v. Murdock,
(Texas) 20 S. W. (2d) 1070;

San Antonio Traction Co. v. Kumpf,
(Texas) 99 S. W. 863.

Insofar as the Nelson case is concerned the question has been definitely settled against appellants' contention. It will be remembered that Paul Nelson was twenty years of age at the time of the collision. There was no showing upon the trial of any deficiency, either physical or mental,

connected with his development. Not only would the general law charge Nelson, in the absence of some proper showing, with the responsibility of an adult but this court has gone one step further and has held that one nineteen years of age is to be regarded as an adult in determining the presence or absence of contributory negligence. In *Newton v. Oregon Short Line*, 43 Utah 219, 230; 134 P. 567, this court dealt with a collision between a train and a minor nineteen years and eleven months of age. Young Newton was killed on a street crossing and the question of his contributory negligence came under review by this court. In speaking to the precise point now presented this court said:

“In principle this case is not distinguishable from the case of *Cromeenes v. San Pedro, Los Angeles & Salt Lake Railroad Company*, 37 Utah 475, 109 Pac. 10, Ann. Cas. 1912C, 307. The only essential difference between that case and the one at bar is that in that case the injured boy was only about twelve years old, and hence was clearly of immature age, while *in this case the deceased must be treated as a young man (an adult)*, and further that in the *Cromeenes Case* the trains were approaching on the two tracks from opposite directions.”

1. adult

Ramona Smith was sixteen and a half years of age at the time of the fatal collision and, in the absence of some showing to the contrary, plaintiffs were not entitled to have her conduct measured by that of any subnormal person. The general rule of law for which we contend, that one the age of Ramona Smith is not entitled under

the circumstances in this case to be regarded as under any disability in the absence of a showing to that effect, is clearly reflected in the announced public policy of the state in connection with the operation of motor vehicles upon the highways. A woman sixteen years of age and otherwise qualified is entitled to receive from the state a license to drive an automobile upon all of the highways of the state. This authorization must proceed upon the assumption that in the absence of some demonstrated infirmity, not presumed to exist in persons sixteen years of age, such a person is presumed to possess that discretion and physical capacity consistent with the safe use of the highways.

We do not contend that the statute, withholding licenses to drive from persons under sixteen years of age and authorizing their issuance to persons sixteen years of age and over, undertakes to declare that all persons licensed to drive possess the same capacity, but it certainly must be construed as setting an age at and above which the presumption of adult responsibility attaches. If either Paul Nelson or Ramona Smith had failed to attain the mental and physical development normally attained at their respective ages the facts could easily have been presented by appellants and the burden was upon them to make the proof. In both cases the proof was exactly to the contrary. The picture the jury got was of a perfectly normal young man twenty years of age and a perfectly normal young woman sixteen years of age. Neither was subnormal in any respect and upon the record the jury should not have

been instructed that it was at liberty to apply to their conduct any standards applicable to subnormal persons.

The cases cited by appellants in their brief do not hold against our contention in this respect. Appellants cite

Balle v. Smith, 81 Utah 179, 17 P. (2d) 224;

Montague v. Salt Lake & Utah Ry.,
53 Utah 368, 174 P. 871;

Kyne v. Southern Pacific Co.,
41 Utah 368, 126 P. 311.

We will discuss them in the order cited.

The minor involved in *Balle v. Smith* was fourteen years of age and it is true that this court stated that the degree of care required of her was not the same as that required of an adult, but the question here presented was not before the court as clearly appears from the opinion. It is stated in the opinion that: "No reference is made in any of the requested instructions to the plaintiff's age and the degree of care required of a minor fourteen years of age."

From the foregoing it would appear that it was not necessary for a decision of the *Balle* case to rule upon the precise point here presented. Certainly it was not necessary for the court to rule upon the standard of care required, in the absence of a showing of some deficiency, of a sixteen or twenty year old person. In connection with the obiter dictum in *Balle v. Smith* may be observed that in *Payne v. Utah-Idaho Sugar Company*,

62 Utah 598, 607; 221 P. 568, this court in discussing whether plaintiff's injury was brought within the attractive nuisance theory stated: "It may indeed be seriously questioned whether a lad of plaintiff's age and mentality may avail himself of the doctrine here involved." Plaintiff in that case was fourteen years and eight months old and sought recovery from the sugar company on the ground that it maintained a nuisance attractive to children.

In the *Montague case*, supra, the young woman was seventeen years old at the time of trial—probably sixteen at the time of the accident—but in that case there was no question before the court such as the one presently under review. There was no question there and no holding with regard to instructions upon the degree of care required in any given case of a sixteen year old minor. There the question was whether the trial court should have instructed the jury to find contributory negligence as a matter of law. This court sustained the trial court in sending the case to the jury in view of "her age, *her lack of experience*, the duty imposed upon her by law, and all of the other facts and circumstances" (Utah report, volume 52, page 371). Plainly in that case there must have been a showing of a "lack of experience" and other "facts and circumstances" which, when viewed in connection with the plaintiff's youth, moved this court to the conclusion that contributory negligence as a matter of law had not been established, and that is all the case decides. In this case there is no showing of lack of experience and no showing of any

facts and circumstances which might be considered in connection with the youth of the persons involved.

Kyne v. S. P. Co. involved a child ten years of age and we would readily agree that in the absence of a clear showing of extraordinary development care required of her was not the care which would be required of an adult.

By its decision in the Newton case this court has settled the rule against plaintiffs in the Nelson case and it is earnestly submitted that upon the facts of the particular case and the general law applicable thereto plaintiffs in the Smith case were not entitled to the instruction requested.

Our contention in this respect is sustained by well considered cases from other jurisdictions. A distinction is recognized between a situation wherein a minor passively fails to sense danger and one wherein the minor actively creates the danger himself. It has been held that a minor who participates in the overcrowding of an automobile is guilty of contributory negligence as a matter of law.

In *Mahoney v. City of Pittsburgh*, 181 Atl. 590, the Supreme Court of Pennsylvania had for review a case in which eight persons crowded into a Ford coupe, four in the front seat and four in the rumble. An accident resulted and the Supreme Court of Pennsylvania, in holding that the crowding of the Ford contributed as

a matter of law to the injuries, made the following statement:

“It is common knowledge that the space on the front seat of such a car is slightly more than three and less than four feet, and that about one-half of it is designed to accommodate the driver and furnish him with sufficient room to manipulate the apparatus designed to control the course of the car. Leonard, one of the witnesses, who sat on the front seat, said he weighed 180 pounds and that one of the women sat on his knee with her back to the door. Another woman sat between Leonard and the driver. A driver must always have his car under reasonable control, though the measure of that duty may vary with circumstances; what is reasonable on a highway in the country may be unreasonable in built-up sections. (*Lorah v. Rinehart*, 243 Pa. 231, 89 A. 967; *McGettigan v. Quaker City A. Co.*, 48 Pa. Super. 602); the driver is affected by provisions of the Motor Vehicle Code providing rules for safe driving (*Jamison v. Kamerer*, 313 Pa. 1, 169 A. 231; *Farmer v. Nevin Bus Lines*, 107 Pa. Super. 153, 163 A. 41; *Stevenson v. Sarfert*, 310 Pa. 458, 165 A. 225; *Hegarty v. Borger*, 304 Pa. 221, 155 A. 484); by the condition of the highway (*Mason v. C. Lewis Lavine, Inc.*, 302 Pa. 472, 153 A. 754); and by the character of the load carried or the manner of loading (*Dorris v. Bridgman & Co.*, 296 Pa. 198, 145 A. 827; *Boyle v. Leech*, 298 Pa. 188, 148 A. 70). In this case the crowding of the front seat would so impede and restrict the driver’s freedom of motion as to make it impossible for him to act freely in such emergencies as must have been expected and actually occurred. This crowding not only deprived him of the room

required to manipulate the steering wheel and control the course of the car generally, but put him at serious disadvantage in operating the gearshift and the brake. This impairment of the power of control, considered with the condition of the street, the poor visibility, and the corresponding necessity for a high degree of care, make it evident that the driver's negligence was a contributing cause to the accident.

“Plaintiff, though a guest, assisted in bringing about the crowded condition of the car. He was cognizant of the danger (he was an experienced driver) and was therefore likewise guilty of contributory negligence. *Curry v. Riggles*, 302 Pa. 156, 159, 153 A. 325, and cases here cited.”

To the same effect is *McIntyre v. Pope*, 191 Atl. 607, wherein the Supreme Court of Pennsylvania again ruled that:

“Where more than three adult persons sit in the the front seat of an automobile, thus overcrowding it and restricting the driver's freedom of action to exercise necessary control in the event of emergencies, and injuries result, those overcrowding the front seat are guilty of contributory negligence as a matter of law.”

In the case just quoted from it is interesting to observe that the plaintiff was eighteen years of age and was not the driver of the Ford coupe but simply a passenger who contributed to the overcrowding. In that case plaintiff urged that she should have been relieved of the charge of negligence because of her youth.

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negligence of the driver without adequate protestation. There, realization of danger may be material. Appellant was 18 years of age, had considerable knowledge of the operation of automobiles, and was able to estimate the speed at which cars travel. Her opinion that the presence of four occupants in the front seat did not hamper the driver's ability to operate the car does not excuse her from measuring up to the required standard of reasonable care notwithstanding her own personal belief."

A conclusion to the same effect as that reached by the Supreme Court of Pennsylvania in the two cases cited above was reached by the Supreme Court of Louisiana in *Lorance v. Smith, et al.*, 138 So. 871. There four persons including the driver occupied the single seat of a Ford coupe. One of the four was the fifteen year old plaintiff and in discussing her and her age the Supreme Court of Louisiana ruled that she had reached the age of discretion. Because the case parallels the one now under review so closely we quote therefrom the following:

"That Alphonsine Lorance and Adelia Menant, the guests in this case, were guilty of independent negligence which contributed proximately to the accident and to their injury and death is manifestly clear. This is made clear by the testimony. But aside from that, plaintiffs' own allegations show that they were guilty of contributory negligence. They allege that 'Walter Smith was guilty of gross negligence in inviting three persons as his guests to ride in a Ford runabout built for two and in allowing and consenting to

apparently as there were the appellant cannot remember only 15 cars but the facts. During 50 miles per hour.

Clark Morgan's driving said car *in its crowded condition* at an excessive and unlawful rate of speed of fifty or more miles per hour, on a foggy night'; and '*That said Ford car was built for the accommodation of only two persons, whereas there were four persons riding in said runabout, thereby making it impossible, due to the crowded condition of said car, for Clark Morgan to operate said car with safety, particularly at an unlawful rate of speed on a foggy night.*'

"We heartily concur with plaintiff's counsel, who drew these petitions, that it was negligent for Walter Smith to invite and permit four persons to ride in a small car built for the accommodation of only two, especially on a foggy night, and that it was negligent for Clark Morgan to attempt to drive it under such conditions, and also that its crowded condition made it impossible for him to operate it with safety on a foggy night. These allegations need no proof to support them. It is self-evident that the crowding of four grown people into the seat of a small car built to accommodate only two deprives the driver of the free use of both hands and arms, without which he cannot operate it efficiently and with safety.

"Now let us consider the case from the standpoint of these guests. They had both reached the age of discretion, one being fifteen years old and the other a woman who had been twice married and was the mother of a child seven years old. They knew, as well as did the young men, that the night was foggy, that the Ford runabout was built for the accommodation of only two, and that for four people to crowd themselves into a seat built for two would make it impossible for the driver to operate the car with safety.

They knew this before they entered the car to go to Covington, and they knew it before they got into the car to go home. Yet they consented to ride in the car under those conditions; they were two of the four who crowded into the seat; they themselves helped to create the condition which made it impossible for Clark Morgan to operate the car with safety, helped create the condition which brought about their injury. Now, if it was negligence on the part of the young men to invite the women to ride under those conditions, were not the guests also negligent in accepting the invitation and riding under those conditions? Most assuredly they were."

The foregoing cases are uncommonly close upon the facts to the cases now under review by this court. But the facts of our cases call even more emphatically for the application of the rule announced by the Pennsylvania and Louisiana cases. Here there were five fully grown persons in the Ford coupe and here there was a statute condemning such overcrowding. Also, here the evidence is positive that the driver of the Ford lost and was unable to regain control of the Ford under such circumstances that the explanation must be found in the overloading of his coupe.

Appellants assign error in that the trial court refused to strike defendant's memorandum of costs and assert that the cost bill was not "filed" within time. The section of the code which controls the matter of serving and delivering of cost bill is 104-44-14 R. S. U.

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1933. The pertinent part of that section reads as follows:

“The party in whose favor judgment is rendered and who claims his costs must deliver to the clerk and serve a copy upon the adverse party within five days after the verdict * * *”.

It will be observed that the code uses the language “deliver to the clerk”. This is a departure from the language used in many other sections of the code where it is provided that the documents must be filed with the clerk or filed in the office of the clerk. In this case respondent served a copy of the cost bill upon appellants’ counsel in Salt Lake City where he maintained his office on the fifth day after the verdict and on the same day delivered the same to the clerk by depositing it in the United States Mail, postage prepaid, and addressed to the clerk of the court at his office in Provo, Utah.

That the delivery of the cost bill to the clerk by depositing the same in the mail was a delivery within the statute was held in the case of *Gloucester Mutual Fishing Insurance Co. v. Hall*, 96 N. E. 679 (Mass.).

See also:

Hackley Union National Bank v. Farmer,
(Mich.) 234 N. W. 135;

Kansas City Life Ins. Co. v. White,
(Arizona) 264 P. 474;

*Unterharnscheidt v. Missouri State Life
Ins. Co.*, (Iowa) 138 N. W. 459.

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Report of the Investigating Committee of Utah & surrounding areas
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Appellants complain because the court awarded full costs against the plaintiffs Smith and also against the plaintiffs Nelson. Appellants misconceive the effect of assessing the full amount of costs against both plaintiffs. They assert that one-half of the costs should have been assessed against the plaintiffs in each case and contend as if the court were awarding double witness fees and double mileage. There was no taxing of witness fees or double mileage or double per diem. There was taxed only the costs taxable in a single action and they were taxed against all plaintiffs whose action made defense necessary.

Respondent does not assert the right to recover double fees for its witnesses. It paid its witnesses only one day for each day's attendance and similarly it paid other costs only once, but it is entitled to look to all or any of the plaintiffs for full reimbursement. It is entitled to a joint and several judgment against all plaintiffs for the full amount of its taxable costs and when its judgment or costs has once been satisfied it cannot, of course, make any further recovery. It has been put to certain expenses in connection with the defense of the consolidated action. Either one of the cases tried by itself would have resulted in the same expenses and one case, as well as another, created the necessity in connection with the consolidated trial. Respondent does not seek to recover more than the amount expended. It seeks only one recovery, but it may look to all plaintiffs, or any of them, for reimbursement and if one of the plaintiffs shall hereafter pay more than

his share of the judgment for costs he may look to the other parties for reimbursement to the extent that his payment has exceeded his proportionate share. Point may be given to the contention by assuming a corollary situation. Assume that the driver of the Ford had survived and plaintiffs had sued both this respondent and the driver of the Ford and had recovered a verdict against both for damages and costs. The costs would not have been apportioned to the two defendants but would have been taxed in full against both. In such case a payment by either defendant would have discharged a judgment for costs.

Support for our contention upon this point is to be found in the following cases:

Kerrick v. Edes, 19 F. (2d) 693;

Proprietors of Kennebeck Purchase v. Boulton, 4 Mass. 419;

William H. Frank Brewing Co. v. Mayor of New York, 46 N. Y. S. 24;

Gray's Harbor Boom Co. v. McAmman, et al., (Wash.) 58 P. 573;

Lamotte v. Martin, (La.) 27 So. 291;

Moore v. Woodson, (Texas) 99 S. W. 116.

SUMMARY.

An examination of the entire record fails to disclose any evidence of sufficient substance or probative value to give legal support to any finding of negligence on the part of defendant. Defendant's truck was on

the extreme righthand side of the highway at the time of the collision. The driver had moved over just as far as he could to clear the way for the oncoming Ford. There was open to the Ford and free of obstruction the entire east shoulder—four and one-half feet wide—, the entire east half of the cement strip—nine feet—, and about five feet of the west half of the cement. There was open highway more than eighteen feet wide over which the Ford could have traveled in perfect safety. But the Ford was out of control and could not be brought into that portion of the highway intended for its use. Inasmuch as the evidence compels the conclusion that the truck was on the west side of the highway at the time of the collision the defendant was guilty of no negligence as a matter of law. The collision resulted either from the negligence of the driver of the Ford alone or from his negligence combined with that of his numerous companions who so crowded him as to make control of the Ford difficult or impossible.

But even if it should appear to this court that there is some evidence of negligence on the part of the defendant in the record still appellants' case cannot be rescued. It is plain that the accident could have been and would have been avoided if Sheffield had regained control of the Ford during the four hundred feet between the curve and the point of impact. The movements of the Ford after reaching the curve and turning north bespeak without contradiction and with great eloquence the fact that the driver was so crowded that control of the driving mechanism was impossible.

It was to avoid just such situations that the legislature, following the accident reviewed by this court in *Balle v. Smith*, supra, enacted 57-7-50 R. S. U. 1933. If a tragedy is necessary to demonstrate the wisdom of that enactment certainly this case is demonstration enough.

Upon the trial we contended, and we now most earnestly urge upon the court, that contributory negligence on the part of the occupants of the Ford was shown as a matter of law. The trial court concluded differently and sent the matter to the jury with instructions clearly leaving it to them to find (1) whether Paul Nelson and Ramona Smith were guilty of any negligence, and (2) if so, whether such negligence contributed in any degree to the collision. The charge fully and fairly submitted plaintiffs' theory.

Plaintiffs cannot be heard to complain that their requested instruction No. 3 was not given. Paul Nelson came clearly within the ruling of the Newton case and there was no showing justifying any such contention as to Ramona Smith.

The assignments of error dealing with the cost bill would seem to be of less than ordinary significance. In view of the fact that this appeal is taken by all appellants *in forma pauperis* the errors assigned should not be sustained. The cost bill was served upon appellants' counsel and delivered to the clerk within the time required by the statute and certainly plaintiffs were not entitled to have the costs apportioned among themselves.

To have defended either case separately the defendant would have been required to produce exactly the same witnesses and obligate itself for the same mileage as it produced and for which it was obligated in the consolidated hearing. Respondent is entitled to recover its taxable costs and if it ever makes recovery from any defendant its claim will, of course, be discharged. It does not seek and would not be permitted any recovery beyond that and it should be asked to accept nothing less.

It is respectfully submitted that plaintiffs were accorded a fair hearing and that the verdict of the jury should not be disturbed.

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Attorneys for Respondent.