

1972

## Mary Pauley v. Carol Zarbock : Appellant's Brief

Utah Supreme Court

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### Recommended Citation

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**IN THE SUPREME COURT  
OF THE STATE OF UTAH**

MARY PAULEY,  
Plaintiff, Appellant

vs.

CAROL ZARBOCK,  
Defendant, Respondent

Case No. ~~192638~~

12807

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**APELLPANT'S BRIEF**

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**APPEAL FROM THE THIRD JUDICIAL DISTRICT  
COURT, IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH**

**HONORABLE FRANK WILKINS, JUDGE**

---

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**FILED**

JUL 25 1972

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Clerk, Supreme Court, Utah

## TABLE OF CONTENTS

STATEMENT OF THE NATURE OF THE CASE.....	2
DISPOSITION IN THE LOWER COURT .....	2
RELIEF SOUGHT ON APPEAL .....	2
STATEMENT OF FACTS .....	2
STATEMENT OF MEDICAL FACTS AND STIPULATION .....	9
STATEMENT OF POINTS .....	11
ARGUMENT .....	12
POINT I .....	12
POINT II .....	16
POINT III .....	21
POINT IV .....	23
POINT V .....	25
CONCLUSION .....	30

## AUTHORITIES

### STATUTES CITED

59 A-5 Utah Rules of Procedure .....	25 & 26
Utah Statute of Limitations of Action 78-12-26 .....	13

### CASES CITED

Beuey v. Central Mutual Insurance Co. of Chicago 196 SE 837 .....	12
Burke v. Hodge 97 NE 920 34 ALR 2d 988 .....	24
Bright v. Eyrion, 1 Burrows 390 .....	26
ERCO Distributing Inc v. Ferrin 17 Utah 2 375, 412, p2, 615 .....	29
Haywood v. Shreve N.J.L. (15 Vrom) 94, 104 .....	13
Hicken v. Allstate 147 SW 2d 182 .....	13
Highland v. St Mark's Hospital 19 Utah 2d 134, 427 P2, 736 .....	26 & 27
Hoey v. Solt 236 SW 2d 244 .....	19
Holmes v. Nelson, Ut 326, Pac. 2d 722 .....	28
O'Connor v. Boulder Colorado Sanitarium Association 112 Pac. 2d 633 .....	17
Langton v. International Transport Inc. 26 Utah 2d 452, Pac.2d 1211 .....	24 & 25
Lee F. Lechner v. Sarah Bruce Kelly 467 SW 2d 652 .....	18
Roylance v. Davis 18 Utah 2d. 395,424 Pac. 2d. 142 ..	16

## TEXTS CITED

American Jurisprudence 2d Ed. Vol. 57, Sec. 141 . . .	14
American Jurisprudence 2d, Vol 57, Sec. 142 . . . . .	14
American Jurisprudence 2d Vol. 58, 128, pg. 478 . . . .	13
22 American Jurisprudence 2d pg. 15 . . . . .	15
58 American Jurisprudence 2d Sec 27 pg 112 . . . . .	24
58 American Jurisprudence 2d, Sec 140, pg 347 . . . .	29
58 American Jurisprudence 2d. 360 Sec. 153 . . . . .	24
Corpu s Juris Secundum 58 . . . . .	16

IN THE SUPREME COURT OF THE STATE OF UTAH

MARY PAULEY,	}	Case No. 192638
Plaintiff, Appellant		
vs.		
CAROL ZARBOCK,		
Defendant, Respondent		

APPEAL FROM THE THIRD JUDICIAL DISTRICT  
COURT, IN AND FOR SALT LAKE COUNTY,  
STATE OF UTAH

---

HONORABLE FRANK WILKINS, JUDGE

---

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STATEMENT OF THE NATURE OF THE CASE

This case is a personal injury action in which the Defendant admits mis-judgment in her perception which caused her to run into the rear of the plaintiff's stopped vehicle while plaintiff was waiting her turn to drive up to the window of the Valley Bank and Trust Company, Cottonwood Branch, on Highland Drive, in Salt Lake City, Utah. The Court found the Defendant negligent as a matter of law. There was no claim of contributory negligence, nor intervening third party. Counsel for the Plaintiff and Defendant stipulated on the amount of doctor bills of two medical doctors and of a physical therapist and stipulated to the amount of lost wages, and stipulated to the receiving of hospital reports in evidence. The stipulation did not go to the matter of liability.

## DISPOSITION IN THE LOWER COURT

The jury returned a verdict of No Cause of Action upon which the Honorable Judge Frank Wilkins rendered judgment and subsequently denied plaintiff's motion for judgment notwithstanding verdict or in the alternative, a new trial.

## RELIEF SOUGHT ON APPEAL

Appellant seeks an Order remanding the cause back to the trial court with instructions to award damages to the Appellant, or for an order granting a new trial.

## STATEMENT OF FACTS

The Statement of Facts is made brief because the Defendant was found guilty of negligence as a matter of law in running into the rear end of Plaintiff's stopped vehicle at the drive-in window at the Valley Bank and Trust Company and no contributory negligence was claimed by the defendant on the part of the plaintiff and there was no claim of third party involvement, and apparently the only matter for determination is defendant's liability as determined by proximate cause which the plaintiff contends should have been determined as a matter of law by the Court and covered in the instructions to the jury, from which the jury could have offered special and general damages.

For the purpose of showing causal connection between the accident, the injury and the damages, the facts were that the plaintiff was sitting in her car turned sideways looking in her purse for a pen to fill out a deposit slip. Her car was stopped, out of gear and her foot on the brake pedal. TR-10. Plaintiff testified that just when the woman in front pulled away from the window,

she, plaintiff, got a terrific jolt by impact from the car behind, hard enough to throw forward two small children who were strapped under one seat belt in the adjoining seat. The Plaintiff and the Defendant, driver of the other car, had some brief conversation immediately. That rubber bumper guards on back of Plaintiff's car had prevented any scratching or bending. TR 12-3. Plaintiff did tell the defendant, however, that she was concerned about having a physical problem, because of an injury to her neck she had sustained the year before in a fall; that she was afraid of injury because of the collision. TR 12-9. Plaintiff made a deposit at the bank and started home and began to have pain in her neck and on reaching up on the right side of her neck discovered a swelling or lump about the size of an egg which had developed since the impact with defendant. The pain and the swelling or lump on the side of her neck developed from the time she left the bank window at Highland Drive to 23rd East Street, a distance of approximately 6 blocks, with no intervening occurrence of any kind. TR 12-24.

She was distressed and immediately called her doctor, Dr. Clifford Cutler, who had been her family doctor for many years and who had her come immediately to his office. TR 13. The accident was about 2:30 P.M.; the call was at 3 o'clock P.M. and the appointment was given for 3:30 P.M. TR 15. He examined her, gave her medical treatment and medication for relief of pain and the lump on her neck, placed her in a surgical collar and made an immediate appointment for her to see a physical therapist, one David Shields, at the Cottonwood Hospital, TR 14-15. The patient saw Dr. Cutler frequently afterwards. TR 15, and went to see the therapist almost daily. Five days later, on the 11th or 12th of December, Dr. Cutler put the patient in the Cottonwood Hospital for intensive therapy treatment where she was placed in traction with 6 lb. weight constantly on her neck and

diathermy treatment with moist packs and massage being applied by the therapist. TR 15-8 ~~Page~~. Mrs. Pauley, in answer to question about any limitation or of pain prior to the collision, answered as follows: "I never, before the accident at the Bank, had any limitations at all with my arm or my shoulder. I had no pains in that area at all until then. To this day, I have pain in my arm and shoulder. It starts both down the back of my neck, over my shoulder, down my arm here." TR 15-20. Plaintiff did, however, testify to having sustained a fall in December of 1966, in a parking lot, for which injury she had treatments and therapy beginning January of 1967, through June, but had completely recovered by July of 1967 and was doing all former activities including bowling, fishing, hunting, water skiing, housework, with no limitations, none of which she has been able to do since the accident with Carol Zarbock on December 5, 1967. TR 17.

The Plaintiff's husband, John Pauley, testified to having been married to the Plaintiff for approximately 20 years; that they have an eleven year old son at home, and when he, the husband, returned from work on the 5th of December, 1967, his wife was at the Cottonwood Hospital having treatments to her neck. That evening he observed the swelling on her neck or a knot about the size of an egg. TR 101. That she was in considerable pain and that evening took pain pills and muscle relaxant under the doctor's orders. That on the day before the 5th and prior thereto, she had been very normal, with no pain, no discomforts, had engaged in sports, including golfing and bowling, fishing. He knew of no limitations physically or any discomfort that his wife experienced prior to Dec. 5, 1967. TR 103-104.

R. Don Vernon, a physical therapist at Cottonwood Hospital, testified that the Plaintiff, Mrs. Pauley, was treated at the Cottonwood Hospital by the chief

therapist, David Shields, on Dec. 6th and nearly every other day for 3 weeks. That she was placed on self-administered treatment at the home in April until she was referred back for treatment by Dr. LaVerne Erickson, Neuro specialist, Sept. 11, 1968.

Dr. LaVerne Erickson, Neuro specialist and Neuro surgeon of Salt Lake City, testified that the patient was referred to him and that he first saw her on March 22, 1968, at which time she complained of injury to her neck which she called 'whip lash' and related it to an accident of the 5th of December, 1967 while she was waiting to go to the drive-in bank window and her vehicle was hit in the rear, TR 56. The Doctor testified that when he saw her, her main symptoms were pain of the left side of neck and of the shoulder going into the area a little below her shoulder blade and into much of the left upper extremity at the wrist area, and this would occur especially with the use or activity of the arm. That she had some numbness, discomfort into the third, fourth and fifth fingers, her digits on the left hand were numb. She had head ache which was described as on both sides of the back of the neck and in the head itself, which would progress to become a generalized headache if it continued. TR 56. The doctor further testified that he conducted a neurological examination and examination of the limbs, joints and musculature structure for the sensation, the feelings and the strength and the evaluation of the joints that were involved and of the other joints, too, and found that she had some - - I think the positive findings really were some mild differences in the reflexes being less active in this left upper extremity, what I label as triceps jerk, which is striking the triceps muscle here, causing motion, which compared to the other right side was less active. TR 58-2. Doctor Erickson further testified that the patient, Mrs. Pauley, had on the first visit, tenderness in the neck, pain of movement in the

neck. She had some muscle tightness which in part is the subjective type of evaluation, and partly watching a person when they are moving about in your office has some degree of objectivity, or being apart from a person's ability to control it. She had tenderness over the neck muscles and some tightness, mainly tenderness on the left side of the neck at the base of the skull, and on examination of the feeling, some lessened sensation on that first visit along the fifth digit here and along this heeled part of the hand and also along this thumb side there was some slight difference in sensation, less active sensation to pin-prick response and vibratory sensation, which is a tongue fork applied to that portion, which was somewhat less active, as well. So those were the main things I think, on examination at that time. TR 60-16.

In answer to question by Plaintiff's counsel, he said:

Question. What treatment, if any, did you prescribe, doctor?

Ans. I suggested at that time that she be hospitalized and checked for the possibility of a disc in the neck at this level because of the reflex difference. That led to her first hospitalization, then, in April of 1968 she was in for five days then and had a myelogram at the LDS Hospital under my care, and that myelogram showed some minor differences, really, which getting into them, I think, it would just confuse the issue. TR 60-20.

The doctor was further asked on direct examination, Question: "What did you find the condition of Mrs. Pauley to be, Doctor? What were her ailments?"

Ans. We thought she had some irritation of the nerve, but her primary problem was one to be treated conservatively with a cervical sprain as the diagnosis. TR 62-1.

Question: How long have you continued to treat the patient, Doctor, and do you have a record of the dates in which you have rendered treatment?

Ans.: Yes. We have seen her off and on since that time, about the first of the year after that first visit about every two to three months, generally more infrequently.

Question: Now, going back to your primary, your first examination that you made of her when you diagnosed her condition as a cervical sprain, I am going to ask you, Doctor, if, based upon your clinical examination and based upon your subjective and your objective findings, if you have an opinion based upon reasonable medical certainty as to the cause of this condition?

Ans.: Yes.

Question: And what is that opinion, Doctor?

Ans.: I believe that it was caused by the injury that she reported on that first visit.

Question: It was associated, then, with trauma?

Ans.: Yes, trauma, in 1967. TR 63-17.

Question by Counsel: The symptoms, I understand, developed on the 5th day of December, 1968, and I am wondering if it is significant that it developed on a day certain, rather than over a gradual period of time?

Ans.: Yes, I believe the injury was the source of that.

Question: And what significance is there to that, Doctor?

Ans.: I think she had enough of an injury then to cause a sprain in the neck.

A most unfortunate circumstance relating to the facts and issues of this case is that while Mrs. Pauley, the Plaintiff, was receiving medical treatment from Dr. LaVerne Erickson and physical therapy treatments from Don Vernon, that in July of 1969, while she was at the Cottonwood Mall parking lot, her vehicle was again run into from the rear by one Grace Harrington, after which accident her injuries and suffering were added to and/or aggravated with this occurrence. The trial of the issues was clouded by an Insurance Adjuster for Nationwide In-

surance Co., one John H. Ware, who was called to testify by defendant. There was a deliberate attempt on the part of the two insurance companies, the one represented by defendant's counsel and the one representing Nationwide Insurance Co., to discredit the plaintiff and they characterized their dialogue as attempting to impeach the credibility of the witness, Mrs. Pauley. When plaintiff's counsel registered his objection to the line of questioning as being entirely irrelevant, immaterial and prejudicial. TR 155-10. Over objections of Plaintiff's counsel, the witness representing Nationwide Insurance Co. attempted to recite conversation of June 19, 1971, with Plaintiff and her counsel relative to negotiations for settlement of the Harrington accident of July, 1969. The witness stated that Mrs. Pauley had said to him that she had been released by her physician as it relates to injuries received prior to the accident of July of 1969. She said that she had physical problems directly related to an accident occurring in July of 1969 for which she was making claim against Nationwide. TR 157-5. This testimony was given despite the fact that Plaintiff had never indicated to him the nature of the injuries or the duration of the treatment that were attributable to either of the accidents, but that she and her counsel had promised to furnish him a report of evaluation by the doctor determining which injuries were due to which accident which fact he knew to be the case. TR 159-12. At three different times the witness was asked by defense counsel if there was more to the conversation, TR 157-11. He had said, "the witness had *indicated* to me" TR 156-27, showing that he was making the dialogue to suit himself. Again he was asked by counsel, "was there more to the conversation in relation to those expenses?" Ans.: "There was quite a bit of substance to the entire conversation and I'm sorry, but I can't remember exact words or all of the conversation at this late date without anything to refer to." Again

the question by counsel. Ques.: "Do you have any recollection now as to any amounts that were referred to in relation to medical expenses as that related to the accident of July 1969?" (Which questions were irrelevant and prejudicial.) That to the leading question, he was permitted to speculate that, "Attorney Eliason told me that there were expenses relating to the injury of approximately \$1200, and I never seen a list or itemization of these". TR 158-3. He was again asked by defense counsel, Ques.: "Was there anything else to the conversation other than what you have related?" He answered "NO". TR 158-7.

The Plaintiff was by this dialogue characterized as a money hungry, claim seeker, in the eyes of the jury, without any opportunity for Plaintiff's counsel to discuss the relative details of or the procedures for filing claims with Insurance carriers for fear that the same would be, if even mentioned, grounds for a mistrial.

## STATEMENT AND STIPULATION OF MEDICAL FACTS AND EXPENSE

Counsel for the Defendant stipulated with Counsel for the Plaintiff and reported to the Court and Jury the following:

Mr. Christian: I'll be happy to stipulate. If the proper person were called to testify they would testify that the charges I shall indicate were charges made for services performed for and on behalf of Mrs. Pauley and that the charges so made were so reasonable. I do not stipulate, however, that the services performed were necessary nor do I stipulate that we are responsible therefor. Those charges are as follows, your Honor: See Plaintiff's Exhibit No. "1". Dr. Clifford N. Cutler, Statement for Services, including:

Dec. 5, 1967	Office call and Examination	\$ 5.00
Dec. 5, 1967	X-Ray, Cervical Spine & Cervical Collar	25.00
Dec. 12, 1967	Office Call	4.00
Dec. 14, 1967	Hosp. Admittance & Initial Hosp. call	25.00
Dec. 15, 16, 17, 18, 19, 20	Hospital calls	30.00
Jan. 1, 15	Office calls	8.00
		<hr/> \$97.00

For a total services to Dr. C. N. Cutler, as per Exhibit P "1" and stipulation, the sum of \$97.00

Physical Therapy treatments as per Ex. P "1", stipulated to were administered Dec. 6, 7, 8, 9, 11, 12, 22, 23, 26, 27 & 30.

Jan. 1, 2, 4, 6, 9, 12, 15, 18, 24 & 27.

Charges at Cottonwood Hospital for admittance Dec. 13, 1967 were \$318.95, as per stipulation and Exhibit.

Charges for admittance to L.D.S. Hospital, April 10, 1968, as per treatment by Dr. Erickson were \$317.90.

Loss of earnings stipulated to was 11½ days, for \$180.00.

All of which claims shown on Plaintiff's Exhibit "1" were direct and proximate results of the injuries received by the Plaintiff on December 5, 1967.

Statement of W. R. Spence, M.D. -- that was an electro myelogram, wasn't it, Mr. Eliason? Mr. Eliason: Yes, Mr. Christian, \$40.00. And physical therapy, \$536.00; and medication, of what bills I have seen of \$58.00. As

medical evidence there was admitted into evidence Exhibit P "1". Upon stipulation of counsel of both plaintiff and defendant that Dr. C. N. Cutler rendered services to Mary Pauley on Dec. 5, 12, 14, 16, 17, 18, 19 and 20 in 1967 and on January 8 and 15 of 1968, and it was stipulated that Dr. Cutler would testify if called that the value of the services so rendered was reasonable.

## STATEMENT OF POINTS

I. The trial Court erred in refusing to find as a matter of law that the proximate cause of the injuries and damages to the Plaintiff was the negligent acts of the defendant.

II. That the Court erred in not directing a verdict on the liability of the defendant as requested in Plaintiff's Instruction No. 1.

III. That the trial Court erred in allowing the testimony of witness John M. Ware, Nationwide Insurance Company, over objections of plaintiff's counsel, which testimony was irrelevant, inadmissible and prejudicial.

IV. That the verdict is not supported by the evidence and was and is against all of the substantial evidence and testimony.

V. That the Court abused its discretion in refusing to grant a new trial or judgment notwithstanding verdict in light of the overwhelming evidence of the defendant's liability and of the plaintiff's injury and damage.

## ARGUMENT

POINT I. The Court erred in not finding as a matter of law that the defendant's negligence was the proximate cause of injury, making defendant liable. When the Court found that the defendant was negligent in causing the accident complained of with the Plaintiff on Dec. 5, 1967, and when there was no finding or even any claim of contributory negligence by the defendant and when there was no claim of any third party involvement and especially where the evidence is uncontradicted and even stipulated with defendant, that plaintiff on the day of the accident and following, incurred medical expenses with Dr. Clifford N. Cutler for examination and treatment of her injuries, which continued with Dr. Cutler for several days, including hospital admittance and treatment under his direction, totaling \$97.00, and when the evidence is uncontradicted, undisputed and even stipulated that Plaintiff incurred expenses for physical therapy treatment from physical therapist David Shields and Don Vernon, beginning Dec. 5, 1967, the day of the accident and injury and continuing thereafter almost daily for several weeks, and when the evidence is further conclusive, uncontradicted, undisputed and in fact, stipulated to, that plaintiff had 11½ days of loss of earnings because of hospitalization and inability to work following the accident, there can be no question of the causal connection and the liability of the defendant.

Liable has been defined by the Court as follows:

*"Liable is the state of being liable or obligated in law of justice. It is that which is under obligation to pay, or for which one is liable."* Bouev v. Central Mutual Insurance Co. of Chicago, 196 SE 837.

In Words and Phrases, Permanent Ed. Vol. 25, no. 71, in a quotation from Haywood v. Shreve N.J.L. (15

Vrom) 94, 104, the following statement of the law is made as to liability for one's Acts:

"Liability as a legal term signifies that condition of affairs which gives rise to an obligation to do a particular thing to be enforced by action, as we say, an Executor is liable for the debts of his Testator, or, a principal is liable for the acts of his agent."

By exactly the same reasoning a tortfeasor is liable for the consequences of his tortuous act.

Liability has always been held to apply to responsibility for torts as well as for breach of contract and is used in Utah's statute of Limitation of Actions. 78-12-26, applicable to actions on liability not bound upon instrument in writing but which liability includes responsibility for torts and is applied to all actions of law, not specifically mentioned in other portions of the statutes.

Liability is also described in relation to an automobile liability policy under the terms of which the insurer agrees to pay on behalf of the insured \$5000.00 for injuries to one person and \$10,000.00 to two or more in any one accident, which the insured should after date of issuance of the policy, become obligated to pay by reason of liability imposed on him by law as a result of the ownership or use of the automobile described in the policy and under contract the company became liable for the liability of the tortfeasor upon the occurrence of the injury. Such a case was *Hicken v. Allstate*, 147 SW 2d 182.

Liability attaches when there is proximate cause or legal cause or cause not remote to be speculative, connecting the wrongful act to the injuries and damage involved.

Proximate cause is described in *American Jurisprudence* 2d Vol. 58, Sec. 128, pg. 478.

"As the proximate, not the remote cause, the connection between the negligence and the injury must be a direct and natural sequence of events unbroken. The law does not require that negligence of the defendant must be the sole cause of the injury in order to entitle to damages. All that is required is that the negligence in question shall be a proximate cause of the injury."

Under the law of probable cause as recited in Am. Jur. 2d Ed. Vol. 57, Sec. 141, it is stated:

"It is sufficient if the proof shows that various possible causes shown by the evidence, the one for which the defendant was responsible, was the most probable." Quoting further from Am Jr 2d, Vol. 57, Sec. 142, "The test for cause in fact is (1) in all cases where proximate cause is an issue, the first step is to determine whether the defendant's conduct in point of fact was a factor in causing the plaintiff's damage." In other words, except where there are concurrent causes for the injuries sustained, an actor's negligent conduct is not a substantial factor in bringing about harm to another if the harm would have been sustained even if the actor had not been negligent. If the inquiry as to cause in fact shows that the defendant's conduct in point of fact was not a factor in causing the plaintiff's damage, the matter ends there, *but if it shows that his conduct was a factor in causing such damage, then the further question is whether his conduct played such a part in causing the damage as makes him the author of such damage and liable therefore in the eyes of the law.* An inquiry into Cause in Fact requires answers to several questions in determining whether there was cause in fact. Courts generally apply one or more of the various tests and criteria. Some cases have relied on the ordinary natural consequence test or on the substantial factor test. ~~on the~~ orbit of the risk test, all of which in effect held the defendant liable for any and all of the direct consequences of his conduct."

The circumstances surrounding the negligence, the injury and the damages in the Pauley vs. Zarbock case, are so definite, so immediate, so continuous that there can be no doubt whatsoever that the conduct of the defendant was a factor (and the only factor) causing such injury and the resulting damages, and according to the authorities makes the defendant the author of such damages as a matter of law, and liable therefore in the eyes of the law. Damages are automatic where there is probable cause and liability.

In regard to the matter of damages resulting from liability, substantive and the case law provides that whenever there is an invasion of one's rights, the law infers some damage and the innocent person therefore has a remedy, irrespective of the amount or the actuality of the damages. 22 Am Jur 2d page 15. It is the general rule that where a cause of action is established, the law imports damages from the invasion of one's legal rights. 22 Am Jur 2d, page 15.

The matter of liability and of proximate cause either became a matter of law to be determined by the Court; or <sup>or</sup> more complete and understandable instruction on probable cause and liability was required of the Court, as requested, ~~when~~ <sup>but</sup> it declined to instruct as requested on a directed verdict after having found negligence as a matter of law, leaving the jury entirely up in the air with the Court's instruction No. 14, which was as follows: "I have determined as a matter of law that the defendant was negligent in making contact with the plaintiff's vehicle on Dec. 5, 1967. Therefore, the only issues for you to determine in this matter are:

A. Whether the injuries and damages, of which Plaintiff complains were proximately caused by the Defendant's negligence and, if so,

B. What amount of money, if any, should be awarded to Plaintiff. The Plaintiff in order to prevail must prove both A and B above by a preponderance of the evidence.

POINT II. The Court erred in not directing a verdict for Plaintiff as a matter of law.

Without instructions the jury lacked understanding as to legal cause and proximate cause. Court's Instructions No. 13 and 14 were completely inadequate. The Utah cases have imposed upon the Court the duty and responsibility of directing and determining liability as a matter of law when there is no substantial dispute in the evidence. One such case is *Roylance v. Davis*, 18 Utah 2d. 395, 424 Pac. 2d. 142, where the Court held:

"When there is no substantial dispute in the evidence and when the trial Court can say as a matter of law that reasonable men could find only one way on the facts, then it is the trial Judge's duty to determine the applicable law and direct the jury to return a verdict under the law and the facts presented."

The Court held the jurors are more likely to try to do fireside justice than are Judges who have the duty to enforce the law as it is written. Under the law a directed verdict is required under circumstances of the *Paul-ey* case.

*Corpus Juris Secundum* 58. In discussing trial procedure on page 420, is quoted as follows:

"Where the evidence is conclusive a fact issue can be decided only as a matter of law. Evidence may be so conclusive as to entitle the Plaintiff to a favorable finding as a matter of law, but in the ab-

sence of an admission by the opposite party the person having the burden of proof seldom establishes his claim as a matter of law, and defendant on whom rests the burden of an affirmative defense may make out his case with a measure of certainty that entitles him to a ruling of the Court against the Plaintiff taking the case from the jury." *Where all the evidence, fairly considered, points to one conclusion only, a question of law is presented which is not for the jury.*"

It is violative of the legal rights of the Plaintiff if the Court does not make such finding as a matter of law, as is stated in *O'Connor v. Boulder Colorado Sanitarium Association*, 112 Pac. 2d 633, in which case the plaintiff filed action to recover damages resulting from alleged negligent care in treatment by agents of the Boulder, Colorado Sanitarium Association. A motion was interposed by counsel for the Sanitarium for a directed verdict concerning which the trial Court reserved its ruling. During the time the jury was deliberating upon its verdict the Trial Judge read a part of the testimony which had been transcribed and had the Court Reporter read to him a part of the other testimony and when the verdicts herein were returned he advised the jury that there was no evidence to warrant a verdict against the Sanitarium. However, regardless of this statement, and independent thereof, we entertain the same opinion. It is true that Courts should be very reluctant to take the issue of proximate cause from a jury, and this perhaps was the reason why the Trial Court in the instant case, not having in mind all the evidence, submitted the fact to the jury. Where, however, the record is devoid of evidence showing a probability of proximate cause, the question becomes one of law for the Court. In our opinion, the situation here calls for the application of that rule. //

The most convincing and most recent case involving such requirements for a directed verdict and one which is almost identical in all fact situations as well as being directly in line with the legal pronouncements is the case of Lee F. Lechner v. Sarah Bruce Kelly, 467 SW 2d 652. In that case the Appellee testified that she was stopped at a traffic signal, did not see the Appellant's automobile prior to the collision. She further testified that as a result of the impact from behind her car came to rest at a point approximately 24 steps from the point of impact. She offered evidence showing that damage to her automobile amounted to the sum of \$149.00. One Alfred Brinkley, Jr., called as a witness by the Appellant, testified that he observed the accident from his place of employment at a service station located across the street. He testified that immediately before the impact the Lechner automobile came to a complete stop and then rolled forward into the appellant's automobile and bumped it. The Appellant argued that the testimony of Brinkley showing that appellant stopped before colliding with appellee, together with his own testimony that he saw the appellee and made "at least some application of his brakes" was sufficient to create a disputed fact issue. In determining whether the foregoing evidence is sufficient to support a judgment non obstante verdicto, we are required to consider all of the evidence in the record in a light most favorable to the findings of the jury and disregard all evidence to the contrary. If there is any evidence of probative force to support the Jury's findings exonerating the appellant, the judgment non obstante verdicto cannot be sustained. That the Court held:

"In rare cases, to which we think this one belongs, where the evidence is without material dispute and where only one reasonable inference may be drawn therefrom, the question of negligence becomes one of law. The rule simply means that if reasonable

minds can differ as to the inferences and conclusions to be drawn from the undisputed evidence then the case is one for the jury. If reasonable minds cannot differ, then an issue of law is presented. It cannot be gainsaid that one who fails to stop his automobile in response to a traffic signal, but propels the same into the rear end of an automobile which has stopped in obedience to the signal, is guilty of negligence, *PROXIMATELY CAUSING The INJURY Or DAMAGE UNLESS SUCH CONDUCT IS EXCUSED BY SOME EXTENUATING CIRCUMSTANCE OR CONDITION.*

And in that case as in the pre ent Pauley v. Zarbock case, there is no contention that there are any extenuating circumstances excusing the driver from colliding with the rear of the stopped vehicle. For a very similar case involving the same rule requiring a directed verdict the Court cites Hoey v. Solt, 236 SW 2d 244. Both cases are widely annotated. It is submitted that there is no difference whatsoever whether as to fact situation or law involved with these landmark cases and in the instant case of Pauley v. Zarbock.

To reanalyze and parallel said facts, Plaintiff Pauley was stopped waiting her turn to pull up to the drive-in window at the Valley Bank and Trust Co.. Defendant admits running into rear of plaintiff's vehicle because of misjudgment. Defendant does not claim any negligence on the part of the plaintiff. Defendant does not claim any intervening act of a third party. Plaintiff testified of immediate injuries, a swelling or lump on her neck within 10 minutes to one-half hour from the time of accident; of pain, discomfort and limitation of bodily functions. She testified to having been free of such conditions prior to the accident. She testified that Dr. Clifford N. Cutler examined her approximately one-half hour after accident, put her in a surgical collar and referred her to a physical therapist, TR 14. Dr. Cutler treated her

for several days and directed her admittance to Cottonwood Hospital for specialized therapy for 5 days. TR 15. Therapists David Shields and Don Vernon both treated the Plaintiff for cervical sprain for several weeks following the accident. TR 111.

Plaintiff's husband, John Pauley, testified that plaintiff was free of disability, pain and had no injuries or swelling on the neck prior to the accident on the 5th of December, 1967. That on the evening of the 5th of December he observed the knot on her neck, that she was in pain, had limitations of motion and was taking pain pills and muscle relaxants. TR 101.

Dr. LaVerne Erickson, Neuro specialist, testified that he treated her beginning March 22, 1968 for cervical sprain resulting from a whiplash of Dec. 5, 1967, TR 56. That she had tenderness in her neck, pain of movement in the neck, muscle tightness, and had head aches, and he requested further hospitalization for possible disc injury, TR 60. After treating the patient for more than one year, the Doctor gave it as his opinion that the injury of the Plaintiff was caused by the accident she reported of December 5, 1967. TR 63. Being specific, he answered:

Question: Do you have an opinion based on reasonably medical certainty as to the cause of her ailment?

Ans.: "Yes, I believe the injury was the source of that. I think she had enough of an injury then to cause a sprain in the neck." This testimony is not only the greater weight of the believable testimony but the only testimony respecting such matters and the fact that she was injured remains uncontradicted, especially where the Defendant has stipulated as to reasonableness of medical and hospital bills and as to the reasonableness of loss of earnings while the Plaintiff was thus being treated, even though he didn't admit being the cause of all of them.

POINT III. The Court erred in allowing the witness, John M. Ware, Claims Adjuster for Nationwide Insurance Company, to testify relative to negotiations on a subsequent accident.

While the Plaintiff was recovering under Doctor's treatment from the injuries of her accident with Defendant, on December 5, 1967, she was a victim of a second rear end accident which happened in July of 1969, which added to or aggravated the previous accident's resulting injuries. Dr. LaVerne Erickson, Neuro specialist, continued his treatment of the plaintiff through the first injury and with the physical therapists, continued with their patient following the second accident. The Plaintiff and her attorney had been negotiating with Defendant's Insurance Company prior to the second accident and were, of course, immediately contacted by insurance carrier for the driver in the second accident. The Doctor knew of the condition of the Plaintiff before the second accident, knew of her symptoms, diagnosis and treatment of the second accident and should have been the one to testify, and was called by Plaintiff to describe the effects of the second accident, but the issues were clouded when counsel for the Defendant called the Insurance Adjuster to testify relative to the settlement negotiations on the second accident. Plaintiff's counsel objected to the entire line of questioning; stating that it was entirely irrelevant, immaterial and foreign to the issues of the case and even prejudicial. TR 155.

After the objections, the Court called both counsel to the table for discussion and overruled Plaintiff's objection. The witness after four leading questions, to which he gave uncertain answers, was permitted to testify to the following question: Question: Do you have any recollection now as to any amounts that were referred to in relation to medical expenses as that related to the accident of July 1969? TR 157.

Ans.: I have never seen an itemization of expenses so I don't have exact amounts. At that time Attorney Eliason told me that there were expenses relating to this injury of approximately \$1200. I never seen a list or itemization of these, no.

When counsel for defendant was cross-examining Mary Pauley relative to the negotiations of herself and her Attorney with John M. Ware, whom she didn't even recall, counsel asked her: "And do you deny telling him that you had incurred medical specials in the sum of \$1200.00 solely from the accident that you were involved in in July of 1969? Do you deny telling him that? TR 51.

Ans.: I don't remember the conversation.

Question: Do you remember telling him you thought the injuries you had sustained in the accident of July, 1969, were worth \$7500.00? Do you remember telling him that?

Ans.: I asked to settle for that, yes.

Question: And prior to that time you had told him and indicated that the injuries you had sustained were worth \$10,000.00. Isn't that true? TR 51-52.

Ans.: No, because I didn't see him only one day.

Question: Did you ever give your Attorney authority to settle that for \$10,000.00 prior to that time? I am talking about just the accident of July, 1969.

Ans.: I don't know what my Attorney might have said to him when I was not there.

Question: I am asking you whether or not you instructed or gave your Attorney authority to submit that figure to Mr. Ware.

It is submitted to the Court that the only purpose whatsoever for the questions and answers of John M. Ware, Insurance Adjuster for Nationwide Insurance Company, and the further questions which counsel thrust upon

the witness relative to negotiations for settlement with Nationwide of injuries in a subsequent accident, was to embarrass the Plaintiff with the Jury and make it appear that she was requesting excessive amounts for the injuries she had sustained and even made it appear to the Jury that it was improper to negotiate such settlement on a figure more than what may have been actual special damages. She was made to appear money hungry and claim conscious. Insurance settlement question would have been prejudicial if asked by Plaintiff. The Doctor alone could testify as to which injuries were attributable to which accident.

It is submitted that the testimony was wholly immaterial, irrelevant and prejudicial. That it prejudiced the Jury to the point that she could not thereafter have a fair determination of her injuries in the December 5, 1967 accident, and when the Court overruled Plaintiff's counsel's objections to the line of questioning and to any further questioning which was overruled on the grounds that the defendant was testing the credibility of the Plaintiff. Plaintiff was never thereafter able to overcome the effects of such prejudicial treatment.

POINT IV.: The Court should prevent manifest injustice as is made evident from the judgment being against the weight of the evidence, and rehear issue of damages.

It is within the power of the trial and appellate Court and their bounden duty to prevent injustice if it can be determined to exist, as when the verdict is against the greater weight of the competent evidence presented and in order to prevent such an injustice, courts sometimes direct that particular issues be retried or in the alternative that certain awards be modified to prevent such injustice. It goes without saying that had the jury in the

instant case made an award of \$100,000.00 to the Plaintiff based upon the evidence which was submitted the trial court and the appellate court should be compelled to recognize the excessiveness of the damage found by the jury and unless such injustice was otherwise corrected it would be incumbent to order either a new trial upon the issue of damages only or as has been stated by this Court: in *Langton vs. International Transport Inc.* 26 Utah 2nd 452, 491 Pac. 2d 1211

It is equally well recognized that the trial court or the appellate court may, because of the inadequacy of the award, require a review or new trial of the issue in question (damage) or a new trial on all the issues. 58 Am Jur 2d pg. 211, Sec. 27. In a proper case the Court may order a retrial on the issue of proximate cause. *Burke v. Hodge* 97 NE 920 34 ALR 2d 988.

“No distinction is to be drawn between the granting of a new trial because of excessive damages and the ordering of a retrial by reason of the fact that damages awarded by the verdict were inadequate. 58 Am Jur., 2d. 360 Sec. 153.

“As has been said, a verdict for a grossly inadequate amount stands upon no higher ground in legal principles or in rules of law than a verdict for an excessive or extravagant amount, and no reason can be given why a new trial may not be granted upon one ground as well as upon the other, although it is doubtless true that the granting of a new trial upon the grounds of inadequacy of damages occurs less frequently than the granting of new trials upon the grounds of excessive damages, because it is not as easy to detect inadequacy as it is to detect excessiveness . . .”

It is submitted that after the Trial Court found negligence as a matter of law. without any evidence whatsoever of contributory negligence, intervention of Third

Party and uncontradicted, conclusive, believable, corroborated evidence that Plaintiff incurred doctor bills the same day for treatment for neck injury by Dr. Clifford N. Cutler, in the amount of \$97.00 TR 15; bill from physical therapists who treated the patient beginning with treatments the day following the accident; uncontradicted and stipulated evidence that the plaintiff sustained loss of earnings because of inability to attend work for 11½ days, in the sum of \$180.00; and the fact that the plaintiff sustained hospital and doctor bills at Cottonwood Hospital, Latter Day Saints Hospital and with Dr. LaVerne Erickson, Neuro surgeon, the amount of which services were filed as Exhibit "P 1" and stipulated to by counsel. That the jury were required to find some damages based upon the conclusiveness of the evidence; and that to find no damage is tantamount to finding an inadequacy of damages in view of the finding of negligence, and that issue should be retried.

The matter of the Plaintiff's right to a new trial is discussed in the next and final point of Plaintiff's brief, but the serious injustice wrought on the Plaintiff by the failure of the Court and Jury to communicate properly is grounds for the Appellant Court to correct the injustice by retrial of the issue involved.

Where there has been an inadequate award of damages which appears to have been given under the influence of passion or prejudice or under license of misadventure or mistake, under the rule a new trial must be granted to correct the error. Rule 59 A-5 Utah Rules of Civil Procedure. Langton v. International Transport Inc. supra.

POINT v: The Court erred and abused its discretion in denial of Plaintiff's motion for a new trial.

There is nothing more definite in the law nor more

clearly pronounced in the Utah statutes than the rights of a party, where injustice has resulted, to relief by a new trial. It is an abuse of discretion to deny it where the constitutional rights of a litigant have been denied in one or more of the following circumstances:

1. Irregularity in the proceedings of the Court, Jury or adverse party or any order of the Court or abuse of discretion by which either party was prevented from having a fair trial.

2. Error in law or failure of the Jury to apply the law to the fact situation against the law.

3. Excessive or inadequate damages mistakenly granted or under the influence of passion or prejudice. Rule 59-A, Utah Rules of Civil Procedure.

As was observed by Lord Mansfield in *Bright vs. Ey-  
rion*, 1 Burrows 390.

“The effect of a new trial is no more than having a cause more deliberately considered by another jury when there is reasonable doubt or perhaps certainty that justice has not been done.”

In a recent Utah case in an action by patient against the hospital in which the jury found no cause of action and judge entered judgement for the patient against the hospital on question of negligence and ordered a new trial lim-judgement entered accordingly, and thereafter the trial ited to damages. The writer of the prevailing opinion stated in *Highland v. St. Mark's Hospital*, 19 Utah 2d 134, 427 P2, 736:

“Notwithstanding the fact that it was not entirely without reason for the trial Court to determine that evidence showed so persuasively that the Orderly was responsible for what happened that a finding exculpating the Hospital of negligence worked a serious injustice and the granting of a new trial should be on all of the issues.”

In that case, the Plaintiff was requesting a new trial on the issue of damages only and the Court's ruling speaks loudly in favor of the Plaintiff's position in the instant case. In the Highland case the Plaintiff sued for injuries suffered while being catharized by an orderly in the Defendant St. Mark's Hospital. Without detailing the fact situation, the Plaintiff in that case was recovering from a heart attack. In that case there was some evidence that the orderly, Manzanare's procedures in performing the function produced the injury of which the plaintiff complained and there was some further evidence that there may have been interference by the Plaintiff which affected the outcome of the catharization, but even so, the Court made this important statement in its ruling:

"Notwithstanding the fact that the trial Court's ruling does not impress us as wholly unreasonable, out of a desire that a new trial be fair to both sides, we believe that justice would best be served by removing any restriction upon, and accordingly through a new trial on all of the issues."

The Supreme Court has further said in that case, "We have indeed frequently affirmed the importance of trial by jury, however, it must be realized that even a jury is not so sacrosanct as to be beyond the possibility of error. Like other aspects of authority in our system of government under law, it is essential that there be some check against arbitrariness, abuse or mistake. The safeguard against this is the authority of the trial judge who has supervisory control over the proceedings and is charged with the ultimate responsibility of seeing that justice is done. To accomplish that purpose it is essential that his power to grant or deny motions for new trial be recognized. This is necessarily something more than simply to rule as a matter of law that the evidence will or will not support a verdict. The latter would only allow him to judge whether the verdict should be sustained

as a matter of law, and would not permit any latitude of discretion."

"Consistent with the purpose just discussed, whenever what has transpired in the proceeding is so offensive to the trial court's sense of justice that he believes the desired objective of affording the parties a fair trial has failed, he has both the prerogative and the duty to grant a new trial. . ."

If the trial Court abuses its discretion then thanks to our system the review court can correct the abuse.

Plaintiff cites in support of his request for a new trial, the Court ruling in *Holmes v. Nelson*, Ut. 326, Pac. 2d 722. In that case an action for injuries sustained by a three and one-half year old child who ran into the street and was struck by defendant's automobile at about 8:20 P.M. in mid-July, was heard by the jury, who returned a verdict of NO cause of action. In that case it will be noted there was a question of the extent of negligence of defendant, possibility of contributory negligence and unavoidable accident, none of which exist in the present case.

In view of the conflicting testimony in that case, notwithstanding the fact that there was believable evidence to sustain the jury's findings of no cause of action, and even the further question of unavoidable accident the Court granted a new trial because the Court said there was ample evidence to support a verdict for the child and therefore it was proper to grant the child a new trial on grounds that the evidence was insufficient to justify a verdict of No cause of action.

If the evidence was insufficient to justify no cause of action in that case, then the error in the present case in failing to grant a new trial becomes more apparent because in the instant case there was the finding of negligence, the absence of contributory negligence, the absence

of unavoidability, the absence of contradiction as to damages.

The law with regard to granting a new trial where verdict has been rendered on insufficient evidence is well stated in 58 Am Jur 2d, Sec. 140, pg. 347, in the following language:

"Sec. 140: If a verdict against a party has been rendered on insufficient evidence, his remedy is by way of an application for a new trial. Indeed, a motion for a new trial is indispensable where a case has been tried to a jury and the unsuccessful party desires to test the sufficiency of the evidence to support the verdict.

Where the evidence offered for the party for whom a verdict has been rendered, conceding to it the greatest probative force to which according to the laws of evidence, it is fairly entitled, is insufficient to support or to justify the verdict, it is the duty of the Court to set it aside and grant a new trial. A new trial will be granted where the verdict is wholly unsupported by the evidence in an essential particular, or where both parties have, without fault, failed to introduce material evidence."

This Court has said in ruling upon similar matters that when it comes to applying the law to undisputed facts, the Appellate Judges are not to be classed as unreasonable simply because they don't agree with the Trial Judge.

A very similar case was heard by the Supreme Court in the case of EFCO Distributing Inc. vs Ferrin, 17 Utah 2 375, 412, p 2, 615, although in that case plaintiff failed to produce evidence of damage and the claim of any loss was unsupported. It is a strong holding for the case here.

The case was an action for damage for breach of contract by defendant in failing to order out *Products*.  
The Court said.

"If it clearly appears that there has been miscarriage

of justice because jury has refused to accept credible, uncontradicted evidence, where there is no rational basis for rejecting it, or it is plain to be seen that jury has acted under misconception of proven facts, or has misapplied or disregarded law, or where it appears that verdict was result of passion or prejudice, it is both the prerogative and duty of Court to set aside verdict and grant a new trial. This does not have the effect of depriving a party of a fair trial by jury, but in reality is a safeguard to assure it."

## CONCLUSION

In the extensive research made it is difficult to find a parallel to the instant case, where the Court has found negligence as a matter of law, and where contributory negligence and/or an intervening cause have been ruled out. And especially where all the evidence supported the plaintiff's claim of injury caused by the defendant and no evidence was presented by the defendant denying the liability or denying the loss of wages, the expenses incurred for doctor and hospital charges following the injury and accident.

The only testimony produced by defendant was her own where she admitted to negligence <sup>CH 11, 12</sup> into Plaintiff's vehicle and claimed no excuse. And the testimony of a medical Doctor called by the insurance company to make an evaluation about two years after the accident, whose testimony at best could only tend to minimize the damages caused by the injuries in the accident of December 5, 1967. He didn't claim that the plaintiff's doctors and physical therapists had not performed their services as testified to, nor that such services were not proper under their diagnosis. He, in fact corroborated the history of pain and suffering since the accident.

The only other defendant witness was the insurance adjuster from Nationwide Insurance Co., who gave testimony that in a subsequent accident of July 1964 he had attempted to negotiate a settlement with plaintiff and her attorney for a sum which was quoted by the attorney for negotiation but for which settlement was deferred. The only rational meaning the Court could give to such testimony was an acknowledgement of damages and liability which the second company should help pay.

The instructions of the Court were faulty after he found negligence as a matter of law that he didn't find the negligence proximately caused or contributed to the injuries and that he didn't find liability as a matter of law rather than to leave the jury with insufficient instructions, or guidelines.

When the trial judge subsequently found the jury as a result of error or prejudice had mis-applied the law to the facts and had made a verdict contrary to all the credible evidence and contrary to both the law and the facts, then that ~~it~~ was abuse of discretion for the trial court to not have corrected the matter by granting a new trial ~~not have corrected the matter by granting a new trial~~ either on the issue of damage or a new trial on all the issues, and it is respectfully submitted that to correct the injustice thus caused that the Appellate Court should remand the matter for rehearing of the issues involved or direct a judgment.

Respectfully submitted,  
ELDON A. ELIASON  
Attorney for Plaintiff, Appellant

This is to certify that ten copies of the within brief were mailed to the Supreme Court of the State of Utah, Capitol Building, and that two copies were mailed to Gary Christian, attorney for the defendant, Boston Building, Salt Lake City, Utah, July 22, 1972. -

*Edw. C. Hanson atty*