

1980

Lisa Watters v. Clayton N. Querry, Jean C. Querry,
Charles L. Querry, Elizabeth Hemingway, and
David E. Hemingway : Appellant'S Brief

Utah Supreme Court

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Recommended Citation

Brief of Appellant, *Watters v. Querry*, No. 16897 (Utah Supreme Court, 1980).
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IN THE SUPREME COURT OF THE STATE OF UTAH

LISA WATTERS,)

Plaintiff/Appellant,)

vs.)

CLAYTON N. QUERRY, JEAN C.)

QUERRY, CHARLES L. QUERRY,)

ELIZABETH HEMINGWAY, and)

DAVID E. HEMINGWAY,)

Defendants/Respondents.)

Case No. 16897

(Formerly 15454)

APPELLANT'S BRIEF

APPEAL FROM VERDICT AND JUDGMENT
OF THIRD JUDICIAL DISTRICT COURT
FOR SALT LAKE COUNTY, HONORABLE
JAMES S. SAWAYA, JUDGE

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FILED

MAY - 9 1980

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Clk. Supreme Court, Utah

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STATEMENT OF THE CASE

Personal injuries were suffered by appellant who was driver of the middle car of a three car "chain" automobile accident.

DISPOSITION IN LOWER COURT

Jury trial resulted in verdict finding driver of front car of chain, defendant-respondent, Elizabeth Hemingway, negligent, but with such negligence not found to be proximate cause; found plaintiff-appellant neither negligent nor at fault; found driver of third car, defendant Clayton Querry, 100% at fault. Awarded verdict of \$115,000.00 general damages and \$38,000.00 special damages.

RELIEF SOUGHT ON APPEAL

Defendants Querry settled prior to trial, were not represented by counsel at trial, and are not believed to be parties to this appeal.

Appellant seeks finding that Hemingway's negligence was a proximate cause of the accident as a matter of law, and remand for trial solely on apportionment of fault between Hemingway and Querry, or as secondary alternative, that issues of liability be remanded for trial, or as last alternative, for new trial.

STATEMENT OF FACTS

The accident occurred at 10:00 P.M., February 26, 1976, at 2910 South 7th East, Salt Lake County, Utah, a public highway. Although it was a winter night, the weather was clear, visibility good and the road dry.

All vehicles were driving north, with the Hemingway vehicle making a "U" turn from north to west, then south.

No alcohol was involved.

Plaintiff-appellant is Lisa Watters. She was 36 years of age. She was driving a 1974 Mercury Cougar from her home at 6734 South 1560 East, enroute to the Holy Cross Hospital, where she was due to start night shift work at 10:30 P.M. as a respiratory therapist.

Defendant-respondent Elizabeth Hemingway was driving a 1968 Chevrolet Impala. She was 17 years of age. Defendant-respondent David E. Hemingway is her father. He is a party to the lawsuit only because of his statutory liability due to his being signatory on her driver's license. In this brief, reference to "Hemingway" shall be to Elizabeth Hemingway. She had just dropped off Mike Stewart, who was a friend of her brother, David, at his home on Elgin Avenue east of 7th East. Elgin Avenue is at 3000 South. As remaining passengers, she had her brother, David Ernest Hemingway, and his friend, Randall Rigdon. All were students at Granite High School, with Miss Hemingway being the oldest and the only one with a driver's license.

Miss Hemingway resided at 436 East 4335 South. She intended to go south on 7th East from Elgin Avenue in order to drop off Randall Rigdon who resided southwest from there.

Defendant Clayton N. Querry was driver of the third car. He was 16 at the time of the accident. Jean C. Querry, his mother, is not a party to the action although named in the pleadings, because it was first thought that she was signatory to his driver's license. She has since been released from the case. Defendant Charles L. Querry, Clayton's father, was signatory to his license and so is a party due to his statutory liability as such signatory. All reference herein to "Querry" will be to Clayton Querry. Clayton had been to an L.D.S. Ward basketball game and was on his way home. He was accompanied by a friend, Scott Federson. Clayton resided at 2773 Adams Street. He was using 7th East to get to 27th South where he intended to make a left turn to the west. Clayton did not testify at the second trial, being on an L.D.S. Mission, so his testimony from the first trial was read into the record.

The issue is as to proximate cause of Hemingway. In view of Miss Hemingway's favorable jury verdict, she is entitled to favorable factual interpretation. Accordingly, most facts stated will be from testimony of her and her passengers. Even so, appellant claims that the facts are such that the jury was led into error by errors in law of the trial court and will submit facts supporting this claim of Hemingway's fault.

To ask the court to set aside a jury verdict and the trial court's denial of an NOV motion on the basis that the facts are adequate to show fault as a matter of law requires a detailed exposition of the facts.

The case was tried and appealed once before, reported in 588 P2d 702. In that opinion, most of the essential facts were synthesized as follows:

"At about 10:00 P.M. on February 26, 1976, defendant Elizabeth Hemingway turned her car north onto 7th East Street from Elgin Avenue (about 2950 South in Salt Lake City). She accelerated to the speed of traffic flow (about 50 m.p.h.) while she was moving to her left from the extreme outside (easterly) lane to the inside (against the highway divider) lane. After thus proceeding northward about 600 feet to a break in the divider, she made a sudden stop to await an opportunity to make a left turn. Plaintiff Watters, immediately following Hemingway, managed to stop without contact. But the next following car, whose driver, defendant Clayton Querry, was admittedly inattentive, ran into the back of plaintiff Watters' car resulting in injury to plaintiff and damage to her car.

"The difficulty with the instruction about which plaintiff complains is that, as applied to the instant situation, it would seem to exculpate defendant Hemingway (who created a dangerous situation) if it is found that the defendant Querry (the later actor) was negligent, whether or not the latter's conduct was foreseeable. If the principle of law just discussed is properly applied to the evidence in this case, it appears to us that there is a legitimate question as to whether a jury could reasonably find that defendant Hemingway, in making the alleged abrupt stop, should have foreseen that, in traffic such as there was on that highway, some momentarily inattentive driver following her would not be able to react and brake quick enough to avoid collision with her car or the car behind hers. The instructions should have presented that problem to the jury as contended by the plaintiff."

It should be noted that the dissent was based on a misapprehension of fact. That is, it is based on Miss Hemingway entering the roadway going slower than Watters and continuing to move slowly until she stopped for the turn. Actually, Miss Hemingway accelerated, which led following traffic to think she was moving into traffic flow. Miss Hemingway spoke for herself on the point as follows:

"As I pulled on into lane 2 [next to inside lane], I was probably going from 30-35 and 35 as I changed lanes into lane one and proceed there at 35 until I braked, and I don't know how much I slowed down with that braking motion, but I did accelerate up to no more than 35 m.p.h. and then I proceed to slow back down again as I saw this car approach and pass that break in the island as I turned." [Emphasis added] (Tr. P202, L6-13)

Miss Hemingway's brother, David, agreed testifying that in his opinion she reached a speed of 40 m.p.h. between the two times she braked. (Tr. P265, L1-8)

"Q. In your testimony today, your testimony is that she got up and accelerated, driving down the island to about 40 m.p.h.

A. Yes.

Q. She accelerated promptly, didn't she, when she got into that high speed lane? She moved right up close to the traffic, didn't she?

A. Yes.

Q. ... But when she started to slow down she was about 100 feet from the end of the island?

A. From the break in the island, yes.

Q. And going about 40 at the time?

A. Uh-huh." (David Hemingway's testimony, Tr. P268, L28-P269, L11)

The distances involved were 2,080 feet from Elgin Avenue south to 33rd South, and 360 feet more from Elgin Avenue north to the break in the traffic divider where the accident occurred.

Assuming conservatively that Miss Hemingway had an average speed of 25 m.p.h. from her entry onto 7th East until her stop, she would have traveled the distance in 10 seconds.

As to whether approaching northbound traffic would be obstructed by her stopping, she denied this saying that she looked south from Elgin Avenue, saw traffic at 33rd South, saw the light turn green for the traffic to start, with no traffic in between and so knew that she had plenty of time. (Tr. P201, L3-10; P224, L10-P225, L8) She denied coming to a complete stop, which would have added to her time, before she made the turn. For traffic to have reached her from 33rd South in the same 10 seconds covering 2,440 feet, it would have had to have been traveling at 160 m.p.h.

This tends to confirm her alternate version of the facts in which she admitted that she usually went south about 100 feet to a break in the island, but this time turned north because oncoming traffic was close enough that one of the boys in the car asked her not to go south. (Tr. P211, L4-P213, L14)

When Miss Hemingway moved into the inside lane with traffic close enough to keep her from making the jog to the south as was her custom, she testified the jog took only 3 to

5 seconds. (Tr. P213, L6-14) When she moved from lane two to lane one, she glanced back, saw approaching traffic in her rear-view mirror, but made no estimate of its distance from her. (Tr. P202, L14-29; P227, L1-16)

What did Miss Hemingway do then after she entered the high speed inside lane? She has given two versions. In her most recent version, she traveled slowly looking for the end of the island. (Tr. P203, L2-14)

In her first two versions, at deposition and first trial, as quoted above, rather than going slowly, she accelerated until she got to the island and then slowed abruptly. The former testimony was summarized at trial as follows:

"Q. Do you have an estimate as to how fast you were traveling when you made the lane change?

A. I said 40, but I have gone 40 on the road before and I know now that there wouldn't be any way I could be able to stop if I was going 40. So I am going to say now about 30 to 35.

Q. ... You didn't know where the break in the island was, did you?

A. No, sir." (Tr. P216, L17-29)

During the entire time when traveling in the inside lane and stopping, Miss Hemingway made no effort to check to see how close following traffic was to her (Tr. P227, L1-6), notwithstanding that she knew it was too close for her to have cut south when ~~entering~~ seventh east, and would have to have come closer to her while she accelerated entering the roadway.

When did she next look? After she heard the impact.
(Tr. P217, L9-10; P227, L1-6) Whether she stopped prior to making her turn or not is again a subject on which she gave differing testimony, a major factor on the degree to which she obstructed traffic. As indicated above, in her deposition, she clearly remembered the fact of her stopping, using her recollection that she did in fact stop to arrive at her estimate as to her maximum speed while in lane one. At trial, however, she testified twice that she slowed down, timed the car going south, and swung "very smooth" through her U-turn after it passed without her needing to slow below 5 to 10 m.p.h. and not stopping at all. (Tr. P203, L27-P204, L12; P208, L26-P209, L3) Despite this precise detail, she gave, she admitted on cross-examination that she didn't know whether that fact situation ever happened at all, admitting that she might very well have come to a complete stop for southbound traffic to approach, (Tr. P223, L26-P224, L9) in which case her testimony as to her slow, smooth timed turn would have to be imagination. Either way, she testified that she could have stopped being an obstruction simply by continuing or starting north again, rather than insisting on remaining in position to turn. (Tr. P227, L12-P228, L22)

The look Miss Hemingway made was when she heard the collision. This is when she had just commenced her turn, she stating, "As I rounded the corner, I heard the crash." (Tr. P217, L9-10; P227, L1-6)

Again, there is conflict in her testimony in a vital area-- her awareness at the time of being in the right or in the wrong.

At the second trial, Miss Hemingway testified that she felt she had done nothing wrong and didn't know that her turn was illegal. (Tr. P205, L19-26; P208, L9-16-P209, L11-12)

This was in conflict with her previous testimony in her deposition. (Refusal of admission of this testimony was a primary point in the first appeal, and the evidence was received at the second trial.) She admitted that immediately on getting home on the night of the accident, she went to the home of an older friend to talk to her about the accident and at that time said, "And I just told her that I felt really bad because I felt that I was the cause of an accident." (Tr. P220, L1-20)

Miss Hemingway also testified that at the time the accident occurred, she knew the turn was illegal. (Tr. P220, L21-P221, L1) Her own passenger, Randy Rigdon testified that immediately after the accident there was talk between the three people in the Hemingway car, and that she felt badly because she had caused an accident making an illegal turn. It was Rigdon's opinion that Miss Hemingway had caused the accident. In fact, the next day, through pure happenstance, the small world department, he mentioned to a friend of his, Clayton Querry, that he had been in a car that had caused an accident the night before, to find to his amazement that Clayton was the driver of one of the cars involved in that accident. (Tr. P81, L2-23; P82, L30-P84, L11)

"Q. ...'You know Clayton Querry a little, don't you?'

A. 'Yes.'

Q. 'All right. Do you remember mentioning to him one morning in February the night before you had been in a car that had caused an accident and it turned out to be a small world because he was in the car that did the hitting?'

A. 'Oh yes, I think so.'

Q. 'Do you recall if Liz Hemingway had her left-turn signal on when she was stopped at the end of the island.'

A. I don't." (Tr. P81, L18-27)

Other than that chance comment, Miss Hemingway might never have been found as she left the accident scene without identifying herself.

"Q. Did anybody say anything between you and Liz and her brother about having caused the accident by having been stopped?

A. I think we talked about it, yes.

Q. Now tell as well as you can recall what this talk was.

A. Well, we was just kind of like talking back and forth to each other. I think one of us mentioned that--I don't know if the law--you can't make a turn in that kind of a dip.

Q. You can't make a U-turn?

A. Where there ain't no--

Q. Storage lane?

A. Yes.

Q. Do you know who it was who said that?

A. One of us did, maybe it was me.

Q. Did Liz say anything to indicate that she felt bad about the accident?

A. Yes." (Tr. P83, L21-P84, L11)

Rigdon also confirmed Miss Hemingway and Mrs. Watters that the impact between Watters and Query happened just as Miss Hemingway's turn was starting. (Tr. P80, L4-22)

On that point, Watters had testified that as she was stopping, she saw the lights of the Query car closing behind her and knew she was "in for it," but she felt trapped not being able to change lanes due to other traffic. She tried to accelerate forward the instant that Hemingway commenced her turn. Watters was unsure as to whether she was still stopped or starting at the time of the impact. (Tr. P113, L24-P115, L2; P174, L13-23)

In Watters' opinion, Miss Hemingway was stopped for a very short time (Tr. P153, L10-;7), for a period of probably less than 5 seconds (Tr. P159, L24-P160, L5), and that the accident happened immediately after she (Watters) had stopped. (Tr. P155, L2-9).

Mr. Rigdon estimated Hemingway's stopped time at 5 seconds, 10 at most. (Tr. P79, L7)

It should be noted that the jury also apparently accepted Watters' version of the facts as supported by evidence from other witnesses, as it found her entirely free of negligence and fault.

The testimony of Mr. Query as read into the record was that he glanced over to say something to his companion, the companion said, "Look out," Query looked up, saw the Watters' car in the act of stopping, but not stopped, started to stop himself and ran into the rear of the Watters' car. Query estimated his

speed at maybe 5 m.p.h. less than the 40 m.p.h. he had been traveling at. On this, Query put himself too much at fault. The investigating officer, Trooper LeCours, with 12 years' experience, said that the rather modest damage to the two vehicles was such that the speed differential between Watters and Query was only 5 to 10 m.p.h. He dismissed the accident as a "fender-bender," but had seen severe injuries from such minor accidents on occasion, depending on luck. (Tr. P22, L1-27) LeCours estimated Watters' speed at the time of impact at 5 to 10 m.p.h. and Query's at 10 to 15 m.p.h., based in part on Watter's statement at the accident scene that she thought she had managed to start forward when she was hit. (Tr. P26, L2-7)

Trooper LeCours was confirmed in the 10 m.p.h. impact speed differential between Watters and Query by Watters' expert witness, David Lord. (Tr. P46, L16-P48, L13)

The immediacy of Query's approach and collision in relationship to Miss Hemingway stopping and turning was clear. As Miss Hemingway's own expert, Captain Ed Pitcher, U.H.P., agreed:

"Q. Now with that, everything happens one right after the other, doesn't it?

A. Most likely so, yes.

Q. Its all one continuous chain, isn't it; the first stop, second stop, the third car?

A. Its all interrelated, yes.

Q. Completely interrelated, isn't it?

A. Yes. " (Tr. P303, L23 -P304, L2)

The only other factual point that needs to be covered is as to the emergency causing Miss Hemingway to do what she did. She stated this as follows:

"Q. (by Mr. King) Do you recall during your deposition when I asked you why did you make this U-turn?

'Answer: I was short on time.'

Q. If it had not been for that, you would have gone and made the turn at some other place, wouldn't you?

A. I believe so.

Q. What was the hurry?

A. I guess I was a little put out that my brother asked me to take his friends home and it was late. I don't know what I had done that evening, but I feel that I was just a little short on time and patience, probably with him." (Tr. P222, L23-P223, L3)

Certain facts are in agreement, between appellant and respondent, which include the vital ones:

1. Miss Hemingway, through her attorney, stipulated that her left turn was in violation of traffic code. 46-6-63.10 UCA.
2. Miss Hemingway knew, as she drove, slowed, and, probably, stopped in lane one, that there was traffic following behind her.
3. Miss Hemingway made no effort to determine how close the traffic was.
4. Watters reacted promptly and, when Hemingway's stop became apparent, Watters started to stop.
5. Query started braking before Watters was fully stopped.
6. The impact between Query and Watters occurred immediately after Hemingway started her turn.

Facts of trial are part of the facts of the total case on review. At trial, both parties submitted their proposed instructions at the start of the trial which was on a Wednesday morning, the trial concluding the following Tuesday night. The court did not discuss these proposals, nor its proposed instructions, with counsel until near the end of the trial. It then advised counsel it did not choose to discuss the instructions with them, as the work of the case was hard enough, and it did not want to spend an additional "hour being harangued by counsel" in chambers on the law. The court also indicated that it wanted the exceptions to be taken after the jury was instructed and after the judge had left the bench.

These details are incorporated herein by reference to Annex 1, the affidavit of appellant's counsel, which the court reviewed at the NOV Motion. The trial court was not lacking in candor, and after commenting that counsel was asking the court for a stipulation which the court was not going to give, the court still agreed the facts as stated in the affidavit were substantially accurate. (Tr. P324, L30-P25, L9)

As a result of the court's approach to the instructions, appellant's requested instructions 17 and 17a which set out appellant's theory of liability on the part of Hemingway of improper lookout and obstructing highway were not submitted to the jury, although not disapproved, so that the instructions to the jury do not have a single word in them about any duty of lookout on the part of Hemingway, or any duty on her part not to

obstruct the roadway. Similarly, the instructions have three different and conflicting definitions on proximate cause, while appellant's proposal on proximate cause which was long but carefully tailored to the fact situation was not given, without being approved or disapproved, but simply ignored. Due to this, in the factual context of the trial, the jury had no law before it on which to find Miss Hemingway negligent based on lookout or traffic obstruction, nor the relationship of these acts to her being a proximate cause of the accident.

POINT I.

AS A MATTER OF LAW, RESPONDENT WAS A
PROXIMATE CAUSE OF THE ACCIDENT.

Instruction 24 (Annex 6) shows the kind of difficulty a trial court can have in applying proximate cause. It says that the jury can find Hemingway liable to Watters if the accident happened in the "sequence of events which might reasonably be expected to follow the actions of Elizabeth Hemingway"

This instruction is unfair to Hemingway because liability is the ultimate test and proximate cause, as a matter of law imposing legal liability, cannot be laid on acts which are not wrongful and the instruction is not limited to wrongful acts. Similarly, the court erred in not defining, to protect Watters, either here or at any other part of the instructions, the acts of Hemingway that Watters claimed to be the wrongful acts from which proximate cause arose.

To determine what the wrongful acts of Miss Hemingway were, resort to the basic law is appropriate. Once those acts are defined, determination can be made if their ongoing effect was a proximate cause of the accident.

Appellant cannot seek to hold Hemingway to duties that she did not claim at trial. Appellant claimed three such duties as specified in her proposed instruction 17.

"Plaintiff claims that Elizabeth Hemingway was negligent because she obstructed a moving lane of traffic. Plaintiff claims that this negligence was of three types which are: (1) that she attempted an illegal left turn thereby blocking arterial traffic; (2) that she kept an improper look-out so that she failed to clear the road as oncoming traffic approached; (3) that she failed to drive as a reasonable driver would have and should have under the existing circumstances." (Annex 7)

(Neither this instruction, nor any other instruction dealing with Miss Hemingway's duties to keep a look-out and not to obstruct traffic, went to the jury.)

As stated by Dean Prosser, Prosser on Torts, 4th Ed. §45, p. 289:

"PROXIMATE CAUSE--FUNCTIONS OF COURT AND JURY. (1) The determination of any question of duty, that is, whether the defendant stands in such a relationship to the plaintiff that the law will impose on him any obligation of reasonable conduct for the benefit of plaintiff, is one of law, and is never for the jury."

The court did not assume this responsibility. It submitted the case to the jury with no definition of Miss Hemingway's duties. As proximate cause traces from breach of a duty, the jury had no basis, if it followed the instructions, to do other than release her on the issue of proximate cause.

On the facts, the Watters' car was close behind Miss Hemingway when Hemingway started to stop. This is not in dispute. Miss Hemingway's own proposed instruction, incorporated as instruction 25 of the court's instructions, claimed that Watters followed Miss Hemingway too closely.

In this situation the lead car had control. A glance into her rearview mirror was all that was required of Miss Hemingway. It was not a situation where one might reasonably stop, as in a residential neighborhood. This was the most heavily traveled and highest speed street in Salt Lake County, east of State Street. Miss Hemingway's acts were not accidental, as overlooking a stop sign might be. They were intentional. What she did was done because she chose to do it. There was no crisis created by others forcing her to act without thought.

Are the duties claimed by Watters against Hemingway appropriate? The answer to this question lies in the concept of foreseeability, and that lies in the fruits of the exercise of the legal duty to think.

Palsgraff v. Long Island Railway, 162 NE 99, 59 ALR 1253 (NY, 1928), deserves its prominent place in the lexicon of proximate cause. The important aspect of that case applies with equal force here. Justice Cardozo found that the railroad guards in pushing and pulling the passenger onto the train had no reason to foresee that the newspaper wrapped package he carried contained explosive fireworks. If they had thought and considered the matter, their actions would have been the

same because they were simply assisting a passenger with no known risk of harm. Accordingly, they breached no duty to the passenger at a remote part of the railway platform who was injured when the explosion of the fireworks contained in the package knocked the heavy scales onto her.

Justice Cardozo reasoned that one has a duty to avoid conduct which is foreseeably dangerous to another. Duties do not exist "in the air" as he put it, but must anchor to something tangible. As no risk was to be anticipated, no duty to avoid risk arose. As no duty arose, the question of proximate cause never arose. Proximate cause as used in law cases is a legal term. It means legal responsibility for the consequences of a negligent act. As there was no negligent act, hence no duty breached, he concluded that the issue of proximate cause was "foreign to the case before us," and put plaintiff out of court. However, his rationale puts Miss Hemingway in court.

Justice Cardozo's thinking is much similar to Dean Prosser's. It is for the court to determine duties. A jury can weigh facts but legal concepts--because they are law--is beyond them, and for the courts. These legal determinations arise as appropriate from the facts of the case.

One of the clearest expressions of the duty of the primary actor is a 97 year old English case which is still cited and used as a basis for the present English rule. Relating the relationship of an act and its legal effect to legal cause, the opinion states:

"... That whenever one person is by circumstances placed in such a position in regard to another that everyone of ordinary sense who did think would at once recognize that if he did not use ordinary care and skill in his own conduct in regard to those circumstances, he would cause danger of injury to the person or property of others, a duty arises to use ordinary care and skill to avoid such danger." Kevin v. Pender, 11 QBD 503 (1883), Brett, MR. as quoted and explained at Torts, 3d Ed., p. 163-165, Schulman, James & Grey, 1976.

The English opinion goes to the heart of it,

"If everyone of ordinary sense who did think would at once recognize"

To approach the concept of what is reasonable conduct by asking one to think has a nice commonsense clarity. It also ties in with Prosser and Palsgraff. Think--is there a risk--act accordingly. It helps us determine what our "reasonable man" should do.

The foregoing citations have not been for the purpose of rhetoric, but function. Applying them to Miss Hemingway's conduct, at the very least, she had a duty to think, to ask herself what would happen if she created an embolism in the artery? The thought would have led to the look, the look would have led to the knowledge of danger --if she didn't already have that knowledge. It is always possible that Miss Hemingway is of the type who simply does what they want in traffic and lets others brake as they will.

Miss Hemingway had to know that traffic was behind her because she had seen it. She had to know that she had not reached the flow speed, which customarily is around the speed limit, so

that as she traveled the 360 feet from Elgin Avenue to the end of the island, she had to assume traffic was closing on her. These were things she admits she knew. There is no question on them. Knowing that traffic was approaching, she had the duty to determine if what she wanted to do would expose others to a risk of harm or not. If so, her duty was to choose a safer course.

Miss Hemingway's duties are self-defining on analysis of the facts. As requested by Watters at trial, they were to keep an adequate look-out and not to create a hazard by blocking the traffic lane.

The original opinion of the Utah Supreme Court is clear on this. It refers repeatedly to Miss Hemingway's "stop," and makes only passing reference to the left turn. It was the stop, whose obstructive effects were still existing, which caused the collision. Duty, breach, and resulting harm are, as stated by Miss Hemingway's own expert, "completely interrelated." (Tr. P303, L23-P304, L2)

Accordingly, as a matter of law, Miss Hemingway is part of proximate cause unless the later act of Query releases her. That is the next point.

POINT II.

THE LATER ACTOR'S CONDUCT WAS NOT OF
SUCH CHARACTER AS TO RELIEVE THE FIRST
ACTOR OF RESPONSIBILITY FOR PROXIMATE
CAUSE.

The most recent case in point, Jensen v. Mountain States
Tel & Tel. Co. et al., Utah, 16417, filed April 15, 1980, draws

a fine distinction which is highly applicable to the case at bar.

There, the telephone company doing work in an intersection, put out excellent warnings of the presence of its van in the intersection. Should any person have driven into the van, they would probably have been sole proximate cause of the accident as not being able to see and avoid the van was not probable. However, the case involved two cars which collided with each other trying to work through the blind area created by the van's presence. It was foreseeable by the telephone company that in trying to get through a crowded intersection, such accidents might occur. The telephone company had made no provision, such as a flagman, to assist traffic in getting by the hazard it had created.

In an analysis very similar to that in Palsgraff, the court reversed a non-suit in favor of the telephone company, remanding for trial because of foreseeability of the hazard that produced the accident as a jury question. The duty to foresee was found as a matter of law by the appellate court's review of the facts.

This test of duty arising from foreseeability is precisely the reason that Miss Hemingway had duties.

An important part of Jensen, supra, as applied to this case, is its rejection of the argument that regardless of the fault of the telephone company, the later act of the automobile drivers was an intervening act which superceded the negligence of the company, thereby insulating that negligence from being a substantial factor in causing the collision.

Rejecting the argument that a later independent act of negligence breaks the chain of proximate cause, the court quoted Hillyard v. Utah By-Products Co., 1 U2d 143, 263 P2d 287, which held that a later act of negligence would be the sole proximate cause only when it "was so unusual, so out of the ordinary, so unforeseeable as to be unanticipatable from a legal point of view."

The Jensen opinion then went on to cite the Restatement of the Law of Torts with approval which put strong duties on the original wrongful actor (contra to what was done by the trial court in the case at bar), setting up three situations in which an independent later negligent act does not relieve the original actor. These being, that a later actor might reasonably act as the injured party did; that the later act would not be regarded as highly extraordinary; or that the later act was a normal but negligent response to the situation and the manner in which it was done was not extraordinarily negligent. The basis stated in the Restatement and as approved by the court was that:

"The first actor cannot excuse himself from liability arising from his negligent acts merely because the later negligence of another concurs to cause injury, if the later act were a legally foreseeable event." [Emphasis not added]

There is nothing in the fact situation which makes Query's conduct in any way "extraordinarily negligent."

The sequence of time and distance was too short. If Query had had such time and distance "after being charged with knowledge of the hazard," as stated in Hillyard, supra, then his

act could be a later intervening act and sole proximate cause. However, without any dispute in the evidence, he was in act of stopping before Watters had completed her stop. There could not have been a delay in his reaction and braking of more than two or three seconds. This was ordinary negligence, if negligence at all.

In accord, Holmes v. Nelson, 7 U2d 435, 326 P2d 722, (Court has power to analyze difficult fact situation), King v. Union Pac. R. Co., 117 U 40, 12 P2d 692 (if evidence untenable, verdict can be modified).

While last clear chance and the extraordinary act of negligence of a later actor that breaks the chain of proximate cause are not judicially equated as being the same, their elements are remarkably similar, and last clear chance is helpful in defining that act which releases an earlier wrongdoer from liability.

Jensen v. Denver & Rio Grande Ry. Co., 44 U 100, 138 P 1185 (1914), is a well respected case on that, requiring the later actor to be in a position where he knew or should have known as a matter of law of a hazard in front of him; that after he is charged with that knowledge, and he has a clear opportunity to avoid an accident, yet proceeds and causes the accident, then and only then, he has the last clear chance.

A series of Utah cases considering the later independent actor is submitted by appellant as being all in accord as a matter of law, Querry's act was not the sole proximate cause

of appellant's injuries although it was one of the proximate causes.

Toma v. Utah Power & Light Co., 12 U2d 278, 365 P2d 788:

"An injury due to neglect of duty on the part of a defendant cannot be avoided because a similar duty rested upon another who violated his duty. One, in such manner, cannot escape the consequences of his own act."

Nyman v. Cedar City, 12 U2d 45, 361 P2d 1114;

Martin v. Stevens, 121 U 484, 243 P2d 747;

McMurdie v. Underwood, 9 U2d 400, 346 P2d 711;

Velasquez v. Greyhound Lines, Inc., 12 U2d 379, 366 P2d 989;

Taylor v. Johnson, 18 U2d 16, 414 P2d 575.

In sum, the principle for which appellant claims that Hemingway is liable as a matter of law is stated in relation to the amount of a verdict but appropriate all the same in Bodon v. Suhrmann, 8 U2d 42, 327 P2d 826:

"In such instances, the court exercises its inherent supervisory powers over jury verdicts, which derive from their duty to see that justice is done; and make corrective orders necessary for the purpose. This is done by the trial court, or upon its failure to do so, by this court on appeal."

POINT III.

APPELLANT WAS PREJUDICED BY NOT HAVING HER THEORY OF THE CASE SUBMITTED TO THE JURY.

Error is prejudicial when it is substantial and a reasonable likelihood exists that in the absence of the error, the result would have been different. Ortega v. Thomas, 14 U2d 296, 383 P2d 406.

A party is entitled to have his theory of the case submitted to the jury and the failure to do so is prejudicial error. Morrison v. Perry, 104 U 151, 140 P2d 772; State v.

Valdez, November, 1979, #15920, Utah.

In this case, respondent's theory of appellant's negligence was submitted to the jury as instruction 25.

Appellant's theory as to the forms of negligence of respondent was not submitted to the jury. These were included in instruction 17 of appellant's request setting forth the kinds of negligent acts claimed, and 17a defining the terms used in 17 (Annexes 7 and 8).

The facts surrounding the rejection of the instructions by the court are set forth in counsel's affidavit, Annex 1. The regrettable thing is that the rejection was not based on the merits of the proposed instructions but on the fact that appellant had not requested them in the first trial.

These instructions were proper statements of the law, based on the evidence before the jury. The court's refusal to give them denied appellant's vital theory of proximate cause from going to the jury, because it was improper look-out and the obstruction of traffic that were the duties whose breach continued into the accident, whereas the left turn was a fait accompli before the accident occurred.

Not only did the trial court refuse to allow appellant to improve her thinking from trial to trial, it simply declined to revise the instructions from the previous trial even though it had criticized those instructions as "poor." The court stated:

"The Court: For better or worse--I don't take credit for their authorship or for their accuracy or for their

Mr. King: Freedom from error. One last matter.

The Court: I will give Judge Snow all the credit for these instructions." (Tr. 313, L30-P314, L4)

POINT IV.

THE COURT ERRED BOTH IN TWICE INSTRUCTING THE JURY THAT A LATER ACT OF NEGLIGENCE WAS SOLE PROXIMATE CAUSE, AND IN OVERLOOKING THE MANDATE OF THE SUPREME COURT ON THAT POINT.

"D. By 'proximate cause' is meant that cause which in a natural, continuous sequence, unbroken by any new cause, produced the injury and without which the injury would not have occurred." [Emphasis added] Instruction 7D (Annex 2)

This is the same concept as that given by the court at the first trial on which reversal was based, i.e., a later act of negligence breaks the chain of causation. Accordingly, the court's previous holding in this case is submitted as being dispositive.

Instructions are to be tailored to the fact situation.

Mackey v. Harvey, 572 P2d 382 (Utah, 1977), Lund v. Mountain Fuel Supply Co., 12 U2d 268, 272; 365 P2d 633; and if not and misleading, reversal is appropriate. Watters v. Querry, 588 P2d 702 (Utah, 1978); Ortega v. Thomas, 14 U2d 296, 383 P2d 406.

Appellant had submitted a detailed instruction on proximate cause tailored to the facts, designed to accomodate situations in which a later negligent driver was and was not an independent new cause adequate to break the existing chain of proximate cause. This is attached as Annex 9.

This instruction was submitted as being identical to the court's instruction 7 through sections A, B and C, and simply inserted in D a longer more appropriate proximate cause clause. As indicated, this was rejected by the court without consideration of its merit because the court relied on the first trial instructions.

Its instruction 17 (Annex 3) dealt with concurring causes of an accident. "Concurring" was the wrong term as that is at the same time, and here the acts were successive. The instruction thus was inappropriate.

Worse, it compounded the erroneous message of instruction 7 by stating again that a proximate cause is "unbroken by an efficient intervening cause." Mr. Query was exactly that--an efficient intervening cause. What he was not was an extraordinarily negligent driver. No saving definition was given as to the court's terms, "efficient," and "intervening."

The final instruction on proximate cause given by the trial court, instruction 24, is attached as Annex 6. It is the instruction previously considered by the Utah Supreme Court with the last sentence deleted. It fails to cure the error and confusion of the other two instructions. Calahan v. Wood, 24 U2d 8, 465 P2d 169.

POINT V.

THE COURT ERRED IN NOT ALLOWING COUNSEL TO
SEE, CONSIDER AND TAKE EXCEPTION TO, THE
COURT'S PROPOSED INSTRUCTIONS.

The facts are covered in Annex 1.

All this occurred, it is submitted, because the requirements of Rule 51, URCP, were not complied with, it requiring as a minimum that exceptions be taken in the presence of the court before the jury is instructed so that the court can correct oversights and mistakes before the act, usually irretrievable, of submitting the case to the jury.

CONCLUSION

On her first appeal, appellant sought an opinion finding respondent liable as a matter of law. This time, she restates that request. The additional evidence from the second trial has tightened the case so that such determination can now more readily be made.

It is unusual to have two juries go down the same, wrong, fork in the road, but then each received the same, wrong, directions.

The parties have all suffered four years of cost and uncertainty.

Appellant asks the Supreme Court to remand for trial on as few issues as possible.

In some cases, the court on appeal makes specific findings covering liability, as recently done in Hahn Inc. v. Armco Steel, (Utah, September, 1979). To end this case, appellant proposes she would accept a judicial determination and directive that both defendants are 50% at fault and if that be rejected by respondent, new trial solely to apportion liability between defendants.

DATED May 9, 1980.

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SAMUEL KING

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