

1952

# Ronald Ralph Olsen v. Sheldon T. Warwood et al : Brief of Plaintiff and Appellant

Utah Supreme Court

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# In the Supreme Court of the State of Utah

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RONALD RALPH OLSEN by his  
Guardian Ad Litem, Ralph E. Olsen,  
Plaintiff and Appellant,

vs.

SHELDON T. WARWOOD, BOARD  
OF EDUCATION OF THE ALPINE  
SCHOOL DISTRICT, a Body Corpo-  
rate; CLIFTON R. CLARK, CLAR-  
ENCE D. ASHTON, VICTOR C. AN-  
DERSON, THOMAS POWERS, and  
THOMAS A. BARRATT, Members of  
the Board of Education of the Alpine  
School District, a Body Corporate,  
Defendants and Respondents.

**CASE  
NO. 7789**

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## BRIEF OF PLAINTIFF AND APPELLANT

Appealed from the District Court of Utah County  
Hon. William Stanley Dunford, Judge

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and

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and Respondent

J. RULON MORGAN

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and THOMAS A. BARRATT, Members of  
the Board of Education of the Alpine  
School District, a Body Corporate,  
Defendants and Respondents.

**CASE  
NO. 7789**

---

## BRIEF OF PLAINTIFF AND APPELLANT

---

### STATEMENT OF CASE

Plaintiff brought this action against the defendants to recover a judgment against the defendants because of personal injuries sustained by the plaintiff being run over by

a school bus owned by the Board of Education of the Alpine School District and operated by the defendant, Sheldon T. Warwood. The injury occurred on February 17, 1949, at about 12:30 p.m. about four miles north of Provo, Utah County, Utah, as or just after the plaintiff alighted from a school bus belonging to the defendant school district.

There is no conflict in the evidence as to the existence of the following facts:

At the time involved in this litigation the Board of Education of the Alpine School District owned and operated a school bus which was used to transport school pupils to and from school (Tr. 128); On February 17th, 1949, just after 12:00 o'clock noon, the defendant Sheldon T. Warwood, who was employed to operate one of the school buses of the defendant Board of Education, pursuant to his duty called at the Page or Edgemont School and there took on a bus load of six-year-old school children, among whom was the plaintiff in this action (Tr. 58, 83, 138).

The defendant, Sheldon T. Warwood, stopped the bus near the Edgemont Church for the purpose of permitting some of the children, including the plaintiff, to get off the bus. Immediately after the plaintiff alighted from the bus he was run over by the rear dual wheels of the bus and sustained very serious injuries which left him in the hospital for 19 days and confined him in bed until the later part of May, or more than three months (Tr. 111). The nature and extent of the injury sustained by the plaintiff was described in detail by one of the attending doctors. A number of X-rays were taken of the injuries which were received in evidence (Tr. 7 to 21).



There is a conflict in the evidence as to the exact location and condition of the place where the plaintiff was injured, and also as to the facts and circumstances that existed immediately before he was injured.

Plaintiff called as witnesses two of the children who were on the bus and who claimed that they saw how the plaintiff was injured. One of such witnesses was the plaintiff and the other was Marjorie Ferguson, both of whom were six years old at the time in question and both of whom were examined by the court as to their competency to testify. The examinations made by the court as to competency of the plaintiff to testify will be found in Tr. 53-57. The examination of the court as to the competency of the witness, Marjorie Ferguson to testify will be found in Tr. 77 to 81. To enable this Court to pass upon what plaintiff claims was prejudicial error in giving certain instructions to the jury, it will be necessary for the Court to have in mind the evidence touching the manner in which it is claimed by the parties that the injury to the plaintiff was brought about.

The plaintiff, in substance, testified:

That on February 17, 1949, about five minutes after 12 oclock noon, the defendant picked up the plaintiff and other children to take them home. That the bus arrived at the Edgemont Church about 12:30; that Mr. Warwood was in the front of the bus on the left hand side driving the bus (Tr. 58); that at the time plaintiff got out of the bus there were three or four children on the bus, including the plaintiff (Tr. 59); that before the plaintiff went to get off he was sitting on the bus right behind the driver; that Marjorie Ferguson was sitting on the right hand side near the front (Tr. 60); that the day he was hurt the bus stopped in front of the Edgemont Church; that there was snow on



the ground; that when Mr. Warwood stopped the bus at the church he said, "Hurry and get out, I have got some more kids to pick up today." That when the bus stopped Lewis got out and then Shirley got out, and then I went to get out. While I was getting a good footing he took off (Tr. 61). But he had only one foot out when he took off and "I spun around and flew under the bus, and then I tried to get out from under it."

Q. "Well how did you try to get out from under it?"

A. "Dig my heels in the ice and push myself out."

Q. "Then what happened as you were pushing yourself to get out from under the bus?"

A. "The wheels passed over me."

Q. "Which wheels?"

A. "The dual wheels on the back."

That Mr Warwood picked him up and put him in the bus after he was run over (Tr. 62). That when he got home Warwood carried him in the house and when he took him in the house his mother was there and Mr. Warwood stated to his mother that the child had been hit by the bus and "I told you kids to stay away from the bus," and mother said, in substance, "Well, I don't think that it is necessary to discuss that right now, I think the important thing is to contact his father and get an appointment with the doctor (Tr. 64 and 74). On cross-examination he testified that at the time he was injured he was not running towards the bus and trying to catch hold of the side of it (Tr. 75).

Marjorie Ferguson was called as a witness by the plaintiff, and testified in part as follows: That she remembers the day that plaintiff was hurt; that Mr. Warwood stopped in front of the Edgemont Church to let plaintiff out (Tr.

85). But when he stopped Mr. Warwood said something like this, "Hurry and get off here, I have other loads to get or other children to pick up, or something like that, I don't remember." That Shirley Cluff got off first, and then Louis Ivie and then Ronny (plaintiff). That she was sitting by the railing at the first seat from the door where you go out; that she could see the steps that are used in going out of the bus from where she sat; that she saw Ronny (plaintiff) as he was leaving the bus; that he wasn't completely off the step when Mr. Warwood started up; that she saw him grab for the bus, I guess brace himself to pull his other leg out, but the bus started up and such a jolt I guess he didn't quite have time and the bus run over him (Tr. 86). That she saw him lying on the ground after the bus run over him (Tr. 87); that when she saw Ronny (plaintiff) fall she said, "Oh, there is Ronny"; that she felt a bump after the bus started up, "I said what was that?" and Mr. Warwood said, "I don't know," and then she poked her head out of the window and saw plaintiff lying on the ice and snow (Tr. 88). Marjorie Ferguson was recalled and testified that on the day that the plaintiff was injured the snow where the bus stopped was higher than me, and that the snow bank was a little bit farther than the length of her arm from the bus door (Tr. 102). The plaintiff was also recalled and testified that where he got off the bus the snow was about 30 inches high (Tr. 104) and that the snow bank was about the length of his arm from the bus (Tr. 105).

Ralph E. Olsen, the guardian ad litem of the plaintiff, testified that he went to the place where the plaintiff was injured on the night of the day that he was injured. That the snow had been pushed back from the highway and was

so high that you couldn't stand and jump over it in lots of places (Tr. 24). That there was a raise of a foot or ten inches; that the snow was a good two feet deep in front of the Leo Hansen property (Tr. 27). That in front of the church the snow was about 15 inches high built up against the fence (Tr. 28).

The defendant, Sheldon T. Warwood, testified in part as follows: That on February 17th, 1949, a little after 12 o'clock, he picked up some children at the Edgemont school, among them the plaintiff. That he stopped at Stubbs Lane where he let Ronald and the other two, the boy and the girl, out, that the snow at the Stubbs Lane had been pushed back so the people could go up that road (Tr. 138). That he told the children to get clear of the bus; that he opened the door for the children to get out and they were standing a good five feet away from the bus when he closed the door to start up again; that as he turned to go out on the highway he looked through the side view mirror to see if there was any oncoming traffic. When he did so he could see somebody laying on the ground; at that time I thought they was fighting, when kids start fighting we try to stop them. That there was the boy and girl standing there by him; that he stopped the bus and went to where the plaintiff was laying and picked him up and carried him to the bus and took him home; that when he picked plaintiff up, he said the bus ran over him (Tr. 140). Mr. Warwood denied that he reprimanded the plaintiff, as testified to by his mother (Tr. 179).

The evidence further shows that the bus that was being driven by the defendant Warwood at the time plaintiff was injured was 29 feet 5 inches long. It was painted yellow; it is a full 7 feet 10 inches wide, the sides are 18 inches

and the lower step used in going in and out of the bus is 12 inches from the ground (Tr. 155). A number of photographs which defendant Warwood claims to have taken of the place where the accident occurred on Feb. 20, after the accident were offered and received in evidence, as were also a number of pictures of the bus that was being used at the time the plaintiff was injured.

Shirley Cluff, a witness, called by the defendant, testified in part as follows:

Q. "Do you recall the day that Ronny Olsen was hurt by the bus?"

A. "I know that he was hurt, but I can't remember, hardly."

Q. "What can you remember about it?"

A. "I can remember the winter that the bus stopped by the church and I was way up there after he got run over." (Tr. 187).

Over objection of counsel for the plaintiff, counsel for the defendant was permitted to ask these questions on the claim that he was seeking to refresh her recollection (Tr. 189).

Q. "Now I want you to listen right close because what I am going to do right now is ask you as near as I can what I asked you then when you were home with your mother, and then I am going to repeat the answers that were taken down, as near as I can. Do you remember whether or not I asked you this? 'Shirley'—speaking to you that time, 'you didn't see him before the bus ran over him?' Now I am talking about Ronny. Now did you see him before the bus ran over him?' " (Witness shakes head).

Q. "Your answer is no to that?" (Witness nods head).

Q. "And then your answer to that, you said no, and then do you remember me asking you this question here: 'Was he holding onto the bus or trying to get hold of the bus?' and then you answered 'No, he was running towards it.' Do you remember telling me that he was running towards the bus just before the accident happened?"

A. "A huh uh."

Q. "And do you remember me asking you again—running towards the bus?"

A. "Yes."

Q. "And then I asked you this question, 'Do you know where he was running towards it?' and your answer 'No, he used to just hold it to slide and just slide along with it.' Do you remember telling me that? that he used to just hold it and slide?"

A. "Uh huh."

Q. "Your answer is yes to that?" (Witness nods head).

MR. HANSEN: May it please Your Honor, I don't know whether she really understands me here or not."

Q. "Had you seen Ronny hold onto the bus before and slide along with it when it started out?"

A. "I don't know whether he did, but there were some other kids done that" (Tr. 190).

On cross-examination, she testified that she did not see Ronny hanging onto the back of the bus the day he was hurt; that when she got off the bus she walked to the front of the bus and that she didn't go back to where Ronny was hurt (Tr. 192).

We, of course, are mindful that it is not the province of this Court in this case to pass upon the weight that should

be given the evidence, and we have cited the foregoing testimony for the purpose of directing the attention of the Court to the testimony (viewed most favorably to the defendant) upon which the trial court gave certain instructions to the jury which we contend were erroneous and prejudicial to the plaintiff.

The plaintiff seeks a reversal of the judgment appealed from and the order refusing to grant plaintiff a new trial upon the following grounds:

### **POINT ONE**

THE TRIAL COURT ERRED IN REFUSING TO GIVE TO THE JURY PLAINTIFF'S REQUEST NUMBERED 1 (R. 72 and 199) AND IN GIVING IN LIEU THEREOF INSTRUCTIONS NOS. 4 AND 5 (R. 90 and 91).

### **POINT TWO**

THE TRIAL COURT ERRED IN GIVING THAT PART OF INSTRUCTION NUMBERED 7 WHEREIN THE JURY WAS INSTRUCTED THAT "IN OTHER WORDS, YOU CANNOT RETURN A VERDICT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT UNLESS THE NUMBER OF JURORS REQUIRED TO REACH A VERDICT AGREE UPON THE SAME ACT OR UPON THE SAME FAILURE OR FAILURES TO ACT." (R. 201-202 and 225).

### **POINT THREE**

THE TRIAL COURT ERRED IN GIVING TO THE JURY THAT PART OF INSTRUCTION NUMBERED 9 WHEREIN THE JURY WAS INSTRUCTED THAT "IF,



THEREFORE YOU FIND FROM THE EVIDENCE THAT AFTER THE PLAINTIFF RONALD OLSEN AND THE OTHER CHILDREN HAD BEEN DISCHARGED FROM SAID VEHICLE AND THAT THEREAFTER WHEN SAID VEHICLE STARTED IN MOTION RONALD OLSEN RAN TOWARDS THE SIDE OF THE BUS NEAR THE RIGHT WHEEL AT A TIME AND IN A PLACE WHERE DEFENDANT COULD NOT SEE HIM——” (R. 202-204 and 224).

#### POINT FOUR

THE TRIAL COURT ERRED IN GIVING ITS INSTRUCTION NUMBERED 11 (R 204 and 226).

#### ARGUMENT

##### POINT ONE

Plaintiff requested the trial court to include in its instructions to the jury the following:

“You are instructed, members of the jury, that it was the duty of the defendant to exercise a high degree of care to enable the plaintiff to alight and get from the bus in safety. The degree of care required is such as a very prudent, careful and competent person would exercise under similar circumstances. A failure to exercise such care constitutes negligence” (R. 72).

In lieu of the requested instruction the court instructed the jury that the defendant was required to use such care as a reasonable and prudent person would use under like conditions and circumstances (Instruction No. 9, R. 94-95).



There is some conflict in the authorities as to the degree of care that is required of the driver of a school bus. Some of the cases hold that the driver of a school bus is a private carrier and as such is required to use only ordinary care. Such is the holding of the District Court of Appeals of California. *Shannon et al v. Central Gaither Union School District*, 23 Pac. (2d) 769. *Foster v. Elmer*, 158 Pac. (2d) 978. So far as we are able to ascertain, the question has not been decided by the Supreme Court of California..

On the other hand, it is held by the Supreme Court of Washington in the case of *Phillips v. Hardgrove et al*, 161 Wash. 121; 296 Pac. 559, that upon grounds of public policy and in conformity with principles of law applicable to common carriers and to operators of elevators that the operator of a school bus is required to exercise the highest degree of care. In the Washington case just cited, the court quotes at some length from other cases from Washington and from the Supreme Court of the United States wherein it is held that a common carrier of passengers is held to the highest degree of care consistent with the practical operation of the means of transportation being used.

Some of the cases dealing with the question of the degree of care required of the driver of a school bus seem to take a somewhat middle ground. For example, in the case of *Burnett v. Allen*, 114 Fla. 489; 154 So. 515, it is said that the driver of a school bus is required "to use every reasonable precaution and care for the safety of such children as to prevent any harm or danger to them." While such language is not the same as that sanctioned by the authorities in instructing a jury as to the degree of care required of a common carrier, the effect thereof is substantially the

same. It is, of course, the general rule that greater care is required where children of tender years are involved than in the case of adults.

It will be noted that in the instructions given in this case, the court merely instructed the jury that they could, among other matters, take into consideration the age of the children. Such instruction, however, did not enlighten the jury as to what, if any, additional care the driver of the bus was required to take because the children he was transporting were only six years of age

The law is well settled that a common carrier of passengers is required to use a high degree of care for the safety of its passengers. The degree of care has been variously expressed as "a high degree of care," "the highest degree of care, prudence and foresight the greatest possible care and diligence," "the utmost care and diligence," "extraordinary care and caution." See 13 C. J. S. Sec. 678, pp. 1255-56, and cases there cited.

This Court is committed to such doctrine. *Taylor v. Bamberger Electric R. Co.*, 62 Utah 552; 220 Pac. 695. *Christensen v. Oregon Short Line R. Co.*, 35 Utah 137; 99 Pac. 676. The same doctrine is thus stated in 10 Am. Jur., page 163, Sec. 1245:

"In general, however, carriers of passengers are required to exercise the highest degree of care, vigilance and precaution for the safety of those it undertakes to transport, and is liable for the slightest negligence."

Numerous cases which support the text are collected in foot notes to the text above quoted. The same degree of care required of common carriers is required of the op-

erators of elevators. 13 C. J. S., page 1270, Sec. 687, and cases there cited. It is there said:

“While the owner of a passenger elevator operated in a building for carrying persons up and down may not be a carrier of passengers in the sense that he is bound to serve the public, yet his duty as to protecting the passengers in his elevator from danger is the same as that applicable to common carriers of passengers by other means, and he is bound to do all that human care, negligence and foresight can reasonably suggest under the circumstances and in view of the character of the mode of conveyance adopted, to guard against accident and injuries resulting therefrom and a failure in this respect will constitute negligence rendering him liable.” See also 13 C. J. S., page 1386, Sec. 734.

We have a statute 1943, 75-7-24, which provides that:

“The minimum uniform educational program to be provided in the various districts of the state shall include a school term of nine months; the employment of legally certified teachers; the transportation to and from school of all pupils living more than two and one-half miles from school, or provision towards such transportation of an amount equal to the allowance thereafter made for the apportionment of the equalization fund.”

Provision is made in U. C. A., 1943, 75-7-27, for payment out of taxes the expenses of transporting children to and from school.

While we do not contend and in our objections to the refusal of the court to give the requested instruction touching the degree of care required of the driver of a school bus, we did not claim that the operator of a school bus is

a common carrier within the meaning of our Public Utilities Act (U. C. A., 1943, 76-4-25). We do most earnestly contend that every reason that has prompted the courts to require common carriers to exercise a very high degree of care in transporting passengers is applicable to the driver of a school bus that is engaged in carrying children six years of age to and from school.

The fact that a school bus is not a common carrier certainly does not justify the conclusion reached by some courts that it is a private carrier. The principal distinction between a common carrier and a private carrier is that the former holds himself out as being willing to carry all who apply, while a private carrier is one who does not so hold himself out, but undertakes to render service pursuant to a special contract between the carrier and the person desiring the service. Generally the degree of care required of the two is not the same, although some authorities require the highest degree of care and skill for the safety of a passenger from a private carrier. *Mahony v. Kansas City R. Co.*, 254 S. W. 16; 286 Mo. 601; 228 S. W. 821.

The primary basis for distinguishing between the degree of care required of a common carrier and a private carrier seems to be that the former having held himself out as being able and willing to render service to all who apply, by such holding out, the law, on grounds of public policy requires such carrier to use the highest degree of care. The person who seeks the services of a public or common carrier may rely upon the fact that being a common or public carrier he has a right to demand the highest degree of care without the necessity of either making an investigation to ascertain whether or not such a carrier is competent or

entering into a contract that such carrier will use the highest degree of care.

On the other hand, one who employs a private carrier has it within his power and it is his responsibility to employ whomsoever he may choose and to enter into a contract requiring the degree of care required of a common carrier or requiring the private carrier to insure safe transportation or requiring the carrier merely to use ordinary care. A child who is required by law to attend school, who has no choice as to how or by whom he is to be transported to and from school and who is being transported by one who is paid with money received from taxation is in no sense a private carrier. On the contrary, every reason that can be advanced to support the doctrine that a common carrier of passengers should be and is held to the highest degree of care applies to the operator of a school bus. Indeed, the reasons that might be advanced for requiring the highest degree of care of the driver of a school bus are stronger and more in harmony with public policy than those which require such degree of care on behalf of a common carrier. A six-year-old school child has no choice as to the one who is his transporter to and from school. He or his parents is indirectly compelled to pay for such service whether he uses it or not. No such requirement is exacted on behalf of a common carrier.

The driver of a school bus under the laws of Utah, while not compelled to transport all persons who present themselves, is by law required to transport all children who fall within the class designated by the law. Unlike a private carrier, he cannot carry only those children he chooses to carry. Nor may the Board of Education lawfully transport some children and refuse to transport other children.

similarly situated. A school board must treat all children similarly situated alike. While a school bus is not a common carrier, it is certainly a public, as distinguished from a private carrier, and every principle of public policy that requires the exercise of the highest degree of care by a common carrier applies to the operator of a school bus.

## POINT TWO

THE TRIAL COURT ERRED IN GIVING THAT PART OF INSTRUCTION NUMBER 7 WHEREIN HE INSTRUCTED THE JURY THAT "IN OTHER WORDS, YOU CANNOT RETURN A VERDICT IN FAVOR OF THE PLAINTIFF AND AGAINST THE DEFENDANT UNLESS THE NUMBER OF JURORS REQUIRED TO REACH A VERDICT AGREE UPON THE SAME ACT OR ACTS, OR UPON THE SAME FAILURE TO ACT (Tr. 92-93).

The plaintiff objected to the foregoing Instruction because it is not the law as applied to the evidence in this case (Tr. 207).

As we understand the foregoing Instruction, it means that if three of the jurors found that the defendant was negligent because he did not give the plaintiff sufficient time to get off the bus before starting the same and two found that the defendant was negligent because the defendant stopped the bus too near the fence and snow in front of the church and the other four jurors found that neither starting of the bus or the stopping it before the snow piled up at the church was sufficient to bring about the injury complained of but it required the operation of the two acts to cause the injury to the plaintiff, then and



under such a state of facts a verdict must be rendered for the defendant. We confess that we have never heard of such an instruction having been approved and in our somewhat limited search we have not been able to find an authority so holding.

We have found cases such as *Sportman vs. Wabash R. Co.*, 177 S. W. 703, 191 Mo. App. 463, where it is held that where there are two acts of negligence charged, one of which renders the defendant liable and the other does not, the jury must find in favor of the plaintiff on the negligence properly chargeable against the defendant to sustain a verdict. We also find that in such cases as *Sessions vs. Pacific Improvement Co., et al*, 206 Pac. 653, and *Merrill vs. Kohlberg*, 155 Pac. 824, that where two counts are alleged a general verdict is sufficient to support a judgment. We can readily understand where two entirely distinct and independent acts of negligence are relied upon there may be some basis for a jury being required to find as to each act and that if they are unable to agree upon which of the independent acts caused the injury complained of, a verdict for the plaintiff would be improper. In this case and in many cases negligence resulting in injury is caused by a combination of several acts. Under the Instruction now being discussed, the jury could not, as we understand the Instruction, find for the plaintiff unless the required number of jurors were in agreement as to the act or various acts which caused the injury.

A discussion touching the necessity of a majority of the judges of an appellate court to agree upon the grounds for the reversal or affirmance of a judgment will be found in 5 C. J. S. 1314 et seq., 4 C. J. 1121, and cases there cited. We can understand that where a case is reversed and a new



trial ordered in an action at law, it may be necessary to have a majority of the court agree upon the particular error that is the basis for a reversal as otherwise the trial court will probably be compelled to repeat the error. To illustrate, if three members of the five members of an appellate court say that the trial court correctly gave Instruction No. 1 and three members say that the trial court correctly gave Instruction No. 2 and three members say that the trial court correctly gave Instruction No. 3, but two members say that the trial court was in error as to each of such Instructions it is easy to understand why the judgment should be affirmed even though all five members should be of the opinion that the judgment should be reversed for different reasons. However, even in such case some of the authorities hold that the judgment should be reversed. (See cases cited in footnote to the text above cited). The case of *Wilcox vs. Wunderlich*, 73 Utah 1; 272 Pac. 207, lends support that if a majority of an appellate court holds that a trial court was in error in the trial the cause should be reversed even though the members of such appellate court are not in agreement as to the grounds that required a reversal.

By analogy, if a majority of a jury are agreed that a defendant was negligent and that his negligence was the proximate cause of the injury, we can conceive of no sound reason why the jury may not properly find a verdict for the plaintiff even though they may not be agreed upon the particular act of negligence of which the defendant was guilty.

### POINT THREE

THE TRIAL COURT ERRED IN GIVING ITS INSTRUCTION NUMBER NINE, WHEREIN THE JURY

WERE INSTRUCTED THAT "IF THEREFORE YOU FIND FROM THE EVIDENCE THAT AFTER THE PLAINTIFF, RONALD OLSEN AND THE OTHER CHILDREN HAD BEEN DISCHARGED FROM SAID VEHICLE AND THAT THEREAFTER WHEN SAID VEHICLE STARTED IN MOTION RONALD OLSEN RAN TOWARD THE SIDE OF THE BUS NEAR THE RIGHT WHEELS AT A TIME AND IN A PLACE WHERE DEFENDANT COULD NOT SEE HIM THEN YOUR VERDICT MUST BE IN FAVOR OF THE DEFENDANT AND AGAINST THE PLAINTIFF (Tr. 93-94).

The plaintiff objected to the foregoing Instruction and particularly to that portion thereof wherein the court informed the jury that if they found that Ronald Olsen ran towards the side of the bus near the right wheels and if defendant did not expect such action on the part of plaintiff, it's because there is no evidence or pleading which shows that plaintiff ran towards the bus (Tr. 202 to 203).

The law seems to be well settled that, "The scope of an Instruction in a particular case, whether civil or criminal, is to be determined not alone by the pleadings therein, but also by the evidence in support of the issues; and even though an issue is raised by the pleadings, it is not proper to give an Instruction thereon where there is no basis for it in the evidence. An Instruction not based on the evidence is erroneous in that it introduces before the jury facts not presented thereby, and is well calculated to induce them to suppose that such state of facts in the opinion of the court is possible under the evidence and may be considered by them." (53 Am. Jur., Sec. 579, Pages 455-456). Numerous cases from the Federal and State Courts are cited in footnotes 17 and 18 to the text above cited. The cases

of Griffin vs. Prudential Ins. Co., 102 Utah 563; 133 Pac. (2d) 333; 144 A. L. R. 1402; Smith vs. Clark, 37 Utah 116, 106 Pac. 603, from this jurisdiction are there cited.

Among the numerous other Utah cases where the same doctrine is announced are: Jensen v. Utah Ry. Co., 72 Utah 366; 270 Pac. 349; Manti City Savings Bank v. Peterson, 33 Utah 209; 93 Pac. 566; Ohlinkamp v. Union Pacific R. R. Co., 24 Utah 232; 67 Pac. 411; Hillyard v. Bair, 47 Utah 561; 155 Pac. 449; Smith v. Cannady, 45 Utah 521; 147 Pac. 210; Armstrong v. Larsen, 55 Utah 347; 186 Pac. 97; Davis v. Midvale City 56 Utah 1; 189 Pac. 74; Tyng v. Consolidated-Lorraine Inv. Co., 37 Utah 304; 108 Pac. 1109; Dimmick v. Utah Fuel Co. 49 Utah 430; 164 Pac. 872; Sagers v. International Smelting Co., 50 Utah 423; 168 Pac. 105; Candland v. Mellen, 46 Utah 519; 151 Pac. 341; Verdi v. Helper State Bank, 57 Utah 502; 196 Pac. 225; Kendall v. Fordham, 79 Utah 256; 9 Pac. (2d) 183.

Heretofore in our statement of the case, we have directed the attention of the Court to the testimony of the witness, Shirley Cluff, who was called by the defendant. It will be noted that under the pretext of refreshing her memory, counsel for the defendant asked her a number of leading questions, among which was:

Q. "Now I want you to listen right close because what I am going to do right now is to ask you, as near as I can, what I asked you then when you were home with your mother, and then I am going to repeat the answers that were taken down, as near as I can. Do you remember whether or not I asked you this—'Shirley' speaking to you that time—'You didn't see him before the bus ran over him?'" Now I am talking about Ronny. Now did you see him before the bus ran over him?" (Witness shakes head).

Q. "Your answer is no to that? (Witness nods head) and then your answer to that, you say 'No' and then do you remember me asking you this question here? 'Was he hold-ing onto the bus or trying to get hold of the bus?' And your answer 'No, he was running towards it.' Do you re-member telling me that he was running toward the bus just before the accident happened?"

A. "Huh uh."

Q. "And do you remember me asking again: 'Running towards the bus?' "

A. "Yes."

Q. "And then I asked you this question: 'Do you know where he was running towards it?' and you answered: 'No, he used to just hold it to slide and just slide along with it.' Do you remember of telling me that—that he used to just hold it and slide?"

A. "Uh huh."

Q. "Your answer is yes to that."

MR. HANSEN: "May it please Your Honor, I don't know whether she really understands me here or not."

Q. "Had you seen Ronny hold onto the bus before and slide along with it when it started out?"

A. "I don't know whether he did, but there were some other kids done that" (Tr. 190).

There were other questions asked and statements made before the jury such as "if she were older, I think I would ask leave to impeach her," (Tr. 191), which were calcu-lated to impress the jury with the idea that the plaintiff may or was running towards the bus just before he was injured. It was bad enough to ask such leading questions and make such statements before the jury, but such matter may have been overlooked were it not for the fact that the

court gave credence to such statements by the giving of Instruction numbered 9.

A careful reading of the evidence of Shirley Cluff will show that nothing can be gleaned from the testimony that would justify a finding that the plaintiff was running towards the bus as indicated by Instruction numbered 9. There is no other evidence that lends support to such a fact. It will be noted from the pictures of the bus that there is nothing on the side of the bus that plaintiff could hold onto. It is, to say the least, extremely improbable that the plaintiff would have run towards the bus, or if he should that he could get there in time to get under the rear wheels unless he was attempting to commit suicide.

#### POINT FOUR

THE TRIAL COURT ERRED IN GIVING INSTRUCTION NUMBERED 11 IN THAT THE SAME IS ARGUMENTATIVE AND THE COURT IN EFFECT COMMENTED ON THE WEIGHT OF THE EVIDENCE.

In Instruction numbered 11, the court instructed the jury in part that "In weighing the evidence as to **defendant's** alleged negligence, it is your duty to consider it under all of the facts and circumstances existing at the time of the accident and not to consider it as you would in looking back upon the events from this later date. Quite ordinarily, individual actions in any given set of circumstances may disclose faults and criticisms when looked back upon and tested by cool and deliberate thinking away from the event, which would not be apparent to a reasonable and prudent person at the time he is surrounded by the circumstances of the accident" (R. 95).

The plaintiff objected to that Instruction for the reason that the same is argumentative in favor of the defendant's claim in this case (Tr. 204).

The jury is as able to determine the relative value or effect of looking back on an event as compared with viewing the act when it occurred as is the court. It is essentially the province of the jury when called upon to decide questions of facts and the weight that shall be given evidence to do so without the aid or suggestions of the court. *Howley v. Corey*, 9 Utah 175; 33 Pac. 695; *Smith v. Gilbert*, 49 Utah 510; 164 Pac. 872; *Moore v. Utah-Idaho Cent. R. Co.*, 52 Utah 373; 174 Pac. 873. 53 Am. Jur. Page 439, Sec. 552 and cases there cited in footnotes.

It is submitted that a new trial should be granted to plaintiff, and that he should be awarded his costs on appeal.

Respectfully submitted,

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