

1953

Irene Paul and Charles J. Paul v. Woodrow Lawrence Kirkendall : Brief of Appellant

Utah Supreme Court

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Donn B. Downen, Jr.; Howell, Stine and Olmstead; Attorneys for Appellant;

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Case No. 7957

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Clerk, Supreme Court,

IN THE SUPREME COURT

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STATE OF UTAH

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IRENE PAUL and CHARLES J. PAUL,
Respondents,

—VS—

WOODROW LAWRENCE KIRKENDALL,
Appellant.

APPELLANT'S BRIEF

DONN B. DOWNEN, JR.
HOWELL, STINE AND OLMSTEAD

Attorneys for Appellant

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IN THE SUPREME COURT of the STATE OF UTAH

IRENE PAUL and CHARLES J. PAUL,
Respondents,

— vs. —

WOODROW LAWRENCE KIRKENDALL,
Appellant.

STATEMENT OF FACTS

This is a suit for damages for personal injuries to Irene Paul and loss of society and companionship to Charles J. Paul, her husband, arising out of an accident which occurred on April 29, 1951 in the City of San Fernando, California. The collision occurred between the automobile driven by Woodrow Lawrence Kirkendall and the automobile driven by Charles J. Paul, in which Irene Paul was a passenger. At the time of the collision Charles J. Paul was driving his car and Irene Paul was sitting in the middle of the front seat holding in her lap her baby and her oldest boy was sitting at her right, all four being in the front seat. Nothing is claimed in this suit for personal injuries to any person excepting Irene Paul. No aggravation arising out of physical ailments

of which Irene Paul suffered at the time of the accident is claimed in the Complaint. The defendant Woodrow Lawrence Kirkendall admitted liability for the accident, contested, however, the issue of the nature and extent of the damages. The sole issue in the case was the extent and nature of the damages. The Jury returned a verdict in favor of the plaintiff and against the defendant in the sum of Twenty Thousand (\$20,000.00) Dollars, fixing the damages as follows:

General damages to Irene Paul \$11,800.00

Special damages to Irene Paul and Charles J. Paul \$3,000.00

Damage to the automobile of Charles J. Paul \$200.00

Damages to Charles J. Paul from loss of his wife's services \$5,000.00

Motion for a new trial was denied and this appeal is taken up on the sole question as to whether the damages are excessive. Points relied on by appellant, the appellant contends:

1. That the general damages awarded to Irene Paul are excessive.
2. That the special damages of \$3,000.00 are excessive.
3. That the award of \$5,000.00 to Charles J. Paul for loss of service of his wife is excessive.

POINT ONE

Mrs. Paul testified on cross-examination and gave the following medical history: That she had her tonsils out when she was about 13. That she had an operation

in 1938 for a uterine suspension; that during the period from 1941 to 1951 she had recurrent infections or inflammation of the kidneys and bladder; that she had virus pneumonia and that she had sinus trouble and prior to the accident had a nasal drip and discharge over a period of years; that she had had five miscarriages, starting from the time she was eighteen years of age; that her bladder and kidney condition gave her a pain in the back and severe pain; that immediately prior to the accident she had gone to a hospital in Glendale for the purpose of having an x-ray of her back made. At that time she was experiencing difficulty with her back. (Transcript Pgs. 27-32). Also, that on the 11th of May, 1951, after the accident she consulted a Dr. Herman about her bladder condition as she had awakened that morning with pain in the bladder region and some pain in urinating; that before the accident she had swollen ankles and nervousness and a tingling sensation in her right leg; that she complained of the pain in her right leg after the accident; that she was a very nervous person and prior to the accident had experienced on awakening in the morning, swollen ankles and a bad sinus condition and her ankles had swollen at various times and the pain made her nervous and that she experienced pain with swollen ankles and swollen eyes prior to the accident and that she had permanent backache from pregnancy and her kidneys; that Dr. Herman gave her medication for a period of five or six weeks; that this medication relieved the pain. (Transcript 35-38). She also testified that prior to May 11, 1952, which was after the accident, she consulted one Dr. Crosley about her kidney condition, from which she had experienced pain some time before and that she called on

Dr. Crosley about bladder and kidney condition; that she saw him on the 21st day of May, 1951 and again sometime in June, 1951 and that from the time of the accident up to those days, she had not consulted Dr. Crosley, who was her family physician. That prior to the accident, following pregnancy she had consulted Dr. Crosley about tenderness and pain in her sacroiliac region where the rib joins the spine, and that she likewise consulted him for circulation trouble; and that following the birth of her last child she was tired all the time and had aches and pains and nervousness in her legs and arms and that she took certain treatments in a sanatorium, consisting of steam baths and massage and that she complained of swollen ankles and swollen hands in the morning and tightness in the chest and dizzy spells; that her baby was born in September, 1950; that this was her second son. (Transcript 38-42). That she also saw a Dr. Peterson in May of 1951 and did not see him again until September, 1951 when he gave her a rectal examination. The Dr. Peterson told her she had a coccyxgodynia infection; that she went to a neurosurgeon, being sent there by Dr. Graham to ascertain whether she had a herniated disc, or a disc injury and that he told her there was no indication of an injury to the disc and advised therapy and rest but she went to a Dr. Risser in the latter part of October and he gave her the same advice. The name of the Neurosurgeon was Dr. Eder and Dr. Graham sent her to him with a recommendation that he, Dr. Eder, was the best. (Transcript 44-47)

That she then discussed an operation with Dr. Graham and he recommended an operation on her spine

and they had an x-ray made to determine whether there was a pelvic fracture and the x-ray showed negative; that no doctor ever told her that she had a fracture of any type in the pelvis or the spine or anywhere else in her body before she submitted to an operation on November 7, 1951; that she had been involved in another accident after the operation on November 7, 1951 which aggravated a back condition for which she was fully compensated; that she was told by her own doctor that all the symptoms which she had would clear up within a period of a month or two months. (Transcript 47-52). That a certain type of shoes was prescribed for her to correct her posture; that immediately after the accident she was feeling pain in both her ankles and her left hip; that she went to a Doctor Jones, who gave her a complete examination, testing her reflexes, bending over, rotating from left to right. He examined her eyes, pressed her back, made her lie on her back and raise her legs, and asked her about the accident and her past medical history and the circumstances of the accident and the treatments she had received. That no one treated her for back symptoms between June and September, 1951; that she complained to Dr. Jones of a pain in her hip, she did not complain in bending over and coming within a couple of inches of the floor. (Transcript 52-61)

That in her deposition taken on September 27, before the trial, she testified that she had never had any trouble with her back before the accident and that she had never had any trouble with her ankles and legs before the accident. (Transcript 62)

Dr. Frank Arthur Pedersen testified that on the 29th day of April, 1951 he was in a San Fernando hospital and he was called to see Mrs. Paul and she had been in an automobile accident and he saw her for the first time as a patient in the hospital that evening and that he found her in extreme pain in her body and her ankles and he had x-rays taken and that evening he had to catheterize Mrs. Paul because of tenderness of her bladder and her cocyx, which is the tiny bone at the end of her tail bone, was tender, and that he could not tell whether that tenderness was caused by the accident of April 29, 1951 or subsequently when he observed it in September, 1951. That he gave therapy treatment; that she was in a state of emotional shock; that she was in the hospital two or three days and he prescribed corrective shoes and that she had swelling of the ankles; that he last saw her on May 7, 1951 at his office, prior to her visit to his office in September, 1951; that he made no note of any previous history; that he had certain x-rays taken and the x-ray film showed negative for fracture; that when she visited him on September 11, 1951 he dictated and signed a report of her condition in which the following appeared "the spine injury was considered but was not borne out by x-rays and the condition improved spontaneously" that he also made the notation that she was discharged home in two days markedly improved; that he saw her on three subsequent occasions after she left the hospital, in the month of May. That on the 7th day of May he made an entry "range of motion of spine and pelvis is good"; that he put her through various bending tests and tipping tests to find out the range of motion; that she returned on

September 4, 1951 to his office; that she asked him for a letter stating the extent of damage and he wrote this letter September 11, 1951 and he did not in that letter state that there was any pain complained of in the immediate area of the lumbo sacro joint; the letter is shown on Page 92 and 93 of the Transcript and reads as follows: (Transcript 77-92)

“To Whom it May Concern:

Mrs. Irene Paul, 652 Orange Grove, San Fernando, has been under the care of this office since April 29, 1951, when she was involved in an auto accident. She was hospitalized at the San Fernando Hospital, at that time, as an emergency because of severe low back pain and swelling and pain of both ankles most marked in left ankle. X-rays were negative for fractures. She was discharged home in two days markedly improved, after taping and injecting left ankle. Mrs. Paul was seen on three subsequent visits (May 2, 5, 7, 1951) and showed gradual improvement to diathermy and tolserol.”

The second letter shown on Pages 93 and 94 of the Transcript reads as follows:

“To Whom it May Concern:

Mrs. Irene Paul of 652 Orange Grove, San Fernando, has been under the care of this office since April 29, 1951, when she was involved in an automobile accident. She was hospitalized at the San Fernando Hospital at that time as an emergency because of severe low back pain and swelling and pain of both ankles, most marked in the left ankle. X-rays, AP and lateral views of the lumbar spine, AP view of the pelvis, and AP and lateral views of the ankles were negative for fracture.

On the night of the accident the patient was unable to empty her bladder causing acute pain and severe mental distress. Catheterization was necessary. A spine injury was considered but was not borne out by X-rays and the condition improved spontaneously. She was discharged home in two days markedly improved, after taping and injecting left ankle. Mrs. Paul was seen on three subsequent visits (May 2, 5, 7, 1951) and showed gradual improvement to diathermy and tolserol. Mrs. Paul was not seen again until September 5, 1951, at which time she was still having pain and swelling in both ankles and her left hip still 'catches'. She has had no further trouble with her bladder.

Physical examination revealed very excellent range of motion of both legs, hips and spine. There were definite bursal swellings below the lateral malleoli of both ankles and the lateral ligaments of both ankles were completely disrupted and painful. Physical examination also revealed a marked coccydynia. Her arches were noted to be very poor and her foot and spine alignment was very bad. Corrective shoes were advised and - - - - -."

Dr. Pedersen also testified with reference to his notes; that his record did not show that Mrs. Paul complained of any pain in the immediate area of the lumbosacral joint, but he found pain the coccyx at the end of the spine. That he advised corrective shoes on account of poor arches and weak ankles. That Dr. Rhymes read the X-rays and found no pathology in the pelvis; that he made a note under date of September 4, 1951 "having tremendous domestic difficulties"; that that was his observation of her at the time. That he considered the

possibility of a psychosomatic syndrome or functional overlay in her case; that when she was released from the hospital two days after she entered her condition was markedly improved. (Transcript 85-102)

Dr. Willard Crosley testified that he first met Mrs. Paul February 28, 1950. At that time she registered as an obstetrical patient; that Mrs. Paul made a visit to his office on August 20, 1951 and was seen by Dr. Tarr, who reported that she had terrible pains and throbbing in her legs when she awakened in the morning and seemed exhausted all the time; that she had a slight discharge and that her right ovary was found to be three to four centimeters enlarged; that there was no evidence of a bone fracture in the report made to him from an X-ray he had taken on April 19, 1951. There is a notation in his record under date of March 1, 1950, tenderness in the left sacroiliac and left vertebral area; that the records at his office showed that Mrs. Paul had multiple pelvic adhesions to the ovaries and tubes from miscarriages; that on October 12, 1950 she made a phone call complaining of circulation trouble, hands go to sleep, right leg feels like ice cubes. Hot steam baths and massage were prescribed; that on September 19, 1950 she felt miserable, ghastly tired all the time; aches, pains and numbness in extremities; hands swollen in the morning, ankles swollen in the afternoon, considerable sinus trouble. Much high back ache, very tight uncomfortable sensations throughout chest when tired, dizzy spells; that the records in his office show that on August 20, 1951, feeling pretty rough, many nervous strains; hands and eyes swelled up. Pains and throbbing in her legs when she awakens in the morning; exhausted

all the time; that there was pretty much the same medical picture on September 19, 1950 as he had on August 20, 1951. (Transcript 192-205) Further examination was made by his office; that his records show as follows: "Discharged in good pelvic condition, but with considerable psycho-somatic overlay" which means nervousness; that in medicine the word psycho-somatic means generally an exaggeration by a person of symptoms as they are related to or told to a doctor or any other person. (Transcript 207-208)

Doctor Homer A. Graham, who performed an operation on Mrs. Paul, for a fractured facet, who claimed an injury to the lumbo-sacral joint, gives this answer on Page 227 of the transcript: "Q. Now, Doctor, based on the opinion that you have obtained from other medical experts, the history that you obtained from the patient as you have given it to us and what the X-rays actually showed, do you have any opinions as to whether or not there was a fracture of the facets of that part of the spine of Mrs. Paul?

A. I don't know. I have no proof. I was never able to prove it." This was the doctor who performed the fusion operation, fusing the facets in the lower lumbar region of the spine for which a fee of \$1,000.00 was charged.

"I consulted with Dr. Joseph C. Risser, also Joseph F. Barr from Boston, also Elbert C. Ferguson from Brookline, Massachusetts for interpretation of X-rays. Also X-ray specialist, Dr. Ferguson was uncertain. I can only state that it is my opinion that the appearance to which attention has been directed at the lumbro sacro

facets is due to development irregularity and overlays, shadows, rather than to fracture. Doctor Eder stated that the patient exhibited no evidence of herniated lumbar disk (Transcript 221-223), or any other neuro-surgical condition. I have no proof. I was never able to prove that there was a fracture of the facets of that part of the spine of Mrs. Paul. (Transcript 227)

I performed a spinal fusion between the last lumbar facet of the low back and the first and second sacral vertebra of the sacrum. The purpose was to eliminate the joint. I did not find an injured vertebra. I couldn't demonstrate any definite evidence of injury in surgery. (Transcript 233).

On Dr. Risser's report he did not recommend surgery. (Transcript 240).

"I did not determine surgery was necessary up to the day of surgery. (Transcript 240)

"I took into consideration Dr. Risser's report that there was a severe lumbar lordosis, and clinically there is a severe round back which militates against a good postural correction. (Transcript 244).

In Doctor Barr's report he suggested that there might be a congenital abnormality (of the spine) (Transcript 245)

In Doctor Kennedy's report and Doctor Hamilton's report, in their opinion the X-rays were normal with no evidence of fracture and they found no bony pathology or injury in the coccyx. (Transcript 246)

It was after surgery that I wrote to Dr. Barr and to Dr. Ferguson. On January 14, 1952 I got a letter from him and he stated he did not think there was any fracture. In fact he said he thought it was due to developmental irregularities and overlaps shadows. (Transcript 247-248)

He said it was worth noting that there is a rather large over development of the right first cervical facet laterally which is definitely developmental. (Transcript 249)

I took into consideration that there were certain psycho-somatic overlays in this case, which means the influence of the mind over the body and the pendency of litigation sometimes has an effect upon that situation. (Transcript 249)

I satisfied myself there was no herniated disc. The syndrome which she gave me of referred pains down the leg didn't fit any medical pattern. (Trancript 250)

In my operative record I stated that no definite fracture could be visualized in either articulation. There was some deformity about the facet on the left side suggesting an old healed fracture. (Trans. 258)

In Dr. Risser's record, or letter, dated October 25, he stated "There is a severe lumbar lordosis and clinically there is a severe round back which militates against a good postural correction. Probably one of the most important facts which I observed was the distribution of muscle spasm and the tenderness in the trapezius muscle in the left gluteal area and in the lumbo-sacral area and along the left side of the coccyx. I feel that

these facts must be explained on a systemic basis, and therefore I suggested to the patient that she get a gastric analysis. I am referring her back to you for that particular test."

It was agreed that the word systemic means something not connected with trauma, as used in Dr. Risser's report. (Trans. 267)

"I consider that the operation I performed was the proper treatment for Mr. Paul but I do not think it was absolutely necessary". (Trans. 270)

A chronic sinusitis could make a nervous person more nervous and could cause pretty severe headaches, and a chronic cystitis could make a person more nervous and if these conditions existed over a period of time you would have a plenty nervous person. (Trans. 272-273)

Doctor Charles M. Swindler testified in part, as follows: "I made an examination of Mrs. Paul and my findings are as follows: "The back, on standing, the patient had a mild scoliosis, a curvature of the spine; the motion of the spine with respect to the pelvis and lumbo-sacral joint, that is, she had normal or full forward motion of 90 degrees. She has some pain at 80 degrees, but no muscle spasm. She had full backward or extension motion of 35 degrees with no muscle spasm and no pain. She had full bend to the right of 45 degrees with not muscle spasm or pain and she had equal and full motion to the left with 45 degrees with no muscle spasm or pain. In the bent-over position the patient did not appear to have pain when assuming the straight or upright position. There is a recent midline surgical

scar over the low part of the back. There is some tenderness over the coccyx or tail bone, and just to the left of the midline at the level of the iliac crest. The normal lumbar lordosis was somewhat flat. The muscle power of the muscles of the spine would be graded as fair. Equally the muscles in the abdomen, in power, could be graded only as fair. The leg lengths are equal. The straight leg raising on the right was 105 and on the left was 95.

Q. How does that compare with normalcy?

A. The normal straight leg raising with this person's age would be 90 degrees.

Q. All right.

A. However, the patient volunteered she had a recent operation on her spine which would account for the disparity in my opinion. The motion in the hip joints in all six planes was equal bilaterally and normal. There was no spasm and no apparent tenderness with motion of the hip joints. There was no atrophy of either leg, either above or below the knee joint. There was no atrophy of the muscles of the buttocks.

The Court: I think you had better explain that word "atrophy".

A. A drying up or shriveling as seen with children in infantile paralysis. There was no sensory loss, no loss of sensation in either of the lower extremities when examined, as with ordinary person. The reflexes on both sides were equal in response and physiological in quantity.

Q. Now, what do you mean by "physiological"?

A. The reflexes being normal for a person of that age. When the doctor hits you on the knee with a rubber hammer and hits you behind the heel, he is testing reflexes. There are two additional ones which I did; they are behind the large bone on the ankle joint. The evaluation of the response the patient had to that stimulus would be equal on both sides and normal for a person of that age, and said to be physiological. There was no evidence of any muscle weakness in any muscles in the lower extremities. The musculo-skeletal examination was carried out further, extending down the lower extremities. The knees had full motion with no apparent evidence of old or recent injury. In the feet and ankles there was no dependant edema and no varicose veins, no isolated muscle spasm, no weakness of any specific muscle group on either side. The blood supply, I would consider is good; on the feet there was multiple corns and callouses on both sides and on both sides of the great toe. The patient was able to walk on her toes like a dancer and also on her heels. She was able to step from the right to the left foot while standing on the toes, and from one foot to the other in a manner which would be normal. The range of motion in the ankle joints and the joints below the ankle, which we call the subtalar joint was equally bilaterally and normal. The patient has some relaxation of all the joints of the feet. That was more apparent on the weight-bearing which would be consistent with the congenitally relaxed foot.

The Court: Doctor, sometimes it's not understood by laymen what muscle spasm is. I don't know whether this jury would understand or not.

A. A muscle spasm is like a charley horse. It's a pain in the muscle, the muscle is tight like a bo-string. It's a tightning of any one or a group of muscle anywhere in the body. It's a condition that manifests injury or injury sometimes.

Juror: It's not a twitching.

A. It's not a twitching. That is entirely different. The best thing I can think of is the charley horse the football player has when he goes in training in the spring.

Q. It is voluntary or involuntary?

A. Muscle spasm is involuntary and is not under the control of the patient.

Q. And what is its function. In other words, nature produces this muscle spasm. Why does nature do that?

A. It's a protective reaction. It's a means of protection of a soft-part area. It's a means of preventing the part from moving and is nature's way of putting the part at rest.

Q. Go ahead, Doctor.

A. That is basically my finding of the musculoskeletal examination of Mrs. Paul.

Q. Now, insofar as the ankles and her entire lower extremities, both right and left, could you find any pathology in the course,—we want the jury to understand by pathology, anything that deviates from the normal.

MR. OLSON: Will you read the question?
(The question was read)

A. According to deviation, there would be pathology. The pathology would be the relaxation of the arches of both feet.

Q. Do you attribute that, Doctor, taking into consideration the clinical history you received from Mrs. Paul and your examination, do you have an opinion as to whether that would be connected with or a result of the accident of April 29, 1951?

A. Relaxation of both feet would not be related to the accident of April 29, 1951.

Q. Do you have an opinion as to what caused the condition?

A. Relaxation of the feet is probably hereditary and be developmental. That is, it can be a condition pre-existing the accident and from what I find out it has been present during many many years and developed during the normal course growth.

Q. All right. Now, Doctor, did you examine certain X-rays which Mr. or Mrs. Paul brought to your office?

A. I did. I examined two X-ray films which the patient brought to my office.

Q. Now, I wonder if we could have the shadow box please? Doctor, I'm placing plaintiff's Exhibit 5 in the shadow box which purports to be an anterior X-ray film of the spine including the lumbar and part of the dorsal region, and likewise the lumbo-sacral joint, and ask you whether that is one of the X-rays that you viewed?

A. The X-ray which I viewed was designated as X-ray number S-1831 taken by Hamilton and Kennedy and 639 taken 4-29-51, and at the San Fernando Hospital.

Q. That is 639, look at it.

A. That would be the X-ray that I saw yesterday. And that was the first X-ray that was taken on April 29.

Q. Now, Doctor, in the region of the joint there are a couple of arrows here pointing apparently to what have been testified here to be irregularities. Did you examine those?

A. I did.

Q. Now, Doctor, do you have an opinion as to what is shown in that X-ray film as to the particular places where the arrows are directed?

A. My opinion is, that the arrow points to one of several congenital anomalies which are manifested in this X-ray.

Q. All right. Now, Doctor, will you define for the jury, and turn toward them so they can hear you, what a congenital anomaly is?

A. An anomaly is a difference from the accepted norm. If we were to examine one hundred bones, for example, most of those bones would be identical. There would be minor variations in some of them, maybe a ridge here or there. There may be an absence of a part, or there may be something else. It's different from the accepted norm, and we say that its 'congenital. It's a difference which was present when the bone was made. Therefore, made before the patient was born and present at the time of birth. Congenital means prior

to or at the time of birth. A classical example of congenital anomaly which is common to you people here which would be a congenital heart disease. It's a difference from the accepted norm of a structure and the difference is present at birth.

Q. All right. Now, Doctor, you said those arrows are pointed to two of several congenital anomalies in this spine. Can you point out any others on this particular plate?

A. This particular plate shows what I interpreted to be an extra vertebral body in the human skeleton. There is a good possibility there are six here. I can't be certain of that because I have no X-rays of the rest of the spine to count the number of bones. It's not an uncommon abnormality. The last one vertebral body is different. It tends to take on the shape of bone down to the sacrum. It's not large and square like these up here. It's flat. It's thin. There are processes, we call them, that stick out on each side which are bent up and away from the bone. You notice this large one, and this large one compared to these (indicating on X-ray). Notice this one here; that is short. It has not developed. It hasn't developed for some reason. Therefore, it's different from this, and this, and this (indicating). I have here two vertebral bodies. They are human bodies, and I'll let you look at them when we talk about them.

A. The part I'm trying to show counsel is these are pictures of the bond that would be seen. This is the dry specimen of the bone in that region. It has processes that stand out. Here is this one, particularly

here. Lumbar one, two, three have transverse processes. Lumbar four, particularly nothing on that side, but here appears to be a congenital anomaly, something that has been present for a long time. Here is the fifth or sixth lumbar vertebra, depending on how you count, it being a congenital anomaly, not large and flat and square like these here. Its a little thin bone; the joints which we see here are underdeveloped. There are areas of those joints which have formed separately from the rest of the bones in the back in that particular area. You can see a line here which apparently has an arrow pointing to it which could be interpreted as far as I am concerned, for example, as a congenital anomaly. It represents the method in which this particular portion of this particular vertebral body developed. It's residual of the boney development of the entire body. It has not fused across such as this one has here or this one here, or this one here.

Q. All right.

A. Does that answer your question? There is one more thing I would say as far as that is concerned. That is this sacrum, the lower part of the tail bone, is small and is not developed. It's not large, heavy, square, and keystone. It's under developed. It has a congenital anomaly. That is not the classic picture of that area of the spine as we normal see it.

Q. All right. Now, Doctor, something has been said about facets here. Can you take the bodies which you have, the dry bodies in your hands, and demonstrate to the jury what the facets are?

A. This (illustrating and pointing to parts of bones in his hand) is a bone and this another one. And in the spine of any normal human being, that applies to human beings, they fit together in that fashion. Between the bones you see are two projections, one below and one above. They fit into each other in a careful miter joint. The particular name of that little area right there on this bone is anatomically described as a facet or fa-cet. One fits in with the other, and that forms a gliding joint. They glide back and forth in the normal course of events.

Q. Gliding. Does that mean the same as articulate?

A. That's right. This is the facet for this bone here. This lower vertebral body. This one, the facet in the other upper one is here. In the human, in the living state, they are held together like this.

Q. Now, Doctor, of course, those being dry, all of the soft tissue would surround them has been removed. Can you give the jury an idea by description of what soft tissue you would find, including the disk or any cartilaginous matter including the spinal column, and where it would lie next to those two bones?

A. All right. This, I said, was a joint. It's a normal joint and is like any other joint in the body, such as there would be in the knee or hip or shoulder or joints in the hand. It's the same here. In the living state, there is tissue called cartilage on each side, which acts as a bearing that takes up the friction across the joint. There must be something around it and this is called a capsule. On the outside of the capsule there are ligaments which hold the joint together. Outside of the

ligaments which go to the bones above, all the way up the spine, or down below; there are muscles which are attached here and here and here. There will be ligaments between here and here as well as across the joint and occasionally there will be ligaments between these two and frequently ligaments here. The spinal cord is in the opening where my finger is. My finger would represent the spinal cord. It goes down the spinal canal extending from the head and brain, in an adult to the middle of the lower back. Between each one of these joints the nerve roots comes out depending on the level. By that I mean whether it's in the neck, or low back, will determine where that nerve goes. In this particular situation, these are bones in the lower back. The nerve roots come out on that side, and that side in that fashion, and those nerves supply the muscles of the lower extremities, chiefly. Are there any questions? Let me put it that way?

Q. The disk, nucleus pulposus is another name for it, is the bearing which exists between the vertebral bodies in this area right here. (Indicating.) It's a ball-bearing like structure, generally spherical; it is of the consistency of old jello pretty well dried out jelly and held in an envelope of connective tissue. Ligaments which pass all the way around here, form a band or envelope in that fashion. The disk is a bearing between the bodies of the vertebral bodies, between the major portion of it. It has nothing to do with this back here.

Q. Now, Doctor, assuming a heavy blow is rendered which in the natural anatomy forces the two vertebral

bodies one against the other with that jelly-like substance in there, and assume that there is an injury which results, what do you call that type of injury?

A. If the injury goes on far enough, that type of injury would be the herniated disk or herniated nucleus pulposus. Now, when the disk herniates, it ruptures, it leaves its normal place; it punctures through the lining immediately behind the vertebral bodies and encroaches upon the nerve here. Now, if you put your finger right in there, one of you—it won't hurt you. Put your finger in there, in the normal course of events nothing happens. The lady's finger represents the nerve route, and in the normal course of events all goes well. If the patient encounters an injury and the herniated disk comes out behind, it will press against that nerve root and then gives problems or signs of damage to the nerve root.

Q. How do they manifest themselves, Doctor, without? That is, how do they neurologically manifest themselves, that injury? Does that type of injury, neurologically manifest itself?

A. Practically always.

Q. How does it do it, in what fashion.

A. As far as the patient is concerned, he has what is called sciatica, or neuralgia. Pain down the back of the leg or in the sciatic nerve, objectively, as far as one finds on examination, the patient would have a change in the reflexes on hitting his knee, he wouldn't respond as fast as other patients. The patient would have diminution to sensation, would not feel the pin prick in certain areas as well as in others, the patient would say his

foot is asleep. The examining doctor would say in such and such area, there is absence to sensation. There may be loss of muscle power. In one isolated muscle, there is a weakness, an inability, for example, to lift the toes off the ground, or lift the big toe.

Q. That's called a drop-foot.

A. Classically, yes. The patient would have the dragging of a foot, like some type of polio patients.

Q. Now, Doctor, do you have an opinion as to the probable effect on a person of Mrs. Paul's age of the existence of congenital abnormalities which you have demonstrated in the film exhibit 5?

A. I don't get your question.

Q. Well, let's put it this way, with the presence of those congenital abnormalities, do you have an opinion or not whether their existence would cause you any trouble, that is either in the back or any other place, any inability to function as a normal human being?

A. Looking at that X-ray, I would anticipate that the patient must have had trouble, back ache for some-time, the patient nearing 40, I would expect that she would have had trouble, back ache for possibly three, four, or five years, even longer. I especially think of that because the patient has a curvature of the spine, which in an adult, that type of curvature has been there since the child has been 14 years of age, probably.

Q. Doctor, does it help you to know that a film taken before this film that is a week before any accident, showed the same type of scoliosis?

A. Yes. It would very definitely.

Q. There is evidence that there was a film taken on the 21st day of April that showed a scoliosis in the same area. Would that be helpful to you?

A. Quite helpful.

Q. All right. Now, Doctor, for comparative purposes, I'm going to put into the shadow box a smaller film entitled or designated as plaintiff's exhibit 7 of the same area and you will note the check marks are not exactly in the same place, but in the same area and then if you care to compare the two, I'll ask you whether what you see in the one and in the other show any difference, in other words, any difference in the congenital abnormalities you see there?

A. The congenital abnormalities are much more apparent in the last film. It shows more apparent congenital abnormalities and also shows something additional which I can not see in the large film and the defect of the facet which has been outlined here, and what I interpret as a congenital abnormality is also apparent on that small film.

Q. Now, Doctor, assuming that we had a fracture in the mid-area to which this arrow points on exhibit 5 across the facet, if that were a fracture, do you have an opinion as to whether or not the apposition is good or bad, assuming it's a fracture?

A. If that is a fracture, I would say that the alignment is anatomically correct, that it has been restored exactly as it was before. Complete alignment.

Q. And with the complete apposition over a period of five months, what would you expect her to do, if anything?

A. Five months in that area, I would expect to see some X-ray findings of bone healing?

Q. All right. Do you find any in this picture that was taken October 16? I guess I was wrong; six months. In any event, do you find any evidence of any healing which would indicate to you it's a fracture instead of a congenital abnormality?

A. No, I don't.

Q. In other words, they remain the same. Is that true?

A. I would say so.

(We note in passing that there is no denial or refutation of the entire testimony given by Dr. Swindler.) Referring to X-ray Exhibit 7 Dr. Swindler testified that particularly: "I am strongly suspicious of the cystic areas in the sacrococcygeal joint; there is a hypertrophy effect, bones growing out and narrowing of the joint face, a type of arthritis, which takes years to develop. (Trans. 326)

In Doctor Pedersen's report in May, between the period of time between April 29 and May 7th, he was giving Sodium Salicylate to Mrs. Paul. Sodium Salicylate is commonly used for arthritis, but not to my knowledge for anything else. (Trans. 335).

Dr. Jones testified as follows: Mrs. Paul visited him on October 5, 1951. "Upon my experience and upon

the history given me by Mrs. Paul and my examination of Mrs. Paul, I arrived at the following conclusion of her condition: "I stated that from the history that I obtained, it would seem that she had had a period of total disability for approximately nine weeks. I stated that at first she apparently had some genitouring symptoms, but I belived these symptoms had cleared up, and the speciman of urine that she voided in my office contained no pus. As to the painful symptoms in her low back, objectively there were no evidences of disability other than the pain and tenderness elicited on palpation. Motions of her back, I would say, were very normal, and she admitted no pain other than on rotation of the trunk to the right. It was my belief that while a possible ruptured disk lesion had been tentatively diagnosed that I did not think that there was any evidence of this type of disability; that is, I found no evidence of dorsal nerve root irritation which we would get if there was damage to a disk. I found no abnormal neurological findings in the left lower extremity. While she complained of symptoms in both ankle regions, I could find no evidence of swelling and no restrictions in motion; and while she probably still had some subjective distress in the regions of her ankle joints, objectively it looked to me as if she was making a good recovery from these particular injuries." (Trans 393-394)

My final opinion as to condition is that at the time I saw her I felt that the best therapeutic measure would be to have an early adjustment which would eliminate the litigation angle of her case. (Trans. 395)

Dr. Jones and Dr. Swindler were called by the defendant. The other doctors testified in behalf of the plaintiff. We have not set out the complete testimony of all doctors, only excerpts, as shown by the pages of the transcript.

The damages given by the jury to Mrs. Paul are excessive on her own story. She has a record of illnesses, mostly chronic, from the time she was 13 years of age. In her Complaint she asks nothing for aggravation of injuries, claiming that her present condition was due wholly and solely to the injuries she sustained in this accident. Strange to say she was the only person injured in the accident. She was holding a nine months old infant in her lap, who was not injured. Her small son sitting by her side was not injured. Even her husband, who was driving the car claimed no injuries, neither did he ask for any. All four of them were sitting in the front seat of the car. She had suffered from swollen ankles for years; from swollen eyes for years; from permanent backache from pregnancy or from her kidneys. She consulted physicians on numerous occasions before and after the accident about her kidney condition. She had consulted Dr. Crosley prior to the accident about pain and tenderness in her sacroiliac region. She had pains and tenderness in her arms and legs following the birth of her last child, and prior to the accident, and from her own testimony, every single pain and ache and every symptom that she described and claimed as being caused by the automobile accident was with her and had been present for years prior to the automobile accident. In other words, she suffered pain and ailments in various parts and

portions of her body for years prior to the accident and she complained of pain after the accident arising from the same bodily ailments which she had suffered prior to the accident.

Mrs. Paul has suffered from chronic ailments from the time she was 13 years old, and the chronic ailments she suffered from after the accident were the same as she had suffered prior to the accident. As Dr. Jones put it, she had functional overlay, or litigation neurosis. No doubt she was shook up in the accident but the theory upon which the plaintiff tried this case was not an aggravation of existing ailments, but they claimed damages for conditions caused solely by the accident. The story of each Doctor in this case is a story of a long procession of ailments, starting early in her life. She had suffered from a leg condition, a back condition, a bladder condition, a kidney condition, and an ankle condition for many years. She had curvature of the spine, low ankles, faulty posture, coccyxidinia, pains in her legs and arms and she had suffered from these ailments long prior to this accident.

Except in the opinion of the man who performed it and against the judgment of every other doctor who testified in the case, Mrs. Paul had an operation performed for an injury to the spinal disk, which nobody ever found, and it is apparent from the testimony of all the other doctors in the case that this operation was wholly unnecessary. The doctor who performed it in his own testimony stated that he made up his mind to do the operation on the day of the operation. For this operation he charged a fee of \$1,000.00. Of course,

this fee was not included in the general damages to Mrs. Paul, but it was treated for ailments for every part of her body excepting the stomach, heart and the head. She was even X-rayed for a lung condition. On the day, during the progress of the trial, when she was examined by Dr. Swindler, she had no lost or faulty motion in any part of her body. She could rock back on her heels, stand on her toes, move her legs up and down, lean over and almost touch the floor, rotate from side to side and go through the motions of any normal persons. There was no denial by her of the testimony of Dr. Swindler. She had gone through five miscarriages and a sterilization operation, and developed all the symptoms, concerning what she described, for a long period of years prior to this accident. There is no evidence in the case of any injuries to her spine or vertebra arising out of this accident. There is no evidence in the case tending to prove that the pain she claimed to have suffered in her low back was caused by anything other than muscle spasm or sore muscles, or from an arthritic condition of her vertebra. Her own doctor, Dr. Pedersen, gave her medicine for an arthritic condition, which of course, is always a painful condition, which occurs in the vertebra. Every doctor expected her ailments arising out of the accident to clear up and apparently all of them were baffled by her continued complaints. The only logical conclusion is that her condition was due to litigation neurosis. The damages awarded her by the jury were so excessive as to appear prejudicial, and were without any consideration whatsoever of the physical condition of the woman prior to the accident.

POINT II

With respect to the special damages awarded, these also seem excessive. It is true Mrs. Paul received care in her home, and while she had a nurse, most of the care given to her was given by her own relatives, or the relatives of Mr. Paul. However, in connection with point No. 2 and No. 3, the jury awarded \$3,000.00 for special damages for medical nursing and medicine, and \$5,000.00 to Charles J. Paul for loss of his wife's services. The testimony shows that Lorraine Barthelmew took care of the house and babies and was paid \$170.50 from April 30, 1951 to November 1951 and that Phyllis Heilman was paid \$60.00 for the first week of May 1951 and \$210.00 to September 1951, and that Marjorie McAlister was paid \$53.00 for her service in November 1951 and Catherine Decker was paid \$130.00 from December, 1951 to January 5, 1952 and that Lois Machado was paid \$200.00 for the period January, 1952 to March, 1952 and Ellen Clark was paid \$10.00 in May, 1952 and they wanted to pay Mrs. Charles J. Paul \$330.00 for five or six weeks that she was there and that Doris Timson was paid \$423.00 from July, 1952 to October, 1952 and that an aunt was there for 5 or 6 weeks and they wanted to pay her \$10.00 per day. (Trans. 105-110) All of which was included in the award of special damage. Of all of these individuals, only one was a nurse, the rest of them were housekeepers or baby tenders. It seemed from testimony that if these individuals were performing services in the home ordinarily performed by Mrs. Paul, that the special damages of \$3,000.00 would more than cover all of the services performed in the home during the period complained

of, so that the dollar and cent value of the loss of services had already been included in the award of special damages. What other services Mrs. Paul was rendering during the period complained in, the record, as evidenced, keeping up the house, caring for the children, doing the house work and the cooking, was attended to by the individuals named. It is not claimed anywhere that Mrs. Paul rendered any aid to Mr. Paul in his business. It is not claimed anywhere that she rendered any services except those of a housewife and a mother, nor is there evidence in the record that her services were other than those of a housewife and mother. If she was unable to perform those services, and they were performed by others, for which damages have already been awarded, in the award for special damages it would seem that nothing should be awarded, for loss of services for there is no evidence in the record to sustain an award for loss of services. The Court specifically told the jury that no award could be made for the loss of companionship in order to sustain an award for loss of service there must be some evidence of damage arising out of that situation and the evidence in the record shows that the entire conduct in the care of the home and the children was carried on by other persons, for which services, those doing the work were already paid, or expected to be paid, and again we say, there is no evidence in the record to sustain an award for the loss of services.

We submit below our list of authorities:
Duncan vs. Branson 110 Pac. 2nd 789

Crawford vs. City of New York - 59 NYS 2d 873 270
App. Div. 819

O'Brien vs. J. I. Case Co. 2n NW 2d 107

Godfrey vs. United Electric Rys Co. 38 Atl. 2d, 308

Missouri Pac. Transp. Co. vs. Sacker - 138 SW 2d, 371

Ravare vs. McCormick & Co. - 166 So. 183

Leverich vs. Casden - 300 NYS 762 - 253 App. Div. 742

Carballal vs. Pilgrim Laundry - 5 NYS 2d 38 - 254 App.

Div. 773 18 NE 2d, 44

Colonial Baking Co. vs. Acquino - 103 SW 2d, 613

Respectfully submitted,

DONN B. DOWNEN, JR.

HOWELL, STINE AND OLMSTEAD

Attorneys for Appellant