

1954

# Leonard Bates v. Odell Walker Burns et al : Brief of Defendants and Respondents

Utah Supreme Court

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Stewart, Cannon & Hanson; Attorneys for Defendants and Respondents;

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

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LEONARD BATES,  
*Plaintiff and Appellant,*

— vs. —

ODELL WALKER BURNS, and ODELL  
WALKER BURNS, FARRELL BURNS,  
and FRANK D. BURNS, doing business  
as a copartnership in the name and style  
of BURNS FEED AND SUPPLY COM-  
PANY,

*Defendants and Respondents.*

Case No.  
8207

NOV 30 1954

Supreme Court, Utah

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BRIEF OF DEFENDANTS AND RESPONDENTS

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STEWART, CANNON & HANSON  
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Respondents*

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## BRIEF OF DEFENDANTS AND RESPONDENTS

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### NATURE OF THE CASE

This appeal arises out of an automobile accident which occurred on October 9, 1952, at the intersection of U. S. Highway 91, a through highway, and Utah Highway 114, also known as the Geneva Road and Third West Street, in Pleasant Grove, Utah. Plaintiff had been traveling in a generally north direction along U. S. Highway 114 and was driving a pick-up truck through the intersection to proceed north on Third West in Pleasant Grove, Utah, when his pick-up truck was struck by a coal

truck driven by the defendants, which had been traveling west upon U. S. Highway 91, towards Salt Lake City, Utah. At the conclusion of plaintiff's evidence, defendants moved for a directed verdict. The court reserved its judgment and submitted the case to the jury, who returned a verdict itemized as follows:

Physical injury, pain and suffering.....	\$
Medical Expenses .....	\$ 214.50
Loss of earnings during recuperation....	\$1,000.00
Permanent disability.....	\$4,000.00
Pick-up truck .....	\$ 565.00
Total .....	\$5,779.50

(R. 171)

Thereafter, the court, pursuant to defendants' motion, set aside the verdict and entered a judgment of no cause of action in favor of the defendants (R. 237-8) on the grounds that the plaintiff was guilty of negligence which proximately contributed to cause the collision as a matter of law.

The questions presented by this appeal are two-fold: Whether the evidence sustains the court's finding that the plaintiff was guilty of negligence which was a contributing cause of the accident and his resulting injuries, and, in the event the court should see fit to reinstate the verdict, should it be reinstated in view of the fact that it is erroneous, the verdict being invalid and there being no evidence or findings to sustain damages for loss of earnings or permanent disability?

## STATEMENT OF FACTS

The intersection where this accident occurred is located south of Pleasant Grove in Utah County. It is formed by the crossing of U. S. Highway 91, which at this point runs generally east and west, and a highway extending generally north and south designated as Highway 114, or the Geneva Road south of the intersection and Third West Street north of the intersection (See Exhibit A).

U. S. Highway 91 is the preferred highway. There are stop signs located on the northwest and southwest corners of the intersection, so that cars entering the intersection from the Geneva Road or Third West Street are obliged to stop before entering (Exhibit A).

Plaintiff was thoroughly conversant with the intersection having made the same trip six days a week for some time (R. 59). He testified that at times the traffic along U. S. Highway 91 was very heavy. There is evidence he had been required to wait as long as fifteen minutes before entering and crossing the intersection.

On the day of the accident at about two o'clock P.M., the plaintiff, a man sixty-nine years of age (R. 83), was driving his pickup north on the Geneva Road (R. 58-59) on his way to the Jacob Feed Mills of Pleasant Grove, Utah, to get a load of feed for turkeys that he was raising. The weather was clear and the pavement dry. He testified that as he reached the intersection he stopped at the stop sign, remaining stopped for four or five minutes as the traffic on Highway 91 was heavy. Then he started across the intersection (R. 61) at a speed of five to six

miles per hour (R. 62). He testified on direct examination that he did not see defendants' truck until it was "maybe 150 feet" away and speeded his pick-up truck up a little "on the last end" to get through the intersection. (R. 62) On cross-examination, the plaintiff estimated that he was past the center of Highway 91 (R. 89) when he first saw the defendants' coal truck 100 to 150 feet away (R. 90). He denied ever making the statement (See Defendants' Exhibit 1): "I did not see the truck or know it was near until it hit me," although he admits that he signed the statement (R. 93). He admitted that he may have forgotten that he did not see the truck at all. (R.90) The point of impact was approximately 125 feet from the stop sign where the plaintiff had stopped (Exhibit A). A line drawn on Exhibit from the point where the stop sign was located would indicate a vehicle approaching the intersection from the south would have been visible when 368 feet from the intersection, provided that trees and foliage on the south west corner of the intersection did not obstruct the line of visibility.

The plaintiff did not recall seeing Dr. Paul V. Christopherson, whom he knew, drive a car east toward the intersection and turn south onto the Geneva Road while plaintiff was stopped at the stop sign (R. 88). Paul V. Christopherson testified that he was personally acquainted with the plaintiff (R. 103). Immediately prior to the accident he had been traveling east on U. S. Highway 91 (R. 104). As he reached the intersection, he made a right hand turn onto Geneva Road (R. 104). As the witness passed the plaintiff's truck, which was then



stopped in the vicinity of the stop sign, he nodded to the plaintiff, who did not return his salutation (R. 105). Plaintiff was looking to the west out of the window at the time he was observed by the witness. As the witness drove past him, the plaintiff started his pick-up truck through the intersection. Apparently Dr. Chrisopherson became apprehensive by reason of the inattention of the plaintiff to traffic upon U. S. Highway 91, and watched him in the rear view mirror as plaintiff proceeded into the intersection (R. 106). He testified that he saw the plaintiff's truck start through the intersection and proceed to a point about 6 to 10 feet north of the center line where the collision occurred (R. 107). After the collision, the witness returned to the scene of the accident. From his observations both before and after the collision, the witness expressed the opinion that the defendants' coal truck was not traveling fast (R. 114).

La Var Holdaway, plaintiff's witness, testified that he was stopped at the stop sign at the northwest corner of the intersection waiting for the coal truck to pass at the time of the collision (R. 23). He saw plaintiff's pick-up truck stopped across U. S. Highway 91 (R. 23). He watched the pick-up move forward into the intersection (R. 23). As plaintiff proceeded through the intersection, he did not change his rate of travel, stop, or turn his vehicle at any time before the collision (R. 29-31). It appeared to the witness that plaintiff did not see the coal truck (R. 29).

La Var Holdaway testified further that he observed the coal truck approaching at a normal rate of speed,



at one time estimating the speed at 40 to 50 miles per hour and at another at 40. The plaintiff crossed in front of the coal truck when it was 50 to 75 feet from the plaintiff's pickup (R. 30). The driver of the coal truck applied the brakes and swerved toward the witness's car, almost striking the front of the witness's car, in an effort to avoid the collision (R. 30-31).

Ione Garbin testified that she lived on the northwest corner of the intersection (R. 130). At the time of the collision, she was standing in her kitchen door calling her daughter and two grandchildren for lunch. From where she was standing she had a clear view of the intersection and first observed the plaintiff's pick-up truck as it started across the highway (R. 131). The pick-up proceeded very slowly across the intersection and neither stopped or turned or otherwise attempted to avoid the collision (R. 132). She also observed the coal truck and saw the driver of that truck attempt to avoid the pick-up and still not strike a car which was stopped at the stop sign on the north side of the highway (R. 132). The witness testified that since the accident, the southwest corner of the intersection has been re-graded and the weeds on that corner removed to give drivers a better view of approaching traffic (R. 133).

Mack Ostergaard testified that on October 9, 1952, he was employed as a police officer for Linden City and was called to the scene of this accident (R. 115). Upon arriving at the scene, he first went to the plaintiff to see if he could be of any assistance. Mr. Bates told him, "I don't know what hit me." Odell Burns, driver of

defendants' coal truck, told him, "I didn't have a chance. He pulled right in front of me." Mr. Burns estimated his speed at 35 miles per hour just before the accident, and said that he had tried to drive between the two cars, the pick-up and the car parked on the north side of the intersection, and had tried to avoid hitting either of them (R. 117).

The police officer testified that since the accident the area on the southwest corner of the intersection has been graded to give better visibility of approaching traffic (R. 118). The witness located the point of impact by the debris on the highway as being on the north side of U. S. Highway 91 and in the normal lane of traffic for cars traveling north on Third West Street. He placed an "(X)" on Exhibit A where he believed the point of impact to be (R. 119). From this point there were skid marks extending back up Highway 91 for a distance of 22 feet, presumably laid down by the coal truck.

Odell Burns, the driver of the defendants' coal truck and one of the defendants herein, testified he was traveling west on U. S. Highway 91 at a speed of 35 miles per hour (R. 138-140). When he was within approximately 100 feet of the intersection, he saw the pick-up truck start across the highway from the south going north (R. 169). He expected the pick-up to stop, but honked his horn and turned slightly to the right. The pick-up kept coming north without changing its speed, turning or in any way changing its course. When it became apparent that it was not going to yield the right

of way, he applied the brakes and turned his truck to the right (R. 139).

Mr. John Stewart, testified that he took the statement, defendant's Exhibit 1, wherein the defendant said that he did not see the truck or knew it was near until it hit him. The statement was taken in the presence of Mrs. Bates and was read by Mr. Bates before he signed it. At the time Mr. Stewart went out to see Mr. Bates, Mr. Stewart testified that he had no connection with either Mr. Bates or the counsel for the defendant. Testifying out of the presence of the jury, Mr. Stewart testified that he was employed by the Farmers Insurance Company at the time. When the statement was taken he did not recall whether or not Mr. Bates was insured with his company but that his employer did not have any business connection, relationship or connection of any kind with the Burns Feed Company, the partners in that company or the attorneys for the defendants.

On the question of the injuries sustained, the only evidence presented was the testimony of the plaintiff, his wife, and his daughter and a stipulation between the parties. They testified that the plaintiff had received a cut on his head two and a half inches long (R. 35-68), a lump on his forehead, and his right eye was swollen, his knees were cut, and he had a sprained shoulder (R. 27). It was stipulated that the plaintiff received seven simple fractures of the ribs, and at the time of the trial, the ribs had fully healed. No X-rays were produced. There was no medical testimony that plaintiff sustained any permanent disability. The only evidence

was that he was that he was forgetful (R. 39-53), and that he cannot do the work now that he could do before the accident (R. 40-54). He admitted that he had not done heavy work before the accident.

Plaintiff claimed to have lost a number of turkeys in the year 1952 as a result of this accident. An examination of his testimony which appears in the record starting on page 75 will show that the evidence in this regard is extremely speculative. Mr. Bates testified:

“Q. Now, your wife testified that you raised quite a number of turkeys in 1952. How many?

A. Well, I got 6,000 to start in with, but I lost, oh—I marketed about 5,200.

Q. 5,200. That would be a loss of about 800.

A. Yes, sir—800.

MR. HANSON: 800.

MR. STEWART: Pardon me. Now, in connection with your loss of turkeys, do you know approximately how many of these were lost after October 2, 1952?

A. No, I couldn't tell you.

Q. Have you some idea?

A. No, I haven't any idea.

\* \* \*

MR. STEWART: Were any of the turkeys in 1952 lost after October 9th of that year?

A. Oh, yes. Well, after October 9th, there were several lost between then and the time I marketed them, on the 1st of December.

Q. Would you have any idea approximately how many were lost?

\* \* \*

A. Well, I should judge—you take later in the

season, when your turkeys is about ready for market, why you lose a few more than you do earlier. I should judge maybe I lost 200.

\* \* \*

Q. Now was the loss, a higher loss than ordinarily for that season of the year?

\* \* \*

A. It all depends on the season. Now we had quite a lot of storm in October of 1952, and November, and when the turkeys get heavy, that is when you have quite a loss.

\* \* \*

Q. Now as a result of your accident, can you trace any of your losses to the fact that you were incapable of looking after your turkeys that year?

A. Well, I wasn't able—as a general rule, I go through my turkeys twice and three times a day, and I watch them pretty close, and I wasn't able to do it.

\* \* \*

Q. What part of that loss would you say?

\* \* \*

A. I should judge I lost about thirty-five per cent more.

Q. Thirty-five per cent more?

\* \* \*

MR. STEWART: What did you receive for your turkeys that year?

\* \* \*

A. I got thirty-eight cents a pound, that was for A's. Then the B's was three cents below that, and the C's were two cents—and ten cents below that.

Q. Now can you tell us of the 200 that you lost, about what percentage were A's and what were B's?

A. I couldn't tell you that.

Q. You haven't any way to arrive at that?

A. Most of your turkeys, if your herd is in good shape, they are pret' near all A turkeys. They will run about, around, oh pretty close to eighty per cent, between seventy-five and eighty per cent.

Q. That is of your herd?

A. Herd.

Q. Now, of the 200, would there be some way to guess at that, or estimate it?

\* \* \*

A. Well I should judge that there was, out of that 200, there was anyway 150 of them A turkeys.

\* \* \*

Q. That would leave you 50 turkeys?

A. That would leave 50 turkeys for B's and C's.

Q. Now, I'm trying to get at the 70 that you lost, or thereabouts, as a result of your not being able to be on the job.

MR. HANSON: We object to that as leading and suggestive, and repetitious, Your Honor, he testified about the storms. Apparently the man doesn't know. And counsel keeps asking him the same question.

We object to it as repetitious."

Mr. Bates testified further in this regard that he

had to hire additional help to raise his turkeys in 1953 because of his injuries. In the year 1952, he stated he made about \$2,000.00 net, but that in 1953 he ran more turkeys grossing \$58,038.67 and netting \$8,212.35, It appeared that the plaintiff had made considerably more from the operation of his turkeys after the accident than he had the year before.

In his brief, plaintiff has presented his argument in four points. The first three appear to be directed toward the proposition that the evidence did not sustain the court's finding that plaintiff was guilty of negligence as a matter of law. The last point appears to be directed toward the entry of the verdict of the jury. We will deal with the argument under the following statements of points:

## STATEMENT OF POINTS

### POINT I.

THE EVIDENCE SUSTAINS THE FINDING THAT PLAINTIFF WAS NEGLIGENT AS A MATTER OF LAW, AND THAT HIS NEGLIGENCE WAS A PROXIMATE CAUSE OF THE COLLISION.

### POINT II.

THE VERDICT RETURNED BY THE JURY WAS IMPROPER ON ITS FACE AND NOT SUPPORTED BY THE EVIDENCE.

## ARGUMENT

### POINT I.

THE EVIDENCE SUSTAINS THE FINDING THAT PLAINTIFF WAS NEGLIGENT AS A MATTER OF LAW, AND THAT HIS NEGLIGENCE WAS A PROXIMATE CAUSE OF THE COLLISION.

Much of the plaintiff's argument is dedicated to a



discussion of whether the driver of the defendants' coal truck was negligent. Without conceding that the driver was negligent, we wish to point out that the verdict in this case was set aside on the grounds that the plaintiff "was negligent as a matter of law and, likewise, as a matter of law, his negligence proximately contributed to produce the accident and his own injury and damage." We will, therefore, confine our argument to a discussion of the plaintiff's own negligence.

The assertion is made that in reviewing the court's action on this motion, we must review the evidence in its most favorable light to the plaintiff. We do not controvert this proposition and will not, therefore, cite any authorities on this point.

The evidence in this case is that the plaintiff was well acquainted with the intersection which was on occasion very busy. Frequently, plaintiff had to wait a considerable time for traffic to clear before entering the intersection. Reference to Exhibit 1 will illustrate that the stop sign is located a considerable distance south of the intersection. At that point the plaintiff would have had a view of traffic approaching the intersection on the east for a distance of 368 feet, except that the foilage on the southeast corner of the intersection may have blocked his view. He testified that he looked both ways and he could not see but what the highway was clear. There is no evidence in the record that he looked toward the east again, the direction from which the coal truck came, until after he had entered the intersection and crossed the center line of U. S. Highway 91. The witness Paul

Christopherson, testified that plaintiff was looking west and continued to do so as he entered the intersection. Had plaintiff looked to the east, he would have probably seen the defendants' truck approaching, as La Var Holdaway did as it was only 100 feet from the intersection at that time. If this were the case, plaintiff would be guilty of negligence as a matter of law in entering the intersection. If the truck were not within his range of vision, which was somewhat greater than 368 feet, plaintiff had ample time to enter the intersection and drive through the same safely before the coal truck traveling from 35 to 50 miles per hour could have reached the intersection, that is, had he proceeded at a reasonable rate of speed. The evidence shows that he entered the intersection; <sup>and travelled</sup> ~~that is, had he proceeded at a reasonable~~ the approximate <sup>125</sup> ~~15~~ feet to the point of impact at a speed of only 5 or 6 miles per hour.

The witness, La Var Holdaway, who was stopped at the stop sign across the intersection testified that at the time the plaintiff entered the intersection the witness could see the coal truck and was waiting for this truck to pass. Plaintiff drove to the point of impact without either slowing or increasing his speed or varying the course of his vehicle. It appeared to the witness and the conclusion is warranted that the plaintiff did not see the coal truck. The other eye witness, Ione Garbin, testified the same. The plaintiff himself told the investigating police officer that, "I don't know what hit me." Plaintiff signed a statement to the effect, "I did not see the truck or know it was near until it hit me."

It therefore appears from the evidence that the plaintiff drove through a busy intersection without looking in the direction from whence came the car that struck him, either as he entered or proceeded through the intersection at the very slow speed of 5 to 6 miles per hour.

This accident could have been avoided at any time by the plaintiff by one or more of the following actions. He could have looked for approaching traffic from the east before entering the intersection. Had he seen defendants' coal truck approaching, the plaintiff need only have waited until the vehicle passed the intersection. Not seeing the coal truck, plaintiff would have had plenty of time to cross the intersection had he proceeded at a reasonable speed and not at a speed of only 5 to 6 miles per hour. As the plaintiff drove into the intersection, his range of vision naturally became greater than the 368 feet that he had at the stop sign. Had he been properly observant as he drove through the intersection, the coal truck would have been apparent to him at some point prior to the collision. In this event, plaintiff needed only to have slowed his vehicle slightly or increased his speed in order to have avoided the collision. Thus, it becomes apparent that his failure to look, or if he looked, his failure to see was a proximate cause of the collision.

Plaintiff cites a number of cases purporting to support the proposition that the question of whether or not the plaintiff was guilty of negligence in this case was a jury question. In none of these cases was the negligence of the plaintiff or the causal relationship of that negligence to the injury as clearly shown as in this case. The

collision in the case of *Martin v Stevens*, 243 Pac. (2d) 747,.....Utah....., occurred at an open intersection in a residential area where neither driver was preferred to the other. Plaintiff in that case testified that he looked to the east when approximately 20 feet from the intersection and saw no car in the direction from whence the defendant came. The plaintiff proceeded into the intersection at a speed of 10 to 15 miles per hour where he was struck by a car which was exceeding the speed limit. In the case at hand, we have no evidence that the plaintiff looked as he entered the intersection. In fact, the evidence is to the contrary. He was entering a preferred highway, and therefore had a higher degree of duty than that in the case above cited. Moreover, he drove through the intersection at a speed of only 5 to 6 miles per hour.

Likewise, in the case of *Poulson v Manness*, 241 Pac. (2d) 152,.....Utah....., the evidence was that plaintiff looked in the direction from whence the defendant came and could not see a car within 400 feet of the intersection and was struck while crossing the intersection by a car which was approaching, not at a rate of 35 to 50 miles per hour as here, but at a rate of 70 miles per hour.

In *Lowder v. Holley*, 233 Pac. (2d) 350, .....Utah..... plaintiff also testified that he looked before entering the intersection, but could see no car within 40 rods of the intersection and was struck by a car traveling at an excessive rate of speed.

The factual situation in *Hardman v. Thurman*, 239 Pac. (2d) 215,.....Utah....., is not analagous to the factual

situation in this case. In that case, Mrs. Hardman was driving in a southerly direction on State Street in Salt Lake City, Utah, intending to turn east on Twenty-First South Street. As the light turned green at Twenty-First South Street, she stopped momentarily to permit north-bound traffic to proceed. An oil tanker which was proceeding northward in the first lane east of the center of State Street stopped at the south line of the intersection signalling for a left-hand turn. A car in the second lane east of the center of State Street stopped as Mrs. Hardman started to turn east. Mrs. Hardman observed no cars in the third lane to the east of the center of the street, but as the Hardman car reached a point where it would have been crossing the third lane, a trailer truck operated by the defendant struck her automobile. The court found that in view of the street plan at the intersection, it was not unreasonable for Mrs. Hardman not to expect any through traffic on the third lane and she might well have been unable to see the defendant's vehicle because of the other cars which were stopped at the intersection.

The case of *Conklin v. Walsh*, 193 Pac. (2d) 437, 113 Utah 276, involved the duties of one traveling upon an arterial highway to observe traffic which might enter upon that highway from intersecting highways. In that case there was no question but that the driver of the car entering the arterial highway was guilty of negligence, the question being whether her negligence, she being the wife of the owner of the automobile she was driving, could be imputed to the owner.

The case of *Nielsen v. Mauchley*, 202 Pac. (2d) 547, 115 Utah 68, likewise deals with the duty of one traveling upon an arterial highway to observe other vehicles entering upon a highway, in that case from a driveway.

The same problem was involved in *Hess v. Robinson*, 163 Pac. (2d) 510, 109 Utah 60.

In *Martin v. Stevens*, supra, the court discussed those cases in which the driver was held guilty of contributory negligence as a matter of law: *Bullock v. Luke*, 98 Utah 501, 98 Pac. (2d) 350; *Sine v. Salt Lake Transportation Co.*, 106 Utah 289, 147 Pac. (2d) 875; *Hickok v. Skinner*, 113 Utah 1, 190 Pac. (2d) 514; *Conklin v. Walsh*, 113 Utah 276, 193 Pac. (2d) 437; and *Gren v. Norton*, (Utah) 213 Pac. (2d) 356. Each of these cases was said to have one principle which distinguished it from the case of *Martin v. Stevens* and the other cases cited by the plaintiff.

“Each of them was decided upon a proposition that the circumstances were such that the driver held to be negligent as a matter of law, either observed, or in the exercise of due care should have observed, the manner in which the other driver was approaching the intersection, and in the exercise of ordinary and reasonable care have avoided the collision. Or to state it in other words, the negligence, or manner of driving of the other driver was such that the driver appraising the situation was alerted to it, or by using due care would have been so alerted in time so that by the exercise of ordinary precaution he could have avoided the collision. And, in each of these cases this seemed to the court so clearly manifest that reasonable minds could not find to the contrary.”



In the case of *Bullock v. Luke*, *supra*, a motorcyclist approaching an intersection at a speed of 25 miles per hour, who failed to see a truck approaching the same intersection from his left until he was within 20 feet of the intersection, although his view was unobstructed for a distance of 200 feet when 60 feet from the intersection, was held to be contributorily negligent as a matter of law for failing to observe the truck sooner and for insisting on his right of way after it was apparent that the truck driver was not going to yield. The court said:

“The question may arise: When should Bullock have seen Luke to have avoided the characterization of being negligent? In *Blashfield*, Vol. 2, Perm. Ed. *Cyclopedia of Automobile Law and Practice*, page 230, Sec. 1038, this statement is found: ‘There is no arbitrary rule as to the time and place of looking for vehicles on an intersecting road, and no particular distance from the intersection is prescribed for that purpose. The general standards are that observation should be made at the first opportunity and at a point where observation will be reasonably efficient for, and conduce to, protection.’

“We do not have to determine any given point. It is sufficient if under all the circumstances we can properly say that Bullock’s failure to see Luke was, as a matter of law, negligence. When we consider that the view west on First South was unobstructed for a distance of 200 to 800 feet, varying with a position from 20 to 60 feet south of the south intersection line of Third West, and that through all that distance, and even farther, Bullock failed to see Luke, we believe reasonable minds cannot differ as to negligence on the part of Bullock.”



In *Sine v. Salt Lake Transportation Co.*, supra, it was held:

“It was the duty of taxi cab operator toward passenger on approaching intersection, to look in both directions along intersection, and not merely in direction from which vehicles having right of way over him might be approaching.”

And that:

“If taxi cab operator, having right of way at intersection, saw, or in exercise of due care should have seen, another automobile approaching at an excessive rate of speed or otherwise indicating that right of way was probably not going to be yielded to taxi cab operator, his duty toward passenger required him to slow down, or stop or otherwise take appropriate measures to avert a collision.”

In the case of *Hickok v. Skinner*, supra, the collision occurred at Twenty-First South Street and West Temple in Salt Lake City, Utah. The plaintiff was traveling north on West Temple. Upon approaching the intersection, plaintiff came to a stop at the stop sign located 20 feet south of the south curblineline of Twenty-First South Street. There was heavy traffic coming from the west, so he waited for these cars to pass. He then looked east and saw the automobile driven by the defendant more than half a block away, between 400 and 500 feet east of the intersection. When he started up, plaintiff figured he had time in which to make a safe crossing before the car coming from the east would reach the intersection. He never again looked to the east and was struck by a car coming from that direction when he was 18 feet south of

the north curblin of Twenty-First South Street and 65 feet north of the stop sign at which he had stopped. The trial court found the plaintiff to have been guilty of contributory negligence as a matter of law. The Supreme Court sustained the judgment and said :

“\* \* \* While the burden to drive so carefully as always to be prepared for, and to be able to avoid, the negligence of another should not be placed on either driver, there should be placed on both the burden to keep a proper lookout and to use reasonable care to avoid a collision. Neither should be permitted to close his eyes to other vehicles which he knows or has reason to believe are approaching, simply because a state statute or municipal ordinance designates him the preferred driver. The rights of drivers approaching and crossing intersections are relative. Both drivers have the duties of being heedful and of maintaining a proper lookout. Plaintiff was neglectful in both particulars, and no jury could reasonably find he was not negligent.

“Plaintiff in claiming that, having looked once and having concluded that he had time to clear the intersection, he was not negligent in not having looked again, overlooks two factors that we believe are controlling influences in this case, and which effect the application of the rule of the Bullock case mentioned above. The first is, he was uninformed as to the speed of defendant's car. The second is that the speed at which plaintiff was traveling and the distance which he had to travel, before he entered defendant's path of travel, permitted him to look and to re-appraise the relative positions of the cars and permitted him ample opportunity to correct his first conclu-

sion, if he had erroneously estimated the distance the defendant's car was from the intersection."

There is some question as to whether or not the Hickok case was overruled in the *Martin v. Stevens* case, supra. It may be that the court extended the doctrine too far under the particular facts in the Hickok case. In that case, plaintiff's negligence consisted in traveling 65 feet into the intersection without ever looking to the east after having observed an automobile approaching from that direction a sufficient distance away that the plaintiff felt he had time to get through the intersection.

However, in the case at hand, the facts show a much clearer picture of contributory negligence. In this case there is no evidence that the plaintiff looked in the direction from which the defendant came, either as he drove the 125 feet into the intersection and to the point of impact at the slow speed of 5 or 6 miles per hour or as he entered the intersection. At least, not until it was too late to avoid the collision.

As we have stated, the case of *Conklin v. Walsh*, supra, is concerned mainly with the duty of a driver on an arterial highway to observe a disfavored driver on an intersecting street.

The facts in the last case, *Gren v. Norton*, supra, are very similar to this case. The collision occurred at the intersection of Fifth West and Twelfth North Streets in Provo, Utah. Fifth West is an arterial highway running north and south. Traffic on Twelfth North Street is controlled by stop signs on the east and west sides of the intersection. From the intersection to the north, Fifth

West Street continues on the level for approximately 2,265 feet and then rises gradually before again leveling out to a point approximately one mile north of the intersection.

The defendant was driving a truck south along Fifth West Street toward the intersection. At the same time, the decedent approached the intersection from the east along Twelfth North Street. The defendant driver testified he first saw decedent's automobile as it was moving between the stop sign and the east edge of a concrete safety zone in the center of the intersection. At that time the defendant was approximately 250 feet north of the intersection. He tested his air brakes and sounded his horn and expected the deceased to stop in the safety zone in the center of the intersection and wait until his truck had cleared. The decedent's car proceeded along the intersection in a straight westerly direction at a constant rate of speed which he estimated to be between 5 and 10 miles per hour. When the defendant was about 100 feet north of the intersection, he decided that the deceased was not going to stop and he immediately set his brakes and sounded his horn to the point of impact. The defendant testified that the deceased drove his automobile slumped down in his seat and his head straight forward and until just before the point of impact. That when the deceased was about 10 feet east of the point of collision, he appeared to look up and try to turn his automobile to the left to avoid a collision.

Two eye witnesses, not parties to the action, testified decedent's car proceeded into and across the intersection

at a slow, constant rate of speed. Both observed the deceased slumped down in the seat of the car with his head straight forward.

All witnesses to the accident or to the movement of deceased's car immediately prior thereto, testified the car continued across the intersection at a slow and constant rate of speed without any appreciable change in speed or direction until just before the impact. While the estimated speeds varied, all witnesses described the movements of the car as relatively slow and all were impressed with the apparent lack of action on the part of the deceased as the cars approached each other.

The distance from the stop sign where the deceased had stopped on Twelfth North Street to the point of impact was 108 feet.

The fourth District Court had entered a judgment for the plaintiff. The Supreme Court held the plaintiff's decedent was contributorily negligent as a matter of law and reversed the judgment. The court said:

"It is undisputed in this case that as deceased entered the intersection he had an unobstructed view of Fifth West Street to the north for about one mile. Under the rules announced in the cases previously mentioned, he is charged with being aware of the approach of defendant's large trailer truck. In traversing the intersection deceased was traveling slightly to the north of west and by merely glancing to his right, he could have seen all traffic which was within one-half mile of the intersection coming south on Fifth West Street. Undoubtedly, at the time he stopped at the stop sign defendant's truck was some con-

siderable distance north of the highway and deceased could then have reasonably concluded that it was not close enough to constitute an immediate hazard. His negligence, if any, was not in starting into the intersection. If he can be charged with negligence, as a matter of law, it is because of his failure to look for approaching traffic or observe defendant's truck after he entered into and upon the main traveled portions of the highway and before he started across the west portion. He had ample time to make observations to the north. It is some 108 feet from the place where deceased stopped to the place where the collision occurred. If we accept the testimony most favorable to the deceased, defendant's truck was traveling at a speed of between 50 and 55 miles per hour. This would have figured approximately 80 feet per second, so that it would require approximately 25 seconds for the truck to travel the 2,000 feet which, according to the testimony is relatively level. There is no reason why, during this whole period, the truck could not have been observed by the deceased had he been keeping any lookout.

“There is some contention made that the jury could have concluded that deceased saw the approach of defendant's truck, concluded he had the right of way and estimated that he could clear the crossing prior to the time the defendant reached the intersection, and that such estimate would only be an error in judgment and would not charge the deceased with being guilty of negligence as a matter of law. It is further contended in this connection that deceased is entitled to a presumption that he used due care for his own safety and that due care presumes that he saw the approach of the truck and concluded that he could pass through the intersection in safety. These contentions might



bear merit if the facts did not establish contrary conclusions. The deceased had approximately 88 feet to travel from the stop sign until he reached the place where his movement might be imperiled by traffic proceeding south along the west side of the highway. After reaching this safety area he would no longer be concerned with the movement of any vehicles traveling north and so he could concentrate his attention on the movement of traffic to the south. As he passed between the lanes of northbound and southbound traffic, he had approximately 22 feet of safe space and at the speed he was traveling he was afforded a reasonable opportunity to make observation to the north. There was no other traffic with which he need concern himself. His actions, as testified to by the witnesses, seemed to indicate that he had abandoned all precautions for his own safety. He could not have made an estimate of the distance the defendant was from the intersection when deceased attempted to pass from the safety zone into the traffic lane on the west, as to the size of the truck, its immediate proximity to the intersection, and the noise of the horn, which witnesses claim was operating, all argue strongly against the possibility of the deceased concluding he could pass over the west lane ahead of the truck. Moreover, unless deceased was oblivious to the approach of the truck, he would not have remained immobile and motionless and would have taken some action to avoid the collision. It is inconceivable that a person would see a fast-moving truck coming down a highway, estimate he could clear ahead of the vehicle, and yet fail to further observe its movements, fail to reappraise the situation, fail to increase or decrease the speed of his car or change his course of travel, or take any ac-



tion to avoid the collision until 10 feet away from a point of impact, particularly when there was no necessity of observing the movement of other vehicles, when there was no obstruction of vision, when visibility was good and when the horn of the truck was blowing for at least 100 feet and the tires were dragging for 55 feet. The physical evidence and deceased's acts and conduct were such that any presumption of due care had been destroyed. One look to the north at any time after deceased cleared the east lanes would have appraised a reasonably careful driver that the movement across the west lanes could not be made in safety."

We agree with the statement in the opinion of *Martin v. Stevens*, supra:

"No matter how far afield one may go in reviewing, analyzing and rationalizing the decisions in these intersection cases, he must always come back to the one basic concept which underlies and controls the law of torts: The conduct of the mythical but extremely useful 'ordinary reasonable prudent man under the circumstances', all of which is encompassed in the shorter phrase, 'due care'."

We feel that under the peculiar circumstances of this case; that is, that the plaintiff drove 125 feet from the stop sign on the south side of the highway into a busy intersection and to the point of impact at a speed of only 5 to 6 miles per hour without looking to the east for traffic which might be approaching, after leaving the stop south of the intersection, although he could have seen a distance of 368 feet when he left the stop sign and could have seen an even greater distance as he proceeded

through the intersection, evidences such a lack of “due care” on his part as to make him guilty of negligence as a matter of law.

POINT II.

THE VERDICT RETURNED BY THE JURY WAS IMPROPER ON ITS FACE AND NOT SUPPORTED BY THE EVIDENCE.

The verdict rendered in this case was as follows:

“We, the jury impaneled in the above entitled cause, find the issues in favor of the plaintiff and against the defendants jointly and severally and assess plaintiff’s damages as follows:

“Physical injury, pain and suffering .....	\$	
Medical Expenses .....	\$	214.50
Loss of earnings during recuperation .....	\$1,000.00	
Permanent disability .....	\$4,000.00	
Pickup truck .....	\$	565.00
Total .....	\$5,779.50”	

Plaintiff contends that it was error for the judge to insert a cipher after physical injury, pain and suffering, although the record does not indicate that the judge did so (R. 171). Plaintiff asserts that the absence of the cipher indicates that the jury inadvertently overlooked this item, while the insertion of the cipher indicates that the jury concluded that the plaintiff had sustained no pain and suffering.

We are not so clairvoyant. We believe the verdict is so confusing as not to indicate what the jury intended to do and is, therefore, invalid. On the face of the verdict the jury found that the plaintiff sustained no pain

and suffering. Having found that he received no physical injury or pain or suffering, they could not then find that he had suffered either any loss of injuries during recuperation or permanent disability.

Of course, we do not contend that the plaintiff did not receive some physical injury. In fact, at the time of trial, we stipulated to the contrary. We do feel that the verdict is so unresponsive to the issues and so confusing that it was invalid and cannot, therefore, be entered. Of course this point is not involved in this appeal. Defendants are not appealing from the judgment and believe it is correct. The point becomes important only should this court determine to set the judgment aside and direct entry of judgment on the verdict. At that point defendants would have a constitutional right of appeal from that judgment. We raise the point for the court's consideration now to hope that it may aid the court in its determination and obviate the expense of further litigation.

As to the validity of the judgment, the following is found in *53 Am. Jur.*, page 729:

“In an action in which a money judgment is sought, a verdict which fails to state specifically, or which is indefinite as to, the amount which the jury deems the plaintiff to be entitled to on his cause of action, or the amount which the defendant should recover in the event that the verdict finds in his favor on the counterclaim or cross-complaint, or a verdict which affirmatively states that the party in whose favor the verdict is rendered is entitled to no amount, is not one on which a valid judgment can be entered. The principle

just stated is applicable to the award of nominal damages as well as compensatory damages, since this term is purely relative and carries with it no suggestion as to amount. However, general verdicts should be construed to give them effect, if that can be reasonably done, and it has been held in a number of cases that if by reference to the entire record in the case and all of the pleadings, or from the data found by the jury, a definite sum can be fixed, judgment on the verdict should be entered for such fixed and definite amount. Thus, for example, where the suit is upon a promissory note, and the jury finds for the plaintiff, the amount due on the note sued upon, the court in such a case has sufficient data from which the intention of the jury can be determined."

It has been held that a finding of actual damages is a necessary predicate of punitive or exemplary damages. See the annotations on this subject contained in 33 *A.L.R.* 384, and 81 *A.L.R.* 913, wherein the general rule is stated to be:

"\* \* \* That actual damages must be found as a predicate for—or, as sometimes expressed, actual damage must have been done to sustain—an award of exemplary damages, is the rule to which most of the courts are committed."

See also the cases collected in 116 *A.L.R.* 828, wherein the following general rule is announced:

"In an action in which a money judgment is sought, a verdict which fails to state specifically, or which is indefinite as to, the amount to which the jury deems the plaintiff to be entitled on his cause of action, or the amount which the defendant should recover in the event that the verdict finds in his favor on his counterclaim or cross-

complaint, or a verdict which affirmatively states that the party in whose favor the verdict is rendered is entitled to no amount, is not one on which a valid judgment can be entered.”

In 20 *A.L.R.* (2) 276, will be found a collection of cases which hold that a verdict which awards the plaintiff the amount of his medical expenses without simultaneously awarding him damages for pain and suffering is invalid. Therein will be found this statement:

“The question discussed in this annotation is whether a verdict may validly award plaintiff, in a personal injury action, the exact amount of his medical expenses without simultaneously awarding him damages for pain and suffering where claim therefor was made and properly proven.

“The number of cases in which this question has been specifically answered is relatively small. But despite the dearth of authority, it seems permissible to state, on general principles, that such a verdict is invalid, and all the cases in which this particular point was involved are in accord with this rule.”

The foregoing citation was cited in *Hall v. Cornet*, (Ore.) 240 Pac. (2d) 231. In that case, plaintiff brought an action for personal injuries sustained in an automobile collision which allegedly resulted from the negligence of the defendant. The first verdict of the jury awarded the plaintiff \$1.00 general damages and \$1,066.40 special damages. The jury was instructed and sent back for further consideration. The jury then returned a verdict awarding \$300.00 general damages and \$707.40 special damages. The court then set aside the verdict and grant-

ed plaintiff a new trial. The Supreme Court sustained the trial judge and said:

“A verdict cannot validly award plaintiff in action for personal injuries allegedly caused through defendant’s negligence, exact amount of his medical expenses without simultaneously awarding him damages for pain and suffering when claim therefor was properly made and proven.”

The court sustained the granting of a new trial in that case under the following reasoning:

“In returning that verdict, (the second verdict) the jury was guilty of misconduct. The record conclusively shows they merely juggled the figures which they had adopted in their first abortive verdict. They simply borrowed \$299.00 from the undisputed amount of the special damages, as first found by them, and added that sum to the \$1.00 which they had previously attempted to award as general damages, with a resultant verdict of \$300.00 general damages and \$707.40 special damages. They gave no genuine consideration to the instruction of the trial court to award the plaintiff, in the event they found liability, such ‘sum of money as would reasonably compensate her for such injuries and damages, pain and suffering.’ ”

In the case of *Haydel v. Morton*, 48 Pac. (2d) 709, (Cal.) it was held that a verdict for plaintiff in a slander suit which assessed compensatory damages in the sum of \$0.00 and exemplary damages at \$10,000.00 required a new trial.

One might argue that the defendant was not prejudiced by the failure of the jury to find any damages for



physical injury, pain and suffering. Such an argument overlooks the fact that the verdict shows on its face that the jury were guilty of misconduct in failing to follow the instruction of the court in assessing damages or that the instructions of the court were confusing or misleading. It presumes that if the jury had followed the instructions of the court, or the instructions had not been misleading, the jury would have returned exactly the same verdict except that they would have made an award for physical injury, pain and suffering. Such a presumption is not warranted.

The Court in its Instruction No. 1 R. 212-213, in reviewing the claims of the plaintiff, instructed the jury that the action had been brought by the plaintiff to recover for injuries and damage including the following.

“A hemorrhage of the mouth, a brain injury, from which he has suffered partial loss of function of his right hand and arm and from which, such right hand and arm are still partially paralyzed, continuous accute headaches, impaired vision and accute pain and suffering. That such injuries to his brain are continuing and progressive and will require that plaintiff undergo surgical care and treatment . . . that in addition thereto plaintiff has been caused to incur medical expenses which amounted to \$214.50 . . . which plaintiff contemplated would increase \$2,000.00 . . . and he alleges . . . he was a healthy and able bodied man and was capable of earning \$700.00 per month, because of the accident he was unable to work at all for four months, from which fact he suffered damages in the sum of \$2,800.00, he has suffered continuing impairment and disability so that he suffered a loss of earning power in the sum of \$56,000.00.”.



These instructions were excepted to (R.160) upon the grounds that there was no evidence to substantiate any of these claims except the item of \$214.50 medical expenses and that these issues should not be presented to the jury even in the form given in Instruction No. 1 as such would tend to mislead and confuse the jury. The court repeated this error in Instruction 15. That they were misleading and did confuse the jury is evidenced by the excessive award given for permanent injuries in this case.

On the question of loss and earnings, the only evidence was that Mr. Bates lost 200 turkeys after this accident during the year 1952. However, he was only able to guess at this amount after the continual prodding of his attorney, his first answer being that he had no idea. He then testified that it was normal to lose more turkeys at this time of the year than at any other time of the year and that most of these losses were normal, so that it is impossible to determine from the evidence in this case if Mr. Bates lost any turkeys as a result of this accident, if he did, how many, and the value of those lost. Of course, the following year, Mr. Bates netted \$8,212.35 as compared with \$2,000.00 in the year 1952, so that if any conclusion can be drawn the only conclusion warranted is that the accident was responsible for him making more rather than less on the operation of his turkey farm.

On the question of permanent disability, there was no evidence of any permanent disability other than the fact that the plaintiff, a sixty-nine year old man, was

forgetful after the accident and that he could not do the work after the accident that he could before although he admitted he could not do heavy work before the accident.

It is submitted, therefore, that the verdict was invalid and judgment cannot be entered thereon, and that the defendant would be prejudicially affected by its entry.

## CONCLUSION

In conclusion we can summarize the evidence and the reasons why plaintiff was guilty of contributory negligence no better than the trial judge in his memorandum decision herein starting on page 174 of the record:

“The plaintiff testified that he was driving his truck from his turkey ranch northward on the Geneva Road on October 9, 1952, and at about two o'clock P.M. came to the intersection of that road with Highway 91 at Pleasant Grove, where he stopped at the stop sign. The weather was clear and the pavement was dry. That the traffic was quite heavy, compelling him to wait four or five minutes before the intersection cleared sufficiently for him to attempt to cross. That he was driving a 1941 truck in low and was going 5 to 6 miles per hour. He was well acquainted with this intersection, knew it was a very busy way and had had to wait at times for as much as fifteen minutes for traffic to clear. That he saw the coal truck coming when it was ‘maybe 150 feet away and coming fast’ and ‘did speed up a little right on the last’ and got ‘pret’ near across but got hit.’ He estimated the point of impact and upon his estimate it was measured upon plaintiff’s exhibit ‘A’ at 125’ from the stop sign where he had stopped. Upon cross examination he testified that he did

not see one Dr. Paul Christopherson who was traveling east upon Highway 91 and turned south upon the Geneva Road past him. Neither did he see Dr. Christopherson's salutation even though he did see a car approaching. He couldn't tell how far the truck was away when he saw it, but estimated that it was between 100' and 150 away. He did speed up a little, saw the truck approaching just before the impact. The testimony now is that he saw the truck but doesn't know exactly how far away it was. He did not remember John Stewart, an insurance adjuster. Nor did he remember giving him the statement, Defendants' Exhibit 1, or that he made the statement therein contained, to-wit:

“ ‘I was about three-fourths of the way across the highway (two lanes) when I was hit by the truck or know it was near until it hit me.’

“To this statement he wrote in his own hand:

“ ‘I have read pages one, two, three and they are correct. Leonard Bates.’ and he acknowledges that the signatures upon each page of the statement are his own.

“He drove in a straight line from the stop sign the 125 feet plus or minus to the point of impact, making no attempt whatsoever to turn his truck to the left. Considering this evidence in its most favorable light for the plaintiff as the court must do upon a motion of the sort under consideration, there is still no escape from the conclusion that after the plaintiff had prudently stopped at the stop sign, and had prudently waited for some 5 or 6 minutes for traffic to clear, and prudently started into the intersection after it had become clear, he did not look again in either direction, at any rate until he had crossed the center

line of Highway 91 going northerly. Furthermore, it is inescapable that he continued his truck in low gear for a distance in excess of 100 feet traveling through an intersection which he knew to be so busy that he had had to wait as much as fifteen minutes on previous occasions for traffic to clear, at a speed of 5 or 6 miles per hour while he stated he could have traveled faster, (he said that he did speed up a little when he saw the truck coming at him pretty fast) and if he had traveled faster by any appreciable degree he would have cleared the intersection before defendants' truck came within a dangerous distance.

"As shown on Plaintiff's Exhibit 'A', a line drawn from the stop sign easterly past the first obstruction to visibility, gave him an unobstructed view up the highway for 268 feet. Manifestly as he advanced into the intersection, his view extended to his right (as well as to his left). If he had kept a reasonable and proper lookout he could have seen defendants' truck for a great distance along the highway (considering that he was traveling as slowly as the evidence indicates and the defendant was traveling between 35 and 50 miles per hour). Even if he had seen it was 268 feet away, he would still have had plenty of time to speed up and pass in head of it or stop safely on the south side of the center line (even though ever so negligent) to pass safely in head of him.

"If he had looked as the law required him to do, he would have seen, and if he had seen he could have avoided the collision by the simple expedient of stopping, turning aside or even by speeding up.

"In his failure, he was negligent as a matter of law and likewise, as a matter of law, his negli-

gence proximately contributed to produce the accident and his own injury and damage. Generally, the authorities for this determination are so familiar to both counsel that to quote them would be mere surplusage, except the court especially draws attention to the language of *Martin v. Stevens*, 243 Pac. (2d) 747, under syllabus No. 7, where the court describing the duties of the driver with the right of way at an intersection says: 'Admittedly the right of way is not absolute. One who has it under one or both of the aforementioned rules, (entering the intersection upon his right of way because he entered first, when to do so would hazard a collision and that giving right of way to the right hand of two vehicles entering the intersection at the same time) *may not, with fool-hardy assurance, claim the right of way in face of danger which one exercising due care would see and avoid. Although plaintiff (as here) had the right of way under both rules above referred to, yet there developed upon him the duty of due care in observing for other traffic. But in doing so, he had the right to assume, and to rely and act on the assumption that others would do likewise; he was not obligated to anticipate either that the other would drive negligently, nor fail to accord him his right of way, until in the exercise of due care, he observed, or should have observed, something to warn him that the other driver was driving negligently or would fail to accord him his right of way.*' "(Italics added.)

The entry of the verdict in this case was erroneous. Not for the reasons set forth by the plaintiff. The reasons being that a finding of permanent damage and loss of earnings during recuperation must be predicated upon



a finding of physical injury, pain and suffering. And for the additional reason that the evidence does not sustain the amount awarded for loss of earnings or permanent disability and these issues should not have been submitted to the jury. Of course, this point is immaterial should this court determine that the trial judge was correct in the granting of the motion to set aside the verdict. It becomes important only if the court should reverse the trial judge, in which event, it is respectfully submitted, this court would have no alternative but to grant a new trial.

Respectfully submitted,

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