

1949

J. Harold Mitchell v. Arrowhead Freight Lines, Ltd. And Marvin C. Van Patten : Brief of Appellants

Utah Supreme Court

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7242

Case No. 7242

**IN THE SUPREME COURT
of the State of Utah**

J. HAROLD MITCHELL,

Respondent,

VS.

**ARROWHEAD FREIGHT LINES, LTD.,
a corporation, and MARVIN C. VAN
PATTEN,**

Appellants.

APPELLANTS' BRIEF

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and Appellants**

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PATTEN,

Appellants.

APPELLANTS' BRIEF

To avoid any possible confusion, we call the court's attention to the fact that in quoting the evidence, reference is made to the transcript pages at the bottom of the page and not the reporter's pages numbered at the top of the page.

STATEMENT OF FACTS

This action was brought by the plaintiff, J. Harold Mitchell, for the purpose of recovering for personal injuries sustained by him arising out of an automobile accident which occurred April 3, 1947, about 2:15 P.M. on U. S. Highway 91, south of Beaver, or about fifteen miles north of Paragonah, Utah, at a place called Muley Point. The highway was a two-lane asphalt road, nine-

teen and a half feet in width exclusive of the graveled shoulders two and a half to three feet wide. (Tr. 388) A dust storm had developed, and the defendant, Marvin C. Van Patten, a truck driver, was driving a truck and trailer of the co-defendant, Arrowhead Freight Lines, Ltd., in a southerly direction following a Buick four-door sedan, driven by Charles S. Pace of Payson, Utah, attached to which was a small boat trailer. Van Patten had so followed the Buick through the dust storm for some two miles on a slight down grade at a very slow rate of speed, about 10-15 miles per hour (Tr. 425, 471). In following the Buick through the dust area, Van Patten would have to hold the truck back to stay behind (Tr. 441). He came to a long straight of way where it appeared the dust was clearing, and he could see down the highway a sufficient distance, so that he thought he had a good opportunity to pass (Tr. 426, 446). Seeing no northbound cars approaching, he pulled out to the left to get into position to pass and had barely pulled up to about the middle of the boat trailer attached to the Buick (Tr. 424-5) when he saw plaintiff's 1946 pick-up Chevrolet truck driven by plaintiff Mitchell coming from the opposite direction crossing the highway diagonally from west to east (Tr. 425-7). The evidence is not certain as to the distance plaintiff's truck was then away, but there were varying estimates of from 100 feet (Tr. 462) to 100 yards (Tr. 427, 458). Pace estimated the distance at from 25 to 50 yards (Tr. 471) ahead of his Buick, which would probably figure out about 100 to 175 feet between the front of defendant's truck and the front of

plaintiff's pick-up. Plaintiff denied that he was at any time on his wrong side or that he had come from the west side of the highway (Tr. 237). He claimed to be stopped or stopping on the east side of the highway (Tr. 237). Van Patten, upon seeing plaintiff's truck, immediately attempted to stop (Tr. 430) and swung his equipment abruptly to the east, entirely off the improved portion of the highway. Plaintiff also headed his small pick-up continuing across the paved portion and across the east shoulder and out into the barrow pit, where the collision occurred, the vehicles hitting at an angle, so that the left front of the Mitchell truck hit the right front corner of defendants' truck (Tr. 430-2). See also plaintiff's Exhibit V. The small Mitchell truck swung around to face southeast parallel with the larger truck, just enough to turn the small truck around (Tr. 440). See plaintiff's Exhibit T. (Also Tr. 460-1).

The evidence is not entirely clear as to how far east of the highway the point of impact was, the distance varying from three to four feet east of the paved portion (Tr. 395) to as far as ten or fifteen feet (Tr. 429). One estimate was fifteen feet east of the center line (Tr. 454-5), which would be around five or six feet east off the paved portion.

The following diagram, which is a photostatic copy of defendants' Exhibit 6, illustrates some of the testimony, including the position of the trucks to the east of the highway where the collision occurred.

The rectangle, marked with the figure 4, illustrated the position and direction of the Mitchell truck when first seen by Van Patten and Pace (Tr. 460, 446, 447). The three rectangles together east of the highway shown fifteen feet from the center line were illustrative of defendants' truck, marked with a figure 1, plaintiff's truck marked by the figure 2 (to illustrate in what manner the trucks came together), and the rectangle marked with the figure 3 is the position of plaintiff's truck where it came to rest (Tr. 435).

Plaintiff's Exhibit T is a photograph introduced in evidence by plaintiff, which shows the position of plaintiff's truck with respect to defendants' truck as it came to rest. The picture is also illustrative of the point of impact on the small truck, that is, plaintiff's truck on the left front (Tr. 436). See also plaintiff's Exhibit V.

The plaintiff, J. Harold Mitchell, was fifty-one years of age at the time of the accident. His occupation was that of a school teacher, having been so engaged at Safford, Arizona for twenty-four years (Tr. 232). Before the accident, he had arranged to terminate his connections with the Safford School District as of July 1, 1947 (Tr. 332). His salary at the time of the accident as superintendent was \$4800.00 a year. There were 1250 pupils under his supervision from kindergarten to the twelfth grade (Tr. 233). He owned a ranch and farm in or near Parowan, Utah, and had intentions of getting the ranch into operation and then resuming his occupation as a school teacher, running the ranch on the side (Tr. 359-

60). He had no intention of returning to Safford either before or after the the accident (Tr. 354-5).

Following the accident, he was taken to the hospital at Cedar City, where he was under the care of Dr. L. V. Broadbent for thirteen days. The general nature of plaintiff's injuries as testified to by Dr. Broadbent were a fractured rib (Tr. 205), fractures of the lower jaw, one simple fracture near the point of the chin (Tr. 200) and compound comminuted fractures on both sides of the lower jaw (Tr. 200). Other general injuries consisted of moderate concussion (Tr. 194, 211), a badly cut left ear (Tr. 192), swelling about the face (Tr. 209), some hemorrhage about the eye (Tr. 210), small lacerations requiring one or two or three stitches (Tr. 212) and shock (Tr. 213). There was also loss of several upper teeth, later necessitating the use of an upper plate.

After the thirteen days, he left the hospital, spending the next few days in and around Parowan, returning to Safford, Arizona, April 22, 1947. There he was in bed for a week or two (Tr. 245, 280) and was treated until May 16th by Dr. F. W. Butler, his family physician, leaving Safford June 3rd, the following month, for Parowan, where he has lived since. In Salt Lake, he was attended by Dr. K. L. Dedekind, oral surgeon, and Dr. W. Les Warburton, who took care of his teeth inserting an upper plate. He received no other medical treatment except a few visits to the office of Dr. Paul S. Richards in Bingham, Utah, between June 18, 1947, and July 2, 1947 (Tr. 512). He was also examined by Dr. Reed Clegg

on January 15, 1948, and April 20, 1948, just preceding the trial. The testimony of these physicians, and the nature and extent of plaintiff's injuries will hereafter be discussed in greater detail. Suffice it to say here that the principal complaint at the time of the trial was *some* (or as was described by Dr. Clegg "moderate") *limitation of motion of the jaws and neck*; otherwise the evidence showed that he had overcome, or was overcoming, his injuries, but plaintiff testified as to his then present inability to do the hard physical work on his farm.

Annuity tables, combined with the American Experience of Mortality or Life Expectancy tables, were offered and received in evidence over defendants' objections. The jury returned a verdict in favor of plaintiff and against both defendants on the first cause of action of \$18,691.72 general damage, plus \$1,638.50 special damage, on the second cause of action \$1,264.00 making a total verdict of \$21,594.22.

Both defendants have appealed from the judgment.

ASSIGNMENTS OF ERROR

Errors in Relation to the Annuity Tables

The court erred:

1. In admitting in evidence the annuity tables (Plaintiff's Exhibit X) over defendants' repeated objections to said tables and the entire line of such evidence, based upon the grounds that they were incompetent, irrelevant and immaterial, insufficient founda-

tion laid, and specific objection the form of such evidence as offered by said exhibit, and that the entire line of such evidence and some of the questions and answers in relation thereto assumed facts which were not in evidence. (Tr. 405, 418, 410, 411, 412, 541).

2. In denying defendants' motion to strike said tables. (Tr. 541.)

3. In giving instruction No. 22(Tr. 79), excepted to (Tr. 546), which effectively told the jury to use such tables and in connection therewith, failing in any way to qualify the mortality table used in connection with said Exhibit X.

4. In instructing the jury by its instruction No. 17 that plaintiff was "entitled to compensation for his actual loss of *past earnings*, if any, and for the impairment of earning capacity * * * in the future," (Tr. 75), excepted to (Tr. 545).

5. In refusing to give defendants' requested instruction No. 15 (Tr. 100) withdrawing the annuity tables from the jurors' consideration; excepted to (Tr. 547).

6. The court erred in overruling (Tr. 31), Paragraph 2 (i) of defendants' demurrer to plaintiff's amended complaint (Tr. 27) relating to special damages in the nature of wages paid on the ranch.

Errors as to other Instructions

The court erred:

7. In giving its instruction No. 6 (Tr. 63) excepted to (Tr. 544).

8. In giving its instruction No. 7 (Tr. 64) excepted to (Tr. 544-5).

9. In giving its instruction No. 8 (Tr. 65) excepted to (Tr. 545).

10. In giving its instruction No. 10 (Tr. 67) excepted to (Tr. 545).

11. In refusing to give the latter part of defendants' requested instruction No. 6 (Tr. 90) excepted to (Tr. 546).

12. In refusing to give defendants' requested instruction No. 9 (Tr. 94) excepted to (Tr. 547).

13. In refusing to give defendants' requested instruction No. 18 (Tr. 103) excepted to (Tr. 547).

14. The court erred in denying defendants' motion for a new trial (Tr. 118-119; 152).

We have briefly stated the assignments of error particularly relating to the instructions of the court for the reason that the instructions complained of are hereinafter set forth in greater detail. We have grouped the assignments so that those relating to the annuity tables can be considered together, and those relating to the court's instructions on negligence and contributory negligence can be considered in a separate group.

ASSIGNMENTS OF ERROR NOS. 1 TO 6

Error in Admitting Annuity Tables

The trial judge refused to permit us to argue the question of admissibility or propriety of the annuity tables (Plaintiff's Exhibit X) as to form, and overruled our repeated objections to their introduction in evidence based upon the several grounds hereinabove stated. It was acknowledged these objections should go to the entire line of testimony (Tr. 411, 412, 416), and all of defendants' objections were renewed in the form of a motion to strike the annuity tables, Plaintiff's Exhibit X (Tr. 541).

This court in *Pauley v. McCarthy*, (Utah) 184 Pac. (2) 123, apparently realizing the misuse of these tables in many cases and the vicious effect they usually have upon the jurors, placed a definite restriction upon the use of such tables, as follows:

"We wish to make it clear that we do not hold that in every case where permanent injuries are alleged and evidence in support thereof is introduced, that the mortality and annuity tables are admissible. We go only so far as to hold that where the injury alleged and proved is permanent and is of such nature as to indicate a permanent material impairment of a substantial nature in the earning capacity of the plaintiff, the mortality and annuity tables are admissible."

Therefore, in the instant case, we have presented the question as to whether there was evidence to support a finding not only that plaintiff's injuries were *perma-*

ment, but such as to prove “*a permanent impairment of a substantial nature in the earning capacity of the plaintiff.*” Other objections to the particular tables used in this case are raised in this appeal.

THE PLEADINGS

In the instant case, while plaintiff by his pleadings claimed that his injuries would render him unable to carry on his duties as a school teacher (See paragraph 5 of plaintiff’s amended complaint, Tr. 21), he did not claim that his earning capacity was *permanently* impaired in connection with the operation of the ranch, but in substance alleged by paragraph 11 of the amended complaint, that it was necessary to employ other parties to perform some of the work, and by reason thereof suffered loss of earnings to the then amount of approximately \$3,000 (Tr. 23).

It is also significant that plaintiff, by his pleadings, based his claimed neck injury upon the existence of fractures in the vertebrae, as follows:

“That by reason of the fracture and injury to his cervical vertebra, plaintiff suffers from stiffness in the neck and pain upon motion * * * that the injuries to his neck and nervous system *may* be permanent in character.”

As we shall see from the evidence, any possible fracture of the neck or cervical vertebra, as testified to by Dr. Butler (which was the reason plaintiff probably believed he had a broken neck) was entirely disproved

by plaintiff's own witnesses, Drs. Broadbent and Clegg. If not, it was clear that any possible fracture or even chip fracture (which Dr. Clegg indicated could have been a possibility) *had entirely healed*, and there would be no disability due to fractures. Plaintiff himself acknowledged he did not require any particular treatment as to his claimed neck injuries (Tr. 346-7).

THE EVIDENCE

The only lay testimony as to plaintiff's inability, if any, to teach school was plaintiff's answer to his counsel's question:

“Q. Would you be able, from a physical standpoint, to carry on your vocation as a school teacher or school superintendent at the present time?

* * *

A. I wouldn't want to try to continue my school work *at the present time*.

Q. Why?

A. I just simply feel like I couldn't handle it *this year.*” (Tr. 332)

He was paid for the full school year, ending July 1, 1947 (Tr. 354-5). He was taking part in activities in the community, and had been teaching a Sunday School class for about two months and singing in a choral group for about five weeks (Tr. 353).

As to the ranch and his activities in connection therewith, he testified:

“I had intended to come to Parowan where my farm property was, farm and ranch property, and to, first of all, get that in condition so that it would operate properly, and then, if conditions arose whereby I could continue my school work, I had always expected to do that.” (Tr. 359-60)

“I have a farm and some livestock range, the farm itself consists of what they call thirty and a quarter acres of water; that acre, however, calls for about 1.8 hours of water from the portion of the stream that comes down the Parowan Canyon. * * * You can irrigate on that, most any season, two to two and a half times that much land. * * * I have about 98 acres at the present time that I’ll attempt to irrigate this summer. * * * As to grazing lands, I have pastures there in the valley, and winter grazing set-up over in the north end of the valley, privately owned, and some public domain, then I have approximately fourteen hundred acres of summer grazing mountain land, eight to ten miles south of Parowan.” (Tr. 333)

He further testified that in connection with this ground, he ran sheep and cattle. During the past year, he paid his brother wages, \$150 a month, to operate the ranch and farm, (Tr. 333) from June until the 2nd day of December, 1947 (Tr. 334). He (plaintiff) was personally able to do very little ranching or farming work up until December of 1947. Since that time, December, 1947, there has been very little to handle, just a few

chores to do during the winter time. Now spring is opening up, there is real work down there. "At the present time, my father has been helping a little, and my son has been helping." (Tr. 334)

He testified to being able to do the chores and substantially all of the work around the farm and take care of the farm, except the heavy work like hoisting grain and things of that kind. He was able to manage the farm (Tr. 353).

He could drive an automobile in pretty good shape, although he had some difficulty in turning to look to the rear; that at the time of trial, he was engaged in farming; that he was then unable to do "strenuous physical work, *I don't do that well.*" He could drive the tractor, although he wouldn't undertake to drill grain (Tr. 248). "I can ride horses, trusty horses, all right, if I take it easy. * * * I don't usually get them off the walk." That he has some pain and discomfort when he attempts to lift heavy objects (Tr. 249). That he was unable to pitch hay without some pain (Tr. 250).

He said his ribs had entirely cleared up; that he had no dizziness; that his headaches have diminished quite considerably, although they were still with him; that his breathing was "quite definitely cleared up." (Tr. 344) That he didn't require any particular treatment as to his claimed neck injuries (Tr. 346-7).

Plaintiff was the only lay witness to testify regarding his condition.

MEDICAL TESTIMONY

DR. L. V. BROADBENT

Dr. L. V. Broadbent, the attending physician at Cedar City took x-rays of the skull and jaws, Exhibits E and G, (Tr. 197-8), an x-ray, Exhibit F, of the jaw after the jaw was wired (Tr. 202), and x-rays of the shoulders and ribs, Exhibits I and J (Tr. 204-5). The x-rays showed a fractured rib and fractures of the lower jaw as heretofore described. Treatment for the most part consisted of reducing the fractured jaw and wiring the jaws into position and suturing the left ear. He further testified that after wiring the jaws, there was good alignment and good apposition with respect to those fractures (Tr. 205).

With respect to the x-rays of the cervical spine, he said: "I was unable to demonstrate to my satisfaction that there was a fracture to the back bone or cervical vertebra. * * * I didn't find any. The positions of alignment were good. * * * I was looking particularly for a fracture in that area, but *I couldn't demonstrate one.* (Tr. 217) Damage to tissue causes pain; they repair themselves." (Tr. 218)

As to the ear, he stated that the blood supply would regenerate and that the ear was then well attached (Tr. 220-21), a slight scar remaining behind the ear. (Tr. 194) There was no skull fracture. (Tr. 223) He left the hospital April 16th after thirteen days, and never returned for further treatment. (Tr. 209) No opinion was expressed

by Dr. Broadbent regarding the permanency of plaintiff's injuries.

DR. F. W. BUTLER

The testimony of Dr. F. W. Butler, plaintiff's personal physician, was taken by deposition at Safford, Arizona, March 6, 1948, and read at the trial. He testified to having treated plaintiff April 22nd to May 16th, his last visit. (Tr. 281) His general description of the injuries is much the same as that of Dr. Broadbent. (Tr. 261-2) He said that plaintiff was at home up to May 4th, but that he was able to come to the office for the next appointment May 9th. (Tr. 280) He took x-rays, plaintiff's Exhibits B and C, May 9, 1947. Exhibit B was an incomplete exposure. Exhibit C related to the cervical vertebra. Exhibit A of the frontal sinuses was taken May 16th. (Tr. 261)

Dr. Butler's testimony differed from that of the other doctors in that he gave as his opinion that Exhibit C showed "a fracture in the body of the first cervical vertebra" and "a comminuted chip about one-fifth the size of the body of the first cervical vertebra." (Tr. 269, 282) He then gave as his opinion, based upon the existence of the fractured vertebra, that the injury to the neck would be of a permanent nature, and that there would "be some limitation of motion there * * * limitation of motion in all spheres, side, lateral, up, down, back—all spheres of motion." (Tr. 271) He had operated on plaintiff for an appendectomy about two weeks prior to the accident. (Tr. 277) And had previously treated plaintiff

for gall bladder trouble the preceding March. (Tr. 278-9, 286) That the last treatment was rendered by him May 16, 1947. (Tr. 281) That plaintiff finished all his regular routine work before leaving Safford June 3rd. (Tr. 283) That he made a wonderful recovery—he would not say a complete recovery, but he made a remarkable comeback. (Tr. 284) That with reference to the vertebra, he did not ever have him wear a Forester collar. (Tr. 284) In fact, if there was a fracture, the condition had healed to the extent that he did not think a collar was necessary, and if it had healed that much in that three weeks period, it would continue to heal. That he believed plaintiff would continue to get better right along, except that he was not qualified to express an opinion as an expert on nerve injuries. (Tr. 285)

On re-direct examination, Dr. Butler summed up his opinion as follows: “Well, I had still in my mind that the last time I saw him he had this limitation of motion in his neck and he had pain in his jaw and quite a lot of nervousness.” (Tr. 287)

DR. K. L. DEDEKIND

Mr. Mitchell came to Dr. K. L. Dedekind July 2, 1947, for dental surgery and an x-ray was taken. (See plaintiff's Exhibit D.) Dr. Dedekind stated there were no teeth damaged in the lower jaw (Tr. 172), and two of the rear lower teeth were infected by pyorrhea not caused by the accident (Tr. 172, 181-2). There were nine of the upper teeth with respect to which there was no evidence of injury (Tr. 172). The remaining upper

teeth, however, were not adequate to support a denture very well (Tr. 173). It was decided to remove all of the upper teeth and insert a complete upper plate (Tr. 173). That during the healing processes, he would be inconvenienced by not being able to eat as formerly (Tr. 176). That ordinarily fractures of that type repair themselves (Tr. 182), and on July 2nd, when he examined Mr. Mitchell, he found them repaired at that time, and that they were "solid and well united." (Tr. 183) When the x-rays were taken July 2nd, he noticed some restriction in the ability of Mr. Mitchell to open his mouth (Tr. 186-187), and further stated: "There may be fractures where a good union would be achieved and the jaw would become solid again, and yet there would be a restriction upon the motion of the jaw * * * depending upon the position and extent of the fracture." (Tr. 188)

DR. W. LES WARBURTON

Dr. Warburton's testimony was not materially different from that of Dr. Dedekind. He testified to semi-ankylosis of the jaw at the time of his first examination July 22, 1947. With reference to that time, he further testified that his mouth was pretty well healed—"in the healing process, almost complete." (Tr. 370) A complete upper denture was installed October 14th. (Tr. 376)

DR. REED CLEGG

The testimony of Dr. Reed Clegg, orthopedist who was used by plaintiff for the purpose of physical exam-

inations January 15, 1948, and April 20, 1948, just before the trial, for the purpose of determining plaintiff's then physical condition summarizes the extent of plaintiff's injuries on those dates. He took numerous x-rays and stated that his findings disclosed the following: (1) A healed fracture of the left mandible ; (2) Absence partial teeth; (3) Healed scar of the left ear; (4) Area of anesthesia about the left ear and left side of the chin; (5) Healed rib fracture, seventh on the left side; (6) Anklyosis or limitation of motion, partial fibrous of the cervical spine or neck; (7) Apparent healed fracture of the nasal bone, with deviation of nasal symptom to the left; (8) Anklyosis, partial fibrous slight of left thumb in the opponens direction; and (9) Anklyosis partial fibrous temporal mandibular. (Tr. 290-291) As to the x-rays he took, Dr. Clegg testified that plaintiff's Exhibit Q, x-ray of the chest, indicated there *may* have been a fracture of the seventh rib. (Tr. 292-3) Exhibit P, a side view of the cervical spine, part of the left jaw and skull, showed no abnormalities but a roughened area on the jaw may possibly have been a fracture. (Tr. 293-4) Exhibit O, jaw bone, showed a roughened area indicating a healed fracture. (Tr. 294) Exhibit N, left hand, definitely no abnormalities. (Tr. 294-5) Exhibit M, front and back view of neck, showed no abnormalities. (Tr. 295-6)

Dr. Clegg was then shown plaintiff's Exhibit C, which was the x-ray taken by Dr. Butler at Safford, Arizona. The only possible evidence of fracture he could

detect from that exposure was what he described as “an area of roughness in front or anterior to the first cervical vertebra,” (Tr. 296) which “might be the result of a chip fracture.” (Tr. 297)

Dr. Clegg then gave as his opinion with respect to the jaw that there would be “some permanent limitation of the motion,” (Tr. 298) and as to the neck, “I would expect there would be some limitation of motion.” (Tr. 299)

That in the opinion of Dr. Clegg was the full extent of any possible permanent injuries other than a small area of anesthesia in the vicinity of the lower rib. (Tr. 301)

Upon being asked whether the condition of the body and neck would have a tendency to produce pain, he said, “It *might*.” (Tr. 302)

On cross examination Dr. Clegg further testified:

“Q. Would you explain to the jury what ‘ankylosis’ means, Doctor?

A. The term, ‘ankylosis,’ merely means limitation of motion, may be partial or complete.

Q. It is used in lieu of the term ‘stiffness’, is it not?

A. Yes, similar. (Tr. 303-4)

Q. Now, with respect to the x-rays you have examined, I believe you indicated that the only possible fracture you could observe as to the cervical vertebra was a chip fracture?

A. Yes, sir.

Q. So, from your examination of those x-rays, you would conclude there was no fracture in the vertebra itself—that is, in the body of the vertebra or into the joint?

A. I couldn't see any, no, sir.

* * * *

A. There is some bony roughness which may represent a healed chip fracture.

Q. A healed chip fracture?

A. That's right.

Q. Will a healed chip fracture ordinarily result in any stiffness or limitation of motion?

A. Not necessarily from the bony changes, no, sir.

Q. Ordinarily you wouldn't expect any limitation of motion by reason of that? (Tr. 305-6)

A. Not from the bony changes.

Q. So that, so far as the bones are concerned, there is no fractures you have been able to locate which should, in any way, restrict the movement of Mr. Mitchell's neck?

A. That is, as far as the bones are concerned, yes, sir.

With respect to the tissues of the neck, Dr. Clegg testified:

Q. And tissues and fibrous tissue in the neck, Doctor, tends to repair itself, does it not?

A. There is general improvement, but there *may* be permanent limitation.

Q. There may be?

A. Yes, sir.

Q. Whether there is going to be permanent limitation in a particular case is a matter of speculation, is it not, Doctor?

A. Yes, sir; yes, sir.

Q. Just pure guesswork?

A. Well, we don't term it that. (Tr. 309)

Q. But it is speculation?

A. It is speculation.

Q. As to how he is going to be in the future?

A. Based on experience.

Q. But the normal thing is for that tissue to repair itself and the patient to improve?

A. Yes, sir.

Q. That tissue to build itself up again and become strong?

A. Yes, sir.

Q. And, during your practice, Doctor, have you treated many patients with neck injury involving damage to the fibrous tissue?

A. Yes, sir.

Q. And most of them finally regain the full use of their neck, do they not, or substantially so? (Tr. 310)

A. Depending on the extensiveness of the injury, they do.

Q. People you have so treated have been people doing comparatively hard labor?

A. All types.

Q. Their neck becomes strong, and they return to their occupations and go through life, sometimes just about as good as they did, or as well as before, do they not?

A. I would say by far the majority do.

Q. Yes. And if, assuming, Doctor, that Mr. Mitchell, on or about the 15th day of January of this year, which was, I believe, the very day you examined him, stated at that time that his neck was getting better, improving, you would normally expect that that neck would continue to do so, would you not?

A. I think so.

Q. And it would gradually improve and become better?

A. I think so.

Q. And might become entirely well, so far as that neck injury is concerned?

A. Might.

Q. Now, the same would be true as to these fractures of the jaw, would it not, that the soft tissue of the jaw which is damaged, bones which were damaged, they would normally tend to restore themselves, would they not?

A. Yes, sir.

Q. And whether or not there be any — you couldn't state for any certainty as to whether or not — well, I believe you stated, Doctor, there might be some permanent loss of motion there, that there might be?

- A. If I said, 'might', I should have said stronger; I don't think there is much question about it, there will be some limitation; you can't say a hundred per cent sure, but I don't think there is much question about it.
- Q. And the extent of that disability would be a matter of pure speculation, however, wouldn't it?
- A. Yes, there is always variations." (Tr. 311-12)

DR. PAUL S. RICHARDS

Plaintiff came to Dr. Richards June 18th, about two and a half months after the accident, and made some repeat visits until July 2nd following. (Tr. 512) In open court, he examined all of the x-rays of the neck, Exhibit A taken by Dr. Butler, Exhibit C by Dr. Butler, Exhibit F by Dr. Broadbent, Exhibit P by Dr. Clegg, five x-rays of the cervical spine, defendants' Exhibits 1 to 5 inclusive, all of which he testified were entirely negative as to any fracture. (Tr. 513-519) Based upon the history of the case and an examination of all of these x-rays, he concluded there was no fracture of the cervical vertebra. (Tr. 519) He also stated as his opinion that so far as the bony structure was concerned, "the ultimate outcome should be no permanent or partial disability." (Tr. 521) As to what progress the damage, if any, to the soft tissues had made in the meantime, he reserved his opinion due to the fact that he had not seen Mr. Mitchell since July 2, 1947, (Tr. 521) but went on to say:

“I can tell the court this that in my opinion, at the time of my examination, I felt definitely that this man would improve and provided he was under adequate supervision, provided the man was diligent in his own endeavor to improve, then I would expect he had marked improvement over what I found at the time of my examination in July of 1947.

“Q. And what would you say, Doctor, as to what he should do by way of diligence or activity in order to improve that condition?

A. Well, I felt he should immediately go out and engage in a definite theraputic policy of keeping himself entirely occupied and physically active.

Q. And does that activity tend to repair that condition in the neck, or make it well?

A. Yes, sir.

Q. Improve that condition?

A. Yes, sir.” (Tr. 522)

Then on re-direct examination in answer to Mr. White’s questions, he stated:

“A. My opinion, following the injury this is to early to try to ascertain permanent disability. This man can suffer everything you state and still be only in a partial temporary disabled condition. (Tr. 524)

Q. How much time should elapse from the time of the accident before you could determine whether he had a permanent restriction of motion in the neck?

- A. If the condition was fixed at a certain point?
 Q. Yes. (Tr. 525)
 A. I would say at least two years.
 Q. Then after two years you think you could make a pretty safe judgment as to whether he would be permanently injured, or not?
 A. Provided the patient had been under proper guidance." (Tr. 526)

DR. A. K. WILSON

Dr. A. K. Wilson, an experienced radiologist, went over each and every x-ray in the case relating to the cervical vertebra and gave as his opinion that there was nothing that he would consider a fracture of the cervical vertebra (Tr. 489) and nothing as to the bone condition of the neck which could restrict motion. (Tr. 490) That the vertebrae were all in good alignment and apposition. (Tr. 481-495)

LACK OF EVIDENCE

From the foregoing, it is seen that the doctors could only speculate whether there was a permanent injury to the neck and jaw of plaintiff. The most that can be said is that there might be some limitation of motion, which Dr. Clegg described at the time of his examination as *moderate*, but proof of permanent injury is not proof of "a permanent material impairment of a *substantial nature* in the *earning capacity* of the plaintiff."

1. None of the doctors testified that plaintiff would be unable to perform the duties of a school teacher, or

that he would be unable to carry on the operations of his ranch.

2. There was no evidence that plaintiff would be *permanently* unable to carry on his activities in the teaching profession.

3. There was no evidence that plaintiff would have taught school for his full life expectancy, and furthermore, the State law allows retirement at ages fifty-five and sixty after fifteen years of service. (Sec. 75-29-44, Utah Code Annotated 1943).

4. While plaintiff testified that he was at the time of trial unable to do the strenuous physical work, his testimony was uncorroborated by any medical testimony, and there was *no testimony* that he would be unable to do hard physical work *permanently*.

5. If plaintiff was physically able to engage in strenuous physical work before the accident at the age of fifty-one years after twenty-four years of teaching school (and there was no actual evidence on that matter), *there was no evidence that he would have been physically able to engage in that type of work during his full life expectancy of 20.20 years.*

6. No evidence that plaintiff would not have hired some hands for the hard physical work on the farm, notwithstanding the accident.

7. No evidence that the operation of the ranch or farm was an asset or a liability or that there was any *earning capacity* in connection with the operation of the

ranch, especially as to a school teacher without practical farming experience.

8. It was not even proven by any evidence that plaintiff's income, if any from the ranch, would be less even though he hired some help, because by spending more time to good management, his capacity to earn may have been greater.

9. There was no evidence that plaintiff's earning capacity would be less while teaching school and managing the ranch, as was his intention, than it would be if he did all the strenuous physical work.

It was error to permit the jury to consider the annuity tables in connection with plaintiff's teaching profession, first because of the entire lack of any evidence that he would permanently be unable to teach (the only statement on the matter being plaintiff's statement that he did not feel up to it *that year*); second, even had there been any evidence, it was error to permit the jury to consider the matter from the standpoint of plaintiff's full life expectancy from the *date of the accident*, (20.20 years) when he was actually paid in full to July 1, 1947, and contemplated discontinuing his school work when he got the ranch and farm going. He would then be fifty-two on September 15, 1947; nor could it be assumed that he would teach the balance of his life expectancy up to the time of his death, nor beyond the retirement age of fifty-five to sixty years.

As to the ranch, the total insufficiency of the evidence to establish that plaintiff sustained any permanent loss of earning capacity of a substantial nature in connection therewith is apparent in that in order to so find, first, it is necessary to assume or infer from the evidence that plaintiff had an earning capacity in connection therewith (the opposite might be the conclusive presumption in the case of a school teacher, fifty-one years of age, without farming experience); second, if it be assumed that he had an earning capacity, then as to the strenuous physical work, it would have to be inferred or assumed from the evidence that he would permanently be unable to perform the same; inferred that he was able to do the hard physical work before the accident; inferred that if he could so do, he would have continued to be physically able to do the strenuous manual work during his full life expectancy; further inferred that he would not, during the full term of his life expectancy, have hired the hard manual work done anyway. Then, if each of those inferences were resolved in favor of plaintiff, it would have to be inferred from those inferences that the earning capacity as to the ranch would be greater by doing the strenuous physical work himself rather than hiring it done. That, too, would be insufficient under the facts in the instant case because plaintiff intended to occupy himself as a school teacher and

manage the ranch. It would, therefore, further have to be inferred that plaintiff's earning capacity would be less while teaching school and managing the ranch, (which would consume his full time) than it would be by himself doing the strenuous physical work; and so to reach the ultimate fact, it is necessary to construct inference upon inference.

FAILURE TO SUSTAIN BURDEN OF PROOF

The burden of proving by competent and actual evidence that plaintiff sustained "a permanent material impairment of a substantial nature in his earning capacity" rested upon plaintiff. That burden is not fulfilled where it is necessary to pyramid inferences or base inference upon inference to reach the ultimate conclusion. *Utah Foundry & Machine Co. v. Utah Gas & Coke Co.*, 42 Utah 533, 131 Pac. 1173; *Karren v. Bair*, 63 Utah 344, 225 Pac. 1094; *Prentice Packing & Storage Co. v. United Pacific Insurance Co.*, (Wash.) 106 Pac. (2) 314; *Goodloe v. Jo-Mar Dairies Co.*, (Kan.) 185 Pac. (2) 158.

In *McCaffrey v. Schwartz*, (Pa.) 132 Atl. 810, the Pennsylvania Supreme Court refused to permit use of annuity tables where there were too many uncertainties involved. The court pointed out that, among other things, the jury's attention should be called to the fact that a

man's earning power naturally decreases as his life approaches its end, and that is particularly true "of the manual laborer, but it also applies in a less degree to the average brain worker." That statement is particularly applicable to the instant case in that it would be highly improbable that Mitchell would be capable of doing the strenuous physical work clear through to the end of his life expectancy or his natural death.

OBJECTIONS AS TO FORM

The following is a copy of the table, or plaintiff's Exhibit X, as offered and received in evidence:

EXHIBIT X
CASE NO. 81886

**J. HAROLD MITCHELL VS. ARROWHEAD FREIGHT LINES LIMITED
AND MARVIN C. VAN PATTEN**

**Computations of Present Value of Various Monthly Income
At Various Rates, Age 51, Life Expectancy 20.20 Years
Based on American Experience Mortality Table**

(242 Months or Periods Used in Computations)

ANNUITY PER MONTH	R A T E S P E R A N N U M						
	2½%	2¾%	3%	3½%	4%	5%	6%
	PRESENT VALUES OF MONTHLY ANNUITIES AT ABOVE RATES						
\$ 1.00	\$ 189.92	\$ 185.60	\$ 181.41	\$ 173.42	\$ 165.92	\$ 152.26	\$ 140.18
10.00	1,899.24	1,855.96	1,814.05	1,734.16	1,659.17	1,522.58	1,401.80
25.00	4,748.09	4,639.90	4,535.13	4,335.39	4,147.93	3,806.45	3,504.51
50.00	9,496.19	9,279.80	9,070.26	8,670.78	8,295.86	7,612.90	7,009.02
100.00	18,992.37	18,559.59	18,140.53	17,341.56	<u>16,591.72</u>	15,225.80	14,018.05
200.00	37,984.75	37,119.18	36,281.05	34,683.12	33,183.45	30,451.60	28,036.09
300.00	56,977.12	55,678.76	54,421.58	52,024.69	49,775.17	45,677.41	42,054.14

Attention is called to the fact that the table, being based upon 20.20 years of life expectancy, was in such form that the jurors were *bound* to assume that plaintiff would live his full life expectancy, it being impractical or impossible for them to make any other use of the table, and the court gave no qualifying instructions to the jury as to the use, if any, the jurors could or should make with reference to the life expectancy.

The court in *Pauza v. Lehigh Valley Coal Co.*, 231 Penn. 577, 80 Atl. 1126, held that when mortality tables are entered in a personal injury action, it is the duty of the judge to carefully guard the effect to be given them by the jury, and that:

“Unless this is done in a very pointed and direct way by the court, the jury may be misled as to the value and weight to be attached to this character of evidence. The important fact for the jury to determine is the life expectancy of the injured party. This depends more upon his prior state of health, character, and habits, perils of employment, personal characteristics and other circumstances surrounding his own life, than it does upon the average expectancy of other lives based upon mortality tables. The trial judge should instruct the jury that these tables are not to be accepted as establishing the expectancy of life of the injured party, but only as an aid in arriving at what the expectancy might be in view of all the conditions surrounding the particular life in question. It is not sufficient to instruct the jury that the tables are some aid, but not conclusive in determining the life expectancy of the injured party. All the circumstances affecting

the probable duration of life disclosed by the evidence should be called to the attention of the jury in order that they may have an intelligent understanding of what their duty is in determining the life expectancy in the particular case submitted to them.”

Similarly holding that the court should not leave the jury to infer from instructions that mortality tables are to serve as an absolute standard, but must give adequate qualifying instructions, see:

McCaffrey v. Schwartz, (Pa.) 132 Atl. 810;
Bowman v. Coyle. (Kan.) 260 Pac. 643;
Vicksburg & Meridian R. Co., Pl. in error v. Israel Putman, 118 U. S. 545, 30 L. Ed. 257;
Morrow v. Mendleson, (Cal.) 58 Pac. (2) 1302;
Scott v. Sheedy, 102 Pac. (2) 575;
Cornell v. Great Northern Ry. Co., (Mont.) 187 Pac. 902.

The court, by its instruction No. 22 (Tr. 79), in effect instructed the jury to unqualifiedly make use of the table (Plaintiff's Exhibit X) in awarding damages as follows:

“If you find the issues in favor of the plaintiff on the question of liability and if you likewise find from preponderance of the evidence that plaintiff has suffered an impairment of earning capacity and as a result thereof will suffer a loss of future earnings as a proximate result of his injuries, the damages resulting from a loss of such earnings would not be the total of the amounts he would thus lose in the future, *but would be the present cash value of such total.*”

“The total loss of future earnings, if any, *must* be reduced or discounted on the basis of a fair rate of interest or return on said sum. *It is for you to determine from the evidence what rate of interest or return could fairly be expected from a safe investment* which a person of ordinary prudence, but without any particular financial experience or skill, could make, *and reduce or discount the total sum at such fair rate of interest or return as you thus determine.*”

From the parts underscored, the jury would naturally assume that they were to use the table. While some qualification with respect to the use of the annuity table was given in the following instructions, No. 22-A (Tr. 80), the jury was misled and no qualification of any shape or form was given to the *life expectancy tables*.

The table in the form offered assumed facts which were not proved by the evidence. (Tr. 541). There was certainly no evidence of loss of \$300 per month, or \$200 a month, or any other sum, and the court should have granted defendants' motion to strike the specified figures, and at least limited the table to such figures as there was evidence to sustain them. Plaintiff might just as well compile a table up to \$500 or \$1,000 a month, and figure that if the jury knocked down the amount two-thirds, that he would obtain a verdict based on \$300 a month, or approximately \$50,000.

We heretofore called attention to the pleadings and pointed out the insufficiency of plaintiff's allegations as to any loss of earning capacity in connection with the

ranch. By the allegations of the amended complaint, we were lead to believe that plaintiff was claiming special damages by reason of wages paid in the amount of \$3,000. We therefore demurred specially by paragraph 2 (i) (Tr. 27) of said demurrerr, asking that plaintiff be more specific as to such claim. Had the court sustained the special demurrer, as it should have done, plaintiff would have thereby been required to be specific about what his actual claims were as to the ranch and the wages paid, or whether he was in fact claiming anything by way of "*permanent impairment of earning capacity*" in connection with the ranch, a question which is not yet clear in this case, either from the pleadings or the evidence introduced. For that reason, we have claimed error in connection with the ruling on our special demurrer.

Another development is important in this connection. The only evidence of wages paid was \$150 a month to plaintiff's brother from June to December 2, 1947, or approximately \$900. At the conclusion of the evidence, when counsel saw the court was going to leave the annuity tables in evidence, he very shrewdly told the court that he withdrew his claim of wages paid the brother. While his action in so doing does not specifically appear of record, he will not deny the matter, as it is evident from the instructions given by the court on special damages that the \$900 item was eliminated because the item of special damages relating to the second cause of action, \$1,264, (Tr. 116) was damage to plaintiff's truck, and the item of special damage in the verdict of the first cause of

action, \$1,638.50, (Tr. 116) (see also the court's instruction No. 18) (Tr. 76) consisted solely of hospital, medical and traveling expenses and incidental damage to personal property. While no complaint would normally be made as to counsel's withdrawing the item of \$900 in wages, it is evident that his purpose in so doing was to confuse the jury as to the difference between claimed special damages for wages paid plaintiff's brother on the ranch with *permanent loss of earning capacity*. That this probably did so confuse the jury is evident from the verdict based on \$16,591.72 (an exact figure from the table) or \$100 per month for plaintiff's life expectancy, and the approximate amount plaintiff was paying his brother during the first year, that is about \$900 for about nine months.

When the total verdict was \$21,594.22, it takes no stretch of the imagination by reference to the table, to see that the jury arbitrarily selected the figure \$16,591.72 from the four per cent column in the fifth line providing for \$100 per month for the full life expectancy. As four of the last five figures are identical, or figuring it another way, when the claimed special damages of \$1,638.50 and \$1,264.00 are added to \$16,591.72, the total is exactly \$2,100.00 less than the total verdict. The affidavits of the jurors received in proof of the quotient verdict showed that as to the \$2,100.00, \$1,200.00 was for pain and suffering, and \$900.00 wages paid by plaintiff to his brother for services on the farm June to December 2, 1947.

After the jury was instructed, we took exception (Tr. 545) to the court's instruction No. 17 (Tr. 74-5) as a whole, and also to specific parts, including that part which told the jury that the plaintiff is entitled "to compensation for his actual loss of *past earnings*, if any, *and* for impairment of earning capacity, if any." When we called attention to this error, counsel for plaintiff turned down the offer of the court to call the jury back to have the instruction corrected, and elected to take his chances. The fact that the jury in its verdict allowed \$900 for the past *damages* paid plaintiff's brother, plus \$16,591.72, or \$100 per month for his full life expectancy, showed the harmful effect of this error and the misuse of the annuity tables.

It should be noted that the reason or grounds for admissibility of the annuity tables is quite different when a death is involved and earning capacity is thereby ended or in an instance such as that which existed in *Bruner v. McCarthy, et al*, 105 Utah 399, 142 Pac. (2) 649, wherein a helper on the railroad, whose duties included putting coal in the engines, sustained the loss of a leg, or in the Pauley case (wherein the court expressed doubt as to the sufficiency of the evidence governing their admissibility, where there was expert medical testimony that there was fifty per cent disability of the leg for hard work, twenty-five per cent disability in the left foot and twenty-five per cent disability of the right hand and another doctor testified that injured was not able to go back to work as a trainman for the railroad.

In *Schlatter v. McCarthy, et al*, (Utah) 196 Pac. (2) 968, this court aptly pointed out that the situation may differ when various occupations are considered.

We submit that the use of the annuity tables should not have been permitted in this case, because of the lack of evidence of *permanent* impairment of earning capacity of a *substantial* nature; that in any event the table used was not in proper form; that the jury was not given proper or adequate instructions; and that errors were committed prejudicial to the defendant's right to a fair and impartial trial on the measure of damages.

ASSIGNMENTS OF ERROR NOS. 7 TO 13

The usual issues of negligence and contributory negligence were involved in this case. Defendants pleaded by their answer in substance that defendant's driver was reasonably misled in that there was an apparent opportunity to pass, but plaintiff suddenly and unexpectedly came from the west side of the road across the center line and immediately in front of defendant's truck, creating an emergency. That the collision was solely caused or proximately contributed to by the negligence of plaintiff in the following particulars:

“(a) In approaching traffic coming from the opposite direction on his wrong side of the highway and in suddenly and unexpectedly creating an emergency by turning across the highway immediately in front of such opposing traffic.

“(b) In failing to keep a reasonable and

proper lookout and particularly in failing to keep a proper lookout for automobiles and traffic approaching from the opposite direction.

“(c) In failing to keep said Chevrolet truck under proper, immediate and safe control.

“(d) In failing to exercise reasonable and ordinary care to avoid a collision.” Tr. 37-38).

ASSIGNMENT OF ERROR NO. 7

The court erred in giving verbatim plaintiff's requested instruction No. 1 (Tr. 108). See the court's instruction No. 6 (Tr. 63) as follows, to-wit:

“You are instructed that the defendants have admitted in their answer and it is undisputed in the evidence that the defendant Arrowhead Freight Lines, Ltd., was the owner of the truck and trailer which collided with plaintiff's truck on April 3, 1947, that the defendant Marvin C. Van Patten was the driver of said truck as the servant, agent and employee of the defendant Arrowhead Freight Lines, Ltd., and was acting within the course of his employment.

“You are further instructed that the defendant Arrowhead Freight Lines, Ltd., is *liable* for any negligent acts or omissions, if any, of its servant Marvin C. Van Patten, committed or omitted by him in the course of his employment.”

Defendants duly excepted to the whole of said instruction and also specifically excepted to the last paragraph of said instruction, and further specifically interposed an exception to the word “liable.” (Tr. 544).

This instruction in unequivocal terms told the jury that the defendant, Arrowhead Freight Lines, Ltd., was *liable* if there was any possible negligence on the part of the defendant, Marvin C. Van Patten.

It entirely eliminated proximate cause as a condition to recovery.

It unequivocally eliminated contributory negligence as a defense so far as the defendant Arrowhead Freight Lines, Ltd. was concerned.

Clear and palpable error of this kind is not cured by other instructions correctly stating the law, because this only creates a conflict in the instructions, and it is impossible to determine if a jury followed the correct instruction.

See *Sorenson v. Bell*, 51 Utah 262, 170 Pac. 72, wherein the court stated:

“ * * * True, counsel point to other portions of the charge wherein, they contend, the rule respecting the burden of proof is correctly stated. If that be conceded, it still does not minimize, much less cure, the palpable error contained in the foregoing instruction. At most it would merely present a case where two instructions were given upon the same subject, one proper and the other improper. Where such is the case, and the evidence is conflicting upon the subject covered by the instructions, or is such that more than one conclusion is permissible, and the record leaves it in doubt whether the jury followed the instruction that is proper or the one that is improper, then but one result is legally permissible in this

court, and that is to reverse the judgment and grant a new trial to the aggrieved party.”

See also *State v. Green*, (Utah) 6 Pac. (2d) 177; *Martin v. Sheffield*, (Utah) 189 Pac. (2) 127, and the cases hereinafter cited under the court’s instruction No. 7.

ASSIGNMENT OF ERROR NO. 8

Defendants duly excepted to the court’s instruction No. 7 as a whole, as well as to certain parts of said instruction for the reasons hereinafter mentioned. (Tr. 544-5). The instruction given read:

“You are instructed that the laws of this state provide that no vehicle shall be driven to the left side of the center of the roadway in overtaking and passing another vehicle traveling in the same direction, unless such left side is clearly visible and is free of oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of any vehicle approaching from the opposite direction of any vehicle overtaken. In every event, the overtaking vehicle must return to the right-hand side of the roadway before coming within one hundred feet of any vehicle approaching from the opposite direction.

“If you shall find and believe from a preponderance of the evidence that the defendants operated the Arrowhead truck and trailer upon U. S. Highway 91, and attempted to overtake another vehicle proceeding in the same direction at a time when the left side of said highway was

not clearly visible and was not free from oncoming traffic for a sufficient distance ahead to permit such overtaking and passing to be completely made without interfering with the safe operation of the vehicle approaching from the opposite direction, which was being driven by the plaintiff, then you are instructed that such conduct on the part of the defendants was negligent and in violation of the traffic laws of this state; and if you shall further find from a preponderance of the evidence that such negligence was the proximate cause of the collision between plaintiff's pickup truck and said Arrowhead truck and trailer, then you should find the issues in favor of the plaintiff and against the defendants." (Tr. 64).

The instruction, the last one discussed, was as well as erroneous and prejudicial error in that it directed the jury to return a verdict "in favor of the plaintiff and against the defendants" if they found the defendant negligent, and "that such negligence was the proximate cause of the collision."

Such instructions have repeatedly been held to be reversible error in that they eliminate contributory negligence as a defense. In other words, an instruction requiring a verdict in favor of the plaintiff must state all of the conditions essential to recovery or the instruction is erroneous. Nor is the error cured by reason of the fact that the law is correctly stated in other instructions, because where there are conflicting instructions it is impossible to say which instruction the jury followed in arriving at a verdict.

The situation is well illustrated in *Beyerle v. Clift*, (Cal.) (hearing denied by Supreme Court), 209 Pac. 1015. We quote:

“The errors relied upon consist in the giving of two instructions to the jury. In each of these instructions the court stated certain provisions of law defining the duties imposed upon an operator of a vehicle, and then said:

“ ‘If, therefore, you believe that the defendant violated any of the provisions of the law above mentioned at the time of the accident complained of in this case, and that such violation was the proximate cause of the accident, you should find for the plaintiff.’

“Assuming that the issue of contributory negligence was properly before the court, there is no doubt that these were erroneous instructions, because it is settled law that, if an instruction by its terms purports to state the conditions necessary to a verdict, it must state all those conditions and must not overlook pleaded defenses on which substantial evidence has been introduced.

“The court gave other instructions on the subject of contributory negligence, the correctness of which is not challenged. But this is not sufficient to overcome the prejudicial character of the erroneous instructions.

“ ‘ * * * But the giving of these other instructions simply produce a clear conflict in the instructions given the jury by the court, and it is impossible for us to say which instruction the jury followed in arriving at a verdict in favor of the plaintiff.’ *Pierce v. United Gas & Elec. Co.*, supra, 161 Cal. at page 185, 118 Pac. at page 704.”

In *LaRue v. Powell*, (Cal.) (hearing denied by Supreme Court), 42 Pac. (2) 1063, the court said and held:

“ ‘The authorities are legion to the effect that a so-called “formula” instruction must contain all the elements essential to a recovery, and the absence of any one of such elements may not be compensated for nor cured by a reference thereto in other instructions correctly and fully stating the law. * * *’ We think is obvious that the above instruction is fatally defective, and although there are instructions inconsistent with it we are satisfied they do not correct the evil. The instruction practically deprives the defendant of a trial by jury under the negligence laws of the state, * * *”

In accord see also:

Sinin v. Atcheson T. & S. F. Ry. Co., 284 Pac. 1041;

Pierce v. United Gas & Electric Co., (Cal.) 118 Pac. 700;

Shell Pipe Line Co. v. Robinson, (10th C. C. A.) 66 Fed. (2) 861;

Bauer & Johnson Co. v. National Roofing Co., (Neb.) 187 N. W. 59;

Birmingham E. & B. R. Co., v. Hoskins, (Ala.) 39 So. 338;

McVey v. St. Clair Co., (W. Va.) 38 S. E. 648;

Oklahoma R. Co. v. Milam, (Okla.) 147 Pac. 314;

Keena v. United R. R. Co. of S. F., (Cal.) 207 Pac. 35;

Morse v. Incorporated Town of Castna, (Iowa) 241 N. W. 304;

Baker v. Rosaia, (Wash.) 5 Pac. (2) 1019;

Pittsburgh County R. R. Co. v. Hasty, (Okla.) 233 Pac. 218;

Brooks vs. Thayer Co., (Neb.) 254 N. W. 413.

The court's instruction No. 7, given at plaintiff's request, was apparently taken from Section 57-7-124 of the Utah Code. In addition to the reasons hereinabove mentioned, the instruction was erroneous in that it told the jury that defendant was negligent as a *matter of law* if he was not successful in completely passing the Buick car and also successful in getting completely back onto his right side of the road before coming within one hundred feet of any vehicle approaching from the opposite direction (in this case, plaintiff's truck). The instruction in that form failed to take into consideration the fact that if Van Patten was misled by reason of the fact that plaintiff's truck came from the west or wrong side of the road in a deceptive dust storm or dust condition, that there might be an excuse or justification on the part of defendants' driver. In other words, if an emergency was created or contributed to by reason of plaintiff's negligence, defendants should not be held *negligent as a matter of law* for not being able to successfully pass and return to his normal position on the highway.

In *Lang v. Siddall*, (Iowa) 254 N. W. 783, it was held to be reversible error to instruct the jury that a failure on the part of a person operating a motor vehicle upon a public highway to give one-half of the traveled part of such highway by turning to the right when meeting

another vehicle "constitutes negligence as a matter of law," when it is prima facie negligent. The court said:

"The instruction cannot be approved. It is erroneous to instruct the jury that as a matter of law it would constitute negligence. * * * The jury should be told clearly, plainly and correctly the rule of law pertaining to the so-called law of the road under the circumstances, such as are presented in the case at bar, where it was contended that the accident resulted because of the claim that the appellant's automobile was on the wrong side of the road. * * * The giving of the instruction complained of was prejudicial error."

The imposition of a greater duty upon the defendant than the law requires was held reversible error in *Saltas v. Affleck*, (Utah) 105 Pac. (2) 176, wherein the court in practical effect instructed the jury that the defendant was required to drive his automobile "using reasonable care and prudence so that he could avoid injuring anyone or colliding with any person upon the highway," whereas the law only requires one to use reasonable care to avoid a collision. The court said such an instruction practically required the defendant to avoid a collision "with anyone regardless of whether such one were or were not guilty of negligence." The court further pointed out:

"That part of the instruction failed to take into consideration the right of defendant to assume that all other persons upon the highway would use ordinary care and reasonable precaution for their own safety until the contrary appeared."

It has been decided by California in connection with a statute, which provided that before turning, the driver "shall first see that such movement can be made in safety, and if it cannot be made in safety, shall wait until it can be made in safety," that such statute required a reasonable construction and that:

" 'Safety' does not mean absolute safety, for under that construction a driver intending to turn would be required to await the time when no other vehicle could possibly be affected in any way by such movement. The quoted portion of the section should be construed to require that the driver see first that the movement could be made in safety, assuming that both he and others using the highway exercise ordinary care. This gives to the common sense rule embraced in the section a common sense interpretation." *Inouye v. Gilboy Co.*, (Cal.) 300 Pac. 835.

This court in *Martin v. Sheffield*, *supra*, recently pointed out that the court's instructions should clearly set forth the correct "legal effect of defendant's negligence" if any, and in reversing the judgment pointed out that in the instruction given in that case it:

"might well be construed by the jury to mean that though the jury found negligence on the part of plaintiff which proximately contributed to the accident, nevertheless plaintiff was entitled to a verdict."

DEFENDANTS' REQUESTED INSTRUCTIONS
ASSIGNMENT OF ERROR NO. 11

The court, by its instruction No. 13, gave the preliminary part of defendants' requested instruction No. 6 (Tr. 90) as follows:

"You are instructed that the laws of Utah provide that upon all roadways of sufficient width a vehicle shall be driven upon the right half of the roadway, except when overtaking and passing another vehicle proceeding in the same direction under the rules governing such movement.

"It was, therefore, the duty of the plaintiff, J. Harold Mitchell, to keep on his right side of the highway at all times, particularly if there was or might be traffic approaching from the opposite direction."

but there the instruction was ended, without stating the legal effects or consequences of plaintiff's approaching from the wrong side. The instruction should have been completed as requested by defendants to further read as follows:

"And if you find from the evidence that the plaintiff, J. Harold Mitchell, was guilty of any negligence in approaching on his wrong side of the highway when there was traffic approaching from the opposite direction, and that by reason thereof, the defendant, Marvin C. Van Patten, was prevented from seeing said pick-up truck driven by plaintiff as soon as he could or would otherwise have seen it had it been upon its proper side of the highway, or that the plaintiff, J. Harold Mitchell, was thereby prevented from seeing the

truck as soon as he could or would otherwise have seen it, and that such negligence on the part of plaintiff proximately contributed in any degree to cause the collision, then plaintiff cannot recover, and your verdict should be in favor of defendants and against the plaintiff, no cause of action, even if you should find there was also negligence on the part of the defendant, Marvin C. Van Patten.” (Tr. 90-91)

Defendants were entitled to have the instruction completed so as to explain the legal effects of plaintiff’s action as constituting contributory negligence, and what verdict to return in the event they so found. *Martin v. Sheffield*, supra.

ASSIGNMENT OF ERROR NO. 12

The court refused to give defendants’ requested instruction No. 9, as follows:

“You are instructed that it was the duty of plaintiff, J. Harold Mitchell, to avoid creating an emergency and also to avoid a collision if he could do so in the exercise of reasonable and ordinary care. Therefore, if you find from the evidence that the plaintiff, J. Harold Mitchell, was negligent in failing to take reasonable precautions to avoid an emergency or a collision by failing to pull off and stop on the left hand shoulder at an earlier time or by negligently getting onto his wrong side of the highway when there was traffic approaching from the opposite direction, or by failing to keep a proper lookout or by failing to take reasonable and ordinary care to pass between defendant’s truck and the car driven by Charles S. Pace, and that such negligence on his part

proximately contributed in any degree to cause the collision, then plaintiff cannot recover, and your verdict should be in favor of defendants and against the plaintiff, no cause of action, even if you should find there was also negligence on the part of the defendant, Marvin C. Van Patten.” (Tr. 94)

The whole of this request was refused, the trial court endorsing in pencil: “Covered by No. 8 in substance.” The court’s instruction No. 8 (Tr. 65) in no possible sense of the word covered the matter requested. While the court’s instruction No. 14 (Tr. 71) indirectly covers some of the same subject matter, it did not adequately cover the duty of plaintiff to take steps to avoid the collision, by the means set forth in said request, and the legal effects of such as constituting contributory negligence.

ASSIGNMENT OF ERROR NO. 13

The court refused defendants’ requested instruction No. 18 in its entirety as follows:

“You are instructed that if you find from the evidence that the plaintiff, J. Harold Mitchell, knowingly drove into a dust storm and continued to drive therein at a time when he knew, or in the exercise of reasonable care should have known, that traffic was or might be approaching from the opposite direction, and under such circumstances that, as a reasonable person under the circumstances, he knew or should have known, of the danger of collision with opposite-bound traffic on said highway, due to limitations of visibility caused by the dust storm, then he was negligent, and if you further find that such negligence

proximately contributed in any degree to cause the collision, then plaintiff cannot recover and your verdict should be in favor of defendants and against the plaintiff, no cause of action, even if you should find there was also negligence on the part of the defendant, Marvin C. Van Patten.” (Tr. 103)

This requested instruction was justified because of plaintiff’s claim that he was entering a dust storm or area, and that his visibility was substantially obscured by reason of the same. Entering a dust storm under such conditions could reasonably be found by the jury to be contributory negligence.

The court did in its instruction No. 10 explain plaintiff’s duty to pull off onto the shoulder and stop if reasonably necessary (Tr. 67), but again the court in No. 10 did not go on to explain the legal effects of such failure as constituting negligence or contributory negligence on the part of plaintiff, to which defendants were entitled.

ASSIGNMENT OF ERROR NO. 10

Defendants assigned as error the giving of the court’s instruction No. 10 for the reasons just mentioned, and for the further reason that said instruction undertook to state that it was the duty of both drivers to drive at a reasonable speed and to pull off to the side of the highway and stop, if reasonably necessary to avoid danger; however, the last paragraph of said instruction reads as follows:

“Therefore, if you find from the evidence that plaintiff or defendant Van Patten was unable to see his true position on the highway and continued to drive at a speed which was not reasonable and prudent under the conditions then and there existing, *then the one violating this duty was negligent.*” (Tr. 67)

The court by using the underlined clause, inferredly or impliedly told the jury that *only one* of the two parties could be negligent in such particulars.

The law is well established that defendants were entitled to have the case submitted to the jury on any theory justified by their evidence, as well as upon the theory of the whole evidence, and failure to so instruct the jury on a material issue under defendants’ theory of the evidence would affect defendants’ substantial rights.

Morgan v. Bingham Stage Line Co., 75 Utah 87, 283 Pac. 160;

Hartley vs. Salt Lake City, 41 Utah 121, 124 Pac. 522;

Pratt v. Utah Light & Tr. Co., 57 Utah 7, 169 Pac. 868;

Smith v. Lenzi, 74 Utah 362, 279 Pac. 893.

EVIDENCE AS TO PLAINTIFF’S NEGLIGENCE

There was substantial evidence of plaintiff’s negligence in the particulars pleaded, and defendants were entitled to adequate instructions as to those issues as well as instructions correctly defining defendants’ duties.

Except for some variations as to actual distances, the principal conflict in the evidence arose by reason of plaintiff's testimony that he was at all times on his proper side of the highway and that he had pulled off onto the east of the traveled or paved portion, being just in the act of stopping. That plaintiff was in error was proven by the testimony of Van Patten corroborated by Charles A. Pace, a disinterested witness.

MARVIN VAN PATTEN

Mr. Van Patten testified that the van he was driving was thirty feet in length, and the trailer also thirty feet. (Tr. 423). He said:

“Then I went on up over the ridge and as I come to the top of the ridge I could see a storm on the flats. It was dusty and cloudy. I proceeded down off the Beaver Ridge and as I got down onto the flats why I come upon a car that was pulling a trailer. It was an open two-wheel trailer. I followed him for quite some time; I would say two or three miles, travelling pretty slow. It was pretty dusty and pretty windy and then you would get a break it wouldn't be quite so bad and you could see pretty good, and I followed him down there.

“I had to get around him, and on one of these breaks in the storm I could see down the road far enough to pull up around him, and I proceeded to do that. I started up around and I got about halfway along side this trailer when I noticed a car coming up from the opposite side towards this car I was passing, and just as I seen him it seemed like he crossed the center line, and when I

seen him I couldn't get back behind the car I was attempting to pass, so I pulled completely off the road and at the same time he also pulled off the road and we had our collision when we were completely off the road. (Tr. 424-5).

* * *

“Q. When you did that how far could you see down the road?

“A. Well, I can't be sure on that. I would say possibly 200 yards that I could see. I seen I had plenty of room to pass or I don't believe I would have attempted to pass in the first place. The road was plenty clear when you got a break in the storm. (Tr. 426).

* * *

“Q. Where did that truck come from?

“A. It seemed like he come from the center of the road, or the opposite side, like he just crossed over. (Tr. 426-7).

* * *

The truck was then possibly one hundred yards away; “maybe not that far—I don't know exactly—when I first seen him. * * * I believe I got the whole truck and trailer completely off the road before we had the collision.”

He turned about a forty-five degree angle toward the southeast. The other car pulled off the road at the same time. Both trucks were going about the same speed. (Tr. 427). He changed gears or shifted into third direct when starting to pass. (Tr. 528)

“We were completely off the road at the time of the impact. * * * I don’t know exactly how far off it was. I know we were both completely off the road. I would say anyway the distance of this room, maybe ten or fifteen feet. (Tr. 42).

“Q. What did you do, if anything, when you saw this other car turning off the highway?

“A. I attempted to stop, and also get out of his way at the same time to avoid the collision, if I could possibly do it. That is why I turned off on the shoulder of the road, to avoid it.”
(Tr. 430).

He didn’t believe the pick-up truck went over five or ten feet after the impact. It wasn’t very far. The left front corner of plaintiff’s truck came in contact with the right front corner of defendants’ truck. (Tr. 430-1).

On cross-examination, Van Patten further testified that he was prepared to follow the Buick the rest of the way if he had to, but the storm did break from time to time. (Tr. 441). It was breaking more as they went along. (Tr. 444). In starting to pass, he went up to about twenty miles an hour. Both trucks had their lights on. When he got about even with the trailer, he continued to look down the highway and could see two hundred yards or better. (Tr. 445). He, Van Patten, didn’t attempt to get back into his proper lane because he was too far up to do that and he didn’t have time to complete passing. (Tr. 447).

There was some confusion as to whether feet or yards were meant in stating the distance between his

truck and the Mitchell truck when first seen, but he finally approximated the distance at one hundred to two hundred feet. (Tr. 458). Prior to seeing the Mitchell truck, he could see no vehicles approaching on the highway proper. (Tr. 459).

“I was being very cautious and careful as I knew how to be. I wouldn’t have attempted to pass in the first place if I hadn’t seen ample room to get around, and do it safely enough, I wouldn’t have attempted to pass in the first place.” (Tr. 460).

The borrow pit was not very deep. It was more or less level. When he came in contact with the Mitchell truck, it swung the Mitchell truck around. (Tr. 460). There were no marks indicating the Mitchell truck had been “shoved or pushed forward.” It (the sand or dirt) was disturbed around there where he had turned after the impact. (Tr. 461).

“Q. And yet you didn’t see the Mitchell car until it came within 100 feet?

“A. That is right.

“Q. Why, on account of the dust?

“A. Well, it was on the opposite side of the road.

“Q. I thought you said it was in the center of the road?

“A. Yes. I wasn’t looking for one there. I was looking more or less on the east side. * * * I wasn’t looking for any on that (opposite) side.” (Tr. 462).

It just came out of nowhere. (Tr. 463).

“Q. You mentioned, Mr. Van Patten, that you did not expect Mr. Mitchell to come from the west side of the road; is that correct?

“A. That is correct.” (Tr. 466).

CHARLES A. PACE

Charles A. Pace, a disinterested witness, testified that he was on his way to Lake Mead; that he was traveling in the west lane of traffic (Tr. 470), about in the middle of that lane, at about ten or fifteen miles an hour, going just about as slow as he could go and still keep going. He had been traveling at that speed for quite some distance. With reference to plaintiff's pick-up truck, he said:

“Well, it just seemed to come up out of nowhere. Visibility was bad and it just came up all of a sudden. It came from the opposite direction. I could only give the approximate distance that I first saw it. I would say anywhere from 25 to 50 yards approximately. (Tr. 471)

“Q. Where was that truck with respect to the center of the highway.

“A. It was about in the center of the highway, or probably straddled on the center, or yellow, line of the highway when I saw it.

“Q. Had you seen that pick-up truck prior to that time?

“A. No sir. I didn't actually see the collision; they hit just back of me. I heard the crash but I did not actually see them hit.”

He went back to the scene of the accident. With reference to the two trucks, he said:

“They were both off the highway, down into the barrow pit. (Tr. 472).

“Q. Did you observe the conduct of Mr. Van Patten after the accident?

“A. Yes, sir.

“Q. In what manner did he conduct himself?

“A. Very gentlemanly, very fine and very gentlemanly.”

On cross-examination, he said he would judge that he had traveled more than a mile through the dust storm. “My guess would be several miles.” (Tr. 473). The dust storm did not envelope the highway constantly.

“There would be breaks that you could see through, and see the pavement ahead; then it would fill in and you could not see the pavement nowhere. * * * and sometimes it would clear away and you could see the highway for some distance ahead.” (Tr. 474).

When the dust abated, there were sort of gusts of wind and dust. He could not estimate the exact distance of visibility. (Tr. 475).

“It would vary, sometimes it would be a short time, sometimes longer.” (Tr. 476).

The pictures identified as plaintiff's Exhibits V and P, and the diagram, defendants' Exhibit 6, hereinabove shown in the brief, show that the collision took place well east of the paved highway, when viewed in

connection with the foregoing summary of Van Patten's and Pace's testimony.

J. HAROLD MITCHELL

That Van Patten was in fact coming to the end of the dust storm and into the clearing is also evident from plaintiff's testimony:

"Q. And then you later noticed that the dust did clear up to some extent, did you not?

"A. That's right; it wasn't, it wasn't entirely regular. There were waves, sometimes the dust was a little heavier than at other times.

"Q. In other words, the dust was variable; sometimes it was thicker than others?

"A. That's right.

"Q. And about the time you — after you waited for this other car to get ahead, and the dust had started to clear, as you thought it had started to clear, then you started out, didn't you?

"A. Yes.

"Q. The dust didn't prevent you from seeing the line?

"A. No." (Tr. 336-7).

WILLIAM M. MITCHELL

William M. Mitchell, plaintiff's father, was riding with him and appeared to be concerned as to whether they were on the proper side of the road, as is shown from the following part of his testimony:

“Q. About how far ahead of the pick-up truck could you see as you proceeded through the dust?

“A. Well, I wasn’t looking ahead very far. I kept my eye on the shoulder of the road to see we were in the road as we went along.

“Q. Why were you doing that?

“A. Because I was little nervous, quite dusty, and I knew my son was careful driver, but, just the same, I was just little worried for fear we would get one side or the other off the road.” (Tr. 398).

When it reasonably appeared to Van Patten that he was coming into the clearing and from his position that he had a reasonable opportunity to pass, it cannot be said that he was *negligent as a matter of law* in pulling up into position beside the trailer. At that point, he was confronted with an unexpected or sudden emergency by reason of the fact that Mitchell apparently through his own misjudgment, or being lost in the fog, had gotten west of the highway and cut across immediately in front of the Pace Buick and defendants’ truck. Van Patten then did all he could to stop and get out of the way by, turning abruptly into the borrow pit. Had Mitchell been where he would normally be expected to be, on the east side of the road, Van Patten, although behind the Buick and trailer, probably would have seen him before he did, and would not have undertaken to pass had he known Mitchell was approaching. At least, he may not have reached such a position that he could not return to his

proper side. Van Patten saw the Mitchell truck when one hundred to three hundred feet away, and the physical facts necessarily bear him out. Therefore, it likewise must have been possible for Mitchell to see the same distance, but he acknowledged not seeing defendants' truck until twenty-five feet away. (Tr. 238) Had Mitchell seen defendants' truck earlier, he might reasonably have avoided the collision. Neither truck was exceeding fifteen or twenty miles per hour, and there was twelve, or possibly twenty feet, between the center line of the highway and where the collision occurred. Had Mitchell seen defendant's truck earlier, or had he been more alert, he reasonably could have turned slightly to the west before the collision or stopped sooner. In view of the conflict as to whether Mitchell created an emergency, and in view of the possible inferences and deductions from the evidence, it was reversible error for the court to instruct the jury as it did and refuse to instruct the jury as requested by the defendant.

MOTION FOR NEW TRIAL

Defendants duly moved for a new trial on the grounds that the verdict was excessive and upon errors in law occurring at the trial, as hereinabove outlined, and misconduct of the jury in arriving at a quotient verdict. (Tr. 118). In support of the latter ground, affidavits of seven jurors were filed on behalf of defendants. We quote the affidavit of Sterling E. Tanner, foreman, to which six of the other jurors agreed:

“Sterling E. Tanner, being first duly sworn on oath, deposes and says: That he is one of the jurors and foreman, on the trial of the above entitled case, wherein a verdict was returned Monday, April 26, 1948. That the amount of the verdict was determined in the following manner:

“We first agreed to return a verdict for the plaintiff. We then allowed the special damages of \$1638.50 on the first cause of action, and \$1264.00 on the second cause of action. We then added \$16,591.72 from the annuity table, plus \$900.00 for wages paid to plaintiff’s brother during 1947. We differed as to the amount to be paid for pain and suffering, so we each agreed to submit an amount on a slip of paper as to the amount, if any, that should be awarded. We also agreed to adopt the average as our verdict, after including the amounts hereinabove mentioned. We each submitted a figure by secret ballot, and they were then handed to me and I added the figures and divided by eight, which gave a result of \$1,200.00, which figure governed our final verdict without further deliberation. Adding of all the figures was checked by some of the jurors, but there was no further deliberation after we computed the average of \$1,200.00, as to pain and suffering. On my slip, I put nothing for pain and suffering, but consented to the result because of our previous agreement.” (Tr. 121-133).

These affidavits, in clear, concise and unmistakable language, showed that the final figure of \$1200.00, as to pain and suffering was arrived at by quotient verdict. As that was the final figure which went to make the final amount of the total verdict of \$21,594.22, the jurors there-

by confessed that their final verdict was arrived at by quotient or chance.

While counsel for respondent went back and obtained counter-affidavits (Tr. 134-149), couched in his own language or legal phraseology apparently obtained from the case of *Pence v. Mining Co.*, 27 Utah 378, 75 Pac. 934, the jurors having confessed in clear and concise terms under oath to the quotient verdict, their later modification was clearly an afterthought to avoid the effects of such illegal or quotient verdict.

The trial court should have granted a new trial on account of the numerous grounds herein argued, or in any event reduced the verdict to \$5,002.50 by eliminating the figure \$16,591.72 on the grounds that the verdict was excessive.

CONCLUSION

The fact that the verdict in this case, exclusive of the figure of \$16,591.72, adopted from the annuity tables, was \$5,002.50 (that is \$1,638.50 special damages for medical, hospital, traveling expenses, and incidental property damage; \$1,264.00, damages to the truck; \$900.00, wages paid plaintiff's brother; and \$1,200.00, for pain and suffering) illustrates their vicious effect upon defendants' right to a fair and impartial trial on the issue of damages. This is particularly true when the evidence is totally insufficient to sustain the admissibility of the tables, as it was in this case. It is equally important that even when admissible, that they be in proper form and not in

such form as to be confusing or misleading. Proper precaution should always be taken so that adequate qualifying and explanatory instructions are given to the jury, explaining the limitations upon their use as applied to the actual evidence in the case so that the jurors can apply them properly and upon a correct theory in relation to permanent impairment of earning capacity, and not in relation to special damage such as wages, which they appeared to do in this case. We submit that the tables should have been excluded altogether, but even if admissible, that reversible error was committed as to their use.

As to the instructions on the issues of negligence and contributory negligence, defendant was likewise entitled to have the jury properly instructed and to a fair trial upon those issues.

It also appears from the evidence that the verdict is excessive and unreasonable, aside from the errors above discussed.

We respectfully submit that a new trial should be granted.

Respectfully submitted,

STEWART, CANNON & HANSON
E. F. BALDWIN, JR.

Attorneys for Defendants
and Appellants