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Robert ER. Anderson v. Dionne Bradley : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT E. ANDERSON,

Plaintiff and Appellant,

vs.

DIONNE BRADLEY,

Defendant and Respondent.

APPELLANT'S BRIEF

Appeal From a Judgment
of Salt Lake County

Honorable Stewart B. ...

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IN THE SUPREME COURT OF THE STATE OF UTAH

ROBERT E. ANDERSON,)
Plaintiff and Appellant,)
vs.) Case No. 15571
DIONNE BRADLEY,)
Defendant and Respondent.)

APPELLANT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries suffered by a pedestrian when he was struck down by defendant's automobile within a marked crosswalk.

DISPOSITION IN LOWER COURT

The case was tried to a jury which found that plaintiff and defendant were equally negligent, resulting in a verdict and judgment for the defendant.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks reversal of the judgment and remand for a new trial.

STATEMENT OF FACTS

In the early evening of February 7, 1976, Robert Anderson, plaintiff-appellant, was crossing Sunnyside Avenue at Guardsman Way en route to a movie at the University of Utah. There were no traffic control lights at the crossing. He was in a marked crosswalk, walking from south to north, and was within about

6 feet of the north curb when he was struck by an automobile driven by Dionne Bradley, the defendant, and thrown several feet (Ex. 1-P, R 155), landing at the side of the road, partly in the roadway and partly on the sidewalk. He was taken by paramedics to the University Hospital, where he was to be confined in bed for the next two months (R 302).

When admitted to the hospital, plaintiff was unconscious, had obvious injuries to both legs in the region of the thigh, plus multiple bruises, and injuries to his head. He remained in intensive care for several days and was ultimately transferred to the general ward (R 295).

Both of plaintiff's thigh bones were fractured. The fracture of the left leg was comminuted, with one large piece and some smaller pieces knocked off the bone. It was necessary to treat this fracture with a pin through the upper end of the shin bone and the leg in traction to keep it relatively straight (R 296). The injury to the right leg was higher, near the hip, and the bone was completely broken with piercing of the skin, an open fracture. Surgery was necessary to insert an intermedullary nail to keep the bone in place, the nail being driven in from the top of the hip bone down through the shaft across the fracture site, and far enough that the nail fit snugly inside the bone (R 299).

While plaintiff was in the hospital, infection developed in one of the legs, requiring treatment with antibiotics,

and he was in traction for about six weeks of his stay in the hospital, after which time he was given physical therapy until his release from the hospital on April 7 (R 302).

After his release from the hospital, pulmonary embolism, which was a result of the fractures, necessitated his being hospitalized again for more than a week (R 303). His leg was in a cast until July 4, some five months after the accident, and he suffered permanent disability (R 209, 252).

As a result of the injuries and the resulting disabilities and treatment, plaintiff incurred costs at the University of Utah Medical Center in the amount of \$12,798.94, at University Radiology Associates for \$504.50, and miscellaneous costs of \$2,660.48, or total expenses of \$15,963.92 (Exs. 22-P and 23-P).

The case was submitted to the jury on a general verdict with special interrogatories, which resulted in a verdict and judgment of no cause of action, the jury having found that plaintiff and defendant were equally negligent. The trial court denied a motion for a new trial, and this appeal was taken.

ARGUMENT

The jury's finding that plaintiff and defendant were each 50% negligent is contrary to the evidence and wrong as a matter

of law; and the trial court's refusal to grant a new trial was an abuse of discretion.

The enactment of the Comparative Negligence Law, 78-27-37 et seq. Utah Code Annotated 1953, requires some reconsideration of the roles of trial and appellate judges in controlling errant jurors, particularly with reference to their findings as to the relative degrees of negligence of the parties.

A comparative negligence trial differs markedly from one involving common law contributory negligence. Under the prior practice, a motion for a directed verdict was available to test the issues of negligence and contributory negligence in the first instance. The judge could decide, in some cases, whether there was sufficient evidence for a finding of negligence, on the one hand, or contributory negligence, on the other. In a comparative negligence case, however, it seems to be almost out of the question for the trial judge to direct the jury on apportionment. Even if he were convinced that the plaintiff was entitled to recover, it would not be his function to arrive at percentage figures. To do so would subvert the system. It is the jury's function to determine, within limits, the percentage of negligence attributable to each. Accordingly, the trial judge must assume his supervisory role through the granting or denying of motions for a new trial.

The present case is a classic example of a jury gone wrong, and a trial judge's failure to exercise that super-

vision essential to the proper administration of justice. It is not a case in which there was serious disagreement as to how an accident happened. It is a case in which the court should have set aside a clearly erroneous determination.

Review of the evidence is necessary, but that relating to the accident itself was not lengthy, and it was not contradictory. There were only three eye witnesses at the scene: the plaintiff, the defendant, and Raymond Ward, who was following the defendant in another vehicle.

The accident occurred at about 6:30 o'clock p.m. on February 7, 1976, on Sunnyside Avenue at Guardsman Way. Sunnyside Avenue is a wide street (about 70 feet where plaintiff was crossing) and has marked traffic lanes, left turn lanes, and pedestrian lanes. It is marked for two lanes of travel in each direction, and there are mercury vapor street lights at the intersection (Ex. 1-P).

Just before the accident, Raymond W. Ward was driving west down Sunnyside, approximately four to five car lengths behind the defendant's vehicle (R 155). It was early dusk on a clear day, still quite light (R 154). Ward could see through the rear window and windshield of defendant's automobile, and through her windows observed that there was a pedestrian in the way almost directly in front of defendant. He knew that the pedestrian would be hit if defendant didn't apply her brakes immediately. By the time the car struck

the plaintiff, he had walked a few more steps since Ward had first seen him. The car hit the pedestrain and boosted him over to the right of the road where he landed at the curb line (R 155). When Ward first observed him, plaintiff was on the north or destination side of the road. He was struck at a point approximately six feet from the curb. The witness did not see any sign of brakes being applied by the defendant until after the plaintiff was struck, nor did he notice the car slow down (R 156). The witness and the defendant were both going at a rate of about 35 to 40 miles per hour (R 157). When Ward first observed him, plaintiff was four or five car lengths in front of the defendant's car and didn't seem to be aware that the car was bearing down on him. He was walking at a medium to fast gait (R 162-163).

The defendant testified both by deposition and in person. She was driving by herself, west on Sunnyside Avenue, saw a pedestrian in the crosswalk and swerved to the left and behind him, hitting him with her right headlight. She was in the right-hand lane of westbound traffic and she guessed about 50 feet from plaintiff when she first saw him. She said she was traveling at about 30 miles per hour (R 183). She didn't apply the brakes before hitting him, but only swerved. Contrary to Ward's testimony, she stated that she had her headlights on at the time, on low beam. When she first saw plaintiff, he was in the middle of the right-

hand lane, the one in which she was traveling. There was no traffic to impede her and she attempted to swerve left toward the middle lane. Plaintiff was in the middle of the right-hand lane when she hit him (R 184) at the right headlight of her automobile. Plaintiff was then about five feet from the curb (R 185) and in the crosswalk when defendant hit him. She drove along Sunnyside Avenue on a daily basis and was aware of the existence of the crosswalks in that area (R 186). At the time of the accident she was in the northern lane of the westbound traffic (R 322). It was dark, she said, and she had her headlights on low beam (R 322). She was traveling at about 30 miles per hour. Although she testified that plaintiff was about 50 feet away when she first observed him, she testified on cross-examination that she was just entering the intersection at about the eastern crosswalk (R 326) -- a distance of about 85 feet from where she hit plaintiff. The intersection was lighted by street lights (R 327).

The plaintiff testified that he was a student at the University of Utah, and on the evening of February 7 he was walking to the University to see a film. He was walking north along Greenwood Terrace, reached the corner of Greenwood Terrace and Sunnyside Avenue, stopping at the curb to look for traffic to his left. As he reached the curb, he let two cars pass him, then proceeded north across Sunnyside,

glancing to the right. He saw a car some distance away approaching from the east, but he believed it to be far enough away and moving slowly enough that he could cross the street with safety. The next thing he remembered was having been struck and lying on the ground (R 192, 222). After being struck he was in and out of consciousness, lying partly in the road. He testified that he may have sensed his danger a split second before impact (R 222). After being taken to the hospital, he gained and lost consciousness repeatedly (R 224), and after some delay was sedated and given a pain killer (R 225).

At plaintiff's typical stride, there were about 28 paces from curb to curb on Sunnyside. It took him about eight seconds to reach the median line on Sunnyside and about four seconds more to get to the line separating the two northern lanes (R 265), just south of where he was struck.

The only other witness to testify concerning the events surrounding the accident was Artie Banks, Jr., a Salt Lake City police officer who investigated the accident. When he arrived at the scene, he observed the plaintiff at the curb and gutter, lying across the curb and gutter, the upper portion of his body approximately on the sidewalk, and the lower half on the roadway. He was conscious but in extreme pain (R 167). Banks talked to the defendant who told him that she did not see plaintiff until it was too late, and

that she attempted to move away from his direction by turning the wheel, but was unsuccessful (R 168). The point of impact was near the center or right of center in the crosswalk in the far "right-handmost lane". The distance from point of impact to where plaintiff was lying was approximately 20 feet. He had been struck by the right front fender and bumper. Banks testified that he talked to plaintiff later in the hospital, and that plaintiff told him that he had reached approximately the midpoint of the intersection, had seen a vehicle coming and attempted to sprint across the roadway, making it as far as the right-hand lane, and at that point he saw that the vehicle was going to continue and tried to jump out of the way (R 169). (This version, if told to Banks at all, was told while plaintiff was in and out of consciousness, in great pain, and probably drugged. It is inconsistent with the descriptions of the three persons who were there.)

In addition to giving customary instructions on negligence, the court instructed the jury specifically with respect to the relative duties of pedestrians and motor vehicle operators. Among the instructions given were the following:

A driver of a motor vehicle has a duty not to drive the vehicle on a highway at a speed greater than is reasonable and prudent under the conditions, and having regard to the actual and potential hazards then existing, and speed is to be so controlled as may be necessary to avoid colliding

with any person, vehicle or other conveyance on or entering the highway, in compliance with legal requirements and the duty of all persons to use due care. The statutes also require that the driver of a vehicle shall, consistent with the foregoing, drive at an appropriate reduced speed when approaching and crossing an intersection, or when special hazards exist with respect to pedestrians or other traffic, or by reason of weather or highway conditions. (R 53)

A driver of a motor vehicle is required to yield the right-of-way, slowing down or stopping if necessary to so yield, to a pedestrian crossing the roadway within a crosswalk when the pedestrian is upon the half of the roadway upon which the vehicle is traveling, or when the pedestrian is approaching so closely from the opposite half of the roadway as to be in danger.

The person having the right-of-way may assume that the other will yield. Failure of defendant to so yield the right-of-way to plaintiff would constitute negligence on defendant's part, if you so find. (R 54)

It is the duty of every operator of a motor vehicle to exercise ordinary care and keep a careful lookout ahead and about him. The exercise of ordinary care requires him to make observations at a point or points where his observations will be efficient for protection from injury to persons or property, requires a seasonable and effective use of a driver's sense of sight to observe timely, not only the presence, location and movement of other users of the highway, pedestrians as well as vehicles, but traffic signs and signals, obstructions to vision, and everything else with might warn him of possible danger. (R 55)

Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting him; to look to that vicinity from which, were a vehicle approaching, it would immediately endanger his passing; and to make the determination which a reasonably prudent person would make under the same circumstances as to whether it is reasonably

safe to attempt the crossing. What observations he should make, and what he should do for his own safety, while crossing the street are matters which the law does not attempt to regulate in detail and for all occasions, except in this respect: it places upon him the continuing duty to exercise the care a reasonably prudent person would observe to avoid an accident. (R 58)

In determining whether the plaintiff was negligent with respect to his own safety, you may take into account the fact that a pedestrian crossing a busy street must be constantly vigilant for his safety with respect to all of the conditions around him, and that even if a car is seen approaching, unless it is so positioned as to constitute an immediate hazard to him, he is not necessarily obliged to focus full and undivided attention on that particular car and so calculate his entire conduct as to avoid being struck by it. He need not anticipate that the driver will speed, fail to observe, fail to control her car, fail to afford him the right of way, or otherwise be negligent unless, in the exercise of ordinary care, he observes or should have observed something to warn him of such improper conduct. (R 59)

Although inconsistent in some minor respects, the instructions were substantially correct, and no exceptions were taken to them.

Under the law, and under the court's instructions, there was insufficient evidence to support a finding that the plaintiff was as negligent as the defendant, and the trial court should have granted plaintiff's motion for a new trial. Where a motion for a new trial has been granted or denied, this court may review the evidence for the purpose of determining whether the trial court abused its discretion in ruling on the motion. Brigham v. Moon Lake Electric

Association, Inc., 24 Utah 2d 292, 470 P.2d 393, 396 (1970);
Law v. Smith, 34 Utah 394, 98 P. 300, 305 (1908).

We are not unmindful of the cases in which this court has stated that it will not reverse an order granting or denying a motion for a new trial unless there has been a clear abuse of discretion, but most cases have dealt with situations in which the court granted a motion for a new trial, such as in King v. Union Pacific Railroad Company, 117 Utah 40, 212 P.2d 692 (1949); and Brown v. Johnson, 24 Utah 2d 388, 472 P.2d 942 (1970).

In Moser v. ZCMI, 114 Utah 58, 197 P.2d 136 (1948) the court did consider a ruling of the trial court denying a motion for a new trial, and said:

The rule in this jurisdiction, early laid down by this court, is that where a motion for a new trial is based upon insufficiency of the evidence to support the verdict, the trial court will not be held to have abused this discretion in denying the motion unless there is no substantial evidence in the record to support the verdict.

Therefore, if reasonable minds could have found as the jury did in this case, from the evidence before it, then we cannot say that the trial court abused its discretion in denying plaintiff's motion for a new trial on the grounds of this insufficiency of the evidence to support the verdict.

Cases on the scope of appellate review of orders granting motions for new trial do not provide much guidance with respect to appellate review of orders denying motions for new trial. As said in Olson v. Thompson, 74 N.W. 2d 432 (N.D. 1956):

Orders granting new trials, on ground of insufficiency of evidence, stand on a firmer foundation in a reviewing court than orders denying new trials, since such orders are not decisive of the case, but only open the way to reinvestigation of the entire case on its facts and merits.

See also Pocota v. Kleppe Corporation, 154 N.W. 2d 177, 183 (N.D. 1967).

Moreover, the restrictions appellate courts have placed upon themselves in reviewing evidence are of doubtful worth in connection with apportionment of negligence by trial juries under comparative negligence statutes. Some courts in administering comparative negligence statutes have seen the need for more judicial supervision of the jury's findings. Schwartz, Comparative Negligence Manual, § 1050, comments favorably upon the granting of a new trial by the Wisconsin Supreme Court, even where ordinary procedures had not been followed:

The Graff case [Graff v. Gerber, 26 Wis.2d 72, 131 N.W.2d 866 (1954)] shows the versatility of the comparative law concept. The trial technique illustrates the effort to avoid repeated litigation. When the supervision of the trial court over the jury's verdict and the supervision of the Supreme Court over the trial court's decision in the interests of justice are combined, the chances there are lessened.

This ingenious concept preserves the adversary system and jury trials, and avoids the evils of passion and prejudice and the desire of the jury to see one side either win or loss. The jury should be purely a fact finding body. While the concept is not perfect, one must conclude that it is a giant step forward in solving the legal uncertainties of the accident victim. No quarrel

can be had with the goal of making each tortfeasor pay for the wrong he committed. No quarrel can be had with evaluating the damages caused to each accident victim by a fair and reasonable standard of proof. No quarrel can be had with a procedure that has built in supervision in the event of error or injustice to any party.

The state of Wisconsin has been a leader in the comparative negligence field, and its courts have shown leadership in exercising necessary controls and supervision over errant juries.

Loomans v. Milwaukee Mutual Insurance Company, 38 Wis. 2d 656, 158 N.W. 2d 318 (1968), arose out of an automobile accident in which the plaintiff slowed her car suddenly, having observed an accident ahead, skidded, and was struck by the defendant's automobile, which had been following behind her. The jury apportioned 60% percent of the cause of negligence to the plaintiff and 40% to the defendant. The trial court granted a motion for a new trial, but failed to follow the required procedure. The Wisconsin Supreme Court, on review, exercised its discretionary power to grant a new trial. Discussing the comparison of negligence question, and the reason for granting the new trial, the court said:

It is contended by the defendant that the comparison of negligence is peculiarly for the jury and therefore cannot be upset or be a basis for granting a new trial in the interest of justice. This is an erroneous view. While it may not be often that this court upsets a comparison of negligence, the court has done so as a matter of law and reversed for error. A comparison may also

be the basis of a new trial in the interest of justice when the comparison is against the great weight and clear preponderance of the evidence although this court cannot as a matter of law say that it was wrong. [Citations omitted.]

In the instant case, the trial court believed the comparison was wrong and the plaintiff Edma Loomans' negligence could not be equal to or greater than that of the defendant Lewin's but the court granted the new trial on the ground of interest of justice. It might have been placed on the ground of error.

In Korleski v. Lane, 10 Wis.2d 163, 102 N.W.2d 234 (1960), a jury had returned a verdict of 50% causal negligence on the part of plaintiff, a motion for new trial had been denied, and judgment had been entered on the verdict. On appeal the Supreme Court of Wisconsin reversed and ordered a new trial in the interest of justice.

In Spath v. Sereda, 41 Wis. 2d 448, 164 N.W. 2d 246 (1969), the court held that where the jury findings were contrary to the great weight of evidence, even though supported by credible evidence, a new trial might be granted in the interest of justice, and that the rule applied alike to questions of damages, negligence, causation, and comparison of negligence. See also Pruss v. Strube, 37 Wis.2d 539, 155 N.W.2d 650 (1968).

Wisconsin differs from Utah in that it has a statute permitting its supreme court to grant a new trial "in the interest of justice," and Utah does not. But this court has recognized that denial of a motion for new trial may be reversed if it constituted an abuse of discretion, and there

is no reason why this court may not determine as a matter of common law that there is an abuse of discretion if the decision of the trial court results in a miscarriage of justice. "Abuse of discretion" is a term of uncertain meaning. In Whiteman v. Pitrie, 220 F.2d 914, 919 (1955), the court stated:

What are the tests for such abuse of discretion?
* * * When all is said and done, however, the question by its very nature is one for which there can be no rule of thumb answer. Attempts at defining or making more certain and exact the tests of abuse of discretion do not usually furnish reliable guide posts, nor tend to clarify the rule.

Under any test, or any approach, the judgment should be reversed in this case because of the trial court's failure to grant the new trial.

As pointed out above, this was not a case in which the evidence was in conflict in any material points, and the presumption given to the validity of the trial court's rulings should apply only to those parts of a trial in which personal presence and personal observation are of importance. When controlling facts are not in dispute, the scope of this court's review should be greater. A case in point is American Life Insurance Company v. Williams, 234 Ala. 469, 175 So. 554, 112 A.L.R. 1215, 1218 (1937), which involved the question of whether the insured had died of a pulmonary disease, in which event the policy would not have

covered the death. The defendant had sought a new trial after a verdict for the plaintiff, but it was denied. The court said:

The next question is whether the motion for a new trial should have been granted because it was against the great weight of the evidence. When such a motion is denied by the trial court, and the verdict is largely dependent upon the credibility of the witnesses, to reverse the judgment on that motion the weight of the evidence must be so strong that there can be no reasonable doubt but that the verdict was the result of passion, prejudice, bias, favor, or some other motive which should not be controlling. [Citations omitted] The same is true in respect to matters in the discretion of the jury. [Citation omitted]

But when the evidence is without dispute in material respects, and the question hinges on a proper interpretation of it, the rule is different, whether at law or in equity. [Citations omitted]

Another case recognizing limitations on the trial court's discretion is Dolson v. Anastasia, 5 N.J. 2, 258 Atl.2d 706 (1969), a motor vehicle rear-end collision case in which the jury had returned a verdict of no cause of action and plaintiff had moved for a new trial on the ground that the verdict was against the weight of the evidence. The trial court denied the motion, and the appellate division felt compelled to affirm the trial court's order in light of what it considered its limited review power. The New Jersey Supreme Court reversed noting the differences between a motion for a new trial after a jury verdict as against the weight of the evidence, a motion for involuntary dismissal,

a motion for judgment at the close of all the evidence, and a motion for judgment notwithstanding the verdict. It pointed out that the tests in those latter types of motions are different from the one in case of a motion for a new trial as against the weight of the evidence, and said:

The standard governing an appellate tribunal's review of a trial court's action on a new trial motion is essentially the same as that controlling the trial judge. Hager v. Weber, 7 N.J. 201, 212, 81 Atl.2d 155 (1951) very correctly so held, at the same time putting to rest all constitutional questions and casting aside any more restrictive "abuse of discretion test." We say the test is "essentially the same", because where certain aspects are important--witness credibility, "demeanor", "feel of the case", or other criteria which are not transmitted by the written record--, the appellate court must give deference to the views of the trial judge thereon. His decision, however, is not entitled to any special deference where it rests upon a determination as to worth, plausibility, consistency or other tangible considerations apparent from the face of the record with respect to which he is no more peculiarly situated to decide than the appellate court. * * *

It consequently behooves the trial judges in deciding new trial motions to spell out fully the reasons for their determinations so that reviewing tribunals may be advised of the extent to which factors entitled to deference entered into the decision.

In this case the trial judge did not spell out his reasons, and there were no factors that were entitled to this court's deference. The evidence of the three eye witnesses to the accident establish the physical facts without serious dispute. The plaintiff was crossing a wide

street, approximately 70 feet from curb to curb. The defendant was proceeding down a wide street that was marked with four travel lanes. She was in the most right hand lane, the one nearest to the north curb, and the one farthest from the point at which plaintiff had left the curb. When the impact occurred, the plaintiff was in the middle of the northernmost lane, approximately 65 feet from where he had left the curb and about 6 feet from being safely across. He was first seen by defendant when he was about in the middle of her car, which was in the middle of the far right lane. The speed of his gait and the speed of the automobiles, whether as testified to by defendant or by the witness Raymond Ward, were such that when the plaintiff left the middle of the mid-point of the roadway and stepped into the half of the roadway in which defendant was driving her automobile, the defendant must have been in a position that would have permitted her to stop, or at least to slow enough to permit the plaintiff to reach a point of safety. She did not stop. She did not attempt to stop. She did not slow or attempt to slow, but took the easy way, hoping to miss him without impeding her journey to the library.

And the plaintiff was visible. Ward saw him through defendant's automobile when the plaintiff was four to five car lengths in front of defendant's automobile, and defendant's automobile was four or five car lengths in front of Mr. Ward.

If she was traveling at a rate of 30 miles per hour, as she said, she would have been moving at a rate of 44 feet per second and if she was just entering the intersection, as she said, at the pedestrian crosswalk on the east side of the intersection, she would have had two seconds within which to apply her brakes and take evasive action. She would not have had to slow much, because the plaintiff was within inches of safety when he was struck by her right headlight.

As the court instructed the jury, the plaintiff had a right to assume that the defendant would slow or would stop and permit him to proceed across the street, and this is true whether or not he saw the defendant's vehicle. The jury must have been overly impressed by the fact that the plaintiff didn't see the oncoming car, and while the failure to see may have been negligence, it was not a cause of the accident, because if he had seen the vehicle, he would have had the right to assume it would yield the right-of-way to him. In Coombs v. Perry, 2 Utah 2d 381, 275 P.2d 680, 685 (1954), an auto-pedestrian case, the court discussed the causation question.

This court has on numerous occasions dealt with that principle. In the case of Lowder v. Holley [233 P.2d 350, 352] defendants strenuously urged that the admitted failure of plaintiff Lowder to see defendant's truck approaching the intersection made plaintiff guilty of contributory negligence as a matter of law which precluded his recovery. But the court, through Mr. Justice Wade, made very clear the thought above expressed, reasoning that

because, the evidence was susceptible of a finding that when plaintiff stopped at the intersection the approaching truck was far enough away to have afforded plaintiff an opportunity to safely cross, that the plaintiff " * * * could have assumed and acted on the assumption that the driver of the truck would exercise ordinary and reasonable care in his driving and that it would be safe to cross the intersection. * * * Under such a state of facts Amasa Lowder's failure to see the truck could in no way have contributed to the accident." (Emphasis added.) In other words, even if he had seen the approaching truck, it could have been found, consistent with due care for plaintiff to assume that he would be afforded his right-of-way because of entering the intersection first, and proceed across. So the accident might well have happened just as it did, whether Lowder saw the defendant or not.

Moreover, assuming that both plaintiff and defendant were somewhat inattentive, and the inattention of each was a cause of the accident, this does not legitimize a 50-50 apportionment. The differing duties of the motorist on the one hand and the pedestrian on the other were observed by this court in Coombs v. Perry, supra, 2 Utah 2d 381, 275 P.2d 680, 682 (1952) (1954):

It is to be borne in mind that although the motorist and pedestrian are both required to exercise the same standard of care, that of the ordinary prudent person under the circumstances, that standard imposes upon the motorist a greater amount of caution than upon the pedestrian because of the potential danger to others in the operations of an automobile.

It is submitted that it was a miscarriage of justice, an abuse of discretion, an error in law, for the trial judge to let the judgments stand.

But, it may be argued, what of the testimony of Officer Banks? The answer is that his testimony should have no weight. It was contrary to the testimony of all three of the persons involved at the scene. Ward, who observed the accident through the defendant's automobile, did not see plaintiff sprint, but observed him walking at a medium to fast gait; the defendant took the stand and testified but said nothing about a sprint from the middle of the roadway; and the plaintiff himself testified that he became aware of the presence of the automobile only a instant before the impact.

The defendant's testimony is important because she had the plaintiff barely moving--she said he was at the middle the right-hand lane when she first saw him and was in the middle when she hit him (R 184). He couldn't have been sprinting. Moreover, Banks spent only 5 minutes at the hospital with the plaintiff on the evening of the accident, when plaintiff was in and out of consciousness and under sedation.

Banks' testimony, of course, was placed before the jury and may well have had some effect on its deliberations. The testimony varied from a statement previously given to plaintiff's counsel. On March 29, 1976, less than two months after the accident, Banks had stated:

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After I had investigated the scene of the accident I went to the hospital and spoke with Robert Anderson. He was in severe pain but did indicate to me that he saw the car but could not get out of the way before it struck him. He was wearing light clothing, i.e., brown cords and a light colored jacket.

The prior statement was pointed out to the trial judge in plaintiff's motion for a new trial, and while the surprise, in itself, might not have been sufficient for the granting a new trial, it was one factor that contributed to a miscarriage of justice, along with the insufficiency of the evidence, and defense counsel's "shackle" remarks in his summation (R 364).

CONCLUSION

The jury made an error of such magnitude as to indicate that the jurors had either ignored or failed to understand the instructions given them by the trial judge. They failed to give consideration to the greater responsibility and duty of the driver of a motor vehicle, and they failed to recognize plaintiff's right-of-way and his right to rely on it. The jury's finding that plaintiff and defendant were each 50% negligent is not supported by the evidence, it is contrary to law, and it is contrary to the instructions given by the court.

A motion for a new trial was made to the trial court on the ground of the insufficiency of the evidence, the surprise resulting from the testimony of Officer Banks, and the

prejudice resulting from defense counsel's remarks about defendant's being "shackled" with a judgment. The jury verdict cannot be justified, and the court should have granted a new trial. Inasmuch as it did not do so, this court should remand the case with directions to grant a new trial, so that the plaintiff may receive some compensation for the serious injuries the defendant inflicted upon him.

Respectfully submitted,

/s/ Bryce E. Roe

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CERTIFICATE OF MAILING

Two copies of the foregoing APPELLANT'S BRIEF were mailed, postage prepaid, to D. Gary Christian, KIPP AND CHRISTIAN, 600 Commerical Club Building, 32 Exchange Place, Salt Lake City, Utah 84111, attorneys for respondent, on this 2nd day of May, 1978.

/s/ Alice V. Christensen