

1952

# Lorraine J. White v. National Postal Transport Association : Brief of Respondent

Utah Supreme Court

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IN THE SUPREME COURT  
OF THE  
State of Utah

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LORAIN E J. WHITE

*Plaintiff and Respondent*

vs.

NATIONAL POSTAL TRANSPORT  
ASSOCIATION, formerly RAIL-  
WAY MAIL ASSOCIATION,  
*Defendant and Appellant.*

Case No. 7829

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BRIEF OF RESPONDENT

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Clerk, Supreme Court, Utah

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BRIEF OF RESPONDENT

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STATEMENT OF FACTS

The respondent believes that a detailed statement of facts in this case will be of benefit to the Court because the questions of law presented on this appeal must be determined from the factual picture presented. It should

be noted that the references to the record which follow throughout this brief are to the pages numbered in red by the Clerk of Court, and have no reference to the typewritten page numbers on the transcript of testimony prepared by the Court Reporter, which latter numbers are apparently referred to by appellant in its brief.

There was evidence in this case from which the jury could find the following facts: Milton J. White, prior to his death, was the holder of a certificate of insurance issued by the appellant association. The certificate, Exhibit "A," contains an insuring clause which provides that the appellant would pay certain disability benefits if the holder of the certificate should receive bodily injuries through "external, violent and accidental means" and paragraph 4 of the insuring clause provides that if "death shall result from such injuries alone within one year from the date of injury," the appellant would pay to the beneficiary, who is respondent herein, the sum of \$4,000.00.

Following the insuring paragraphs, there may be found the exclusion paragraph, in which the term "accidental death" is defined and in which the statement is made that the appellant should not be liable when "disease, defect or bodily infirmity is a contributing cause of death. Accidental death is said to be "either sudden, violent death from external violent and accidental

means, resulting directly, independently and exclusively of any other causes . . . ; or death within one year, as the sole result of accidental means alone.”

Milton J. White died February 14, 1950, approximately 5½ months after having suffered an injury to his right leg (R. 51). Respondent filed her claim with appellant for death benefits, which claim was denied. This action followed. The record is silent as to whether appellant denied the claim because it believed respondent had not brought herself within the insuring clause, or because it believed respondent's claim was prohibited under the exclusion clause. On trial, appellant claimed that the death was not the result, “directly, independently and exclusively” of the injury to the leg, but that a heart “disease” and Buerger's disease were, at least, contributing causes of death.

At the time of his death, White was a man 5 feet 11 inches tall, weighed about 155 pounds, and was age 63. When he was a child, he had apparently suffered from rheumatic fever. In his high school and college days, he had been extremely active physically, participating in the strenuous sports of track and basketball (R. 35). In his adult life, his hobbies were hunting and fishing. He was an “outdoor man” and was “very active.” He had gone on a hunting trip in the fall of the year prior to the accident (R. 36). He was employed at the railroad yards in Ogden and his work consisted

of going about the yards, from train to train, and arranging for space in mail cars (R. 34, 35). He had had such work since about 1919 (R. 35) The certificate of insurance, Exhibit "A," was issued July 8, 1924, and had been maintained by White for 25½ years prior to his death.

White had consulted Dr. Goddard in November, 1948 at which time Dr. Goddard believed that he had suffered a "splenic infarct," or an embolus which struck the spleen, from which he recovered without incident. Thereafter, Dr. Goddard treated White with drugs designed to assist the heart to compensate for the damage which had been done to it by the childhood affliction of rheumatic fever. Dr. Goddard described the condition for which White was being treated as "congestive heart failure" (R. 99), which is a condition wherein the heart is a "damaged heart," one which is "no longer able to handle its load." This is a condition which can be controlled, and there is no reason to believe death will occur suddenly—sudden death is "less apt to occur." (R. 106) The condition was under control. Dr. Olson, the specialist, said that when he first saw the patient, which was after the accident, the patient "didn't have symptoms, signs of *active* inflammation in the heart" (R. 71) (*italics added*). Dr. Olson stated on the death certificate, Exhibit 2, that the rheumatic heart disease was "inactive."



The injury to the leg occurred August 28, 1949, at Dodge City, Kansas, when some men, standing behind the deceased, jerked a wooden bench so that the corner of the bench struck the calf of White's right leg a forceful blow (R. 39). The next day, there was a bruise on the leg, about 2 inches long and one inch wide, running across the leg (R. 40). White was in great pain then and thereafter (R. 41). Prior to the injury, he had never made any complaint about pain in any part of his body (R. 41). He complained of pain to such an extent after the injury that he and his wife cut short their vacation and started back to Ogden, arriving about September 3, 1949. During the trip home, White found it necessary to sit on the back seat of the car, with his leg extended along the seat (R. 41). He arrived home, took a bath, went to bed and Dr. Goddard was called. He hospitalized the patient at once and stated that White was in congestive heart failure at that time.

By the time White was placed in the hospital, the leg was showing definite signs of getting worse. The "little blood vessels . . . were breaking. It was like a spider web, discolored under the skin" (R. 42). The area involved was now all over the lower leg, and on the foot (R. 42.). The doctors felt there was an impairment of circulation and decided to operate in an effort to locate the point of circulation stoppage and remove the clot or other impairment. An embolectomy was per-



formed on or about September 8, 1949, but it did no good (R. 70). Nine days later, White was taken home. The leg continued to get worse, and by late October, it was shiny black, like "patent leather" and the toes on the foot were "curled right up-dead" (R. 44, 45). On October 27, 1949, the leg was amputated at a point 5 cm. above the knee (Ex. 5) and a pathological examination revealed that the vessels of the leg were afflicted with "obliterating thrombo-angiitis," which is Buerger's disease. (R. 105). Following the amputation, White was taken home and thereafter became steadily weaker and was bed-ridden until the time of his death (R. 46).

With reference to Buerger's disease, Dr. Olson testified that it is "probably correct" that trauma or injury "often serves as a starting point of the gangrenous lesion," as stated by a recognized medical authority in discussing gangrene (R. 78). There was no evidence of the presence of Buerger's disease prior to the time Dr. Olson was called on the case (R. 45). The record reveals nothing from which it might be said that the disease was present and if it was present, it was latent and unknown. The doctors were not treating him for Buerger's disease (R. 79).

The shock from the two operations, the subsequent bed rest, the nausea, violent retching and vomiting, were said to be sufficient to act upon White's previous condition so as to "move it into being, or move it into life

again'' and these circumstances also were sufficient to aid in loosening a clot of blood in the system. (R. 71, 72). An embolus is a portion of a clot, in medical parlance.

The three doctors who testified apparently were all of the opinion that an embolism had occurred in the body of White just prior to his death February 14, 1950. Dr. Olson said it was, in his judgment, more likely a cerebral embolism, but admitted it was "quite possible" it could have been a pulmonary embolism (R. 82). Dr. Peltzer said that, statistically, a cerebral embolus was most likely (R. 113, 114). Dr. Goddard refused to state what the exact cause of death was since he was not present at the time, and had been off the case for several weeks prior to death. However, he stated the leg injury "necessarily" had a causal connection with death (R. 101).

The diagnosis in the death certificate, Exhibit 2, of "cerebral embolism" or "embolus in the brain" was not conclusive, in the absence of an autopsy (R. 115), and the term "cerebral embolism" shows where the embolus ultimately came to rest, not the point from which it started (R. 96). The cause of death could have been a "pulmonary embolism" or embolus in the lung (R. 82), but even if the embolus had gone to the brain, it could have originated either in the heart or in the leg. It might have originated in the leg because of the fact that there

is "a likelihood of thrombus forming at the site of an operation" (R. 94). In Dr. Olson's opinion, if the embolus had come from the leg it would have been an "uncommon" situation, but it nevertheless could have happened if the patient had had an abnormal opening in the "two chambers" of the heart (R. 94). There is no way to tell whether this patient had such an abnormal opening without an autopsy. Such an embolism going from the leg to the brain is called a "paradoxical embolism." If that occurred in this case, according to Dr. Olson, the events that made surgery necessary "had a casual connection with the production of thrombus, the patient's embolus, and death" (R. 95). The doctors were all in agreement that an injury of the kind suffered by Mr. White is more or less severe and serious, depending upon the condition of the person upon whom the injury is inflicted and depending upon whether that person has within his system conditions or diseases, known or unknown, upon which such an injury can act or which can be activated by such an injury.

In summarization of the medical evidence which was before the jury, it may be said that all the doctors agreed that an embolus was present in this case, but none of the doctors was certain as to its origin, its route of travel, or its final resting place, although they believed it more likely that it came to rest in the brain. The doctors were in disagreement as to the condition of the patient prior to the injury. Dr. Peltzer described his

condition as "a serious cardiac disease," while Dr. Goddard said the condition was "under control" with death unlikely, and Dr. Olson said that there were no symptoms or signs of "active inflammation" and that the rheumatic heart condition was "inactive" (Exhibit 2). Dr. Peltzer's testimony, of course, was hypothetical since he had never seen the patient, while the other doctors had each been in attendance upon the patient before the injury and afterward.

From this state of facts, the jury was required to answer at least the following questions:

1. Was the heart condition of Milton White a condition which was not active prior to the injury?

2. If his condition was inactive prior to injury, did the injury reactivate it and create conditions which led directly to his death?

3. Were the conditions of Buerger's disease and a damaged heart from rheumatic fever in childhood contributing causes to White's death within the meaning of that term as defined by the Court's instruction No. 6?

The jury apparently answered the first two of these questions in the affirmative and the third in the negative, because it returned a verdict for the plaintiff, against

the defendant, in the amount of the insurance certificate involved, and from the judgment entered upon this verdict, this appeal is prosecuted.

### STATEMENT OF POINTS RELIED UPON

1. **THERE WAS COMPETENT EVIDENCE TO BE CONSIDERED BY THE JURY ON ALL ISSUES IN THIS CASE, AND HENCE THE COURT DID NOT ERR IN SUBMITTING THE CASE TO THE JURY.**
2. **THE COURT DID NOT ERR IN ITS INSTRUCTIONS 8 AND 9, SINCE THEY REFLECT RESPONDENT'S "THEORY OF THE CASE".**

### ARGUMENT

1. **THERE WAS COMPETENT EVIDENCE TO BE CONSIDERED BY THE JURY ON ALL ISSUES IN THIS CASE, AND HENCE THE COURT DID NOT ERR IN SUBMITTING THE CASE TO THE JURY.**

The respondent approached this case upon the theory that since the cause of death could not be determined with certainty in the absence of an autopsy, it would be necessary to bring before the trial court and jury all available factual evidence concerning the physical condition of Milton White in the last months of his life, in order that the jury would be able to weigh the medical evidence in the light of the objective facts and thus arrive at a fair determination of the ultimate truth of the matter. This is not a case where medical

evidence alone can furnish the answers to the problems presented, since the doctors who testified were unable to avoid the admission that death could have occurred in several different ways. All were agreed that death resulted from an embolus, but all recognized that the basic facts about the origin, route and destination of the embolus in White's body were, and must be, unknown.

Respondent therefore presented evidence from which the jury could find either that the injury to White reactivated or "lighted up" an inactive heart condition, which led to his death, or that the injury started an unbroken chain of circumstances which led to his death, independently of any contributing cause. An examination of the record will reveal evidence to support each theory, and that appellant should be held liable upon either of these theories. Certainly, the record reveals sufficient evidence to require submission of the case to the jury, as will be demonstrated in the succeeding argument.

First, there can be no doubt that there was a violent, painful injury to the leg of Milton White, and that the injury resulted from external, violent and accidental means. While the injury was not substantial, compared with some injuries, there is little doubt that it was painful, since the record is uncontradicted that Mr. and Mrs. White cut short their vacation trip and returned from Kansas to Ogden, because of the pain



and discomfort being suffered by Mr. White. During the trip home, he was required to keep the leg elevated on the seat of the car. The day after the injury, a bruise developed at the site of the bump. The bruise was two inches in length and one inch wide, with the length extending horizontally across the calf of the leg.

Six days following the injury, it was apparent even to non-medical eyes that there was more to the injury than a mere bruise. A circulatory disturbance was beginning to manifest itself. The veins were beginning to "break up" and they gave a "spider web" appearance. Both doctors in attendance, Dr. Goddard and Dr. Olson, knew that a circulatory impairment was present and about 11 or 12 days after the injury, an operation, known as embolectomy, was performed to try to correct the situation. The operation was unsuccessful and there followed a period of seven weeks in which the leg became steadily worse. It began to turn black. It was hard. The toes were curled up. The pain was constant and severe and finally, on October 27, 1949, it became necessary to amputate the leg. The amputation was accomplished in a five-hour operation, and the leg was removed at a point about 5 centimeters above the knee.

A pathological examination was made after amputation and it was noted that there was definite evidence of Buerger's disease, and that the leg contained black,



silk-like fibers, such as suture material (Ex. 5). There was no explanation of how this material got in the leg, or how it got “meshed around the artery”, as stated in the exhibit, but it is reasonable to assume that it came from the embolectomy 7 weeks earlier. There was no indication from the examination of how long Buerger’s disease had been in the leg, or whether the disease was advanced. The record is silent on the question, except that there is no suggestion in the evidence that the Buerger’s disease was present prior to the injury. There had never been any indication of any kind of trouble in White’s leg, and it is reasonable to suppose that had there been such trouble, it would have been known, either to White’s wife, or to the doctor who examined him prior to his trip. Since the disease affects the circulatory system, and since White’s work required him to be on his feet, in and about the railroad yards, there is little doubt that had he had the disease before the injury, he would have been aware of it.

These are permissible inferences to be drawn from the record on the question of Buerger’s disease, and when they are coupled with the statement by Dr. Olson that it is “probably correct” that trauma to the tissues is often the starting point of the gangrenous lesion, it is clear that there was evidence to go to the jury on the question of whether or not the injury to the leg had a causal relation to the operations of embolectomy and amputation.

The record next reveals that following the amputation, in fact, in the weeks immediately preceding it, White's condition became steadily worse. He became steadily weaker. He was nauseated. His body was wracked with spasms of violent retching. He lost weight. Dr. Goddard testified that the amputation would be "quite a strain on the man" (R. 101). There is shock from such operations. Bed rest can have an adverse effect. All of these conditions were said to be sufficient, in the opinion of Dr. Olson, to act upon White's previous condition so as to "move it into life again" or "move it into being". (R. 71, 72) These circumstances were sufficient to aid in loosening a clot of blood in the system (R. 72). An embolus is a portion of a clot, in medical parlance.

It was agreed by all the doctors that an embolus, traveling in the blood stream, lodged in a vital area, occluding the passage of blood, resulting in death. This is known as an "embolism". That an embolism resulted in death appears to be conceded. Indeed, no other cause of death was suggested by any doctor.

Up to this point, the evidence is clear, objective and largely factual. The speculation among the doctors begins at this point in the record, and it concerns itself with the source of the embolus that caused death, its route of travel, and its lethal lodging place. The jury necessarily was required to examine the possibilities

advanced by the doctors and to fit those possibilities to the objective and factual evidence already before them. It is here, then, that the two theories, mentioned at the beginning of the argument on this point, enter the case.

The first theory is that the injury, with the resulting conditions already discussed, reactivated or “lighted up” an inactive heart condition, causing death. But, appellant says there was no evidence that the heart condition was previously inactive, prior to the injury. The record is to the contrary. Dr. Goddard described White’s condition, and he is the only doctor in the record who ever saw White before the injury. He said the heart was “damaged” from a childhood disease, but that the condition was under control. Dr. Olson said that when he first saw the patient, on September 3, 1949, *after* the injury, there were “no symptoms, signs of *active* inflammation in the heart” and there was “evidence of heart damage caused by a *previous* rheumatic condition”. (R. 84) (emphasis supplied). Thus, it is clear that at the time of Dr. Olson’s first examination, the heart condition had not yet been reactivated. Dr. Olson also testified that “rheumatic heart disease, where there is no active inflammation, does not produce pain” (R. 88) and it is clear, from the record, that White had no pain in the chest, but only in the leg. Finally, Dr. Olson stated on the death certificate, Exhibit 2, that the rheumatic heart disease was “inactive”. These are all competent statements, made by competent witnesses,

in plain language, and the jury was entitled to believe them. If the jury did believe them, it had substantial evidence upon which to base its finding that the heart condition was inactive, prior to injury. While there was evidence that White had a "clinically diagnosed" embolic episode in the fall of 1948, the jury was entitled to believe, from the evidence of respondent and Dr. Goddard, that there was no further activity of the heart condition from that time until the month of September, 1949, nearly one year later.

If, then, there was substantial evidence upon which to find that the heart condition was formerly inactive, there was equally substantial evidence that the injury led to the gangrenous condition of the leg, which led to the operations, and then, to the complications following amputation, and, as Dr. Olson stated, these conditions were sufficient to "move into being" or "move into life again" the previous condition. Since Dr. Olson and Dr. Peltzer both stated that the active disease manifests itself by irregular beating, or "fibrillation", and that such beating allows clots to form, it is at once clear that if the inactive heart disease was reactivated, as the jury could well find, one of the things to be expected would be the formation of blood clots, from which, as Dr. Peltzer stated, emboli are thrown off (R. 111).

This, then, completes the evidence upon which the jury could find appellant liable upon its policy on the

first of the theories previously mentioned. This theory is that which is discussed and approved in the case of *Lee v. New York Life Insurance Company*, 95 Utah 445, 82 Pacific 2nd 178. While there are factual differences between that case and this, the principles are the same, and the evidence presented is just as substantial as that discussed in the report of the Lee case, particularly when such evidence is viewed in the light most favorable to the plaintiff, as the court must do in determining whether to grant a motion by the defendant for a directed verdict. In the *Lee* case, the facts were as follows:

Lee suffered an injury to his body, on the lower right side of his trunk. There was no mark on the body, but there was pain. It was not until a month after the accident, during which time Lee could "walk about and leave the house", that an examination was made, and it was determined that there was an acute inflammation active in Lee's system. An operation was performed, resulting in the location and removal of his appendix. Exploring further, the surgeon found a ruptured gall bladder and the doctor testified that the gall bladder was infected and was the sole cause of death. The chain of causation utilized in the Lee case was that the blow to the body ruptured the gall bladder, which caused infection to spread, which infection attacked the appendix, which made necessary the operation, leading to death. This Court, in upholding a verdict for plaintiff, said: "If Dr. Pearce be believed, and the jury

had a right to believe him, the diseased condition of the gall bladder was not actively progressing and it afforded no reason to believe that death might be imminent." In the case at bar, both Doctor Olson and Doctor Goddard gave evidence, previously outlined, that White's heart condition was not actively progressing and there was no reason to believe death might be imminent. It is clear that this case and the Lee case are the same in principle.

Appellant urges, however, that the Lee case does not apply and that this case is controlled by the case of *Tucker vs. New York Life Insurance Company*, 107 Utah 478, 155 Pacific 2d 173. This claim is made because in the Tucker case the court denied liability upon the theory that the "chronic and progressing" disease cooperated with the broken arm to produce death. That there are basic differences in fact and principle between the Tucker case and the instant case is so obvious that it scarcely requires discussion. There is no evidence in this case from which the jury could find the existence of a "chronic and progressing" condition. In the Tucker case the doctors testified that "atherosclerosis changes" had been present in the patient for more than a year with "increased blood pressure during that period", and further testified that "it is a chronic condition and *slowly advancing*" (emphasis supplied). Another difference in the cases is that in the Tucker case there was an autopsy and the pathologist was able to determine



the exact nature of death. The doctors were in agreement on all major causal factors. In the instant case, however, the doctors were reduced to giving opinions which were not certain, and were required to admit in all honesty that there were many possibilities which could have resulted in the death.

In the case at bar there is no evidence that Milton White's damaged heart was becoming worse in the period leading up to the accident, and in no sense can it be said that his condition was "chronic and slowly advancing" as was true of the victim in the Tucker case. Even after the injury, Dr. Olson testified that there was no active inflammation noted by him in the patient's heart, and there is an obvious difference, therefore, between the condition of White at that time and the condition of Nichols in the Tucker case. While it is true that the doctors in the instant case were required to reduce their testimony to opinions based upon judgment and to probabilities or possibilities, the jury was entitled to believe that portion of the doctors' testimony which would lend support to the plaintiff's case.

The second theory mentioned at the beginning of this argument was that the injury started an unbroken chain of circumstances leading to Milton White's death, independently of any contributing cause. As has been indicated, it was conceded that death was caused by an embolism. There was ample evidence from which the jury could find that the accidental injury led to the



gangrenous condition of the leg, which in turn made necessary the embolectomy and the amputation. Likewise, there was ample evidence that the amputation, with its resultant shock and because of the fact that an amputation enables blood clots to form, could have caused the formation of a blood clot, and the complications following the operation could have caused the clot to break up or loosen so that an embolus could be released into the blood stream.

On this theory of the case there is little difference, except as to the weight of evidence, whether or not the embolus lodged in the brain or in the lung. Much was made upon trial of the fact that the embolus was more likely to have lodged in the brain and that such an occurrence was more likely to have occurred from an embolus coming from the heart. However, the evidence indicated other possibilities as we will show.

In support of this second theory of the plaintiff, it may be said that there was evidence from which the jury could find that the embolism which caused death was a pulmonary embolism. Dr. Olson so testified. He also testified that blood clots very often form at the situs of an operation such as the amputation. If the lethal embolus was a piece of such a blood clot, it would require no unusual condition for it to travel in the system to the lung and cause death. Such an occurrence is, to quote Dr. Olson. "Quite possible" (R. 82), and to quote Dr. Peltzer, "Quite likely" (R. 115).

If, however, the jury chose to believe that the embolism occurred in the brain, there was still evidence from which the jury might have found that such a cerebral embolism, nevertheless, could have originated in the leg. Having in mind that blood clots form at the point of operation, it will be remembered that Dr. Olson testified that an embolus can reach the brain if there is an abnormal opening in the chambers of the heart. Such an embolism is called a "paradoxical embolism" and is, in the words of Dr. Olson, "uncommon" and, according to Dr. Peltzer, "rare". However, since no autopsy was performed, Dr. Olson stated that there is no way to tell whether Milton White had such an abnormal opening, and therefore no way to tell if this was in fact a paradoxical embolism. He would not rule out the possibility, despite counsel's attempt (R. 92) to get him to say that it was an impossibility.

From all of the foregoing argument, it is clear that the plaintiff had met the requirements of proving her case, and even if it be admitted, for the sake of argument, that some of the testimony produced upon plaintiff's case was not of as great weight as might be desired, it is obvious, nevertheless, that substantial evidence was produced to go to the jury on each of the theories mentioned. In determining whether or not the Trial Court should have granted a motion for directed verdict, it must be remembered that the evidence of the plaintiff is to be tested in the light most favorable to the plaintiff,

and when that test is applied, there can be no doubt that plaintiff met and satisfied her burden of proof. Appellant seems to complain that some of plaintiff's evidence was speculative in nature. It is submitted, however, that the testimony of the doctors in this case has considerably more strength and weight than the testimony upheld by this Court in the case of *Clayton vs. Metropolitan Life Insurance Company*, 96 Utah 331, 85 Pacific 2d 819, wherein plaintiff's case was upheld upon testimony by a physician that he thought that the condition of the deceased "*might*" have been caused by the injury sustained by the deceased (emphasis added).

In summary, it may be said that the first theory discussed is the theory of the Lee case, *supra*, and that if the jury decided to follow the second theory, that is the theory discussed and advanced in the case of *Browning vs. Equitable Life Assurance Society*, 94 Utah 532, 72 Pacific 2d 1060, in which these cases are divided into categories, and in which it is stated that the insurer will be liable where the insured is afflicted with a condition at the time of the accident, but the condition had no causal connection with the injury or death and the injury started an unbroken chain of circumstances resulting in death without the intervention of any other cause.

We therefore submit that the Court did not err in

overruling defendant's motion for a directed verdict and allowing this case to be considered by the jury.

**2. THE COURT DID NOT ERR IN ITS INSTRUCTIONS 8 AND 9, SINCE THEY REFLECT RESPONDENT'S "THEORY OF THE CASE".**

The principles of law applicable in a discussion of Point 2 in this brief have been discussed many times by this Court in reviewing law cases where complaint has been made concerning instructions that were given or refused by the Trial Court.

It is a well known principle of law that each party to a law suit is entitled to have his theory of the case submitted to the jury, if there is evidence to support that theory. As was said by this Court in the case of *Hartley vs. Salt Lake City*, 41 Utah 121, 124 Pacific 522, "There are two parties to a law suit. Each, on a submission of the case to the jury, is entitled to a submission of it on his theory and the law in respect thereof."

In *Toone vs. O'Neill Construction Company*, 40 Utah 265, 121 Pacific 10, complaint was made of an instruction given by the Trial Court which was claimed to be too broad in view of the evidence. The Court stated "... we concede that a party is entitled to have his case submitted to the jury upon the theory of his

evidence as well as upon the theories of the whole evidence. One way the Court might have followed in charging the jury would have been to charge them in separate instructions, first, in accordance with respondent's evidence; and, second, in accordance with appellant's evidence . . . and in each instruction to have directed the jury to return a verdict in accordance with the findings upon that question."

While these cases are not new, they are considered to be leading cases and have been repeatedly referred to by the Court in recent years. See *Webb vs. Snow*, 132 Pacific 2d 114, and *Morrison vs. Perry*, 104 Utah 151, 132 Pacific 2d 114. In *Morrison vs. Perry*, this Court quotes with approval the suggestion contained in *Toone vs. O'Neill*, *supra*.

Applying these principles to the instructions in this case, it is at once apparent that the appellant's theory was presented to the jury in Instruction No. 6, and had the jury found the facts necessary to support that instruction, the appellant no doubt would have recovered a verdict. The respondent's theories were presented in Instructions Nos. 8 and 9.

Instruction No. 8 is the instruction which says, in substance, that the mere fact that Milton H. White had ailments or infirmities of the body which deprived him of normal powers of resistance would not preclude a

recovery by his widow if the jury should find that the claimed injury was a real, direct and efficient cause of his death. The language used reflects the theory discussed by this Court in the case of *Griffin vs. Prudential Insurance Company*, 102 Utah 363, 133 Pacific 2d 333. Instruction No. 8, in fact, is almost identical with the instruction approved in the *Griffin* case.

It is conceded that the *Griffin* case is not on all fours with this case and that the facts were substantially different. However, the principle of law therein announced, and which had previously been announced by this Court in the *Browning* case, is a proper principle to be applied to this case. In the *Browning* case this Court remarked that all people probably have in their systems microbes, germs and bacteria of many diseases. The Court then went on to say "because in warding off such possible diseases we may be in a weakened condition of strength and resistance, we may the more readily succumb to an injury accidentally sustained by external violence. The injury, in the presence of the disease germs in the system, would still be the cause of death or disability."

Any construction of an insurance policy whereby the insurance company would be relieved of liability because of some condition or departure from normal, would reduce insurance contracts to an absurdity. If such a construction were followed, as urged by the



appellant, no person holding an accident insurance policy could be sure of protection and coverage for himself, because many of us are afflicted with damaged organs or impaired bodily functions of which we are not aware.

Typical of the attitude taken by modern courts on this question is that found in the case of *Kearney vs. Washington National Insurance Company*, 52 Pacific 2d 903, decided by the Supreme Court of Washington. In that case there was evidence which indicated that the insured had a condition of arthritis and arteriosclerosis. He suffered a fall, and the next day was blind in one eye. There was evidence that the arteriosclerosis had affected the left eye. The Washington Supreme Court, in upholding a verdict for the insured, quoted with approval from the Michigan Supreme Court in the case of *Kangas vs. New York Life Insurance Company*, 223 Michigan 238, 193 N.W. 867, wherein the Court stated "In most cases a policy of this character would be of little or no value to the insured if the limiting language be literally interpreted, as claimed by the defendant. Death from an external injury, unless instantaneous, is usually the result of various concurring causes. The injury sets in motion other agencies and awakens dormant internal ailments which contribute to death. These are conditions rather than causes. If such insurance contracts are to be of any value to the man who pays for the risk assumed, a construction as fair



and reasonable as the limiting language will permit should be placed upon them.”

Appellant's argument concerning Instruction No. 9 is, in substance, that the instruction sets forth the doctrine of the *Lee* case but that there is no evidence to support such a doctrine in this case. It is submitted that that contention has already been answered in the first portion of respondent's argument, and that an examination of the record will reveal evidence to support each step necessary to bring the *Lee* case to bear upon this case.

Appellant also says that the instruction “opened the door to sheer speculation, bias, and prejudice.” Nowhere in the record have we been able to find any hint of bias or prejudice. There is, of course, speculation in the record because the doctors all admitted that there were various possibilities for the source, route, and destination of the embolus which caused death. As has been demonstrated, however, respondent should be entitled to recover upon either of two theories, both of which find support in the possibilities advanced by the doctors.

When closely analyzed, appellant's contention is merely a quarrel with the weight of the evidence. The question of the weight of the evidence and the credi-

bility of the witnesses was for the jury, and only for the jury.

Where the jury has brought before it a case composed of objective fact, considered medical opinion, and speculative medical opinion, there is little doubt that the jury's task is much more difficult to perform, but this situation occurs in almost every case where medical testimony is given concerning human ailments. Medicine is not an exact science, *Anderson vs. Nixon*, 104 Utah 262, 139 Pacific 2nd, 216, and where the doctors testify as to two possibilities, the jury should be free to accept that possibility which, to their minds, most nearly fits the objective, known and uncontradicted facts before them.

Applying that principle to this case, it is difficult to see how the jury could have held other than it did when it is remembered that prior to the injury Milton White was in no danger of imminent death and was, in fact, actively engaged on a job requiring full use of his physical faculties. 5½ months later he was dead, after having lost the greater portion of his leg, and after having been reduced to a comparative shell of his former self. Those are admitted facts and could not be contradicted in the eyes of the jury. It is, therefore, logical, natural and proper that the jury, having those facts in mind, should choose to believe whatever medical evidence was before them which would tend to give a

reason for the infirmities and death of Milton White.

The jury was not required to believe the appellant's witness, Dr. Peltzer, and particularly is this true when it is recalled that the jury witnessed, throughout the trial, Dr. Peltzer in constant attendance upon appellant's counsel, suggesting questions to be asked, and generally taking the part of appellant's side of the case prior to the time he took the witness stand. Confronted by this situation, and realizing that Dr. Peltzer testified entirely upon the basis of facts told to him and not upon the basis of his actual experience with the patient, the jury could hardly be expected to give as much weight and credibility to his testimony as to the testimony of Dr. Goddard and Dr. Olson.

One other point should be mentioned in connection with the instructions. It is a familiar principle that instructions should be examined as a whole. When the Court's entire charge to the jury is examined in this case, it seems abundantly clear that the jury was instructed so that the theories of both plaintiff and defendant were adequately and properly brought before the jury. It must be presumed that the jury examined and heeded all of the instructions and did not single out any particular instruction. When this presumption is considered, together with the substantial evidence which has been previously discussed, there can be no doubt that the court's instructions were free from error.

Therefore, we submit that the Court did not commit error in giving its Instructions Nos. 8 and 9, and that these instructions merely presented plaintiff's "theory of the case" and should, therefore, be sustained.

### CONCLUSION

Much of the speculation discussed by both parties to this law suit might have been avoided had the appellant exercised its right to an autopsy on the body of Milton White. This right is given to the appellant by its by-laws and constitution (Ex. 6), and had an autopsy been performed, it is likely that the doctors would have been able to be much more specific in their testimony. Inasmuch as the autopsy was not performed, and inasmuch as respondent presented all available evidence bearing upon the issues in this case, and since there was substantial evidence which, if believed by the jury, would entitle her to a verdict, it is submitted that the verdict and judgment were legally proper and morally just and should be affirmed by this court.

Respectfully submitted,

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