

1952

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

Utah Supreme Court

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**IN THE SUPREME COURT OF THE
STATE OF UTAH**

FILED

MAY 24 1932

MERLENE LODDER,

Plaintiff and Respondent,

vs.

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

Defendants and Appellants.

Clerk, Supreme Court, Utah

Case No.
7809

RESPONDENT'S BRIEF

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INDEX

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	4
ARGUMENT:	
I. SUFFICIENCY OF THE EVIDENCE TO PROVE ACTIONABLE NEGLIGENCE.....	5
THE DEFENDANTS FAILED TO KEEP THE LOOKOUT OF REASONABLE, PRU- DENT PERSONS UNDER THE CIRCUM- STANCES	6
(1) The hostler's helper, Mr. Bond, either did not see and observe the Lodder car as soon as it was possible to do so, or else he negligently failed to give the signal to the hostler as soon as he did see the car.....	6
(2) The hostler, Mr. White, either failed to keep a lookout or negligently failed to respond to the wash out signal given by Mr. Bond	9
(3) A reasonable lookout under the circum- stances would have included an observ- ance of the position and signals of the crossing watchman.	11

INDEX—(Continued)

	page
DEFENDANTS NEGLIGENTLY FAILED TO STOP THE LOCOMOTIVE AFTER THE TRAINMEN WERE AWARE OF PLAINTIFF'S POSITION OF PERIL.....	13
THE UNLAWFUL AND NEGLIGENT FAILURE TO WARN OF THE APPROACH OF THE LOCOMOTIVE	15
(1) Did the train crew unlawfully fail to sound the locomotive whistle before en- tering this intersection in a snowstorm?.....	16
(2) Did the crossing watchman station him- self in the intersection or give a reason- able warning of the approach of the locomotive as required by the voluntary practice of the defendant railroad?.....	17
(3) Assuming unlawful failure to warn by whistle or negligent failure to warn by the crossing watchman, was the alleged negligence of the plaintiff's driver the sole proximate cause of the collision and of the injuries sustained by plaintiff?.....	19

INDEX—(Continued)

	Page
II & III. SUFFICIENCY OF THE VERDICT TO SUPPORT THE JUDGMENT.....	39
(1) Sufficiency of verdict as to warning.....	40
(a) Requirement of a whistle warning.....	40
(b) Requirement of warning by watch- man or flagman	42
(2) Sufficiency of verdict as to lookout.....	45
(3) Sufficiency of verdict as to opportunity to stop or signal	47
(4) Summary and application of Rule 49(a).....	48
(5) Propriety of submission of case by special verdict	51
(a) Special verdict may be used at dis- cretion of the Court	52
(b) Appellants were given notice of submission by special verdict and given opportunity to suggest changes in questions submitted	52
IV. THE COURT PROPERLY SUBMITTED ALL MATERIAL ISSUES AND IN- STRUCTED ON THEM.....	55

INDEX—(Continued)

	Page
V. THE COURT CORRECTLY INSTRUCTED THE JURY ON THE QUESTION OF PROXIMATE CAUSE	58
VI. THE ISSUES SUBMITTED TO THE JURY WERE ALL SUPPORTED BY THE EVIDENCE....	59
VII. THE TRIAL COURT DID NOT ERR IN HOLDING APPELLANTS TO THE TIME LIMIT FOR CLOSING ARGUMENT WHICH THEY VOLUNTARILY AGREED UPON	60
VIII. THE VERDICT WAS NOT EXCESSIVE AND DID NOT INDICATE PASSION, PREJUUDICE OR CORPORATION.....	63
Testimony of Plaintiff, Merlene Lodder.....	68
Testimony of William Lodder.....	71
Testimony of Dr. Reed Clegg.....	72
Testimony of Dr. A. M. Okelberry.....	74
Testimony of Ovena Kalm.....	79
Summary as to Evidence of Injuries	81

INDEX—(Continued)

Page

CASES CITED

Ackerman v. Griggs, (Cal. App.) 293 P. 115, 117.....	62
Adkins v. Zalasky, 59 Idaho 292, 81 P. 2d 1090.....	65
Barrett v. U. S. R. Admin. 196 Iowa 1143, 194 N.W. 222..	29, 33
Bell v. Kelly, 73 Cal. App. 189, 238 P. 719.....	62
Bennett v. U. P. R. Co., Utah, 213 P. 2d 325.....	64, 65
Bluhm v. Bryan, 193 Wis. 346, 214 N.W. 364.....	44
Boyle v. Lehigh Valley Transit Co., 150 Pa. Super. 86, 27 A. 2d 682	28
Carlin v. Thompson, 234 Iowa 469, 12 N.W. 2d 224.....	28
Davis v. Mellen, 55 Utah 9, 182 P. 920.....	32
Davis v. Pere Marquette Ry. Co. 241 Mich. 166, 216 N.W. 424	27
Duffy v. U. P. R. Co., Utah, 218 P. 2d 1080	67
Earle v. S. L. & U. R. Corp. 109 Utah 111, 165 P. 2d 877.....	32
Falkenberg v. Neff, 72 Utah 258, 269 P. 1008.....	63
Haarstrich v. Oregon Short Line R. Co., 70 U. 552, 262 P. 100	31
Hansen v. Clyde, Utah, 56 P. 2d 1366.....	32
Hickey v. Missouri Pac. R. Corp. 8 F. 2d 128.....	30, 33
Hickman v. Union Pac. R. Co., Utah, 213 P. 2d 650.....	32
Hinshaw vs. New England Mutual Life Insurance Company, 104 Fed. 2d 45	50
Holmgren v. Union Pac. R. Co., Utah, 198 P. 2d 459.....	15
Hubbs v. Bonston & M. R. R. 260 N.Y. 223, 183 N.E. 370.....	38

INDEX—(Continued)

	Page
Hudson v. Union Pac. R. Co., Utah, 233 P. 2d 357.....	38
Jackson v. St. Louis-San Francisco Ry. Co., 211 S.W. 2d 931.....	38
Jensen v. D. & R. G. R. R. Co., 44 Utah 100, 138 P. 1185.....	67
Lavalle v. Boston & Maine R. R. Co., 89 N.H. 323, 197 A. 816	26
Leavell v. Thompson, (Mo.) 176 S.W. 2d 854.....	35
Lynch v. Pa. R. Co., 48 Ohio App. 295, 194 N.E. 31.....	25
O'Brien v. Alston 61 Utah 368, 213 P. 791.....	32
Olson v. D. & R. G. W. R. Co., 98 U. 208, 98 P. 2d 944.....	31
Panhandle and S. R. Ry. Co. vs. Friend (Tex.), 91 S.W. 2d, 922	51
Pauly v. McCarthy, 109 Utah 431, 184 P. 2d 123.....	65, 67
Pittsburg, C., C. & St. L. R. Company v. Smith, 207 Ill. 486, 69 N.E. 873.....	54
Pokora v. Wabash Railway Co., 292 U.S. 98, 54 S. Ct. 580, 78 L. Ed. 1149.....	28
Saeugling v. Scandrett, 230 Iowa 153, 296 N.W. 787.....	33
Sisk v. Chicago B. & Q. R. Co., (Mo.) 67 S.W. 2d 831.....	38
Stroud v. Chicago M. St. P. Ry. Co., 75 Mont. 384, 243 P. 1089	30
Toomer's Executor v. Union Pac. R. Co., Utah, 239 P. 2d 163	28, 38
Umlauft v. C. M. & St. P. R. R. 233 Wis. 291, 289 N.W. 623.....	27
Van Wagoner v. Union Pac. R. Co., Utah, 186 P 2d 293.....	14
Williams v. Thompson 166 S.W. 2d 785	36

INDEX—(Continued)

Page

STATUTES CITED

U.C.A. 1943, as amended by L. Utah 1943, Section 77-0-14	6, 16, 40
Section 104-25-1 U.C.A. 1943	51
U.R.C.P., Rule 49 (U.R.C.P. Table I, p. 183, and Table III, p. 18)	51
U.R.C.P. 49(a)	50, 52

AUTHORITIES CITED

44 Am. Jur. 771, Sections 526, 527	44
53 Am. Jur. 756, Sections 1090, 1091	42
64 CJ 1166, Section 955	42
64 CJ 1185 (Sec. 974)	46
64 CJ, Sec. 975	46
74 C.J.S. 1354 (Section 728)	44
71 ALR 1160 at 1177	44
Restatement of Torts, Section 301, Comment (f)	44

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

Respondent's Brief

STATEMENT OF FACTS

The rather brief Statement of Facts contained at pages 1 to 5 of Appellants' brief is not controverted excepting in the following particulars:

Plaintiff's amended and supplemental Complaint does not "repeat" the allegations of injuries stated in the original Complaint, but properly reveals that, since the time of the original Complaint, Plaintiff had

experienced additional and long continuing symptoms which indicated a permanent neck injury (R. 2, 28).

Second South Street at the point of the intersection in question is not 132 feet wide but is 93 feet wide from curb to curb (R. 53, Ex. A). The distance from the south curb line to the crossing watchman's shack is an additional 43 feet south (R. 53, Ex. A.). The first switch north of Second South is not 55 feet north but 64 feet from the north curb line (R. 53, Ex. A). The second switch north of Second South is not 170 feet north of Second South but 201 feet north of the north curb line (R. 53, Ex. A); the second switch is 137 feet north of the first switch (R. 53, Ex. A). The third switch is $74\frac{1}{2}$ feet north of the second switch, a total of $275\frac{1}{2}$ feet north of the north curb line of Second South.

Although Mr. White testified (R. 198) that the locomotive approached the intersection at 5 or 6 miles an hour, Mr. Bond testified (R. 246) that the locomotive was going 7 or 8 miles an hour.

Mr. Bond did not testify that the rear of the locomotive was a few feet north of the north line of Second South when he looked east and saw plaintiff's automobile. He does testify that the locomotive was in that position when he first gave a "wash-out" signal to the hostler (R. 234). Mr. Bond testified

p. 245) that his first glance where he could see up the street was by the No. 4 switch, which was 64 feet north of the north curb line and was 33½ feet north of the sidewalk.

Mr. Lodder testified that he first saw the locomotive when he was within about four or five car lengths of the tracks (R. 69, 84), not five or six, as Appellants state. The automobile was dragged 36 feet by the locomotive before it was disengaged (R. 196, 252). Exhibit 1 shows the nature and extent of the damage caused to the automobile by the collision.

Plaintiff's injuries were received not only by striking her head against the automobile but in the snapping or whiplash motion which caused her sprained neck (R. 131).

☆ ☆ ☆ ☆ ☆

This brief statement of facts is not, however, relied on either by Appellants or Respondent as adequate to fully inform the Court as to the circumstances surrounding the accident and injury. Throughout their brief, Appellants have referred to the facts in detail as they have considered some eight points of appeal. Respondent has done likewise in the hope that, by such a treatment of the facts, the Court will be better assisted in fairly appraising the facts.

Statement of Points

I

THE EVIDENCE WAS SUFFICIENT TO PROVE ACTIONABLE NEGLIGENCE.

II and III

THE VERDICT WAS SUFFICIENT TO SUPPORT THE JUDGMENT.

IV

THE COURT PROPERLY SUBMITTED ALL MATERIAL ISSUES AND INSTRUCTED ON THEM.

V

THE COURT CORRECTLY INSTRUCTED THE JURY ON THE QUESTION OF PROXIMATE CAUSE.

VI

THE ISSUES SUBMITTED TO THE JURY WERE ALL SUPPORTED BY THE EVIDENCE.

VII

THE TRIAL COURT DID NOT ERR IN HOLDING APPELLANTS TO THE TIME LIMIT FOR CLOSING ARGUMENT WHICH THEY VOLUNTARILY AGREED UPON.

VIII

THE VERDICT WAS NOT EXCESSIVE AND DID NOT INDICATE PASSION, PREJUDICE OR CORRUPTION.

Point I**SUFFICIENCY OF THE EVIDENCE TO PROVE
ACTIONABLE NEGLIGENCE**

Respondent contends and respectfully submits that the evidence is amply sufficient to prove actionable negligence on the part of both appellants.

Before taking up the three types of negligence relied on, Respondent wishes to make the record clear on the point raised at p. 8 of Appellants' Brief. It is not true that Respondent does "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." Defendants submitted as an interrogatory (R. p. 7) the question, "What particular and specific wilful, reckless negligent and *unlawful* acts does each of the plaintiffs refer to and claim that the D. & R. G. was and is guilty of in Para. 1, of the complaint?" To this, plaintiffs answered (R. p. 10.) among other things, "That its servant and employee, Richard White, was then and there acting as the engineer in charge of the backward movement of said diesel locomotive and in the course of his said employment, negligently and *unlawfully* failed and neglected *** to cause the whistle or horn of said locomotive to be sounded (as the locomotive approached the intersection of 2nd South and

4th West Streets) notwithstanding at the said time and place it was dark and snow was falling.”

It was not necessary to plead more specifically the applicability of Section 77-0-14, U. C. A. 1943, as amended by L. Utah 1943, Ch. 82, Sec. 1, p. 124. This statute required the defendants under these circumstances to sound the locomotive whistle before entering the crossing on penalty of being guilty of a misdemeanor plus liability “for all damages which any person may sustain by reason of such violation.”

**THE DEFENDANTS FAILED TO KEEP THE LOOKOUT OF
REASONABLE, PRUDENT PERSONS UNDER THE CIRCUMSTANCES**

Quite the contrary of Appellants’ position, Respondent submits that the trial court was warranted in submitting the issue of negligent failure to maintain a lookout on three separate and independent factual grounds, as follows:

(1)

The hostler’s helper, Mr. Bond, either did not see and observe the Lodder car as soon as it was possible to do so, or else he negligently failed to give the signal to the hostler as soon as he did see the car.

Since it took the hostler plus his helper to keep a lookout, (Br. p. 10) and since the helper’s signal

was part of the method by which the lookout was kept, failure to promptly signal would be tantamount to a negligent failure to keep a lookout. The helper was the “eyes” through which the engineer was obliged to “see.”

The hostler’s helper, Mr. Bond, testified that he saw the Lodder car when it was approximately 200 feet east of the tracks, (R. p. 233, 245) He then testified that the locomotive moved fifty to fifty-five feet from the point where he, Bond, *jumped* and signalled to the point of collision (R. p. 246); but that the locomotive moved two car lengths or approximately ninety feet from the point where he first saw the car to the point of collision (R. p. 246.) He carefully makes the distinction between the point where he first saw the car, and the point where he jumped. (R. p. 246) He did not signal until after or as he jumped. (R. 233.) He knew in his mind there was going to be a collision the moment he first observed the car. (R. p. 233). The train was moving seven or eight miles an hour. (R. p. 246.)

If Bond did not jump and signal for thirty-five to forty feet after he first saw the car and knew of the danger, he waited (assuming 10 feet per second) three and one-half or four seconds, before he gave the warning. Normal reaction time at seven or eight miles an hour is not more than ten to twelve feet.

From this testimony, the jury could reasonably conclude either that Bond did not jump and signal within a reasonable time after seeing the car, or that he did not in fact see the car as soon as it could be seen because he failed to keep a proper lookout?

The same point is perhaps even more graphically demonstrated by another aspect of Mr. Bond's testimony, as follows:

Bond testified that when he jumped he lit right on the sidewalk at the curb line. (R. p. 246) But he says that he was at or by the No. 4 switch when he first saw the Lodder car. (R. p. 245) The distance from the curb line to the first switch north of the street is sixty-four feet. (Ex. A., R. p. 52.) If the jury accepted this testimony of Bond's, then it must have concluded he waited two thirds of the distance from the point where the car was first seen to the point of collision (said by Bond to be approximately 90 feet (R. p. 246), before jumping and signalling. Or else he did not actually see the car when he says he did, i. e. when he first could have seen it back by the first switch north of second south. (Appellants agree at p. 10 of their brief that Bond first had an opportunity to observe and did in fact first see the Lodder car when "the rear of the locomotive was about at the switch nearest Second South." For this they cite R. p. 243, but no language on that page

seems to bear on the point.) (Note also that Bond repeatedly refers to the first switch north of Second South as "No. 4 switch.") (R. 243, 245.)

Since Bond also testified (though somewhat more indefinitely) that he jumped and signalled when he first saw the Lodder car, (R. p. 233, 245) the jury might well conclude that he did not see it till he was nearly at the curb line, and hence did not keep a proper lookout, else he would have seen it at the first switch.

(2)

The Hostler, Mr. White, either failed to keep a lookout or negligently failed to respond to the wash out signal given by Mr. Bond.

Mr. White, the hostler, testified on direct (R. p. 199) and also on cross (R. p. 220) that the locomotive in question could be stopped at this intersection on the rails in the condition prevailing the night of the accident, in sixty to seventy feet. Notwithstanding this fact, Mr. White admitted (R. p. 220) that it took him ninety feet to stop after he began to apply the air brakes. There is no explanation tendered for this inconsistency. Mr. White says he was only going five or six miles per hour at the time he entered the intersection (R. p. 220) and that he applied the independent air the moment he saw Bond jump, (R.

p. 219) and applied the emergency air and sand the moment he saw the car coming into sight (R. p. 221) and that he had already seen Bond jump before he saw the car (R. p. 219). Officer Farnsworth testified (R. p. 252) that the street is ninety feet wide, that the point of collision was thirty feet south of the north curb line, and that the locomotive moved sixty-one feet after the impact.

The jury could have concluded from these facts that Mr. White did not stop in the sixty to seventy feet that was possible, because he was not aware of the signal or the approach of the Lodder car until he was already into the intersection. At the very least there is a clear split between Bond's testimony and White's. The physical facts show that the car could be seen by Bond before the rear end of the locomotive on which he was standing came to the sidewalk and Bond insisted he first saw it 200 feet east of the track. If Bond signalled when he first saw or could have seen, then White was not looking or he could have stopped short of the point of collision. It was not for the court to reconcile these inconsistencies—the issue of reasonable lookout was properly submitted to the jury for its determination.

A reasonable lookout under the circumstances would have included an observance of the position and signals of the crossing watchman.

Mr. White admitted that it would take sixty to seventy feet to stop the locomotive at the time and place in question. (R. 199, 220) White also stated that after the rear end of the locomotive passed the switch some 64 feet north of the intersection, he could no longer see the crossing watchman from his position on the right side of the cab. (R. p. 213, 206.) Mr. Bond testified (R. 243, 244) that after the locomotive started down from the switch he, Bond, didn't "keep track" of the watchman—"didn't have time to watch him all the time"—and never saw him again after he gave the proceed signal when the locomotive was at the northernmost switch.

If White and Bond can without any help from the crossing watchman safely bring the locomotive backwards into the intersection by maintaining a diligent and reasonable lookout, there may be no negligence in failing to provide White with a fireman on the left side of the cab who can see the watchman, or in Bond failing to observe the watchman and his signals. But here the facts seem to be that the train requires at least sixty to seventy feet (or ninety-one feet) to stop; that if Bond was not negligently failing

to keep a lookout, he did signal as soon as the automobile could be seen; and if White was not failing to keep a lookout, he did apply the air brake as soon as the signal was given—and yet the train could not be stopped until it passed over the entire intersection. Hence it is reasonable to suppose that only by having Bond keep a lookout which included an observation of the location and signals of the crossing watchman, could the locomotive be safely brought into the intersection, and only thus could a reasonable lookout be maintained. And in this case where Bond's observance of the crossing watchman would have revealed that the latter was not stationed in the intersection or giving warning of the approach of the locomotive, Bond's lookout would have required a warning signal to White of the absence of the usual watchman. Thus Bond's failure to keep a lookout for Walters, the crossing watchman—or the failure of the defendant to provide White with a fireman in the cab who could watch out the left side and see the crossing watchman, could reasonably have been found by the jury to be the proximate cause of the collision.

**DEFENDANTS NEGLIGENTLY FAILED TO STOP THE LOCOMOTIVE
AFTER THE TRAINMEN WERE AWARE OF PLAINTIFF'S
POSITION OF PERIL**

In view of the answers to Questions 13 to 18 (Br. p. 37), it is evident that the jury concluded that neither plaintiff nor the driver of her car was guilty of contributory negligence as they approached the intersection. Consequently, the negligent failure of the trainmen to stop the locomotive or blow the whistle after the plaintiff's position of peril was evident to them, we submit, is primary negligence.

If, however, the defendants' negligence in this regard amounts to last clear chance as a matter of legal analysis, nevertheless, it was a conscious and actionable last clear chance, as follows:

As Appellants have stated in their Brief, p. 10:

“He (Bond) estimated that the automobile was 200 feet east of the tracks when he observed it. At that time, the rear of the locomotive was about at the switch nearest Second South. (64 feet from the curb.) Before the rear of the locomotive reached this point, Bond had no view of automobiles approaching from the East. The moment he saw the automobile he realized that it would be unable to stop before reaching the tracks. He immediately jumped off and gave the engineer an emergency stop signal.”

Mr. White testified (R. p. 199, 220) that with a locomotive of this type and in view of the weather conditions then prevailing, he could bring the locomotive to a stop within sixty to seventy feet.

From this testimony, the jury could conclude that there was a clear and conscious opportunity to stop the locomotive before it reached the point of collision, which was 94 feet south of the switch nearest Second South. Likewise from this testimony the jury could find that had the whistle been sounded when Bond claims he first saw the car 200 feet east of the track, the plaintiff's husband, driving in a reasonable and prudent manner, as the jury found he was, would have been given opportunity to bring his car to a gradual and safe stop short of the tracks.

There was therefore sufficient evidence to warrant the submission of Questions 8 and 9 to the jury.

Rather than the situation in *Van Waggoner vs. Union Pacific R. Co.* (186 P. 2d 293) where the Court found that:

“Under the most strained construction of the facts, the train crew could not have anticipated deceased's presence on the track until the train had reached a point approximately 220 feet from the point of impact, and this was half the distance necessary to stop the train ***”

the instant case presents a factual situation

where the train crew did actually observe the presence of plaintiff when there was once and a half as much distance as the crew required to stop the locomotive.

The Holmgren case, 198 P. 2d 459, is clearly distinguishable on the same ground.

THE UNLAWFUL AND NEGLIGENT FAILURE TO WARN OF THE APPROACH OF THE LOCOMOTIVE

Under their point entitled “Alleged Failure To Give Warning of Approach of Locomotive,” Appellants have thrown together three arguments which better lend themselves to analysis and understanding when isolated and treated as three separate issues, as follows:

(1.) Did the train crew unlawfully fail to sound the locomotive whistle before entering this intersection during a snowstorm?

(2.) Did the crossing watchman station himself in the intersection or give a reasonable warning of the approach of the locomotive as required by the voluntary practice of the defendant railroad?

(3.) Assuming unlawful failure to warn by whistle or negligent failure to warn by the crossing watchman, was the alleged negligence of plaintiff's driver the sole proximate cause of the collision and of the injuries sustained by plaintiff.

Mr. White admitted (R. p. 212) that he was two-thirds of a block north of the intersection in a snow-storm and standing still with the locomotive when he blew the only warning whistle before proceeding to and entering the intersection; that the whistle was sounded only in response to the proceed signal of the crossing watchman, who was also acting as a switchman (R. 277, 278), that he thereafter waited one or two seconds before releasing the air; consumed four or five seconds in releasing the air; and then proceeded to the point of collision at five or six miles per hour.

Respondent submits this would not satisfy the requirement of Sec. 77-0-14 U. C. A. 1943, as amended, which requires a whistle warning before entering the intersection during a snowstorm.

Not less than 50 seconds would necessarily have expired between the time of the whistle and the collision. At the time of the whistle, Respondent would have been one and one half blocks away from the intersection. So that a whistle so sounded would not have been "before entering the intersection" nor a warning to motorists of the approach of the locomotive to the intersection.

Mr. Bond's conflicting testimony merely raised

a factual question which it was proper to submit to the jury, as the trial court did in Questions 3 and 4; and the jury could well find, as it did, that the failure to give the required statutory warning was the proximate cause of the collision.

(2)

The record indicates that the crossing watchman's shack is 43 feet south of the south curb line (R. p. 53, Ex. A.); that the crossing watchman, Mr. Walters was also obliged to discharge the duties of a switchman on this occasion (R. p. 260, 262); that after giving the locomotive engineer the proceed or high-ball signal when the locomotive was some two thirds of a block up the street and standing still (R. p. 259, 260), he observed Mr. Bond inspect or check the switch at the locomotive, and being in doubt as to whether he, Mr. Walters, had properly lined the switches for the approach of the locomotive to the station, (R. 277) he returned to the watchman's shack, set down his lantern, and proceeded to telephone the stationmaster (R. 261, 278) and inquired as to which track it was intended for the locomotive to travel upon (R. 262, 279).

When he finished this conversation, he picked up his lantern, turned it on (R. 266) and stepped outside of the shack. He observed the Lodder car approaching (R. 264, 280, 281) and walked toward

the intersection swinging his lantern to warn of the approach of the locomotive (R. 282). Upon receiving the proceed signal from Walters, Mr. White waited one or two seconds and then received the go ahead signal from Mr. Bond. (R.208) The locomotive then proceeded at either five or six, or seven or eight miles per hour without further stopping and without sounding the whistle right up to the point of the collision. (R. 212, 213) This was a distance of approximately 300 feet. (R. 212, 213) It would have taken altogether less than one minute. During this interval Walters observed the movement, turned and entered his shack, telephoned the stationmaster, explained his problem, got his answer, picked up his lantern, turned it on, and then began to signal to warn of the approach of the locomotive by walking toward the middle of the street which was 89½ feet away (R. 282) and was still walking toward the middle of the street when the collision occurred (R. 283).

The plaintiff and her husband both testified that there was no watchman in the intersection, no warning given, and that had he been there or had the warning been given, they would have seen it. (R. 70, 153) Plaintiff did see a red light which was apparently the watchman's lantern when it was stationary off at the south side of the road by the watchman's shack, and formed the conclusion that it was a warning of an excavation. (R. 158)

It is submitted that in view of the foregoing physical facts of time and space plus the testimony of the plaintiff and her husband, coupled with the evasive and inconsistent testimony of Mr. Walters (R. 282), the jury could well conclude as it did, 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," and that "such negligence was a proximate cause of the injuries . . . suffered by plaintiff."

(3)

Appellants next contend that notwithstanding the foregoing evidence of unlawful and negligent misconduct on the part of the railroad and its servants, nevertheless the sole proximate cause of the collision was the alleged negligence of Mr. Lodder, the driver of the car. This contention is not only clearly at variance with the facts, but is squarely refuted by the findings of the jury. (R. 353: Questions No. 3, 4, 7, 8, 9, 10, 11, 12, 13, 14, 15.)

With considerable disregard for the record, Appellants state at p. 19 of their brief that "The uncontroverted evidence establishes that the driver of the automobile . . . approached the crossing at an unlawful and negligent rate of speed." This unjustified

conclusion is apparently predicated not upon any evidence of speed or failure of the Lodders to keep a lookout, but solely upon the fact that when Mr. Lodder was suddenly confronted by the appearance of the locomotive as it came from behind the buildings which obstructed his view, he was required to apply his brakes suddenly and violently so that his car skidded on the ice. The argument completely neglects the fact that had the defendants given a reasonable warning, the car would have been braked and slowed gradually so as to have stopped in a reasonable distance and prior to entering upon the tracks.

Indicative of this fallacious analysis of the facts is Appellants' unwarranted assertion that "it (the car) did not stop even when it struck the locomotive. It continued in another direction for an additional distance of 36 feet." The clear fact is that the car struck the locomotive with so little force that it did not rebound or careen away, but stopped and was then dragged by the locomotive alongside the track 36 feet and that the locomotive thereafter proceeded an additional distance of some 27 feet before it stopped (R. 196, 252).

Appellants also make the unwarranted claim (Br. p. 19) that the car slid on the snow and ice a distance of 60 feet before "crashing" into the locomotive, whereas in fact the officer's measurement shows

only 45 feet of sliding if 15 feet is properly deducted for the length of the car (R. 252).

Mr. Lodder testified that because of the snow-storm he had put on his chains (R. 63); that he had come to a full stop only one block before this intersection (R. 65); that he had his windshield wipers in good working condition and his lights burning (R. 64); that he and his wife were not talking nor was the radio going (R. 69 64); that he was keeping a careful lookout and also listening for an audible warning (R. 69, 87, 88); that the windshield was clear (R. 69); that the maximum speed attained between 3rd west and 4th west (the intersection of the tracks) was 15 miles per hour (R. 65); that as he approached the tracks he took his foot off the accelerator to more or less coast to the crossing (R. 69); that he was within four or five car lengths from the tracks when he first had any warning of the approach of the locomotive and that was by observing its black end suddenly loom up from behind the building at the north-east corner of the crossing (R. 69); that he immediately tried to get away from the train, but that because it came from behind the buildings without any warning, he did not have time to turn or stop before it was upon him (R. 70); that notwithstanding he was required to suddenly bring his car to a stop, he managed to slow down to two to five miles per hour before the collision (R. 73); that

his wife, the plaintiff, saw the locomotive only a second after he did and warned that they were going to hit, but it was already too late to do anything about it (R. 92, 93).

The plaintiff, Mrs. Lodder, testified that though it was snowing, the car had been equipped with chains (R. 150); that the car was not going over 15 miles per hour (R. 152); that she knew her husband was a careful and competent driver (R. 151); that the defrosters and windshield wipers were working (R. 152); that she had her eyes on the road and was watching the crossing (R. 153); that though she was looking and listening she saw no signals and heard no warning (R. 153); that there were other automobiles parked along the north curb just prior to the intersection which partially obstructed the view (R. 154); that the "big red beer joint" on the northeast corner of the intersection also obstructed the view (R. 155); that she first sensed danger when she saw a big black "mountain" of darkness moving from behind the building and immediately warned her husband by crying out, "We're going to hit, aren't we?" (R. 156); that when the train was first visible to her, their car was too close to the tracks to do anything (R. 170); that her husband had shifted into second gear a split second before she was able to warn him (R. 171); that she was not con-

scious of the car sliding, but only of the train coming toward her before the collision (R. 172).

With regard to the crossing watchman, plaintiff and her husband testified that they were familiar with the crossing and had crossed it many times (R. 66, 150); that they knew that generally when a train approached this particular intersection a watchman would come out with a sign in the daytime or a lantern at night (R. 66, 150); that when the watchman was off duty, the cover was removed from a sign on the cross arm so that it stated, "Watchman Off Duty" (R. 67, 68); that at the time of the accident, the sign was covered so as to indicate that the watchman was on duty (R. 100); that although they were looking for a watchman at the crossing, they saw none and received no signal from a watchman (R. 88, 153); that Plaintiff saw a red light over toward the watchman's shack, off to the side of the road, that the light was not moving, and that it was apparently protecting an excavation (R. 158).

Quite to the contrary of Appellants' unreasonable assertion that "Had it (the car) not struck an immovable object it would have continued on its course indefinitely until its momentum was expended," (Br. p. 19) this testimony plus the physical facts clearly demonstrate that Mr. Lodder slowed the car from some ten or twelve miles per hour down

to a speed of two to five miles per hour within a distance of forty-five feet. There can be little question but that had he received the warning to which he was entitled either from the locomotive whistle or from the crossing watchman, he would have brought his car to a safe stop before reaching the tracks. And Mr. Lodder's testimony as to this material reduction in speed is corroborated by the physical facts that the car did not rebound or careen off from the locomotive, did not smash itself inextricably into the underpinnings of the locomotive, nor damage the locomotive other than by slightly bending the stirrup at the point of impact. (R. 196, 93, Ex. 2).

Unlike any of the cases relied upon by Appellants (Brief p. 20 to 34), it is clearly demonstrated that Mr. Lodder was conscious of the icy condition of the road, had attached his chains, slowed his speed, and was keeping a sharp lookout, and that he acted promptly and reasonably to stop his car as soon as any warning was available. The trial court and jury could not conclude otherwise than that the whistle warning required by law, or the signal warning required by the railroad and its watchman by reason of the practice voluntarily established by them, would have been promptly acted upon by Mr. Lodder so that he would have braked his car to a gradual and safe stop. It is not only possible (Br. p. 22) but inescapable that the warnings

or either of them "would have enabled the driver to stop before the collision."

Respondent sincerely submits that in the light of the foregoing evidence a legal decision holding that plaintiff and her husband approached this intersection in such a manner as to be guilty of negligence as a matter of law which constituted the sole proximate cause of the collision, would be tantamount to a ruling that all motorists must either approach and cross railroad tracks within the city strictly at their own peril notwithstanding the railroad unlawfully and negligently fails to give the required warning, or alternatively turn around at such crossings and return home to legal safety.



At this point in their Brief (Br. p. 20 to 34) Appellants cite and rely upon a series of cases some of which by quotation out of context appear on the surface to support their contention as to sole proximate cause. For the assistance of the Court, Respondent submits the following analysis of those cases.

In *Lynch v. Pa. R. Co.*, 48 Ohio App. 295, 194 N. E. 31, the driver went 25 to 30 miles per hour on an extremely slippery oiled road toward a railroad intersection at which visibility was unimpaired. He made no attempt to stop until he was within 25 feet

of the crossing and was then unable to stop because of the condition of the street. There was no question as to the adequacy of the warning supplied by the railroad, and the court concluded that such conduct was "sheer madness." Quite the contrary of the instant case, there was nothing in the cited case which would have warranted the court or jury in believing that further warning from the railroad would have induced the driver to earlier apply his brakes.

In *Lavallee v. Boston and Maine R. R. Co.*, 89 N. H. 323, 197 A. 816, (Br. 23) the case goes off on the same basis as the *Lynch* case, to wit, the statutory warning would not have been effective to induce the driver to sooner slacken his speed or stop his truck. This conclusion was inescapable from the peculiar facts of the case, namely, that the truck was 350 feet from the crossing when the train was at the whistle post, the truck was then at least 216 feet the other side of a crest in the road which obscured the visibility of the crossing, and "it could not reasonably be inferred (from these facts) 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." We submit that the evidence in the instant case indicates that had he been given the timely warning required of

the defendants, Mr. Lodder would have at once commenced to stop his car.

The facts in the case of *Umlauft v. C.M. & St. P. R. R.*, 233 Wis. 291, 289 N. W. 623, (Br. p. 25-27) are in no way parallel to the facts of the instant case. There the driver approached the crossing at 25 to 30 m.p.h. instead of 10 to 15 m.p.h., he had clear visibility of 442 feet at a distance of 100 feet from the track, there was no claim of unlawful or negligent failure to warn of the locomotive's approach, the driver proceeded to within 75 feet before applying his brakes notwithstanding the icy condition of the road and the clear view of the train which was moving at 40 m.p.h., there was no evidence that the driver slackened his speed before the impact, and the only claim of negligence was that if the train had been going at 15 m.p.h. as required by law, the car would have slid across the track in front of the train instead of hitting the second car. The excessive speed of the train was held not to have been the cause of the accident since it was entirely speculative whether under these circumstances the train would not have struck the car had the train been proceeding at only 15 m.p.h. as required by law.

Davis v. Pere Marquette Ry. Co. 241 Mich. 166, 216 N.W. 424 (Br. p. 21) relies on the case of *Baltimore and Ohio R. Co. v. Goodman*, 275 U.S. 66, 48

S. Ct. 24, 72 L. Ed. 167, which announced the strict rule of getting out of the car and going forward to view the tracks, which case was abrogated by the Supreme Court of the United States in *Pokora v. Wabash Railway Co.*, 292 U.S. 98, 54 S. Ct. 580, 78 L. Ed. 1149. The *Pokora* case was cited with approval by the Utah Supreme Court in *Toomer's Executor v. Union Pac. R. Co.* Utah , 239 P. 2d 163.

In *Carlin v. Thompson*, 234 Iowa 469, 12 N. W. 2d 224, (Br. p. 21) the driver had 300 feet of visibility, travelled at 45-50 miles per hour, and there was no issue of failure to give reasonable warning of the approach of the train. Here, again, the driver approached the crossing at an unreasonable rate of speed without in any way being so induced by the negligence of the railroad in failing to warn of the approach of the train. In the instant case, the *Lodgers* were going only 15 m.p.h. and would not have been going that fast had they received any due warning from the defendants.

This was substantially the situation in *Boyle v. Lehigh Valley Transit Co.*, 150 Pa. Super, 86, 27 A. 2d 682, (Br. p. 21) where the driver had 480 feet of visibility, travelled at 35 miles per hour, failed to slow until he was 25-30 feet from the tracks, and the train was in plain view.

The next three cases relied on by Appellants (Br.

27-32) are properly distinguishable on the ground that in each of these cases the court properly found that had a timely warning been given it would not have been acted upon by the driver of the car in time to have avoided the collision because either he was unaware of the slippery condition of the road, or came upon the slippery portion unexpectedly. This is the point of distinction which Judge Ellett pointed out at p. 307 of the record.

The following quotation from *Barrett v. U. S. R. Admin.*, 196 Iowa 1143, 194 N. W. 222, clearly indicates the basis for these decisions:

“As plaintiff approached the side track crossing, she had the train and its schedule in mind and reduced the speed of her auto for that reason, so that she had it apparently in perfect control. It would have been a perfect control were it not for the icy condition of the ground at that place and her ignorance thereof. She had no intention of crossing the main line without first looking to the west for a train. She had all the time a clear view of the east and knew that no train was approaching from that direction. She did look to the west immediately and did discover the train. She was 40 feet away and mentally ready to stop her car. The icy surface and the skidding of the car were conditions which she had not foreseen or contemplated. These were the conditions which exposed her to the collision . . .”

“ . . . The most that can be said is that if

she had heard the signals, she would have come to an earlier stop when she was farther away. Can we assume, or could the jury assume, that, if the signals had been given, she would have stopped her car farther away than 40 feet? Why should she do so? If conditions had been in fact as she supposed them to be, she could, readily, and would have, stopped her car after crossing the side track. Would it have been less prudent for her to stop her car 40 feet away from the track than to stop it 60 or 80 feet away therefrom? . . . An automobile, stopped 30 or 40 feet away is as safe under ordinary conditions as if stopped 100 feet away. . . .”

Hickey v. Missouri Pac. Railroad Corp. 8 F. 2d 128; and Stroud v. Chicago M. St. P. Ry. Co. 75 Mont. 384, 243 P. 1089, both of which are quoted out of context by the defendants, involve fact situations similar to the Barrett case heretofore discussed, and both rely upon the Barrett case as their authority.

Appellants’ reference (Br. p. 29) to the Stroud case gives an unfair interpretation of the facts in that it is implied that the entire highway was covered by ice, whereas the court found that “the proximate cause of the collision was the icy and slippery condition of the planking on the crossing.” The driver was found not to be chargeable with knowledge of this condition. The court found that the failure to give the crossing signals in no way influenced plaintiff’s actions in view of this circumstance.

The defendants' reliance upon *Haarstrich v. Oregon Short Line Railroad Co.*, 70 U. 552, 262 P. 100 (Br. p. 32) involves a total misconception of the problem involved herein.

In the *Haarstrich* case, the driver had clear vision for 900 feet. The car was traveling 25-30 miles per hour. It could have been stopped in 40 feet. The train was on the crossing when the car was 210 feet away, and there was no reason the driver couldn't have seen it had he looked. How can such a set of facts be decisive of the instant case when no sufficient warning was given to apprise the automobile of the presence of the train which suddenly loomed from behind the building? Obviously, it is not, nor are any of the other Utah cases cited and relied on by the defendants decisive of the present case.

Olson v. D & R. G. W. R. Co. 98 U. 208, 98 P.2d 944, involving a caboose with lights on blocking a street, succinctly sets forth the basis for the rule of that case and the *Haarstrich* case in the following language.

“ . . . the actual presence of a train on a crossing is notice and warning to motorists regardless of the absence or presence of other warning signs or signals. . . ”

By no stretch of the facts in the instant case can it be said that the offending locomotive was on the

crossing as notice to anyone. The evidence is to the contrary that it was not visible until too late to avoid the collision.

Hansen v. Clyde, Utah , 56 P. 2d 1366; O'Brien v. Alson 61 Utah 368, 213 P. 791; Davis v. Mellen, 55 Utah 9, 182 P. 920, involved highway barricades, again obvious hazards visible in the road ahead.

The difference between the line of Utah cases upon which defendants rely where the object obstructs the highway ahead and its presence there is notice, and the present case where the obstacle suddenly looms up from the side of the highway is set forth by Chief Justice Wolfe in his concurring opinion in Hickman v. Union Pacific R. Co., (Utah) 213 P. 2d 650, and constitutes a complete answer to the defendants on this point.

The cited line of Utah cases is also distinguished in Earle v. S. L. and U. R. Corp., 109 Utah 111, 165 P. 2d 877. This is a case where the railroad failed to sound its whistle until it was too late for the approaching motorist to stop. His only warning, as here, was his view of the train as it bore down upon him.

The balance of the Utah cases cited by Appellants (Br. p. 33) are quite obviously without bearing

on the present case. They are not helpful to the Court and require no further consideration.

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Almost the exact problem presented by the case at bar was presented to the court in *Saeugling v. Scandrett* 230 Iowa 153, 296 N. W. 787. The Court distinguished that case factually from the *Barrett v. United States Railroad Administration* case, 196 Iowa 1143, 194 N.W. 222, a case which was decided by the same court, as well as the *Hickey v. Missouri Pacific R. Corp.* case, 8 F. 2d 128, on the grounds on which those cases have been heretofore distinguished in this brief. Because the case is so parallel, and because it also lays at rest the authorities relied on by the defendants in this case, by illustrating wherein they are distinguishable, we take the liberty of quoting extensively from the case:

“Appellant relies upon *Barrett v. United States R. Administration*, 196 Iowa 1143, 194 N.W. 222, and *Pifer v. Chicago, M. St. P. & P. R. Co.*, 215 Iowa 1258, 247 N.W. 625. An examination of these cases distinguishes them from the one before us. In the *Barrett* case, the plaintiff applied her brakes within about 40 feet of the intersection. With her car in the condition that it was, she could have stopped in time to have avoided the train, but for an icy stretch of which she was not aware.

“It appears, therefore, or at least the jury

could have found that as she proceeded to the crossing her reliance was in the brakes of her car and not upon any signals. She knew that a train was due to approach at about that time. Her injury resulted from lack of knowledge of the condition of the street. Acting on the assurance that she could stop, she continued to the point where she first saw the train and then met with injuries she would not have sustained but for the icy pavement.

“In that case, as in this, the view of the approaching train was obscured to within 40 feet of the track.

“In the Pifer case, the plaintiff was familiar with the crossing and anticipated that a train might be along at that time and he intended to stop and reconnoiter before crossing the track. His expectation of stopping and looking was frustrated by loose gravel, the presence of which he was unaware. When he applied his brakes, his auto slid into the train. The Federal case which appellant cites, *Hickey v. Missouri Pac. Corp.*, 8 Cir., 8 F. 2d 128, is very much like the Barrett case and is not controlling.

“To sum the matter up, we have the plaintiff and her associates approaching a well-known crossing on a pavement which they knew would be icy and slippery. They knew as they neared the track that a train was due at any moment. They had the car window down to permit the hearing of signals but they heard none. The windshield was clear of frost but because of the obstruction they did not see the train until within 40 feet of the track.

“Under these circumstances, we do not feel that we should substitute our judgment for that of the jury on the fact question whether had the signals been given they would have been heard, and being heard, whether the automobile would have been stopped out of the zone of danger. They had a right to assume, until they had knowledge or notice to the contrary, that the signals required by Code, section 8018 would be given by the train crew. What has been said makes it unnecessary that we should analyze appellee’s citations. Agreeing with the trial court, that this is properly a case for the jury, its judgment is affirmed.”

In *Leavell v. Thompson*, (Mo.) 176 S.W. 2d 854, the court had before it a fact situation very similar to the one at bar. The streets were covered with snow and ice and were slick; the view was obstructed until within 50 feet of the crossing. The train failed to give any warning of its approach and when plaintiff discovered the train he applied his brakes. The car skidded onto the railroad tracks. Said the court:

“We think that defendant’s failure to warn plaintiff of the approach of the train contributed to the collision as, at least, one of the proximate causes thereof. Plaintiff knew that the road was icy and slick and was listening intently for the approach of the train, which he knew was due, as he passed along the obstruction that prevented his seeing its approach. The jury could have reasonably inferred that a sudden blast of the whistle would have been heard, heeded and acted

upon by plaintiff at that time. (citations) Ordinarily, the question of proximate cause is one for the jury (citation), and in this case we think it was a question for the jury to determine whether the failure of the defendant's agents to give a timely warning concurred at least as one of the proximate causes to bring about the collision. *Williams v. Thompson*, Mo. App. 166 S.W. 2d 785; *Sisk v. Chicago B. & Q. R. Co.*, Mo. App., 67 S.W. 2d 830.

" . . . The evidence shows that the place where plaintiff's car skidded was not only slick but that there had been a large snow fall in the vicinity. There was, also, evidence that there was ice and snow on other roads in the vicinity. In fact it would be a freak of nature for ice and snow to be upon the road in question between the end of the obstruction and the tracks and not appear anywhere else. The jury could have inferred that the operators of the train saw the general icy condition if it was not, as a matter of law, their duty to see it. (citation)"

In *Williams v. Thompson*, 166 S.W. 2d 785, under facts similar to those of the present case, that is, prevalence of ice on the streets, obstructed crossing, no signals given by the train, the car traveling 10-15 miles per hour, the driver and other occupants of the car discovered the train and the driver applied the brakes but slid on the ice into the train. The railroad advanced the same argument as in the case at bar, the failure to give signals was not the proximate

cause of the accident but that the slippery condition of the highway was. The court said:

“ . . . It is obvious that defendant, as well as plaintiff, was familiar with the snow and ice on the street and the slippery condition thereof. Defendant well knew the hazards surrounding the crossing in question and that the snow and icy condition increased the danger. It is evident that the snow and ice on the street played an important part in producing the accident. It is also true that plaintiff saw the approaching train in time to have stopped before going on the track had the pavement been free of ice and snow. But there is no merit in defendant's contention that the presence of snow and ice on the pavement was a new intervening and efficient cause which broke all casual connection between its negligence in having failed to ring the bell or blow the whistle, and the accident.

“Plaintiff and the other occupants of the automobile approached the crossing oblivious to the on-coming train which was hidden from their view by the obstructions heretofore mentioned, and were about half way down the hill. The evidence indicates that as soon as plaintiff saw the train (all occupants of the car saw it about the same time) the driver immediately tried to stop the automobile. . . .”

The court then reviewed the testimony of the witnesses, none of which was as strong on the question of reasonable care as that of plaintiff and her husband in the present case, and concluded that:

“It may be reasonably inferred from the foregoing that if defendant had given a warning, such as the facts and circumstances demanded, the driver of the automobile could and would have stopped on the level pavement that led up to the office west of the tracks and would not have reached a position of peril from which he could not extricate himself as the train approached. It cannot be said that the snow and ice upon the street was of itself, sufficient to cause the collision for if defendant had given a warning plaintiff would not have reached such position that the collision could not have been avoided. It seems clear that plaintiff was brought into her perilous position by defendant’s negligence. In such situation an issue of fact is presented that should be solved by the triers of fact. (citation).”

To like effect are the following cases: Jackson v. St. Louis-San Francisco Ry. Co., 211 S.W. 2d 931; Hubbs v. Boston & M. R. R. 260 N. Y. 223, 183 N.E. 370; and Sisk v. Chicago B. & Q. R. Co., (Mo.) 67 S.W. 2d 831.

It is submitted, that in this case as in the Toomer’s Estate v. Union Pac. R. Co., (Utah), 239 P. 2d 163, the automobile had a right to proceed under the circumstances existing at the crossing, and that the case comes within the rule announced in Hudson v. Union Pac. R. Co.,Utah, 233 P. 2d 357:

“Defendant contends the sole proximate cause of the accident was the fact that the automobile stalled momentarily on the track

just before it was struck. However, a jury could reasonably find that the failure to give the warning signals, if such was found to be the fact, was a proximate cause of the collision.

Nothing needs to be added to what was stated by this court regarding proximate cause in *Earle v. Salt Lake and Utah Ry. Co.* 109 Utah 111, 118, 165 P. 2d 877, 881.”

Points II and III

SUFFICIENCY OF THE VERDICT TO SUPPORT THE JUDGMENT

Appellants’ Points II and III can better be considered together, for the reason that Point III is based upon and relies entirely upon a conclusion reached in Point II, which conclusion is not supported by the law or the facts.

It is appellants’ position (Brief, p. 39 and 45) that the special verdict “is fatally insufficient to support the judgment rendered.” In this part of their brief appellants do not raise the question as to whether the evidence is sufficient to warrant or support the findings.

Appellants’ argument can be fairly separated and treated in five parts:

(1)

The first complaint (Br. p. 38-41) is that no one single interrogatory asked the jury to find whether appellants failed to give "reasonable warning to motorists of the approach of the locomotive to the intersection." Appellants seem to recognize that Interrogatories 1, 2, 3, 4, 5, 6, 10, 11, and 12 were submitted relative to this issue of warning and that answers favorable to respondent were elicited as to Questions 3, 4, 10, 11, and 12. Appellants argue that for the trial court to conclude from these affirmative answers that appellants failed to give a "reasonable warning," would be an inference of fact, not of law, and would constitute an unwarranted finding of fact in support of the judgment.

(a)

Appellants erroneously contend that their only duty under the circumstances was to give what amounted to a reasonable warning. (Brief, page 39).

In view of the facts as found that this locomotive approached an intersection in Salt Lake City during a snow storm, the duty is not to give a reasonable warning, but the duty is that prescribed expressly by statute. Section 77-0-14, U.C.A. 1943, as amended by Laws of 1943, page 124, provides in part as follows:

“ . . . During the prevalence of fogs, snow and dust storms, the locomotive whistle shall be sounded before each street crossing while passing through cities and towns . . . Every person in charge of a locomotive violating the provisions of this section is guilty of a misdemeanor, and the railroad company shall be liable for all damages which any person may sustain by reason of such violation.”

When the jury found that (1) “in this case 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” and (2) that “this failure to sound the whistle was a proximate cause of the injuries . . . sustained by the plaintiff,” and (3) that neither plaintiff nor the driver of the car was guilty of contributory negligence, then there was nothing left for the trial judge to do but apply the law. There were no additional questions or issues of fact which it would have been proper to submit to the jury as to this matter. The test was not one of reasonableness, but was a specific factual test supplied by the legislature. This is a matter of general statutory law, not of ordinance, and was not required to be pleaded. It was incumbent upon the trial judge to apply the law to the facts as found. On this basis the trial court

was obliged to find for plaintiff on the issue of liability.

If the trial court had submitted an interrogatory (as suggested by appellants in their brief) as to whether appellants failed to give reasonable warning of the approach of the locomotive, we submit this would have been error in that it would have been the submission of an issue of law, not of fact.

See: 53 Am. Jur. 756, Sections 1090, 1091; 64 CJ 1166, Section 955.

(b)

Appellants contend that the findings with respect to the watchman and his failure to signal, "fall far short of a finding that the defendants failed to give reasonable warning of the approach of the locomotive." (Brief page 41).

It is not disputed that the appellant railroad had, prior to the accident, voluntarily assumed the duty of maintaining a crossing watchman or flagman at the intersection in question (R. p. 16 and 21, No. 10). It is also undisputed that the plaintiff and her husband, the driver of the car, were aware of the practice of the railroad in maintaining a crossing watchman at this intersection, had come to rely upon this method of warning, and were misled into believing that no train was approaching at the time of the collision

by reason of the failure of the watchman to be stationed in the intersection and to give timely warning of the approaching locomotive. (R. p. 66-68, 150-151, 153, 172)

In view of this circumstance, the duty was not merely to give a "reasonable warning." The duty was that assumed by the appellant railroad—namely, to give timely warning of the approach of a locomotive to the intersection through the medium of the crossing watchman or flagman. Any warning short of this warning would not, as a matter of law, be a reasonable warning. Therefore, the court properly elicited a finding of an ultimate fact by its Interrogatories No. 10 and 11. In response to these questions the jury found "that there was a watchman or flagman on duty at the intersection and at the time of the collision" and 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."

In view of these answers to Questions No. 10 and 11, plus the uncontroverted evidence as to plaintiff's knowledge of and reliance upon the watchman or flagman, the trial court had no alternative but to find the issue of negligence against appellants, as a matter of law.

As stated at 74 C.J.S. 1354 (Section 728):

“Where a flagman is employed or a gate established, the person in charge is bound to perform his duties with reasonable care and prudence, and a failure to do so is negligence for which the railroad company is liable. It is negligence for a gate keeper or flagman to leave his post, knowing that an engine is approaching, without giving some signal of danger . . . ”

See to the same effect: 44 Am. Jur. 771, Sections 526 and 527, Restatement of Torts, Section 301, Comment (f); 71 ALR 1160 at 1177, *Bluhm v. Bryan*, 193 Wis. 346, 214 N W364.

Respondents concede, however, that in view of the findings that the bell on the locomotive was rung and that the light on the south end of the locomotive was burning prior to the collision, it might have been error for the trial court to conclude, as a matter of law, that the failure of the watchman to give timely warning was the proximate cause of the collision and of the injuries sustained by the plaintiff. The trial court did not make this mistake of passing on proximate cause, but specifically asked the jury, in Question No. 12:

“Do you find by a preponderance of the evidence that such negligence (failure of the watchman to be stationed in the intersection or to signal) was a proximate cause of the injuries?”

To which the jury answered, "Yes."

Appellants do not complain that there were insufficient facts to warrant submitting the issue of proximate cause to the jury. No doubt the fact that the bell was at the north end of a 120-foot unit (R. p. 183, 185), was separated from the street by intervening buildings, and that the small light on the south end of the locomotive was not seen by respondents but was diffused in an intersection which was thoroughly lighted by two sodium lamps. (R. pp. 54 to 56), and was also obscured by an extension on the end of the locomotive (R. 218), warranted the court in believing that the jury question as to proximation did, in fact, exist.

(2)

Appellants further complain of the insufficiency of the special verdict (Br. p. 42) on the ground that Question No. 7 falls short of being a finding that "the trainmen negligently failed to keep a reasonable lookout for plaintiff's automobile as the locomotive approached the intersection." The actual language of the question is whether "the train men on the locomotive negligently failed to keep a lookout for automobiles crossing the intersection." This question was answered, "Yes."

Appellants' point seems to be that the duty was to watch out for automobiles "approaching" the intersection, not for automobiles "crossing" the intersection. This would seem to be strictly a point without a prick. No jury could be expected to take so narrow a view of the question.

As stated at 64 CJ 1185 (Sec. 974):

"A special verdict, finding or answer is to be construed liberally with a view of ascertaining the intention of the jury. . . . It must be borne in mind that the jury may employ a term in its common rather than its technically correct sense; and the findings should be held to have the meaning that the average juror would understand them to have."

Particularly when Question 7 is read together with Question 8, it is evident that the finding is in substance that the trainman failed to keep "the lookout of reasonable prudent persons under the circumstance."

"A special verdict, finding or answer is to be construed as a whole, and where there are two or more answers or findings, they are to be construed together. Also, all the special issues submitted to the jury for answers must be considered together as a whole." (64 CJ, Sec. 975.)

Appellants further contend that Finding No. 8 does not establish that the train crew had a clear-cut opportunity to stop the locomotive or give the signal in time to enable the plaintiff to stop the automobile and thus avoid the collision. (Brief, p. 43)

No complaint is made by appellants in this section of their brief that the facts do not warrant the submission of Question No. 8 to the jury.

We submit that Question 8 and the affirmative answer, particularly when read together with Question 7, is a specific finding that the train crew did have a clear opportunity to stop or signal so as to avoid the collision.

Apparently the real basis of the attack upon this portion of the verdict is that the facts do not warrant the submission of Question 8 to the jury, since there is no evidence from which the jury could find that the hostler was made or could have been made aware of the approach of the automobile sufficiently early to sound a warning whistle which would have been "a benefit to either the driver or the plaintiff."

The blowing of the whistle "after it was apparent to the trainmen or should have been apparent to a reasonable prudent person that the driver of the automobile was not going to stop his automobile be-

fore driving into the path of the locomotive” is not as appellants would lead the Court to believe, the same thing as a question whether the whistle could have been blown “after the train crew saw the peril of the automobile” and “it was much too late to afford any benefit to either the driver or the plaintiff.” (Brief, p. 44)

Under the evidence which went to the jury (R. p. 233) the jury could have concluded that Mr. White, the hostler, was given a signal when the automobile was 200 feet east of the tracks. A whistle signal at that point might very well have been sufficient to give the driver timely warning of the approach of the locomotive so that he could have brought his car to a slow and gradual stop, notwithstanding the presence of the ice.

(4)

It will be evident to the Court from the foregoing that Respondent contends and represents that the special verdict was, in all particulars, sufficient as a matter of fact to support the judgment rendered. Respondent believes she has demonstrated the following:

(1) The answers to Question 3, 4, 10, 11, and 12 establish that defendants failed, as a matter of fact, to give the whistle warning of the approach of

the locomotive to the crossing which was required by the statute, in the one instance, and the flagman warning which was required by the voluntarily adopted practice of the defendants, in the other instance.

(2) That the answers to Questions 8 and 9 establish that the trainmen failed to keep the lookout of a reasonable, prudent persons under the circumstances.

(3) That the answers to Questions 8 and 9 further established that the trainmen failed to exercise reasonable care to avoid the collision by giving a timely whistle warning after a reasonable lookout did disclose to them that the automobile was 200 feet east of the track and when such a warning would have permitted the driver to bring his car to a gradual and safe stop short of the tracks.

(4) That the answers to Questions 8 and 9 established that the trainmen failed to exercise reasonable care by stopping the locomotive in time to avoid the collision.

(5) That the answers to Questions 4, 9, and 12 establish that the foregoing negligence of the trainmen was the proximate cause of the collision and of the injuries suffered by the plaintiff.

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It is evident therefore, that the trial court was not obliged to imply any findings of fact to support the judgment. Hence, the argument of appellants' Point III, to the effect that "no finding in support of the judgment can be implied," is beside the point and raises an issue of law which has no applicability in this case.

However, the Court may be interested in an analysis of Rule 49(a) and of appellants interpretation and application thereof as developed on pages 48 and 49 of their Brief, wherein certain Texas authorities are cited and relied upon.

The Texas cases have reference to entire omitted issues and separate defenses rather than to additional findings which may be a part of and related to existing issues or defenses. The correct application of URCP 49(a) is to be found in the case of *Hinshaw vs. New England Mutual Life Insurance Company*, 104 Fed. 2d 45, in which case Federal Civil Rule 49(a) was construed to mean exactly what it says:

"If . . . the court omits any issue of fact raised by the pleadings or 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 accord with the judgment on the special verdict."

Respondent submits that a Texas decision more helpful and more pertinent is the case of *Panhandle and S. R. Ry. Co. vs. Friend* (Tex.), 91 SW 2d, 922. In that case the court ruled that

“... where issues are submitted which are clearly referable to a specific ground of recovery, it is the manifest purpose of the statute that omissions in the charge will be supplied by presumption of finding, when there is supporting evidence.”

Appellants refer at page 45 of their Brief to Section 104-25-1, UCA 1943, which defines a special verdict in a manner which apparently they claim is favorable to them. This section was superseded January 1, 1950, by Rule 49 URCP (see U.R.C.P. Table I, p. 183, and Table III, p. 18), and thus the statute could have neither controlling nor persuasive effect herein. Rule 49 gives complete support to respondent's position. If appellants must rely on Section 104-25-1 to sustain their position, then that position is necessarily without merit.

(5)

Appellants finally complain (Brief, pp. 50-51) that (a) the trial court submitted a special verdict to the jury without the parties having requested such a procedure; (b) appellants were not given “any

notice” of the court’s intention to so instruct; and (c) appellants were not given any opportunity to prepare requests for submission to the jury “covering any special issues.”

(a)

Rule 49(a) does not require that the special verdict be used only when invoked by counsel. Quite to the contrary, it expressly provides that “the court” may submit written interrogatories and may require a special verdict.

(b)

The record plainly shows (R. 307-8) that appellants were given notice of the trial court’s intention to submit special interrogatories; that both Mr. Jensen and Mr. Bagley did, in fact, make suggestions as to the content of the interrogatories; that appellants suggested that a question be submitted to the jury which would permit a finding as to whether Mr. Lodder’s alleged negligent driving and the icy condition of the street were the sole proximate cause of the accident; that the trial court quite properly ruled that this suggestion would add nothing to the proposed interrogatories, since Questions 13, 14 and 15 squarely tested the jury’s conclusions on this very issue. Since the jury expressly found that Mr. Lodder did not drive the automobile “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," or "without keeping the same lookout which a reasonably prudent person would have kept under the same circumstances then existing," it is extremely difficult to see how appellants could possibly be prejudiced if this was the only suggestion they had for a further issue.

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Appellants made no further requests or suggestions for interrogatories, excepting to remind the court that, in their opinion, there were no issues of fact whatsoever which should be submitted to the jury. This had already been covered by their request for directed verdict. Appellants did not ask for time or other opportunity to consider further the special verdict.

Appellants' position throughout this case demonstrates a thorough failure to distinguish the situation wherein the driver of an automobile, either not knowing of the ice or coming upon it at the last minute, would *not* have slowed earlier had he been timely warned, as against the situation here presented, where the driver knew he was on ice, was driving with regard for this very circumstance, and would have commenced to brake and slow earlier and with

adequate gradualness had he received the timely warning which the railroad and its employees were obliged to give. It is evident that the trial court perceived this very distinction at this point in the case, for, at page 307 of the Record, he responds to counsel's suggestions for additional interrogatories by pointing out that the presence of the ice would be an intervening cause only where "ice is inserted suddenly when you are driving on a highway."

Since the trial court not only submitted the proposed special verdict to counsel for both parties but, beyond this, warned them as to the effect of their failure to make requests covering all issues (R. p. 307) and then fully and frankly discussed the coverage of the proposed interrogatories with counsel, it can scarcely be error that appellants failed to suggest anything further of merit. This is hardly the situation which was presented in *Pittsburg R. Co. vs. Smith*, 207 Ill. 486, 69 NE 873, relied upon by appellants (Brief, p. 51,) as even a cursory reading of that case will demonstrate.

Point IV

THE COURT PROPERLY SUBMITTED ALL MATERIAL ISSUES AND INSTRUCTED ON THEM

Appellants' contention under point IV of their brief is that the court erred in failing to submit to the jury the question of whether plaintiff was negligent, and whether her negligence, if any, contributed to the collision. The specific complaint is that the trial court failed to submit to the jury the issue of whether in the exercise of reasonable care the plaintiff should have protested against the alleged unreasonable and unlawful rate of speed at which her husband approached the tracks.

The answer to this contention may best be divided into three parts:

(1)

In answer to interrogatory No. 3, served by plaintiff on the defendant railroad, the railroad stated that the negligence of the plaintiff upon which they relied to defeat her claim was:

“The plaintiff, Merlene Lodder failed to hear the bell and whistle warning of the approaching engine or failed to heed said warning and communicate the knowledge she had or should have had to the driver at a time

when the said warnings were clearly audible; plaintiff failed to look for or see or heed the approaching engine and communicate the knowledge she had or should have had to the driver so that he would slow up or stop his automobile at a time when the engine was plainly visible; plaintiff failed to maintain a proper lookout as she approached the railroad crossing and communicate timely warning to the driver of the automobile.”

No mention was ever made of a claimed issue of contributory negligence in failing to tell her husband to diminish an alleged unlawful rate of speed. Therefore, this issue was not raised either by the pleadings or the answers to the interrogatories.

(2)

Question No. 13, submitted the issue to the jury as to whether plaintiff's husband drove “at a rate of speed that was greater than safe, reasonable, and prudent, having regard to the surrounding circumstances.” The jury by their answer indicated that he did not fail to exercise reasonable care in driving at the speed he did, and that he was not driving at an excessive speed. This being so, Appellants obviously cannot have been prejudiced by the court's failure to submit to the jury a question as to whether plaintiff should have protested the alleged driving at an excessive rate of speed.

The general issues of Mr. Lodder's alleged negligence both as to excessive speed and failure to keep a lookout and plaintiff's alleged contributory negligence were submitted to the jury by questions 13, 14, 15, 16, 17 and 18.

Although the proposed special verdict covering the issue of Plaintiff's alleged contributory negligence was submitted to counsel for Appellants before it was given to the jury, (R. 307) no objection was made on this point, nor did Appellants request a more specific interrogatory covering this aspect of Plaintiff's alleged contributory negligence. It is hardly an answer to this omission to complain that the trial court undertook to submit the "issue" on its own motion, but did so imperfectly. (Br. p. 55.) Rule 49(a) seems to contemplate that counsel have a duty to call such imperfections to the attention of the trial court or thereafter keep their peace.

In view of the answers elicited to these questions, the trial court reasonably concluded that the jury in fact found plaintiff not guilty of contributory negligence in failing to protest against the alleged excessive speed of her husband's driving. If the jury concluded that the speed was reasonable it could hardly have believed she had any duty to complain or protest on this ground. Under Rule 49(a) the

trial court had every right to so conclude, and in the absence of Appellants' express objection to the interrogatory as proposed, it must be presumed that the trial court did, in fact, imply this finding if it is necessary as a matter of law to support the judgment.

Point V

THE COURT CORRECTLY INSTRUCTED THE JURY ON THE QUESTION OF PROXIMATE CAUSE.

Appellants contend that instruction No. 2 relating to proximate cause, given by the the trial court and set out in Appellants' brief at p. 60 is an abstract definition of a legal concept which the trial court failed to apply to any of the facts of the case. This argument completely disregards and overlooks the special verdict procedure under which the case was submitted to the jury.

The instruction has direct application to interrogatories 2, 4, 6, 9, 12, 15, and 18, and the jury could scarcely have concluded otherwise. Rather than failing to connect it to any factual proposition, we submit that the court did an excellent job of setting it forth so the jury could see its application to each of the interrogatories submitted to them. The definition of proximate cause is set forth, and was coupled with a series of interrogatories which set up

the application of the principle defined. Nothing could be clearer to the jury than this method of instructing them.

Nor, do we read into the last sentence of the instruction the conflict with the balance of the instruction which appellants complain of. To the contrary, it appears to be very clear and explicit.

As has been pointed out under point No. II of this brief, the jury found that Appellants' negligence was the proximate cause of the plaintiff's injuries (Interrogatories 3 and 4, 7, 8 and 9, and 10, 11 and 12). The jury also found that plaintiff's husband was not negligent in any particulars (Interrogatories 13, 14 and 15) and that plaintiff herself was not negligent (Interrogatories 16, 17 and 18). These findings provide a complete answer to the balance of Appellants' argument (p. 63, 64) under their heading, Point V.

Point VI

THE ISSUES SUBMITTED TO THE JURY WERE ALL SUPPORTED BY THE EVIDENCE

Appellants contend that certain issues were submitted to the jury unsupported by the evidence. This is but a rehash of a part of their argument under point I of their brief.

The argument made refers to requested instructions No. 1 and 8, which were refused by the trial court.

We have heretofore pointed out (see Point I) wherein the issue of negligence on the part of the plaintiff's husband was properly submitted to the jury, which is the point raised by defendants' requested instruction No. 1; and we have also pointed out (see Point I) wherein the evidence supported the submission to the jury of the issue of failure to keep a lookout on the part of the trainmen and negligent failure to stop the train. A claim to the contrary was the basis for defendants' requested instruction No. 8. We refer the court to Respondent's Point I for a discussion of the evidence in regard to these matters.

Point VII

THE TRIAL COURT DID NOT ERR IN HOLDING APPELLANTS TO THE TIME LIMIT FOR CLOSING ARGUMENT WHICH THEY VOLUNTARILY AGREED UPON

Appellants' Brief (p. 67) neglects to inform the Court that no time limit was "allotted" to or imposed upon them for closing argument, but that by voluntary agreement of all counsel, they undertook to confine their closing argument to 40 minutes to the side.

It is only by reference to the Record (p. 323-324) that it becomes clear that the time limitations were self imposed by agreement of counsel..

The record also clearly shows that the trial court then warned all counsel, that if they were to keep themselves within these time limits, they would have to reserve part of their time to argue the question of damages if that became an issue as the result of a special verdict favorable to Plaintiff (R. 324). It is also clear from the record that when they argued the question of liability, Respondent's counsel saved some eight or nine minutes out of the forty agreed upon. Appellants' counsel voluntarily elected to consume their entire time in arguing the issue of liability and apparently made the decision that by so doing they could best present their case and protect their interests. As a matter of fact they consumed not only their agreed forty minutes, but exceeded that in arguing the issue of liability.

It was only when they were apparently surprised by the jury's special verdict in favor of plaintiff, that defendant's counsel suddenly attempted to retrieve themselves from this error of strategy and created a situation in which the trial court was obliged in fairness to the agreement voluntarily reached, to insist that Appellants' counsel abide by their agreement.

This is not the situation presented in the cases cited by Appellants in their brief at page 68. In each of those cases the trial court imposed on counsel without their consent or approval, a time limit which was found to be unreasonable in view of the complexity of the issues to be argued.

The case comes closer to *Ackerman v. Griggs*, (Cal. App.) 293 P. 115, 117, where the appellant complained that the trial court refused to permit him to continue his argument beyond the one hour set aside for him, and the appellate court concluded that, "This is a matter wholly within the discretion of the trial judge."

The following language from *Bell v. Kelly*, 73 Cal. App. 189, 238 P. 719 is pertinent:

"In addition to the claim that the damages are excessive, appellant contends that error was committed by the trial court in restricting the time for argument by counsel before the jury to 35 minutes for each party. The plaintiff and respondent was satisfied with this allotment of time, and it is a matter resting within the sound discretion of the trial court. We may not presume that a more lengthy argument upon the facts would have caused the jury to see them differently than it did."

Incidentally, it is not quite fair to state (Brief p. 66) that Respondent's counsel argued the matter of

damages "at length." Since this point is raised, the Court should know that not more than four minutes in all was consumed in the closing argument of Respondent on the issue of damages, and that all in all, her time for argument was not fully used.

Point VIII

THE VERDICT WAS NOT EXCESSIVE AND DID NOT INDICATE PASSION, PREJUDICE, OR CORRUPTION

The only fair and helpful approach to this issue is to compare the amount of the jury's verdict with the evidence which went to the jury on the issue of Plaintiff's bodily injuries. It is specious to approach the question of reasonableness of the damages by comparing the jury's verdict with the trial court's personal view of damages in a personal injury case.

This basic fallacy in Appellants' position is perhaps best demonstrated by three points, as follows:

First: In the case of *Falkenberg v. Neff*, 72 Utah 258, 269 P. 1008, this very Supreme Court reduced a jury award by 70% for excessiveness without finding passion and prejudice. Therefore to reason that because Judge Ellett reduced Mrs. Lodders verdict from \$25,000 to \$10,000, a matter of 60%, this Court must conclude from this fact alone that the verdict was a result of passion, etc., is to fly in the face of

both reason and precedent. (Appellants do not include the Falkenberg case in their table at page 71 of their Brief.)

Second: The results that would follow from such an inflexible and arbitrary ruling as that a remission of 60% is *per se* sufficient evidence of passion etc. to warrant reversal, demonstrate the hollowness of the argument. Would any trial court hereafter in this jurisdiction ever express himself as to excessiveness of the verdict even though he were convinced that a remission of 60% or more would work justice, and that there was in fact no prejudice evidenced by the verdict? Obviously not. In fact, the trial courts would be extremely cautious in considering remissions of any substantial proportion because of the danger of falling within the unfortunate doctrine of the Lodder case. Hence such benefit as our system of jurisprudence derives from this accepted practice would be very much impaired and limited. See *Bennett vs. U.P. R. Co.* (Utah), 213 P. 2d 325.

Third: If prejudice and passion is to be determined by comparing the jury's idea of damages against that of a single trial judge, (rather than against the evidence of injury), then we are actually substituting a judge's test as to what was fair in place of the jury's judgment as to what was fair. This is

the reasoning process Appellants would have the Court follow. Respondent submits it is a procedure which completely turns its back upon and ignores the spirit and benefits of the jury system.

When the issue of damages is submitted to the jury, eight persons of diversified background, temperament, and judgment, eight persons “of various ages, occupations and experiences” (Adkins v. Zalasky, 59 Idaho 292, 81 P. 2d 1090) are available to measure what is a fair damage figure in view of the extent of the injuries and in view of the “present cost of living and the diminished purchasing power of the dollar” (Bennett v. D & R. G. Co., (Utah) 213 P. 2d 325, at 331). This is the right to which Plaintiff is entitled when she demands a jury trial. It is denied her if as Appellants contend, this Court must measure the fairness of the award against the judgment of a single trial judge who cannot be expected to be completely free from a point of view conditioned by his own individual background, experience, and temperament.

Surely no reasonable mind can avoid the conclusion that what must be done here is to measure the verdict against the injury — not the verdict against the amount of remission which the trial court considered necessary to remove excess. See *Pauley vs. McCarthy*, 109 Utah 431, 194 P. 2d 123,

Incidentally, the Court may be assured that respondent was disappointed and disturbed by the trial court's heavy hand in reducing this verdict. She did not believe, and does not now concede, that the original verdict was not justified by the evidence. The remittitur was accepted in the belief that thus an appeal would be avoided and that the plaintiff would at long last receive some prompt monetary assistance.

Having accepted the remittitur in lieu of a new trial with its costs and delays, Respondent concedes that she cannot now complain of what is considered to have been an unreasonable and unwarranted reduction in the verdict. Hence this point is not here cross appealed.

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Parenthetically—there is an independent basis upon which Appellants' argument in Point VIII must fail, as follows:

Our Court is apparently among those jurisdictions which hold that if the reduction required by the trial court is sufficient to bring the verdict down to where the resulting figure has eliminated that portion of the verdict which seemed to have been the result of passion and prejudice, then the error has been corrected, and in such a situation even though the original verdict can be said to have been so excessive as

to have resulted from passion and prejudice, the trial court does not commit error in refusing to grant a new trial. This seems to be the reasoning of at least two Utah cases, to wit:

Jensen v. D. & R. G. R. Co., 44 Utah 100,
138 P. 1185; Duffy v. U. P. R. Co., (Utah)
218 P. 2d 1080.

This doctrine is apparently recognized in Pauly v. McCarthy, 109 Utah 431, 184 P. 2d 123, at page 125.

Respondent does not at all concede, however, that she must stand or fall upon the acceptance of this doctrine. The burden of her position here is that when the original verdict is measured against the injury sustained, it is not excessive, but is justified and warranted by the evidence, and that consequently no inference (conclusive or otherwise) of passion or prejudice can be predicated thereon.

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Therefore the unavoidable task at hand is to painstakingly review the evidence as to personal injury, and to put in proper perspective the thoroughly incomplete and one-sided statement of the record and unwarranted inferences, therefrom spelled out in Appellants' Brief.

In considering the following summary of the record, it will be helpful if the Court will have in mind that the accident happened on December 19, 1949; and the the Plaintiff's complaint was filed on May 16, 1950; the Amended and Supplemental Complaint was filed on February 26, 1951; and that the trial commenced on December 7, 1951. (Appellants seek to make some point of the Plaintiff's increased prayer for damages in the supplemental complaint as against the original complaint. The reason for this increase will become quite evident when it is shown that the true nature of plaintiff's injuries was not discovered until after the earlier complaint had been filed.)

Plaintiff testified in her own behalf as follows: That she was in exceptionally good health before the accident, and even quite athletic and had not suffered from headache (R. 158); that she was regularly employed as a waitress at the Temple Square Coffee Shop and earned an average of \$35.00 for wages plus \$48.00 in tips every two weeks (approximately \$175 per month) (R. 146); that as a result of the accident she sustained a huge black spot, bump, on her forehead, a bruised knee, and a gradually stiffening neck which made her realize something was wrong that night, but that it was too late to go to a doctor (R. 158, 159, 161); that the next day she went to Dr. Kimball's office where her neck was

x-rayed, following which Dr. Kimball immediately sent her to Dr. Clegg's office (R. 161); that Dr. Clegg immobilized her neck by putting her in a cast (R. 161); that she was in the cast for a week or so, and that when the doctor removed the cast, he put her in a metal brace (R. 161, Ex. G.); she fastened this brace to her neck in the presence of the jury, and without Appellants' objection, to demonstrate the awkward position in which it held her neck, chin and head (R. 162); that she wore this brace for two and one half to three months, night and day (R. 162); that the brace "was uncomfortable to say the least, uncomfortable night and day. You can't sit down. You can't stand up. It's inconvenient. You can't turn your head." (R. 162, 163); that during this period she definitely experienced pain, but not headaches (R. 162); that after the brace was removed she began to experience headache (R. 163); that during the time she wore the brace she could not sleep nights, took sleeping pills, but that they did no good after awhile (R. 163); that after the brace was removed she returned to work, but found she was not as well as before the accident, that her neck was still stiff and her headaches started (R. 164); that she felt that she tired more easily and rapidly, and did not feel the same at all as before the accident (R. 164); that she started taking aspirin and then empirin and then codein and finally phenobarbital (R. 164);

that from these drugs she secured only temporary relief but no let-up in the pain and headache (R. 164); that on July 14, 1950 she first went to see Dr. Okleberry at the Salt Lake Clinic (R. 165); (she was under Dr. Okleberry's care and observation both by physical examination and x-ray thereafter until June, 1951); that in June of 1951, he put her "right back in a cast, right back where I started from" (R. 165, Ex. H); that she wore this cast throughout the summer of 1951 until Sept. 24, 1951 (R. 165); that after the second cast was removed she did not hold a steady job, but worked a few days at several different cafes (R. 166); that at the time of the trial she was still suffering pain "up the back of my neck to the back of my head, and then even persists onto the top of my head" (R. 166); that at the time of the trial, "if I find myself turning quickly to the left or to the right, I hear a banging click sound. I go weak all over" (R. 166); that she still suffered headaches, but not quite to the extent as before she went to Dr. Okleberry (R. 166); that at the time of the trial she was unable to rest comfortably at night, that her headaches continued at frequent intervals, and were of such intensity that no matter what she took to reduce the pain, they still continued (R. 167.)

Although Appellants now complain strenuously that the evidence of Plaintiff's injuries which went to

the jury did not warrant the verdict, at this point in the trial they made no effort to impeach or diminish the foregoing testimony by cross examining Mrs. Lodder as to the injuries, discomforts, pain, or headaches about which she had thus testified in detail. The jury could not help but get the impression that Appellants did not question that Mrs. Lodder had sustained the injuries and experienced the resulting suffering to which she testified.

Mr. Lodder, plaintiff's husband, testified as follows: That before the accident, plaintiff was "in good health. She was always jolly, just swell to have around. She was in good health, and never complained a minute of anything, and we got along real swell." (R. 79); that plaintiff "never missed any time at work. She liked her work and she was very good at her work" and was one of the best waitresses he had worked with (R. 79); that after the accident, the plaintiff "didn't seem to be the same. She has been irritable and a bit cross. She is always complaining of headaches, and her son get's barked at once in awhile;" that "she is easily irritated. She get's cross. She is fairly hard to get along with at times. She was never that way before. She's not herself. She's just constantly with those headaches and having to take pills of some kind to take down her headaches, and she's not the same person." (R. 79); that at the time of the trial, plaintiff "is still cross and

irritable, always has headaches, not as often, but they are just as severe, and she is always complaining about them." (80); "that she used to sleep very good and fall right to sleep, but she's very hard of sleeping now. She get's up in the middle of the night occasionally, and she doesn't rest well at all." (R. 80); "that she wore the brace two and one half months, all day and all night, she never took it off (R. 81); that sometime "in June of 1951" they put her back in a cast and she wore that three and a half months." (R. 81).

Here, again, Appellants indicated by their failure to cross examine Mr. Lodder, that they did not question the extent of Plaintiff's injuries or suffering.

Dr. Clegg testified as follows: That Plaintiff first visited his office on December 20, 1949; that on taking her history, he learned that since the accident of the night before, she had experienced pain in the upper part of her neck (R. 107); that he examined x-ray's which had been taken by Dr. Kimball, and took ten sets of x-rays of his own; that his physical examination revealed tenderness to the touch in the upper neck, limitation of motion and some muscle spasm (R. 108); he identified Exhibit I as an x-ray he had taken of the upper portion of plaintiff's neck, March 21, 1950, and read it as showing a fracture line in the ring portion of the first cervicle vertebrae;

that from his x-rays he concluded that there had been a fracture or break in the ring of the first vertebrae of the cervicle spine (R. 109, 110); that he had treated the fracture by putting plaintiff in a plaster cast, and later a brace to support the neck, which he had instructed her to wear day and night and to keep tight and snug at all times (R. 110); that by radiograph on the 6th of February, he observed that the fracture showed as much union as could be expected at that time; that as of the 6th of March or shortly thereafter it appeared that the fracture had healed (R. 111); that while such a break is healing it is always painful (R. 112).

Although Appellants attempted on cross examination of Dr. Clegg, and now attempt by argument (Br. p. 77) to establish that some portion of the injuries sustained by Plaintiff resulted from her failure to wear the brace at night during the latter part of the period when it was prescribed, nothing in Dr. Clegg's testimony, or in the testimony of Dr. Okleberry, as will be pointed out, supports this conclusion. Quite to the contrary, Dr. Clegg stated that in his opinion the fracture united as soon as could be expected, and Dr. Okleberry stated that the more serious injury consisting of the sprained neck, the angulation between vertebrae, the strained ligaments, the ruptured disc, and the traumatic arthritis (R. 134) were not caused or in any way contributed to by this minor

and inconsequential failure to follow to the letter the prescription as to wearing the brace at night, if such be the fact. (R. 135).

Dr. Okleberry's testimony on this point is at page 133 to 135 of the Record where he says, "I don't think not wearing it (the brace) at night had anything to do with the persistent symptoms."

Dr. A. M. Okleberry testified both on direct and on cross examination at some length and covered the nature of the injuries quite comprehensively. He stated that Plaintiff first came under his care on July 14, 1950; that he examined her neck condition, took x-rays, and from those x-rays and the x-rays taken by Dr. Clegg, concluded that Plaintiff had sustained a fracture of the first cervicle vertebrae and in addition thereto a sprained neck which was evidenced by ligamentous injury (R. 116, 117); that in taking her history he learned that her symptoms which had continued from the accident on December 19, 1949, consisted of pain and stiffness in her neck and headache; that she appeared to be in distress as though her neck did pain (R. 117); he prescribed heat and massage and the wearing of the brace as much as possible; that she continued under his observation and treatment until April 27, 1951; that during this period although she was wearing the brace two or three hours each day, she was exper-

iening headaches of about the same intensity, and had a catching in her neck when she turned her head to the left (R. 118); that when he examined her on April 23, 1951, her symptoms indicated that she was probably developing traumatic arthritis or showed early symptoms of a ruptured disc (R. 119); that on April 27, 1951 he took additional x-rays with the neck in a hyper-extended position to see if they demonstrated any instability or excessive motion in the neck joints (R. 119-120); that from one of these x-rays (Ex. J.) he concluded that there was a slight angulation so that the interpretation was that there had been some injury to the ligaments surrounding the third and fourth cervicle vertebrae and that Plaintiff had some instability there, and that possibly some damage to an intervertebral disc was causing the recurring sharp catching pains in her neck (R. 121); that he suggested a plaster cast, and on June 11, 1951, he applied the plaster cast; he felt certain that the neck should be immobilized and the cast was applied in the hope that the neck would heal and not go on and get worse (R. 123); that she wore the cast until September 24, 1951, when it was removed (R. 123); that the foregoing symptoms did result from a severe blow to the forehead or some other sudden jar on a date as far back as December 19, 1949 (R. 123); that even while she was wearing this cast, plaintiff suffered sharp pain in the middle of

her neck and pain and numbness in her left arm which could be expected as one of the outgrowths of this condition (R. 124); on October 23, 1951 her neck was about the same with catching pain a few times each day which never lasted very long, her headaches had become a little worse and she began to experience the headaches also on the sides of her head and complained of a ringing in her left ear; that she had about 25% less than normal range of motion in her neck in all directions (R. 125); that he examined her on Monday prior to the trial by a prior appointment made in October, and that she had recently experienced a bad occipital headache, neck pain and a little more stiffness in the neck than she usually had, also an audible and palpable click over the back of her neck in the junction of the neck and the thoracic part of the spine notwithstanding Plaintiff had "gone through about all the advice we could think of to give her." (R. 125).

Dr. Okleberry then testified that it was possible Plaintiff would require an operation in the nature of a bone graft done across one or both of the joints which showed instability and in which ruptured disc material would have to be removed (R. 125, 126).

The Doctor's prognosis was that Plaintiff might go on and improve "or at least not get any worse," but that she might suddenly get worse without any known cause, and would be more apt to have trouble

in the future than if she had not been injured (R. 126). That no operation would be required unless the patient did get worse. (R. 126).

The Doctor testified that he had not known until a few days before the trial that Plaintiff was in a lawsuit and that he believed her symptoms were objective in that they showed angulation, fracture and instability; that these conditions would “necessarily” cause pain and headache (R. 130); that the condition was not congenital but the result of trauma (R. 130); that “the sprain and the instability that were still residual were considered the cause of the persistent headache” (R. 131); that the sprain was a ligament as distinguished from a muscle sprain (R. 131).

At this point in the Doctor’s cross examination (R. 131) Appellants made an abortive attempt to prove that Plaintiff’s injuries resulted not from the accident, but from the treatment which Dr. Holbrook had given her and which had taken the form of a stretching of the neck. The examination by Mr. Bagley is as follows:

Question: “Doctor, do you or would you recommend stretching this woman’s neck?”

Answer: “No. It’s already stretched too much.

Q. “It’s already been stretched, hasn’t it?

A. “That’s right. This is one of those

things that has been classified and extensively known as a whiplash injury. Apparently she received both; first a whiplash type of injury and then a direct blow which caused her fracture. One or the other caused it, maybe both. Can't tell."

Respondent submits that this testimony effectively refutes the Appellants' contention that the permanent injuries resulted from a stretching by Dr. Holbrook (Dr. Clegg's partner). The only fair and warranted inference from the evidence, is that when the Plaintiff's head was suddenly snapped forward and then backward in the collision, she suffered not only a fracture of the cervicle spine, but also the ligament sprain which gradually brought on the objectively determinable angulation and ruptured disc.

Dr. Okleberry then further testified that during the course of his treatment of Plaintiff, he had recommended that she attempt to continue with her work because "many of these things last too long for people to wait for them to get well and stay off work forever." (R. 131, 1932).

Dr. Okleberry concluded his testimony on the cross examination by Mr. Jensen, as follows: (R. 138-139)

Q. "Well, why is it that subsequent immobilization would help where it wouldn't have initially?

A. "It isn't certain whether it has helped, not at all certain.

Q. "Don't you think she's in better condition now than she was at the time when you noticed the excessive angulation in those vertebrae?

A. "I kind of doubt it.

Q. "Do you think that you're placing her in a cast this summer was a complete waste of time?

A. "Well, I don't know for sure.

O. "Well, now, in your direct examination you stated, did you not, that at this time that the condition of her neck had improved and that further immobilization would not help her.

A. "Her neck would improve while she was in the cast. It may not be any better now than it was before we put the cast on . . . From the standpoint of her symptoms, at least, I don't think she's cured.

Q. "Well, now, the only symptoms you are talking about when you speak of standpoint of symptoms, is her complaints of pain and stiffness. Isn't that correct.

A. "That's right, plus one other thing, this very definite, audible, palpable click that she has in her neck, it didn't change that."

Mrs. Ovena Kalm testified as follows: That she had known Plaintiff for over three years; that she had worked with Plaintiff as a waitress six days a

week at the Temple Square Hotel (R. 141); that prior to the accident Plaintiff was very healthy and energetic, didn't take time off, didn't complain about illness or anything, had never complained about headache, had been a very efficient waitress, one who remembered her orders and was pleasant with the customers (R. 142); that after Plaintiff returned to work in the Spring following the accident, there was no comparison in her health; she was pale, she had lost considerable weight, was in a great deal of pain an awful lot of the time and Mrs. Kalm didn't even see how she could keep on the job she was in such severe pain so much of the time; that Plaintiff just looked ghastly much of the time; that there were times when "you would see her (Plaintiff) turn her head just ever so slightly, and she would look like she was going to faint." (R. 143).

This witness then stated (R. 143-144).

"She would become ghastly white and just—well, you could tell that she was suffering from that pain, and there was one occasion that I remember very distinctly that she was clearing the table, and she was sort of leaning forward over the table, clearing the dishes, and she just seemed to go weak and pale and I thought she was going to drop her whole handful of dishes. One of the other girls went over to her and said, 'Merlene, are you all right?' She seemed dazed and turned and walked into the kitchen without even answering."

Mrs. Kalm then testified (R. 144) that after the accident, Plaintiff was not a very good waitress and she noticed particularly that:

“... she couldn't remember her orders at all. She would go to the kitchen and seem to have forgotten entirely what she was even doing. She couldn't remember what one customer had ordered. It was hard on us all and mainly hard on her because she would get confused.”

On cross examination by Mr. Lewis, Mrs. Kalm testified that:

“I am anxious for Mrs. Lodder's health, nothing else, and I can see that it has been greatly impaired.” (R. 145).

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In summary, Respondent earnestly submits that the foregoing evidence shows that the Plaintiff sustained the following injuries:

1. A severe bump on the forehead which caused a fracture of the ring at the first cervicle of the neck.
2. A whiplash or snapping injury which caused a sprained neck that developed its objective symptoms some months after the injury and become demonstrable by x-ray evidence of angulation or spreading between the third and fourth vertebrae, and by an audible and palpable clicking and catching.

3. A ligamentous injury, traumatic arthritis, and ruptured disk in the same area.

4. Severe and prolonged discomfort amounting to physical suffering as the result of wearing the first cast and, thereafter, the metal brace for a period of nearly three months, and the second cast for a period of nearly four months.

5. Extreme and prolonged pain and suffering as the result of the direct pain in the neck, particularly at times of catching, but, more importantly, because of the resulting headaches which were of such intensity as to be beyond the reach of normal sedatives.

6. A resulting loss of weight, inability to sleep, consequent emotional upset and disturbance resulting in both a change of personality, change of attitude toward her husband and child, and also an inability to continue successfully with her employment because of loss of memory, impaired general health, recurring severe headaches, limitation of motion in the neck and head, and an extreme catching pain accompanying any unusual motion.

7. Special damages by way of loss of wages and medical expenses amounting to \$1,466.50.

8. A neck injury of such permanence that, at the time of trial two years after the accident, and after following the advice and prescription of the best

orthopedic surgeon in the intermountain country for a period of 18 months, including the wearing of the second cast for 4 months, plaintiff was not cured, and her doctor could state only that at least he hoped she would not get worse and would not require an operation to remove the injured ligament and disc material.

From the foregoing, Respondent submits that the jury was warranted in awarding a verdict of \$25,000 to the Plaintiff as a reasonable sum to compensate her for her injuries and losses; that such an award is fair and reasonable in view of the evidence as to injury and loss; and that such a verdict, in view of all the evidence, "is not so grossly excessive and disproportionate to the injury that the court can say from that fact alone that as a matter of law the verdict must have been arrived at by passion or prejudice." It did not shock the conscience of eight tried and true jurors. It does not shock the conscience of Respondent, and should not indicate passion, prejudice, or corruption on the part of the jury to any person who fairly and patiently reviews the evidence on which the jury based its verdict.

Respectfully submitted,

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THATCHER & YOUNG

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