

1955

## Steven L. West v. Miles N. Anderson et al : Brief of Plaintiff and Respondent

Utah Supreme Court

Follow this and additional works at: [https://digitalcommons.law.byu.edu/uofu\\_sc1](https://digitalcommons.law.byu.edu/uofu_sc1)



Part of the [Law Commons](#)

Original Brief submitted to the Utah Supreme Court; funding for digitization provided by the Institute of Museum and Library Services through the Library Services and Technology Act, administered by the Utah State Library, and sponsored by the S.J. Quinney Law Library; machine-generated OCR, may contain errors.

Anderson and Taylor; Attorneys for Plaintiff and Respondent;

---

### Recommended Citation

Brief of Respondent, *West v. Anderson*, No. 8294 (Utah Supreme Court, 1955).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/2329](https://digitalcommons.law.byu.edu/uofu_sc1/2329)

This Brief of Respondent is brought to you for free and open access by BYU Law Digital Commons. It has been accepted for inclusion in Utah Supreme Court Briefs (pre-1965) by an authorized administrator of BYU Law Digital Commons. For more information, please contact [hunterlawlibrary@byu.edu](mailto:hunterlawlibrary@byu.edu).

MAR 27 1956

LAW LIBRARY  
U of U

# In the Supreme Court of the State of Utah

STEVEN L. WEST,

*Plaintiff and Respondent,*

vs.

MILES N. ANDERSON, HAL AN-  
DERSON, CLYDE ANDERSON,  
MALCOLM N. McKINNON, dba  
AMERICAN FUEL COMPANY,  
and CLYDE COX,

*Defendants and Appellants.*

Clerk. Supreme Court  
MAY 20 1956

Case No. 8294

BRIEF OF PLAINTIFF AND RESPONDENT,  
STEVEN L. WEST

ANDERSON AND TAYLOR

*Attorneys for Plaintiff and  
Respondent Steven L. West*

345 South State Street  
Salt Lake City, Utah

## SUBJECT INDEX

	Page
STATEMENT OF FACTS .....	5
STATEMENT OF POINTS .....	7
Point I. The Defendants, Malcolm McKinnon and Clyde Cox, Were Guilty of Negligence as Found by the Jury Because Clyde Cox, in Loading a Truck Unattended on a Grade With the Wheels Turned in a Down Hill Direction, Was Not En- titled to Rely Upon Hal Anderson Having So Securely Braked the Truck That it Would Not Run Down Hill and Cause Grave Injury to the Plaintiff.....	9
Point II. The Plaintiff, Steven West, Was Not Guilty of Contribu- tory Negligence as a Matter of Law in Sitting Down by the Side of the Main Traveled Way on a Pile of Coal Without Being Attentive Merely Because the Jury Found Clys Cox Guilty of Negligence, Because, the Circumstances Surround- ing the Acts and Failure to Act of Cox and the Circumstances Surrounding the Acts of West Were Entirely Different.....	39
Point III. The Instructions Given by the Trial Court Do Not Over- Accentuate the Plaintiff's Theory, Because, Such Instructions Were Given to Enable the Jury to Answer the Special In- terrogatories Submitted to Them. ....	47
Point IV. The Submission of the Special Interrogatories to the Jury Regarding the Loss of Earning Capacity of Steven L. West Was Proper Because the Testimony of Mr. West and the Testimony of the Doctor Who Attended Mr. West Sup- ported the Submission of the Question of Loss of Yearly Earning Capacity to the Jury.....	51
Point V. The Court's Instruction, Number 9 (a) Regarding the Right to Rely on Due Care of Another, and Number 12 Regarding Circumstances to be Considered in Determining Ordinary Care of Cox, Are Not Contradictory Instructions Because Clyde Cox Did Not Have An Absolute Right to Rely	

	Page
Upon the Assumption That Hal Anderson Would Not Be Negligent, But Could Only So Rely Until Some Act Was Done by Hal Anderson To Indicate to the Contrary or the Circumstances Indicated That Hal Anderson Might Be Negligent. ....	53
Point VI. The Trial Court Did Not Commit Error in the Giving and Failure to Give the Instructions Complained of by the Defendant Because in Submitting a Case to the Jury on Special Interrogatories, Only Such Instructions as Will Enable the Jury to Intelligently Answer the Interrogatories Need Be Given. ....	55
ARGUMENT .....	9
CONCLUSION .....	59

## INDEX OF AUTHORITIES

### CASES

Best vs. Huber (Utah), 281 Pac. 2nd 208 .....	35
Caperon vs. Tuttle, 100 Utah 476, 116 Pac. (2nd) 402.....	38
Devine vs. Cook, (Utah), 279 Pac. (2d) 1073 .....	49
Dickinson vs. Pacific Greyhound Lines (Calif.) 131 Pac. 2nd 401..	36
District of Columbia vs. Woodbury, 136 U. S. 450, 10 S. Ct. 990..	52
Downey v. Gemini Mining Co., (Utah), 24 P. 431, 68 P. 413.....	20
Hilliard v. Utah By-Products Company (Utah) 263 Pac. (2nd) 287.....	12, 25
Hone vs. Mammoth Mining Company, (Utah) 27 U. 168 .....	45
Hooton, et al vs. City of Burley, (Idaho) 219 Pac. (2nd) 651.....	41
Humble Oil & Refining Company, et al vs. Martin et al (Texas) 222 S. W. 2nd 995 .....	28
Jensen vs. Utah Railway (Utah), 72 U. 376, 270 P. 349.....	54
Kitchen vs. Women's City Club (Mass.) 66 N.E. 554 .....	42
Knox vs. Snow (Utah) 229 P. 2nd 874 .....	42

	Page
Konold vs. Rio Grande Western Railway (Utah), 21 Utah 379, 60 P. 1021 .....	54
Martin vs. Stevens (Utah), 243 Pac. (2nd) 747.....	46
Massachusetts Bonding and Insurance Company vs. Cudahy Packing Company, 61 Utah 116, 211 Pac. 706 .....	38
McCulloch vs. Horton (Mont.) 56 Pac. (2nd) 1344 .....	47
Mehl vs. Carter, (Kan.) 237 Pac. (2nd) 240 .....	26
Murray vs. Ralph R'Oench Co., (Mo.) 147 S.W. (2nd) 623, 13 Negligence Cases, 638 .....	41
Scofield vs. Sprouse-Reitz Company (Utah), 265 Pac. (2nd) 396....	42
Seibly vs. City of Sunnyside, (Wash.) 35 Pac. (2nd) 56 .....	38
Shafer vs. Keeley Ice Cream Co., 65 Utah 46, 234 P. 300, 38 A.L.R. 1523 .....	35
State vs. Waid (Utah), 92 Utah 279, 67 Pac. (2nd) 647.....	54
Taylor vs. Oakland Scavenger Co. (Calif.) 100 Pac. (2nd) 1044..	38
United States vs. First Security Bank of Utah, 208 Fed. (2nd) 424..	38
VanHorn vs. Wyoming Game and Fish Commission (Wyo.) 92 Pac. (2nd) 560 .....	44
Wold vs. Ogden City, et al (Utah) 258 Pac. (2nd) 453.....	42

## TEXT

38 Am. Jur. 667, Sec. 24 .....	21
53 Am. Jur. 493, Sec. 638 .....	58
65 C.J.S. 1192, Sec. 264 .....	57
88 C.J.S. 837, Sec. 317 .....	57
5 Moore's Federal Practice 2207 .....	48
Prosser on Tort Hornbook Series 243-49 .....	19
Restatement of the Law of Torts Sec. 302(i) .....	22

	Page
Sec. 302(j) .....	23
Sec. 302(l) .....	24
Sec. 340, page 927 .....	41
Sec. 452, Comment (a) .....	37
Sec. 466 .....	42
Sec. 466, Comment (c) .....	43
Sec. 466, Comment (g) .....	43

### LAW REVIEW ARTICLES

7 Notre Dame Law Review 468 .....	26
3 Utah Law Review 275 .....	12
3 Utah Law Review 281 .....	13

### RULES OF CIVIL PROCEDURE

Rule 49 (a) .....	34, 48
-------------------	--------

# In the Supreme Court of the State of Utah

---

STEVEN L. WEST,

*Plaintiff and Respondent,*

vs.

MILES N. ANDERSON, HAL AN-  
DERSON, CLYDE ANDERSON,  
MALCOLM N. McKINNON, dba  
AMERICAN FUEL COMPANY,  
and CLYDE COX,

*Defendants and Appellants.*

Case No. 8294

---

BRIEF OF PLAINTIFF AND RESPONDENT,  
STEVEN L. WEST

---

## STATEMENT OF FACTS

For the most part the respondent, Steven L. West, concurs in the Statement of Facts set forth in appellant's brief. However, in respect to the plaintiff's earning capacity, the statement is erroneous. On page 11, in the defendant's Statement of Facts and again on pages 39 and 40 in the argument, the defendants contend that the only evidence of the plaintiff's

loss of earning capacity was that in 1951 he made around \$2,400.00 prospecting and hauling coal, and in 1952 he made around \$2,600.00, and at the time of the accident he was earning \$300.00 per month. Defendants state that there was no evidence in the record whatsoever that plaintiff was qualified or could earn an excess of \$300.00 per month. Such we submit is not the fact. With regard to Mr. West's 1951 earnings, he testified that he worked on and off for a period of about five months and that the rest of the time he was prospecting, which produced him no income (R-336). Mr. West further testified (R-334) that he could, and did, gross in some months as much as \$800.00. His testimony also indicates that he could make four trips per week and make a net profit on each trip of \$45.00. Even based upon three trips per week in which he would gross \$60.00 per trip, or a total of \$180.00, his expenses for the three trips being \$45.00, Mr. West would net \$135.00 per week, or an average of \$540.00 per month. On redirect examination, (R-356), Mr. West made it clear that his gross salary was \$300.00 per month and that out of the \$300.00 his income taxes would be deducted.

There are certain additional facts not contained in the defendant's statement of facts to which the plaintiff desires to call the attention of the Court. Exhibit P-4, reproduced in plaintiff's brief, distorts the distances and makes it appear that the truck was facing the position where Mr. West was injured. Exhibit P-7 and the defendant Cox's, testimony (R-186-190), more clearly and more accurately illustrates the relative positions of the truck, scoopmobile, and Mr. West. The defendant, Cox, testified that the truck "described an



arc," indicating that the wheels of the truck were cramped considerably to the left (R-208). At the time, the defendant Hal Anderson parked the truck, he did so under the direction of the defendant Cox (R-252-R-178). The defendant Cox saw Hal Anderson leave his truck after he had parked it and also saw him go down the canyon to his brother's truck. This he had seen before he started to load the truck (R-183-184 and R-190). The evidence also indicates that the defendant Cox knew where West was before he started to load the truck (R-196) and further, that he was looking at West while the truck was moving (R-215). The defendant Cox testified that he did not check the brakes (R-198). This evidence is undisputed.

## STATEMENT OF POINTS

### POINT I

THE DEFENDANTS, MALCOLM McKINNON AND CLYDE COX, WERE GUILTY OF NEGLIGENCE AS FOUND BY THE JURY BECAUSE CLYDE COX, IN LOADING A TRUCK UNATTENDED ON A GRADE WITH THE WHEELS TURNED IN A DOWN HILL DIRECTION, WAS NOT ENTITLED TO RELY UPON HAL ANDERSON HAVING SO SECURELY BRAKED THE TRUCK THAT IT WOULD NOT RUN DOWN HILL AND CAUSE GRAVE INJURY TO THE PLAINTIFF.

### POINT II

THE PLAINTIFF, STEVEN WEST, WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF

LAW IN SITTING DOWN BY THE SIDE OF THE MAIN TRAVELED WAY ON A PILE OF COAL WITHOUT BEING ATTENTIVE MERELY BECAUSE THE JURY FOUND CLYDE COX GUILTY OF NEGLIGENCE, BECAUSE, THE CIRCUMSTANCES SURROUNDING THE ACTS AND FAILURE TO ACT OF COX AND THE CIRCUMSTANCES SURROUNDING THE ACTS OF WEST WERE ENTIRELY DIFFERENT.

### POINT III

THE INSTRUCTIONS GIVEN BY THE TRIAL COURT DO NOT OVER-ACCENTUATE THE PLAINTIFF'S THEORY, BECAUSE, SUCH INSTRUCTIONS WERE GIVEN TO ENABLE THE JURY TO ANSWER THE SPECIAL INTERROGATORIES SUBMITTED TO THEM.

### POINT IV

THE SUBMISSION OF THE SPECIAL INTERROGATORY TO THE JURY REGARDING THE LOSS OF EARNING CAPACITY OF STEVEN L. WEST WAS PROPER BECAUSE THE TESTIMONY OF MR. WEST AND THE TESTIMONY OF THE DOCTOR WHO ATTENDED MR. WEST SUPPORTED THE SUBMISSION OF THE QUESTION OF LOSS OF YEARLY EARNING CAPACITY TO THE JURY.

### POINT V

THE COURT'S INSTRUCTION, NUMBER 9 (a) REGARDING THE RIGHT TO RELY ON DUE CARE OF

ANOTHER, AND NUMBER 12 REGARDING CIRCUMSTANCES TO BE CONSIDERED IN DETERMINING ORDINARY CARE OF COX, ARE NOT CONTRADICTORY INSTRUCTIONS BECAUSE CLYDE COX DID NOT HAVE AN ABSOLUTE RIGHT TO RELY UPON THE ASSUMPTION THAT HAL ANDERSON WOULD NOT BE NEGLIGENT, BUT COULD ONLY SO RELY UNTIL SOME ACT WAS DONE BY HAL ANDERSON TO INDICATE TO THE CONTRARY OR THE CIRCUMSTANCES INDICATED THAT HAL ANDERSON MIGHT BE NEGLIGENT.

#### POINT VI

THE TRIAL COURT DID NOT COMMIT ERROR IN THE GIVING AND THE FAILURE TO GIVE THE INSTRUCTIONS COMPLAINED OF BY THE DEFENDANT BECAUSE IN SUBMITTING A CASE TO THE JURY ON SPECIAL INTERROGATORIES, ONLY SUCH INSTRUCTIONS AS WILL ENABLE THE JURY TO INTELLIGENTLY ANSWER THE INTERROGATORIES NEED BE GIVEN.

#### ARGUMENT

##### POINT I

THE DEFENDANTS, MALCOLM McKINNON AND CLYDE COX, WERE GUILTY OF NEGLIGENCE AS FOUND BY THE JURY BECAUSE CLYDE COX, IN LOADING A TRUCK UNATTENDED ON A GRADE

WITH THE WHEELS TURNED IN A DOWN HILL DIRECTION, WAS NOT ENTITLED TO RELY UPON HAL ANDERSON HAVING SO SECURELY BRAKED THE TRUCK THAT IT WOULD NOT RUN DOWN HILL AND CAUSE GRAVE INJURY TO THE PLAINTIFF.

The defendants Malcolm N. McKinnon and Clyde Cox contend that they were not guilty of any negligence which was the proximate cause of the injury to the plaintiff. The defendants state on page 12 of their brief that, "the only issue raised by defendants' motion for a directed verdict is was there sufficient evidence to go to the jury on the issue of whether Clyde Cox was negligent by failing to ascertain that the dump truck was so securely braked or the wheels blocked, before starting to load it; and was he required to foresee that if this was not done, the truck would roll down hill and against and upon the plaintiff?" " This we submit is the primary question for the court to determine upon appeal. The defendants assert that if Steven West could assume the truck was securely braked that Clyde Cox was entitled to the same assumption. It is apparently the defendants position that Clyde Cox had the absolute right to rely upon the assumption that Hal Anderson would not be negligent and that there was nothing about the situation to give him notice to the contrary. The jury was instructed upon this proposition as follows:

"9-(a): You are further instructed that any person has a right to rely upon the assumption that other people will not be negligent unless and until some act is done by the other person to indicate to the contrary."

Under the instruction, as given, in order to find that Clyde Cox was negligent by failing to ascertain that the dump

truck was so securely braked or blocked that it would not run down hill while he was loading it, the jury must have found that there were some acts done by Hal Anderson which would indicate that he had not braked or blocked the truck. Several acts of substandard conduct existed which should have indicated to Cox that some extra precaution should be taken. The truck was placed in his presence on a grade facing in a downhill direction. The wheels were also turned in a downhill direction and Hal Anderson immediately left the truck after he had parked it on the grade. While Clyde Cox stated that he didn't notice that the wheels were turned in a downhill direction (R-179), he did testify that the scoopmobile which he was operating was to the righthand side of the truck and had he looked, he would have been able to see that the wheels were turned in a downhill direction (R-179). Having failed to look, or failing to see, he is placed under the same obligation as though he had seen it. This one circumstance is sufficient to put him on notice that Hal Anderson might have been negligent. Instruction 9-(a), as given, does not clearly and accurately state the law, but the error, if any, was in favor of Cox and McKinnon, so they can't complain of it, and we submit that the appeal should be considered in the light of the law as it should have been given. Actually, a correct instruction on this phase of the law should have been given as follows:

"You are further instructed that a person has the right to rely upon the assumption that other people will not be negligent when an ordinary prudent person would so assume. In determining whether an ordinary prudent person would assume that other people will not be negligent, you may take into consideration all the facts and circumstances of the situation, the acts

of failure to act of the third person and the class or type of person or persons involved."

The essential distinctions between the instruction as given and as suggested are that rather than there be an absolute right to rely upon another's being non-negligent, that right exists only when an ordinary prudent man would so rely. And that, rather than the right to rely, continuing until some *act* is done by the third person to indicate the contrary, the indication may come through the static facts of the situation, any circumstances attendant, failure to act upon the part of third persons or the type or class of person being dealt with. These propositions are discussed at length later in this brief.

In order to properly analyze the aforementioned rules, we should first consider the basic rules as to the "scope of duty" and the quantum of caution required in situations such as the case at bar. An excellent discussion of this matter is found in Flemming James' article in 3 *Utah Law Review* 275, entitled "Nature of Negligence." The essence of the article is that negligence is conduct which exposes another to an unreasonable risk of harm. The statement of the rule was approved by the Utah Supreme Court in the case of *Hilliard vs. Utah By-Products Company (Utah)* 263 Pac. 2nd 287, page 290, as follows:

"One is guilty of negligence when 'he does such an act or omits to take such a precaution that under the circumstances present, as an ordinary prudent person, he ought to reasonably foresee that he will thereby expose the interest of another to an unreasonable risk of harm.' When one does so, he may be held liable for resulting injuries caused by any reasonably foreseeable

conduct, whether it be innocent, negligent, or even criminal."

The amount of caution required of an ordinary prudent person in any situation is measured by the following standards: (1) The likelihood that the conduct will injure others, taken with (2) the seriousness of the harm threatened and balanced against (3) the interest which must be sacrificed to avoid the risk.

Fleming James in his article in 3 *Utah Law Review* 281-2 sets forth these standards as follows:

"1. The amount of caution required tends to increase with the likelihood that the actor's conduct will injure others."

2. "The amount of caution required tends to increase with the seriousness of the injury, if it happens."

3. "The interest which must be sacrificed to avoid the risk is balanced against the danger."

We can measure the amount of caution required of Cox in this case to fulfill his duty to West by applying the foregoing standards. The truck was parked facing down hill with its wheels turned downhill, and in the direction of Steve West. It was there to be loaded with coal out of a scoopmobile. The loading operation tends to jostle the truck. Hal Anderson, the driver, had left, prior to the time Cox started to load. All these things Cox actually knew or was legally bound to have known. To state that it is unlikely that the truck would break loose is to ignore a human experience. Trucks and motor vehicles can and frequently do break away and run down hill when parked upon a hill. The defendants concede on page

27 of their brief that: "The probability of the truck rolling forward if not properly braked was obvious to any one in the vicinity." The likelihood therefore that Cox's conduct in loading the truck without checking to see that it was properly braked would result in injury to another if for any reason whatever it broke loose was exceptionally high. The instrumentality being dealt with was a large heavy truck being made heavier ton by ton by Cox. It is obvious to anyone that if such an instrumentality were to run against a man or go over him, the harm to him would be great and serious. "The seriousness of the injury, if it happened" was tremendous and frightening and anyone could see that it would be, if it happened. The "interest which must be sacrificed to avoid the risk" was small indeed. Cox needn't have gotten out of the scoopmobile. He could have called to Hal Anderson to check his brakes and block the wheels. This would have been no inconvenience and would have sacrificed no interest. He could have gotten out of the scoopmobile and tugged once on the brakes to test them or told Hal Anderson to turn his wheels up hill. None of these things would have required more than a moment or two or much effort. There would have been little or no inconvenience or expense to Cox to exercise some additional precaution under the facts of this case.

The defendants take the view that Cox was unfamiliar with the truck's mechanism, that modern trucks are complicated and that the average person wouldn't know whether or not it was braked. The defendants further assert on page 14 of their brief that the emergency brake would have no effect on the movement of the truck's rear wheels. Such contentions



are not in accordance with the facts or with reason. There is no evidence in the record that the emergency brake would not operate if the vacuum leaked out of the Eaton two-speed rear axle as contended by the defendant. Hal Anderson, in his testimony (R-281), when asked about the emergency brake, testified as follows:

“Q When you say you pulled the brakes on what brake do you mean?

A The emergency brake.

Q How is that operated?

A Just with a lever.

There is some other evidence in the record with regard to the ratchet on the brake of the truck; however, there was no conclusive evidence from which the jury might have believed that the ratchet was defective. We submit that it is wholly unreasonable to conclude that Clyde Cox, if he had checked, would not have know whether the truck was properly braked. On the contrary, there is some evidence in the record from which the jury could have concluded that Cox did know how to operate a truck. When being questioned by Mr. Wooley with regard to the operation of the scoopmobile (R-206), Mr. Cox testified as follows:

“Q. And operate it (referring to the scoopmobile) much like you do a truck?

A: Yes, sir.”

In applying James’ analysis to the facts as they existed in this case, we contend that a very substantial amount of caution was required on the part of Cox in order to avoid

having his conduct be such that it would involve an unreasonable risk of harm to West. It is in the light of this very high duty that the question whether Cox's acts or failure to act constituted negligence must be considered.

The jury found that Cox was negligent by failing to ascertain that the dump truck was so securely braked or blocked that it would not run down hill while being loaded. And they found that that was a proximate cause of West's injury. The inquiry then must be whether or not Cox had any duty to ascertain that the dump truck was securely braked so that it would not run down hill while he was loading it. This question must in turn be examined in the light of whether or not Cox is entitled, under circumstances of the case as they existed at the time he started to load the truck, to rely upon the proposition that Hal Anderson had braked the truck properly and that it would not run down hill. The defendants contend that they had such right to rely and they base said contention primarily upon the proposition that if West, the plaintiff, was entitled to assume that the truck was properly braked that Cox is entitled to the same assumption. With regard to West's right to rely we will discuss that proposition at a later point in the brief. We come to the portion of Mr. James' article dealing with the obligation to take into account conditions and conduct of others. The following is his discussion of the exact point:

"E. The Obligation to Take Into Account the Conditions and the Conduct of Others.

When men live together in society, even the most selfish of them must regulate their lives to a very great extent on the basis of how they expect other

people to act. And naturally enough in determining whether any given conduct involves an unreasonable risk of harm, the reasonably foreseeable conduct of others which may affect the consequences of the actor's conduct should be considered. This is the general rule. It remains to examine some special applications of it and some vestigial limitations upon it in practice.

The case where the conduct of the other person (i.e., other than the actor whose conduct is being judged) is itself that of a normal, reasonably prudent adult, gives no trouble at all. Such conduct the actor is bound to take into account if under the circumstances of the case it is reasonably foreseeable. Thus the manufacturer of an automobile in order to be in the exercise of due care must foresee that it is likely to be driven along public highways without the detection and repair of a latent defect.

The obligation to regulate one's conduct with a view to other people's disabilities and their substandard conduct should stand no differently. People generally do take extra precautions when they drive past a crowd of young children playing by the roadside, or when they see an aged and infirm pedestrian crossing the street. They do realize that other drivers often pull out from the curb without looking for traffic, and that they sometimes fail to yield the right of way or keep on going after a traffic light has turned red against them, and they drive with a view to these hazards. They do lock houses and automobiles and secure valuables against the possibility of theft, and so on. There are several types of situations where this notion has been applied, and for mere convenience of treatment they may be divided as follows:

1. Where something specific about the situation gives notice of the likelihood of the other person's disability or his substandard conduct. The first two ex-

amples given in the last paragraph are of that kind. So also are those cases where the nature of the place (e.g., playgrounds), or signs, proclaim the probability that children or blind people, or the like, will be present. And of course the other person's conduct may often show his infirmity to one who has eyes to see.

2. Where the actor's conduct (including omissions and also such things as the maintenance of premises or highways) is likely to affect an indeterminate number of people, among whom there will in all probability be some children, some aged and infirm people, some pregnant woman, some foreigners who do not know the language or the customs of the country, and the like. In such situations, if the imputation of negligence is to be avoided, some account must be taken of reasonably foreseeable deviations like those mentioned. But such general likelihood does not call for as much in the way of precautions as do the situations mentioned in the previous paragraph.

When the other person's conduct involves negligence or a crime, there are certain notions which sometimes impede the full application of the foregoing rational principle. It is often said that an actor may assume that others will act lawfully and carefully. Rightly understood this is sound enough, and no more than a corollary of the general principle. As a broad generalization, people probably do obey the law, so that unlawful conduct is more or less deviational and unusual. In many situations, therefore, the assumption mentioned no more than reflects the real factual probabilities as to what another person's conduct will be. If the assumption is made only in cases where it reflects the facts, it is useful and proper. But in this connection two things must be noted. The first is that such an assumption does not always correspond to the facts. It does not in situations where a law is generally disobeyed.

It does not where the facts in a specific case would show to a reasonable man in the actor's position that another person will probably disobey the law this time. And it does not wherever the actor's conduct exposes some interest to risk from a large and indeterminate group of people which will probably include some who will be negligent or commit crime, so that the likelihood of some negligence or some crime is considerable, though the number of those who will be responsible for it is relatively small. The second thing to be noted is that the assumption has often been applied rather mechanically, without any real regard to the factual probabilities of the situation. Perhaps the most significant trend that has taken place in this particular field, in recent years, has been the increasing liberalization in allowing the wrongs of other people to be regarded as foreseeable where the facts warrant that conclusion if they are looked at naturally and not through the lens of some artificial archaic notion.

Subject to the qualifications just mentioned, situations where the probable negligence or crime of another is to be taken into account in evaluating conduct, fall into classifications parallel to those mentioned above with respect to the infirmities of others:

3. Where something specific about the situation gives notice of the likelihood of the other person's probable negligence or crime."

*Prosser on Torts*, Hornbook Series, pages 243 to 249 inclusive, has a well-documented discussion relative to anticipating the conduct of others. The cases supporting the following propositions are referred to in the article and the following extractions give the substance of the conclusions:

"There are many situations in which the hypothetical reasonable man would be expected to anticipate and

guard against the conduct of others. Anyone with normal experience is required to have knowledge of the traits and habits of common animals, and of other human beings, and to govern himself accordingly. \* \* \* he is required to realize that there will be a certain amount of negligence in the world. In general, *where the risk is relatively slight*, he is free to proceed upon the assumption that other people will exercise proper care \* \* \* *But when the risk becomes a serious one*, either because the threatened harm is great, or because there is an especial likelihood that it will occur, reasonable care may demand precautions against that occasional negligence which is one of the ordinary incidents of human life and, therefore, to be anticipated."

To restrict the rule that one must contemplate the possibility of negligence on the part of a third person to a situation where some *act* of that person puts the actor on notice of the third person's disposition to be negligent, is to restrict the rule improperly.

*The static facts of a situation* may, by themselves, be sufficient to give a reasonable man warning that he must contemplate the possibility of negligence on the part of others.

The trial court instructed the jury in Instruction No. 12 in part as follows:

"Clyde Cox as an employee owed Steve L. West a duty to use reasonable care to avoid harming him. That is to say, Clyde Cox was under an obligation to conduct himself in reference to his business invitees as a reasonably prudent man would do under the same or similar circumstance."

The Supreme Court of the State of Utah in the early case of *Downey vs. Gemini Mining Co., (Utah)* 24 P. 431, 68 P. 413, defined ordinary care as follows:

"Ordinary care simply implies and includes the exercise of such reasonable diligence, care, skill, watchfulness, and forethought as, under all of the circumstances of the particular case a careful prudent man or officer of a corporation would exercise under the same or similar circumstances. And by the term 'same circumstances' is meant to include *all the circumstances of time, place, and attendant conditions.*"

Again our Court reaffirms that the jury may consider more than just the "acts of the third person."

38 *Am Jur.* 667 Section 24, provides:

"The probability of injury by one to the legally protected interests of another is the basis for the law's creation of a duty to avoid such injury. Every person is under a duty to exercise his senses and intelligence in his actions in order to avoid injury to others, and where a situation suggests investigation and inspection in order that its dangers may fully appear, the duty to make such investigation and inspection is imposed by law."

In the case at bar Cox was about to load a large truck parked with wheels turned down hill on a hill. It had been left there by a boy not quite 16 years of age who got out of the truck after having left the wheels pointed down hill and immediately left the truck to go down to talk to his brother. Here, we submit, a reasonable man should be required to contemplate that the truck might roll forward when it was being loaded if it had been improperly braked. In view of the seriousness of the injury which would be caused were it to roll forward, Cox could be held by a jury to have the affirmative duty to ascertain that the brakes were firmly set in

such a manner that the truck would not roll forward when he commenced to load it.

The class of persons with whom one is dealing may be sufficient in and of itself to put one on notice that some of those persons may be negligent. The outstanding example of this is a case where one is dealing with children. One must contemplate that children may act without any care for their own safety. Similarly we contend that Cox was required to contemplate the possibility that a sixteen year old boy might not act with the amount of caution which an ordinary prudent grown man would use under the circumstances there attendant.

The acts of third persons are a third class of cases which would put a reasonable prudent man upon notice that the third person might be negligent. Such acts as leaving a truck unattended and turning the wheels down hill toward the plaintiff when it is parked on a hill are such acts which a jury could properly find to be sufficient to put a reasonable man upon notice that the person doing those acts might be negligent.

The *Restatement of the Law of Torts* deals with the rule in situations such as those present in this case. The following are portions of the Restatement, paragraph by paragraph, with the facts applied to the situation which are sufficient to support the jury's findings and the judgment entered upon it.

*Restatement, Torts, Sec. 302:*

"i. *Action of human beings.* Whether the actor as a reasonable man is entitled to expect that human beings will exercise the amount of attention, foresight, care, and skill which persons of their class customarily exercise in similar conditions depends upon a variety of



factors. If the actor knows or should know that the safety of the situation which he has created depends upon the actions of a particular person or a particular class of persons, he is required to take into account their peculiar characteristics of inattention, carelessness, unskillfulness, or even recklessness if he knows or should know thereof."

Cox knew or should have known that the safety of the situation with which he was dealing depended upon the actions of Hal Anderson. The situation which Cox created was the application of active force tending to push the truck down hill where the truck was standing unattended on a hill with the wheels pointed in a downhill direction toward the plaintiff. He certainly knew or would be required to know that the safety of the situation thus created depended entirely upon whether or not Hal Anderson had behaved with every reasonable care. Under the circumstances he, under the rules stated above, is required to take into account the particular characteristics of inattention, carelessness, or unskillfulness of the third person if he knows or should know thereof. Cox knew of Hal's inattention because he saw that Hal had left the truck and was paying no attention whatever to it. He knew or should have known that Hal was careless because he saw or should have seen that Hal had left the wheels on the truck turned in a downhill direction. He knew or should have known that Hal Anderson may be unskilled because he knew or could see that Hal was a young man of approximately 16 years of age.

*Restatement, Torts, Section 302:*

"j. Irrespective of the actor's knowledge of the peculiar propensities of particular persons or classes of

persons, he is required to know that there is a certain percentage of all human beings which acts with less than normal propriety. Unless the interest at stake is valuable, the actor may be entitled to ignore the slight risk of harm to others involved in such propensities and to assume that human beings will act with normal propriety. If the actor knows or should realize that the situation is one which, if improperly interfered with, involves serious chance of grave harm to valuable interests of others, he is required to take this chance into account and provide against it, particularly if his conduct is of little or no utility."

The above comment should be analyzed with the realization that the "interest at stake" is of tremendous value. The interest being the life and limb of Steven West, because certainly under the situation as seen by Cox, the person whose interest stood in the greatest peril was Steve West and the interest which stood in that peril was his life. Certainly Cox knew or should realize that the situation there present was one which, if improperly interfered with, involves serious chance of grave harm to valuable interest of others. It is true that the conduct of Cox in loading the truck was conduct having substantial utility but offset against the substantial utility is the consideration that it would have taken so little time and so little effort to have done the things which would have made the situation safe.

*Restatement, Torts, Section 302:*

"1. *Anticipation of third person's negligence.* The actor is often required to anticipate and provide against that occasional negligence which is one of the ordinary incidents of human life and therefore to be anticipated, particularly if there is little or no utility in the creation

of the situation and the harm likely to be done is something more than trivial.”

The defendants cite *Restatement of the Law of Torts, Negligence, Section (e)* page 17, in support of their proposition that the defendant Cox had no duty to anticipate that the truck might roll down hill. Properly analyzed this rule is applicable to the case at bar but does not support the plaintiff's proposition. It sets forth the rule that an actor is entitled to assume that human beings and animals will act and that natural forces will operate in their usual manner. This portion of the rule is not applicable, however, if, first, the actor had reason to expect the contrary or, secondly, that the action would create a serious chance of grave harm to same valuable interest, i.e., the life of Steve West, and there is little utility in the actor's conduct such as the ease of checking the brakes. Referring to the first exception, i.e., where the actor has reason to expect to the contrary, we submit, that under Instruction 9(a) as it was given to the jury, they must have come to the conclusion that some act on the part of Hal Anderson put Cox on notice to the contrary and that he might act in a negligent manner.

The defendants cite the case of *Hilliard vs. Utah By-Products Company (Utah)* 1 2nd 287, 263 Pac. 2nd 287, as being particularly applicable to the evidence in this case, not only as to whether Cox should have foreseen the negligent conduct on the part of Hal Anderson in parking the truck but also his duty to foresee that the plaintiff would not exercise reasonable care for his own safety. The Hilliard case is not in point on the facts. It involves the foreseeability of an intervening actor. That case might throw some light on the

duty and foreseeability with regard to Hal Anderson, however, that matter is not involved in this appeal.

The case of *Mehl vs. Carter*, (Kan.) 237 Pac. 2nd 240, cited by the defendants with regard to the question of foreseeability, cannot be in point in this case. The facts are entirely different and shed no light upon the problem to be determined with regard to the question of foreseeability.

We must determine as to whether or not it is necessary that Cox be given specific notice of the exact manner in which the accident may take place. It is not required that one foresee the exact manner in which harm actually comes to the person injured. The test of foreseeability is that the person harmed may be within the general class to whom such harm is threatened and that the harm which results be of the general class of harm which may be expected to result. The sequence of events by virtue of which the harm results need not be foreseeable. This is set out by Harper in 7 *Notre Dame Law Review* 468 in his article "*Foreseeability Factor in the Law of Torts*" as follows:

"The courts for centuries persisted in stating and purporting to apply the 'natural and the probable' formula to determine whether consequences were proximate to conduct. Many still insist that there can be no recovery if the injuries complained of were not reasonably foreseeable. It would be most astonishing that such a formula should persist for so long if there were no validity whatever to it. *The secret is revealed by the frequent qualification of the rule that the exact manner in which the injuries occurred need not be foreseeable.* The explanation is that the courts are perfectly accurate in declaring that there can be no liability where

the injuries were unforeseeable, if 'foreseeability' refers to the general type of harm sustained. It is perfectly true that there is no liability for injuries or damage that falls entirely outside the general threat of harm which made the conduct of the actor negligent. The sequence of events, of course, need not be foreseeable. *The manner in which the risk culminates in harm may be unusual, improbable, and highly unexpected*, from the point of view of the actor, at the time of his conduct. And yet, if the general result suffered falls within the danger area, there may be liability, providing to other requisites of legal causation are present.

It should be observed that while non-liability for harm is completely outside the general threat is a correct statement of the results, to catch the rule in terms of legal causation is not a desirable analysis of the problem. It is rather a lack of analysis. Legal causation is better confined solely to the problem presented by the sequence of events leading up to the injury. Where the actor's liability is predicated upon his negligent conduct, the question of whether the harm sustained falls within or outside the general class of harms which made the conduct negligent may be treated more conveniently as an aspect of the negligence problem, and it has been so treated by the American Law Institute in its Restatement of Negligence."

The defendants contend that in the two years Clyde Cox had been loading coal that this was the first time that a truck had ever moved from its moorings and rolled down a hill and that therefore the defendant had no duty to anticipate and foresee that such would be the case. There is no evidence in the record that Cox had ever loaded a truck under the same circumstances as he did in the instant case. It takes no great amount of insight to foresee that a truck loaded

under these circumstances might run away and not being driven by anyone could result in great harm. The general result suffered in this case, i.e.: the injuries to Steve West, we submit, falls within the danger area and was reasonably foreseeable.

The Supreme Court of the State of Texas, in the case of *Humble Oil & Refining Company, et al vs. Martin et al (Texas)* 222 S. W. 2nd 995, considered a factual situation almost on all fours with the case at bar. In that case the petitioner Humble operated a filling station which was located on an incline of about 6 inches per 27 feet. The owner of the automobile, a Mrs. Love, parked her car in the service station to obtain service by Humble and with the latter's actual knowledge and consent and left the car unattended on a sloping drive. The court held Humble to be liable to persons who were injured when the car rolled down the drive. The court held in part as follows:

"It seems proper that the operator of a filling station should owe to that part of the public which might be affected—such as respondent Martin here—the duty of ordinary care to prevent cars left with it under such circumstances from rolling away and injuring persons or property. If there were any doubt about this in the ordinary case, there could hardly be any in a situation like the present, in which both the possibility of such an accident and the probability of serious results therefrom were obvious. If, to take an extreme example, the station employee, Manis, had been otherwise unoccupied and standing close by Mrs. Love's car in a position where he could readily and with safety to himself have stopped it but, after seeing it start, had yet made no effort to stop it, there could be little doubt

that such conduct would constitute actionable negligence on Humble's part toward the public. Similarly, if Mrs. Love had been a stranger visiting the station for the first time and with the previous knowledge of the station employees, had left her car unoccupied and unbraked beside the pumps, so that it later rolled away, it seems plain that Humble ought to be responsible for the consequences to innocent third persons. These examples illustrate the existence of the duty of the station operator to the public and also the corollary proposition that the operator is not free to omit precaution or effort simply because the particular car in question is brought onto the premises by its owner or happens to escape *before the station operator has taken physical control of it*. They do not, however, throw much light on the problem of the quantum of care or precaution necessary to meet the standard of reasonable prudence.

As to the latter question, undoubtedly the peculiar physical characteristic of the station, all of which must be taken as a matter of law to be well known to Humble, have a legitimate bearing, and as a result, we think the amount of care should plainly be greater than, for example, in the case of a station located in a flat area and without sloping driveways. Should authority be needed to support such a conclusion, it has been held in Texas and elsewhere that, under the so-called rule of *res ipsa loquitur*, evidence that a defendant's car was parked by him in a heavily sloping street and thereafter rolled down without a driver, damaging the plaintiff's person or property, was sufficient to carry the case to the jury on the issue of the defendant's negligence, even though the only other evidence on the point was direct evidence by the defendant or others that the emergency brake was carefully set at the time the car was parked. *Ketchum v. Gillespie*, Tex. Civ. App., 145 S. W. 2d 215; *Glaser v.*

Schroeder, 269 Mass. 337, 168 N. E. 809. While we do not consider the present case one of *res ipsa loquitur* or other rule of circumstantial evidence in so far as the liability of petitioner Humble is concerned, the decisions mentioned do necessarily imply that the matter of leaving a car on a sloping way is one in which the ordinarily prudent man would be expected to take a greater amount of precaution than otherwise. Assuming that in the instant case the station employee, Manis, were unoccupied at the time Mrs. Love left her car in the pump area, knew she had herself taken no precautions to keep the car stationary and yet stood idly by in his office for even two or three minutes, we think there would be a serious question as to whether Humble would not be guilty of negligence as a matter of law. This, because his knowledge would, by all reasonable standards, call for quicker action than might otherwise be required. The only differences between such a situation and the instant case are, first, that in the latter Manis might conceivably have been justified in relying on Mrs. Love herself to take the necessary precautions; and, secondly, that Manis was evidently occupied with servicing another car at the pumps and other successive duties from the time Mrs. Love left her car until it rolled away.

As to the first difference, while Mrs. Love was a regular customer of the station, understood the necessity of securing her car and was negligent in failing to secure it, *we cannot say that as a matter of law, Manis exercised sufficient care in the discharge of his duty to the public by simply assuming she had secured it.* A plaintiff injured when standing close to a public street without keeping a lookout, is not, as a matter of law, to be acquitted of contributory negligence because he assumes that the defendant's oncoming car will be driven with due care and will therefore not strike him. Cronk v. J. G. Pegues Motor Co., Tex. Civ.



App., 167 S. W. 2d 254, writ ref. w. o. m. *And there is distinction between the general axiom that a person is not bound to anticipate the negligence of others and the idea that one may always discharge a duty of due care to the public by relying on performance by another of the same duty owed by the latter.* Mrs. Love did not indicate to Manis that she had secured or intended to secure the car, and we think any implied reliance by him upon her doing so was merely a circumstance to be considered by the jury on the issue of negligence.

Nor can we say, as a matter of law, that the circumstance of Manis being busy with other matters at the time shows him to have discharged his duty of due care. It was clearly not very difficult for him to have interrupted his other work for the brief time an inspection would require. The jury might well have thought it a more urgent matter to make this inspection than to collect for soft drinks purchased by customers, or do several other things he appears to have done before the car rolled away. Plainly any unfavorable consequences of interrupting these latter duties would be less serious than those of a failure to inspect an unguarded car. As to the matter of just how much time elapsed between the moment Mrs. Love left her car and the moment it rolled away, while the preponderance of the evidence does indicate that this period was rather short, we cannot say as a matter of law that it was only "two or three minutes" as testified to by Manis. His estimate was at best an estimate and, coming from him as an employee of the defendant Humble and one who might himself be responsible in the premises, need not be taken as conclusive, while at the same time there is at least some evidence from the various other witnesses indicating that a considerably greater period of time might have elapsed. In any event the period is itself not conclusive one way or the

other. If with his knowledge that the car was left on the sloping lane, it was reasonable for Manis to forego an inspection for two or three minutes, it was doubtless reasonable for him to do so for a still longer time. On the other hand, we think the jury might properly have considered even two or three minutes too long a delay under the circumstances. The point was merely evidentiary and no more the proper subject of a special issue than, for example, the question of just what other duties Manis was in fact performing during the period.

Other contentions (by both petitioners) stem from an apparent confusion in the jury findings to the effect that, while Mrs. Love negligently failed to set the emergency brake (she admitted failing to set it), she nevertheless did "properly place the gears of her car in reverse" (as she—and she alone—testified) when she left it. The jury also found upon sufficient evidence that the gears were not in defective condition. An apparently impartial witness testified rather convincingly that when he examined the car immediately after it stopped in respondent Martin's yard, the gear was in the neutral position. The evidence does not admit of any theory of the accident such as the meddling of a third party or the intervention of any force other than gravity. If the car were left in reverse gear, it seems clear that neither Humble nor Mrs. Love would be liable. It is common knowledge that such a procedure is quite as safe a method of securing a car as setting the emergency brake, and that cars in reverse gear do not roll on grades such as that prevailing at and even beyond the place where the Love car undoubtedly was left. Mrs. Love could not be negligent if she took an obviously sufficient precaution, and if she did take it, the failure of Humble to inspect was not the proximate cause of the accident, nor was its failure to take other precautions negligence. The Court of Civil Appeals considered that, under the circumstances, the finding

that the car was left in reverse was "almost incredible." Without the least reflection upon the good faith of Mrs. Love, we more than agree with this view and think this Court is not bound by the finding or Mrs. Love's statement, which is its only support, her testimony being in our judgment at variance with elemental physical facts and common knowledge and so not evidence, regardless of the good faith of the witness. *Seilwell v. Hines*, 273 Pa. 259, 116 A, 919, 21 A.L.R. 139; *Austin v. Neiman*, Tex. Com. App., 14 S. W. 2d 794, 20 Am. Jur., Evidence, Sec. 1183. *This conclusion disposes of the only serious contention of petitioner Humble with respect to its negligence not being a proximate cause of the accident.*" (Underlining added.)

The parallel between the factual situation in the Humble case and the case at bar is noteworthy. In the Humble case Mrs. Love had come to purchase gasoline; in the case at bar, Hal Anderson was present on the premises as an independent contractor of the Eastern Utah Development Company to purchase coal from McKinnon doing business as the American Fuel Company. In both cases the motor vehicle ran down a hill after it was left unattended by the driver of the motor vehicle. In the Humble case the service station operator knew that Mrs. Love had left the automobile there and had apparently consented thereto. In the case at bar, Cox saw Hal Anderson leave the truck and made no protest but proceeded to load the truck. In the Humble case the car escaped before the station operator had taken physical control of it. In the case at bar, there is even a stronger indication that Cox had some duty because he was interfering with the truck by loading large loads of coal into the body of the truck. In the Humble case, the Humble Oil Company contended that

their employee Manis had a right to rely upon the fact that Mrs. Love had secured the automobile. Here Cox contends he is entitled to rely upon the fact that Hal Anderson had secured the truck. The jury in the Humble case found that Mrs. Love had left the car in gear; however, the Court of Appeals considered that under the circumstances such finding was almost incredible and was at variance with elemental physical facts. In the case at bar, the jury found that Hal Anderson was negligent in failing to set the brakes securely on the dump truck. In both cases the defendants contended that any act done by them was not the proximate cause of the accident. The only possible distinction between the two cases is the question of custody and control of the motor vehicles. However, if such distinction makes any difference we submit that the defendant Cox cannot make such a claim.

The issues were submitted to the jury on special interrogatories pursuant to *Rule 49(a) U.R.C.P.* The defendant did not ask that the issue as to control of the truck be submitted to the jury, and the Court omitted such issue of fact. The rule provides in part:

“The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue. If in so doing the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury.

As to the issue of control the court made no finding, however, the rule further provides:

"As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on a special verdict."

In view of this rule, we submit that the court has found that Cox was in control and custody of the truck at the time that he commenced to load it, and this is based upon the fact that Hal Anderson had left the truck unattended and nobody else was in the area. The reasoning of the Texas Supreme Court, in the Humble case alone, is sufficient to sustain the finding of the jury that Cox was negligent.

A Utah case throwing light on this general area and holding the problem of negligence and cause to be for the jury where the question is whether one must anticipate that others may be negligent is *Shafer vs. Keeley Ice Cream Co.*, 65 U. 46, 234 P. 300, 38 A.L.R. 1523.

The precise question is whether the court may say *as a matter of law* that Cox was not negligent, under all of the circumstances present, in loading without checking the brakes or whether it is a question to be left to the jury. The rule is stated generally in the recent case of *Best vs. Huber (Utah)*, 281 Pac. 2nd 208, as follows:

"It has been frequently announced by this court that negligence is a question for the jury unless all reasonable men must draw the same conclusion from the facts as they are shown. *Shafer v. Keeley Ice Cream Co.*, 65 Utah 46, 234 P. 300, 38 A.L.R. 1523; *Lowe v. Salt Lake City*, 13 Utah 91, 44 P. 1050, 57 Am. St. Rep. 708; *Baker v. Decker*, 117 Utah 15, 212 P.2d 679. As was said in *Linden v. Anchor Min. Co.*, 20 Utah 134, 58 P. 355, 358:

" 'Where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law, but of fact, and to be settled by a jury; and this whether, the uncertainty arises from a conflict in the testimony, or because, the facts being undisputed, fair-minded men will honestly draw different conclusions from them.' "

In discussing the general rule that a person has a right to presume that every other person will perform his duty, the Supreme Court of the State of California, in the case of *Dickinson vs. Pacific Greyhound Lines (Calif)* 131 Pac. (2nd) 401, at page 403 held:

"Whether reasonable care is used under the circumstances in any particular case in relying upon the presumption, is a question for the jury."

It appears to us that under the circumstances present in this case, the jury may well hold that a *reasonably prudent man* would not have relied upon Hal Anderson's being free from negligence but would instead, being alerted by the unusual circumstances present and by the tender age of Anderson, take some additional precautions such as blocking or braking the truck. This is what they did in fact hold.

When it is seen that the true rule is not that "one has an absolute right to rely upon the freedom from negligence of another until some *affirmative act* upon the other's part gives him specific notice that the other person is not doing the thing which he should," but instead, the same old rule that one must behave as a reasonable man would under the circumstances, it is apparent the jury's verdict can be sustained and that the judgment entered upon it is proper. Whether these facts were

sufficient to give a reasonable man notice is purely a question for the jury. If there is in fact a fair, proper and lawful theory sustaining the verdict and the judgment, it is the duty of the court to allow the verdict to stand as given and not to disturb the judgment entered upon it. There is such a proper theory sustaining the verdict and the judgment. In view of this, the court should allow the verdict and judgment to stand.

In their argument in Point I the defendants finally contend that any act of Clyde Cox was twice removed from the injury to the plaintiff. They state: "Not only do we have the intervening negligence of the defendant Hal Anderson, but we have the conduct of the plaintiff \* \* \* ."

We do not believe that the defendants seriously contend that the negligence of Hal Anderson was an intervening cause.

The defendant Cox cannot excuse his negligence because of the negligence of Hal Anderson. The negligence of Hal Anderson and of Clyde Cox were concurrent causes. The test in determining whether or not it is a concurrence of causes is simply: could the accident have happened without their cooperation? See *Sherman and Redfield on Negligence*, Vol. 1, Sec. 39, page 106. In his case if either Hal Anderson had put on the brakes or if Clyde Cox had not loaded the truck without checking the brakes the accident would not have happened.

The *Restatement of Torts*, Section 452, discusses the problem of a third person's failure to prevent harm. Comment (a) states:

"The fact that the third person has failed to perform his duty to protect the other from harm threatened by the actor's negligence, implies that had the duty been performed, it would have prevented the actor's negligence from causing the harm which resulted from it. In order that there can be a failure of a duty of protection the person owing it must have either the opportunity to perform it or at least he should have had an opportunity had he been reasonably attentive to his surroundings. The third person's failure to perform his duty in this respect makes him concurrently liable with the negligent actor for any harm which results from the actor's negligence which would have been prevented by the third person's duty."

The law is well settled in Utah that a defendant is not relieved from liability merely because some other cause operated with the negligence of the defendant to produce the injury.

*Massachusetts Bonding and Insurance Company vs. Cudahy Packing Company*, 61 Utah 116, 211 Pac. 706; *United States vs. First Security Bank of Utah*, 208 Fed. (2nd) 424; *Caperon vs. Tuttle*, 100 Utah 476, 116 Pac. (2nd) 402.

The Supreme Court of the State of Washington followed the same rule in the case of *Seibly vs. City of Sunnyside*, (Wash) 35 Pac. (2nd) 56.

The Supreme Court of the State of California in the case of *Taylor vs. Oakland Scavenger Co.* (Calif) 100 Pac. (2nd) 1044, states the Rule as follows:

"If an injury is produced by the concurrent effect of two separate wrongful acts, each is a proximate cause of the injury, and either can operate as an efficient intervening cause with regard to the other. \* \* \*  
The fact that neither party could reasonably anticipate



the concurrence of the other concurrent cause will not shield him from liability so long as his own negligence was one of the causes of the injury." (Citing cases.)

The defendants base their argument with regard to the negligence of Clyde Cox and also as to the contributory negligence of Steven West upon the proposition "that if Steven West could assume that the truck was securely braked that Clyde Cox was entitled to the same assumption. The defendants cite no case to support this theory and we find none. However, we will discuss the question in connection with the next point.

## POINT II

THE PLAINTIFF, STEVEN WEST, WAS NOT GUILTY OF CONTRIBUTORY NEGLIGENCE AS A MATTER OF LAW IN SITTING DOWN BY THE SIDE OF THE MAIN TRAVELED WAY ON A PILE OF COAL WITHOUT BEING ATTENTIVE MERELY BECAUSE THE JURY FOUND CLYDE COX GUILTY OF NEGLIGENCE, BECAUSE, THE CIRCUMSTANCES SURROUNDING THE ACTS AND FAILURE TO ACT OF COX AND THE CIRCUMSTANCES SURROUNDING THE ACTS OF WEST WERE ENTIRELY DIFFERENT.

The defendants base their argument with regard to the contributory negligence of Steven West primarily upon the proposition that Steven West and Clyde Cox were aware of the same situation. In defendants' brief (page 22) or as stated in defendant's brief page 32.

"Therefore they are saying what should have been apparent to the defendants as reasonable and prudent men should not have been apparent to the plaintiff under the same circumstances as a reasonable and prudent man."

Then basing their reasoning upon this premise conclude:

"that if under these circumstances Cox was negligent, then West must have also been contributorily negligent as a matter of law." (Page 33 defendants' brief.)

We submit that there can be merit to defendants' argument if, but only if, the facts of the case were such that the circumstances are the same and are equally apparent to both. That is not true in this case. There was a similarity of situation only up to the point where Hal Anderson got out of the truck. Cox directed Anderson to park the truck as he did and West heard the truck backing in. Beyond that point West's negligence, if any, was inattentiveness. He testified that he did not know what was going on. The evidence is clear that his hat was down over his eyes and he was inattentive. However, as to Cox, he saw Hal Anderson leave the truck and go down to talk to his brother. Further, he was in a position where he could see that Hal Anderson had left the wheels turned in a downhill position. He knew that Hal Anderson was the driver of the truck and was a young man—an apparent youth. Cox knew of the position of the truck and its relation to the grade. None of these things were known to West inasmuch as he was, in fact, inattentive. The only issue which was submitted to the jury with regard to the negligence of Steve West was question No. 3, and that was whether or not West was negli-

gent in occupying the position where he was injured. The only contention made by the defendants in the pleadings or pretrial order as finally decided upon, was that

“The plaintiff was himself guilty of contributory negligence which proximately contributed to cause his injuries and damages in that the said plaintiff seated himself in an inattentive position downhill and slightly to the left of and in front of the truck being loaded.” (R-43).

Thus, we submit, the contributory negligence, if any, of Steven West must be considered with regard to the situation as it existed as to him and not with regard to the situation as it existed to Clyde Cox. The defendants cite the *Restatement of the Law of Torts, Sec. 340*, Page 927, and a number of cases which stand for the general proposition that as stated in the *Restatement of the Law of Torts*:

“A possessor of land is not subject to liability to his licensees, whether business visitors or gratuitous licensees, for bodily harm caused to them by any dangerous condition thereon, whether natural or artificial, if they know of the condition and realize the risk involved therein.”

In the case of *Hooton, et al, vs. City of Burley, (Idaho)* 219 Pac. (2nd) 651, cited by the defendants as particularly applicable to this case, the defendant had left some bare electrical wires. The plaintiff saw the wires flashing and was cognizant of the danger involved. The case merely announces the general rule that where a plaintiff voluntarily exposes himself to a danger he is precluded from recovery. The case of *Murray vs. Ralph R'Oench Co., (Mo.)* 147 S.W. 2nd 623,

13 Negligence Cases, 638 involves a wet spot on a floor which plaintiff testified she *saw and was pointed out to her on her entrance to the premises. Kitchen vs. Women's City Club (Mass.)* 66 N.E. 554, involved a situation where the plaintiff slipped on a highly polished hardwood floor. As stated in the case:

"The plaintiff knew all the conditions of which she complains, she knew that light rugs when stepped on may be expected to slip on slippery floors."

In the case of *Wold vs. Ogden City, et al (Utah)* 258, P 2nd 453, the court emphasized the fact that the plaintiff *knew of the hazard*, an open trench. The rules announced in these cases, we submit, are not helpful in deciding the issues involved in this case. Each involves a situation where the plaintiff assumed the risk of a known danger. The defendants cite two other cases: *Scofield vs. Sprouse-Reitz Company, (Utah)* 265 Pac. (2nd) 396, and *Knox vs. Snow (Utah)* 229 P. 2nd 874. Each of these cases involved a situation where the plaintiff falls into an easily observable hazard. These cases we submit have no application here.

*Restatement of the Law of Torts Sec. 466* recognizes two types of contributory negligence. The section states:

"The plaintiff's contributory negligence may be either

(a) an intentional and unreasonable exposure of himself to danger created by the defendant's negligence, of which danger the plaintiff knows or has reason to know, or

(b) conduct which, in respects other than those stated in Clause (a), fall short of the standard to which the

reasonable man should conform in order to protect himself from harm.

Comment (c) under said section discusses the type of negligence in clause (a) as follows:

"In order that the plaintiff's conduct may be contributory negligence of the sort described in Clause (a), the plaintiff must know of the physical condition created by the defendant's negligence and must have knowledge of such facts that, as a reasonable man, he should realize the danger involved. Furthermore, the plaintiff must intentionally expose himself to this danger. He must have the purpose to place himself within reach of it. It is not enough that his failure to exercise reasonable attention to his surroundings prevents him from observing the danger, or that lack of reasonable preparation or competence prevents him from avoiding it when the condition created by the defendant is known to him."

Comment (g) under said section discusses the type of negligence described in clause (b) as follows:

"The negligence dealt with in Clause (b) usually consists of plaintiff's failure to pay reasonable attention to his surroundings so as to discover the danger created by the defendant's negligence or to exercise reasonable competence, care, diligence, and skill to avoid the danger when it is perceived, or to make such preparations as a reasonable man would regard as necessary to enable him to avoid the possible future danger. Such negligence is negligence of inadvertence and will, for convenience, be hereinafter described as casual negligence to distinguish it from the type of negligence dealt with in Clause (a) which is herein called assumption of risk and consists in the plaintiff's voluntary and unreasonable exposure of himself to a known danger."

The law and cases cited by the defendants under Point II involve the type of negligence discussed in Clause (a). The negligence of Steve West, if any, can only be negligence of inadvertence as discussed in Clause (b). At the time Steve West assumed the position that he did no danger existed. Furthermore, the only evidence in the record with regard to the custom as to where men would sit while waiting to be loaded was to the effect that they sat wherever they felt like and on other occasions had been observed to sit in the same place or the same vicinity where Steve West was sitting when he was injured (R-325). Also the same day that West was injured Cox testified he saw other men at the same place as Steve West (R-185).

There is no evidence in the record to show that Steve West had any reason to apprehend any danger and we submit therefore that he cannot be found guilty of contributory negligence. The Supreme Court of the State of Wyoming in the case of *VanHorn vs. Wyoming Game and Fish Commission (Wyo)* 92 Pac. (2nd) 560, 562, states this principal as follows:

"Here we think the more pertinent principal applicable is as held in *Chicago Telephone Company vs. Commercial Union Assurance Company, Ltd., of London*, 131 Ill. App. 248, that the doctrine of contributory negligence does not apply where it appears that the omission or conduct alleged to constitute contributory negligence was in the doing or the not doing of some act or acts in relation to a danger not reasonably to have been apprehended. In the opinion in that case the decision in *Ingall vs. Smith*, 82 Mich. 1, 7, 46 N.W. 21, was quoted to this effect: 'It is a sound rule of law that it is not contributory negligence not to look out for

danger when there is no reason to apprehend any.'  
Beach Contrib. Neg. 41."

The jury under special interrogatory found that Steven L. West was not guilty of negligence in assuming the position he did. This finding under the facts and circumstances of this case we submit should not be disturbed by the court upon appeal. The Utah Supreme Court has long recognized the rule that contributory negligence is generally a question of fact for the jury. In the case of *Hone vs. Mammoth Mining Company*, (Utah) 27 U. 168, 176, the court held as follows:

"This court held in *Holland vs. Oregon Shortline Railway Company*, 26 Utah 209, 212, 72 P. 940, that 'contributory negligence is a question of law only when the testimony is not conflicting, and is such as permits no reasonable difference of opinion as to its effect; but, whenever there is doubt as to the facts, it is the province of the jury to determine the question, or, whenever there may reasonably be a difference of opinion as to the inference and conclusions from the facts, it is likewise a question for the jury. It belongs to the jury not only to weigh the evidence and find upon the questions of fact, but to draw conclusions as well, alike from disputed and undisputed facts."

"This court, in the case of *Linder vs. Anchor Mining Company*, 20 Utah 134, 148, 58 Pac. 355, 358, held in the opinion delivered by Mr. Justice McCarty, that: 'It is well settled that, where there is uncertainty as to the existence of either negligence or contributory negligence, the question is not one of law but of fact, and to be settled by a jury; and this whether the uncertainty arises from a conflict in the testimony, or, because the facts being undisputed, fair minded men will honestly draw different conclusions from them."

In view of the fact, that in this case there was no apparent danger to Steven West and that at the time he assumed the position he did there was no activity whatever, reasonable minds might differ as to whether or not he was contributorily negligent in assuming the position he did and remaining inattentive to what was going on. The question was properly submitted to the jury. The Supreme Court of Utah in the case of *Martin vs. Stevens (Utah)*, 243 Pac. (2nd) 747, at page 749 states the rule as follows:

“The question of contributory negligence is usually for the jury and the court should be reluctant to take consideration of this question of fact from it. Neilson vs. Mauchley, Utah 202 P. 2nd 547; Toomers Estate vs. Union Pacific Railway Co., (Utah) 239 P 2d 163, The expressions in those cases are in accord with this uniformly accepted doctrine. The right to trial by jury should be safeguarded. Before the issue of contributory negligence may be taken from the jury, the defendant's burden of proving both (a) that plaintiff was guilty of contributory negligence, and (b) that such negligence proximately contributed to cause his own injury, must be met, and established with such certainty that reasonable minds could not find to the contrary; conversely, if there is any reasonable basis, either because of lack of evidence, or from the evidence and the fair inferences arising therefrom, taken in the light most favorable to the plaintiff, upon which reasonable minds may conclude that they are not convinced by a preponderance of the evidence rather (a) that plaintiff was guilty of contributory negligence or (b) that such negligence proximately contributed to the cause of the injury, the plaintiff is entitled to have the question submitted to the jury.”

The defendants finally contend that as a matter of law



under the evidence neither the defendant, Cox nor the plaintiff, West, were negligent in failing to anticipate Hal Anderson's negligence. With this proposition we agree in part. Failure to anticipate negligence of another which results in an injury, is not contributory negligence and will not defeat the action. *McCulloch vs. Horton (Mont.)*, 56 Pac. (2nd) 1344. However, this is not the negligence involved in this case. The jury found Cox negligent in failing to ascertain that the brakes on the truck were applied before he started to load the truck and that this was a proximate cause of the accident. They found that Steve West was not negligent in assuming the position he did and remaining inattentive. We submit, therefore, that because the jury found Cox guilty of negligence it does not follow that West was guilty of contributory negligence as a matter of law.

### POINT III

THE INSTRUCTIONS GIVEN BY THE TRIAL COURT DO NOT OVER-ACCENTUATE THE PLAINTIFF'S THEORY, BECAUSE, SUCH INSTRUCTIONS WERE GIVEN TO ENABLE THE JURY TO ANSWER THE SPECIAL INTERROGATORIES SUBMITTED TO THEM.

Under Point III in defendants' brief, the defendants have discussed a number of contentions wherein they claim the court erred in its instructions and for convenience we have broken this point down into four points and will discuss them in the same order as discussed in defendants' brief.

The defendants contend that the court instructions placed undue emphasis on the plaintiff's theory of the case and did not give equal emphasis to the theory of the defendants. The instructions in this case must be considered in light of the fact that the issues were submitted to the jury on special interrogatories. Rule 49 (a) U.R.C.P., provides in part as follows:

"The court shall give to the jury such explanation and instruction concerning the matter thus submitted as may be necessary to enable the jury to make its findings upon each issue."

Professor James William Moore in *Moore's Federal Practice*, Vol. 5, Page 2207, in discussing the instruction of a jury under a special verdict states as follows:

"Use of the special verdict eliminates the necessity for and use of complicated instructions on the law, which are a normal concomitant of the general verdict. Complicated instructions have always been ludicrous and vicious; ludicrous in that only the naive can believe lay juries are capable of absorbing all the legal elements involved; vicious in that lack of comprehension leads to confusion and ultimately, injustice. When the special verdict is used the court should give to the jury only such explanation and instructions as it deems necessary to enable the jury to make intelligent findings upon the issues of facts submitted."

The instructions given with regard to Hal Anderson's negligence i.e. Instructions 10 and 11 cited by the plaintiff in support of their theory that the court over-emphasized the plaintiff's theory of the case were necessarily given in order to enable th jury to make their findings with regard to the

negligence of Hal Anderson. The defendants do not claim that they are erroneous in stating the law but merely that they over-emphasized the duty of the defendants and particularly that they over-emphasized the duty of Clyde Cox. Such contention, we submit, is without merit. The court must of necessity instruct the jury with regard to each of the special interrogatories submitted. The defendants cite the case of *Devine vs. Cook*, 279 Pac. (2d) 1073, in support of their theory that the court in this case over emphasized or over accentuated the plaintiff's theory of the case. However, an analysis of this case and the other cases therein cited indicates that the over accentuation discussed in those cases is the giving of multiple and complicated instructions on the same subject. Such was not done in this case.

The defendants further claim and cite *Divine vs. Cook*, *supra*, as authority that it is error to have the instruction pertaining to one party to be given in a positive manner and those pertaining to another given in a negative manner. This proposition, we also submit, is not applicable to the case at bar. Instruction No. 12 with regard to the duty of Clyde Cox merely places upon Clyde Cox a duty to use reasonable care to avoid harming Steve West and that he was obligated to conduct himself as a reasonably prudent man. Paragraph two of the Instruction merely sets forth the conditions which the jury was entitled to consider under the evidence in determining whether or not Clyde Cox did act as a reasonably prudent man. There is no positive instruction that if Clyde Cox did not check the brakes he would be guilty of negligence. This fact was left for the determination of the jury under an in-

struction which we claim to be proper. On the other hand Instruction No. 13 with regard to the contributory negligence of Steve West states in a postive manner that Steven L. West would be guilty of negligence in assuming the position he did without keeping an outlook for his own safety. The defendants complain of this last phrase, however, the evidence was undisputed that he did not keep an outlook for his own safety and thus the instruction given amounts to a positive instruction that Steve West would be negligent if an ordinarily prudent man could have foreseen that the truck while being loaded might be set in motion and that it would likely run upon the general area where Steve West was reclining. Instruction 12, we submit, was necessary and sufficient to enable the jury to make the determination as to whether or not Steve West was contributorily negligent.

The only proper theory upon which the defendants could rely was, that Clyde Cox was not negligent; that he acted as a reasonably prudent man would under the circumstances of the case; and that Steven West was guilty of contributory negligence. The special interrogatories and instructions, as given, submitted this theory to the jury.

The defendants set forth on page 46 of their brief Instruction No. 10 and assert that such Instruction states the correct rule of law applicable to the case and that it sets forth the defendant's theory of the case. A perusal of the instructions indicates that it is erroneous. The instruction as requested gives to Clyde Cox an *absolute right to assume* that the brakes were securely set so as to hold the truck in place during the loading operation. As pointed out in Point I of plaintiff's brief, such

is not the law and it would have been error to give Instruction No. 10.

The special verdict, as submitted to the jury in part II, sets forth the facts to be determined by the jury with regard to Clyde Cox's negligence and part III sets forth the question of Steve West's contributory negligence. The instructions, as given, do nothing more than enable the jury to intelligently answer these questions. Thus, we submit, there is no error prejudicial to the defendants.

#### POINT IV

THE SUBMISSION OF THE SPECIAL INTERROGATORY TO THE JURY REGARDING THE LOSS OF EARNING CAPACITY OF STEVEN L. WEST WAS PROPER BECAUSE THE TESTIMONY OF MR. WEST AND THE TESTIMONY OF THE DOCTOR WHO ATTENDED MR. WEST SUPPORTED THE SUBMISSION OF THE QUESTION OF LOSS OF YEARLY EARNING CAPACITY TO THE JURY.

The defendants excepted to the giving of that portion of Instruction 17 which submitted the question of the loss of Steven L. West's earning capacity to the jury and also special interrogatories No. VI and VII on the grounds that there was no evidence in the record that Steven West sustained a loss of earning capacity as a result of the accident. The defendants contend in their statement of facts and in their brief on page 39 that the only evidence in the record on the point

of Steven L. West's earning capacity was that the plaintiff earned \$2,600.00 per annum for the year 1952 as disclosed by his income tax returns and \$2,400.00 during the year 1951, but since his recovery he had been earning \$300.00 per month. They make the further assertion that there is no evidence in the record whatsoever that he was qualified for or could earn in excess of \$300.00 per month were it not for his injuries. Such contention we submit is without merit. Mr. West testified (R-336) that during the year 1951 he worked on and off for a period of about five months and that the rest of the time he was prospecting. That the prospecting produced him no income. This evidence alone, we submit, is sufficient to allow the jury to make a determination as to Mr. West's loss of earning capacity. If a plaintiff uses his time for any valuable purpose, though he doesn't actually earn any money by it, he should be allowed the reasonable value thereof. *District of Columbia vs. Woodbury*, 136 U. S. 450, 10 S. Ct. 990. If a further evidence of Mr. West's earning capacity be necessary, he testified (R-334) that he could and did in some months gross as much as \$800.00 per month. His testimony also indicates that he could make four trips per week and make a net profit on each trip of \$45.00. Based upon three trips per week wherein he would gross \$60.00 per trip or a total of \$180.00 and his expenses for three trips being \$45.00, Mr. West would net \$135.00 per week or an average of \$540.00 per month. The testimony of Dr. Hubbard (R-238, 239), makes it clear that Steven West will never be able to do heavy work again. Dr. Hubbard testified as follows:

"Q Do you think he will ever be able to do that type of work?

A He won't be able to do that heavy trucking. No.

Q And for how long, at any time? Will he ever be able to do it again?

A Well, I thing the trucker the way—of course, I maybe don't understand that but he won't be able to do any heavy physical work that he has done in the past.

Q As long as he lives, is that correct?

A Yes, sir, that means that. I mean the heavy lifting, truck work, heavy physical work, shoveling or scooping or the type of work they do would do that."

Such evidence is sufficient to sustain the jury's findings as to Steven L. West's loss of earning capacity and it was not error to submit this issue to the jury.

## POINT V

THE COURT'S INSTRUCTION, NUMBER 9 (a) REGARDING THE RIGHT TO RELY ON DUE CARE OF ANOTHER, AND NUMBER 12 REGARDING CIRCUMSTANCES TO BE CONSIDERED IN DETERMINING ORDINARY CARE OF COX, ARE NOT CONTRADICTORY INSTRUCTIONS BECAUSE CLYDE COX DID NOT HAVE AN ABSOLUTE RIGHT TO RELY UPON THE ASSUMPTION THAT HAL ANDERSON WOULD NOT BE NEGLIGENT, BUT COULD ONLY SO RELY UNTIL SOME ACT WAS DONE BY HAL ANDERSON TO INDICATE TO THE CONTRARY OR THE CIRCUMSTANCES INDICATED THAT HAL ANDERSON MIGHT BE NEGLIGENT.

The defendants in arguing that the court's Instructions Nos. 9 a and 12 are contradictory base their assumption upon an erroneous interpretation of the law, i.e., that Clyde Cox was entitled to absolutely rely upon the non-negligence of Hal Anderson. As heretofore discussed in Point I, such is not the law. Even as given, Instruction No. 9a, gives Clyde Cox the right to rely upon the assumption that Hal Anderson would not be negligent only until some *act* was done by Hal Anderson to indicate to the contrary.

Viewed in the light of the true rule that Clyde Cox was entitled to rely upon Hal Anderson only if a reasonably prudent man would have done so under the circumstances, the two instructions herein involved are not contradictory in that Instruction No. 12 or the paragraph of which the defendants complain merely sets forth the facts and circumstances of the case which could be considered by the jury in determining whether or not Clyde Cox acted as a reasonably prudent man under the circumstances. The cases of *Konold vs. Rio Grande Western Railway* (Utah) 21 Utah 379, 60 Pac. 1021; *Jensen vs. Utah Railway* (Utah), 72 Utah 376, 270 Pac. 349, and *State vs. Waid* (Utah), 92 Utah 279, 67 Pac. (2d) 647, are cases in which the instructions, as given, were in irreconcilable conflict on a material point and, of course, such instructions were held to be error. However, in the case at bar the instructions, as given, can be reconciled. Clyde Cox was entitled to the assumption that Hal Anderson would not be negligent only until some act was done on his part to indicate to the contrary. While we submit this is not the true rule of law, it was to the defendants' benefit that it was given in such a



restrictive manner. Under the instructions the jury was entitled to determine first whether or not there was some act on the part of Hal Anderson which would put Clyde Cox on notice that he might have been negligent. Once having made this determination under Instruction 9a the jury was then entitled to determine whether or not Clyde Cox failed to use ordinary care and were entitled to consider the circumstances as set forth in Instruction No. 12. Viewed in this light, we submit that there is no conflict in the instructions. They are not contradictory and are not irreconcilable and therefore the cases cited do not require a reversal on this ground.

The question as to whether or not Hal Anderson committed some act or did some act which would put Clyde Cox on notice of his negligence was not submitted to the jury nor did the court make a finding thereon. The defendants did not request that such an issue be submitted and therefore if such finding is necessary to support the verdict of the jury, such finding shall be deemed to have been made in accordance with the judgment on the special verdict. *Rule 49(a) U.R.C.P.* The last sentence provides in part as follows:

"As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict.

## POINT VI

THE TRIAL COURT DID NOT COMMIT ERROR IN  
THE GIVING AND THE FAILURE TO GIVE THE IN-

INSTRUCTIONS COMPLAINED OF BY THE DEFENDANT BECAUSE IN SUBMITTING A CASE TO THE JURY ON SPECIAL INTERROGATORIES, ONLY SUCH INSTRUCTIONS AS WILL ENABLE THE JURY TO INTELLIGENTLY ANSWER THE INTERROGATORIES NEED BE GIVEN.

The defendants complain of the failure of the court to give certain instructions requested and not heretofore discussed. Defendants request No. 15 is the usual instruction given in a general verdict case. However, bearing in mind that this case was submitted on written interrogatories such instruction would have served no useful purposes. The Court in Instructions No. 17 as given (R-125) instructed the jury in part as follows:

“Before you answer the question pertaining to damages in your special verdict you ought to report to the court to see if it is necessary to answer these questions.”

The jury did not follow this instruction but continued and answered all of the interrogatories. (See remarks of the court, (R-498). The jury answered the questions with regard to negligence and contributory negligence first and the failure to report back to the court to determine whether or not it was necessary to answer the questions on damages cannot or was not prejudicial to the defendants herein. Defendants also complain that their Instruction No. 6 (R-104) submitting the issue of unavoidable accident was not given. The issue of unavoidable accident was not submitted to the jury nor was it requested by the defendants that the issue be submitted. The issue of inevitable or unavoidable accident is submitted to the jury only where the evidence tends to show that the

injury resulted from some cause other than the negligence of the parties. The rule is stated in 65 CJS 1192, Sec. 264 (e) as follows:

“Ordinarily the issue of inevitable or unavoidable accident should be submitted to the jury where it is raised by the evidence; and such issue is raised when, and only when, there is evidence tending to prove that the injury resulted from some cause other than the negligence of the parties. It is not raised and may not be submitted for consideration by the jury where either party was guilty of negligence in the situation which resulted in the injury, or if there is no evidence tending to prove that something other than the negligence of one of the parties caused the injury complained of; and the fact that the action is against two alleged tort-feasors does not alter the rule, since a dispute in the evidence as to whether the injuries resulted alone from the negligence of one of the defendants presents a question of sole proximate cause and not a question of unavoidable accident.”

Defendants' requested Instruction No. 7 (R-105) could have been proper only if the verdict had been a general verdict. The jury was instructed on proximate cause in Instruction No. 9. Under such instruction the jury could have answered the special interrogatories in such a manner as to find that the negligence of Hal Anderson was the sole proximate cause of the accident. This they did not do.

It is not necessary in submitting special interrogatories to the jury that the jury be instructed on the general law of the case. Only such instructions should be given as necessary to enable the jury to answer the special interrogatories. This rule is set forth in 88 C.J.S. 837, Sec. 317, as follows:

"Where a case is submitted to the jury for a special verdict or on special issues it is unnecessary and erroneous to instruct the jury generally as to the law of the case, but instructions as to general rules of law should be given as far as they are reasonably necessary to enable the jury to answer the special questions intelligently and in accordance with the law."

See also 53 Am. Jur. 493, Sec. 638, as follows:

"Where a special verdict is required, it is improper to instruct the jury generally concerning the law of the case, for the reason that inasmuch as the jury are not to apply the law to the facts. instructions as to the law can serve no useful purpose. In such case the instructions should be confined to matters as are necessary to inform the jury as to the issue made by the pleadings, and the rules for weighing and reconciling testimony, who has the burden of proof as to the facts to be found, and whatever else may be necessary to enable the jury clearly to understand their duties concerning such special verdict, and the facts to be found therein."

The defendants complain that the giving of court Instruction No. 17 required the jury to return a verdict for the plaintiff. Particular reference is made to the last part of the instruction where the court advised the jury that he would apply a mathematical formula. We must keep in mind that the issues were submitted to the jury on special interrogatory and not a general verdict. The jury in this case had determined the questions of negligence and contributory negligence prior to the time they considered the question of damages and even assuming that the instruction did require the jury to make the findings complained of such fact does not prejudice the

defendants. It is the court that enters the judgment and determines the amount of the verdict.

In this case the court instructed the jury properly to enable them to answer all of the questions propounded and the giving and the failure to give the instructions complained of by the defendants was not error.

## CONCLUSION

The defendants' approach to the problems herein involved and the defendants' entire argument is based upon the erroneous premise that Clyde Cox had an absolute right to rely upon the fact that Hal Anderson would not be negligent and that the brakes had been securely set and that the truck would not move when he commenced to load it. Under the law and even under the instructions of the court, as given, Clyde Cox had this right only until he was put on notice to the contrary. The jury by its answers to the special interrogatories and the trial court by its judgment found Clyde Cox guilty of negligence and Steven West free from contributory negligence. They found that some act on the part of Hal Anderson apprised Cox that Anderson had not taken the precautions necessary to insure the safety of the truck.

In the interest of accuracy we would point out that the American Fuel Company is not a corporation as stated by the defendants in their brief, page 48.

The defendants have had the advantage which a special verdict necessarily gives to a defendant. They imply that the

jury was sympathetic to the plaintiff because of the severe injuries and for that reason returned a verdict for the plaintiff. Such, we submit, is not the case. The jury answered questions of ultimate fact and did not return a general verdict.

We respectfully submit that in view of the foregoing authorities and arguments that the judgment of the trial court based upon special interrogatories of the jury should not be set aside upon appeal.

Respectfully submitted,

ANDERSON AND TAYLOR

*Attorneys for Plaintiff and  
Respondent Steven L. West*

345 South State Street  
Salt Lake City, Utah