

1952

Merlene Lodder v. Western Pacific Railroad Company and Richard White : Brief of Appellants

Utah Supreme Court

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In the
Supreme Court of the State of Utah

MERLENE LODDER,
Plaintiff and Respondent,

VS.

**WESTERN PACIFIC RAILROAD
COMPANY and RICHARD WHITE,**
Defendants and Appellants

Case No.
7809

FILED
APR 12 1952

Clerk, Supreme Court, U

APPELLANTS' BRIEF

**W. Q. VAN COTT,
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INDEX

	Page
STATEMENT OF THE CASE	1
POINTS RELIED ON BY APPELLANTS	6
I. THE EVIDENCE IS INSUFFICIENT TO PROVE ANY ACTIONABLE NEGLIGENCE ON THE PART OF EITHER OF THE AP- PELLANTS	6, 7
ALLEGED FAILURE TO KEEP A LOOKOUT	9
ALLEGED LAST CLEAR CHANCE	12
ALLEGED FAILURE TO GIVE WARN- ING OF APPROACH OF LOCOMOTIVE ..	16
II. THE SPECIAL VERDICT IS INSUFFI- CIENT TO SUPPORT A JUDGMENT IN FAVOR OF THE PLAINTIFF	6, 34
III. NO FINDING IN SUPPORT OF THE JUDG- MENT CAN BE IMPLIED	6, 45
IV. THE COURT ERRED IN REFUSING TO SUBMIT THE ISSUE OF CONTRIBUTORY NEGLIGENCE AND IN REFUSING TO IN- STRUCT THE JURY ON THAT ISSUE AS REQUESTED BY THE DEFENDANTS ...	6, 7, 52
V. IT IS ERROR TO INSTRUCT THE JURY UPON PROPOSITIONS OF LAW NOT AP- PLIED OR APPLICABLE TO THE ISSUES AND EVIDENCE EVEN THOUGH THE PROPOSITIONS ARE CORRECTLY STATED ..	6, 60

INDEX—Continued

	Page
VI. THE COURT ERRED IN SUBMITTING TO THE JURY ISSUES UNSUPPORTED BY THE EVIDENCE	7, 64
VII. THE DEFENDANTS WERE PREVENTED FROM HAVING A FAIR TRIAL BY THE COURT'S REFUSAL TO PERMIT THEIR COUNSEL TO ADDRESS THE JURY AFTER THE SECOND SUBMISSION OF THE CASE	7, 66
VIII. THE TRIAL COURT ABUSED ITS DISCRETION IN NOT SETTING ASIDE THE ENTIRE VERDICT AS TAINTED BY PASSION AND PREJUDICE AND GRANTING DEFENDANTS A NEW TRIAL	7, 68
LOSS OF EARNINGS	75
TOTAL MEDICAL EXPENSE	75
PAIN, SUFFERING AND INJURY	76
PAIN AND SUFFERING	80
SUMMARY	81

CASES CITED

Anderson v. Bransford, 39 Utah 256, 116 Pac. 1023 ..	33
Barrett v. United States Railroad Administration et al., 194 N. W. 222, 196 Iowa 1143	31
Baurne v. Moore et al., 292 Pac. 1102	71
Blackwell v. Union Pacific Railroad Company, 52 S. W. (2d) 814, ... Mo.	39

INDEX—Continued

	Page
Boyle v. Lehi Valley Transit Co., 27 A. (2d) 682, 150 Pa. Sup. 86	21
Brown v. Alton Railroad Company, 151 S. W. (2d) 727, ... Mo. Appeals	54
Carlin v. Thompson, 12 N. W. (2d) 224, 234 Iowa 469	21
Colbert v. Dallas Joint Stock Land Bank, 102 S. W. (2d) 1031, 129 Tex. 235	49
Colorado S. R. Company v. Thomas, 81 Pac. 801, 33 Colo. 517	54
Cooper v. Robischung Brothers, 155 S. W. 1050	68
Cowan v. Salt Lake & Utah Ry. Co., 56 Utah 94, 189 Pac. 599	60
Davis v. Mellen, 55 Utah 9, 182 Pac. 920	33
Davis v. Pere Marquette Ry. Co., 216 N. W. 424, 241 Mich. 166	21
Duffy v. Union Pacific R. Co., ... Utah ..., 218 P. (2d) 1080	71, 75
Edd v. U. P. Coal Company, 25 Utah 293, 71 Pac. 215	33
Edgar v. Rio Grande Western Railroad Company, 32 Utah 330, 90 Pac. 745	33
Eleganti v. Standard Coal Co., 168 Pac. 266	71
Faubel v. Draper, 108 N. Y. S. (2d) 15	71
Fish v. So. Pacific Railroad, 143 P. (2d) 917, ... Ore.	40
Fowkes v. J. I. Case Threshing Mach. Co., 46 Utah 502, 151 Pac. 53	66
Geary v. Cain, 255 Pac. 416	71
Hansen v. Clyde, ... Utah ..., 56 P. (2d) 1366	33
In Re Hansen's Will, 167 Pac. 256, 50 Utah 207	45

INDEX—Continued

	Page
Haarstrich v. Oregon Short Line Railroad Company, 70 Utah 552, 262 Pac. 100	32
Hickey v. Missouri Pacific Railroad Corporation, 8 F. (2d) 128 (C. C. A. Eighth)	27
Hillyard v. Barr, 225 Pac. 1094, 63 Utah 344	62
Hudson v. Union Pacific R. R. Co., 233 P. (2d) 357	60
Holmgren v. Union Pac. R. Co., 198 P. (2d) 459, Utah	14, 16
Industrial Comm. v. Wasatch Grading Co., 80 Utah 223, 14 P. (2d) 988	66
Jensen v. Utah Railway Company, 270 Pac. 349, 72 Utah 366	61
Jerrell v. N. & P. Belt Line Railroad Company, 184 S. E. 196, 166 Va. 70	68
Kendall v. Fordham, 79 Utah 256, 9 P. (2d) 183	66
Kennedy v. O. S. L. R. Co., 54 Pac. 968	71
Lavallee v. Boston & Maine R. R. Co., 89 N. H. 323, 197 A. 816	23
Lawrence v. The Denver and Rio Grande Western Railroad Co., 174 Pac. 817, 52 Utah 414	59
Lynch v. Pa. Railroad Company, 194 N. E. 31, 48 Ohio Appeal 295	21
McAfee v. Ogden Union Ry. & Depot Co., 62 Utah 115, 218 Pac. 98	69
Mecham v. Foley, 23 P. (2d) 497, Utah	71
Mehr v. Child, 91 P. (2d) 624, 90 Utah 348	62
Michael v. C. B. & Q. Railroad Company, 131 N. W. 892, 146 Wis. 466	40
Mil. & St. P. R. R. Co. v. Kellogg, 94 U. S. 469, 24 L. Ed. 256	62

INDEX—Continued

	Page
Montague v. Salt Lake & Utah Ry. Co., 52 Utah 368, 174 P. 871	60
Morris v. Chicago, B. & Q. R. Co., 163 N. W. 799, 101 Neb. 479	53
Morrison v. Perry, 140 P. (2d) 772, 104 Utah 151	66
Moses v. Proctor Coal Company, 179 S. W. 1043, 166 Ky. 805	68
Nicholas v. C. B. & Q. Railroad Company, 100 N. W. 1115, 125 Iowa 236	40
O'Brien v. Alston, 61 Utah 368, 213 Pac. 791	33
Olson v. The Denver and Rio Grande Western Rail- road Company, 98 Utah 208, 98 P. (2d) 944	33
Olwell v. Skobis, 105 N. W. 777, 176 Wis. 308	56
Ormsby v. Ratcliffe, 1 S. W. (2d) 1085, 117 Tex. 242 ..	48
Papageorge v. Boston & M. R. R. Co., 57 N. E. (2d) 576, ... Mass.	20
Pauly v. McCarthy, 109 Utah 431, 184 P. (2d) 123 ..	70, 71
Peterson v. Sorensen, 91 Utah 507, 65 P. (2d) 12	66
Phillips v. Davis, 3 F. (2d) 798	54
Pittsburg, C., C. & St. L. R. Company v. Smith, 69 N. E. 873, ... Ill.	52
Plaunt v. Railway Transfer Co. of City of Minneap- olis, 97 N. W. 433	73
Shaffer v. Keeley Ice Cream Company, 234 Pac. 300, ... Utah	62
Shepherd v. Payne, 206 Pac. 1098	71
Shoemaker v. Floor, 217 P. (2d) 382, ... Utah	81
Smith v. Lenzi, 279 Pac. 893, 74 Utah 362	59
Steinbuchel v. Wright, 23 Pac. 560	73

INDEX—Continued

	Page
Stevens Ranch & Livestock Co. v. Union Pacific R. Co., 48 Utah 528, 161 Pac. 459	69, 71
Stroud v. Chicago, M. & St. P. Ry. Co., 243 Pac. 1089, 75 Mont. 384	29
Tice v. Pacific Elec. Ry. Co., 96 P. (2d) 1022, ... Cal. App.	54
Tunnell Mining & Leasing Co. v. Cooper, 115 Pac. 901, Colo.	72
Umlauft v. C., M. & St. P. R. R., 289 N. W. 623, 233 Wis. 291	25
Van Wagoner v. Union Pac. R. Co., 186 P. (2d) 293, ... Utah	15, 16, 43
Wagoner v. A. T. & S. F. R. R. Co., 292 Pac. 645, 210 Cal. 526	54
Wawrzyniakowski v. Hoffman & Billings Mfg. Co., 131 N. W. 429, 146 Wis. 153	58
Wichita Falls and Oklahoma Ry. Co. v. Pepper, 135 S. W. (2d) 79, ... Tex.	48, 49
White v. Pinney, 108 P. (2d) 249, 99 Utah 484	62

STATUTES CITED

Section 57-7-80, U. C. A. 1943	20
Section 57-7-113, U. C. A. 1943	19
Section 104-24-14, Paragraph 4, U. C. A. 1943	59
Section 104-25-1, U. C. A. 1943	45
Section 59 (a) (5) Utah Rules of Civil Procedure	72

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Plaintiff and Respondent,

VS.

WESTERN PACIFIC RAILROAD
COMPANY and RICHARD WHITE,
Defendants and Appellants.

} Case No.
7809

APPELLANTS' BRIEF

STATEMENT OF THE CASE

Respondent and her husband William Lodder commenced this action against The Denver and Rio Grande Western Railroad Company and the appellants to recover

damages sustained in an automobile-locomotive collision which occurred at the intersection of 2nd South and 4th West Streets in Salt Lake City (R. 1-2). The complaint is in the form approved by the Utah Rules of Civil Procedure for situations where the plaintiff is unable to determine definitely whether "CD or EF is responsible or whether both are responsible" (Form 10) and accordingly alleges that one or the other of the three named defendants or any one of three different combinations of the defendants negligently moved the locomotive into the intersection and against the automobile of the plaintiff William Lodder, which he was driving and in which the plaintiff Merlene Lodder was "present" (R. 1). Plaintiff William Lodder prayed for a judgment for the damage to his automobile and the plaintiff Merlene Lodder prayed for judgment for her special damages and \$5,000.00 general damages (R. 2).

Later the plaintiffs filed an amended and supplemental complaint in which the Salt Lake City Union Depot and Railroad Company was added as a party defendant (R. 25). The allegations of negligence in the original complaint were repeated, as were the allegations describing the injuries sustained by the plaintiff Merlene Lodder (R. 25). With respect to the added defendant, it was charged with negligence in having maintained and employed a watchman at the crossing between certain hours for a period of four months before the accident occurred; that the plaintiffs had, during this period, used the crossing frequently during the hours the watchman was on duty and were thereby lead to believe that the crossing would be protected by the watchman and that a warning would be given of the approach of

trains to the intersection; that on the night of the collision the watchman negligently failed and neglected to warn the plaintiffs of the approach of the locomotive to the crossing. The plaintiff Merlene Lodder alleged that as a result of her injuries she had been damaged in the sum of \$50,000.00, plus special damages (R. 25-28). A few minutes before the time set for the trial the plaintiff William Lodder moved to dismiss his complaint without prejudice, which motion was granted (R. 44).

The action was tried to a jury and at the close of the evidence the defendants separately moved for a directed verdict (R. 30-43). The motion for the defendant Salt Lake Union Depot Company was granted (R. 46). No ruling was made on the motions of the other defendants. Although all parties requested that the jury return a general verdict, the court of its own motion directed the jury to return a special verdict (R. 353). The jury answered some of the questions submitted to them in the affirmative and some in the negative (R. 353-6). Immediately upon return of the special verdict the court directed the jury to again retire and assess the amount of damages. The jury assessed the damage in the sum of \$25,000 (R. 351-2).

The defendants, other than the Depot Company, then filed separate motions for judgment notwithstanding the verdict and in the alternative for a new trial (R. 362-3). The motion of the defendant The Denver and Rio Grande Western Railroad Company for judgment notwithstanding the verdict was granted (R. 359). The motions of the appellants for judgment notwithstanding the verdict were denied, but a new trial, limited to the issue of injury and

damage, was granted unless the plaintiff remitted the sum of \$15,000 from the judgment (R. 364). The plaintiff accepted the reduction (R. 366).

The collision occurred at about 9:15 P.M. December 19, 1949.

Second South Street extends east and west and intersects Fourth West Street at right angles (Ex. A).

These streets are each 132 feet wide (Ex. A). Four sets of railroad tracks laid in Fourth West Street intersect Second South Street (Ex. A). The most easterly track crosses Second South Street at an angle of 15 degrees and is referred to in the evidence as Track No. 1 (Ex. A). It branches off from the next westerly track at a switch, which is 55 feet north of Second South (Ex. A). Approximately 170 feet north of Second South is another switch leading to Track No. 1 (Ex. A). The intersection is lighted by two street lights, one located at the northwest corner and the other at the southeast corner (Ex. A).

The Diesel locomotive operated by the appellant White, assisted by hostler helper Bond, was brought from the roundhouse to a point near First South Street, where it was backed in on Track No. 1 and brought to a stop at the third switch north of Second South (R. 188-191). At this point the hostler received a signal from the crossing watchman, who was then in the intersection of Second South and Fourth West (R. 191). Bond lined the switch, gave the hostler a back-up signal and got on the stirrup located at the rear on the left side of the locomotive (R. 231). The locomotive approached the crossing at a rate of speed of about five or six

miles per hour (R. 198). When the rear of the locomotive reached a point a few feet north of the north line of Second South, Bond looked to the east and saw the plaintiffs' automobile approaching (R. 233). He estimated that the automobile was then about 200 feet east of the track on which the locomotive was moving (R. 233). When he first saw the automobile he realized that it would be unable to stop before reaching the railroad track, and, accordingly, jumped off the locomotive and gave the hostler an emergency stop signal (R. 233). The hostler had observed his helper jump off the locomotive and realized that some accident was imminent (R. 195). He applied the independent brakes on the locomotive as Bond jumped off and made an emergency application of the brakes immediately upon receiving the emergency signal (R. 195).

Bond's first apprehension of a collision proved correct. Lodder said that he saw the locomotive when his automobile was about five or six car lengths (15 feet each) from the track, that he immediately shifted into second gear and applied his brakes (R. 84-9). This application of the brakes locked the wheels and the car skidded or slid on the icy street and struck the rear of the locomotive at the point of the stirrup on which Bond had very recently been riding (R. 84-93). The point of collision was 30 feet south of the north curb line of Second South (R. 252). The locomotive moved 61 feet and the automobile 36 feet, both in the same direction, after the impact (R. 252). The automobile was badly damaged and plaintiff received an injury when her head struck the windshield of the auto.

POINTS RELIED ON BY APPELLANTS

POINT I

THE EVIDENCE IS INSUFFICIENT TO PROVE ANY ACTIONABLE NEGLIGENCE ON THE PART OF EITHER OF THE APPELLANTS.

POINT II

THE SPECIAL VERDICT IS INSUFFICIENT TO SUPPORT A JUDGMENT IN FAVOR OF THE PLAINTIFF.

POINT III

NO FINDING IN SUPPORT OF THE JUDGMENT CAN BE IMPLIED.

POINT IV

THE COURT ERRED IN REFUSING TO SUBMIT THE ISSUE OF CONTRIBUTORY NEGLIGENCE AND IN REFUSING TO INSTRUCT THE JURY ON THAT ISSUE AS REQUESTED BY THE DEFENDANTS.

POINT V

IT IS ERROR TO INSTRUCT THE JURY UPON PROPOSITIONS OF LAW NOT APPLIED OR APPLICABLE TO THE ISSUES AND EVIDENCE EVEN THOUGH THE PROPOSITIONS ARE CORRECTLY STATED.

POINT VI

THE COURT ERRED IN SUBMITTING TO THE JURY ISSUES UNSUPPORTED BY THE EVIDENCE.

POINT VII

THE DEFENDANTS WERE PREVENTED FROM HAVING A FAIR TRIAL BY THE COURT'S REFUSAL TO PERMIT THEIR COUNSEL TO ADDRESS THE JURY AFTER THE SECOND SUBMISSION OF THE CASE.

POINT VIII

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT SETTING ASIDE THE ENTIRE VERDICT AS TAINTED BY PASSION AND PREJUDICE AND GRANTING DEFENDANTS A NEW TRIAL.

POINT I

THE EVIDENCE IS INSUFFICIENT TO PROVE ANY ACTIONABLE NEGLIGENCE ON THE PART OF EITHER OF THE APPELLANTS.

The defendants made demand upon the plaintiffs in the form of written interrogatories for a bill of particulars

of the negligence which plaintiffs claimed each defendant was guilty of (R. 7-8). In response thereto, plaintiffs stated under oath that the defendant Richard White was the engineer in charge of the backward movement of the Diesel locomotive and in the course of his employment (1) failed to look and observe in the direction the locomotive was moving so as to apprehend the approach of the plaintiff's automobile and to take reasonable precautions to avoid the collision which could have been avoided if he had kept a proper lookout as the locomotive approached the intersection, (2) failed to cause the bell of the locomotive to be rung as it approached the intersection, (3) failed to cause the whistle or horn of the locomotive to be sounded, (4) failed to cause the rear light of the locomotive to be lighted so as to shine in the direction the locomotive was proceeding, notwithstanding it was dark and snow was falling, and (5) that the defendant railroad companies employed a crossing watchman who failed to proceed into the intersection with a lighted lantern or otherwise and thus to warn approaching motorists, including the plaintiffs, of the presence of the locomotive and its movement into the intersection (R. 9-13). The bill of particulars further stated that if Richard White had maintained a proper lookout and thereafter exercised reasonable control of the locomotive he could have observed the approach of plaintiff's automobile and slowed or stopped the backward movement of the locomotive so as to have avoided the collision with the automobile (R. 11-12).

It will be observed that the bill of particulars does not charge the defendants with any negligent acts or conduct

other than the acts and omissions of the engineer and the crossing watchman, and further that the plaintiffs do not claim or assert that either of the railroads or their servants failed or neglected to give any signal or warning required by any statute or ordinance.

ALLEGED FAILURE TO KEEP A LOOKOUT

The railroad track on which the locomotive was backing crosses Second South at an angle of 15 degrees east of north and south. It extends north of Second South at this angle a distance of approximately 170 feet, although it begins to curve slightly to the west after a point about 60 feet north of Second South (Ex. A). A two-story brick building is located on the northeast corner of the intersection. The southwest corner of this building is 20 feet from the north curb line of Second South and 42 feet east of the center of the tracks on which the locomotive was backing. The intersection is lighted by street lights located on the northwest and southeast corners. The Diesel locomotive consists of three units, their overall length being about 120 feet (R. 183). It is about 15 feet high (R. 183).

It was necessary to back the locomotive down Fourth West Street in order to attach it in the proper position to the Western Pacific train which was destined to go west (R. 188). The locomotive started its backward movement from a point near First South (R. 189). The hostler helper, Bond, who was acting as switchman, got off the engine to check the switch (R. 190). He then gave White the backup signal (R. 143). White operated the locomotive from his seat on the right-hand side of the cab (R. 190). He kept a lookout

in the direction the engine was backing by leaning out the window and turning his head (R. 190). Because of his position in the cab of the locomotive and the location of the building on the northeast corner of the intersection, it was not possible for White to see an automobile approaching from the east until it was practically to the intersection. He saw the automobile for the first time when it was about 20 feet east of the tracks (R. 194). The back of the locomotive was then out into Second South (R. 194). However, he had observed Bond jump off the locomotive before he saw the automobile (R. 195). Bond had boarded the locomotive when it was approximately 170 feet north of Second South (R. 240). He maintained his position on the locomotive by standing in the stirrup and grasping the handhold with his right hand (R. 244). He held his lighted lantern in his left hand (R. 244). He estimated that the automobile was 200 feet east of the tracks when he first observed it (R. 233). At that time the rear of the locomotive was about at the switch nearest Second South (R. 243). Before the rear of the locomotive reached this point Bond had no view of automobiles approaching from the east (R. 245). The moment he saw the automobile he realized that it would be unable to stop before reaching the tracks (R. 233). He immediately jumped off and gave the engineer an emergency stop signal (R. 233). The rear of the locomotive was then just a few feet north of the north curb line of Second South (R. 234). The engineer responded immediately to the emergency signal (R. 235). He applied the brakes as soon as Bond jumped off.

The locomotive traveled about 50 feet from the time Bond jumped off until the automobile collided with it (R.

246). The locomotive was brought to a complete stop with the rear end just about on the south sidewalk of Second South (R. 250).

We ignore the omission in the pleadings of any charge that the defendant Western Pacific Railroad Company failed to maintain a proper lookout for the automobile. It is submitted that there is a complete failure to prove that either of the appellants neglected to maintain a reasonable lookout for the automobile in which the respondent was riding. Bond was stationed on the rear end of the locomotive continuously for at least 170 feet until he jumped off in order to avoid serious injury. He did not jump off until the locomotive was practically into the intersection. He observed the automobile at the first opportunity that it could be observed by a person riding on the stirrup of the locomotive. White, of course, was in no position to keep a lookout for automobiles approaching the intersection from either direction. The railroad did not rely upon White to keep a lookout. It stationed Bond on the rear end of the locomotive where he would be in the best possible position to keep a lookout as the locomotive came into the intersection.

The testimony of White and Bond with respect to lookout for plaintiff's automobile is uncontradicted. It demonstrates that the best possible lookout under the circumstances was maintained and that the automobile was actually seen as soon as the physical conditions at the crossing permitted. In the case of *Van Wagoner v. Union Pacific Railroad Company*, . . . Utah . . . , 186 P. (2d) 293, the evidence with respect to an alleged failure of a train crew to keep a look-

out for automobiles approaching a public crossing was quite similar to the evidence in the case at bar except that in the *Van Wagoner* case there was some evidence that the car stalled momentarily on the crossing before it was struck by the train. This court held that the evidence was insufficient as a matter of law to establish a failure to maintain a reasonable lookout.

Furthermore, as pointed out in the *Van Wagoner* case:

“Even were we to assume the train crew failed to keep a proper lookout, appellants must still fail in their assignment, as assuming the truck was stalled for a couple of seconds, if it is intended to submit this question to the jury, there must be a basis for concluding that the failure to keep a lookout proximately contributed to the accident * * *.”

ALLEGED LAST CLEAR CHANCE

In order to establish a causal connection between a failure to keep a lookout for the plaintiff's automobile and the accident, it was incumbent upon the plaintiff to prove that the train crew had a clear opportunity by the exercise of reasonable care to avoid the collision after they saw or should have seen that the driver was in a situation in which he would be unable to stop the automobile short of the track. No such evidence was produced. On the contrary, the uncontroverted facts are that the train crew exercised the highest degree of care to avoid the collision after they saw or could possibly have seen that the driver was in a situation in which it was impossible for him to stop.

As has already been pointed out, Bond saw the automobile as soon as it was possible in his position to see it. He

had assumed the most advantageous position possible on the locomotive to maintain a lookout for automobiles approaching from the east. Unquestionably, the driver was in a position of peril when Bond first observed the automobile. It was then skidding and completely out of control, Bond instantly realized that it would be unable to stop before reaching the tracks. He immediately jumped off the locomotive and gave an emergency stop signal to the engineer. The latter had anticipated the emergency signal and applied the independent brakes as soon as Bond jumped off. The application of the emergency brake automatically applied sand to the rails, and the locomotive was brought to a stop before it had cleared the crossing. There is not even an intimation in the evidence that this locomotive could have been stopped in any shorter distance than it was stopped. There was not the slightest delay on the part of Bond in signaling the engineer to stop after he saw the approaching automobile. He did not give an ordinary stop signal, but called for an emergency stop. There was not the slightest delay on the part of the engineer in responding to the stop signal. In fact, he started to stop the locomotive the moment he saw Bond jump off.

It may be that the train crew did not give any signal to the driver after they discovered or should have discovered the perilous situation in which he had placed himself. Obviously, no signal of any kind from the train crew at that time could possibly have enabled him to avoid the collision. At that time he had lost all control over his vehicle and nothing but an immovable object could have prevented him from reaching the tracks.

The allegations in the bill of particulars to the effect that the train crew failed to keep a reasonable lookout and failed to exercise reasonable care to stop the locomotive after a reasonable lookout would have disclosed the inability of the driver of the automobile to stop is an attempt to invoke what is referred to commonly as the last clear chance doctrine.

This court has already pointed out that the doctrine of last clear chance is seldom, if ever, applicable in a crossing case. See *Holmgren v. Union Pac. R. Co.*, . . . Utah . . . , 198 P. (2d) 459. In the case cited the facts necessary to be established by the plaintiff in order to invoke the last clear chance proposition are stated thus at page 463 of the Pacific citation:

“This court has more than once cited with approval the rule of last clear chance stated in the American Law Institute Restatement of Torts, Sec. 480, which reads as follows:

“‘A plaintiff who by the exercise of reasonable vigilance could have observed the danger created by the defendant’s negligence in time to have avoided harm therefrom, may recover if, but only if, the defendant

“‘(a) knew of the plaintiff’s situation;

“‘(b) *realized or had reason to realize that the plaintiff was inattentive and therefore unlikely to discover his peril in time to avoid the harm, and*

“‘(c) thereafter is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff.’ (Italics added.)

“In amplification of this rule, and particularly subparagraph (b) thereof, we have said that ‘to

hold the defendant liable it must plainly appear to the jury that defendant knew or reasonably should have known of plaintiff's * * * inattention and after such realization or after he reasonably, had he been conducting himself with the vigilance required of him, should have known it, "is negligent in failing to utilize with reasonable care and competence his then existing ability to avoid harming the plaintiff." In the clear chance doctrine the plaintiff's negligence has become in a sense fixed and realizable and on to this state of things defendant approaches on to the negligent plaintiff with and in control of the danger.' *Graham v. Johnson*, 109 Utah 346, 166 P. 2d 230, 235, 236."

and in the case of *Van Wagoner v. Union Pac. R. Co.*, ... Utah ..., 186 P. (2d) 293, at page 302 of the Pacific citation:

"The engineer or other members of the train crew could assume the deceased would stop until he was so close to the track that a reasonable person would know otherwise. Undoubtedly when deceased cleared the one tree some 20 feet from the crossing, it would be apparent that he did not intend to stop. Disregarding the testimony of two members of the crew that when they did see the truck clear this tree they gave the emergency signal, appellants' evidence only permits one or two seconds for the train crew to have taken the necessary steps to have prevented the accident. This is not giving the defendant the last clear chance. *The opportunity to avoid the accident must not be a possibility; it must be a clear opportunity.* Not even by speculation could the jury reach a verdict on the theory that the train crew had time to appreciate that deceased was negligent and that by reasonable means they could have avoided the ensuing collision. *When, as in this jurisdiction, a train has the preferred right of way, its operator*

is entitled to assume the driver of a car will yield to this preferment, and if the doctrine of last clear chance is to be invoked, it must clearly appear that time permitted the train crew to appreciate deceased's predicament, and to give warnings sufficiently early enough for the deceased to extricate himself, or the time element was sufficient to permit the crew to bring the train to a stop. No such showing was made here."

These decisions preclude any contention in this case that the railroad employees had a clear chance to avoid the collision by the exercise of reasonable care after they should have seen the plaintiffs' automobile in a situation of peril. The train crew saw the automobile as soon as it could have been seen. There is no conflict in the evidence as to this fact. There was, therefore, as a matter of law, no failure to maintain a reasonable lookout for the plaintiffs' automobile. It is likewise undisputed that the train crew did everything humanly possible to avoid the collision after they first became aware that the automobile would be unable to stop. The facts in this case with respect to last clear chance are far less favorable to the plaintiff than those in either the *Holmgren* or the *Van Wagoner* cases. In each of these cases it is held as a matter of law that the railroad had no clear opportunity to avoid the collision after becoming aware of the negligence of the motorist. No different conclusion could reasonably be reached in the case at bar.

ALLEGED FAILURE TO GIVE WARNING OF APPROACH OF LOCOMOTIVE.

The jury found against the plaintiff upon the issue of the ringing of the bell and the operation of the lights on the

rear of the locomotive. In any event, the evidence was undisputed that the bell was ringing and the backup light functioning throughout the entire backing movement of the locomotive.

With respect to the blowing of the whistle or horn on the locomotive, the testimony of White was to the effect that the cords by which the horn is operated are just above the engineer's seat in the cab of the locomotive; that when the locomotive stopped at the second switch north of Second South he blew the whistle in recognition of a signal which he had received from the crossing watchman. Bond testified that the horn was sounded when the locomotive was approaching the first switch north of Second South and that it was loud enough to be heard for a half mile. Hilton, who was standing on the platform of the depot on Third West, heard the horn of the locomotive when it was about half way between First and Second South (R. 289). The plaintiff and her husband each testified that they did not hear any whistle from the locomotive.

With respect to the crossing watchman, the plaintiff and her husband stated that they did not see any signal given by him. The plaintiff's husband says he did not see anybody in the intersection as the automobile approached (R. 70). The plaintiff testified that she did not see the watchman before the collision but did see a red light, near the watchman's shanty (R. 156). This shanty is located between the second and third tracks a few feet to the south of the south line of Second South Street (R. 157). She placed the red light about on the crosswalk north of the watchman's shanty (R. 157). The watchman testified that he was on

duty at the crossing at the time of the collision and was equipped with a lantern by which he could give signals to train operators and motorists by either a white or a red light (R. 255-6).

While sitting in the shanty he observed the locomotive stop up by the third switch. He went out and signaled the hostler that the switches were lined (R. 261). He then returned to the shanty, called the stationmaster on the "dummy" telephone and then with his lantern showing the red light walked toward the center of the street. He observed the auto when it was about two-thirds of a block east of Fourth West. He signaled to the automobile and continued to do so until just before the collision occurred. He was standing in the center of Second South Street at the time the automobile struck the locomotive (R. 281).

We shall assume for the time being and for sake of argument that a jury could properly find from the evidence above recited that the defendants in the exercise of reasonable care should have given some warning in addition to that established by the special verdict and the uncontradicted evidence, and that the trainmen failed to give such additional warning. Our contention is that the failure to give some additional warning of the approach of the locomotive was not a proximate cause of the collision. We further contend that proximate cause of the collision was the negligence of the driver of the automobile in which the plaintiff was riding, which negligence consisted of approaching the railroad track at an unlawful and unreasonable rate of speed under the conditions.

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The uncontroverted evidence establishes that the driver of the automobile in which the respondent was riding approached the crossing at an unlawful and negligent rate of speed. He knew the exact location of the railroad tracks and was familiar with the character and condition of the crossing. He knew that he was approaching a place of danger and that engines and trains passed over the crossing at all hours of the day and night. He also knew that the street on which he was driving was covered with snow and ice and in an extremely slippery condition. Notwithstanding this knowledge and appreciation of these conditions he approached the tracks at a rate of speed which he could not reduce to any appreciable degree. The moment he attempted to accomplish such reduction of speed the automobile went completely out of his control. Although the brakes were in good condition and the rear tires equipped with chains, the car slid on the snow and ice a distance of 60 feet before crashing into the locomotive. Had it not struck an immovable object it would have continued on its course indefinitely until its momentum was expended. It did not stop even when it struck the locomotive. It continued in another direction for an additional distance of 36 feet. From the moment the brakes were applied until the automobile finally came to rest the driver had no more control over its movement than he would have had if he had been sitting at home.

Section 57-7-113, U. C. A. 1943, provides that no person shall drive a vehicle on a highway at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. The above section also provides that the driver of every

vehicle shall drive at an appropriate reduced speed when approaching rail grade crossings. A violation of this statute is a misdemeanor. See Section 57-7-80. A similar statute has been construed by the Supreme Court of Massachusetts in a crossing case as follows:

“The plaintiff was bound by the express command of the statute, G. L. (Ter. Ed.) c. 90, § 15, as amended by St. 1933, c. 26, § 1, to reduce his speed to a proper rate and to proceed cautiously over the crossing. The purpose of reducing the speed is to afford the operator such control of the vehicle as will enable him to avert any danger that he might encounter on his journey over the crossing. But the purpose and words of the statute are not complied with by a mere reduction of speed. There must be caution commensurate with the perils that are universally recognized as lurking in a place where a railroad crosses a public way at grade.”

See *Papageorge v. Boston & M. R. R. Co.*, 57 N. E. (2d) 576, ... Mass.

In approaching the crossing in the manner and under the conditions above set forth respondent's husband violated both sections of the statute. He drove his automobile at a speed greater than reasonable and prudent in view of the conditions of the street and the proximity of the railroad crossing. He did not approach this crossing at an appropriate reduced speed because having violated the first provisions of the statute he was unable to reduce the speed as required by the second provisions of the statute.

Even if there were no statute making such operation of an automobile unlawful, the common law would condemn

it as a negligent operation. In *Lynch v. Pa. Railroad Company*, 194 N. E. 31, 48 Ohio Appeal 295, a motorist approached a railroad crossing over a strip of highway which had recently been oiled and was therefore in a slippery condition. This strip of oiled road extended 600 feet from the railroad tracks. When the motorist reached a point 25 feet from the railroad tracks he applied the brakes. The automobile immediately began to slide and continued to do so until it struck the side of the locomotive about to cross the highway. The court held that the driver was negligent as a matter of law.

“It is to-day a matter of common knowledge that the presence of oil, such as is usually placed upon streets, makes them extremely slippery. It is very difficult to bring vehicles to a stop. They will skid and slide very easily. A condition of the street which is so obvious requires that a vehicle operated upon a street so oiled must be under perfect control. To drive an automobile up to a railroad crossing over which a locomotive or train may be caused to pass at any moment, at what would be a safe rate of speed when the street was dry, may be sheer madness when the street is covered with oil up to the crossing. It is clear that decedent made no effort to stop the automobile until within 25 feet of the crossing, and that he was then unable to stop, owing to the condition of the street.

See:

Carlin v. Thompson, 12 N. W. (2d) 224, 234 Iowa 469;

Davis v. Pere Marquette Ry. Co., 216 N. W. 424, 241 Mich. 166;

Boyle v. Lehi Valley Transit Co., 27 A. (2d) 682, 150 Pa. Sup. 86.

It being established that the driver of the automobile in which the respondent was riding approached the crossing at an unreasonable and unlawful rate of speed, it becomes a matter of pure speculation whether some additional warning would have enabled him to stop before reaching the track. It was incumbent upon the plaintiff to present some factual basis for a conclusion that some additional warning of the movement of the locomotive toward the crossing would have enabled the driver to avoid the collision. She produced no such evidence.

Plaintiff made no attempt to show in what distance the automobile could have been stopped short of the railroad track at the rate of speed it was moving or at any other rate of speed. It is, therefore, impossible to say that some additional warning from the train crew would have enabled the driver to stop before the collision.

The driver admits that he saw the locomotive when his automobile was approximately 80 feet from the tracks. He actually saw it sooner because he shifted the gears before applying the brakes and losing control of his vehicle. The moment he attempted to reduce the speed of the automobile he lost all control of it. There just isn't any effective warning that can be given to a motorist who approaches a crossing at a rate of speed which renders it impossible for him to control the movement of a vehicle. It is even conjectural whether some additional warning would have prevented the driver from becoming negligent and it is certainly entirely speculative whether additional warning would have enabled him to avoid the collision.

It is legally impossible to combine or unite the negligence of the driver of the automobile with any failure of the railroad to give additional warning of the approach of the locomotive to form the legal or proximate cause of the collision. There is no connection between them. The negligence of the driver is the dynamic, efficient and direct cause, and, therefore, the proximate cause of the collision. The assumed insufficiency of warning by the railroad is a remote, disconnected and wholly speculative cause and, therefore, not a legal cause of any kind. These conclusions are established by numerous authorities.

Lavallee v. Boston & Maine R. R. Co., 89 N. H. 323, 197 A. 816, was an action by a guest riding in a truck that was struck by a railroad train at a public crossing. The highway on which the truck was moving descended slightly toward the railroad tracks and was extremely icy and slippery. When the truck reached a point about 125 feet from the tracks the driver saw the approaching train which was then about 700 feet from the highway. The driver immediately applied his brakes and the truck skidded approximately 100 feet onto the tracks. When the brakes were applied the truck was traveling 12 to 14 miles per hour, but that speed was reduced to about four or five miles per hour before the impact. The train was moving about 25 or 30 miles per hour. There was evidence that the statutory warning signals were not given by the train crew.

The contention of the plaintiff that the driver would have stopped or reduced his speed before losing control of

the truck was answered by pointing out that it was purely conjectural whether he would have done so. The court said:

"It may be argued, however, that if the statutory signals had been given, and had been heard by the driver, he would have stopped before reaching the crest of the grade. The answer is that the burden was upon the plaintiff to prove the causal connection between the negligence complained of and the collision, and the case is bare of evidence upon which to base a conclusion that the conduct of the truck driver would have been different if he had received earlier notice of the train's approach. He made no such claim in his testimony, and the probabilities are all against it.

"Assuming that the speed of the train was 30 miles per hour, a simple mathematical calculation indicates that if the whistle had been blown at the whistling post 1,320 feet from the crossing, this would have been 13 seconds before the driver in fact saw the train 700 feet from the crossing. It follows that the truck, proceeding at a speed of 12 to 14 miles per hour, would then have been from 216 to 250 feet from the crest of the grade. The evidence clearly indicates that at this distance the train would not have been visible. Whether the crossing would have been in sight is problematical. It could not reasonably be inferred that if the truck driver had then heard a whistle he would at once have stopped his truck in order to avoid a collision with a train, which was then invisible, upon a crossing approximately 350 feet away. There is nothing in common experience to justify such a conclusion. On the contrary, it is generally known that truck drivers do not act that way.

"If it be argued that the speed of the truck might have been reduced before reaching the crest of the grade, the answer is that there is no more basis

in the evidence for this inference than for the one last considered. In regard to the speed of the truck, the driver testified upon direct examination as follows:

“Q. When you reached this point (indicating on plan), when you applied your brakes, and saw the train coming, and you applied your brakes, you were proceeding along the River Road here (indicating on plan), how fast do you say your truck was going, when you applied your brakes? A. Around twelve to fourteen miles.

“Q. Why was it going such a slow speed? A. Because of danger.

“Q. The danger was what? A. Ice.”

“Having thus prepared for the danger incident to the icy condition of the road, which, as he later testified ‘brought about the accident, there is no reason to infer that he would have made additional preparation for meeting the train by a further reduction in speed, at a distance of over 20 rods from the crossing, if he had then heard a whistle.

“We therefore conclude that the present record contains no evidence upon which it could be found that the accident was caused by the defendant’s failure to give the statutory crossing signals. A similar conclusion was reached by the Supreme Court of Iowa in a case having many points of similarity to that before us. *Barrett v. United States Railroad Administration*, 196 Iowa 1143, 194 N. W. 222.”

In *Umlauft v. C., M. & St. P. R. R.*, 289 N. W. 623, 233 Wis. 291, the plaintiff, August, was driving an automobile belonging to Paul. It ran into a train at a public crossing. August brought suit to recover damages for personal injuries and Paul brought suit to recover damages to the

automobile. The cases were tried together. The jury found that August approached the crossing at a negligent rate of speed and that this negligence was a proximate cause of the collision. The jury also found that the train was moving at an unlawful rate of speed and that this negligence was a proximate cause of the collision. The evidence disclosed that August had no view of the approaching train until his automobile reached a point 100 feet from the railroad track. At that point he attempted to stop but the automobile skidded along the slippery street a distance of 75 feet before colliding with the second car of the train which was moving 40 miles per hour. It was the contention of the plaintiffs that if the train had been going at a reasonable rate of speed the automobile would have skidded across the tracks in clear of the train. The court held that the proximate cause of the collision was the negligence of the driver of the automobile and that the speed of the train had no causal connection with the collision. We quote from the opinion:

“The plaintiffs argue that if the train had been proceeding at a speed of only 15 miles per hour when it was observed by August, he would have proceeded on his way and not attempted to stop. There is no evidence that he would have so acted. That argument is based upon pure speculation. In our opinion, the plaintiff’s attempt to stop after he discovered the approaching train was exactly what he would have attempted to do had the train been proceeding at only 15 miles per hour. The jury could only speculate as to what he would have done had the speed of the train been lawful and as to the success of any attempt to cross ahead of the train.

"The plaintiffs further argue that if the train had been running at a lawful rate of speed, the automobile with its brakes set, would have skidded safely across the track a second or two ahead of the train. When the plaintiff August set his brakes, he was traveling at a speed of less than 30 miles per hour. What his speed was at the time he hit the side of the second car no one attempted to estimate. The argument is based upon estimates of distances and speeds considered as absolute verities. In our opinion, the finding of proximate cause, based upon the speed of the train, is so speculative and is so lacking in reasonable certainty, as to be incapable of being upheld.

"We are therefore compelled to conclude that the sole proximate cause of the collision was the speed of the automobile which obviously was so great as not to permit of its being stopped on the icy road after the approaching train was discovered. This case is similar in some of its features to that of *Duame v. Feltus*, 229 Wis. 655, 283 N. W. 299, 301, where an automobile skidded 70 feet into a two-car train operated by the Milwaukee E. R. & L. Co. The plaintiff there was a passenger on the train. The court concluded in that case that the negligence of Feltus, the driver of the automobile, 'was the responsible cause of the plaintiffs injury.'"

In *Hickey v. Missouri Pacific Railroad Corporation*, 8 F. (2d) 128, (C. C. A. Eighth), the plaintiff, administrator of the estate of his father, brought this action involving a collision between a truck and a train at a public crossing. The public highway extended in an east and west direction and crossed the railroad tracks at a right angle. The train approached the crossing from the north and the truck from the east. The driver of the truck, who was the son of the deceased, was an experienced driver and

both he and his father were familiar with the crossing. The view of the driver to the north was completely obstructed for a distance of 175 feet until the truck reached the point 20 feet east of the tracks. When the truck arrived at the last mentioned point, the driver saw the approaching train and immediately applied the foot brake and then the emergency brake. The automobile skidded upon a sheet of ice which extended about 15 or 20 feet east of the track. The automobile was coasting on a slight downgrade toward the track and was moving at about eight miles per hour when the brakes were applied and it began to skid on the ice. The driver said he did not know of the existence of the sheet of ice until the car began to skid although the accident occurred in daylight. After the automobile passed over the ice the driver applied the power in an attempt to cross the tracks ahead of the train. The attempt was almost successful, the train striking the rear end of the automobile. The evidence warranted a finding by the jury that no warning signals were given as the train approached the crossing. The trial court directed a verdict for the defendant upon the ground that the failure of the railroad to give reasonable warning of the approaching of the train was not the proximate cause of the collision. The Circuit Court of Appeals held this ruling to be correct. The contention of the plaintiff that the jury could properly determine that the automobile would have been stopped if a reasonable warning of the approach of the train had been given was answered as follows:

“It is claimed on behalf of the plaintiff that, if the usual signals had been given, he would not

have driven the automobile so near the crossing as 20 feet before applying the brakes. Whether this claim is anything more than an afterthought may be open to doubt. There was no testimony showing how far from the railroad track plaintiff would have tried to stop if he had heard any signals from the approaching train. Furthermore, it is pure speculation whether, if the brakes had been applied at a distance from the crossing of 30 to 40 feet, the accident would not have happened just the same. There is no evidence in the record that the condition of the road 30 or 40 feet from the crossing was any different from the condition within the 20-foot limit. If the usual signals had been given by those in charge of the train, and if the brakes had been applied to the automobile when at a distance of 30 or 40 feet from the crossing, yet, if the icy condition which plaintiff claims existed within the 20-foot limit extended as far back as 30 or 40 feet, the accident might very likely have happened, notwithstanding the attempt to stop the automobile 30 or 40 feet from the track.

“Such being the facts disclosed by the record, we hold that within the rules announced in the foregoing cases, the failure by defendant to give customary signals when the train was approaching the crossing, if such failure in fact existed, was not the proximate cause of the accident.”

In *Stroud v. Chicago, M. & St. P. Ry. Co.*, 243 Pac. 1089, 75 Mont. 384, the plaintiff was riding in a truck driven by Harris. The truck approached a public crossing over a highway covered with ice. When the train came into view the truck was traveling only three or four miles per hour. When about 17 feet from the railroad track the driver, having become aware of the approaching train, applied the brakes, which caused the wheels to lock and

the truck to slide into and against the front end of the locomotive. The train was traveling about 10 to 25 miles per hour. No warning of its approach to the crossing was given. The court held that neither the plaintiff nor the driver was guilty of contributory negligence as a matter of law. The plaintiff contended that if proper warning signals of the approach of the train had been given the driver of the truck would have been able to stop and avoid the collision. This contention was answered by the Supreme Court of Montana thus:

“The weakness of the plaintiffs’ case is that they failed to introduce testimony which would have warranted a finding that, if they had been warned, they would have taken earlier steps to have avoided the collision by sooner applying the brakes, or not entering upon the crossing until after the train had passed. Instead of making this essential showing, the testimony in the record leads inevitably to the conclusion that the proximate cause of the collision was the icy and slippery condition of the planking on the crossing, which caused the truck to skid forward until it collided with the locomotive. The defendant was not responsible for the condition of the crossing; it did not know of its condition, and was not chargeable with knowledge thereof.

* * * * *

“While counsel for plaintiffs concede that the collision was occasioned by the icy and slippery condition of the crossing which caused the truck to skid, he contends that there was nothing about the icy crossing which would have made it dangerous in the absence of the defendant’s negligence, that it was a condition for which neither party was responsible, and he invokes the rule laid down in *Meisner v. City of Dillon*, 74 P. 130, 29 Mont. 116:

“ ‘Where two causes contribute to an injury, one of which is directly traceable to the defendant’s negligence, and for the other of which neither party is responsible, the defendant will be held liable, provided the injury would not have been sustained but for such negligence.’ ”

“But this rule has no application to the facts in this case, because, as above pointed out, there is nothing to show that the alleged negligent act of the defendant in failing to give the crossing signals in any way influenced the plaintiffs’ actions; so it cannot be said on this record that ‘the injury would not have been sustained but for such negligence.’ ”

In *Barrett v. United States Railroad Administration et al.*, 194 N. W. 222, 196 Iowa 1143, the plaintiff, alone in her automobile, approached a railroad crossing at a rate of speed of about 10 or 12 miles per hour. When she reached a point 40 feet from the tracks she observed an approaching train about the same distance from the crossing. She applied her brakes, but the automobile slid on the icy pavement until it had almost cleared the track. There was evidence that the train crew failed to give the statutory warning signals as the train came to the crossing. The court held that there was no basis in the evidence for a finding that proper warning signals would have enabled the plaintiff to avoid the collision. The point is disposed of in this language:

“* * * Proximate cause is a mixed question of law and fact. Is it sufficiently a question of fact under the evidence in this case to warrant submission to the jury? In other words, could a jury assume, and could the court permit the jury to assume, that, if the station signals had been given, the car

would not have skidded over the ice onto the track, or that the plaintiff would have stopped her car so far away that the car could not have so skidded? The jury could not properly pass upon such question arbitrarily. The burden was on the plaintiff to show that the collision was the proximate effect of the failure to give the train signals. If the record discloses no evidence of a causal connection, or if the evidence of plaintiff negatives a causal connection, between the failure of the signals and the happening of the collision, the jury has no discretion to find otherwise. In such a case, it is the duty of the court as a matter of law to direct a nonsuit.

“We cannot avoid the conclusion that this record contains no evidence upon which a finding of causal connection could be based. It follows that the defendant’s motion for a directed verdict ought to have been sustained upon that ground, and that its motion for a new trial should have been sustained upon the same ground.”

The case of *Haarstrich v. Oregon Short Line Railroad Company*, 70 Utah 552, 262 Pac. 100, is decisive of the point that any failure on the part of the railroad to give additional warning of the approach of the automobile was not a proximate cause of the collision and that the proximate cause of the collision was the negligence of the driver of the automobile in which the plaintiff was riding. In that case the automobile in which the plaintiff was riding as a guest approached the crossing in the night time at a rate of speed which the jury very conservatively fixed at 30 miles per hour, and struck a slow moving train that had gone on to the crossing without reasonable warning. This court held that any failure to give reasonable warning of the approach of

the train was not a proximate cause of the collision but that the negligent operation of the automobile was. The only factual distinction between the case at bar and the *Haarstrich* case is that in the latter the automobile did not slide a distance of 60 feet or more on an icy street.

Other Utah cases in point are:

Olson v. The Denver and Rio Grande Western Railroad Company, 98 Utah 208, 98 P. (2d) 944;

Davis v. Mellen, 55 Utah 9, 182 Pac. 920;

Edd v. U. P. Coal Company, 25 Utah 293, 71 Pac. 215;

O'Brien v. Alston, 61 Utah 368, 213 Pac. 791;

Edgar v. Rio Grande Western Railroad Company, 32 Utah 330, 90 Pac. 745;

Anderson v. Bransford, 39 Utah 256, 116 Pac. 1023;

Hansen v. Clyde, . . . Utah . . . , 56 P. (2d) 1366.

Mr. Justice Wolfe dissented from the majority opinion in *Hansen v. Clyde*, *supra*. He makes a very logical analysis of the principle of proximate cause in negligence cases and places the situation in the case at bar in the same category as the *Haarstrich* case. He demonstrates the situation in which the negligence of the driver of one vehicle cannot be thrust upon the operator of another vehicle. The situation in which that may not be done is the precise situation we have in the present case. Here, the driver of a motor vehicle approaches a place of danger at such a rate of speed that the moment he attempts to reduce that speed he loses all control of the vehicle, which then careens wildly until it crashes into another moving vehicle. Nothing that the oper-

ators of the latter vehicle did or omitted to do caused the operator of the first vehicle to lose his control of it. That control was lost solely because of the conduct of the motorist.

We most earnestly submit that the evidence in this case is wholly insufficient to establish any negligence on the part of the defendants and that the trial court erred in refusing to direct the verdict in favor of the appellants.

POINT II

THE SPECIAL VERDICT IS INSUFFICIENT TO SUPPORT A JUDGMENT IN FAVOR OF THE PLAINTIFF.

The special verdict in the form of questions and answers is as follows:

“Question No. 1: Do you find by a preponderance of the evidence that the bell on the locomotive which collided with the automobile in which plaintiff was riding was not rung continuously from a point 80 rods from the intersection of Second South Street with Fourth West Street in Salt Lake City, Utah?

“Answer (Yes or No) No.

“Question No. 2: If your answer to Question No. 1 is ‘Yes,’ do you further find by a preponderance of all the evidence that the failure to have the bell on the engine ringing continuously for 80 rods was a proximate cause of the injury, if any, sustained by plaintiff?

“Answer (Yes or No) Not Answered.

“Question No. 3: Do you find by a preponderance of the evidence introduced in this case that the locomotive involved in the collision was driven into the intersection of Second South Street with Fourth West Street during the prevalence of a snow storm without the whistle thereon being sounded just prior to the entrance of the locomotive into the said intersection?”

“Answer (Yes or No) Yes.

“Question No. 4: If your answer to Question No. 3 is ‘Yes,’ do you further find by a preponderance of the evidence that this failure to sound the whistle was a proximate cause of the injuries, if any, sustained by the plaintiff?”

“Answer (Yes or No) Yes.

“Question No. 5: Do you find by a preponderance of the evidence that the light on the south end of the locomotive was not burning just prior to and at the time of the collision with the automobile in which plaintiff was riding?”

“Answer (Yes or No) No.

“Question No. 6: If your answer to Question No. 5 is ‘Yes,’ do you further find by a preponderance of the evidence that such failure to have the light burning was a proximate cause of the injuries, if any, suffered by the plaintiff?”

“Answer (Yes or No) Not Answered.

“Question No. 7: Do you find by a preponderance of the evidence that the trainmen on the locomotive negligently failed to keep a lookout for automobiles crossing the intersection of Second South Street with Fourth West Street?”

“Answer (Yes or No) Yes.

“Question No. 8: If your answer to Question No. 7 is ‘Yes,’ do you further find by a preponderance of the evidence that had the trainmen kept the lookout of reasonable, prudent persons under the circumstances the hostler on the locomotive could have blown his whistle or stopped his engine in time to have avoided the collision after it was apparent to him or should have been apparent to a reasonable, prudent person that the driver of the automobile was not going to stop his automobile before driving into the path of the locomotive?”

“Answer (Yes or No) Yes.

“Question No. 9: If your answer to Question No. 8 is ‘Yes,’ do you further find by a preponderance of the evidence that such failure to stop or blow the whistle was a proximate cause of the injuries, if any, sustained by the plaintiff?”

“Answer (Yes or No) Yes.

“Question No. 10: Do you find by a preponderance of the evidence that there was a watchman or flagman on duty at the intersection and at the time of the collision between the locomotive and the automobile in which plaintiff was riding?”

“Answer (Yes or No) Yes.

“Question No. 11: If your answer to Question No. 10 is ‘Yes,’ do you find by a preponderance of the evidence that the watchman or flagman negligently failed to be stationed in the intersection or that he negligently failed to signal the plaintiff or the driver of her car that a locomotive was approaching the intersection?”

“Answer (Yes or No) Yes.

“Question No. 12: If your answer to Question No. 11 is ‘Yes,’ do you find by a preponderance of

the evidence that such negligence was a proximate cause of the injuries, if any, suffered by plaintiff?

"Answer (Yes or No) Yes.

"*Question No. 13:* Do you find by a preponderance of the evidence that plaintiff's husband, William Lodder, drove the automobile in which they were riding into the intersection of Second South Street with Fourth West Street at a rate of speed that was greater than was safe, reasonable, and prudent, having regard to all surrounding circumstances then existing?

"Answer (Yes or No) No.

"*Question No. 14:* Do you find by a preponderance of the evidence that the husband of plaintiff drove the automobile in which plaintiff was riding into the intersection of Second South and Fourth West without keeping the same lookout which a reasonably prudent person would have kept under the same circumstances then existing?

"Answer (Yes or No) No.

"*Question No. 15:* If your answer to Questions Nos. 13 and 14, or either of them, is 'Yes,' do you further find by a preponderance of the evidence that the conduct of the driver of the car in which plaintiff was riding in driving too fast, if he did, or in failing to keep such a lookout, if he so failed, was the sole proximate cause of the injuries, if any, sustained by plaintiff?

"Answer (Yes or No) Not Answered.

"*Question No. 16:* Do you find by a preponderance of the evidence that plaintiff herself negligently failed to keep a lookout for the approach of the locomotive with which the car in which she was riding collided?

"Answer (Yes or No) No.

“Question No. 17: If your answer to Question No. 16 is ‘Yes,’ do you find by a preponderance of the evidence that had she kept such a lookout as a reasonably prudent person under the same circumstances would have kept, she could have appraised the driver of the car in which she was riding of the danger in time to permit him to have avoided the accident?”

“Answer (Yes or No) Not Answered.

“Question No. 18: If your answer to Questions Nos. 16 and 17 is ‘Yes,’ do you further find by a preponderance of the evidence that plaintiff’s negligence, if any, was a proximate cause of her own injuries, if any?”

“Answer (Yes or No) Not Answered.”

The issues raised by the pleadings were: (1) whether the Railroad Company failed to give reasonable warning to motorists of the approach of the locomotive to the intersection; (2) whether the failure to give such warning was a proximate cause of the collision; (3) whether the operators of the locomotive maintained a reasonable lookout for the automobile; (4) whether the defendants had a clear opportunity to avoid the collision by the exercise of reasonable care after the engine crew saw or should have seen that the automobile would be unable to stop before reaching the tracks.

It is unnecessary to cite authorities in support of the proposition that it was incumbent upon the plaintiff to establish the affirmative of issues 1 and 2 or issues 3 and 4 in order to be entitled to a judgment in her favor. These are the controlling issues of liability, and, unless the special

verdict establishes the affirmative of them, the judgment appealed from is unsupported by essential facts. We submit that the special verdict fails completely to establish affirmatively any of the controlling issues above enumerated.

First, there is no finding that any of the defendants failed to give reasonable warning of the approach of the locomotive to the intersection.

It is elementary that in the absence of the statute or ordinance a railroad is not under any duty to give any particular type of warning at any particular time or place, of the approach of its locomotive or train to a public crossing. The duty is merely to give what under the circumstances amounts to a reasonable warning. It may employ any means or devices at any time or place that are adequate to convey to motorists a reasonable warning of the approaching train or engine. These propositions are well established by many authorities. In the case of *Blackwell v. Union Pacific Railroad Company*, 52 S. W. (2d) 814, ... Mo. ..., it is held:

“It was defendants’ duty to warn plaintiff of the train’s approach to the crossing, but they were not required to give such warning by any particular method. In other words, a failure to warn by a particular method would not be negligence if an adequate warning was given by some other method. Plaintiff concedes that she would not be entitled to recover on the ground that defendants failed to sound a signal of warning if a sufficient warning was given by the ringing of the automatic bell, or by a brakeman giving signals with a lighted lantern, or if the lights at the crossing had been burn-

ing so that the approach of the train could have been discovered in time to avert the collision. This being true, plaintiff's instruction P-1, which directs a verdict for plaintiff on the sole ground that defendants negligently failed to sound any signal of warning, is fatally erroneous, in that it does not require a finding that defendants did not give a warning by any of the other methods mentioned. In other words, the instruction does not require the jury to find the facts necessary to constitute a failure to warn."

Michael v. C. B. & Q. Railroad Company, 131 N. W. 892, 146 Wis. 466;

Nicholas v. C. B. & Q. Railroad Company, 100 N. W. 1115, 125 Iowa 236;

Fish v. So. Pacific Railroad, 143 P. (2d) 917, ... Ore.

The finding that the locomotive was driven into the intersection during the prevalence of a snow storm without the whistle thereon being sounded just prior to the entrance of the locomotive into the intersection is at most a finding that a particular kind of warning signal was not given at a particular spot. It falls far short of a determination that reasonable warning of the approach of the locomotive to the crossing was not given. Furthermore, it is almost inconceivable how the blowing of the whistle just prior to the entry of the locomotive into the intersection could have afforded any effective warning to anyone.

The findings with respect to the conduct of the watchman are likewise insufficient to support the judgment, because they, at most, determine merely that a specified signal was not given by a specified individual. There is no statute which requires a railroad to maintain a watchman at any

crossing or intersection in this state. There is likewise no ordinance which requires that a watchman be stationed at the crossing where the accident occurred nor is there any statute or ordinance requiring a watchman to give any warning or any signals of the approach of a train or locomotive to a highway. The findings with respect to the watchman and his failure to signal the plaintiffs fall far short of a finding that the defendants failed to give reasonable warning of the approach of the locomotive.

It is unnecessary to consider whether the findings with respect to the watchman might be sufficient to sustain a judgment against him. He was not a party to the action and no judgment has been rendered against him.

We submit that the findings with respect to the watchman do not even determine that he failed to signal the plaintiffs of the approach of the locomotive. Finding No. 11 is to the effect that the watchman negligently failed to be stationed in the intersection *or* that he negligently failed to signal the plaintiffs that the locomotive was approaching the intersection. This finding incorporates two distinct propositions in the alternative. Since it is a finding that the watchman failed to station himself in the intersection or that he failed to give a signal to the plaintiffs, neither omission is established. The finding, destroys itself.

Second, there is no finding that a failure to give a reasonable warning of the approach of the locomotive was a proximate cause of the collision. Since there was no determination of a failure to give reasonable warning, that omission is fatal to the judgment. There is nothing to which proximate cause could attach.

It remains to be considered whether the findings with respect to the matter of lookout and operation of the locomotive are sufficient to sustain the judgment. We recognize that the operators of the locomotive were bound to maintain a reasonable lookout for the plaintiff's automobile as the locomotive approached the point of collision. There is no finding in the special verdict that the operators of the locomotive failed to maintain such a lookout. Finding No. 7 is merely a determination that the trainman negligently failed to keep a lookout for automobiles crossing the intersection of Second South Street with Fourth West Street. No argument is required to demonstrate that this falls short of determining that the trainman failed to maintain a reasonable lookout for the plaintiff's automobile as the locomotive approached the point of contact. Any failure to maintain the type of lookout described in Finding No. 7 is utterly immaterial because there was no duty imposed upon the trainman to maintain such lookout. The plaintiffs never claimed or asserted a failure to keep such lookout. The automobile never crossed the intersection of the two streets because it ran into the locomotive. To keep a lookout for automobiles at the place described in Finding No. 7 would be to keep a lookout altogether too late to have any bearing whatsoever upon the accident. The only lookout, so far as the train crew is concerned, that could have afforded the plaintiffs any protection whatsoever, was a lookout for the plaintiff's automobile as the locomotive approached the intersection. There is no finding that such a lookout was not maintained.

Even if there were a finding that the trainmen failed to maintain a proper lookout for plaintiffs' automobile as the

locomotive approached the intersection, no legal significance could be attached to it unless it be accompanied by a finding of facts demonstrating that such failure to keep a proper lookout was a proximate cause of the collision. *Van Wagoner v. Union Pac. R. Co.*, *supra*.

In order for the failure to keep a proper lookout to be a proximate cause of the collision there must be a finding to the effect that if the trainmen had maintained a proper lookout they would have seen the automobile in a situation of peril in ample time to have brought the locomotive to a stop before it reached the point of collision or that the train crew could have given the plaintiffs an effective warning in time to have enabled them to stop the automobile before it reached the tracks on which the locomotive was being operated. This finding must establish that the train crew had a clear-cut opportunity to stop the locomotive or give the signal in time to enable the plaintiffs to stop the automobile and thus avoid the collision. Again quoting from the *Van Wagoner* case:

“* * * The opportunity to avoid the accident must not be a possibility; it must be a clear opportunity. Not even by speculation could the jury reach a verdict on the theory that the train crew had time to appreciate that deceased was negligent and that by reasonable means they could have avoided the ensuing collision. When, as in this jurisdiction, a train has the preferred right of way, its operator is entitled to assume the driver of a car will yield to this preferment, and if the doctrine of last clear chance is to be invoked, it must clearly appear that time permitted the train crew to appreciate deceased's predicament, and to give warnings sufficiently early enough for the deceased to extricate

himself, or the time element was sufficient to permit the crew to bring the train to a stop."

The answer of the jury to Question No. 8 that if the trainman had kept the lookout of a reasonably prudent person under the circumstances, the hostler could have blown his whistle or stopped his engine in time to avoid the collision after it was apparent to him, or should have been apparent to him, that the motorist was not going to stop before driving into the path of the locomotive is a total nullity and affords no support whatever to the judgment. It fails entirely to determine that the train crew had a clear or any opportunity to avoid the collision by the exercise of reasonable care after they knew or should have known that the driver would be unable to extricate himself from a dangerous situation.

The futility of Finding No. 8 is made more obvious by the alternative proposition embraced in it. It says that if the trainman had kept a reasonable lookout, the hostler could have done two alternative acts; (a) he could have blown his whistle, or (b) stopped his engine in time to avoid the collision. Obviously, the blowing of the whistle after the train crew saw the peril of the automobile was much too late to avoid any benefit to either the driver or the plaintiff.

The answer to Question No. 9 is likewise an utterly irrelevant finding. If the train crew had a clear opportunity to avoid the collision by the exercise of reasonable care after they should have seen the perilous situation of the automobile, their failure to exercise such care must necessarily have been the proximate cause of the collision, but since there

is no such finding, the conclusion of the jury that "such failure to stop or blow the whistle was a proximate cause of the injuries" is entirely immaterial.

Section 104-25-1, U. C. A. 1943, defines a special verdict as that by which the jury finds the facts, only leaving the judgment to the court, and provides that such verdict must present the conclusions of fact as established by the evidence and that those conclusions of fact must be so presented that nothing shall remain to the court but to draw from them, conclusions of law. It is plain from the language of this statute that unless the special verdict determines affirmatively all issues upon which liability of the defendant depends, a judgment in favor of the plaintiff cannot be rested upon it.

See: *In Re Hansen's Will*, 50 Utah 207, 167 Pac. 256.

Inasmuch as the verdict does not determine that any of the defendants failed to give reasonable warning of the approach of the locomotive to the crossing or that the men in charge of the locomotive failed to keep a proper lookout for the plaintiffs' automobile or failed to exercise reasonable care to avoid the collision after a reasonable lookout would have disclosed to them that the automobile could not be stopped short of the railroad track or that any of the omissions stated were the proximate cause of the collision, it is fatally insufficient to support the judgment rendered.

POINT III

NO FINDING IN SUPPORT OF THE JUDGMENT CAN BE IMPLIED.

It has been demonstrated that the special verdict does not determine the controlling issues of liability and is in-

sufficient to support a judgment in favor of the plaintiff. There is no statute in this state which supplies a determination of the omitted issues. The trial court made no finding either for or against the plaintiff upon the omitted issues. Undoubtedly the respondent will rely upon Rule 49 (a) of the Rules of Civil Procedure to supply the insufficiency of the verdict.

That rule in substance provides that if the court omits any issue of fact raised by the pleadings or the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accordance with the judgment on the special verdict.

There are several reasons why this rule cannot be invoked to bridge the gap in the special verdict.

First, it is observed that no implied finding can be indulged upon an issue not supported by the evidence. We have demonstrated that the omitted issues were not supported by the evidence and that as matter of law the alleged failure of the engineman to give additional warning of the approach of the locomotive was not a proximate cause of the collision. But even if this court were to hold otherwise, Rule 49 (a) cannot be used to cure the insufficiency of the verdict.

In such an unlooked-for event, the case would stand in this position: The trial court of its own motion and over the protest in effect of all parties required the jury to re-

turn a special verdict. This verdict was prepared by the trial judge without any suggestion or assistance of counsel of either party. In so doing, he failed to submit to the jury the issue raised by the pleadings of whether the defendants failed to give reasonable warning of the approach of the locomotive or whether such failure, if any, was a proximate cause of the collision. Consistently with their position and contentions throughout the trial, the defendants did not request that either of these issues be submitted to the jury. Had they made any such request, they would thereby have admitted, at least impliedly, that these issues were issues of fact for the jury. Certainly, such a request by the defendants would be utterly inconsistent with their position that there were no issues of fact for the jury.

But suppose it turns out that these were issues of fact, can Rule 49 (a) be invoked to supply an adjudication of these issues in favor of the plaintiff? It is certain that they have not been adjudicated by the jury, or by the trial court for that matter.

It is significant that the plaintiff made no request to have these issues submitted to the jury, although she is the one who demanded a jury trial. The burden rested upon her to prove the affirmative of those issues. Does she not, by failing to request that these issues upon which she had the burden of proving be submitted to the jury, do more than merely waive her right to have them adjudicated by the jury? Does she not by such failure, in effect confess that she has failed to present any evidence sufficient to make the issues of fact? We submit that Rule 49 (a), rightly construed, requires affirmative answers to these questions.

In other words, if a party fails to request the submission to the jury of issues upon which he has the burden of proof, he not only waives his right to trial by jury of those issues, but actually abandons them. Having abandoned the issue, no adjudication of it in his favor can be made by the court or implied by the appellate court. Any other interpretation of Rule 49 (a) would, we submit, render it invalid by making it a rule of law instead of a rule of practice or procedure.

In the State of Texas there has long been in force a statute which, though frequently amended, embraces essentially the provisions of Rule 49 (a). As will appear from the cases cited below, the statute provides that when a case is submitted on special verdict all issues made by the pleadings and evidence must be submitted, and that the failure to submit an issue shall not be deemed a ground for reversing of the judgment, unless its submission has been requested in writing by the party complaining of the judgment, and that on appeal or writ of error an issue not submitted and not requested is deemed to be found by the court in such manner as to support the judgment, if there is evidence to sustain such finding. The Supreme Court of Texas has several times construed this statute to mean that no finding of fact can be made by the court or be implied in support of a judgment in favor of a party who has failed to request the submission to the jury of an essential issue upon which he has the burden of proof. See:

Wichita Falls and Oklahoma Ry. Co. v. Pepper,
135 S. W. (2d) 79, ... Tex. ...;
Ormsby v. Ratcliffe, 1 S. W. (2d) 1085, 117 Tex.
242;

Colbert v. Dallas Joint Stock Land Bank, 102 S. W. (2d) 1031, 129 Tex. 235.

We quote from *Wichita Falls & Oklahoma Railway Company v. Pepper* as follows:

"The fundamental principle underlying the construction of Art. 2190 is that in a case tried before a jury each litigant has the legal right to have the jury pass upon the ultimate or essential issues of fact raised by the pleadings and the evidence, and findings made by the jury thereon, sufficient to form the basis of a judgment. The power of the judge to make findings where none are submitted or requested does not extend to ultimate or essential issues which are necessary to base a judgment thereon, or to independent grounds of recovery or defense. A party may waive an issue upon which he relies for recovery or defense, by failing to request its submission. We find no language in Art. 2190 which places the duty on the plaintiff to present defensive issues which would support a judgment for the defendant; and no duty rests on the defendant to present such issues as are essential to a recovery by the plaintiff. In such case, if the party has failed to request for submission such issue, or issues, as will sustain his action or defense, he has not met the burden placed upon him by law, and no waiver can be imputed to the other party for such failure."

We emphasize that the rule does not provide that a finding of fact essential to the *support* of the judgment can be implied. Only such findings as are *in accord* with the judgment may be implied. This carefully considered language of the rule was obviously designed to preclude the implication of any finding essential or indispensable to the

support of the judgment. Such interpretation of the rule makes it what it purports to be, namely, a rule of procedure and not a principle of substantive law.

Another convincing reason why no finding in support of the judgment can be implied by virtue of Rule 49 (a) is that the defendants had no opportunity to prepare any issues for submission to the jury or to prepare any requests for explanation or instructions covering any special issues. The conduct of the trial of this case is *suigeneris*. The parties concluded the presentation of their evidence late in the evening of December 6 (R. 306). The court announced that the trial would resume at 9 o'clock the next morning. Both sides submitted requested instructions for a general verdict. The defendants filed separate motions for a directed verdict. None of the parties requested that any special interrogatories or issues be submitted.

The trial resumed promptly at 9 o'clock the next morning, not in open court but in the Judge's chambers. Here for the first time the form of the verdict and the court's determination to require a special verdict were made known to the defendants' counsel. While we do not undertake to speak for the plaintiff's counsel, it would appear from the record that they too for the first time learned of the special verdict. Defendants' counsel protested against the submission to the jury of the entire special verdict. He attempted to state his theory of the case to the court but was summarily interrupted (R. 307). He did object to each of the interrogatories but was informed by the court that he could take his exceptions later. When he attempted to point out that conceivably there might be an issue as to whether or not

the negligence of the driver of the automobile and the icy condition of the street were the proximate cause of the accident, the suggestion was brushed aside. The court insisted that the issue of proximate cause was covered by questions 13, 14 and 15. After some brief discussion between the court, counsel for plaintiff and counsel for the Depot Company, in which the court elaborated somewhat on a wholly erroneous theory of proximate cause, the court proceeded to read the special verdict to the jury.

If Rule 49 (a) has the effect of supplying a finding of fact in favor of the plaintiff upon the issues of liability not submitted to the jury under the circumstances of the trial of this action, it ceases to be a rule of procedure and becomes a device by which a trial court can deprive a party of all semblance of a fair hearing. It would make of it a weapon in the hands of the trial court whereby he could take over both the prosecution and the defense of an action and conduct the trial without regard to any of the established conceptions of a fair trial.

We recognize that the rule does not require that the court give any notice of its intention to require a special verdict. Such notice is, however, indispensable to a fair trial and must be read into the rule. Such a requirement is read into statutes which require that special verdicts requested by one party shall be served upon the other.

In *Pittsburg, C., C. & St. L. R. Company v. Smith*, 69 N. E. 873, ... Ill. ..., which was a crossing case, the trial court submitted a special interrogatory without having advised counsel for the plaintiff beforehand that such special interrogatory would be presented. The defendant's counsel

thus had no opportunity to study the special interrogatory or offer for submission other interrogatories. The jury answered the interrogatory unfavorably to the defendant, and the Supreme Court of Illinois reversed the ruling of the trial court in submitting the special interrogatory without first having given the defendant the opportunity to prepare for submission additional interrogatories. The Illinois Practice Act required the submission of special interrogatories when requested by any of the parties, but required the demanding counsel to serve the interrogatories upon counsel for the other side. The decision of the court in part reads:

“It is true that the Legislature did not see fit to command the court; but every reason which could have moved them to require the adverse party to submit an interrogatory applies with equal force where the same interrogatory is propounded by the court without a request, and we would scarcely adopt a rule of practice that a court might be less fair and just to a litigant than the statute requires his adversary to be. If it should be held proper practice for the court, of its own motion, to give an interrogatory without notice to parties, they would be deprived of the opportunities which the statute secures to them, for the mere reason that the court gives the interrogatory.”

POINT IV

THE COURT ERRED IN REFUSING TO SUBMIT THE ISSUE OF CONTRIBUTORY NEGLIGENCE AND IN REFUSING TO INSTRUCT THE JURY ON THAT ISSUE AS REQUESTED BY THE DEFENDANTS.

The court did submit in questions 16, 17 and 18 the question whether the plaintiff negligently failed to keep a

lookout for the approach of the locomotive and whether she could have apprised the driver of the danger in time to permit him to have avoided the accident if she had kept such lookout. The court also submitted the question whether, if the answers to questions 16 and 17 were yes, whether the plaintiff's negligence, if any, was a proximate cause of her injuries.

These questions obviously do not submit the issue of whether the plaintiff was negligent or whether her negligence, if any, contributed to the collision. They submitted only the question of whether she failed to keep a reasonable lookout for the automobile and whether such lookout would have enabled her to warn the driver in time to permit him to avoid the accident. It was the duty of the plaintiff to exercise reasonable care to avoid the collision. Reasonable care involves something more than merely keeping a lookout. She was entirely familiar with the crossing and with the condition of the street over which she was riding. She was also fully aware of the speed at which the automobile approached the crossing. A jury could most certainly properly determine that the exercise of reasonable care would have prompted her to protest against the unreasonable and unlawful rate of speed at which her husband was approaching the tracks. She was sitting in the front seat next to the driver, who was her husband. A jury could rightly say that she should have warned the driver not only of the danger presented by the approaching locomotive but also the danger inherent in his excessive speed.

In *Morris v. Chicago, B. & Q. R. Co.*, 163 N. W. 799, 101 Neb. 479, the plaintiff was riding as a guest in an auto-

mobile which was struck by a train at a public crossing with which he was familiar. He was held guilty of contributory negligence in failing to caution the driver to slow down. The court said:

"In the present case plaintiff was not charged with the responsibility of driving the automobile. His opportunity to be on the lookout for impending danger at a place he must have known to be dangerous was therefore perhaps better than that of the driver. Knowing the vicinity and the railroad crossing as he says he did, it was plainly his duty to use every reasonable effort to induce the driver of the automobile to slow down or to stop the machine if the view of the track was obstructed. It is not shown in the record before us that he cautioned the driver about impending danger before they reached the track where the collision occurred, nor that he made any attempt to induce his companion to slacken the speed of the car or to stop."

See also *Phillips v. Davis*, 3 F. (2d) 798; *Colorado S. R. Company v. Thomas*, 81 Pac. 801, 33 Colo. 517; *Brown v. Alton Railroad Company*, 151 S. W. (2d) 727, ... Mo. Appeals ...; *Tice v. Pacific Elec. Ry. Co.*, 96 P. (2d) 1022, ... Cal. App. ...; *Wagner v. A. T. & S. F. R. R. Co.*, 292 Pac. 645, 210 Cal. 526.

It will be observed that the only finding which was made by the jury with respect to the conduct of the plaintiff was an implied negative finding to wit that she did not negligently fail to keep a lookout for the approach of the locomotive. The special verdict does not even require the jury to determine whether, if she had kept a reasonable lookout, she could have warned the driver in time to enable

him to stop, because the jury was directed to answer Question No. 17 only in the event the answer to question 16 was yes. Further, the jury was not required to determine whether the negligence of the plaintiff contributed to the collision and injury of which she complained. It was not even required to determine whether her negligence was a proximate cause of the accident and injury, because they were directed to answer question 18 only in the event they answered both 16 and 17 in the affirmative. It is clear, therefore, that the special verdict does not either submit or determine the issue whether the plaintiff exercised reasonable care to avoid the collision or the issue whether the negligence of the plaintiff, if any, contributed to the collision and injury.

No finding adverse to the defendants upon the issues of contributory negligence can be implied under Rule 49 (a). This is so because the court undertook to submit the issue on its own motion, but did so imperfectly and erroneously. Further, the defendants requested that the issue be submitted by its Requested Instruction No. 9. Although the issues might have been framed somewhat differently if the defendants had had an opportunity to do so, Requested Instruction No. 9 clearly and succinctly stated the issues and requested that they be submitted.

A statute which is in substance identical to Rule 49a has long been in force in the State of Wisconsin. It has been held repeatedly under that statute that no implied finding can be indulged in support of a judgment upon an issue not submitted to the jury where the complaining party has called the attention of the trial court to the omitted issue by a

requested instruction or by a request of a general or informal character.

In the case of *Olwell v. Skobis*, 105 N. W. 777, 176 Wis. 308, the plaintiff alleged that she had sustained injuries by reason of the negligence of the defendants in chipping off with a chisel a piece of iron from an office building. The piece of iron struck the plaintiff as she was leaving the office, and she recovered a judgment upon a special verdict. The trial court failed to submit to the jury the issue whether the cutting or chipping of the iron was done by the defendants in the usual safe and workmanlike manner. The defendants requested an answer to the inquiry whether the work of smoothing the iron water rib was done by them in all respects in the usual and ordinary way generally pursued in doing such work in like locations and under similar circumstances by workers in iron in Milwaukee. The defendants also requested an instruction that if the defendants were carrying on the work in the way that such work in like locations and under similar circumstances was usually and ordinarily carried on throughout the City of Milwaukee and vicinity general, then the employees of the defendants were not guilty of any want of ordinary care in so carrying on such work. The Supreme Court reversed the judgment for failure of the trial court to submit the issue whether the cutting and chipping of the iron was done by the defendants in the usual safe and workmanlike manner. The pertinent parts of the decision are:

“Counsel for the plaintiff contend that the question so requested was defective, in that it limited the inquiry to the mere work of smoothing the iron

water rib, and also limited the inquiry to the way generally pursued by workers in iron in Milwaukee and vicinity. There seems to be much force in the criticism. The true test is that degree of care which is ordinarily observed by men of ordinary care and prudence, or by men generally, engaged in the same or similar business, under the same or similar circumstances. *Guinard v. Knapp-Stout & Co.*, 95 Wis. 482, 70 N. W. 671; *Rylander v. Laursen*, 124 Wis. 2, 102 N. W. 341. But the request called the attention of the court sharply to the subject. It was followed by another request, covering one of the issues thus made by the pleadings, which reads: 'In smoothing the iron water rib upon the north edge of the Hyatt light frame in front of the office room referred to, in the manner in which that work was done, did the employes of the defendants exercise such care as is generally and usually exercised under similar circumstances by persons in the same line of business, engaged in doing similar work.' This request is not as concise as it might have been, but it covered one of the issues in the case.

"Counsel for the defendant sought to have the question mentioned covered by the jury in an instruction to be given under the second question submitted, to the effect that if the defendants were carrying on the work 'in the way that such work in like locations and under similar circumstances was usually and ordinarily carried on throughout the city of Milwaukee and vicinity generally, then the employes of the defendants were not guilty of any want of ordinary care in so carrying on such work, and although an injury did result to the plaintiff, yet, nevertheless, if you find that said employes of defendants were carrying on the work in the usual and ordinary way of carrying on such work under similar circumstances, your answer to the second question will be no.' While such instruction

would have been defective in so far as it limited the inquiry to Milwaukee and vicinity, as already indicated, yet it served to call the attention of the court again to the question so at issue and not submitted to the jury. We must hold that the failure to submit such question to the jury was error."

In *Wawrzyniakowski v. Hoffman & Billings Mfg. Co.*, 131 N. W. 429, 146 Wis. 153, the defendant called the court's attention to the omitted issue by a request improper in form and by a requested instruction to the jury upon the issue. The Supreme Court held that the omission to submit the proper issue was sufficiently called to the court's attention by the improper request and by the request for instruction and that the judgment which rested upon a special verdict could not be sustained because of the omission to submit to the jury a material issue. The court pointed out:

"The duty of framing a special verdict, however, devolves upon the court. Its attention was sharply called to the issue which the defendant desired to have submitted, although not in exact language. Under these circumstances it was the duty of the court to frame and propound the correct question. It is so decided in *Olwell v. Skobis*, supra."

It was also error for the court to refuse to instruct the jury upon the issue of contributory negligence as requested by the defendants. Rule 49 (a) specifically provides that when a cause is submitted upon special verdict "the court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue." We submit that where the trial court upon its own motion, with-

out notice to the parties and over their protests, submits a case to the jury for a special verdict, it is error to fail to properly instruct the jury upon each special issue, even without any request by the parties.

In any event, in the circumstances of this case the trial judge may not properly refuse to grant a requested instruction merely because it may have some inaccuracies and may be subject to verbal criticism. If it is a substantially correct statement of law and is applicable to the facts, it or some similar instruction must be given.

It will be observed that the statute also requires the court to instruct the jury upon the law applicable to the case (104-24-14, par. 4). In the case of *Smith v. Lenzi*, 74 Utah 362, 279 Pac. 893, it is said:

“We have frequently held that the statute requires the court to instruct upon the law applicable to the case. Upon a question so essential to a proper determination, and so clearly within the issues made by the pleadings, it is the duty of the court to instruct. This duty cannot be avoided because a request fairly calling the attention of the court to the principle of law may also contain some language in addition to the statement of the legal principle which may be subject to the criticism of being argumentative. *Sutton v. Otis Elevator Co.*, 68 Utah 85, 249 P. 437; *Comp. Laws Utah 1917*, § 6802; *Everts v. Worrell*, 58 Utah 238, 197 P. 1043.”

That defendants' Instruction No. 9 was a correct statement of the law of contributory negligence and applicable to the facts in the case cannot be questioned. See *Lawrence v. The Denver and Rio Grande Western RR Co.*, 52 Utah

414, 174 Pac. 817; *Hudson v. Union Pacific RR Co.*, 233 P. (2d) 357; *Montague v. Salt Lake & Utah Ry. Co.*, 52 Utah 368, 174 P. 871; *Cowan v. Salt Lake & Utah Ry. Co.*, 56 Utah 94, 189 P. 599.

POINT V

IT IS ERROR TO INSTRUCT THE JURY UPON PROPOSITIONS OF LAW NOT APPLIED OR APPLICABLE TO THE ISSUES AND EVIDENCE EVEN THOUGH THE PROPOSITIONS ARE CORRECTLY STATED.

Instruction No. 2 reads as follows:

"The proximate cause of an injury is that cause which, in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury and without which the result would not have occurred. It is the *efficient* cause, the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element of circumstance, or the conduct of only one person. To the contrary, the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case each of the participating acts or omissions is regarded in law as a proximate cause. (The sole proximate cause of an injury is the only cause thereof. In order to have a sole proximate cause of any injury, there cannot be an intervening efficient cause which proximately contributes to cause the injury.")

This instruction is a mere definition of a legal concept. Assuming for the moment that it embodies a correct statement of the legal principle, it was error to fail to apply it to any of the facts in the case. Since it was not applied to any of the issues or evidence the inevitable effect of it was to confuse and misdirect the deliberations of the jury. In *Jensen v. Utah Railway Company*, 72 Utah 366, 270 Pac. 349, the trial court in its instructions gave to the jury abstract propositions of law but made no application of them to any phase of the case. This court conceded that these abstract principles were correctly stated but held that the failure of the court to apply them to any aspect of the case was error. It pointed out:

“As a general rule a trial court should not leave the jury to apply mere general principles of law to a case, as here was done by the defendant’s requests. The court should give the jury what the law is as applied to the facts either stated or assumed, and if so found by the jury. The rule is well settled that instructing a jury as a mere abstract or general statement as to the law should be avoided, and that all instructions should be applicable to evidence on either one or the other of the respective theories of the parties. Instructions which are not so applicable, though abstractly they may be correct, are not helpful to the jury, are apt to be misleading and to be improperly applied. That a proposition may be correct in a sense, and yet be inapplicable to the evidence or to the issue, is readily perceived. By the charge, or some of it, given at the request of the defendant, because unrestricted and unrelated, the jury could and may have taken the view that, though all that was testified to by the plaintiff’s witnesses with respect to the use made of the defendant’s track by pedestrians, adults, and children may be true,

nevertheless the plaintiff, a child less than two years of age, was on the defendant's track without right or permission; that she had no right to be there, hence was a trespasser, to whom the defendant owed no duty until she was actually discovered in a place of danger."

See also:

Mehr v. Child, 91 P. (2d) 624, 90 Utah 348;
Hillyard v. Barr, 225 Pac. 1094, 63 Utah 344;
White v. Pinney, 108 P. (2d) 249, 99 Utah 484.

Rule 49 (a) clearly means that the instructions shall apply the law to the facts involved in the particular issue. The requirement that the law be applied to the issues is peculiarly necessary upon the issue of proximate cause. The term proximate cause in negligence cases is, as pointed out by the Supreme Court of the United States in *Mil. & St. P. R. R. Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256, not "a question of science or of legal knowledge." It is a matter to be determined upon the facts in each particular case. See *Shaffer v. Keeley Ice Cream Company*, ... Utah ..., 234 Pac. 300.

But Instruction No. 2 does not have even the virtue of being a correct statement of any legal proposition. If we concede that the language, excluding the last sentence, is a fairly accurate statement of proximate cause of an injury, it is flatly contradicted by what is contained in the last sentence. To say that in order to have a sole proximate cause of an injury there cannot be an intervening efficient cause which proximately contributes to cause the injury, is diametrically opposed to everything that has been said in

the preceding language of the instruction. The two parts of the instruction negative each other and render the whole an incorrect statement of any recognized principle of law.

Furthermore, there was no issue submitted to the jury to which Instruction No. 2 could be applied.

The instruction deals with the proximate cause of an injury or injuries. We are not concerned in this case with the proximate cause of the injury sustained by the plaintiff. There was no question but that the proximate cause of the injury sustained by the plaintiff was the striking of her head against the windshield of the automobile. What we are concerned with in this case is the proximate cause of the collision. The court did not submit any issue with respect to the proximate cause of the collision. There was, therefore, no issue submitted to the jury to which an instruction defining proximate cause of an injury could possibly be applied.

Even if we concede that the proximate cause of the plaintiff's injury and proximate cause of the collision mean the same thing, still there was no issue submitted to the jury to which Instruction No. 2 could be applied.

So far as proximate cause, either of the collision or the plaintiff's injuries, that conceivably could have been submitted to the jury was whether the failure, if any, of the defendants to give additional warning of the approach of the locomotive combined or concerted with the negligence of the driver of the automobile. This issue the court did not submit to the jury. It never was required to determine even whether the failure, if any, of the de-

fendants to give reasonable warning of the approach of the locomotive was the proximate cause of the collision or injury. Much less was it required to determine whether such negligence, in concert with the negligence of the driver, was the proximate cause of the collision or injury.

We do not overlook the issue submitted in question 15 which inquired whether the jury found by a preponderance of the evidence that the conduct of the driver of the car in driving too fast, if he did, or in failing to keep a lookout, if he so failed, was the sole proximate cause of the injury. It will be noted, however, that this issue was submitted only conditionally, and the jury was not required to determine it except in the event they answered other inquiries in a certain way. There was, therefore, no submission of even the issue of whether the negligence of the driver was the sole cause.

POINT VI

THE COURT ERRED IN SUBMITTING TO THE JURY ISSUES UNSUPPORTED BY THE EVIDENCE.

In Question No. 13 the court submitted to the jury the issue whether plaintiff's husband drove the automobile in which she was riding into the intersection at a rate of speed that was greater than was safe, reasonable and prudent, having regard to all surrounding circumstances then existing, and in Question No. 14 the issue whether he was keeping a reasonable lookout. The court also submitted in Questions Nos. 7, 8 the issues whether the operators of the locomotive failed to keep a lookout for automobiles crossing the intersec-

tion and whether, if a reasonable lookout had been maintained by them, the hostler could have blown his whistle or stopped his engine in time to avoid the collision.

We have previously demonstrated that the plaintiff's husband was negligent as a matter of law in approaching the railroad crossing at a rate of speed that was excessive and unreasonable in view of the slippery condition of the street and his familiarity with the crossing. We have also demonstrated that there is no evidence that would support a finding that the train crew failed to keep a reasonable lookout for the automobile or that they could, by the exercise of reasonable care, have avoided the collision after they knew or should have known that the automobile would be unable to stop before reaching the tracks.

The defendants requested in their Request No. 1 that the jury be instructed that plaintiff's husband was as a matter of law negligent in approaching the crossing at an excessive and unreasonable rate of speed in view of the condition of the street, and in Requested Instruction No. 8 requested the court to instruct the jury that there was no evidence that would support a finding that the engineer failed to maintain a lookout or that he failed to exercise reasonable care in the operation of the locomotive to avoid a collision with the automobile in which the plaintiff was riding.

Rule 49 (a) provides that when the action has submitted to the jury for its special verdict that the issues to be submitted are those which may be properly submitted under the pleadings and evidence. The rule impliedly, if

not expressly, prohibits the submission to the jury of any issue unsupported by the evidence. This court has repeatedly held in cases submitted to the jury for a general verdict that it is reversible error to submit to the jury an issue not supported by the evidence. See:

Morrison v. Perry, 104 Utah 151, 140 P. (2d) 772;

Fowkes v. J. I. Case Threshing Mach. Co., 46 Utah 502, 151 Pac. 53;

Kendall v. Fordham, 79 Utah 256, 9 P. (2d) 183;

Industrial Comm. v. Wasatch Grading Co., 80 Utah 223, 14 P. (2d) 988;

Peterson v. Sorensen, 91 Utah 507, 65 P. (2d) 12.

POINT VII

THE DEFENDANTS WERE PREVENTED FROM HAVING A FAIR TRIAL BY THE COURT'S REFUSAL TO PERMIT THEIR COUNSEL TO ADDRESS THE JURY AFTER THE SECOND SUBMISSION OF THE CASE.

Immediately after the jury returned its first special verdict the court instructed the jury upon the measure of damage and submitted to them another special verdict for the assessment of the amount of damage. Plaintiffs' counsel thereupon addressed the jury at length on the subject of damage. When the defendants' counsel attempted to answer the plaintiff's argument the court prevented him from making any further argument or answer (R. 322, 323, 324). The reason given by the trial judge for his

ruling was that the defendants' counsel had already exhausted the time allotted to him at the conclusion of the evidence.

We do not assert that the appellants were not allowed to use the time allotted to them at the conclusion of the evidence, nor do we contend that the trial judge may not in his discretion limit the time of counsel to argue the case to the jury. What we do contend is that the court abused its discretion in not permitting defendants' counsel to argue the question of damages. As already indicated, two special verdicts were submitted to the jury. The first one dealt solely with the issues of liability and did not mention the subject of damage. After the court had instructed the jury upon the first set of issues and the parties had argued that matter, the court submitted the issue of damage and gave additional instructions. There was, of course, no opportunity for counsel to argue to the jury any matters pertaining to special damages until the second verdict was submitted to them. Counsel for the plaintiff was permitted to and did argue the question of damages and was in no manner interrupted or restrained by the trial court. In that situation the most elementary conception of a fair trial demanded that the defendants' counsel be accorded the opportunity to present his theories of the evidence and to answer the argument of plaintiff's counsel.

To deny the defendants' counsel the opportunity to argue the matter of damages was particularly harmful in this case because of the manifest uncertainty with respect to the extent of the plaintiff's injuries and pain or

suffering experienced by her. The evidence was such that the defendants might well have contended that plaintiff had long ago fully recovered from any injury sustained in the collision and that the symptoms of pain or suffering were entirely subjective. He might further have properly contended that part of the conditions of which she complained and part of the suffering which she claimed to have endured were due solely to mistreatment by one of her doctors. She testified that this doctor has placed her in a mechanical device and stretched her neck. Another one of her doctors testified that such treatment was the worst treatment that could have been given to her. Not to permit defendants' counsel to present these vital matters to the jury is to deprive the defendants of any semblance of a fair hearing. See:

Jerrell v. N. & P. Belt Line Railroad Company,
184 S. E. 196, 166 Va. 70;
Moses v. Proctor Coal Company, 179 S. W. 1043,
166 Ky. 805;
Cooper v. Robischung Brothers, 155 S. W. 1050.

POINT VIII

THE TRIAL COURT ABUSED ITS DISCRETION IN NOT SETTING ASIDE THE ENTIRE VERDICT AS TAINTED BY PASSION AND PREJUDICE AND GRANTING DEFENDANTS A NEW TRIAL.

It is appellants' position that the jury's finding that plaintiff was damaged in the amount of \$25,000.00 is so grossly excessive and exorbitant and contrary to the evi-

dence that it shows clearly that the jury was influenced by passion or prejudice. The trial court did, we submit, in effect find that passion and prejudice tainted the entire verdict. It should have granted a new trial.

The appellants view the law of this State to be that where a verdict is so excessive as to be shocking to one's conscience and sense of justice it must and should be inferred that the verdict is the result of passion and prejudice. In such a case the entire verdict is tainted and vitiated and should be set aside. Failure on the part of the trial court to grant a new trial in such a case constitutes an abuse of discretion which this court may correct.

Thus in *Stevens Ranch & Livestock Co. v. Union Pacific R. Co.*, 48 Utah 528, 161 Pac. 459, this Court said:

“* * * It is quite true that, where it is made to appear that the verdict is excessive, and that such excess is the result of passion and prejudice, or either, the error cannot be cured by remitting the excess from the verdict. In the nature of things that must be so, because every other question of fact which is involved in the controversy, and which is included in the verdict, must therefore be tainted.”

In *McAfee v. Ogden Union Ry. & Depot Co.*, 62 Utah 115, 218 Pac. 98, this Court made the following statement:

“* * * We now take occasion to say that verdicts will not be interfered with by this court on account of being excessive unless the facts are such that the excess can be determined as a matter of law or that the verdict is so excessive as to be shocking to one's conscience and to clearly indicate passion, prejudice or corruption on the part of the jury.

When a verdict is so excessive that it clearly indicates passion and prejudice, a new trial should be granted unconditionally."

This Court again reiterated the above stated principle in *Pauly v. McCarthy*, 109 Utah 431, 184 P. (2d) 123, as follows:

"Where we can say as a matter of law that the verdict was so excessive as to appear to have been given under the influence of passion or prejudice, and the trial court abused its discretion in acting arbitrarily or capriciously in denying a motion for new trial, we may order the verdict set aside and a new trial granted. *Jensen v. D. & R. G. Ry. Co.*, supra. * * *

Appellants contend that the order of the trial court requiring plaintiff to remit \$15,000.00 or sixty per cent of the amount of the jury verdict or submit to a new trial, itself clearly and unequivocally demonstrates that the jury's verdict was influenced by passion and prejudice and that the trial court so found. There is certainly a point which a trial court may reach in remitting a portion of a jury verdict beyond which the remission constitutes the clearest and most convincing evidence that the entire verdict was tainted by passion and prejudice. There are decisions of this Court in which it has approved a remission of part of a verdict without finding that the entire verdict was vitiated. In some of those decisions the trial court had remitted part of the judgment; in others this Court itself ordered the remission of part of the judgment. In none of those decisions has the Court gone so far as to hold that the necessity for remitting sixty per cent or more of

a verdict did not evidence passion and prejudice which tainted the entire verdict. The following summary shows Utah decisions on this question, with an indication of the net verdict involved in each case and the amount of the remission approved by the court.

Name of Case	Amount of Net Jury Verdict	Remis- sion Ap- proved by this Court	Approxi- mate % of Net Ver- dict Con- stituting Remission
<i>Duffy v. Union Pac. R. Co.</i> , 218 P. (2d) 1080, ...			
Utah	\$ 9,000.00	\$ 4,000.00	44.4%
<i>Mecham v. Foley</i> , 23 P. (2d) 497, ... Utah	1,000.00	500.00	50%
<i>Pauly v. McCarthy</i> , 184 P. (2d) 23, 109 Utah 431 ...	50,000.00	15,500.00	30%
<i>Geary v. Cain</i> , 255 Pac. 416 .	20,000.00	9,500.00	47%
<i>Eleganti v. Standard Coal Co.</i> , 168 Pac. 266	3,400.00	1,400.00	41%
<i>Stevens Ranch, etc. v. Union Pac. R. Co.</i> , 161 Pac. 459, 48 Utah 528	3,250.00	1,367.50	40%
<i>Kennedy v. O. S. L. R. Co.</i> , 54 Pac. 968	9,685.00	2,600.00	27%
<i>Baurne v. Moore et al.</i> , 292 Pac. 1102	17,850.00	8,350.00	47%
<i>Shepherd v. Payne</i> , 206 Pac. 1098	10,000.00	2,500.00	25%

In the recent New York decision, *Faubel v. Draper*, 108 N. Y. S. (2d) 15, the Supreme Court of New York, Appellate Division, squarely held that a great cut in a verdict by a trial judge itself indicated that the entire

verdict was a result of passion and prejudice and that a new trial would and should be granted under such circumstances. In that case plaintiff, a passenger injured on defendant's train, recovered a jury verdict in the amount of \$240,000.00. The trial court ordered that plaintiff remit all of the verdict in excess of \$100,000.00 or submit to a new trial. Plaintiff accepted the \$100,000.00 and defendant appealed. In reversing the trial court and ordering a new trial, the Supreme Court said:

"The original verdict must have been the result of 'passion, prejudice or a wrong conception of the evidence' in view of the Trial Judge finding it necessary to make so great a cut in the verdict to the sum of \$100,000. Consequently in the interest of justice there should be a new trial before another jury."

Another well considered decision is *Tunnel Mining & Leasing Co. v. Cooper*, 115 Pac. 901, Colo. The Colorado Supreme Court held in that decision that a remittitur by a trial court of nearly three-fourths of a jury verdict was itself as a matter of law a finding that the verdict was the result of passion and prejudice. In that case plaintiff recovered a jury verdict in the amount of \$38,750 for personal injuries. On defendant's motion for a new trial under a statutory provision in substance the same as Utah Rule of Civil Procedure 59(a) (5) the trial court ordered that plaintiff remit all in excess of \$10,000 or submit to a new trial. Plaintiff assented and defendant appealed. The Court said:

"That right, by this provision, to grant new trials, because of excessive verdicts, unless influenced by passion or prejudice, having been withdrawn from

the courts, it logically follows that when, under this particular subdivision of the Code, it was found that the verdict was excessive *and a remittitur of nearly three-fourths of it was required, such finding, although the judge may have declared that he was not able to say that the verdict was returned as the result of passion or prejudice, was, as matter of law, a finding to that effect, and the verdict must be so treated.* Upon such a verdict defendant had an absolute right, under the Code, to a new trial, and the court had no more authority to deny it, or disregard a portion of the verdict and enter a judgment upon the residue, than it had to deny the plaintiff a jury trial, or enter judgment against it without any trial at all. Still, without a verdict for that sum, and indeed without any lawful verdict, judgment was given for \$10,000 upon the mere consent of plaintiff to accept it. That action was a plain violation of law, because what the Code of Civil Procedure gives, in the situation here disclosed, and all that it gives, is a right to the losing party to have, and it makes it the duty of the court to grant, a new trial." (Emphasis added.)

In *Plaunt v. Railway Transfer Co. of City of Minneapolis*, 97 N. W. 433, the Supreme Court of Minnesota held that the size of the trial court's remission was itself indicative of a finding of passion and prejudice. The Court said:

"* * * The diminution was so great that we are obliged to infer that the court below was of the opinion that the verdict was the result of passion and prejudice. It certainly was if the reduction was proper, and, if this be true, the verdict should have been set aside altogether, and a new trial granted."

The Supreme Court of Kansas said as follows in *Steinbuechel v. Wright*, 23 Pac. 560:

"This was an action in the court below for slander. The jury returned a verdict for the plaintiff for \$4,000. It was alleged in the motion for a new trial, among other things, that the damages allowed were given under the influence of passion or prejudice. In overruling the motion for a new trial, the court found that the assessment of the jury beyond the sum of \$500 was excessive. Seven-eighths of the verdict was voluntarily remitted by the plaintiff rather than to have a new trial. In view of the action of the trial court and the testimony in the case, we are compelled to say that the damages were so excessive as to show the verdict was given under the influence of passion or prejudice. If seven-eighths of the verdict was rendered under the influence of passion or prejudice, the other one-eighth must also have been rendered under like influence. In such a case, the amount of damages should be submitted to the judgment of another jury. * * *

It is extremely significant that the plaintiff in her original complaint assessed her general damages in only the sum of \$5,000. In her amended complaint she boosted this estimate to \$50,000, although she alleged precisely the same injuries. The latter complaint did not intimate that she had discovered, subsequent to her original complaint, that her injuries were more serious than she considered them to be at the time of the original complaint nor that she was mistaken in any respect in her original diagnosis or prognosis. All that developed between the time of the filing of the original complaint and the time of the filing of the amended complaint was some additional subjective pain and distress. The verdict assessed her damages in five times the amount that she in effect claimed.

Appellants submit that the evidence shows that the verdict was the result of passion, prejudice or corruption. Although it is impossible for a court to arrive at the exact monetary amount which should be allowed for each and all of the elements of damage, a court may and should in a general way determine the amount that a jury could award for an element of damage without overstepping the bounds of reason and impartiality.

Duffy v. Union Pacific R. Co., ... Utah ...,
218 P. (2d) 1080.

The elements of damage and the evidence relating there-to are as follows:

LOSS OF EARNINGS

The accident in question occurred on December 19, 1949. Between that date and February 26, 1951, plaintiff worked continuously except for a period of eleven weeks (Amended Complaint). The testimony was that plaintiff worked continuously between February 26, 1951 and June 12, 1951 (R. 165). Plaintiff also worked approximately four or five weeks between June 11, 1951 and the time of trial (R. 165-166). On the basis of the foregoing facts it would appear that plaintiff lost a total of approximately thirty weeks of work between the date of her accident and the time of trial. If the rate of earnings, \$42.00 a week, used by plaintiff in her amended complaint is applied, plaintiff sustained a total loss of earnings in the approximate amount of \$1260.00.

TOTAL MEDICAL EXPENSE

The plaintiff's amended complaint alleges medical expense for services of physicians, X-rays, metal brace, etc.,

in the amount of \$220.70. The evidence, however, would support a finding of medical expense only in the total amount of \$206.50 (R. 112, Exhibit K, R. 167, Exhibit L, R. 168).

Loss of earnings and medical expense would therefore be limited by the evidence to approximately \$1,466.50. It must be assumed, therefore, that approximately \$23,500.00 of the jury's verdict was awarded for alleged pain and suffering and alleged permanent disability.

PAIN, SUFFERING AND INJURY

The pertinent evidence relating to plaintiff's alleged injuries was as follows: Plaintiff experienced no pain immediately following the accident in question but only a stiffness in the neck (R. 159). Plaintiff described her condition in March, 1950, after returning to work as follows:

"I found I wasn't as frisky as I have been. I found that my neck was still stiff, my headaches started taking hold. I tired easier, more rapidly. I just didn't feel the same at all. I started taking aspirin. That didn't do any good, so I started taking emperin. Emperin are temporary relief the same as aspirin, but even they get so that I was immune to those. I took a few codein, and then I started taking phenobarbital. It seemed like the more I took the worse off I became. It was just a relief. There was no let-up" (R. 164).

This description by plaintiff of her condition in March, 1950, is fairly representative of her testimony and that of her husband throughout the course of the trial. Although it

is suggestive of pain and suffering to a limited extent, it clearly does not indicate any permanent disability. Although plaintiff tried to convey the impression she had gone through quantities of medicine, she was completely unable to show any expenditures for same (R. 168).

Plaintiff produced two witnesses at the trial to testify with respect to injuries. These witnesses were Dr. Reed Smoot Clegg and Dr. A. M. Okelberry, both orthopedic specialists. Plaintiff was examined by Dr. Reed Smoot Clegg on December 20, 1949 (R. 108). Dr. Clegg testified that his clinical findings and X-ray readings were suggestive evidence of a fracture in the first cervical vertebra (R. 119). On February 6, 1950, Dr. Clegg took a radiograph of plaintiff, which showed a union of the fracture. The testimony of Dr. Clegg would indicate no other injuries found by him (R. 110). Dr. Clegg testified that he had specifically advised plaintiff to wear a metal brace at all times, day and night, and that subsequently plaintiff had advised him that she had not worn the metal brace at all times as he had advised. Dr. Clegg felt that plaintiff had progressed satisfactorily under his treatment (R. 113). On March 6, 1950, Dr. Clegg pronounced plaintiff as cured and advised her to return to work (R. 111-113). Dr. Clegg testified that the average time for healing an injury such as plaintiff's was six weeks to three months (R. 112).

It is significant to note that prior to the time that plaintiff went to Dr. Clegg for examination and treatment she had gone to Dr. Holbrook who put her in a stretcher and stretched her neck (R. 175, 176).

On July 14, 1950, plaintiff went to see Dr. A. M. Okelberry (R. 116). Dr. Okelberry found from his examination of plaintiff and from a reading of the X-rays taken by Dr. Clegg that plaintiff had suffered a fracture of the first cervical vertebra (R. 116). He felt, however, that the fracture had healed (R. 130). His prognosis was that plaintiff carry on, with heat and massage, and wear the metal brace which had been prescribed by Dr. Clegg as much as possible while off work (R. 118). There was apparently no suggestion by Dr. Okelberry that it was necessary or advisable that plaintiff, who had been working, quit work; he specifically recommended that she go on with her work (R. 131). Dr. Okelberry saw plaintiff again on September 5, 1950. At that time he found that her headaches were less frequent and he prescribed a continuation of the previous treatment of massage and heat (R. 118-119). On the occasion of Dr. Okelberry's first examination of the plaintiff, he found nothing to indicate difficulty with plaintiff's neck other than plaintiff's own complaints of stiffness and occasional headaches and pain (R. 136).

Dr. Okelberry had X-rays taken of plaintiff's neck on April 27, 1951, which indicated, he stated, an angulation between the third and fourth vertebrae (R. 120-136). This X-ray was taken of plaintiff in a forward bent position (R. 136). Dr. Okelberry testified that with the head in a bent forward position the vertebrae would naturally tend to separate (R. 137). It was his opinion that the symptoms plaintiff complained of *might* have been caused by a sprained ligament in the area of said vertebrae (R. 120-121).

On June 11, 1951, Dr. Okelberry again saw plaintiff (R. 122). Plaintiff at that time complained of soreness in her neck (R. 123). The following day a plaster cast was applied by Dr. Okelberry (R. 123).

On December 3, the week of the trial, Dr. Okelberry examined plaintiff again. He found no pain in her arms or shoulders; a good balance of her head and neck; a full range of motion; normality in the reflexes and sensation in the arms. He advised plaintiff to do whatever she could and indicated that plaintiff had gone through about all the advice he could think of to give her (R. 125).

On cross examination Dr. Okelberry frankly stated that in his recent examinations of plaintiff he could find nothing wrong with her aside from her complaints of stiffness in the neck, pain and clicking (R. 139). He testified that no radical treatment or even necessity for additional examination was indicated (R. 126).

There is one part of the testimony of Dr. Okelberry which is particularly important. That is his testimony to the effect that the worst thing that could have happened to plaintiff was to have had her neck stretched; that stretching of her neck was the cause of her trouble (R. 131). The Court will recall the testimony of the plaintiff referred to above to the effect that on the occasion of her visit to a Doctor Holbrook the said doctor had placed her in a stretcher and stretched her neck.

It certainly cannot be said from the evidence that there was any objective manifestation of disability. The large period of time during which the plaintiff worked

subsequent to the time of the accident clearly shows that plaintiff was not incapacitated or disabled. Neither of plaintiff's expert witnesses suggested that plaintiff had sustained any permanent injury or disability nor that plaintiff was unable or would in the future be unable to work. Plaintiff was only 28 years of age at the time of trial (R. 145). Dr. Okelberry's treatment during the months of 1951 was, it would appear, related solely to symptoms allegedly caused by a sprain of ligaments in the area of the third and fourth cervical vertebrae. Dr. Okelberry described this condition as having been caused by plaintiff's neck being stretched too much (R. 131). Certainly the defendant could not be held responsible or accountable for any injury caused by such treatment.

The evidence utterly fails to show any permanent injury, much less permanent injury caused by the collision. No part of the jury's verdict could properly have been given for permanent injury.

PAIN AND SUFFERING

Surely a verdict of \$23,500.00 as compensation for pain and suffering where the evidence shows only occasional stiffness in the neck, occasional headaches, and occasional pain and irritability is so exorbitant, excessive and outrageous as to clearly indicate passion or prejudice or both on the part of the jury. It was this very consideration which prompted and compelled the trial court to order plaintiff to remit what amounted to sixty per cent of the verdict or submit to a new trial.

This Court has recently in *Shoemaker v. Floor*, Utah ..., 217 P. (2d) 382, had occasion to consider the question of excessive jury verdicts for personal injuries under evidence of injuries far more serious and extensive than here involved. Although the Court there held that a verdict for \$9,500.00 rendered by the trial court, sitting without a jury, was not so large as to indicate bias or prejudice, it did in fact find that the verdict was "manifestly liberal." Had the verdict in the *Shoemaker* case been two and one-half times the size that it was, or approximately \$25,000.00 as it was in this case, the court manifestly would have had no difficulty in concluding that it was the result of bias and prejudice. If a verdict for \$9,500.00 for injuries far more severe than the injuries involved herein is "manifestly liberal," in the language of the Court, the conclusion seems inevitable that a verdict of \$25,000.00 could be accounted for only and in no other way than as a result of passion and prejudice. Under these circumstances, it could not be cured by an order of the trial court requiring plaintiff to remit part of the verdict. Knowing that the jury verdict was tainted with passion and prejudice and manifesting this knowledge by a conditional order which required the remittance of sixty per cent of the jury verdict rather than granting defendant a new trial as requested constituted an abuse of discretion on the part of the trial court which this Court should correct.

SUMMARY

Summarizing the contentions of appellants, we submit that the evidence is insufficient to support a finding that

either of the appellants was guilty of any actionable negligence and that the trial court erred in denying their motions for directed verdicts in their favor; that the special verdict is insufficient to support the judgment appealed from and that no finding of fact can be assumed or implied in support of the judgment; that in any event, the court erred in failing to submit to the jury the issue of contributory negligence and in refusing to instruct the jury as requested by the defendants; that the court erred in submitting issues unsupported by the evidence and in refusing to withdraw those issues from the consideration of the jury; that the court erred in its instruction to the jury on the issue of proximate cause and abused its discretion in refusing to permit appellants' counsel to argue to the jury the matter of damages. Finally and without regard to the merits of any of the foregoing contentions, appellants submit that the verdict of the jury is so grossly excessive as to manifest unmistakably that it is the result of passion, prejudice or corruption of the jury.

Respectfully submitted,

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