

1957

# George W. Williams v. Arthur Hardman : Brief of Respondent

Utah Supreme Court

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Rawlings, Wallace, Roberts & Black; Rich, Elton & Mangum; Counsel for Respondent;

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Case No. 8663

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IN THE SUPREME COURT  
of the  
STATE OF UTAH

FILED

GEORGE WILLIAMS,  
*Plaintiff and Respondent,*

SEP 20 1957

—vs.—

ARTHUR HARDMAN, dba HARD-  
MAN AUTO SALES,  
*Defendant and Appellant.*

Clerk, Supreme Court, Utah

BRIEF OF RESPONDENT

RAWLINGS, WALLACE, ROBERTS & BLACK  
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# IN THE SUPREME COURT of the STATE OF UTAH

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GEORGE WILLIAMS,  
*Plaintiff and Respondent,*

—vs.—

ARTHUR HARDMAN, dba HARD-  
MAN AUTO SALES,  
*Defendant and Appellant.*

Case No.  
8663

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## BRIEF OF RESPONDENT

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(Numbers in parenthesis refer to pages of the record. The parties will be referred to here as they appeared in the trial court.)

## STATEMENT OF THE CASE

This is the third case to reach this Court arising out of the same head-on collision. On December 20, 1954, plaintiff was driving, and four others were riding, an automobile in a westerly direction on highway 40, approximately 10 miles west of Salt Lake City when an eastbound automobile was driven by defendant Child on the wrong side of the road and into plaintiff's automobile. Two of the passengers were killed, the other two

passengers were injured and plaintiff here, George Williams, received very serious personal injuries.

He was awarded judgment in the sum of \$78,055.17 and it is from this judgment defendant Hardman appeals. Defendant Child has not appealed.

The liability of defendant Hardman is based upon the imputation to him of the negligence of defendant Child on the theory that Child was his servant, or agent, or they were engaged in a joint venture.

The Statement of Facts set forth in the Brief of Appellant does not adequately reflect the testimony establishing plaintiff's case. An adequate statement is contained in the opinion in *Anderson v. Hardman*, 313 P. 2d 459 (not yet reported in the Utah reports). This latter case is the first of this group of cases to come before the Court and it has already been decided. We submit the decision in that case requires an affirmance of the case now before the Court.

This appeal is based upon the insufficiency of the evidence to prove the relationship between Child and Hardman and upon asserted errors in the instructions regarding that relationship. Defendant Hardman also contends the damages awarded were excessive.

We will make such statement of facts as we deem necessary under the points where they will be pertinent. We will meet each of the points raised by appellant in the order in which he sets them forth in his brief.

## STATEMENT OF POINTS

## POINT I.

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT DEFENDANT CHILD WAS THE AGENT OR SERVANT OF DEFENDANT HARDMAN OR HIS JOINT VENTURER AND DEFENDANT HARDMAN IS LIABLE FOR THE NEGLIGENCE OF DEFENDANT CHILD AS A MATTER OF LAW.

## POINT II.

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS ON THE LAW AND ADEQUATELY INSTRUCTED THE JURY ON ALL MATERIAL ISSUES.

## POINT III.

THE VERDICT WAS NOT EXCESSIVE AND DOES NOT APPEAR TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

## ARGUMENT

## POINT I.

THE EVIDENCE ESTABLISHES AS A MATTER OF LAW THAT DEFENDANT CHILD WAS THE AGENT OR SERVANT OF DEFENDANT HARDMAN OR HIS JOINT VENTURER AND DEFENDANT HARDMAN IS LIABLE FOR THE NEGLIGENCE OF DEFENDANT CHILD AS A MATTER OF LAW.

The evidence in this case is the same as that presented in *Anderson v. Hardman*, supra. In the case at bar it was shown that Hardman was in the used car business at Sunset, Utah, (123,124) and that in furtherance of

this business he took Child to Tooele to sell him a truck. Their testimony was again to the effect that they had agreed that Child was to pay \$500.00 on the return to Sunset and the balance of \$150.00 would be paid "in a short period of time" (138). Both Child and Hardman contemplated that they would have further documents to sign. Child testified he knew he was going to sign a contract, but did not know what it would provide (103). Hardman testified that there was to be a note and although the note had been mentioned, nothing was said as to what it would contain. It would be produced for the first time for Child's perusal at Sunset (138, 139). Hardman had not delivered the certificate of title nor bill of sale to Child (126). The certificate of registration had not even been delivered to Hardman so he had not delivered it to Child (126). It was agreed on all sides that the transaction was not to be completed until they had returned to Sunset (84, 128). On the return trip the license plates of Hardman were used on the truck (85).

It was necessary, in furtherance of defendant Hardman's used car business, to return the truck to Sunset to complete the ultimate purpose of that business to wit: the sale of the truck. He was taking another car back on his wrecker and he requested Child to drive the truck to Sunset (87). Hardman also suggested that they pass each other on the way back so they could keep in touch with one another (87, 88). As a matter of fact, Child was passing Hardman in compliance with this suggestion at the time the collision occurred.



All of the foregoing facts are uncontroverted and undisputed. We submit that this Court in the Anderson case held that the responsibility of Hardman for the negligence of Child was established as a matter of law. This Court therein said:

“There is no substantial conflict in the evidence; and the facts concerning the relation between Hardman and Child are uncontroverted. The question is what conclusion of law *must* be drawn from the evidence.”

This Court then held that title had not passed from Hardman to Child and in going from Tooele to Sunset they were acting in furtherance of Hardman’s business in completing the sale of the truck. Hence Child’s negligence was imputed to Hardman.

The uncontroverted evidence establishes this relationship and therefore it is not necessary to look to the instructions. The trial court should have instructed as a matter of law that Hardman was responsible for the negligence of Child.

## POINT II.

THE TRIAL COURT DID NOT ERR IN ITS INSTRUCTIONS ON THE LAW AND ADEQUATELY INSTRUCTED THE JURY ON ALL MATERIAL ISSUES.

As stated above, we do not believe the Court need consider these instructions but in order to make a complete answer to appellant’s brief we will consider each of the contentions he makes with respect to the claimed

errors in the instructions given by the court. Defendant does not contend that any requested instruction not given should have been given.

Defendant contends that his theory was not properly presented. He also contends that the repetition of the instructions concerning the issue of master and servant was prejudicial. It is difficult to understand how his theory could not have been presented and at the same time was presented to the point that it was prejudicially repetitious.

Instruction No. 1 purported to set forth the contentions of the parties and cannot be considered an instruction setting forth the elements necessary for plaintiff to prove in order that the jury might return a verdict in his favor. The issue of agency was thoroughly and completely covered in the instructions and plaintiff was required by the instructions to prove this issue. Defendant Hardman answers his own criticism of this instruction when he refers to the court's instruction No. 2. In that instruction the court specifically states the burden of proof is upon plaintiff to prove that Child was negligent and in order to recover against defendant Hardman, plaintiff had the burden of proof to show that Child was negligent and that the relationship between Hardman and Child was that of principal and agent, or master and servant, or joint venturers (46).

Further exploring the contention of defendant Hardman regarding failure to set forth his theory it should be

noted that the jury were instructed concerning the relationship between Child and Hardman in seven instructions. Three of these instructions were those requested by defendant Hardman. Two were requested by plaintiff and two were prepared by the court. Defendant Hardman's requested instructions 7 (33), 9 (35) and 13 (39) were given in substance in the court's instructions 7 (51), 9 (53) and 6 (50) respectively. Comparison and review of these instructions will show that all phases of defendant Hardman's theory was presented to the jury, including that of right of control. See Instructions No. 6 (50) 9 (53) and 11 (55).

Another startling contention of defendant is that there should be a reversal because the trial court gave instruction No. 6 (50). Instruction No. 6 is defendant Hardman's requested instruction No. 13 (39) and it is that requested instruction, word for word, even including the italicized portion of the instruction set forth on Page 8 of appellant's brief.

Defendant contends there was no evidence to justify submission of the case to the jury on the theory of master and servant or joint venture. We submit that *Anderson v. Hardman*, supra, has foreclosed any such argument as this.

We respectfully submit that Child's neglect should be imputed to Hardman as a matter of law and hence we need not consider any claimed error in these instructions. However, even though we do give conscientious

consideration to these instructions it at once becomes apparent that the jury was completely and adequately instructed on the law defining the relationship between Hardman and Child and no error was committed in this regard.

### POINT III.

THE VERDICT WAS NOT EXCESSIVE AND DOES NOT APPEAR TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

Under this point defendant makes the bald contention that the verdict is excessive and appears to have been given under the influence of passion and prejudice. He does not undertake to discuss or analyze the facts. There is good reason why he did not. It is apparent that if he had done so, it would appear without question that this contention would fall of its own weight.

Defendant complains of the failure to give defendant's requested instruction concerning passion, prejudice and sympathy. The trial court did instruct on this subject as follows (64):

"You should consider all the evidence impartially, fairly and without prejudice of any kind, and from such consideration, in connection with the instructions given you by the court, you should reach such a verdict as will do justice between the parties."

We submit the burden is upon appellant to establish that the verdict is excessive. He has not attempted to discharge that burden. With but two pages of his brief

devoted to this subject and with no discussion of the facts, we cannot believe him to be serious in this contention. Even though defendant does not discuss the facts, we will do so to completely put at rest any question about the amount of this verdict.

We believe it will be helpful to review a few of the authorities which define the role the appellate court plays in the review of the contention that damages are excessive.

In our jurisprudence the jury has been selected as the tribunal to fix damages. The trial court has a discretion to exercise in passing upon the amount of the verdict. The question of damages was presented to the trial court by defendant's Motion for a New Trial (66, 67). This motion was overruled (68). The trial court thereby placed his stamp of approval upon the amount of the verdict. This approval is given great weight by appellate courts and very rarely is such approval overruled.

The importance of this approval has been recognized by this Court in *Stephens Ranch & Live Stock Co. v. Union Pac. R. Co.*, 48 Utah 528, 161 Pac. 459, wherein it was stated:

“Necessarily upon such a question appellate courts must, to a large extent, rely upon the judgment and discretion of the trial court. That court is in a much better position to observe and determine whether a jury was actuated by passion or prejudice, or by both, in returning a verdict for an amount larger than the evidence justifies, or

whether the jury was merely mistaken with regard to the amount that should have been allowed.”

In *Geary v. Cain*, 69 Utah 340, 255 P. 416 the Court stated:

“\*\*\* in case of doubt, the deliberate action of the trial court should prevail. Otherwise this court will sooner or later find itself usurping the functions of both the jury and the trial court.”

See also *Wilson v. Oldroyd*, 1 Utah 2d 362, 267 P. 2d 759 (1954).

After the trial court has approved the amount of the verdict, the appellate court only reviews the ruling on the basis of whether the trial court has abused its discretion. It was so held in *Jensen v. Denver & Rio Grande R. Co.*, 44 Utah 100, 138 Pac. 1185, wherein the Court stated:

“Still that court, in such particular, is not supreme or beyond reach. Its action may nevertheless be inquired into and reviewed on an alleged abuse of discretion, or a capricious or arbitrary exercise of power in such respect. Such a review is not a review of a question of fact, but of law. A ruling granting or refusing a motion for a new trial is certainly reviewable when the proceedings with respect to it are properly preserved and presented. That has not been questioned. Of course the ruling will not be disturbed on evidence in conflict or on matters involving discretion. Yet our power to correct a plain abuse of discretion or undo a mere capricious or arbitrary exercise of power cannot be doubted.”

Neither this Court nor the trial court should set its opinion against the opinion of the jury. To do so would but usurp the function of the jury. In the Jensen case this Court stated:

“Neither is either party on that question entitled to the judgment of the court below in a case of tort tried to a jury. Both parties, as to that, are entitled to the unprejudiced judgment of the jury. That is exclusively within their province. Their power and discretion, when properly exercised and when they have been properly directed as to the measure of damages and the mode of assessing it, may not be interfered with merely because the court above or below may think the amount rendered is too large, or even may think it appears to be larger than the evidence apparently or fairly justifies. A court, vacating a verdict and granting a new trial by merely setting up his opinion or judgment against that of the jury, but usurps judicial power and prostitutes the constitutional trial by jury.”

The case most widely cited as laying down the proper rule to be followed by an appellate court is the case of *Coleman v. Southwick*, 9 Johns. 45, where Chancellor Kent stated:

“\*\*\* The damages, therefore, must be so excessive as to strike mankind at first blush, as being, *beyond all measure, unreasonable, and outrageous*, and such as manifestly show the jury to have been actuated by *passion, partiality, prejudice, or corruption*. In short, the damages must be *flagrantly outrageous, and extravagant*, or the court cannot undertake to draw the line; for they

have no standard by which to ascertain the excess. (Cleveland, etc. Co. v. Hadley, 170 Ind. 204, 82 N.E. 1025, 84 N.E. 13, 16 L.R.A. (N.S.) 535, 16 Ann. Cas. 1; 15 Am. Jr., p. 623.)”

This Court has also had occasion to address itself to this problem in *Pauly v. McCarthy*, 109 Utah 431, 184 P. 2d 123 (1947). Most of the earlier Utah cases were cited and the rule was expressed as follows:

“Since the Jensen case above quoted, it is well settled that this court has power to, and will, consider assignments of error based on excessive verdicts. (cases cited) But, although we have the power to order a new trial in case of an excessive verdict, it is a power which we have rarely, if ever, exercised. However, in the case of *Shepard v. Payne*, supra, we ordered a remission of \$2,500 from a \$10,000 verdict. In that case, the excess was not the result of passion or prejudice, but was determinable as a matter of law.

“Where we can say, as a matter of law, that the verdict was so excessive as to appear to have been given under the influence of passion or prejudice, and the trial court abused its discretion or acted arbitrarily or capriciously in denying a motion for new trial, we may order the verdict set aside and a new trial granted. *Jensen v. Denver & R.G.R. Co.*, supra; and other cases cited above following that decision. But mere excessiveness of a verdict, without more, does not necessarily show that the verdict was arrived at by passion or prejudice. *Stephens Ranch & Livestock Co. v. Union Pac. R. Co.*, supra. It is true that the verdict might be so grossly excessive and disproportionate to the injury that we could say from that fact



alone that as a matter of law the verdict must have been arrived at by passion or prejudice. But the facts must be such that the excess can be determined as a matter of law, or the verdict must be so excessive as to be shocking to one's conscience and to clearly indicate passion, prejudice, or corruption on the part of the jury. *McAfee v. Ogden Union Ry. & Depot Co.*, *supra*; *Ward v. Denver & R. G. W. R. Co.*, *supra*. This is not such a case.

"The verdict here was admittedly liberal. But the mere fact that it was more than another jury, or more than this court, might have given, or even more than the evidence justified, does not conclusively show that it was the result of passion, prejudice, or corruption on the part of the jury."

\* \* \*

"The jury is allowed great latitude in assessing damages for personal injuries. *Miller v. Southern Pac. Co.*, 82 Utah 46, 21 P. 2d 865. The present cost of living and the diminished purchasing power of the dollar may be taken into consideration when estimating damages. *Coke v. Timby*, 57 Utah 53, 192 P. 624; *McAfee v. Ogden Union Ry. & Depot Co.*, *supra*.

"We can discover nothing in this case, except the amount of the verdict, which indicates passion or prejudice, and, as we have seen, passion and prejudice are not necessarily inferred from an excessive verdict, without more. No exception was taken to the jury or any member thereof. No conduct on the part of the jury, evincing passion and prejudice, has been called to our attention. The only point of complaint is the size of verdict."

The last paragraph quoted is particularly applicable here because no exception or objection was leveled at the jury or any member thereof or at any conduct of the jury. Defendant relies solely upon the amount of the verdict.

To show how sparingly and with what hesitancy this power should be invoked we point to the fact that this Court has never set aside a verdict on this ground. The Court recognized the fact in *Lodder v. Western Pacific R. Co.*, 259 P. 2d 589 (Not yet officially reported in the Utah reports) (1953) where it was stated:

“But we find no case where this court has held that as matter of law passion and prejudice were shown merely by the excessive amount of the verdict \*\*\*.”

With these rules in mind let us now turn to the evidence presented in the case at bar.

The jury returned a verdict of \$78,055.17. This consisted of general damages in the amount of \$70,000.00 and special damages in the sum of \$8,055.17. These special damages may be further broken down as follows:

Hospital expenses .....	\$5,406.32
Doctors' bills .....	2,624.00
Ambulance .....	24.85
Total .....	\$8,055.17

Counsel states that this verdict is unreasonably high in comparison with other verdicts in this jurisdiction.

While we have been following rather closely for a number of years the verdicts for injuries in this and other jurisdictions, we confidently assert that so far as this jurisdiction is concerned, the injuries suffered by plaintiff were worse than any we have ever encountered. The injuries suffered by plaintiff are both tremendous and frightful. The amount of the verdict pales into insignificance when it is compared with these injuries.

Mr. Williams was the driver of the automobile and was on the left side, which side apparently sustained the brunt of the impact. At the time of trial, twenty-six months after the accident, plaintiff was in a cast incasing both legs and both hips and was still being hospitalized. It appeared further hospitalization would be necessary. Bony union had not been effected in his left leg, his right arm was useless.

A mere recapitulation of the injuries sustained by him shows their aggravated character.

The collision occurred December 20, 1954, shortly after 4:00 o'clock p.m. Dr. Marion B. Noyes first saw plaintiff at approximately 8:00 p.m. on that day at the County Hospital (151). At the time he arrived, the medical staff at the County Hospital was treating plaintiff for shock.

Plaintiff was suffering from acute shock; there was a scalp laceration going clear across his forehead; there were multiple cuts, abrasions and hematose contusions.

He had a badly comminuted fracture with abnormal displacement at the upper end of his left femur; he had a fractured right arm and a fractured right leg. This latter fracture went into the tibial plateau, which is the top of the tibia and the weight bearing portion of that joint. He was also suffering from a concussion of the brain and was unconscious. The cut across the forehead was described as "ragged and dirty." He also had a cut ear and in the area of his neck he had many cuts, ecchymosis, black and blue spots, and hematose collection of the blood underneath the skin. The 8th, 9th and 10th ribs had been fractured and the lung punctured, letting air into the chest cavity. After transfusions of blood and saline transfusions and IB fluids, he was taken to the LDS Hospital (151, 152).

After arriving at this hospital they continued to treat him for shock. It was impossible to give the fractures adequate treatment because of his condition and, as the Doctor stated, it would do no good to fix the fractures if it killed the patient.

The doctor was unable to start any active treatment of the fractures until December 31, 1954 (160).

We will take each of the injuries and conditions and delineate in detail the extent of the injury, the treatment given and the result obtained.

The following is a list of the time spent by plaintiff in the hospital from the date of the collision to the date of trial:

<i>Dates</i>	<i>No. of Days</i>
1. Dec. 20, 1954 to April 17, 1955.....	118
2. Aug. 13, 1955 to Aug. 20, 1955.....	7½
3. Oct. 5, 1955 to Oct. 7, 1955.....	3
4. Nov. 18, 1955 to Dec. 10, 1955.....	22
5. Feb. 20, 1956 to Mar. 11, 1956.....	20
6. Mar. 26, 1956 to Apr. 3, 1956.....	8
7. July 14, 1956 to July 28, 1956.....	14
8. Jan. 5, 1957 to Jan. 7, 1957.....	3
9. Jan. 14, 1957 to Feb. 14, 1957.....	31
Total.....	<u>224½</u>

In considering the above and also in considering the detailed statement of injuries to follow, the Court should have in mind two of the elements of damages recoverable in a personal injury case. Plaintiff is entitled to recover for the mental and physical pain and suffering which he has endured and which he may probably endure in the future. Also he is entitled to recover for loss of bodily function in the past and for the loss of bodily function he may probably suffer in the future. *Picino v. Utah Apex Mining Co.*, 52 Utah 338, 173 P. 900.

## SHOCK

The injuries suffered by plaintiff caused him to suffer shock (151). This condition was considered acute. The Doctor stated: "In fact we treated him all that night; it took a lot of heroic treatment to keep him from expiring." This was treated by blood transfusions, saline transfusion, IB fluids and oxygen. It was not until the 31st of December that his condition of shock was such that they could start to actively treat some of the very

serious injuries plaintiff had sustained in the collision. (152, 153). For at least two nights he was about to expire (153).

### LACERATIONS

There were many lacerations, cuts and bruises and particularly the laceration that went across the forehead (151). These wounds were cleaned out and the necessary treatment given to them.

### FRACTURE OF LEFT FEMUR

This is and the fracture of the right arm are the most serious injuries sustained by plaintiff. In describing the injury as shown by X-rays of December 27 the doctor testified (157):

“Now, the fracture of the left femur was high, it was an especially bad fracture. This is in the splint and this is the ring you can see hanging down, it shows not only a comminution, broken across, it is splintered up and down and fragmented — which shows a large intervening fragment, which in itself complicates the fracture and the outlet for the fracture.”

In referring to an X-ray taken on December 20th, the doctor stated as follows (157, 158):

“It shows the lesser trochanter, the muscles attached are loose.

“Here is another one, the same night. That shows even more so, if you want to see these.

“This is the upper part of the left femur, this is what we call the upper fragment, the upper broken part, the main shaft is below, and this is the large piece intervening—it was knocked loose, it was not only broken once, it was broken twice and up and down this way, and it shows a bad position.

“You have got to get these bones together, get them in position when they are in that condition.

“In other words, it is a very badly comminuted fracture.”

Immediately after he arrived at the L.D.S. Hospital the doctor put plaintiff's left leg in traction (160).

On December 31st an open reduction of the fracture was attempted. It consisted of making an incision in the leg, cutting to the bone, reducing the fracture and immobilizing it (160). In order to immobilize the fracture they performed an operation which the doctor called Intra Medullary nail pinning. It was necessary after this operation to apply a cast to both legs (160). We will treat of the fracture to the right leg hereinafter.

On January 7, 1956 the cast was changed (165). By August of 1956 it was discovered there was evidence of osteomyelitis or low grade infection in the fractured femur. To attempt to cure this was the purpose of two visits to the hospital. The doctor explained how this infection could come from a sequestration of dead bone.

Pieces of bone lose their blood supply in cases of fractures of this kind and they become dead. The body attempts to throw them off and they cause an irritant (168).

Finally on February 22, 1956 it became necessary to perform another open operation (175). The doctor performed what is called a sequestrectomy. At that time the dead bone was removed. The doctor also testified: "\*\*\*\* we saucerized, which means cleaning out the space for the osteomyelitis." Also at this time a bone graft was performed in an attempt to promote the healing. The bone was taken from the iliac crest of the hip bone and placed in the fracture site. Still later on plaintiff developed an abscess high on the thigh, which caused fever. The doctor testified that they put plaintiff to sleep and did an open drainage of the abscess (176).

In July of 1956 an x-ray still showed some dead pieces of bone in the left leg. Another open operation was performed which the doctor called "open drainage." The pieces of dead bone were removed and drainage put in to take care of the infection (176).

On January 15, 1957, the Intra Medullary nail was removed and small pieces of dead bone were cleaned out of the leg. At that time the doctors believed there was a solid bony union, although it was made up of rather poor bone. They provided him with what is known as a Calver brace to support the leg. Following the removal of the pin he again developed pain and soreness, especially on movement. They re-exercised the leg and



found the fracture had not healed. More deformity had occurred, so it was necessary to again put plaintiff in a cast. The cast was put on January 29, 1957. It included the entire left leg and across the abdomen to the right leg. The purpose of this was to immobilize the leg, to give it a chance to heal (177, 178).

The doctor testified concerning the condition of this left leg at the time of trial. There was still osteomyelitis present and he believed it would be present for an indefinite time. He could not tell the duration of this osteomyelitis, but stated that it has been known to go from twenty to thirty years and varies from a short to a long time. He gave his opinion that so far as plaintiff is concerned, it will go for quite a long while (176, 177).

He explained how osteomyelitis involves the bone and eats it out, preventing it from properly healing and causes a moth-eaten appearance and loss of the bone substance. It causes an infection of the bone itself (177).

There had been no union of the fractured bone of the left leg. Another pin had been placed in the leg. The doctor testified that it would have to stay in indefinitely and there was considerable doubt as to the healing of this bone. The doctor testified that he would very likely have to do further bone grafting to try and promote the healing (180). He testified that this leg was not as good as it was on September 2, 1956 (181).

In making a prognosis of the condition found in the left leg, the doctor testified that based on the slowness of the healing, there would be a long protracted course and it might possibly heal. He testified he was going to give it a chance for a matter of months. If it did not heal, he would have to go in and help it with bone grafts (183). He testified that he figured the cast would have to remain on from four to six months and after a reasonable length of time if there was no healing, it would be necessary to again operate and perform a bone graft and then, of course, plaintiff would have to go back in the cast again (184).

He testified very definitely that there would be a permanent disability in this left leg (184).

### FRACTURED RIGHT ARM

The humerus bone of the right arm was fractured. This area is between the elbow and shoulder. There was comminution, that is, the break was not straight across, but was jagged and there was displacement (155). A cast was put on the arm (152). This was known as a hanging cast and ordinarily they can hold the weight down and set the fracture; however, plaintiff had to lie in bed and the cast did not work too well (156). They could not get the bones in the proper position so it was necessary to later go in and put a plate on the bone (156).

In spite of the cast and manipulations, the humerus just would not stay in place. On January 25th he had

an open reduction of this fracture with fixations with vitallium plate and screws and supporting cast (165, 166).

On April 14th there was a reapplication of the cast to the right arm. Of course, there were antibiotics and blood transfusions and all the treatment ordinarily done for fractures.

On November 25, 1955, the right humerus had failed to heal during the protracted period of treatment. The doctor removed the plate and screws, then bone grafted it and inserted a Rush nail, a particular type of intermediary nail. It was put in the inside of the bone. The purpose was to form an internal fixation or support to the fracture site in order to hold the bones in place to implement healing and to correct alignment (174). The bone graft was accomplished by taking bone from other portions of the body and inserting them around the fracture site (174).

On December 7th a cast was put on plaintiff's right arm, shoulder and chest for the purpose of giving support in addition to that afforded by the internal nail (175). The bone had seemed to be healing with bony union, but with obvious defects (180). From the X-ray taken January 7, 1957, it appeared that the union was fairly good, but there was a defect and considerable doubt about its healing. This indicated that the pin would still have to stay indefinitely and it was very likely the doctor would have to do further bone grafting

in an attempt to heal the fracture site. He stated that the outlook on this was indefinite. He also testified that the arm in January of 1957 was not in as good a shape as it had been in September of 1956 (181).

In answering the question concerning the prognosis of the arm, the doctor testified that it was going to require a long time of fixation and probable bone grafting and he concluded, "But I would say he is in for a long time on that." He gave his opinion that plaintiff had suffered a permanent disability to his right arm (185).

### FRACTURED RIGHT LEG

Immediately after the collision no active treatment **could be given** this fracture. The leg was placed in a pillow splint (152). X-rays were taken and disclosed there was a fracture line on the tibia extending into the knee joint and into what is called the tibial plateau. This was onto the weight-bearing surface where the femur bears the weight onto the lower bones of the leg. There was a downward displacement (151, 158).

On December 31st casts were put on this right leg along with the cast on the left leg. This was known as a pelvic cast. Reduction of the fracture in the right knee was first accomplished. In order to do this, two large transverse screws were placed in the tibia. This is done to hold the bone and also to give stability to the wobbly joint (162).

The cast was changed on January 7, 1955 (165). This fracture still has screws in it, but the doctor testified he was of the opinion he had obtained an excellent result so far as the knee was concerned and that it was healed. He testified that he did not anticipate anything further from this knee, but eventually if anything should kick up or cause disturbance, it might be necessary to remove the screws (184).

### FRACTURED RIBS AND LUNG PUNCTURE

Ribs 8, 9 and 10 were fractured. The lung was punctured and let out air into his chest. This is known as a pneumothorax (153). Such an injury embraces the respiratory system and requires constant observation. Air is let out into the lung cavity and the lung collapses (159).

### CONCUSSION OF THE BRAIN

Plaintiff received a concussion of the brain. He was unconscious when he was brought into the hospital (151). On December 31st he could talk a little bit but he was not oriented at all to time, place, position, or the nature of his injury (153). At the time of trial, twenty-six months later, he was still suffering from a confusion of the brain (186).

### MULTIPLE INJURIES

Each of the foregoing injuries was serious in and of itself. Particularly is this true of the fractures and

the concussion. Even to take them individually, without their overall effect, would certainly justify the verdict which was rendered. However, the multiple nature of these injuries has taken its toll on plaintiff's health and have sapped his vitality and energy. The doctor testified concerning this situation (185):

“Well, multiple, serious injuries in anybody causes a great deal of trouble with what we call stress and syndrome. It is hard on the nervous system and hard on the health of the individual. They are notoriously apt to form complications and apt to be slow in healing. When the body has many injuries to take care of it has to divide it up among many healing areas. These areas of disease and deformity acts as areas of lower resistance and infections and what not are more apt to lodge in them. From what complications are apt to develop it is always, as a rule, a long case, especially in a man that is older. A real young individual might heal considerably faster but anybody who has as many injuries as this man has is bound to have a long time.”

And again (186):

“What we have is what we call stress Syndrome, which is quite popular since Dr. Saley has brought it out. But it adds up to if you put any individual through enough strain and enough injury it is going to tax his system. It is bound to do it, no matter who he is. That was well proved in the wars and in the serious protracted illnesses and so forth. In addition this man had confusion of the brain which hasn't been mentioned very much. And so by a combination of

the confusion of the brain plus multiple injuries he has reason for having an upset of his whole system."

The doctor opined that plaintiff would never be able to work again (185). He elaborated upon this on cross examination by stating that he was sure he would not be able to handle the type of work he had been doing at the time of the collision and that he would not be able to handle a shovel as he had done or any hard manual work with a bad leg and a bad arm, and then (189):

"Q. Yes. But so far as any other type of more sedentary work why you wouldn't know about that at this time, would you?

A. Well, I couldn't say whether he could do a sitting job of an easy type. He might be able to if he is qualified for it."

The testimony established that plaintiff had only performed work which entailed manual labor. He was not qualified to do any kind of a sitting job and just what a "sitting job" is, is not disclosed.

In *Schlatter v. McCarthy*, 113 Utah 543, 196 P. 2d 968, this Court in denying the contention there was no permanent impairment of earning capacity and in answer to a contention that the injured person there could hold a "sitting job," the Court stated:

"It should be noted here that plaintiff was not trained or qualified to engage in any other gainful occupation."

The testimony further showed that plaintiff was fifty-six years of age at the time of the collision and fifty-eight at the time of trial. The person who took his job in 1955 received the sum of \$5100.00 (106), there having been an increase in salary.

There are eight separate and distinct elements of damages:

1. Lost earnings
2. Impaired earning capacity
3. Past physical pain
4. Future physical pain
5. Past mental suffering
6. Future mental suffering
7. Past loss of bodily function
8. Future loss of bodily function

We believe that the amount of this verdict should be sustained upon the first two items alone. Twenty-six months had elapsed from the date of injury until the date of the trial. At \$5,100.00 per year this amounts to \$11,050.00. If he had continued to work full time until sixty-five, that would be an additional seven years or \$35,000.00. If he then were given credit for one-half such wages for the balance of his life expectancy (17.05 years at date of trial) another \$25,000.00 would be added making a total of \$71,050.00.

When compared with the verdict rendered in *Schlatter v. McCarthy*, 113 Utah 543, 196 P. 2d 968; 113 Utah 560, 198 P. 2d 573, the verdict here is small.



In that case the verdict was for \$41,212.44 plus specials. There plaintiff was sixty-one years of age when injured, trial was thirteen months after the injury and there was no bony union in his right leg which had been fractured in two places between the knee and ankle. At the time of trial the osteomyelitis was quiescent and apparently healed. The doctor testified plaintiff could return to work two and one-half years after the trial or a total of three and one-half years after the injury.

In the case at bar we have a man fifty-six years of age at the time of injury, fractures of the left femur, right leg, right arm and other injuries. There was no bony union in the left leg after twenty-six months and osteomyelitis was still present. The right arm was useless. The doctor here testified he would never be able to return to work.

We submit that in comparison with the Schlatter case the evidence here establishes more than twice the damages there allowed and approved.

This Court sustained a \$70,000.00 verdict in *Bennett v. Denver & Rio Grande Western R. Co.*, 117 Utah 57, 213 P. 2d 325. There plaintiff was younger and only the right arm was affected. He had lost this arm. Here a leg and an arm were useless and there were multiple injuries as above described. Here the damages were greater than in the Bennett case.

When we detail the past suffering to which plaintiff has been subjected, the numerous trips to the hospital and many operations, it becomes apparent a very large and substantial figure would be required to compensate him. His future is indeed dark. He was still in the hospital at the time of trial and could look forward to more operations and more hospitalizations. His right arm was still useless as well as his left leg.

Plaintiff is entitled to recover for both mental and physical pain and suffering. Think of the mental suffering to which he has been subjected and the contemplation he must have of living a life as a cripple.

In our judgment \$50,000 would be a modest sum for the last six elements above enumerated. To be added to this are his lost earnings and impairment of earning capacity which would put the amount supported well over the \$70,000 awarded.

We submit the verdict here is overwhelmingly supported by the evidence.

### CONCLUSION

We have in this case a fifty-eight year old man who probably will be totally incapacitated from working the rest of his life. He suffered very serious injuries and for two days was expected to die. He has suffered permanent disability to both his left leg and right arm. At the time of the injury he was a shovel operator and the year following his injury the person who took his job received \$5,100.00. Now plaintiff can earn nothing.

This injury occurred to him while Child and Hardman were in furtherance of Hardman's used car business and the jury returned a verdict against both Hardman and Child. We submit the relationship of principal and agent or master and servant or joint venturer was made out as a matter of law. In any event, the jury was fully instructed on all issues in the case, and found for plaintiff.

We respectfully submit that the judgment in favor of plaintiff should be affirmed.

Respectfully submitted,

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