

1951

Ruth Bunke Hardman v. Gaines Edward Thurman
and Woodrow W. Dickey dba Dickey Woody
Produce Company : Brief of Plaintiff and
Respondent

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

RUTH BUNKER HARDMAN, Ad-
ministratrix of the Estate of
Oswald C. Hardman, deceased.

Plaintiff and Respondent,

— vs. —

GAINES EDWARD THURMAN and
WOODROW W. DICKEY, doing
business as Dickey Woody Produce
Company,

Defendants and Appellants.

Case No.
7609

FILED
APR 20 1951

Clerk, Supreme Court, Utah

Brief of Plaintiff and Respondent

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AND RICHARDS,

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Brief of Plaintiff and Respondent

STATEMENT OF FACTS

This action was brought by plaintiff as administra-
trix of the estate of Oswald C. Hardman in behalf of
the widow, a minor daughter and three minor sons of
the deceased. It arose out of an automobile accident at
the intersection of Twenty-first South and State Streets,
in Salt Lake City, Utah, on the 29th day of October,

1949. The Hardman automobile was driven by the widow of the deceased. Mr. and Mrs. Hardman had been working on some apartments being constructed in their home. She suggested that they take a short ride in an attempt to get the baby to sleep. (R. 208) The deceased was riding in the front seat on the right-hand side of the automobile. They had stopped at the Royal Dairy on South State Street, and at Mrs. Hardman's suggestion left there to go to Al Harris' Milk Depot, just east of State Street on Twenty-first South to get an ice cream cone. (R. 208-9)

As they approached the Twenty-first South intersection, Mrs. Hardman was driving in the first lane west of the center line. She made a signal for a left-hand turn at about the time she was opposite the hospital. The light was green as she approached the intersection. (R. 210) It was on Saturday night at approximately 9:15 and traffic was heavy. (*ibid*) One or two cars in front of the Hardman car in the same lane made left-hand turns, but the Hardman car stopped to permit several cars to proceed north on State Street. It was stopped south of the pedestrian lane in this position when a tanker approached from the south and stopped in the first lane east of the center line, waiting to make a left-hand turn to go west. (R. 129 and 135) A tan automobile stopped in the second lane east of the center lane, apparently to permit the Hardman car to make its turn.

When these two automobiles stopped and the way appeared clear, Mrs. Hardman proceeded easterly on to Twenty-first South in low gear. She had crossed ap-

proximately two and one-half lanes when the Hardman automobile was struck by the truck driven by defendant Thurman and owned by defendant Dickey. There was evidence that the truck was moving in excess of 42 miles per hour at the time its skid marks first appeared on the pavement. (See R. 96; and see the skid marks drawn on Exhibit A.) The truck driver testified that he was driving in the eastermost lane, but there was some evidence that he had swung from the first or second lane into the third lane to pass the tanker and tan automobile which had stopped. The truck driver testified that he could not see an object directly in front of the tanker. (R. 260) Mrs. Hardman testified that she never did see the truck. (R. 213)

Since the detailed evidence concerning the speed and distances traveled by the automobiles is discussed in the argument, it is not duplicated here. It is stipulated that Mr. Hardman died from the injuries received in the accident, and this action was brought as a result. The jury returned a verdict of \$21,464.88.

STATEMENT OF POINTS RELIED UPON POINT I.

THE QUESTION OF SPEED AS AN ELEMENT OF NEGLIGENCE WAS PROPERLY LEFT TO THE JURY.

(a) The speed of defendants' truck was not the only element of negligence.

(b) Proper foundation was laid for the testimony of Dr. Swigart.

POINT II.

THE QUESTIONS OF DEFENDANTS' NEGLIGENCE, CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE WERE PROPERLY SUBMITTED TO THE JURY.

POINT III.

THE COURT COMMITTED NO PREJUDICIAL ERROR IN ITS RULINGS.

(a) The testimony of Witness Brady was properly admitted.

(b) The expert opinion of Dr. Swigart was properly admitted.

(c) The testimony of Witness Peterson as to the qualifications of deceased was properly admitted.

(d) The Court did not err in denying defendants' motion for a directed verdict and defendants' motion for dismissal.

POINT IV.

DEFENDANT CANNOT COMPLAIN OF THE INSTRUCTIONS OF THE COURT SINCE THEY WERE MORE GENEROUS TO THEM THAN THE LAW REQUIRES.

(a) The Court instructed that the negligence of the plaintiff is imputable to the deceased as a matter of law.

(b) Requested Instruction No. 12 was adequately covered by Instruction No. 15.

(c) The question of contributory negligence was adequately covered.

ARGUMENT

POINT I.

THE QUESTION OF SPEED AS AN ELEMENT OF NEGLIGENCE WAS PROPERLY LEFT TO THE JURY.

(a) *The speed of defendants' truck was not the only element of negligence.*

In their brief (P. 5) defendants contend that the only possible negligence on the part of Thurman was the driving of the truck at an excessive speed immediately prior to the impact. This is an incorrect statement of the evidence and of plaintiff's theory and of the theory of the trial judge. There was evidence to support the following claims of negligence: Failure to keep a proper lookout for automobiles in and upon the highway, and particularly the automobile driven by Mrs. Hardman; failure to have the truck under control, and particularly failure to have the truck under control so that it could be stopped, and particularly to avoid the striking of the automobile driven by Mrs. Hardman; failure of the driver of the truck to avoid striking the Hardman automobile after its presence became known; proceeding through the intersection on Twenty-first South and State

Streets in the most easterly lane of traffic when such lane of traffic terminates at Twenty-first South, i.e., the attempt of the defendant Thurman to pass three abreast through the intersection at Twenty-first South, particularly in view of the fact that the truck driver knew there were only two lanes north of the intersection and it would be necessary for him to cut in in a westerly direction in passing through said intersection; passing through the intersection when two other cars in the lanes to the west of the defendant had stopped to yield the right-of-way to the Hardman car; failure to yield the right-of-way to the Hardman car.

The attention of the Court is invited to the fact that the truck driver testified that he was traveling only 20 miles an hour as he entered the intersection. (R. 236) This testimony is in the face of the physical evidence to the effect that there were skid marks 127 feet long, indicating that the truck had skidded 76 feet. (The truck is 51 feet long.) Section 57-5-205, Paragraph (b), of the Utah Code requires that a vehicle must be in proper condition to be stopped in 30 feet at 20 miles per hour, so that if the jury believed defendant Thurman's testimony as to the speed, it certainly could have found him to be negligent in not stopping in time to avoid the accident. Especially is this true in view of the undenied evidence that the brakes and other stopping mechanism of the truck were in proper working condition.

The point made is that speed was not the only element of negligence here. The evidence concerning speed

must, of course, be considered with the other circumstances. These matters were covered adequately by Instruction No. 2 (R. 55); Instruction No. 4 (R. 58); Instruction No. 5 (R. 59), and Instruction No. 6 (R. 60).

(b) *Proper foundation was laid for the testimony of Dr. Swigart.*

Perhaps the major contention of defendants' brief is that there was insufficient data upon which to base any expert opinion as to the speed of the truck. Defendants contend that there was no evidence of skidding by the truck. Defendants do not contend that Dr. Swigart is not a qualified witness to compute the speed of the truck if sufficient data was furnished; nor do they complain of the exactness of the computations if the data was correct.

The jury was, of course, not obliged to agree with the witnesses concerning the data or its exactness. The questions to Dr. Swigart assumed the facts to be as indicated in the questions. The jury was advised fully that it was to determine whether the data was correct.

It is submitted that there is ample evidence that the truck skidded.

Officer Brady of the Salt Lake County Sheriff's office and Officer Clark of the Salt Lake City Police Department, Traffic Division, testified as to the measurements of the skid marks made by the truck. Officer Brady testified as follows:

“Q. Will you tell us whether there were any skid marks at the impact, leading from either one of the automobiles, either car or truck?

A. Yes, there were several skid marks, Officer Clark and I measured.

Q. Did you measure the skid marks from the truck?

A. Yes, we did.

Q. Will you describe the skid marks from the truck?

* * * *

A. The skid marks from the trailer were the heaviest marks and up to the point of impact, and from the impact on in we measured more skid marks.

The first marks measured from evidently where the air set them. We measured from there to where the car came to rest. There were several skid marks there, cars going sideways and which I learned from the truck was the left front—”

* * * *

“A. We measured the skid mark where the air was applied and also the skid mark from the point of impact to where the car rested—that is the left front tire.

Q. And did you hold the end?

A. I read it off. Officer Clark held the stationery end and I held the end with the measurements.”

* * * *

“Q. Will you just describe the mark left by the truck?

A. Yes, it was the left front tire of the truck, the one that left the skid mark; we measured from the point of impact to where the car came to rest.

Q. South of the point of impact what did the mark look like?

A. The south point of the impact was heavy, the trailer marks left were the heaviest, marks made by the trailer.

Q. Have you ever driven an object similar to that truck?

A. Not quite that large. I have driven a semi-trailer with tractor and trailer, not that large.

Q. Are you familiar with the braking manipulation for stopping a unit of that kind?

A. Yes.

Q. And can you tell us whether you looked at the tires of this outfit to determine whether there had been any skidding?

A. Yes, I did. I checked the duals on the trailer on the left side, on the right side, the load evidently was leaking, the refrigeration was leaking and I didn't check that.

Officer Clark — we had to go under the trailer to get the marks. As he went under it, I went around it. I would see where the tire had been drug.

Q. (by Mr. Hanson) Which tire, Officer?

A. That is the tractor tires on the left rear.”
(R. 112-113.)

And on Page 115:

“Q. (by Mr. Burton) Now, will you describe the mark that appeared on the pavement south

of the point of impact, — do you understand, Mr. Brady?

A. Yes, those were heavy marks.

Q. Just describe them.

A. They were wide marks like I have said, like the trailer had been locked and drug."

* * * *

"Q. You inspected the rear trailer wheels?

A. Yes.

Q. You saw where they skidded?

A. That is correct.

Q. Did you check the tractor wheels of the truck?

A. No.

Q. They may or may not have been skidding?

A. It was a routine check. I just happened to find them by accident and make a mark they had been slid; I didn't make a specified check of all tires to see whether all had been slid."

Officer Brady was able to point out to the jury on the photographs the location of the skid marks which he measured (R. 115-116). Officer Brady further testified that he could not describe the details of the density of the mark but "it was a slide mark, a tire mark made by sliding." (R. 120)

On cross-examination he pointed out to the jury "marks caused by sliding tires." (R. 122)

Officer Clark further testified concerning the skid marks. From their place of beginning, 57.1 feet south of the curb line at Twenty-First South, they measured 81.7 feet to the point of impact. (R. 143-144) These marks were drawn to scale by the officer on the map identified as "Exhibit A". Officer Clark testified that the marks which he and Officer Brady measured were clear and discernible and that he could see them clearly and distinctly. (R. 152)

The attention of the Court is invited to the fact that the Hardman car was pushed sidewise and northerly by the impact a distance of 45.3 feet. The skid marks made by the Hardman car were measured, and Officer Clark testified that these marks were the same as to color and density as the marks left by the truck. (R. 154-155) He further testified that what he measured at the scene of the accident was skid marks. (R. 163-164) This followed all of the cross-examination by defendants' counsel, wherein an attempt was made to get a distinction drawn between various kinds of marks made by tires on roads.

It is submitted that the record in this case shows clearly and conclusively that the truck skidded into the intersection the distances testified to by the witnesses. Certainly there is competent evidence from which the jury could have concluded that the tires skidded these distances.

The testimony of Dr. Swigart certainly is conclusive if the data upon which it is computed is accurate.

This is admitted by defendants' counsel, in his statements during the trial. (R. 179) The doctor was extremely careful not to speculate; he was generous to the point of giving defendants every benefit of doubt. His calculations did not take into consideration the fact that the greatest stopping force was applied to the truck before it commenced its skid. (R. 175-176) Neither did they take into consideration the energy consumed by the collision between the car and the truck. A glance at the photographs of the car introduced in evidence certainly indicates that that energy would have been considerable in itself. (R. 189)

Coupled with this evidence as to skidding is the testimony of the truck driver Thurman that he locked his wheels (R. 244); that the truck had just been rebuilt from the ground up, and, as far as he knew, the brakes were applied evenly on all wheels at the same time (R. 256); that at 20 miles per hour the truck could stop within 30 feet (R. 257). The testimony of his driving companion Huber was to the same effect. (R. 278-279)

Defendants contend that the truck did not skid but that the tire mark was left by the contact of the tire of the truck with the road surface in the tire whipping the road. In other words, the stopping motion of the tire on the road could cause a mark, but the tires were not skidding. Defendants therefore contend that the formula applied by Dr. Swigart was prejudicial, since it depends upon the idea that the tire was sliding. In this connection the evidence is clear and the physical fact

is without contradiction that the truck was going at a much greater speed than was indicated by Dr. Swigart's formula. The stopping force of the vehicle would be greater if the tires were not sliding than if they were. The formula of Dr. Swigart, therefore, was generous to the defendants if defendants' contention is correct. Certainly they have no justifiable complaint to its application.

Dr. Swigart's discussion of this principal appears throughout his testimony. It is especially clear at R. 174-175. He concludes:

“If there is any mark that would be called a skid mark left at all, then I would say you would be very safe in using the co-efficient of sliding friction because if there is any skid mark being left at all, you would have a co-efficient as great as co-efficient sliding of friction because the other would be a tire mark, because that is rolling and once it starts sliding a little bit, so long as the tire isn't rotating free rolling speed, with that speed you would be perfectly justified in using co-efficient sliding of friction, it might be greater than that because it isn't sliding, this would be a reasonable figure to use.” (R. 175-6.)

What complaint can defendants have to the use of expert testimony based upon data weighed in such a conservative fashion as this. Certainly under the available data it is clear that defendants' truck was being driven at a rate of at least 42.5 miles per hour. If it was going faster than this speed, how can they complain? The jury is entitled to have presented to it the most accurate data available. Such data was submitted and considered.

Appellants argue that the Court erroneously admitted the testimony of Dr. Swigart, because he did not personally conduct any test to ascertain the co-efficiency of friction on the surface involved in this accident. It is submitted that this contention is facetious on its face. Dr. Swigart testified that he had a Ph.D. major in physics; that he had conducted experiments on friction and sliding objects for twenty years at the University of Utah; that he had made studies relative to the co-efficiency of friction, and was familiar particularly with the study of tires sliding upon road surfaces. He testified that if he was given the data he could determine the speed of the vehicle by the skid marks left by the vehicle upon the surface over which it skidded. He demonstrated to the jury the formula used to compute the speed. (R. 166, 167, 168) He was certainly qualified to testify as to what the speed would be, based upon the data furnished by the other witnesses.

One cannot read the testimony of Dr. Swigart in the record without being impressed that his opinion was based upon scientific accuracy and carefully studied computations, and that he displayed the utmost caution. Certainly defendants have no right to complain that this evidence was submitted to the jury for consideration.

POINT II.

THE QUESTIONS OF DEFENDANTS' NEGLIGENCE, CONTRIBUTORY NEGLIGENCE AND PROXIMATE CAUSE WERE PROPERLY SUBMITTED TO THE JURY.

Appellants rely primarily on the cases of *Cederloff v. Whited*, 110 Utah 45, 169 Pac. (2d) 777; *French v. Utah Oil Refining Co.*, Utah, 216 Pac. (2d) 1002; *Fox v. Lavender*, 89 Utah, 115, 56 Pac. (2d) 1049.

With reference to the negligence about which defendants complain of plaintiff in this action, these cases are not in point. It is respectfully submitted that none of these cases applies to the facts in the case at bar. In the *Cederloff* case the driver making the left-hand turn in front of the vehicle was proceeding south and a turn was made directly in front of a north-bound vehicle. The testimony was clear that there was nothing between the two vehicles to obstruct the vision of either driver. Defendants' negligence in that action was the sole proximate cause of the accident as a matter of law, because the Court concluded that the plaintiff had a right to assume that under the circumstances the plaintiff was continuing in a south-bound direction or would permit plaintiff to pass before proceeding across the highway. Defendant could see plaintiff's vehicle all the time, and plaintiff could see defendant's vehicle. There was nothing to obstruct the view.

Similarly, in *French v. Utah Oil Refining Company*, supra, the Court held that our statute governing the turning vehicle at an intersection required the person making the turn to exercise reasonable care for his own safety. The Court said that when there is a reasonable possibility that the movement cannot be made in safety, then the turning driver should yield. In that case as in the Cederloff case, the turning drivers had unobstructed view of traffic approaching from the opposite direction. In both cases, if the turning drivers had looked they would have seen the approaching vehicle and, in the exercise of reasonable judgment, the Court held that they should either have stopped to permit the approaching vehicle to proceed or they were guilty of negligence. *Fox v. Lavender* has no application as far as the negligence problem is concerned.

Our case does not come within the scope of these decisions because the driver of the Hardman automobile in the case at bar could not see from her position at the intersection the approach of the Dickey truck. Between her automobile and the Dickey truck on the inside lane for north-bound traffic was a big oil tanker. On the next lane to the east was a tan sedan. The headlights of these vehicles glared into the face of Mrs. Hardman. Directly east from these two lanes, just off the curb, was the big Utah Oil service station with glaring, bright lights. Traffic was heavy in the intersection. The tanker and the tan car stopped, apparently yielding the right-of-way to Mrs. Hardman. She looked then to the East to the pedestrian lane to determine whether anything

obstructed the contemplated movement of her automobile. Nothing was there and she proceeded to move the car in an easterly direction, watching south and east at all times.

Can this Court say as a matter of law that under these facts and circumstances Mrs. Hardman is bound, in the exercise of reasonable care, to anticipate that a thirty-ton truck and load is going to be barrelling into that intersection in the outside lane at a speed in excess of forty miles per hour? Mr. Thurman, the driver of the Dickey truck, testified that he could not see an object in front of the tanker. How, then, can the Court say that Mrs. Hardman as a matter of law was bound to anticipate that there was a reasonable probability that a vehicle of the size and weight and speed of the Dickey truck was going to enter the intersection in the easternmost lane? Certainly the Court cannot hold that it is negligence as a matter of law for a driver of a vehicle making a left-hand turn in an intersection not to anticipate such reckless and wanton disregard for the safety of others.

Some point was made of the fact that the trailer on the Dickey truck was thirteen feet high. Of course, this is an element to consider in passing upon all of the circumstances. It is also true that the Hardman car was so far to the south in the intersection that Mrs. Hardman was unable to see the semaphore. The light had been green for some time and, like any other experienced driver, Mrs. Hardman anticipated the change in the stopping of north-bound traffic. In fact, almost

instantaneously with the collision the light did change for northbound traffic from green to yellow, according to the testimony of witness Lariante.

Mrs. Hardman accelerated her car from a stopped position to seven miles per hour at a uniform rate. At 42 miles per hour, the truck would, therefore, have been 600 feet south of the intersection at the time she commenced her turn. (See testimony of Dr. Swigart, R. 192, 193.) In view of the fact that the truck was to her invisible, is this Court to hold as a matter of law that she was negligent in not anticipating, in the language of the *French* case, that “there is a reasonable probability that the movement cannot be made in safety?” Certainly the facts of this case are different from those which have heretofore been before the Court, and the principles governing the standard of care to be exercised by the driver of the Hardman vehicle must not be confused with the situation present in previous decisions and previous cases.

Moreover, the Court’s attention is invited to the fact that Mrs. Hardman was not as a matter of law the agent of her husband at the time she was driving this vehicle. It is true that her husband was the owner of the automobile, and, under these circumstances the case of *Fox v. Lavender*, on which the defendants rely so heavily, holds that she was *presumably* driving at his direction. However, Mrs. Hardman’s testimony in this case rebuts that presumption. The suggestion to drive from the Royal Dairy to the ice cream shop was hers.

Her husband did not ever give her any directions as to the course she should take or as to the precautions she should take in making the journey. The presumption of agency certainly should not have been converted into a conclusion of fact for the jury.

In any event, in this regard the defendants cannot complain because the Court instructed the jury that as a matter of law Mrs. Hardman was Mr. Hardman's agent. The jury was further instructed that plaintiff in the action was the deceased's agent. Of course, plaintiff in the action is a quasi-trustee for the benefit of the heirs and widow. Certainly the Court's instructions in this regard were in no way prejudicial to the defendants; in fact, defendants received more generous instructions than those to which they were entitled under the law.

POINT III.

THE COURT COMMITTED NO PREJUDICIAL ERROR IN ITS RULINGS.

(a) *The testimony of Witness Brady was properly admitted.*

Defendants complain that Witness Brady was permitted to answer the following question: "Assuming that the evidence in this case will show that the foot brake operates both the tractor and trailer wheels, then an air brake in proper functioning order would apply equally on all wheels, would it not?" The answer to this question was in no way prejudicial to defendants.

Both Thurman and Fuger testified that Thurman locked his wheels (R. 244); that the brakes were applied evenly on all wheels at the same time. (R. 256; 278-279)

An examination of the exhibits by the witnesses disclosed that the skid marks made by the front wheels of the truck extended to the place where the Hardman car came to rest after being pushed northward across the intersection. The same skid marks showed the rear wheels of the truck. It is clear that all of the brakes, both as to tractor and trailer, were set. The answer by Witness Brady was therefore certainly in no way prejudicial to defendants. (See the photographs marked exhibits 2 and B and the map marked Exhibit A.)

(b) *The expert opinion of Dr. Swigart was properly admitted.*

This point has been discussed in detail under Point I. Dr. Swigart made a computation based upon measured skid marks and an actual test to determine the co-efficient of the friction. It was a conservative calculation because it did not take into consideration any of the factors evidencing speed except the skidding of the truck. Certainly there was evidence for the jury to consider as to whether the tires skidded.

(c) *The testimony of Witness Peterson as to the qualifications of deceased was properly admitted.*

Mr. L. C. Peterson testified that he was Secretary-Treasurer of Bailey, Inc., and that Mr. Hardman was

manager and accountant of this corporation at the time of his death. He testified that to his knowledge Mr. Hardman's abilities had been discussed at a meeting of the board of directors, and he knew there would be an opportunity for him to advance as the company continued to develop. There is nothing prejudicial in any of the rulings as to admissibility of his testimony. Certainly the attitude and opinion of an employer is admissible in determining the future earning capacity in an action of this character.

(d) *Defendants' motion to dismiss was properly denied.*

It is apparent that there was competent and reasonable evidence from which the jury could determine that the defendant Thurman was negligent in driving his truck, and that the deceased was not guilty of contributory negligence. These factors were discussed under Point II. The cases relied upon by defendants do not apply to the circumstances of this case. The unanimous verdict of the jury amply demonstrates that there was sufficient evidence to support plaintiff's judgment.

POINT IV.

DEFENDANTS CANNOT COMPLAIN OF THE INSTRUCTIONS OF THE COURT, SINCE THEY WERE MORE GENEROUS TO THEM THAN THE LAW REQUIRES.

(a) *The Court instructed the jury that the negligence of the plaintiff was imputable to the deceased as a matter of law.*

The Court instructed the jury that if the plaintiff was negligent in the operation of the Hardman vehicle, and if she “suddenly and carelessly and negligently made a left turn in front of defendants’ approaching truck without first ascertaining that such movement could be made with safety and under such circumstances that Gaines Edward Thurman, the driver and operator of defendants’ truck, could not reasonably have expected or anticipated that plaintiff was going to so turn to the left, then the speed, if any, of defendants’ truck would not be a proximate cause of the collision, and if you further find that plaintiff carelessly and negligently made said left hand turn as hereinabove stated, then your verdict must be in favor of defendants and against the plaintiff, No Cause of Action.” (Instruction No. 11; R. 66) Instructions concerning contributory negligence are also contained in Instruction No. 13 (R. 68) and Instruction No. 7 (R. 62). The Court thereby instructed the jury that as a matter of law any negligence of Mrs. Hardman was imputable to her deceased husband.

Defendants rely upon the case of *Fox v. Lavender*, 89 Utah, 115, 56 Pac. (2d) 1049. Defendants' Instruction No. 4 is to the same effect as the instructions of the Court given, viz: that the negligence of Mrs. Hardman, if any, was imputed to her husband. The *Fox v. Lavender* case does not so hold and the law is to the contrary. *Fox v. Lavender* only holds that if the automobile is owned by the husband and he is a passenger at the time of the accident, and the wife is driving the automobile, then a presumption arises to the effect that the wife is driving as an agent of the husband. The presumption merely permits the jury to find that the wife was driving as her husband's agent and under his control. It does not require the jury to so find. It simply *permits* such an inference.

Moreover, in the case at bar the presumption was clearly rebutted by evidence which established that at no time did Mr. Hardman give any instructions as to the driving of the car, either with reference to the course which should be followed or as to its operation while en route. The instructions given by the Court were therefore more generous than they were entitled to receive. They presented defendants' theory unmistakably to the jury. The giving of Instructions Nos. 4 and 5 simply would have been unduly repetitious and would add nothing in substance to those already given.

(b) *The matters covered by Instruction No. 12 were adequately presented by Instruction No. 15.*

In defendants' Instruction No. 15 the Court stated that any damages should be computed by way of allowance for pecuniary recompense, and that they should include the amount of support to the wife and minor children, the money value of the loss suffered by the wife and minor children by reason of loss of comfort and society, and that general damages could not exceed \$75,000.00. There was no issue in the case as to any element by reason of the pain and suffering of deceased; there was no such argument to the jury at any time. Considered as a whole, the instructions adequately covered the proper elements of damage. No prejudicial error was committed by the Court's failure to give defendants' Instruction No. 12 in defendants' language.

(c) The question of contributory negligence was adequately covered.

Most of defendants' requested instructions reiterated the idea of contributory negligence. In their brief defendants complained that each and every one of the requested instructions were not given. As has been pointed out to the Court, the Trial Judge gave at least three instructions concerning what conduct on the part of plaintiff would amount to contributory negligence in this case, and that such conduct would bar plaintiff's recovery. Defendants' requested instructions were unduly repetitious and argumentative. As has been shown, the instructions were more generous than defendants had a right to have given. As has been shown, the instructions gave to defendants every benefit of doubt.

The jury found that there was no contributory negligence. It is submitted that the instructions adequately presented defendants' theory of the case, and failure to give Instructions Nos. 7 and 11 was in no way prejudicial.

It is respectfully submitted that the jury was entitled to consider the questions of negligence, contributory negligence, proximate cause and damage in the case at bar. The application of the doctrine of the *Cederloff* and *French* cases certainly should not be extended to the circumstances now before the Court.

Respectfully submitted,

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