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Howard E. Watkins v. Utah Poultry and Farmers Cooperative : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

HOWARD E. WATKINS,

Plaintiff and Appellant,

vs.

UTAH POULTRY AND FARMERS
COOPERATIVE, a corporation,

Defendant and Respondent.

Case No.

7774.

Appellant's Brief

FILED

JUL 15 1952

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Clerk, Supreme Court, Utah

I N D E X

	Page
NATURE OF CASE	1
STATEMENT OF FACTS	2
STATEMENT OF POINTS UPON WHICH APPELLANT RELIES.....	17
ARGUMENT	18
POINT I: There was insufficient evidence of intoxication of the plaintiff at the time of the collision to warrant the submission of that issue to the jury, and there was no evidence that intoxication was a proximate or con- tributing cause of the collision	18
POINT II. The plaintiff was entitled to have his case submitted to the jury upon the theory of his evidence as well as upon the theory of the whole evidence.....	35
POINT III: The plaintiff was deprived of a fair and im- partial trial by the improper admission of evidence that was calculated to inflame and confuse the jury, and stifle their minds with prejudice and hatred toward the plaintiff	40
POINT IV: The court erred in failing to grant plaintiff's motion for a new trial	44
CONCLUSION	45

CASES CITED

Alexion v. Nockas, (Wash.) 17 P. 2d 911	38
Atlantic Coast Line Railroad Company v. Shouse, (Florida) 91 So. 90	38
Bjork v. U. S. Bobbin & Shuttle Company (NH), 111 Atlantic 284	37
Equitable Life v. Green (Kentucky), 83 SW 2d 478	38
Flemming v. McMillan (West Virginia), 26 SE 2d 8.....	22
Floyd v. Federal Union Casualty Company (Texas) 39 SW 2d 1091 at Page 1093	43
Hurt v. Jurczeit (Illinois) 57 NE 2d 230	37
Jackson v. Farmers Union Livestock Commission (Missouri) 181 SW 2d 211	38
Jennings v. Cooper (Missouri) 230 SW 325	37
Metropolitan Life v. Adams, 37 Atlantic 2d 345	37
Morgan v. Bingham Stage Lines Company, 75 Utah 87, 283 P. 160	37
Morrison v. Parry, 104 Utah 151, 140 P. 2d 772, at Page 162	37
Nonnamaker v. Kay County Gas Company (Okla.) 253 Pacific 296....	38
Pratt v. Utah Light & Traction Company, 57 Utah 7, at Page 10.....	37
Richards v. Parks (Tenn.) 93 SW 2d 639	38
Rogers v. Silverfleet System of Memphis (Louisiana) 180 So. 445....	26
Slater v. United Fuel Gas Company (West Virginia) 27 SE 2d 436....	38

I N D E X—(Continued)

	Page
Southern Pacific Company v. Stevens (NM) 298 Pacific 661.....	38
State v. Johnson, 76 Utah 87, 287 P. 909	22
State v. McKay (Missouri) 30 SW 2d 83	38
Texas Employers Insurance Association v. Patterson (Texas) 192 SW 2d 255	38
Webb v. Snow, 102 Utah 435, at Page 448	37
Yellow Cab Co. v. Sanders (N. Carolina) 27 SE 2d 631	38

TEXTS CITED

31 Corpus Juris Secundum, Page 877, Section 166	43
14 Ruling Case Law, Sec. 58, Page 799	38

IN THE SUPREME COURT OF THE STATE OF UTAH

HOWARD E. WATKINS,

Plaintiff and Appellant,

vs.

Case No.

7774

UTAH POULTRY AND FARMERS
COOPERATIVE, a corporation,

Defendant and Respondent.

Appellant's Brief

NATURE OF CASE

This suit was brought by the appellant Howard E. Watkins against respondent Utah Poultry and Farmers Cooperative, a corporation, to recover damages for personal injuries consisting primarily of the loss of an arm and a leg and brain concussion in a sideswiping truck accident which occurred at a narrow bridge near the Lunt Roadside Park on the Buckhorn Flat, in Iron County, Utah about 7 miles north of Paragonah (Exhibit T). The jury in the trial court returned a verdict of no cause of action in favor of the defendant, and the lower court denied the appellant's motion for new trial; from that order denying the motion for new trial this appeal was taken.

STATEMENT OF FACTS

The Plaintiff Howard E. Watkins was a young man 28 years of age and married March 23, 1946. He was a veteran having served in the United States Army Field Artillery in the South Pacific area for 4½ years, during World War II (R. 52). He attended the Agricultural College in Logan, Utah for four years, majoring in business administration, and had completed his course except for two or three quarters (R. 53). He moved to St. George in 1950, where he was employed as an automobile salesman up until the time of the accident (R. 58). The collision occurred on U. S. Highway 91, about 7 miles north of Paragonah, Utah on the Buckhorn Flat (Exhibit P). The oil portion of the highway all across the Buckhorn Flat varies from 18½ to 20 feet in width (R. 36-37); the shoulder on each side of the oiled portion was about 2 feet wide at the bridge shown on Exhibit G (R. 232); the bridge shown on Exhibit G was over a dry wash about 15 feet wide and deep enough to bury a car (R. 36). The accident occurred at night at approximately 10:00 o'clock P.M. (Exhibit P). The plaintiff testified that he saw the headlights of the defendant's truck on his side of the highway, (R. 80-81); that the truck appeared to be overlapping his side of the road; that he got his right wheels on the shoulder about a foot and a half or two feet when the bridge loomed up. It was either hit the bridge or go into the gulley, or try to get back on the road and pass the truck (R. 60-61). The left front headlight of the plaintiff's Ford collided with the left front corner of the truck-bed, and the truck ripped through the entire left

side of the plaintiff's Ford, the Ford remaining in contact with the truck bed for the full length of the car (Exhibits E and F). The only part of the truck that was really damaged was the extreme corner of the rack (R. 48-49, Exhibit F). There was no damage to the front fender or to any of the truck in front of the bed of the truck (R.49).

Highway Patrolman Ernest Pearce who was at the scene of the accident, testified that he observed tire burns on the highway in the vicinity of the bridge on the evening of the accident. The tire burns began between 10 and 20 feet north of the bridge going in a northerly direction (R. 32). There was no center line stripe on the highway at that place. The officer described the tire burns as starting east of the center line and swinging across the road and back, and then across the road again with the car coming to rest about 400 feet from the bridge (R. 33). On the second turn back to the point where the car came to rest, the tire burns changed from just a burn or brake mark to a rim gouge. The rim gouge, starting at the beginning of the last turn and remaining more or less constant to the point where the Ford came to rest, appeared to be the path taken by the left front wheel after the left front tire had been thrown from the vehicle (R. 34). The tire was picked up by the witness, Claude E. Burton, the following morning. The tire was located on the east side of the road straight across from the Ford automobile (R. 260). Officer Pearce placed two ink crosses on Exhibit G to identify the point where he figured the tire burns started. He was unable to see any

tire burns in line with those indicated on Exhibit G south of that point (R. 41). The officer also testified that raspberries were scattered in all directions, but there was a definite course of the raspberries pretty well toward the center of the road about 160 feet south of the bridge (R. 41). Officer Pearce stated that the tire burn represented the car going forward rather than in a side-slip.

Theodore Atherly, a witness called on behalf of the plaintiff, testified that he was at the scene of the accident before the plaintiff was removed to the hospital; he observed the markings on the highway about 4 feet from the center line on the east side and about 10 feet from the bridge. He identified the ink crosses on Exhibit G as representing the location of the tire marks he saw on that night. He traced the marks from the car back to the point indicated on the exhibit; he saw no other tire burns of any kind extending south of the point indicated by the ink crosses (R. 115). The distance between the left-hand tire burn and the center of the highway was about 4 feet (R. 116). The witness walked back and forth from the injured man's automobile to the bridge area. At the bridge there were a few pieces of boards and some fruit had been scattered across the highway; the fruit took a course right down the middle of the highway (R. 117). There were automobile headlights shining on the area in the vicinity of the bridge almost all the time. The skid marks were very plain. He recalls definitely noting in his mind at the time of the accident that the skid marks started about 10 feet north of the bridge; the tire burns were wider in some places than at others, which was in-

dicated where he had crossed the road side-ways (R. 118-122).

There was a split in authority as to the origin of tire burns between the two highway patrolmen who investigated the accident. As formerly stated, Highway Patrolman Ernest Pearce testified that the crosses indicated on Exhibit G showed the commencement of the tire burns; however Officer Simmons on behalf of the defendant testified that he noticed two gouge marks just north of the bridge and that the southerly most gouge mark was approximately 2 feet from the center of the road on the west side, and about 5 to 7 feet north of the bridge, and was about 2 inches wide and 3 to 4 inches long (R. 307). The second gouge mark was longer and more jagged, and was about 1½ feet north and 6 to 8 inches east of the first gouge mark, and was west of the center. However, on the night of the impact he considered the center of the raspberry smear as the point of impact (R. 314). In his notes of his investigation made the night of the accident (Exhibit N) the officer then showed the point of impact to be 165 feet south of the bridge and 165 paces from the bridge to the plaintiff's car; yet the officer at the trial stated that he didn't believe any of the officers, including himself, thought that the point of impact was the center of the smear (R. 315). The exhibit originally showed the measurement of 17 feet 10 inches from the point of impact to the east shoulder, but the officer corrected it to be 11 feet 10 inches at the trial (R. 318). The officer again made the mistake of 100 feet in his notes of the measurement from the point of supposed

impact to the bridge. On Exhibit N he showed it to be 165 and at the trial he stated it was 65 feet. He took a measurement of 165 paces from the bridge to the plaintiff's car; he took no measurement whatsoever to the truck; he took the driver of the truck's word and was not concerned about the measurement of the truck (R. 321). In his report to the State Highway Patrol, he showed the point of impact to be 700 feet from the Ford automobile; that is from the center of the raspberry smear to the plaintiff's car (R. 322). The first time it ever occurred to him that he was 100 feet off in his measurement of the raspberry smear was the night before the trial. He did not make any note of gouge marks in his report or in his original notes (R. 323). The tire burns were still visible on the surface of the highway about one week following the accident (R. 326). He identified the tire burns on Exhibit G and could see no other tire burns extending south from the point marked by the crosses on the exhibit. Exhibit I showed the tire burns made by the Ford and was apparently an extension of the tire burns shown on Exhibit G (R. 327). Exhibit O was the original report of the officer which showed the 65 foot point to be 165 feet (R. 330). He admitted testifying under oath in his deposition taken before the trial that he came to an agreement with the other officers that the point of impact was the center of the raspberry smear, and that was 165 feet from the bridge; that he measured the distance with a tape (R. 333). And to further indicate the thoroughness of his investigation, although there were quite a few people at the scene of the accident, he took the names of no one (R.

340). Although the only measurements he took had reference to the center of the raspberry smear, the officer testified at the trial that he didn't believe any of the officers, including himself, thought that the point of impact was in the center of the smear (R. 315), and this, notwithstanding his admitted testimony on the deposition that he agreed with the officers that the center of the raspberry smear was the probable point of impact.

Sheriff Arthur Nelson testifying on behalf of the defendant stated that he saw what looked like a fresh gouge in the highway surface (R. 264), but he could not say whether the gouge mark was made the day before the accident or not. He did not measure from the gouge marks, but he estimated that they were two feet from the center of the highway which was purely a guess. It is significant that he saw no tire burns at all connecting the scuff mark up with the tire burns that were about 4 to 5 feet east of the center line (R. 267). The way the tracks started between the two tire burns was about the width of an automobile between the two rear wheels (R. 270). The sheriff claimed that there were no gouge marks between the point where the tire burns started and where the car made its final turn back to where it came to rest. He thought the tire came off right near where the first gouge mark was made, but he didn't know (R. 271-272). He claimed that there was a piece of rubber imbedded between the tire band rim of the truck and the truck bed, and the rear wheel of the truck was scuffed on the east side. The raspberry stain went over the center of the highway as much as 2 or 3 feet and

extended for a distance of about 60 feet south of the bridge (R. 278-279). The tire burn started about 4 or 5 feet east of the gouge marks (R. 285). The presence of these gouge marks was also testified to by William C. Dalton who appeared on behalf of defendant. He thought the gouge marks were just slightly on the west side of the road. He presumed they were made by the Ford wheel (R. 252-254).

Testifying in rebuttal on behalf of the plaintiff, the witness Theodore Atherly stated that he did not see any tire burns near the center of the highway that took a course east of the highway before making a turn to the west. He further stated that he looked in the area between the bridge and where the burns first appeared to see if there were other tire burns indicated on the pavement, and there were no others. He saw some gouges there but didn't think they were from the accident. He further stated that there was nothing there to indicate a connection between the gouge and the tire burns which first appeared on the highway (R. 362).

Officer Pearce testified in rebuttal that he was going up and down the highway with his flashlight, and that the area around the bridge was fairly well lit by headlights of cars and flares; that he did not observe any tire burns which originated at or near the center of the highway and proceeded in a northeasterly direction before they made the trip across to the west shoulder (R. 363-364). The burns indicated by the ink crosses on

Exhibit G represent the first indication of tire burns or marks upon the highway that he observed (R. 364).

The witness Glen C. Garfield who was a school-teacher and a passenger in the defendant's truck testified that the wheels of the truck appeared to be on the very far edge of the highway (R. 77). He stated that he did not see the bridge until they were very close to it although he was watching down the side of the road (R. 186-187). He stated that the plaintiff's car was proceeding in a normal manner as it approached, except for relative apparent speed which was the speed he judged before the plaintiff's automobile got within a quarter of a mile (R. 186-187). He stated that the plaintiff's car was probably traveling with its lights on dim when he last observed it. He stated that the truck was loaded with about six tons of feed and there were several cases of raspberries which were being carried in the tool box, which was located under the left corner; that it was not quite out to the edge of the body of the truck (R. 181). He stated that he was not conscious of the truck's applying its brakes anytime before the impact, and that the truck did not alter its course at all as plaintiff's car approached prior to the impact but maintained a straight course down the highway. He stated the truck was not on the shoulder prior to impact (R. 189-190). He did not think that at any time prior to impact did the truck's wheels get over to the right shoulder (R. 191). He stated that the impact of the collision made little effect on the forward movement of the truck. It just threw the passenger forward a little, but did not cause the truck to

change its course noticeably (R. 193). This fact is significant in that it indicates the contact of the Ford with the truck was strictly a sideswipe and confirms the testimony of the plaintiff to the effect that he just turned slightly towards the truck in order to miss hitting the bridge. If he had turned sharply into the truck, it is inconceivable that the truck would have continued to proceed on an unaltered course despite the force of the impact. The witness Garfield claimed that the truck stopped about 200 feet after impact and then the truck driver pulled up again about 300 feet onto the shoulder. When they went back to the scene of the accident, he saw fragments of broken boxes in the vicinity of the bridge (R. 195). He said there was just a trickle of raspberries even with the bridge, the bulk were down just a distance from the bridge (R. 196). He also stated that the impact was just north of the bridge (R. 200-201). By the time the witness got back to the scene of the accident, there were two carloads of football players from Minnesota who had stopped and rendered assistance to the plaintiff (R. 179). Without knowing whether or not the chains had been moved, he picked up some chains a little bit north of the bridge. There were cars going back and forth at the time (R. 180). He saw several tools scattered along the highway (R. 181), and part of the front fender of the Ford car was stuck in the corner of the truck bed, and a piece of tire from plaintiff's car was imbedded in the rim of the truck's rear wheel (R. 182). He said the bulk of the raspberries were about the bridge and in the center of the road (R. 183).

It is interesting to note that after impact, as the truck continued to pull ahead, it was trailing raspberries which overlapped the center of the highway, even though the truck was ostensibly pulling off the road to stop. It is not altogether unlikely that the gouge mark which the officers thought may have been made by the tire-covered rim of plaintiff's left wheel were in fact made by the falling of the tools onto the highway or by the passing of traffic over the chains and the tools before they were removed from the highway. These tools were carried underneath the truck and could have been knocked to the west some distance by the force of the sideswiping impact, before they actually made contact with the ground.

The truckdriver, Lamar W. Matheson testified that the truck was 23½ feet in length and that the bed of the truck was 94 inches (R. 218); that as he approached the bridge his speed was between 45 and 50 miles per hour (R. 220); that the plaintiff's lights were not blinding him, and when he first saw the plaintiff's car it was approximately two miles away, and he thought the car would clear his cab (R. 221). The truck was in close vicinity of the bridge abutment when the impact occurred. He claimed that the truck was at no time east of the center of the highway in the immediate vicinity of the bridge; he removed tools from the highway which were lying west of the center line. The tool box had been broken into pieces (R. 223-224). He stated that his lights were on low beam just before the accident (R. 225). He first saw the car about two miles away, and it appeared to be coming in a normal manner, and there was no indication that the Ford

was weaving at all on the highway ; it was coming straight (R. 228). Just a moment before the impact, the Ford did actually turn toward him (R. 229). Although the Ford did turn toward him, he did not alter his course other than the road required. At no time prior to the impact did he alter the straightforward course of his truck except as it followed the contour of the road, and there were no curves in the road between the roadside park and the bridge. He stated that the plaintiff's lights were not blinding him (R. 236), that the plaintiff seemed to dim his lights, and the truckdriver dimmed his (R. 240). He stated that after he saw the Ford coming, as it got close to him he didn't move over at all, and that he was over on his extreme left side of the pavement. Thereupon counsel for the defendant corrected him with the following language: "You mean left side or right side?" To which he answered, "West, or right" (R. 230). He said that he did not feel a jolt from the impact; that the force of the impact had no effect on his position in the truck. The first indication of the impact he had was a terrible noise just behind the driver's seat, and that he was too close to the bridge at the time of the impact to see (R. 231) He remembered the shoulder at the bridge to be approximately two feet wide (R. 232). After the impact he remained constantly in the direction he was going until he pulled off the road. All four wheels of the truck were on the hard surface of the road for a distance of 275 feet after impact before the truck was pulled off the highway (R. 234). Officer Pearce had previously testified that he had talked with the driver of the defendant's truck, and the driver

had told him he *thought* he was on his side of the road; that the driver didn't state it definitely (R. 212-213). When asked about this conversation with Officer Pearce, Mr. Matheson stated that he did not recall it, although he did not deny that the statement was made (R. 235).

Evidence Pertaining to Intoxication

Jack Scott testified on behalf of the defendant that the plaintiff came to his place of business about 5:30 o'clock in the evening on the day of the accident, and was very much intoxicated. The witness again, over the objection of the plaintiff, was permitted to testify to an incident which occurred in front of an adjoining store, during the course of which the plaintiff was said to have addressed another man thusly: "Hi, Stupid" and was said to have made threatening gestures with a 22 rifle which he was carrying at the time.

Another witness for the defendant, Robert Tuckett testified that the plaintiff made threatening gestures with the rifle after an exchange of unpleasant words between the witness and the plaintiff R. 135).

Another witness for the defendant, Layron Christenson who was manager of a hardware store in Cedar City, testified that he saw the plaintiff around 5:30; that he was a little bit drunk, and wanted to sell the witness a gun (R. 137).

Another witness for the defendant, Kent T. Farnsworth, testified that he was operating Ted's Bar

the day of the accident, and that the plaintiff came into the bar around 6:30 in the evening; that the plaintiff was unstable, although the witness figured he was all right to be served a beer. However, the plaintiff tipped the glass of beer over and the witness refused to serve plaintiff any more beer, whereupon the plaintiff became belligerent, and it was necessary for the witness to show him to the door (R. 139). The appearance of the plaintiff as he came into the beer parlor was that of a man who had been drinking, but who was carrying himself well at that time and he felt he could sell plaintiff a glass of beer without violating the rules and without rendering plaintiff drunk (R. 140-141).

Orissa Hirschi, an employee of the Circus Lounge, another tavern in Cedar City, saw the plaintiff in the Circus Lounge between 8:00 and 8:30 that evening. She described the plaintiff as very insulting and quite loud-mouthed (R. 143).

The plaintiff was removed from the Circus Lounge by Police Officer William M. Hills, another witness, who testified on behalf of the defendant. He took the plaintiff for a ride in his car and engaged in a conversation with him (R. 150-154). He testified that if the plaintiff had been very drunk and causing trouble, he would have arrested him, and would not have turned him loose (R. 157). He stated that the plaintiff was able to pull himself together in the tavern and walk reasonably straight, having some trouble with his speech but that he was able to carry on a reasonable, sensible conversation, and was-

able to control himself fairly well (R. 158-160). The officer put the plaintiff in the plaintiff's car, but told him not to drive it, and left him alone in the car (R. 162).

Highway Patrolman Thomas H. Simmons called on behalf of the plaintiff testified he could smell the odor of alcohol on plaintiff's breath in the automobile at the scene of the accident (R. 304) and was of the opinion that plaintiff was under the influence of liquor (R. 305).

Highway Patrolman Ernest Pearce called on behalf of the defendant testified that when he got to the scene of the accident, plaintiff was profaning and in a belligerent state of mind; that he was of the opinion that plaintiff was intoxicated. He did not know there was a gash on his temple at that time. He observed that the arm was very badly mangled, and in terrible condition, but did not observe the condition of the plaintiff's leg (R. 205-206). There was much blood on the floor of the car, plaintiff appearing to have lost a great deal of blood, and plaintiff was objecting to the fact that a doctor hadn't come. He appeared to be impatient about the fact a doctor hadn't come and the officer regarded that as an unusual thing (R. 207). When asked by counsel for the plaintiff if he could tell with any degree of certainty whether the plaintiff was under the influence of liquor, the officer stated that he couldn't answer that question "yes" or "no" (R. 208).

The driver of the defendant's truck, testifying on behalf of the defendant relative to intoxication, stated that

he held the plaintiff's head, and was very close to him, but that he did not notice the smell of liquor on his breath, and did not know whether the plaintiff had been drinking or not (Exhibit M).

Doctor L. V. Broadbent of Cedar City, testifying on behalf of the defendant, stated that during the course of treatment at the hospital, the plaintiff used abusive language and was very antagonistic and objected strenuously to anything he attempted to do, although the plaintiff later apologized to him for his behavior on the following morning (R. 289-280). The doctor stated that he was of the opinion that plaintiff was intoxicated (R. 291). However, on cross examination he stated that the patient when he saw him at 11:30 in the evening had a rapid thready pulse which indicated shock, and that when a person is under shock he is usually very depressed, that is, slow to respond (R. 292); that he was in a profound degree of shock from acute blood loss; that his arm was dangling by a piece of muscle only, there being no bone connection on the arm at all, and most of the fleshy portion had been severed. He was not prepared to say that the plaintiff was definitely under the influence of intoxicating liquor (R. 293). That in a measure, the symptoms presented by plaintiff could be explained by the severe shock. Through the course of the night he had been given numerous drugs and sedatives. Being reminded of his previous deposition, the doctor acknowledged that he testified under oath previously that he didn't see evidence of intoxication, and couldn't say that the plaintiff had consumed alcoholic beverage prior to the time he saw

him, (R. 295). Then over the objection of plaintiff, the doctor was permitted to give repetitious testimony about the very belligerent, obstreperous behavior of the plaintiff, and about his use of profane language (R. 297-298).

Phyllis Nelson, a nurse on duty in the hospital, testifying on behalf of the defendant relative to intoxication, stated that she noticed the smell of liquor on the plaintiff's breath, (R. 352). Over the objection of the plaintiff, the witness was asked to testify about the language the plaintiff used in the hospital, and she stated that he was profane, belligerent, and uncooperative in every way (R. 353). She was of the opinion that plaintiff was under the influence of liquor (R. 354). Again, over the objection of plaintiff, the witness was permitted to testify repetitiously that the plaintiff used abusive language and was hard to handle (R. 354).

STATEMENT OF POINTS UPON WHICH APPELLANT RELIES

Point I. There was insufficient evidence of intoxication of the plaintiff at the time of the collision to warrant the submission of that issue to the jury, and there was no evidence that intoxication was a proximate or contributing cause of the collision.

Point II. The plaintiff was entitled to have his case submitted to the jury upon the theory of his evidence as well as upon the theory of the whole evidence.

Point III. The plaintiff was deprived of a fair and impartial trial by the improper admission of evidence

that was calculated to inflame and confuse the jury, and stifle their minds with prejudice and hatred toward the plaintiff.

Point IV. The court erred in failing to grant Plaintiff's motion for a new trial.

ARGUMENT

Point I. There was insufficient evidence of intoxication of the plaintiff at the time of the collision to warrant the submission of that issue to the jury, and there was no evidence that intoxication was a proximate or contributing cause of the collision.

In this case, the ultimate question to be decided by the jury was whether the truck overlapped the center of the road at the narrow bridge and thereby caused the collision. This question was clouded and subordinated in the minds of the jury by testimony on the intoxication of the plaintiff several hours prior to the accident. The witness Jack Scott testified that at 5:00 o'clock on the day of the accident the plaintiff came in to his place of business very much intoxicated. One half hour later, the plaintiff went to the hardware store, managed by the witness Layron Christensen, for the purpose of selling his 22 rifle. Mr. Christenson said that the plaintiff was a little bit drunk at that time (R. 137). An hour later, about 6:30, the plaintiff was said to have gone into Ted's Bar where the witness Farnsworth thought he was all right to be served another beer, but when he observed the plaintiff tipped the glass of beer over he didn't

serve him any more beer. He said that the plaintiff became belligerent, and that it was necessary for him to show plaintiff to the door, (R. 139). He testified that the appearance of the plaintiff was that of a man who had been drinking, but who was carrying it well at the time, and that he could sell him a glass of beer without violating the rules and without rendering the plaintiff drunk (R. 140-141.) The witness Orissa Hirschi, an employee of the Circus Lounge in Cedar City, Utah saw the plaintiff between 8:00 and 8:30. She sold him no beer and he was escorted from the lounge by the police officer. He had been very insulting and quite loud-mouthed. She stated that the plaintiff carried himself well after the officer arrived (R. 146). The last witness to have any personal contact with the plaintiff prior to the collision was the police officer William M. Hills of Cedar City, who went to the Circus Lounge where he saw the plaintiff, and he said that the plaintiff had the appearance of being intoxicated. He conducted the plaintiff from the tavern, and the plaintiff walked fairly straight until they got to the foot of the stairs where he was quite wobbly, and the officer took hold of his arm; however he stated that as an officer in Cedar City, if a man was very drunk and causing trouble, he would arrest him and not turn him loose again; that he took the plaintiff for a ride during which the plaintiff engaged in an intelligent conversation. He stated that although the plaintiff was having some trouble with his speech, he was able to carry on a reasonably sensible conversation (R. 158-159), and was able to control himself fairly well (R. 160). The officer put the

plaintiff in his car, rather than arresting him, and told him not to drive it and left him alone in the car at about 8:45 (Exhibit 1). There is some testimony to the effect that the plaintiff was intoxicated at the scene of the accident, but it must be remembered in this connection that the plaintiff had sustained a severe blow to his temple with a laceration of the head which required suturing (R. 18), and Dr. Milligan considered him to have sustained a concussion of the brain. Plaintiff's left arm was hanging by a ribbon of muscle and he had sustained shattering fractures of the left leg, which later required amputation. Before the tourniquet had been applied to the plaintiff's arm he had lost a great deal of blood. He was at the scene an hour to an hour and a half before medical aid arrived. Officer Pearce based his testimony that the plaintiff was under the influence of liquor at the scene of the accident upon two things: First, that he had the odor of alcohol on his breath, and second that he was profaning and in a belligerent state of mind. He stated that the plaintiff was objecting to the fact that a doctor hadn't come, and appeared to be impatient, and he regarded that as an unusual thing (R. 207). When asked by counsel if he could tell with any degree of certainty whether the plaintiff was under the influence of liquor, the officer stated that he couldn't answer that question "yes" or "no" (R. 208). The driver of the defendant's truck, LaMar W. Matheson, testifying on behalf of the defendant stated that although he held the plaintiff's head and was very close to him the witness did not notice the smell of liquor on the plaintiff's breath and did not know

whether the plaintiff had been drinking or not (Exhibit M). William C. Dalton, another witness called on behalf of the defendant, who was present at the scene of the accident, gave no evidence relative to the intoxication of the plaintiff. Arthur Nelson, Sheriff of Iron County, who was present and participated in the investigation of the accident gave no testimony relative to the intoxication of the plaintiff. Thomas H. Simmons, highway patrolman who likewise was present and investigated the accident, testified that he was of the opinion that the plaintiff was under the influence of liquor, and he could smell the odor of alcohol on plaintiff's breath in the automobile (R. 304-305). On the other hand, Theodore Atherly testified in rebuttal that he went over to the car where Howard Watkins was lying four or five times, and there was nothing about his appearance that indicated he was under the influence of intoxicating liquor. Considering the severity of the plaintiff's injuries, the large quantity of blood he had lost, the blow on the head, with the resulting concussion, together with the fact that he was at the scene of the accident for over an hour before medical help arrived, we do not think that his protesting against the delay in the arrival of doctors could reasonably be taken by anyone as indication of insobriety. Certainly there was no plausible evidence of any kind, other than the odor of alcohol on the plaintiff's breath, which could provide a basis for the opinions expressed by the two highway patrolmen at the scene of the accident, and one of these officers as pointed out admitted that he could not say with any degree of certainty that the plaintiff was under the influence of liquor at the scene of the accident.

In the case of *Flemming vs. McMillan*, West Virginia 26 S.E. 2d 8 appears the following:

“The evidence with respect to the intoxication of defendant at the time of the accident in which Ada Flemming lost her life is not persuasive. It is true that all the witnesses stated that the defendant had the odor of liquor on his breath at the time and place where the body of Ada Flemming was found. The witnesses were law enforcement officers, one being a constable and the other a state policeman. These officers did not arrest the defendant and apparently they had no reason to do so. The constable testified that at some time prior to the accident he could smell alcoholic liquor on the defendant's breath, and that he kept repeating words, but the same witness testified that at the place of the accident on Route 50, defendant still retained the odor of intoxicating liquor, but that he, the constable, observed nothing unusual in conversation or conduct of the defendant. The other officer observed nothing unusual on the part of the defendant at that time and place. The evidence as to intoxication of defendant fails in that it does not appear that his indulgence in the use of such was the proximate cause of the tragedy.”

Another case in point is that of *State vs. Johnson* 76 Utah 84 287 P. 909. In that case, which was a manslaughter case, there was evidence that five people in the evening were walking across the intersection of 4th South and 2nd East, Salt Lake City, crossing from the south to the north on the east side of 2nd East, and had reached a point approximately 15 feet from the north curb line of 4th South when an automobile headed east and driving on the north side of the street at 40 miles per hour crashed

into the group, killing two of the persons, and wounding another. A baby was being carried in the arms of its mother at the time of the accident. This baby was hurled from its mother's arms through the windshield of the car and into the driver's seat, and carried away. The car did not stop or even slacken its speed on account of the accident. The baby was later found at the home of the defendant, to which place it had been carried by him in the automobile which he had been driving. Defendant did not report the accident to the police station nor take the baby, which was bleeding and dying, either to the station or emergency hospital or to any public place, but took it to his home. The defendant's father called the chief of police who went to the defendant's home about 10:00 o'clock and testified that he asked the defendant about the accident, but that the defendant didn't seem to know a great deal about it at the time; and that when he asked the defendant about the accident and where the trouble had happened, the defendant simply shook his head and did not seem to want to talk very much, and was very much excited. The officer stated that he noted a considerable odor of liquor on the defendant's breath. The foregoing facts appear in the dissenting opinion of Justice Folland, page 107 and 108 of the Utah Reports. At the conclusion of the evidence, the defendant requested the court to withhold from the jury the charge that he was under the influence of liquor on the ground of insufficiency of evidence to support such charge. The request was refused and the charge with the other alleged unlawful acts submitted to the jury, who returned a verdict of guilty of involuntary manslaughter. The court held that

the evidence was insufficient to warrant the submission of the issue of intoxication to the jury. We quote from the decision, commencing at the middle of page 89 of the Utah Reports:

“... In addition to the testimony that the chief of police, more than three hours after the accident, on going near the defendant in his house to get, as he testified, a ‘whiff’ of the defendant’s breath and observed ‘a considerable odor of liquor on his breath,’ the other matters so pointed to in support of the ruling and to show that the defendant was under the influence of intoxicating liquor consist of the evidence, though in conflict, that the defendant just before the accident drove the car against a red light, drove it on the wrong side of the street, drove it at an excessive speed, and operated it against others at a street crossing. Though there was sufficient evidence to show that the defendant committed some or all of such alleged unlawful acts charged in the information, it does not relevantly or probatively follow that he was guilty of the alleged unlawful act of driving the car while he was under the influence of intoxicating liquor. In other words, driving an automobile in violation of traffic rules or ordinances in one or more particulars, or driving negligently or even recklessly, resulting in an accident, does not relevantly tend to prove the driver was under the influence of intoxicating liquor. There is no probative relation of the one to the other. It may not be doubted that many ‘as sober as a judge’ and as often have driven automobiles against red lights, frequently violated the speed limit, or otherwise violated traffic rules and met with or caused accident through such violations or negligent driving. To characterize such acts as relevantly tending to show intoxication is to characterize a large percent

of automobile drivers as being intoxicated or under the influence of intoxicating liquors while operating automobiles. General rules governing probative effects of evidence should not be disregarded or prostrated to suit emergencies of a particular case.

“It further in effect is observed that though the evidence be regarded as insufficient to show that the defendant was under the influence of intoxicating liquor, still he was not prejudiced because such issue was admitted to the jury for the reason that there was ample evidence to sustain the conviction of the other unlawful alleged acts. The question presented is not one of sufficiency of evidence to justify the verdict or judgment. No such complaint is made. The question presented is as to whether error was committed in submitting to the jury a material issue upon which it is claimed there was insufficient evidence to support it, and if so whether the error was prejudicial. If in a civil case where several acts of negligence are charged, each constituting actionable negligence, and the evidence is insufficient as to one of such acts, but against objections nevertheless is submitted to the jury and a general verdict rendered in favor of the plaintiff, hardly anyone would contend that no prejudice resulted on the ground that the evidence was sufficient to sustain the verdict on the other alleged acts . . . Letting all the issues as to all of the alleged unlawful acts go to the jury gave them to understand that they could render a verdict of guilty on any one or all of them which was required to be expressed only by a general verdict. Some of the jurors may have been induced to join in the verdict on one or more of the alleged acts, some on other alleged acts but on which or on all it is impossible to tell. That none of the jury was induced to join in the verdict be-

case of the submission of the issue as to intoxication is also impossible to tell. We cannot review a criminal action like an equity case—try it *de novo* on the record—and ourselves determine the guilt or innocence of the defendant, the weight to be given conflicting evidence, the credibility of the witness, or the weight or credit to be given the claim or testimony of the defendant. Though the evidence may amply or satisfactorily sustain the conviction, yet it is not within our province to determine the guilt of the defendant and in such case justify erroneous and adverse rulings against him nonprejudicial. That is to say, if on the record we think a defendant guilty or ought to have been convicted, *we may not regard any kind of a trial good enough for him* (italics ours). We thus think the ruling not only erroneous, but also prejudicial. Its very nature had a tendency and was calculated to do harm, and on the record we cannot say it did no harm or did not influence the verdict. The test of determining prejudicial error is stated in *Jensen v. Utah Railway Co.* (Utah) 270 P. 349.”

See also *Rogers vs. Silverfleet System of Memphis*, (Louisiana) 180 S. 445 from which we take the following quotation:

But before discussing this physical evidence, we will make the observation that from a careful study of the evidence we do not think that Rogers was drinking or that he was under the influence of intoxicating liquors to the extent that his ability to drive the truck was affected. Without analyzing the voluminous testimony on this point, two factors would suffice to justify this conclusion: first the fact that defendant's own witness Bill Badgett did not testify that Rogers was drunk, notwithstanding the fact that Badgett and Mangle

were in a better position to know whether or not Rogers was under the influence of liquor than anyone else, and second if Rogers had been drinking before he left Brookhaven, or drunk before leaving there, some four or five hours had elapsed before the accident, and it is not probable that he would have then been under the influence of liquor . . .”

In the case at bar, there was no substantial evidence other than the odor of alcohol on the plaintiff's breath at the scene of the accident that indicated intoxication, and the evidence of the defendant, who had the burden of establishing intoxication, was to the effect that intoxication could not have been determined with any degree of certainty. The two cases just cited are authority to the effect that the odor of liquor alone on the breath of the plaintiff is not sufficient evidence to warrant submission of the issue to the jury. It is significant that the driver of the defendant's truck, LaMar W. Matheson, testifying on behalf of the defendant stated that he first saw the plaintiff's car about two miles away and that it appeared to be coming in a normal manner and there was no evidence or indication that the Ford was weaving at all on the highway, but that it was coming straight (R. 228). That he actually dimmed his lights and the other driver's lights were not blinding him, and the other car seemed to dim its lights (R. 236 and 240). He testified that just a moment before the impact the Ford actually did turn toward him (R. 229). This corroborates the testimony of the plaintiff to the effect that the truck was overlapping the center, and he had to get onto the shoulder, and when the bridge came into view, he had to turn toward the

truck in an attempt to squeeze between the truck and the bridge. To demonstrate the sobriety of his judgment, if the truck had moved towards its side of the road another six inches, there would have been no accident. Confronted with the alternative of hitting the wash which was deep enough to bury his car, or of hitting the concrete abutment which promised certain death, or of attempting to squeeze through between the bridge and the center-overlapping truck, the plaintiff certainly took the most reasonable alternative. It seems incredibly unreasonable on the part of the truck driver to maintain his bull-headed straightforward course down the middle of the highway without yielding one inch to the plaintiff. A reasonable and altogether sober man in plaintiff's predicament certainly would have been justified in entertaining the hope that the truck would yield sufficiently to plaintiff's side of the road to permit him to pass through. Taking all the evidence as a whole, the proximate cause was the failure of the defendant's truck driver to alter his middle-of-the-road course a few inches to the right in order to permit the plaintiff to pass on the narrow bridge.

Again the witness Glen C. Garfield, who also testified on behalf of the defendant and who was a passenger in the defendant's truck, stated that when he saw the car approaching it was in the distance (R. 185), and the last time he saw the car it was a quarter of a mile away, and as the plaintiff's car approached, it did so in a normal manner, except for the relative apparent speed (R. 186-187). He stated that the plaintiff's car was probably traveling with its lights on dim when he last observed it

(R. 189). We fail to perceive how it can reasonably be contended that planitiff was driving his car under the influence of intoxicating liquor at the time of the impact when the two eye witnesses to the accident, who testified on behalf of the defendant, stated that he operated his vehicle in a normal manner. It is also significant that without any proof of any intervening drinking on the part of the plaintiff, approximately five hours had elapsed since the witness who managed the hardware store testified that he appeared to be a little drunk (R. 270). There is no substantial conflict in the physical evidence. The point of impact was just north of the bridge according to the defendant's witness who was a passenger in the truck, and although that witness asserted that the truck was on its side of the road, nevertheless the tire burns made by the plaintiff's automobile as it established its contact with the truck about 10 feet north of the bridge are still clearly visible in the photograph, Exhibit G. The westernmost tire burn was located 4 feet east of the center of the highway, according to Highway Patrolman Pearce, Sheriff Nelson and Theodore Atherly; and although the truck after impact was pulling off the side of the road to stop, it left a tell-tale trail of raspberries which overlapped the center line for a distance of approximately 60 feet after impact, and those raspberries were falling from the left front corner of the truck. The effect of this physical evidence showing defendant's undeniable encroachment on the plaintiff's side of the road at the narrow bridge is not substantially disturbed by the defendant's statement to Highway Patrolman Pearce that he *thought* he was on his own side of the road. The physi-

cal evidence corroborates the testimony of the plaintiff relative to the truck's position on his side of the road. True, there was some testimony relative to gouges which were thought to have been caused by the left front wheel of the Ford when it struck the truck near the bridge, but the physical evidence showed that the left tire was still on the Ford as it laid its burns shown on Exhibit G, and that tire was not thrown until just before the Ford made its last crossing of the highway. This is definitely shown by the continuous rim mark which appeared on that last turn opposite the point where the tire was found. The witness Atherly testifying in rebuttal stated that he saw some gouges but didn't think they were from the accident, and there was nothing to indicate a connection between the gouge and the tire burns which first appeared on the highway (R. 362).

Instruction No. 5, which the court gave the jury, read as follows :

“You are instructed that it is a violation of the law of this state for any person who is under the influence of intoxicating liquor to be in actual physical control of any motor vehicle. Under the influence of intoxicating liquor means in such condition from the use of intoxicating liquor so as to impair the person's ability to drive an automobile in the manner that an ordinarily prudent and cautious person in full possession of his faculties would operate a similar vehicle under like conditions.

“If you find from a preponderance of the evidence in this case that the plaintiff, while driving his car immediately before and at the time of said

accident, was under the influence of intoxicating liquor as hereinbefore defined, then he was guilty of negligence as a matter of law, and if you further find from a preponderance of the evidence that his condition was the sole or proximate contributing cause of the collision with defendant's truck, then plaintiff cannot recover and your verdict must be for the defendant.''

Plaintiff excepted to the court's Instruction No. 5 and the whole thereof on the ground that there was insufficient evidence to show that the plaintiff was under the influence of liquor at the time of the accident in any extent or to the extent that it affected his operation of his vehicle. Plaintiff further excepted to the last paragraph of Instruction No. 5 and the particularly the part thereof which stated that plaintiff was guilty of negligence as a matter of law for the reason that such instruction was against the law and not applicable to the evidence (R. 368-369).

Plaintiff also excepted to the court's failure and refusal to give Plaintiff's Requested Instruction No. 1 to the effect that they should disregard the evidence in the case pertaining to the consumption of beer by the plaintiff as being immaterial.

We submit that the evidence being devoid of anything tending to show that the plaintiff was under the influence of liquor as he operated his vehicle immediately prior to and at the time of impact, the court was not justified in submitting that issue to the jury for their consideration. The burden was upon the defendant to show as a matter

of defense that the plaintiff was guilty of contributory negligence through being under the influence of liquor, and that such negligence contributed to or proximately caused the accident. Certainly that burden was not discharged by the defendant when the two eye witnesses to the accident, the defendant's truck driver and his passenger, both of whom were defendant's witnesses, testified that the plaintiff approached the scene of the collision in a normal manner. The defendant's truck driver who testified for the defendant and who held the plaintiff's head in his lap, was in a better position perhaps than anyone to determine whether he was under the influence of liquor. He did not testify that Plaintiff was intoxicated, but on the contrary stated that he did not know whether the plaintiff had been drinking or not. It is true that Dr. L. V. Broadbent testifying on behalf of the defendant said that some two hours after the accident he was of the opinion that the plaintiff was intoxicated. He however admitted that when he saw the patient, he had a rapid thready pulse which indicated a profound degree of shock from acute blood loss; that his arm was dangling by a piece of muscle only, and that he was not prepared to say that the plaintiff was definitely under the influence of intoxicating liquor. He admitted that in a measure the symptoms presented by the plaintiff could be explained by the severe shock and that during the course of the night the plaintiff had been given numerous drugs and sedatives. The doctor, reminded of his previous deposition, acknowledged that he testified under oath previously that he didn't see evidence of intoxication, and couldn't say that the plaintiff had consumed alcoholic beverage prior

to the time he saw him (R. 295), nor should any weight be given to the testimony of the nurse, Phyllis Nelson, who was willing to state that she was of the opinion that the plaintiff was intoxicated because there was the odor of liquor upon the patient's breath.

We submit that the best evidence relative to the point of impact appears on Exhibit G which shows that the tire burns started very clearly on the plaintiff's side of the highway near the narrow bridge, and this evidence was corroborated by one of the highway patrolmen, Mr. Pearce, and by the witness Atherly. Such evidence provides a convincing and conclusive answer and repudiation of defendant's truck driver who told Officer Pearce that he thought he was on his side of the road. Again the physical evidence clearly corroborates the testimony of the plaintiff to the effect that the truck was overlapping the center of the road and that when the lights were dimmed of the two vehicles, and the bridge came into view, he was presented with the alternative of either almost certain death by striking the wash or hitting the concrete abutment, or taking the chance of squeezing through between the truck and the bridge hoping that the truck would yield sufficiently to allow him to go through. The plaintiff's version of the approach of the two vehicles to the point of impact was further corroborated by the testimony of the defendant's truck driver to the effect that the plaintiff's Ford turned toward him just a moment before the impact. We submit that the decision made by the plaintiff and the course which he took were the decision and course of a sober man. The plaintiff's conduct seemed

far more reasonable than that of the defendant's truck driver who acknowledged that he maintained his heavily loaded truck on an unaltered course, even after the plaintiff turned his vehicle toward him. Yet if the defendant's truck driver had swerved his vehicle or moved it six more inches to the right—and he had ample room to do it on the highway—there would have been no collision. We feel compelled to inquire, who acted the more reasonably under the circumstances: the driver of the heavily loaded truck, overlapping the center of the highway who refused to alter the course of his vehicle one iota to make room at the narrow bridge, or the plaintiff who took the only course that justified a reasonable hope that the tragedy might be averted. The vital matter for the jury to have determined in this case was not whether the plaintiff acted in an unseemly manner in Cedar City in the early evening preceding the accident, and failed to cooperate with the doctor and the nurse hours after the accident in the hospital when they were cutting off his arm, sewing up his head, and attempting to do something for a leg injured beyond repair. Their clear duty was to determine from the evidence this issue: Who encroached upon the other man's side of the road at the narrow bridge. They were not assisted in arriving at that ultimate truth by anything other than the conduct of the operators of the two vehicles involved immediately prior to and at the scene of the collision, and by the physical evidence, most persuasive of which was the tire burn clearly shown on the photograph, Exhibit G. The jury's minds were diverted from these vital considerations by the invitation of the court to find against the plaintiff, if they thought that

the plaintiff was intoxicated and that his intoxication was a proximate or contributing cause of the accident, without regard to the dearth of evidence in the record to sustain such a finding.

Point II. The plaintiff was entitled to have his case submitted to the jury upon the theory of his evidence as well as upon the theory of the whole evidence.

In this case, in its Instruction No. 5, the court submitted the issue of intoxication to the jury from the defendant's standpoint only. In the instruction, they were told that if they found from a preponderance of the evidence that the plaintiff while driving his car immediately before and at the time of the accident was under the influence of intoxicating liquor, that he was guilty of negligence as a matter of law; and if they further found that his condition was the sole cause or a proximate contributing cause of the collision with defendant's truck, then plaintiff could not recover and their verdict must be for the defendant. At no place in its instructions did the court give the converse which would permit and instruct the jury to disregard the evidence of intoxication if they should find such intoxication was not a proximate or contributing cause of the accident. The plaintiff requested the court to so instruct the jury in its requested instruction No. 3, which instruction the court refused (R. 408). To this failure of the court, the plaintiff took an exception (R. 369). The principle involved in this point is a familiar one to this court, and it has made many pronouncements upon it.

In the case of *Morgan v. Bingham States Line Company* 75 Utah 87, 283 P. 160, the court gave a general instruction on contributory negligence, as in the case at bar, the court gave a general instruction on intoxicating liquor. The defendant's request for a special instruction on contributory negligence was refused. The court said at page 105 of the Utah Reports:

“A party is entitled to have his case submitted to the jury on the theory of his evidence as well as upon the theory of the whole evidence. *Toone v. O'Neill Const. Co.*, 40 Utah 265, 121 P. 10; *Hartley v. Salt Lake City*, 41 Utah 121, 124 P. 522, 523, and *Miller v. Utah Consol. M. Co. et al.*, 53 Utah 366, 178 P. 771; *Pratt v. Utah Light and Traction Co.*, 57 Utah 7, 169 P. 868.

The following language of Mr. Justice Straup in the case of *Hartley v. Salt Lake City*, supra, is peculiarly applicable here: “There are two parties to a law suit. Each on a submission of the case to the jury is entitled to a submission of it on his theory and the law in respect thereof. The defendant's theory as to the cause of the accident is embodied in the proposed requests. There is some evidence as we have shown to render them applicable to the case. That is not disputed. We think the court's refusal to charge substantially as requested was error. That the ruling was prejudicial and works a reversal of the judgment is self-evident and unavoidable.” . . .

While the requests are not models of accuracy, we think the defendants were entitled to have at least the substance of the same given so as to present their theory of the evidence to the jury, and that a failure on the part of the court to do so was prejudicial error.”

The foregoing principle is reasserted in *Webb v. Snow* 102 Utah 435 at page 448, *Pratt v. Utah Light and Traction Company* 57 Utah 7 at Page 10.

We quote from *Morrison v. Parry*, 104 Utah 151, 140 P. 2d 772, at Page 162 Utah Reports:

Defendant's theory which was supported by the evidence that the deceased, by driving on the left-hand side of the highway and his failure to turn to his right side in time to avoid creating an emergency would create an emergency through no fault of his. The court failed to properly separate the theories of the parties but instead gave general instructions treating the rights and the duties etc."

The case of *Metropolitan Life v. Adams*, 37 Atlantic 2d 345 holds as follows:

"A party to a cause of action is entitled to have his theory submitted to the jury where supported by the evidence and the pleading and this makes it the duty of the court to submit all such issues both affirmative and negative."

It is stated in *Bjork v. U. S. Bobbin and Shuttle Company*, (NH) 111 Atlantic 284:

"While it has been held that if the jury are instructed in general terms as to the law applicable to the case, failure to instruct upon request as to the effect of particular evidence is not error, it is now considered that the fairness of a trial requires that the judge shall inform the jury what the law is in its application to the case when a proper request is made."

To the same effect are the following: *Jennings v. Cooper*, (Missouri) 230 SW 325; *Hurt v. Jurczcht*,

(Illinois) 57 NE 2d 230; *Atlantic Coast Line Railroad Company v. Shouse*, (Florida) 91 South 90; 14 R.C.L. Section 58, page 799; *State v. McKay* (Missouri) 30 SW 2d 83; *Equitable Life v. Green*, (Kentucky) 83 SW 2d 478; *Southern Pacific Company v. Stevens*, (NM) 298 Pacific 661; *Nonnamaker v. Kay County Gas Company*, (Okla.) 253 Pacific 296; *Alexion v. Nockas*, (Wash.) 17 P. 2d 911; *Jackson v. Farmers Union Livestock Commission*, (Missouri) 181 SW 2d 211; *Richards v. Parks*, (Tenn.) 93 SW 2d 639; *Texas Employers Insurance Association v. Patterson*, (Texas) 192 SW 2d 255; *Slater v. United Fuel Gas Company* (West Virginia) 27 SE 2d 436; *Herstein v. Kemker*, (Tenn.) 94 SW 2d 76 at page 88; *Yellow Cab Co. v. Sanders*, (N. Carolina) 27 SE 2d 631.

Again there was evidence in this case on the part of the truck driver and his passenger to the effect that the truck pursued a straight course, and did not at any time turn one iota to the right to make more room for plaintiff at the narrow bridge. The defendant's duty to do so was emphasized by plaintiff's theory that defendant was encroaching upon plaintiff's side of the road at the narrow bridge. We therefore think that it was clearly error for the court to refuse to give Plaintiff's Requested Instruction No. 6 which was not otherwise covered by any instruction which the court gave. That instruction is as follows:

You are hereby instructed that if you shall find and believe from a preponderance of the evidence that as the vehicles involved in this accident approached each other prior to the impact, the

plaintiff's vehicle turned to avoid striking the bridge or the wash near the point of impact, and in so doing the plaintiff acted reasonably and exercised ordinary care under the circumstances, and if you shall further find that the defendant observed the plaintiff so alter the course of his automobile, or if you shall find that in the exercise of ordinary care the defendant should have seen the plaintiff so alter the course of his automobile, and if you shall further find that the defendant had a reasonable opportunity thereafter in the exercise of ordinary care to avoid colliding with the plaintiff's automobile, by turning to the right without endangering the safety of the occupants of defendant's truck, and if you shall find that the defendant failed to avail itself of such opportunity, but continued straight ahead on an unaltered course, and that such conduct on the part of the defendant was the proximate cause of the accident, then you must find the issues in favor of the plaintiff and against the defendant, unless you shall also find that the plaintiff was guilty of contributory negligence.

To the failure of the court to grant this requested instruction, the plaintiff duly excepted (R. 369).

There is ample evidence in the record to support plaintiff's theory of the case as embodied in plaintiff's Requested Instruction No. 6. There was evidence that the defendant not only was encroaching upon plaintiff's side of the road at the narrow bridge, but also that the defendant failed to move over, although he had plenty of room and opportunity to do so.

That the court committed prejudicial error in refusing to give plaintiff's Requested Instruction No. 3 and

plaintiff's Requested Instruction No. 6, is clearly established by the foregoing authorities.

Point III. The plaintiff was deprived of a fair and impartial trial by the improper admission of evidence that was calculated to inflame and confuse the jury, and stifle their minds with prejudice and hatred toward the plaintiff.

The record discloses that plaintiff was suffering from a partial amnesia which disabled him from remembering any of the events which transpired in Cedar City prior to the collision, as well as any events that occurred at the hospital at Cedar City (R. 61-62-63, 76-77).

Dr. Milligan testifying on behalf of the plaintiff stated that plaintiff had sustained a concussion of the brain (R. 27), as a result of the blow on his temple which had been sutured. He stated that the blow to the head was moderately severe (R. 18). He also stated that an injury to the head can cause loss of memory for events immediately preceding the accident, and that any degree of loss of memory is possible from a head injury; that the head injury could cause loss of memory over a certain period of time immediately preceding the injury except for things that may have made an extremely strong impression (R. 21). The doctor further stated that it is probable that plaintiff could remember events which struck him forcefully, and would not remember events that did not strike him forcefully; that shock could be of sufficient degree to erase minor impressions in the brain

and leave strong ones, or could be of sufficient severity to erase them all (R. 26).

Over the objection of the plaintiff that the testimony sought to be elicited was remote, the court permitted the witness Jack Scott to testify concerning an incident, wherein the plaintiff addressed a Mr. Tuckett thusly: "Hi, Stupid" and made threatening gestures with a 22 rifle to the witness Tuckett.

Again over the objection of plaintiff, Dr. L. V. Broadbent was permitted to give repetitious testimony about the very belligerent, obstreperous behavior of the plaintiff, and about his use of profane language (R. 297-298).

Again over the objection of the plaintiff, the nurse, Phyllis Nelson was permitted to testify that the plaintiff was profane, belligerent and uncooperative in every way while he was being treated at the hospital after the accident (R. 353). Again the witness was permitted to state:

- A. Well, he didn't appreciate what was being done for him, and he was using abusive language and it was hard for us to handle him."

Counsel for the plaintiff moved that this statement be stricken on the ground that it was repetitious, and the court permitted the answer to stand (R. 354).

It must be remembered in this connection that all the evidence paraded before the jury by the defendant as to the proceedings of the plaintiff in Cedar City prior to the

time of the accident and, subsequently in the hospital where he was undergoing treatment, was not, and could not have been, disputed by the plaintiff by reason of his loss of memory due to the blow on his head. The evidence that plaintiff made threatening gestures, for instance, with his gun to the alarm of the witnesses Tucket and Jack Scott was not offered for the purpose of showing that he was intoxicated, as Scott had already described his behavior at some length prior to that time, but such evidence was presented to the jury for the sole purpose of inflaming their minds against the plaintiff. Again testimony was elicited from the doctor and the nurse while the plaintiff was being treated in the hospital, relative to his profaning and belligerency some two hours after the accident had occurred, not for the purpose of showing that the plaintiff was intoxicated, but for the purpose of arousing the prejudice and hatred of the jury. Considering the condition of the plaintiff in the hospital with his arm hanging by a ribbon of muscle, a gash in his temple, his body almost completely exsanguinated, his right leg in a condition of rigor mortis and the patient loaded with sedatives and on the verge of death, considering that he was finally brought to the hospital after spending an hour to an hour and a half without medical attention on the side of the road, within 7 miles of a town, certainly, the plaintiff was entitled to be irritable. We think it was going a long way for the court to permit the matter of his profaning and his belligerency to be submitted to the jury, on the pretense that such showed intoxication, particularly after the doctor had testified that

his behavior could be attributed to the severity of his injuries and his condition of shock, and particularly after the doctor had acknowledged that he had previously testified under oath that he could not say that the plaintiff was intoxicated. We do not perceive in what manner the threatening of a couple of businessmen in Cedar City with a gun, if such thing actually did happen, at 5:30 in the evening, could have any probative value to assist the jury in determining whether the defendant's truck encroached upon the plaintiff's side of the road at the narrow bridge at 10:00 o'clock in the evening; nor can we perceive how the matter of his profaning in the Cedar City Hospital some two hours after the collision could throw any light upon the issues which the jury were called upon to determine. The conclusion is therefore inescapable that this testimony was calculated to arouse the passion and hatred of the jury toward the plaintiff and to render him despicable in their minds.

It is stated in *31 Corpus Juris Secundum*, Page 877, Section 166 that evidence which tends to prove facts which are admitted or are not controverted will be more readily excluded where if admitted it would probably prejudice and mislead the jury.

Again in the case of *Floyd v. Federal Union Casualty Company*, (Texas) 39 SW 2d 1091 at Page 1093 appears the following:

“The fact of his leaving and the alleged cause thereof was not evidence, and it would have been

improper to have injected into the case sordid details to distract the attention of the jury which should be concentrated on vital points and could only have the effect of wasting the time of the court. The court should refuse to permit its introduction, particularly when the testimony which is challenged as irrelevant is such as to arouse the sympathy of the jurors, or is calculated to create prejudice—the point sought to be proved having already been established—and is offered as being merely corroborative. *Stallings v. Hullman* 79 (Texas) 421 15 SW 677; 2 Jones On Evidence, Second Edition, Sec. 588, 22 Corpus Juris 169.”

In the case at bar the plaintiff was entitled to have the jury pass upon matters which related to the incidents which occurred at the narrow bridge on the Buckhorn Flat at the time of the collision. The court should not have permitted the juror’s minds to be cluttered up, confused and corroded by the events related by the witness Jack Scott and by the alleged profanity which occurred in the hospital. To borrow the thought of Mr. Justice Straup expressed in the Johnson case, *supra*, we should not consider any kind of a trial good enough for plaintiff, just because he had the odor of liquor on his breath.

Point IV. The court erred in failing to grant Plaintiff’s motion for a new trial.

That the court erred in denying plaintiff’s motion for a new trial is apparent from the discussion under the previous points.

CONCLUSION

We respectfully and earnestly conclude that by reason of matters set forth in this brief the plaintiff was deprived of a fair trial, and the judgment of the lower court should be reversed.

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