

1957

Harold W. Bodon et al v. Emil Suhrmann et al : Brief of Appellants

Utah Supreme Court

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**IN THE SUPREME COURT
of the**

STATE OF UTAH UNIVERSITY, UTAH

HAROLD W. BODON, by his Guardian ad
Litem, HEINRICH BODON,

Plaintiff and Appellant,
—vs.—

EMIL SUHRMANN, dba SUHRMANN'S
SOUTH TEMPLE MEAT COMPANY, and
ALBERT NOORDA and SAM L. GUSS,
dba JORDAN MEAT & LIVESTOCK
COMPANY,

Defendants and Respondents.

MAY 3 1958

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Case No. 8715

FILED
DEC 9 - 1957

KURT A. SCHNEIDER,

Plaintiff and Appellant,
—vs.—

EMIL SUHRMANN, dba SUHRMANN'S
SOUTH TEMPLE MEAT COMPANY, and
ALBERT NOORDA and SAM L. GUSS,
dba JORDAN MEAT & LIVESTOCK
COMPANY,

Defendants and Respondents.

Mark, Supreme Court, Utah

Case No. 8716

BRIEF OF APPELLANTS

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dba JORDAN MEAT & LIVESTOCK
COMPANY,

Defendants and Respondents.

Case No. 8715

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—vs.—

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dba JORDAN MEAT & LIVESTOCK
COMPANY,

Defendants and Respondents.

Case No. 8716

BRIEF OF APPELLANTS

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

PRELIMINARY STATEMENT

This is an appeal by the above-named plaintiffs from judgments entered in favor of the defendant Jordan Meat & Livestock Company and also from a judgment in favor of the plaintiff Kurt A. Schneider against defendant Suhrmann for \$2,000.00 and a judgment in favor of plaintiff Harold Bodon against defendant Suhrmann for \$100.00.

The two appeals are from judgments entered in two separate actions brought by each plaintiff and consolidated for trial.

These actions were based on negligence and breach of warranty in selling to plaintiffs mettwurst (a sausage containing pork) infested with trichinae. Plaintiffs ate the mettwurst and contracted trichinosis. Plaintiffs contend that the judgment should have been in their favor against Jordan Meat and that the damages awarded were inadequate, appearing to have been given under the influence of passion and prejudice.

STATEMENT OF THE CASE

The defendant Suhrmann operated the South Temple Meat Company and sold meat and other products which appealed to the German taste (87).

Defendant Jordan Meat served the defendant Suhrmann as a wholesale meat distributor and the first delivery of mettwurst was made on May 27, 1954 (24).

The Jordan Meat & Livestock Company was a partnership consisting of Albert Noorda, Sam L. Guss and Guss' son (51). The Valley Sausage Company was a corporation owned by the same individuals. The Valley

Sausage Company was created to manufacture sausage products (51). Jordan Meat obtained the live animals, or meat products. Any meat which was necessary for Valley Sausage to have for manufacturing sausage was purchased by it from Jordan Meat. After the sausage was manufactured, Valley Sausage would then sell the finished product to the Jordan Meat and Jordan Meat would act as a wholesale distributor of these products (51, 52). In April, 1955, defendant Suhrmann was informed that Jordan Meat would no longer deliver mettwurst. The reason given by Noorda was that he did not want to cool down the ovens in order to accommodate the smoking of mettwurst (60). Alfred Hoffman was the sausage maker for Valley Sausage Company (52).

Defendant Suhrmann had a smoke oven at his place of business and a conversation was had concerning the use to which this oven might be put.

Defendant Suhrmann testified that he called the Jordan Meat by phone to place an order and Hoffman, who always took his orders, answered the phone. He told Suhrmann that he was sorry but they were so much occupied at that time in making other "wursts" that they could not serve him (90-91). One reason given by Hoffman was that the mettwurst had to be cold smoked and they could only hot or warm smoke it (92). Suhrmann told Hoffman that he had a smoke oven and that the mettwurst could be smoked there. Hoffman said the company could deliver the mettwurst finished except for the smoking process (92). He said he would deliver it unsmoked and would come to Suhrmann's place and smoke it there (92). This conversation took place some days before

May 19, 1955. On May 19th the mettwurst was delivered by Hoffman. Suhrmann testified that Hoffman knew how to handle this oven but he did not.

On the 19th Hoffman came to Suhrmann's place of business and explained to him how to smoke the mettwurst (93). He told him that he should never let the mettwurst get warm, that he should touch it from time to time and when it felt warm he should spread water over the fire. He emphasized not permitting the sausage to become warm and that it should be cold smoked (94). He told Suhrmann that it should not be smoked above 80° (95). Hoffman himself lit the fire (95). He never did tell Suhrmann that he should heat the mettwurst to 137° F. In fact, he told Suhrmann that if it went over 80° it would not be fit to eat and he would have to throw it away (96). This manner of handling the mettwurst was continued from that date until the time it was made public that there had been a number of persons who had contracted trichinosis in August of 1955. Some of the mettwurst so processed by Suhrmann was delivered to Jordan Meat in order that Jordan Meat might resell it to its own customers (100-101).

Suhrmann testified that he strictly followed the instructions given to him by Hoffman (102). Both Hoffman and Noorda denied that Hoffman had anything to do with the smoking of this mettwurst. Noorda testified that there was no inspection of the meat by Jordan Meat or Valley Sausage to determine whether or not it contained trichina (53). Noorda testified that one of the ways to eliminate trichina from pork is by freezing and this

method was not followed by either Jordan Meat or Valley Sausage (53). He agreed that after the mettwurst is smoked he would not expect a customer to cook it (61). Hoffman testified that when he worked in New York the sausage was frozen to eliminate trichina (64) and that in manufacturing mettwurst they did not permit the heat to be more than 80° (65).

Starting in the summer time of 1954 Schneider purchased products from Suhrmann. Every week on Friday or Saturday, he purchased mettwurst from Suhrmann (182).

Plaintiff, Harold Bodon, was a brother of Schneider's wife. In the latter part of July and first part of August, 1955, his parents travelled to Yellowstone Park on a vacation. During this period of time he ate his dinner at the Schneider's home and his sister put up a lunch for him. She used mettwurst in making sandwiches for his lunch (217-218).

On August 9, while at work, Schneider suddenly developed a high fever, perspired freely and experienced pain and weakness in his muscles. He thought he had the flu (183). He went home to bed and a doctor was called. The doctors were unable to diagnose what he had, but they concluded it was a severe infection (185). On August 18th he was sent to the L.D.S. Hospital and remained there until August 22 (186). On August 20th the doctors concluded he had trichinosis (129).

Harold Bodon came down with trichinosis during the middle of August (71, 219).

The trial court submitted to the jury a special verdict (46-48) upon which a judgment was entered in favor of

plaintiffs and against defendant Suhrmann and in favor of defendants Noorda and Guss and against the plaintiffs (107-109). It is plaintiffs' position here that they were entitled to a judgment on the verdict against defendants Noorda and Guss. Plaintiffs further take the position that the damages awarded were inadequate and that they should be entitled to either a whole new trial or a new trial on the question of damages alone.

STATEMENT OF POINTS RELIED UPON

POINT I

THE TRIAL COURT ERRED IN ENTERING A JUDGMENT IN FAVOR OF THE DEFENDANTS NOORDA AND GUSS AND AGAINST THE PLAINTIFFS FOR THE REASON IT APPEARED FROM THE SPECIAL VERDICT THAT SAID DEFENDANTS WERE GUILTY OF NEGLIGENCE WHICH PROXIMATELY CAUSED PLAINTIFFS TO CONTRACT TRICHINOSIS.

POINT II

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE DAMAGES AWARDED WERE INADEQUATE, APPEARING TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN ENTERING A JUDGMENT IN FAVOR OF THE DEFENDANTS NOORDA AND GUSS AND AGAINST THE PLAINTIFFS FOR THE REASON IT APPEARED FROM THE SPECIAL VERDICT THAT SAID DEFENDANTS WERE GUILTY OF NEGLIGENCE WHICH

nor violated the statute. The judgment of the trial court was reversed.

The court held there was evidence from which a jury might have inferred that plaintiff's injury was proximately caused by his eating the pork sold by defendant and that it was infected when sold with the trichinella organism.

In the case at bar the jury found in the special verdict that the plaintiffs contracted trichinosis from eating mettwurst sold by Suhrmann which he had purchased from Jordan Meat. (46-47).

The court stated:

"We are of the opinion that pork that is infected with trichinella is diseased within the meaning of the Ohio Pure Foods Law. *Allen v. Marvin*, 46 Wkly. Law Bul. 208, affirmed, 64 Ohio St. 608, 61 N.E. 1139. Its sale, even when the seller has no knowledge that it is diseased or infected, violates the statute and the seller is negligent in law. *Allen v. Marvin*, supra; *Portage Markets Co. v. George*, 111 Ohio St. 775, 146 N.E. 283; *Great Atlantic & Pacific Tea Co. v. Hughes*, 131 Ohio St. 501, 3 N.E. 2d 415. Cf. *Schell v. DuBois*, Adm'r, 94 Ohio St. 93, 113 N.E. 664, L.R.A. 1917A, 710.

"When appellant's testimony was concluded, there was substantial evidence from which the jury could have found that appellant's illness was caused by his eating pork that was infected with trichinella when sold by appellees; and, under Ohio law, the court should have instructed the jury that if they found these facts appellees were negligent in law. See cases cited above. If appellees were thus negligent, it appears to be well

settled, under Ohio law, that their negligence was the proximate cause of appellant's injury, even though another's negligence may have contributed thereto. *Pennsylvania Railroad Co. v. Snyder*, 55 Ohio St. 342, 45 N.E. 559, 60 Am. St. Rep. 700; *Hocking Valley Railway Co. v. Helber, Adm'r*, 91 Ohio St. 231, 110 N.E. 481; *Community Traction Co. v. Freeman*, 116 Ohio St. 448, 156 N.E. 598; *Szabo v. Tabor Ice Cream Co.*, 37 Ohio App. 42, 174 N.E. 18. Cf. *Neff Lumber Co. v. First Nat. Bank of St. Clairsville, Adm'r*, 122 Ohio St. 302, 171 N.E. 327. See II American Law Institute's Restatement of the Law of Torts, §§431, 433 and 447."

See also *Kelly v. John R. Dailey Co.*, 56 Mont. 63, 181 P. 326; *Portage Markets Co., v. George*, 111 Ohio St. 775, 146 N.E. 283; *Rubbo v. Hughes Provision Co.*, 138 Ohio St. 178, 34 N.E. 2d 202; *Kurth v. Krumme*, 143 Ohio St. 638, 56 N.E. 2d 127; *Great Atlantic & Pacific Tea Co., v. Hughes*, 131 Ohio St. 501, 3 N.E. 2d 415.

In the *Kurth* case, *supra*, the court stated:

"Under the evidence in this case there can be no question that plaintiff's decedent died as a result of contracting trichinosis. This disease is acquired by human beings when they eat meat, especially pork, raw or insufficiently cooked, containing larvae denoted as trichinellae. Whether such trichinosis was caused by eating the mettwurst purchased from defendant was undoubtedly a question of fact. On this appeal the defendant asserts that he was entitled to judgment as a matter of law; that the Ohio statutes against selling unwholesome, adulterated or diseased food do not apply to this case; that there was error in connection with the giving of special instructions . . . and in the general charge. Three sections

of the Ohio statutes relating to foods and their sale are involved in this case. Section 12760, General Code, provides: 'Whoever sells, offers for sale or has in possession with intent to sell, diseased, corrupted, adulterated or unwholesome provisions without making the condition thereof known to the buyer, shall be fined not more than fifty dollars, or imprisoned twenty days, or both.' Section 5774, General Code, reads: 'No persons, within this state, shall manufacture for sale, offer for sale, sell or deliver, or have in his possession with intent to sell or deliver, a drug or article of food which is adulterated . . .' Section 5778, General Code, recites: 'Food, drink, confectionery or condiments are adulterated within the meaning of this chapter . . . (5) if it consists wholly, or in part, of a deceased, decomposed, putrid, infected, tainted or rotten animal. . . .' This court has held that Section 12760, General Code, was enacted for the protection of the public and that the sale of unwholesome or corrupted provisions in violation of it, is negligence per se . . . Under the quoted statutes, a violation may occur even though the seller has no knowledge that the food he is selling is contaminated . . . Thus, the United States Circuit Court of Appeals for the Sixth Circuit held in the case of *Troietto v. G. H. Hammond Co.*, 110 F. 2d 135, (abstracted in this note, p. 178), that pork infected with *trichinellae spiralis* is diseased within the meaning of the Ohio pure food laws, and the sale of such pork even where the seller does not know that it is diseased or infected, violates the law and renders the seller negligent per se. We think this case has correctly interpreted the statutes of Ohio, and therefore plaintiff's special instructions and the general charge in accord therewith were proper."

Under the factual situation existing in the case at

bar it is unnecessary that the defendant have knowledge that the mettwurst contained trichina. The statute itself does not require there to be knowledge and hence without it there is a violation of the statute and negligence per se. See 128 A.L.R. 464; 28 A.L.R. 1385.

It is respectfully submitted that under the uncontradicted evidence and the findings of the jury in the special verdict a judgment should have been rendered in favor of plaintiffs and against defendant Jordan Meat.

POINT II

THE TRIAL COURT ERRED IN DENYING PLAINTIFFS' MOTION FOR A NEW TRIAL ON THE GROUNDS THAT THE DAMAGES AWARDED WERE INADEQUATE, APPEARING TO HAVE BEEN GIVEN UNDER THE INFLUENCE OF PASSION OR PREJUDICE.

The jury assessed the damages sustained by plaintiff Bodon at \$100.00 and the plaintiff Schneider at \$2,000.00. There can be no question that both plaintiffs contracted trichinosis as found by the jury in the special verdict. (46-47). The only source of this disease was the mettwurst. This larvae known as trichina becomes imbedded in the body of a hog. This larvae, or worm, is contained within small cysts in the hog. When it is ingested by a human being, the stomach acids dissolve the cysts within which the larvae is contained. The larvae enters the gastro-intestinal wall and in that wall they mature within two or three days. The male and female mate and reproduce. The female lays viable larvae within nine days after being consumed. This is the usual time required for these young larvae to enter the blood stream

PROXIMATELY CAUSED PLAINTIFFS TO CONTRACT TRICHINOSIS.

Jordan Meat purchased the meat used in the manufacture of sausage. This was purchased from it by Valley Sausage and various kinds of sausage were manufactured under the name of that corporation. Valley Sausage in turn sold the completed sausage to Jordan Meat and Jordan Meat acted as a wholesale distributor in selling this sausage to various retail outlets. It sold the mettwurst to defendant Suhrmann who sold it to plaintiff Schneider and the two plaintiffs ate the mettwurst and became infected with trichinosis.

Noorda testified that in the spring of 1955 he discontinued making mettwurst because he did not want to cool his ovens down to accommodate the processing of mettwurst (60). This defendant's contention was that the mettwurst was prepared in a raw form and put in casings and was then sold to defendant Suhrmann who in turn was to complete the process.

Suhrmann testified that the processing was to be done under the supervision of Jordan Meat. Noorda knew that there was a likelihood of pork containing trichinae. No inspection was made to determine whether any of the meat used in making mettwurst contained trichina. He knew that one of the ways to eliminate it was to freeze it. However, this was not done (53). Also, he knew that another way of eliminating trichina was to bring the meat to 137° F. (58).

The jury in the special verdict found that a reasonably prudent person in the position of Noorda and Guss would have known that Suhrmann intended to sell the

mettwurst without processing it as to kill trichina (48).

In spite of this finding, the trial court refused to enter a judgment in favor of plaintiffs but rendered judgment in favor of Jordan Meat (107). Plaintiffs submit that the special verdict required a finding that Jordan Meat was negligent and from the other findings of the jury it appears that plaintiffs were infected with trichinosis by eating the mettwurst so sold by the defendants. There can be no question that where negligence is established there need be no privity. See *Ketterer v. Armour & Company*, 200 Fed. 322; *DeLape v. Liggett & Myers*, 25 F. Supp. 1006, 2 *Harper & James*, *The Law of Torts*, 1601, §2831; *Herman v. Markham Air Rifle Co.*, 258 Fed. 475; *Flies v. Fox Bros. Buick Co.*, 196 Wis. 196, 218 N.W. 855, 60 A.L.R. 357.

The sale of this food comes within that class of product for which a seller may be responsible to the ultimate buyer. This class of product is known as one which is imminently or inherently dangerous to human safety or as put in *Huset v. J. I. Case Threshing Mach. Co.*, 120 Fed. 865, "intended to preserve or destroy human life." That food is included within such category see *Tomlinson v. Armour & Company*, 75 N.J.L. 758, 70 Atl. 314; *Ketterer v. Armour & Co.*, 247 F. 921; *Drury v. Armour & Co.*, 140 Ark. 371, 216 S.W. 40; *Minutilla v. Providence Ice Cream Co.*, 50 R. I. 43, 144 Atl. 884, 63 A.L.R. 334; *Prosser on Torts*, 499.

Jordan Meat's negligence is based upon the proposition that they, as reasonably prudent persons, should have known that Suhrmann would not attempt to kill trichina. Jordan Meat knew that pork products might

contain trichina and yet sold such products knowing they would not be processed to kill trichina and took no precaution to eliminate it. As a matter of fact, they said nothing at all to Suhrmann about the necessity for taking steps to kill this larvae which would be highly dangerous to persons eating the mettwurst. Jordan Meat was also negligent in not warning Suhrmann of the likelihood that there might be trichina in this sausage which had not been processed to eliminate it. A good statement of this rule is found in *Prosser on Torts*, 504 § 84, as follows:

“The question of negligence on the part of the intermediate buyer has arisen in several cases. There is general agreement that the seller may reasonably anticipate that the buyer may fail to inspect the goods and discover their defects before he delivers them to the plaintiff, and that this, or any similar foreseeable negligence of the buyer, will not relieve the seller of liability.”

Upon both of the foregoing grounds defendant Jordan Meat was negligent in this case.

Jordan Meat is also liable because of the fact it violated Section 4-20-5 *Utah Code Annotated* 1953, which provides as follows:

“Every person who manufactures for sale, sells, exchanges or delivers, or offers to sell, exchange or deliver, or has in his possession with intent to sell, exchange or deliver, any adulterated or misbranded drug, or article of food, drink, or confectionery, or who adulterates or misbrands any article of food, drink, drug or confectionery, is guilty of a misdemeanor.”

The term “food” is defined in Section 4-20-6, *Utah*

Code Annotated 1953, as follows:

“The term ‘food’ as used in this chapter shall include all articles, whether simple mixed or compound, used for food, drink, confectionery or condiment by man or beast; and the name and address of the manufacturer or distributor shall appear upon the label of all food offered for sale in package form.”

This trichina infected meat was adulterated within the definition contained in Section 4-20-8, *Utah Code Annotated* 1953, which, so far as material here, provides:

“For the purpose of this chapter an article shall be deemed to be adulterated”: * * * “In the case of foods:” * * * “If it contains any added poisonous or other added deleterious ingredients which may render such article injurious to health.” * * * “If it consists in whole or in part of a filthy, decomposed or putrid animal or vegetable substance or any portion of any animal unfit for food (whether manufactured or not), or *if it is a product of a diseased animal* or one that has died otherwise than by slaughter.

In *Troietto v. Hammond Co.*, 110 F. 2d 135, an action was brought to recover damages for illness alleged to have been caused by eating pork infected with trichina. Plaintiff was a boarder in the home of Mrs. Mella. He went to the market at her suggestion and purchased ground fresh pork. Mrs. Mella made this into meat balls, cooking it 6 to 8 minutes. Those who ate became sick within an hour or two and three days thereafter a doctor was called. It was diagnosed as trichinosis. The trial court directed a verdict in favor of defendant on the ground that the sale of this pork was neither negligence

or the lymph stream. The mature adult female has been estimated to be $1/6$ to $1/8$ of an inch long. The male is usually about half that long. The immature larvae as they exist in the cysts are $1/150$ of an inch and cannot be seen by the naked eye. The amount of larvae produced by each female varies. It may reach as many as 1,000 or more over a period of 6 weeks. The minute larvae are deposited in the intestinal wall, some of them escape into the lumen of the intestines or the g. i. tract, but the majority of them are carried by the lymph stream of the blood stream throughout the body. Wherever the blood stream supplies blood to any muscles or organs the larvae may there end up in cysts. They primarily go to the skeletal muscles or the striated musculature (33-36).

Dr. King explained the disease of trichinosis (68-70). He explained how the symptoms of trichinosis are similar to any other diseases, especially the flu. The patient develops a fever, has aches and chills, and may have a headache. The muscles ache, particularly in the calves of the legs and in the arms and shoulders. Very frequently it hurts to take a deep breath. In some severe cases swelling develops around the eyes. There are changes in the blood. These symptoms develop the 5th or 7th day after eating the infected meat. In mild cases they are present two or three weeks. In severe cases from 3 to 5 months and in extremely severe cases death has been known to result. These larvae usually invade the voluntary muscles in the arms, legs, and diaphragm. They also invade the muscles of the eyes and cause an

aching sensation around the eyeballs and produce swelling. These larvae remain with a patient the rest of his life. Usually over a period of several months the symptoms subside, in about a year the patient is usually symptom free. In heavier infections a patient may be left with muscle weakness for life (68-70).

The above is a general statement of the type of disease from which plaintiffs were suffering. We will take each plaintiff in turn and describe his injuries and losses and will attempt to show that the damages in each case were inadequate and appeared to have been given under the influence of passion or prejudice.

BODON

Harold Bodon, 20 years of age, worked during the summer months of 1955 for a bookbinding company in the forwarding department, rounding and backing books (216-217). He had come to this country from Germany in April of 1952. He contemplated going to Brigham Young University in September, 1955. He was earning between \$55.00 and \$65.00 a week. (217). He lived with his parents and during the latter part of July they left on a vacation. He stayed at the home of the plaintiff Schneider, his brother-in-law, and his sister packed for him his lunch and he ate dinner at the Schneider's. (218). His sister put a mettwurst spread on his sandwiches contained in his lunch. This situation extended over a period of 8 to 10 days, including a few days in August (218). He was in excellent physical condition up to the time he became ill during the middle of August, 1955.

He was at work when he felt warm and weak (219). He requested leave to go home. He went home and to bed. He was there for a week or ten days, during which period of time he was in bed. He felt weak, he had fever and was perspiring. He went to work too soon and as a result had to return home because he couldn't take it (221). He returned to work backing books which did not require the strength of his arms. This he continued to do until he went to school in September. In his athletics he noticed that he had slowed up to a certain extent (222) and was unable to swim as he had before (224). At the time of trial he still felt weak, particularly in his arms and legs (223).

We submit that under well established principles, the jury failed to award Bodon adequate damages.

SCHNEIDER

Schneider was also a German immigrant and after various jobs he eventually obtained a franchise to sell Dresden figureines and Black Forest cuckoo clocks. He had a franchise for the 11 western states (180). Early in 1955, because of his fear that another war might occur in Europe, he took on a side line of selling life insurance (181). His job was traveling. His merchandise business was seasonal, the main business coming for Valentine's Day and Mother's Day in the spring and then the Christmas business at the end of the year. He would travel from January to April in connection with the first part of his business and then between August and December for the Christmas business (181).

On August 9, he was working when he suddenly

developed a high fever, perspired, felt weak and pain in his muscles. He thought he had come down with the flu. He tried to finish up his work and eventually went home and to bed. A doctor was called at ten o'clock that night (183). Both Dr. Keller and Dr. Bennion were called in and an attempt was made to keep his fever down (185).

However, they were unsuccessful and plaintiff was finally taken to the Memorial Center Clinic to have tests performed upon him (185). He thereafter was taken home to bed, but he continued to feel weaker and his fever stayed around 104°. His eyes were swollen and he had headaches. On August 18 he was taken to the L.D.S. Hospital where he remained until the 22nd (186).

While x-rays were taken he fainted. During all of this time he was alarmed about his condition (187). Finally, on the 20th of August his condition was diagnosed as trichinosis (187). From the time of the inception of this illness he was in bed for a month and then remained home for another month, during which period of time he did not work. In October he started to take hold of the reins of his business (188) and attempted to do some work. However, he was still weak, suffered headaches and pains in his muscles. He was unable to take the trips which were necessary to properly take care of his business (189). That he was worried about his condition was reflected by the many doctors from whom he sought treatment. In addition to Doctors Bennion and Keller, he also saw Dr. Klein (196), Dr. Billeter (198), Dr. Crowley (198), Dr. Kimball (199), Dr. Jensen (199) and Dr. Merrill (211).

An analysis of the two exhibits, 12 and 14, will reflect the fact that he lost substantial income. In 1955 his business was off \$1800.00 and in 1956, including his insurance business, his income was off \$2600.00 from its 1954 level. An examination of Exhibit 12 discloses that in 1955 his business before August showed an increase over the 1954 business. After August, however, it showed a steady decline particularly in November and December.

He testified that at the time of trial he was still experiencing weakness and dizziness, still having headaches over his eyes and pains behind his eyeballs. He still had to rest frequently in order to maintain his strength. He experiences a numbness in his legs and arms when he does not keep them in motion.

DAMAGES WERE INADEQUATE

These two plaintiffs were without doubt infected with trichinosis. This meant that they would carry in their systems the larvae which they had ingested through eating mettwurst. They were still experiencing symptoms resulting from this disease at the time of trial.

Reflecting for a moment on the \$100.00 given to plaintiff Bodon convinces that certainly something was wrong with this jury's award of damages. After nine months, when he last saw a doctor, he was still experiencing pain and weakness. (73-76). The doctor was of the opinion that since these symptoms had persisted to that time they might well continue for some considerable time in the future (76). He experienced \$14.00 special damages and \$55.00 loss of wages, but certainly there was more than \$31.00 worth of damage resulting from

the physical and mental pain and suffering experienced by him from the time he first became infected until the trial of this case. To even suggest this amount shows that this jury was acting under passion and prejudice in not awarding to this plaintiff adequate damages.

In the case of plaintiff Schneider, the jury again appeared to be acting under the influence of passion and prejudice in giving to this man the very small and inadequate sum of \$2,000.00. Schneider was laid up for at least two months. He was in the hospital and suffered physical and mental pain and suffering over the months between the inception of the disease and the trial. As shown by the exhibits, his business alone during 1955 and 1956 had dropped off at least to the extent of \$4400.00. It would be even more than this if we consider the monthly decrease after August of 1955, as disclosed by Exhibit 12. In addition to this he had to pay some \$967.25 in special damages including hospital and doctor bills. We submit this figure of \$2,000.00 is ridiculous as an attempted compensation to this plaintiff for the injuries he sustained as a result of trichinosis with which he was infected through the negligence of defendants.

This Court has recognized its power and authority to review the award of damages made in the trial court *Pauly v. McCarthy*, 109 Utah 431, 184 P. 2d 123, and its power and authority to revise damages there awarded, *Duffy v. Union Pacific R. R. Co.*, 118 Utah 82, 218 P. 2d 1080; *Stamp v. Union Pacific R. R. Co.*, 5 Utah 2nd 397, 303 P. 2d 279.

That it is here an inadequacy should not deter this

Court in exercising that power to effectuate justice. 16 A.L.R. 2d 393, 95 A.L.R. 1165.

CONCLUSION

We respectfully submit that a judgment should have been rendered in favor of plaintiffs and against Jordan Meat upon the special verdict and the evidence. We also submit that the conduct of the jury in returning such an inadequate verdict requires that a new trial be granted at least as to damages unless this Court shall make an additur.

We respectfully submit that this Court should direct that a judgment be entered in favor of the plaintiffs against the defendant Jordan Meat and that a new trial be granted limited as to damages or as to the entire case or that an additur be awarded.

Respectfully submitted,
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