

1953

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

Utah Supreme Court

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IN THE SUPREME COURT
of the
STATE OF UTAH

IRENE PAUL and CHARLES J.
PAUL,

Respondents,

vs.

WOODROW LAWRENCE KIRK-
ENDALL,

Appellant.

RESPONDENTS' BRIEF

Paul Thatcher of
Young Thatcher & Glasmann
Attorneys-at-law
1018 First Security Bank Building
Salt Lake City, Utah

FILED

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Milo V. Olson
Los Angeles, California

Clerk, Supreme Court, Utah

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IN THE SUPREME COURT

of the

STATE OF UTAH

IRENE PAUL and CHARLES J.
PAUL,

Respondents,

vs.

WOODROW LAWRENCE KIRK-
ENDALL,

Appellant.

STATEMENT OF FACTS

Respondents disagree with the statement of facts of the Appellant. In fact the Appellant's purported statement of facts is so meager that it can hardly be characterized as a statement, and the Respondents doubt very much that it is sufficient to satisfy Rule 75(p) of the Utah Rules of Civil Procedure. In the course of Appellant's argument he quotes or paraphrases extensively some of the testimony, particularly that portion which was favorable to him as if upon the erroneous theory that this court would consider the weight of the evidence in an appeal of this kind, but that clearly does not satisfy the rule.

In any event the Appellant's statement is so inadequate that we are constrained to restate the facts so that the matter may be considered by the Court as it should be considered.

In this statement we will use the letter "T" to refer to the Transcript of Testimony and the letter "R" to refer to the balance of the Record, which is separately bound.

Respondents agree that this is a suit for damages for personal injuries to Irene Paul resulting in general and special damages, and for damages to her husband Charles J. Paul for the loss of the services of his wife.

At the opening of the trial the Appellant *admitted* his liability and admitted that both Respondents had suffered damages. He contested only the nature and extent of the damages. (T. 4-5). The issue of damages was tried to a jury and submitted under instructions to which neither party took any exception. The jury returned a general verdict in the sum of \$20,000 for the Respondents and judgment was entered thereon. (R. 008 and 009). At the same time the jury answered special interrogatories submitted by the Court assessing Irene Paul's general damages in the sum of \$11,800 and Charles J. Paul's damages in the sum of \$5,000. The special medical expenses were stated to be in the sum of \$3000 and the balance recoverable by the Respondents for property damage was fixed in accordance with the instruction of the Court (given on stipulation) at \$200.

The Appellant filed a motion for new trial upon the ground of "excessive damages appearing to have been given under the influence of passion or prejudice." There was added the ground of insufficiency of the evidence to justify the verdict, but this is now immaterial as only the excessive damage issue is presented in Appellant's Brief. (R. 011).

The motion for new trial was considered and denied by the trial court and this appeal followed.

At the trial the following facts were presented in evidence:

The Respondents are husband and wife, having been married in 1948. Mrs. Paul is forty (40) years old. She has two sons, one ten years old, by a former marriage, and one two years and four months old at the date of the trial in November, 1952. (T. 7). Both children are a part of the household of the Respondents.

The accident in question happened in San Fernando, California on April 29, 1951. In this accident Mrs. Paul sustained injuries to the lumbo-sacral joint of her lower spine which later forced her to submit to an operation for the fusion of this joint. She also suffered injuries to both of her ankles. She suffered tremendous pain, nervousness and anxiety and continued to suffer even through the trial.

Inasmuch as the accident happened in California, it was agreed by the parties (in accordance with law),

although it apparently does not appear from the record, that the California law applies as to the substantive rights of the parties while as to all matters of procedure the Utah Law applies. It was understood that the Court be entitled to take judicial notice of the laws of California as of the laws of Utah, and the Court in instructing the jury based its instructions on the substantive law on the California Book of Approved Jury Instructions.

For some months immediately prior to the accident Mrs. Paul had been in very good health. Prior to the accident she had been active, even athletic, and had played golf, bowled and ridden horseback with her husband, and owned her own horse. Previously she had done all her own housework. Eight (8) weeks after the birth of her second child on July 12, 1950, she had almost completely recovered from the birth and had returned to a normal manner of living. She made no complaints about her body and was able to do her own housework. She accompanied her husband on several fishing trips in the mountains and was riding horseback and bowling. (T. 23, 293-294).

Although she had a history of sinusitis attributed to allergy, had suffered recurrence of cystitis (an infection of the bladder) following childbirth or abdominal operations, had submitted to a uterine suspension for the purpose of enabling her to have children, had undergone an appendectomy, had suffered a number of mis-

carriages and had because of these miscarriages submitted to an operation for the tying of her fallopian tubes following the birth of her second child, and had had chest or thoracic cage X-rays to check her lungs when she had a cold a little more than a week prior to the accident, those matters are obviously unrelated to the injuries she sustained in the accident and had cleared up before the accident.

Her second son, as indicated, was born on July 12, 1950. She had been in bed during eight months of her pregnancy and on getting back on her feet after this long confinement she had some trouble with backaches. This trouble, however, lasted only eight to ten weeks, at the most, after the birth of her son. It also caused some swelling of her ankles. (T. 67-68). This backache and swelling, however, did not interfere at all with her normal activity and her housework. (T. 294). Prior to the accident she drove an automobile and did substantially all of the family shopping. (T. 369). After the accident she was unable to drive the car or to do any shopping. (T. 369, 271).

It must be observed that the type of backache she had following the birth of her child was something that is normal and to be expected and was an entirely different kind of pain from the kind she had in her back following the operation. Before the date of the accident she never had a pain which was similar to the one she felt immediately after the accident and there-

after and until after the operation. (T. 12, 16, 26 and 68). She had never had any injury to her lower back prior to the accident of April 29, 1951. (T. 26).

At the time of the accident Mr. Paul was driving the automobile and she was riding between him and her oldest son and carrying her younger son on her lap. The car was struck on the right front portion by the Appellant's car with such force that it was spun clear around and faced almost in the opposite direction. Mrs. Paul saw the approaching car and braced herself and held her younger child firmly in an effort to protect him. She was violently thrown around in the car and ended up half on the front seat of the car and half on the floor boards in a semi-reclining position. She felt immediate pain in her lower back and in both ankles and was apparently in terrific pain, of which she complained. When the police attempted to move one of her ankles she screamed and was left until an ambulance came with skilled attendants to move her. (T. 8 and 276). She was taken to the San Fernando Hospital by ambulance. Her husband accompanied her there. Upon her arrival she was writhing in pain and had broken out in a cold sweat and was groaning and exclaiming about the pain in her back and tried to reach her back with her arms and was complaining about the pain in her ankles and abdomen. As the family physician was not available, she and her husband consented to being treated by Dr. Frank Pederson who happened to be at the hospital. (T. 279). He noted that she was in extreme pain

in her lower spine, lumbar area, and both ankles. (T. 78). He ordered a sedative after which she quieted down somewhat. (T. 280). Dr. Pederson arranged to have an X-ray taken of Mrs. Paul, Exhibit 5, to assist in his diagnosis. Her husband stayed for about one hour and a half and then left. Sometime during that night Mrs. Paul was unable to empty her bladder and it was necessary because of the distention thereof to remove that pressure by means of catheterization. (T. 79-80).

She was hospitalized for approximately two and a half days for relief of pain and X-rays taken to rule out possible fractures of the pelvis.

Dr. Pederson finding no fractures gave accepted treatment for the condition he did find—salicylate, narcosis, diathermy and rest. She was then definitely suffering severe pain and also from shock resulting from the pain and the mental shock of the accident according to Dr. Pederson. (T. 81-82). She also had marked swelling of both ankles which Dr. Pederson found resulted from the tearing of the lateral deltoid ligaments of both ankles. It was his opinion that Mrs. Paul was definitely injured in the accident as far as her ankles and spine are concerned and his opinion would not be changed by history of ankle pain and swelling for several years prior. (T. 88).

She was discharged two and a half days later showing moderate improvement. (T. 86 and 283). When she left the hospital she was unable to move by herself

and was taken from her bed to the curb in a wheelchair and then Mr. Paul lifted her into the car and on arriving home put her to bed. (T. 282). She remained entirely in bed for about a week except as her husband took her to Dr. Pederson for treatment. After that with help from others she tried to move about the house a little bit but was seated and resting as much as possible. She complained of pain every time she tried to move or anyone tried to move her. For about four weeks after she got out of bed she was unable to move at all without help and then she improved slightly and was able to move about a little bit on her own feet. (T. 283-284). It was apparent from the way she moved that she could not move normally. She was obviously in pain. (T. 285). During the month of June, 1951, she was still unable to move in a normal way or to sit or stand any length of time in any one position. She constantly complained of pain in her back. (T. 286). In the forepart of July, 1951, she was sent with relatives who came to help her to a cabin in Big Bear, California to rest. This was done on the recommendation of her doctor. She stayed there over three weeks. (T. 286-287). On her return her condition was not a bit improved. She was becoming increasingly nervous and tense. The pain had not subsided. (T. 287). In August, 1951, her condition was increasingly worse. She gave constant evidence of extreme pain by her erratic motion and by exclamations, indicating that her back was hurting her. Thereafter and until she saw Dr. Homer Graham, an orthopedic

surgeon, there were some days when her complaints were not so numerous, but for the most part she was increasingly worse. Her husband, Charles J. Paul, never observed her to be free of pain at any time. (T. 289). On September 4, 1951, she returned to Dr. Pederson asking additional help. He examined her and found the coccyx very tender to motion, the tenderness extending out into the ligaments to the left, suggestive of tearing of the ligaments. This is normally caused by trauma. Prior to this Dr. Pederson had last seen her on May 7, 1951, when she was "beginning to limber up" but still had persistent severe pain over the lower left lumbar area and a persistent swelling of both ankles which were still painful. On her return to Dr. Pederson on September 4, 1951, he found Mrs. Paul was also still suffering pain in the left lower lumbar area, (T. 89), and she constantly complained of a sore lumbar spine. (T. 90). Dr. Pederson prescribed corrective shoes for poor arches, weak ankles and scoliosis (or sideways bending) in her spine, thinking it would ease her pain. (T. 52). As of that time Dr. Pederson testified that her back was a puzzle to him, but added, "we do know that she must have had severe back injuries or a blow to have temporary paralysis of her bladder," as he had found the night of the accident. (T. 101-102).

From the first she followed Dr. Peterson's directions for treatment as much as possible. (T. 17). She tried to wear the corrective shoes that Dr. Pederson prescribed, but they caused her excruciating pain to

such an extent that on one occasion she passed out on the kitchen floor. She had never been known to faint before. (T. 52 and 370).

Early in May she developed pain on urinating and was referred by her family physician to Dr. Winfield S. Herman, a urologist. He found she was suffering from cystitis and treated her for that. (T. 13-14, 164-165). Dr. Herman was of the opinion that it was a definite connection between the accident resulting in the distention and catheterization and cystitis, because distention lessens resistance and catheterization occasionally introduces infection no matter how much care is used. (T. 168B). He was also of the opinion that there was no showing of a chronic cystitis existing at the time of the accident. (T. 179).

Mrs. Paul's past urinary infections have always followed an operation or serious illness in which she was catheterized. (T. 184). Dr. Herman's examinations were very painful. As Appellant's counsel indicated in his questioning, they are about as painful an examination as any woman can undergo. (T. 185). Mrs. Paul's regular physician, Dr. Willard Crosley, had attended her during her pregnancy, seeing her first for that cause on February 28, 1950. He saw her periodically until she was delivered of her child and noted that none of her complaints included any pain in her lower back. (T. 192-193). He testified that the backaches she had in the course of her pregnancy and following were of the usual or normal type attending childbirth. (T. 210).

As the conservative treatment she had been given did not help her, Mrs. Paul consulted her family physician, Dr. Crosley, and was by him referred to Dr. Homer Graham, an orthopedic surgeon. Dr. Graham is an orthopedic specialist with a good reputation and record. (T. 196). He examined her on October 4, 1951 and obtained a history. His physical examination disclosed localized low back pain at the level of the lumbo-sacral joint. There was muscle spasm of the entire lumbo-sacral mass of muscles on either side. (T. 116). He had X-rays of her back taken on October 16, 1951. (T. 218, Exhibit 7). He kept her under observation for more than a month and prescribed a brace which she wore while she was under observation. (T. 373-374). He consulted Dr. Joseph C. Risser, an orthopedic surgeon nationally known as a back specialist, (T. 220), and also Dr. David Eder, a neurosurgeon of Pasadena for consideration of a possibility of a ruptured disk or cord tumor or any other neurosurgical condition. (T. 220, 223). Dr. Risser reported that "the X-rays show, I feel, a fracture of the facet of the left side" and Dr. Eder found no evidence of a herniated disk. (T. 222-223).

Finally as Mrs. Paul was not responding to conservative treatment but was growing worse, and more nervous, apprehensive, anxious and tense, (T. 18 and 271), Dr. Graham concluded that a spinal fusion of the lumbo-sacral point was necessary. He concluded that, even though there might be no fracture, injury to the joint required operation because the capsule in which

the point was sheathed (which is generously supplied with sensory nerves) and the cartilage could have suffered extensive damage and this does not repair normally. The replacing cartilage ordinarily does not wear well. This, with muscle spasm, which results in poor circulation, causes the joint to deteriorate instead of improve. It digests itself. This is especially true with a nervous person of Mrs. Paul's type. (T. 288-229). Dr. Graham concluded that Mrs. Paul had sustained damage to the cartilage, the capsule and the ligaments about the lumbo-sacral joint requiring the fusion operation. (T. 269). Finally on November 7, 1951, he performed this operation on Mrs. Paul because he had concluded that she had an injured lumbo-sacral joint which refused to respond to conservative treatment, and for the purpose of relieving her persistent pain. It is a common procedure to fuse a joint which causes severe and persistent pain in order to prevent further deterioration of the injured joint. (T. 228-229). Dr. Graham testified that it was his opinion that the injury for which he operated was caused by the accident and that the operation was necessary. (T. 232, 234).

Mrs. Paul was absent from her hospital room for the purpose of the operation for some five hours. (T. 291).

This operation is a very major operation which is attended with considerable pain and suffering. (T. 103).

Although Mrs. Paul frankly admitted that she

was a nervous person and Dr. Pederson indicated he thought she had some psychosomatic overlay, Dr. Graham stated that in Mrs. Paul's case he did not think that the psycho-somatic overlay had any tendency to bring about an exaggeration of her symptoms. (T. 250). Moreover, he concluded that there was no malingering in this case, as counsel for the Appellant agreed. (T. 250).

Dr. Graham testified that in such operation he expects improvement for a period of one or two years but not after that. (T. 234).

Although Mrs. Paul's husband had never known her to show such symptoms before, after the accident on April 29th and continually until the operation he was awakened quite often at night by her crying and by her grinding her teeth in her sleep. She was often awakened in a cold sweat from the pain and he would have to help her change her nightclothes. Except for a period of time in mid-summer she was unable to get about without assistance and when she visited Dr. Jones, the physician who examined her in behalf of the Appellant on October 5, 1951, she was unable to walk without aid and he had to assist her. (T. 366, 368, 372 and 379). During almost all of the time between the accident and the operation she was in extreme pain with night sweats, moaning and groaning and waking up nights. (T. 376). During this period of time there were many involuntary exclamations of pain such as moaning, groaning and nashing of teeth and quite often when she would step

on an irregular place on a sidewalk or at the edge of the carpet she would exclaim involuntarily and show pain. (T. 372). During this time her husband had to assist her in getting in and out of bed. Usually when the pain wakened her at night and she would try to get up and walk she could not get in or out of bed without help. (T. 370).

After the operation she was fifteen days in the hospital, then she returned home where she stayed in bed for better than four weeks. After she got up there was a period of convalescence when she was unable to do any of her duties. This continued until March 15, 1952, when she resumed some of her household tasks. Since then her condition has improved rather rapidly. She still (at the time of the trial) had made some complaints but of a different degree. (T. 291 to 293).

Dr. Charles M. Swindler of Ogden who examined Mrs. Paul for the Appellant during the course of the trial noted that even then on November 19, 1952, more than a year after the accident her gait was still "somewhat guarded and protected." (T. 302). Dr. Swindler conceded that on the basis of the evidence furnished him he could not decide whether or not the fusion was necessary. (T. 339). Dr. George W. Jones, the other expert who examined Mrs. Paul for the Appellant, likewise refused to testify that the operation was not necessary. (T. 405). Apparently he recognized that only the physician in charge with all of the then circumstances

in mind could make a valid decision. (T. 339). Dr. Swindler also conceded that a fusion operation is properly done to eliminate pain and that if in the accident Mrs. Paul had incurred an acute spinal flexion or bending, a fracture of the facet would be likely and that there would have been *an injury to the joint whether she had a fracture or not*. (T. 355).

Dr. Louis S. Peery, an orthopedic surgeon of Ogden, Utah, and a man of very high standing in his field, testified for the plaintiffs. (T. 117). He had examined the x-ray Exhibit 5 which was taken on the night of the accident, and additional x-rays were taken at the time of the trial under his direction. (Exhibits 11 and 12 and T. 119-120). It was his considered opinion that the x-ray Exhibit 5 discloses a possible fracture at the edge of the facets in the lumbar area, and that the possible fracture line shown in Exhibit 5 is not suggestive of a congenital anomaly because the line too ragged, and because the x-ray taken on October 16, 1951, just before the operation, shows a relatively less distinct line than the one taken immediately after the accident, indicating a healing of a fracture rather than a congenital anomaly. (T. 120, 129, 134-135).

Dr. Peery further testified that the x-rays exhibits 11 and 12 show a bone graft across the lumbo-sacral joint, further secured by two screws, which eliminates the joint and the motion in that area. They show a filling in of the bone from the sacrum to the 5th lumbar

vertebrae and disclose an excellent fusion—a very successful operation. (T. 120-121).

Dr. Peery also testified that the purpose of the fusion operation for the most part is to eliminate pain in the joint, as distinguished from correcting a fracture, and that the pain could come from trauma to the joint even though there was no fracture. He commented that more fusions are done to eliminate pain than because of a fracture. (T. 121, 156).

Dr. Peery also testified that he has reviewed the history of the case as it existed in October of 1951 immediately prior to the operation and that under the circumstances then existing he would consider that “His hand would be forced to do more than had been done up to that time. In other words, she had been given adequate conservative treatment, and it just didn’t leave anything left to do in the way of conservative treatment that would give her relief.” (T. 127). The scoliosis shown in the x-ray films indicates muscle spasm. Dr. Peery was of the opinion that at that stage the only alternatives were to do a fusion operation to remove the pain in the lumbosacral joint or take the pain, which, as the other evidence indicates, had become unbearable. (T. 128).

Dr. Peery also testified that in the case of a fractured bone the pain comes from the irritation to the bone covering which is painful when stretched or torn, and commented that a sprain of the sacroiliac can be more severe than a fracture in the joint. (T. 133).

Mrs. Paul was required to wear her back brace after the operation and continued to do so until March of 1952, when she was advised to leave it off "whenever she could." This she has been doing, and at the time of the trial was able sometimes to leave it off for as much as four or five hours, but not more. She was still having discomfort at each change of weather. (T. 374).

In this connection we believe it is proper to note that during an extended trial the jury had great opportunity to observe Mrs. Paul's demeanor and gait and to see her move about the courtroom and ascend and descend the witness chair. It is believed that these personal observations which the jury very properly made undoubtedly indicated to the jury that Mrs. Paul was still suffering pain and great disability. In this connection Dr. Graham testified that Mrs. Paul may not be completely and forever free from her pain although he did believe she would ultimately be rehabilitated to the point where her disability would not be "significant." (T. 234). That desirable goal has not yet been reached. About ten days before the trial she inadvertently stepped off a small rise in the pavement and exclaimed very loudly indicating pain and thereafter spent two or three days in bed with a very sore back. Even during the trial her husband had to put hot packs on her back in order to limber her up so she could get out of bed. (T. 273).

Although Mrs. Paul had previously cared for her

children, done the family shopping and done all of the housework for her family, after the accident she was no longer able to do any of that and at the time of the trial she was still unable to do any of the heavy work. She is still unable to care for her children and she still has to have help with her housework and is unable to clean windows or do any of the heavier work at all. (T. 23-24, 368). Although prior to the accident they had no help in the home, (T. 368), since then they have had to have help constantly and Mr. Paul has had to assist. He has taken care of them evenings and weekends while they have hired help for them in the daytime. (T. 368). The same situation has occurred as to the cooking: they have had hired help in the daytime and Mr. Paul did it on weekends and at night. This situation as to the cooking continued until March of 1952. (T. 369). As to the shopping, after the accident Mr. Paul has had to do all of the shopping except a little recently. (T. 369). Mrs. Paul is no longer able to drive an automobile at all. (T. 371). As a result, in the early part of her illness when their oldest boy was required to go frequently to the dentist for treatment, Mr. Paul had to leave his business thirty miles away and take his oldest boy to the dentist, which took up a half day's time once a week for eight or nine weeks. (T. 372).

The accident obviously has entirely disrupted the normal home life of the parties and as a result thereof Mr. Paul has been deprived of his wife's very valuable services for a long time and equally obviously will not

receive the complete service he did previously for some time to come.

This statement, it is believed, summarizes fairly the facts which were submitted to the jury and upon which the jury based its verdict of \$20,000. In this connection it should be said that although there were undisputed damages established by stipulation to an amount exceeding \$3,500, the jury in its interrogatories assessed these special damages at only \$3,000.

STATEMENT OF POINTS

Point 1. The points relied on and argued by the Appellant, To-wit: (1) That the general damages awarded to Irene Paul are excessive, and (2) that the award of \$5,000 to Charles J. Paul for loss of services of his wife is excessive, are insufficient in law to justify any relief to the Appellant, as no claim is made that they have been given under the influence of passion or prejudice.

Point 2. On this appeal the judgment of the Trial Court is presumed correct, the burden of affirmatively showing error is on Appellant, the evidence and the inferences therefrom must be viewed in the light most favorable to the Respondents, and the ruling on the motion for new trial was largely within the trial court's sound discretion which will not lightly be disturbed.

Point 3. The damages awarded Irene Paul are not excessive nor do they appear to have been given under the influence of passion or prejudice.

Point 4. The damages awarded Charles J. Paul for loss of his wife's services are not excessive nor do they appear to have been given under the influence of passion or prejudice.

Point 5. The decisions relied on by Appellant are not in point.

ARGUMENT

Point 1. The points relied on and argued by the Appellant, to-wit; (1) That the general damages awarded to Irene Paul are excessive and (2) that the award of \$5,000 to Charles J. Paul for loss of services of his wife is excessive, are insufficient in law to justify any relief to the Appellant, as no claim is made that they have been given under the influence of passion or prejudice.

The Appellant argues only two points in his brief. First, "that the general damages awarded to Irene Paul are excessive," and second "that the award of \$5,000 to Charles J. Paul for loss of services of his wife is excessive." See Appellant's brief, Pages 2 and 31. It is true that on page 2 of the brief under the heading Statement of Points, it is stated that the special damages of \$3,000 are excessive. However, the only argument on this point is on Page 31 under the heading of Point 2 where it is said "with respect to the special damages awarded, these also seem excessive. It is true that Mrs. Paul received care in her home and while she had a nurse, most of the care given to her was by her own relatives or the relatives of Mr. Paul." The Appellant then lists some of the items of special damage but eliminates entirely the doctors' fees, the hospital bills and the medical bills, although there was ample evidence, and he does not contend that there was not ample evi-

dence, to support this. In fact substantially all of the special damages were stipulated and they totaled more than \$3,500, of which the jury only awarded \$3,000.

Obviously this point and the argument devoted to it are insufficient to require the court to search the record to demonstrate an absence of evidence which he does not even bother to assert, and it is apparent that this point could not have been made in good faith for the purpose of being relied upon. The case of

Keller vs. Wixom,
----- Utah -----
255 Pac. 2nd 118,

decided by this court on March 31st of this year seems to be in point here.

In any event Appellant does not, either in his statement of points or in his argument claim that the damages appear "to have been given under the influence of passion or prejudice." The granting of a new trial is, of course, a procedural matter and must be governed by Utah's Rules of Civil Procedure. The Appellant does refer, in passing, to the fact that some of the nursing services included were rendered by relatives of Mr. and Mrs. Paul. The pecuniary obligation to pay these relatives was supported by direct and positive evidence. It is wholly immaterial that some of the nursing care was rendered by relatives of the Respondents. It was so held by the California Court in

Kimball vs. Northern Electric Company,

112 Pac. 153.

Rule 59(a) (5) deals with the granting of a new trial upon the ground of excessive damages and says that the Trial Court *may* grant a new trial for “excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.” The Rule does not authorize a new trial merely because the court itself deems the damages excessive, but in addition to the excessiveness of the damages it must be made to appear that they “have been given under the influence of passion or prejudice.” Our Rule, as the Court knows, is taken from our previous statute, Section 104-40-7, Utah Code Annotated, 1943. It is firmly established under this statute and the rule which is taken from it that the granting of a new trial or the requiring of a remission of part of the damages awarded by a jury is proper only where the jury is *clearly* shown to have totally mistaken or disregarded rules of law for regulation of damages or wholly misconceived or disregarded all evidence and thereby committed gross and palpable error by rendering a verdict so enormous, outrageous or unjust as to be attributable to neither the court’s instructions nor the evidence, but only to the jury’s passion or prejudice.

Moreover, it is equally well established that mere excessiveness of the jury’s verdict does not necessarily show that it was arrived at by passion or prejudice, as

is required to authorize the Supreme Court to overrule the Trial Court's discretion as to the granting of a new trial or in the alternative the remission of damages, and the mere fact that the jury awarded more damages than another or the court might have given or more than the evidence justified, does not conclusively show that the verdict was the result of the jury's passion or prejudice as is required to authorize the court to intervene and take from the jury its constitutional function as the trier of the facts in a law case such as this. It is also established that the jury has great latitude in assessing damages for personal injuries unless the excessiveness of the verdict can be determined as a matter of law, which is not the case here. Before the court can intervene in a matter of damages, the verdict must be so excessive as to shock one's conscience and *clearly* indicate passion, prejudice or caprice of the jury as a matter of law. As above noted, mere excessiveness of the verdict without more does not necessarily show such passion or prejudice.

The above principles are firmly established in this jurisdiction by the following decisions of this court:

Saltas vs. Affleck,
99 Utah 381,
105 Pac. 2nd 176;

Walkenhorst vs. Kesler,
92 Utah 312,
67 Pac. 2nd 654;

Pauly vs. McCarthy,
109 Utah 431,
184 Pac. 2nd 123

and

Duffy vs. Union Pacific Railroad Company,
..... Utah
218 Pac. 2nd 1080.

This rule necessarily follows from the provisions of Section 9, Article VIII of the Constitution of Utah, which provides that in cases at law the appeal to this court shall be on questions of law alone so that this court cannot interfere unless the error of the jury is made to appear as a matter of law. See

Whittaker vs. Ferguson,
16 Utah 240,
51 Pac. 980.

In the case now at bar *the Appellant makes no contention that the verdict of the jury resulted from its passion or prejudice* and indeed there is nothing in the record to indicate such passion or prejudice directed against the Appellant. If there is anything in the record in this regard, it would be the failure of the jury to find the full amount of the special damages in excess of \$3,500 after it was stipulated that all of the charges for medical, surgical, hospital and nursing services had been incurred and that the charges were reasonable, and this prejudice, if any, was directed against the Respondents', not the Appellant's, case.

Moreover, the Appellant here *makes no claim whatsoever in his brief that the verdict is so excessive, as to shock one's conscience and to clearly indicate passion, prejudice or caprice* so that passion and prejudice could be inferred as a matter of law, if indeed passion and prejudice can ever be inferred as a matter of law. The Appellant merely states plaintively that he now finds the burden of his admitted fault to be excessive and requests the court to relieve him of it. This under the Constitution, the Rules of Procedure and the decisions of this court, the court cannot and should not do. Even if all the assertions and claims made by Appellant in his brief were taken as true (as they are not), still it would not justify this court in ordering a new trial or forcing the Respondents to remit any part of the damages. Appellant's contentions fail as a matter of law and this alone should determine this case so that the court would not be burdened with consideration of the other points involved.

Point 2. On this appeal the judgment of the Trial Court is presumed correct, the burden of affirmatively showing error is on Appellant, the evidence and the inferences therefrom must be viewed in the light most favorable to the Respondents, and the ruling on the motion for new trial was largely within the trial court's sound discretion which will not lightly be disturbed.

The decisions of this court have long since settled beyond any peradventure of a doubt that there is a presumption that the judgment of the Trial Court was correct and that every reasonable intendment must be

indulged in favor of it, and that the burden of affirmatively showing error is on the Appellant.

Palfreyman vs. Bates & Rogers
Construction Company,
108 Utah 142, 158 Pac. 2nd 132, 133

(Syllabus No. 2) and cases there cited.
Moreover, on appeal from a judgment on a verdict in the plaintiffs' favor the plaintiffs are entitled to have this court consider all of the evidence and every inference and intendment fairly arising therefrom in the light most favorable to them.

Toomer's Estate vs. Union Pacific
Railroad Company,
----- Utah -----
239 Pac. 2nd 163,

and

McLaughlin vs. Chief Consolidated
Mining Company,
62 Utah 532,
220 Pac. 726.

Moreover, the question of whether a new trial should be granted on the ground of an excessive award of damages under the influence of passion or prejudice rests largely within the Trial Court's sound discretion and the Supreme Court is reluctant and slow to interfere with the Trial Court's exercise of that discretion in refusing a new trial on questions relating to damages.
See

Case No. 7957

IRENE PAUL, et al., Respondents vs. WOODROW
LAWRENCE KIRKENDALL, Appellant

ADDITION TO RESPONDENTS' BRIEF FOR BENEFIT
OF RESPONDENTS IRENE PAUL AND CHARLES J. PAUL.

Immediately following the citations on
Page 27 insert the following:

See also:

Geary vs. Cain
69 Utah 340
255 Pac. 416,

commenting that the trial court is in a much
better position than the appellate court to
observe and determine whether a jury was
actuated by passion or prejudice.

The recent and as yet unpublished decisions
of this court in

Wheat vs. The Denver and
Rio Grande Western Railroad Co.
No. 7838

and

Lodder vs. Western Pacific
Railroad Company, No. 7809,

further emphasize that the judgment of the
trial court in cases such as this should be
followed.

Mitchel vs. Arrowhead Freight Lines,
..... Utah
214 Pac. 2nd 620;

Duffy vs. Union Pacific
Railroad Company, *supra*

and

Saltas vs. Affleck, *supra*.

These well established principles should be equally determinative of the question here and determinative in Rspondents' favor. The Appellant in his brief *nowhere contends that the Trial Court in this case abused its discretion in denying his motion for a new trial on the ground of excessive damages*. He merely reiterates that the damages are excessive and it is submitted the assertion gains no force from the reiteration. As we will attempt hereafter to demonstrate, there is ample evidence to justify the size of the verdict and to support the Trial Court's exercise of his discretion. In fact, we are again impressed with the fact that this is a strange case in which the Appellant admits that he is at fault and that the Respondents suffered damages and then, when the jury assesses the amount, he asks for a reversal of the Trial Court's order affirming the verdict *without even claiming that the Trial Court in so doing abused the discretion with which he was vested*. If any presumption whatever is indulged in favor of the Trial Court's ruling, it must in this case be affirmed.

Point 3. The damages awarded Irene Paul are not excessive nor do they appear to have been given under the influence of passion or prejudice.

After reviewing the facts in this case it would seem that little argument need be devoted to the proposition that the amount of the award of general damages to Mrs. Paul was definitely not excessive either as a matter of fact or of law, but that on the contrary, if anything, it was inadequate. There is ample evidence in the record from which the jury could, as it did, conclude that all of the pain, inconvenience, suffering and disability which Mrs. Paul suffered after the accident and up to and beyond the date of the trial resulted from the accident for which the Appellant acknowledged liability. In fact the Appellant does not contend in this court that the evidence did not support the verdict, but only that damages were excessive. Appellant's own expert, Dr. Jones, concluded that she was totally disabled as a result of the accident for nine weeks thereafter. (R. 393). Mrs. Paul obviously suffered excruciating agony for two months after her accident and then although the severe pain subsided somewhat and was somewhat quiescent during July, her condition became increasingly worse from August until the time of her operation. After this very necessary operation she again was totally disabled for a period of months and again suffered excruciating agony to the extent that she became terribly nervous. She was totally disabled until March of 1952 and is still partially disabled and very apparently will be dis-

abled for a long time into the future. She is still suffering pain and misery as the result of the accident. Everybody is agreed that she really suffered very severe pain and that her condition was unendurable before the operation. Everybody is agreed that the operation is a dangerous one, characterized as "major," and causing great suffering.

Mrs. Paul certainly used due diligence and care in obtaining and selecting doctors and she cooperated in all of the treatment which was prescribed for her. During the trial the Appellant seemed to be striving for proof that the operation from which additional suffering proceeded was not made necessary by the accident and that Dr. Graham, who prescribed and performed it, had made an error in judgment, but his own experts refuse to back him up in that. Moreover, whether the operation was actually necessary or not is immaterial so long as the Respondent exercised due care in the selection of her doctors. It is not here contended that she did not use such care. This is the law in the State of California, which is controlling on this problem of substantive right. See

Ash vs. Mortenson,
24 Cal. 2nd 654, 657;
150 Pac. 2nd 876.

We believe it to be equally the law in Utah.

Moreover, on this last point the court in its Instruction No. 13 charged the jury that if Mrs. Paul has used

reasonable diligence in securing the services of a competent medical doctor, given the doctor all clinical history of herself that is material and submits to his examination and follows the treatments prescribed, she cannot be charged with the negligence, poor judgment or malpractice, if any, of her doctor. (T. 421). Inasmuch as this statement of the law by the Trial Court to the jury is not attacked in this court it has become the law of the case and is binding upon the Appellant. The jury's implied finding that Mrs. Paul did exercise due care in selecting her doctors is amply supported by the evidence.

The Courts of California have in many cases held that under comparable circumstances similar awards are not excessive. See

Thomas vs. Southern Pacific Co.,
116 C.A. 126; 2 Pac. 2nd 544;

Perry vs. McLaughlin,
212 Cal. 1; 297 Pac. 554;

Sundberg vs. Ringel,
100 C.A. 545; 280 Pac. 557;

McNown vs. Pacific Freight Lines,
50 C.A. 2nd 221; 122 Pac. 2nd 582;

Lovelandy vs. Sacramento City Lines,
102 C.A. 2nd 28; 226 Pac. 2nd 722;

Perry vs. City of San Diego,
80 C.A. 2nd 166; 181 Pac. 2nd 98;

Roedder vs. Lindsley,
28 Cal. 2nd 820; 822-823; 172 Pac. 2nd 353;

Brinck vs. Bradbury,
179 Cal. 376; 176 Pac. 690;

Lynch vs. Southern Pacific Co.,
24 C.A. 108; 140 Pac. 298;

Hamelin vs. Foulkes,
105 C.A. 458; 287 Pac. 526;

Pearson vs. Whitworth,
75 C.A. 2nd 751; 171 Pac. 2nd 745;

Reilly vs. California Street Cable R.R. Co.,
76 C.A. 2nd 620; 173 Pac. 2nd 872;

Werkman vs. Howard Zink Corp.,
97 C.A. 2nd 418; 218 Pac. 2nd 43.

The jury who saw Mrs. Paul through four long days of trial and saw her obviously good faith efforts to conceal rather than exaggerate her disability as she moved about the court room, and who personally observed her demeanor and that of her husband in describing her injuries and disabilities and the pain she suffered, are certainly best qualified to measure the extent of her past and probable future damages resulting from the accident. Certainly this court from a cold record should not try to say that \$11,800 was so grossly and manifestly excessive as to shock the conscience and clearly indicate passion and prejudice. In this case no one has even contended that Mrs. Paul's agony or disability

were not real, and surely no one can in good conscience say that, for this agony and this severe disability of her back which destroys all certainty and stability and ease of movement, the sum awarded her for past and future pain, suffering, anxiety, mental anguish, inconvenience and physical disability was at all excessive, especially in view of the present inflated value of the dollar. Who would say that this verdict even fairly compensated her for her injuries and suffering? If so, that one for some additional sum should fairly be willing to undergo similar injuries, suffering and disability for \$12,000,000 for that would mean a \$200.00 profit on the transaction. Manifestly no one whether a reasonable prudent man or an unreasonable or imprudent man, would do that.

Actually this verdict, if the jury erred at all, was too modest, for the evidence would have justified a much larger verdict.

In this connection it may be properly noted that under the law the present diminished purchasing power of the dollar may be considered when estimating damages. See

Duffy vs. Union Pacific
Railroad Company, *supra*,

and

Pauly vs. McCarthy, *supra*.
Actually Mrs. Paul is only getting a verdict of approximately \$7,000.00 in uninflated currency.

The Trial Court manifestly did not abuse its discretion in refusing to order a new trial or a remission of damages in this case and the judgment must be affirmed.

Point 4. The damages awarded Charles J. Paul for loss of his wife's services are not excessive nor do they appear to have been given under the influence of passion or prejudice.

The court in accordance with the California Law, which we believe to be consistent with the Utah Law, instructed the jury that if they found that Mr. Paul was entitled to recover damages, they should award to him "a sum that will compensate him reasonably for any loss of his wife's services which he has suffered, or is reasonably certain to suffer in the future as a proximate result of the accident in question." The Court further instructed the jury in effect that they should fix the present pecuniary value of both past and future services thus lost and to that end should consider the character and condition of the home of the parties, the services that have been performed by the wife in the management of the household, the fact that there have been children in the home and the character of the wife's services, the extent to which any work connected with the management of the home has been done by other than the wife and the nature, extent and value of any services of an advisory character although not involving any manual labor or physical skill which have been performed by the wife for the husband. The jury were further instructed that the services rendered by a wife to her husband's benefit may be and often are of such

character that no witness can say what they are worth. Often they have no market value equivalent and hence it is not necessary that there be any direct or express testimony as to the value of a wife's services to entitle her husband to recover therefor. The court instructed the jury that the relationship the wife sustains to her husband is a special and peculiar one and the actual facts of the case at hand considered in the light of their own experience and to the satisfaction of their own consciences must guide them in estimating the husband's pecuniary loss. The Court properly added, under the California Rule, that the law does not permit any award simply for the loss of a wife's society or the comfort and emotional values of her companionship. (Instruction No. 9, T. 417-418). These instruction were taken from the California Book of Approved Jury Instructions and clearly state the law in California. See

Edminister vs. Thorpe,
226 Pac. 2nd 353.

In that case the husband was awarded \$4,000.00 for the loss of services of his wife injured in an automobile accident. The court there quoted with approval from 13 *California Jurisprudence*, Section 83, Page 897 as follows:

“Consequential damages to the husband include loss of services of the wife damages for loss of services of the wife are recoverable, though there is no direct proof of the value of such services.”

Who is there who would say that the substantially total loss of the wife's services from the end of April in one year until sometime in March of the following year, with very strictly limited services for some uncertain time in the future, and possibly a permanent loss of her services, would not be worth \$5,000? True it is, as the Appellant points out, that some of the services, principally the caring for the children and the cooking of the family meals during the daytime, was done by hired help, the cost of which was partly and only partly compensated by the verdict for such damages, but are a wife's services to the family at night of no value, especially where there is a small baby? And are the wife's services as a shopper of no value? And what of the services she had previously rendered to Mr. Paul which he had himself to take care of at night and over weekends as he testified? Moreover, as the Trial Court instructed the jury, the wife's services are of a special nature, and who is willing to say that hired help will adequately replace a loving, careful and intelligent mother in the care and training of Respondents' children?

Those of us among the men in our society who have had occasion to try to substitute for our wives or mothers in cases of an emergency will have a better idea than Appellant of the true value of the services of a wife to her husband in caring for the children, in managing and running the home, and, in general, the managing and organizing and performing all the multitudinous tasks which a housewife and mother must perform. As the

Trial Court very properly instructed the jury, it is very difficult to place a pecuniary value on such services. The services a wife and mother render, like personal injuries and suffering and anguish, cannot really be valued in dollars in view of their special nature.

It is submitted that no fair and reasonable man can conscientiously say that an award of \$5,000 to Mr. Paul for the loss of his wife's peculiar and personal services in the management of his home and family is at all excessive, not to mention its being so excessive as to shock the conscience or disclose passion and prejudice as a matter of law. It seems eminently fair and just and the Trial Court did not abuse his discretion in refusing to order a new trial because of this award.

Point 5. The decisions relied on by Appellant are not in point.

Perhaps some brief analysis of the decisions relied on by Appellant will be helpful to the Court.

It must first be observed that none of the authorities cited by the Appellant come from either California or Utah and hence are not in any sense binding upon the Court.

Moreover, all are distinguishable so that they are not even persuasive. The cases fall into several groups which we shall try to consider in turn.

First, several of the decisions are either memoran-

dum decisions or very brief opinions which contain no discussion whatsoever of the nature or extent of the injuries or lost services involved. As a result they cannot help us either way. These cases include

Crawford vs. City of New York,
59 N.Y.S. 2nd 873,

and

Leverich vs. Casden,
300 N.Y.S. 762.

Second, we have two cases where the Appellate Courts refused to disturb the Trial Court's exercise of its discretion in fixing the damages and hence are obviously of no help to the Appellant here. The first of these is the case of

Ravare vs. McCormick and Company,
166 Southern 183, (Louisiana, 1936).

There the Louisiana Court refused to disturb the judgment of the Trial Court, the trier of the fact, in assessing damages in the first instance. In that case the damages were so modest that when considered in the light of the jurisdiction it seems quite probable that the plaintiff was a Negro.

The second case in this classification is
Colonial Baking Company vs. Acquino,
103 S. W. 2nd 613 (Tennessee, 1936).

There were three plaintiffs there involved and in each of the three cases the Trial Court in the exercise of its discretion had suggested the remission of a part of the verdict as an alternative of the granting of a motion for new trial, and the Appellate Court refused to disturb the exercise of the Trial Court's discretion. In this case the amounts of damages allowed by the Trial Court and affirmed by the Appellate Court are interesting. The Trial Court allowed the first plaintiff, a woman, \$15,000.00 for severe injuries to her head and chest, requiring months of painful treatment, the loss of all teeth and permanent disfigurement, and which rendered her neurotic and nervous.

The second plaintiff, an eleven year old boy, suffered a fractured leg and maimed hand which was rendered practically useless: In the course of treatment the leg became infected and thereafter treatment involved keeping the leg in traction for a month, both of which caused great suffering. The Trial Court suggested a reduction of \$5,000.00 in a \$15,000.00 verdict and the Appellate Court refused to disturb this exercise of discretion. The third plaintiff was the husband of the first and the jury awarded him a verdict of \$10,000.00 for loss of service of his wife and for medical damage. The proved medical damage amounted to \$3,046, including an estimate of \$500.00 for future medical treatment. The Court noted that the wife had resumed her work in her husband's shop and noted that during her incapacity a substitute had been hired to work in the shop for

\$540.00 and further observed that under these circumstances future loss of service was highly speculative. It approved the Trial Court's suggested reduction to a total of \$5,000 for medical expense and loss of service. The Appellate Court in this case held that the Trial Court had properly exercised its discretion but that there was no error in refusing further to reduce these verdicts. It is to be noticed that this case was decided in 1936 in the depths of the depression and that the amounts approved were then the equivalent of double the amount in our present inflated currency so that the damages approved by the court for injuries to the wife, which were apparently less serious than the injuries in the case at Bar, were better than 2½ times the amount of the verdict here for Irene Paul's general damages.

Thirdly, in all of the above cases except the Colonial Baking Company case last considered, and in the additional cases mentioned in this sub-section of our brief, it must be noted that the Appellate Courts considered the question of damages without any reference whatsoever to the problem of passion or prejudice of the jury and it is apparent from the decisions that under the rules or statutes there being administered, the court was not required to find passion or prejudice of the jury before the court was entitled to intervene. This is, of course, not the case in Utah. In addition to the cases above considered, as aforesaid, the cases of

Missouri Pacific Transportation Company
vs. Socker,
138 S. W. 2nd 371 (Arkansas, 1940),

and

Carballal vs. Pilgrim Laundry, Inc.
5 N.Y.S. 2nd 38, 18 N.E. 2nd 44 (1938).

and

Duncan vs. Branson,
110 Pac. 2nd 789 (Kansas, 1941),

fall in this classification. They are clearly distinguishable on this ground from the case at Bar and are of no help to the Appellant.

In the Carballal case it is also interesting to note that during the depression the court left the verdict at \$15,000.00 for personal injuries to a 5½ year old child and at \$3,000.00 for her Father's loss of her services. These verdicts are obviously the equivalent of \$25,000 to \$30,000 and \$5,000 to \$6,000 in the present inflated currency.

In the case of

O'Brian vs. J. I. Case Company,
2 N. W. 2nd 107 (Nebraska, Jan. 1942),

the jury awarded \$10,000 for a contusion or bruise of the periostium of the right middle condyle, a bone in the

right elbow, which caused considerable pain, and a 3½ inch cut just below the hairline of the right brow which resulted in a permanent scar. Undisputed medical testimony was that the elbow would become normal and some other scars which had been sustained would diminish with lapse of time. The plaintiff had received moderate shock and anemia and she complained of headache, elbow pain and irritability, but she lost no wages and was not disabled from and could still perform the duties of her employment. For these relatively slight injuries the court held that \$10,000 was excessive and manifestly resulted from passion and prejudice so that a new trial should have been granted. The tremendous difference in the severity and duration of the injuries between that case and the case at Bar makes them readily distinguishable on the facts.

Finally it should be observed that all of the cases cited by Appellant were decided before the presently existing inflation occurred and if the verdicts which were approved by the court were to be translated into inflated dollars of present value, most of them would tend to support the Respondents' position here. None of the cases are authority for the position advocated by the Appellant in the case at Bar.

CONCLUSION

In conclusion it is very respectfully submitted first, that the Appellant's brief fails to state any grounds upon which this court can grant him any relief and sec-

ondly, that when the various presumptions to which the verdict and the trial court's order refused a new trial are entitled and considered, the verdicts complained of are not at all excessive, but on the contrary are very modest, and that the judgment must be affirmed.

Respectfully submitted,

PAUL THATCHER of
YOUNG, THATCHER & GLASSMAN
Attorneys-at-law
1018 First Security Bank Building
Ogden, Utah

MILO V. OLSON, Esquire,
of the California Bar
Attorneys for Respondents.