

1961

Vada Wellman v. V. Glen Noble and Perry C. Adams : Brief of Respondent

Utah Supreme Court

Follow this and additional works at: https://digitalcommons.law.byu.edu/uofu_sc1



Part of the [Law Commons](#)

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

David K. Holther; Kunz & Kunz; Attorneys for Plaintiff and Respondent;

Recommended Citation

Brief of Respondent, *Wellman v. Noble*, No. 9392 (Utah Supreme Court, 1961).
https://digitalcommons.law.byu.edu/uofu_sc1/3869

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

Case No. 992 9392

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

VADA WELLMAN,

Plaintiff and Respondent,

vs.

V. GLEN NOBLE and PERRY C. ADAMS,

Defendants and Appellants.

Respondent's Brief

DAVID K. HOLTHUR,
and

KUNZ & KUNZ,

*Attorneys for Plaintiff
and Respondent.*

TABLE OF CONTENTS

	Page
STATEMENT OF FACTS	1
STATEMENT OF POINTS	6
ARGUMENT	7

POINT I.

THE ORDER OF THE TRIAL COURT GRANT- ING TO THE PLAINTIFF A NEW TRIAL ON THE ISSUE OF DAMAGES ALONE, IN THE EVENT THE DEFENDANT FAILED TO CON- SENT TO AN ADDITUR OF \$3,000.00, WAS A PROPER EXERCISE OF JUDICIAL DISCRE- TION ON THE PART OF THE TRIAL COURT.....	7
--	---

POINT II.

THE TRIAL COURT PROPERLY FOUND THAT THE EVIDENCE BEFORE IT DID NOT JUS- TIFY THE GIVING OF AN UNAVOIDABLE ACCIDENT INSTRUCTION	18
---	----

CONCLUSION	25
------------------	----

Bodon v. Suhrmann, 8 Utah 2d 42, 327 P. 2d 826, 830	16, 17
--	--------

Butigan v. Yellow Cab Co., 320 P. 2d 500, 504.....	21, 22
--	--------

Capital Traction Co. v. Hof, 174 U. S. 1, 19 S. Ct. 580, 585, 43 L. Ed. 873	10
--	----

Gallichio v. Gumina, 35 N. J. Super. 442, 446, 447, 114 A 2d 447	16
---	----

	Page
Hartpence v. Grouleff, 15 N. J. 545, 549, 105 A 2d 514	14
Hillyard v. Utah By-Products Company, 1 Utah 2d 143, 263 P. 2d 287.....	1
Jolley v. Clemens, 28 Cal. App. 2d 55, 65, 82 P. 2d 51	21
King v. Union Pacific, 117 Ut. 40, 212 P. 2d 692, 697	9, 10
Kreh v. Trinkle, 343 P. 2d 213, 223.....	23, 24
Parker v. Womack, 37 Cal. 2d 116, 230 P. 2d 823.....	21, 22
Paul v. Kirkendall, 1 Utah 2d 1, 261 P. 2d 670, 671	8
Polk v. City of Los Angeles, 26 Cal. 2d 519, 542, 543, 159 P. 2d 931	21
Porter v. Price, 11 Utah 2d 80, 355 P. 2d 66, 68.....	24, 25
Rodoni v. Hoskins, 355 P. 2d 296, 299.....	22
Ruth v. Fenchel, 117 A2 284, 289	14, 15
Scott v. Burke, 39 Cal. 2d 388, 401, 247 P. 2d 313.....	21
Seydel v. Reuber, 94 N. W. 2d 265, 270.....	17
Underwood v. Brockmeyer, 378 S. W. 2d 192, 194....	17, 18

STATUTES CITED

U.R.C.P., Rule 59 (a) (5)	8
---------------------------------	---

IN THE SUPREME COURT of the STATE OF UTAH

VADA WELLMAN,

Plaintiff and Respondent,

vs.

V. GLEN NOBLE and PERRY C. ADAMS,

Defendants and Appellants.

RESPONDENT'S BRIEF

STATEMENT OF FACTS

Appellants and Defendants in their statement of facts draw only from those portions of the trial transcript that present the case in the light most favorable to the appellants. In doing so appellants disregard the Utah rule to the effect that on appeal the Supreme Court in surveying the evidence will review the evidence in the light most favorable to the party prevailing in the trial court. *Hillyard vs. Utah By-Products Company*, 1 Utah 2d 143, 263 P2 287.

On July 3, 1956, Plaintiff and her two children were riding as passengers in a Cadillac then being driven in a

westerly direction by her brother-in-law, Harold House, on U. S. Highway 30 in Duel County, Nebraska. Immediately ahead of the Cadillac Mrs. House was driving a Studebaker in which Plaintiff's brother was riding (T-4). The parties were returning from Norfolk, Nebraska to their home in Vancouver, Washington. That about 4:00 P.M the area through which they were traveling was grain country with rolling hills (T-4). Mr. House testified that as he drove over the crest of one of the rolling hills, he noticed that a pick-up truck towing a house-trailer was slowing down, and it appeared that the truck was stalling (T-6). The pick-up and house-trailer were driven to the shoulder of the road so that the rear of the house-trailer extended about three feet into the west-bound lane of the highway (T-6) (T-298). The Studebaker slowed down behind the house-trailer while it was being pulled onto the shoulder of the road where it came to a stop on the up-grade of the next hill. The Studebaker then passed the house-trailer and pick-up (T-298) (T-6). Mr. House, following in the Cadillac, applied his brakes to slow down, and when he observed the Defendant's truck behind him he put his hand out as a signal to slow, for he was then unable to pass the house-trailer due to a car approaching from the opposite direction (T-6) (T-21) (T-22). As soon as the oncoming traffic cleared he started to pass the house-trailer and pick-up. As he was in the act of passing these vehicles, his automobile was struck in the rear by a large cab-over-engine truck and trailer unit owned by Defendant, V. Glen Noble, and driven by Defendant Perry C. Adams (T-6). The collision occurred at a point approximately 500 to 600 feet west

of the hillcrest from which the vehicles had just descended, and the point of impact was on the up-grade of the next hill (T-8). The truck unit struck the Cadillac with a heavy impact knocking it ahead 15 to 20 feet (T-117) (T-24). The truck had been following the two automobiles at a distance of about 200 feet for about five miles, and the vehicles were all proceeding at a speed in the vicinity of 45 to 50 miles per hour (T-172), (T-190). Mr. House testified that immediately following the collision he got out of his automobile and walked back to the truck and had the following conversation with the Defendant, Perry C. Adams:

“Q. All right. You may proceed. and then what took place when the driver of the truck got out? Did you have a conversation with him?

A. Yes I did.

Q. Was anyone else present at the beginning of that conversation?

A. Not at the present, at that conversation, no.

Q. Will you relate, please, Mr. House, what was said by you and what was said by Mr. Adams at that time?

A. I started walking back to the truck and he got out of it, and I asked him if he had seen me, and he said, ‘Yes, I seen you’. And I said, ‘Why didn’t you slow your truck down?’ And he said, ‘I don’t know why I didn’t.’

Q. Was there any further conversation had between you at that time?

A. I don’t think there was right at that particular time.” (T-9, 10)

Plaintiff was taken to Chappell, Nebraska, where she was hospitalized. Her attending physician had X-rays taken of her neck and treated her with various medications. A cast type bandage (T-111) was applied to her neck to immobilize her neck in order for her to be able to resume her trip to Vancouver, Washington, the following day (T-112). Mrs. Wellman traveled from Chappell, Nebraska, to Vancouver lying on the back seat of the automobile.

Upon her arrival at Vancouver, she was hospitalized and remained in the hospital for 8 days, where she was treated by a Dr. Reubendale (T-114). Following her release from the hospital she was confined to bed at home for a week. At the end of this time her husband felt she was not making satisfactory progress toward recovery and placed her under the care of Dr. J. C. Woodward, an orthopedic surgeon (T-115). Dr. Woodward made a careful examination of her condition and ordered her to be hospitalized at the Vancouver Memorial Hospital (T-116). At the hospital she was placed in traction and given medication for nausea and pain. The nausea was so severe that it was necessary to feed her intravenously (T-117) for the first ten days of her hospitalization. During the period that she remained in the hospital, she was given various types of therapy and conservative treatment (T-117). Mrs. Wellman was confined in the hospital from July 23rd until August 11th, 1956. After she was released from the hospital she was given extensive physical therapy treatments under the direction of Dr. Woodward (T-57). When it became apparent to her physician that the physical therapy treatments were not achieving the desired results,

he changed to another form of treatment, the injection of a novocain solution into the various tender areas at the base of the skull (T-58, 59). The purpose of these injections was to break up the cycle and pain of the muscle spasm from which the plaintiff was suffering. This latter course of treatment did not seem to accomplish any substantial improvement in the plaintiff's condition (T-59).

In March of 1958, Mrs. Wellman returned to Dr. Woodward, and at that time it appeared to him that her condition had deteriorated and was about as bad as it had been about 20 months earlier. During the preceding period of 20 months she had been hospitalized, and she had undergone extensive physical therapy treatments in an effort by her physician to exhaust the various forms of treatment short of surgery (T-59, 60).

In March of 1958, Dr. Woodward came to the conclusion that surgery was indicated, and at this time she underwent two separate surgical procedures which consisted of the severing of muscles in the neck for the purpose of relieving compression on the nerves and artery. Mrs. Wellman was hospitalized for a period of from 10 days to 14 days for these surgical operations and recovery period. Following the surgery, the plaintiff's condition showed definite signs of improvement for some time (T-61, 62, 63), but a few months after these operations she again began to have pains in her neck and shoulders. Her condition was such that it was necessary for her husband and their 12-year old daughter to do a substantial portion of the housework (T-163). Dr. Woodward examined the Plaintiff in

March of 1960, and at that time he found that the use of her arms caused cramps in both sides of the neck and the shoulders; that she suffered from occipital headaches; and that there was atrophy of her muscles, or a wasting away of the muscle tissue. The Doctor stated that in his opinion the atrophy was due to irritation of the nerve roots where the nerves came out of the openings between the vertebrae. (T-63).

In regard to the plaintiff's permanent disability, Dr. Woodward testified as follows in response to counsel's questions:

"Q. Now, Doctor, based upon the numerous examinations which you made of Mrs. Wellman - - the surgical procedures that you have performed and the history that you have taken from her -- do you have an opinion as to whether or not Mrs. Wellman suffers a permanent disability?

A. Yes, I have.

Q. And what is that opinion, Doctor?

A. In my opinion Mrs. Wellman has suffered a permanent disability amounting to approximately 20 per cent as a result of this injury." (T-69).

STATEMENT OF POINTS

POINT I.

THE ORDER OF THE TRIAL COURT GRANTING TO THE PLAINTIFF A NEW TRIAL ON THE ISSUE OF DAMAGES ALONE, IN THE EVENT THE DEFENDANT FAILED TO CONSENT TO AN ADDITUR OF \$3,000.00, WAS A PROPER EXER-

CISE OF JUDICIAL DISCRETION ON THE PART OF THE TRIAL COURT.

POINT II.

THE TRIAL COURT PROPERLY FOUND THAT THE EVIDENCE BEFORE IT DID NOT JUSTIFY THE GIVING OF AN UNAVOIDABLE ACCIDENT INSTRUCTION.

ARGUMENT

POINT I.

THE ORDER OF THE TRIAL COURT GRANTING TO THE PLAINTIFF A NEW TRIAL ON THE ISSUE OF DAMAGES ALONE, IN THE EVENT THE DEFENDANT FAILED TO CONSENT TO AN ADDITUR OF \$3,000.00, WAS A PROPER EXERCISE OF JUDICIAL DISCRETION ON THE PART OF THE TRIAL COURT.

Defendants contend, as the primary basis of their appeal, that the trial judge abused his discretion when he entered his Order providing for either an additur to the judgment with the consent of both parties, or for a new trial on the issue of damages alone.

The Defendants' failure to consent to the additur option offered by the Court has made the question of additur moot as to this appeal, and, therefore, the only question before the appellate court is whether or not the trial court abused its discretion in granting to plaintiff a new trial on the issue of damages only.

The power of a trial court to grant a new trial on the ground of excessive or inadequate damages is clearly

established in the provisions of *Rule 59 (a) (5) U.R.C.P.*, which provides:

“(a) Grounds. Subject to the provisions of Rule 61, a new trial may be granted to all or any of the parties and on all or part of the issues, for any of the following causes; * * *

(5) Excessive or inadequate damages, appearing to have been given under the influence of passion or prejudice.”

In the case of *Paul v. Kirkendall*, 1 Utah 2d 1, 261 P2 670, the Supreme Court of the State of Utah carefully spelled out the rule in regard to verdicts where the trial court had determined that the jury had disregarded the instructions of the court, or where the verdict had been influenced by passion or prejudice. The court states as follows at page 671 of the opinion:

“If inadequacy or excessiveness of the verdict presents a situation that such inadequacy or excessiveness shows a disregard by the jury of the evidence or the instructions of the court that the verdict was rendered under such disregard or misapprehension of the evidence or influence of passion or prejudice, then the court *may exercise its discretion in the interest of justice and grant a new trial.*” (Emphasis ours)

After hearing the arguments of counsel, and after examining the written memorandums submitted, the trial court entered the following order:

“This matter came before the Court on the plaintiff’s motion for new trial and court having heretofore taken the motion under advisement

at this time the court being fully advised in the premises makes it's ruling.

In this matter it appears to the Court that the jury disregarded the Court's instruction pertaining to damages and that the award was inadequate in view of all the evidence on that issue. It further appears that the verdict was given under the influence of passion or prejudice.

It is ordered that the sum of \$3,000.00 be added to the verdict and if the plaintiff and the defendants fail to consent to the additur within 30 days, a new trial is ordered on the issue of damages only."

The Order of the trial judge made the following specific findings:

a. That the jury disregarded the court's instructions pertaining to damages:

b. That the award was inadequate in view of all of the evidence on that issue.

c. That it appeared that the verdict was given under the influence of passion and prejudice.

Point I of Defendant's brief charges that in making the foregoing Order the trial court was guilty of an abuse of discretion. The power of the trial court to exercise its discretion, and the basis upon which such an exercise of discretion shall be reviewed has been discussed in many recent decisions of this Court. The leading case of recent years on the subject is *King v Union Pacific*, 117 Ut. 40, 212 P2 692, 697, where the Court stated:

“The defendant urges that if a trial judge is allowed to set aside a verdict returned by a jury which is supported by substantial competent evidence, there results an infringement upon its rights to a trial by jury. There is no merit in this contention. The Supreme Court of the United States in *Capital Traction Co. v. Hof*, 174 U.S. 1, 19 S. Ct. 580, 585, 43 L. Ed. 873, amply answered this argument when it said:

‘Trial by jury, in the primary and usual sense of the term at the common law and in the American constitutions, is not merely a trial by a jury of 12 men before an officer vested with authority to cause them to be summoned and impaneled, to administer oaths to them and to the constable in charge, and to enter judgment and issue execution on their verdict; but it is a trial by a jury of 12 men in the presence and *under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict, if, in his opinion, it is against the law or the evidence.*’” (Emphasis ours)

An examination of the evidence before the trial court clearly shows that the trial court was justified in finding that the jury disregarded the court’s instructions in regard to damages and acted under passion and prejudice in awarding an inadequate verdict.

It is clear from the evidence that on July 3, 1956, plaintiff sustained an injury to her cervical spine at the time the automobile in which she was riding was struck by defendant’s truck which had a loaded weight of 33 tons (T-185). The evidence is further indisputable that

plaintiff was hospitalized immediately after the accident; that her neck was immobilized by placing it in a type of a cast; and that she was given medications in an effort to relieve her from the severe pain and nausea that followed her initial injury. Plaintiff was forced to ride lying down in the back seat of an automobile from Nebraska to Vancouver, Washington, and during this long journey she suffered great pain and frequent spells of nausea (T-112).

Immediately upon her arrival in Vancouver, Washington, Mrs. Wellman was ordered to be hospitalized for a period of eight days (T-113). Upon being released from the hospital she returned to her home where she was confined to her bed for a period of ten days. Her husband observed that in the days following her release from the hospital that instead of recovering, her condition was becoming more serious each day; she became so nauseated that she was unable to eat food or take any liquids without vomiting (T-157). Mr. Wellman's concern over his wife's deteriorating condition during this ten day period caused him to seek additional medical care for his wife (T-158). He took his wife to Dr. J. C. Woodward, an orthopedic surgeon, a diplomat of the American Board of Orthopedic Surgery, and a fellow of the American College of Surgeons (T-158, 40).

Dr. Woodward's X-Rays and initial examination of plaintiff indicated that she needed immediate hospitalization, and he sent her to the Vancouver Memorial Hospital. Upon her arrival at the hospital she was put in traction, and because of her severe nausea it was necessary to feed her by intravenous feedings for ten days (T-116).

After Mrs. Wellman's release from this second period of hospitalization she was required to wear a plastic cervical collar; to sleep with a traction device upon her neck; and to take daily diathermy treatments (T-120). Plaintiff continued these treatments over an extended period of time in an effort to find relief from the pain in her neck and shoulders and the headaches from which she was suffering (T-120, 121).

In November of 1957, Mr. Wellman was transferred from Vancouver, Washington, to the Seattle, Washington, branch of his employer's business. After their arrival in the Seattle area, plaintiff's condition began to get worse. Her hands and arms became numb, and she was not able to hold things she picked up (T-121). Her condition was such that it was difficult for her to do her housework, and she required help from other persons to perform her daily household duties (T-121).

By March of 1958, it became apparent to Mrs. Wellman that the deterioration of her condition, the increasing pain and suffering, and the progressive loss of bodily function required further medical attention. She returned to Vancouver to see Dr. Woodward, and he determined at that time that the course of conservative treatment that had been followed in the period subsequent to her injury was not providing relief for her, and that surgical intervention would be necessary. Therefore, two separate surgical procedures were performed, each under a general anesthetic; each procedure consisted of dividing a muscle in the neck close to the point where it fastens to the first rib and allowing the muscle to retract upward. The purpose of this surgery was to

relieve the compression of the muscle upon the artery and nerves (T-61). These were painful operations, and it was necessary that plaintiff be placed in a cast following the surgery (T-130). This surgery was performed almost two years after the original injury and following a great effort on plaintiff's part to obtain relief from her pain, suffering, and disability.

Following the surgery, Mrs. Wellman obtained a certain amount of relief, but before long she again began to suffer pains in the shoulders, arms, and neck and to suffer from occipital headaches, as she had so frequently since sustaining her injuries (T-131, 132). The evidence indicates that she was able to perform only a portion of her household duties. That her husband and her 12 year old daughter had been required to do a major portion of the household work. That her activities were restricted so that she could not enjoy camping and dancing as she had previously done. Her husband testified that subsequent to her injury a substantial change had taken place in her temperament and disposition. That prior to her injury she was not a person who complained, but that after the injury she was irritable and upset with her husband and children (T-164). Dr. Woodward testified that based upon the treatment and examination of the plaintiff during a period in excess of four years, that he evaluated her disability rating as one of approximately 20% permanent disability (T-69).

In the light of the medical evidence, of which the foregoing is but a brief summation, and in view of the fact that the trial judge had the opportunity to observe

the witnesses, both lay and medical, it is apparent that he did not abuse his discretion when he found as a fact that the jury had disregarded his instructions pertaining to damages, in that an award of \$2,000.00 general damages was so inadequate as to appear to the court to have been given under the influence of passion and prejudice.

Appellate courts have not been unmindful of the particularly advantageous position of the trial judge in regard to evaluating the evidence presented at the trial. Th Supreme Court of the State of New Jersey discussed this subject in the case of *Ruth v. Fenchel*, 117 A2 284, where they stated as follows at page 289 of the opinion:

“We are aware of the responsibility lodged in a jury to resolve the factual conflict which is invariably present in a negligence case. However; we are also sensitive to the emphasis placed by our Supreme Court in *Hartpence v. Grouleff*, 15 N.J. 545, 549, 105 A 2d (1954), upon the superior position enjoyed by the trial judge over that of the appellate court in deciding ‘whether justice has been done under the particular circumstances and the weight of the credible evidence,’ and this because ‘He sees and hears the witnesses, observes their demeanor and reactions, none of which has life in the record on appeal. He is in a position to know and equate all the factors * * *.’ We are enjoined not to disturb the action of the trial court, ‘unless it clearly and unequivocally appears there was a manifest denial of justice under the law.’ The Appellate Division may not substitute its judgment for that of the trial judge merely because it evaluates the evidence in a light that

would justify the jury verdict. *Gallichio v. Gumina*, 35 N.J. Super. 442, 446-447, 114 A 2d 447 (App. Div. 1955)."

The inadequacy of the jury's award to the plaintiff and the disregard of the Court's instructions by the jury become particularly apparent from the fact that the undisputed medical expenses incurred by the Plaintiff in the treatment of these injuries amounted to \$2,539.50. The expenses that she incurred for household help amounted to \$252.00. The disregard of the court's instruction No. 10 is further apparent by the fact that the jury failed to award plaintiff any damages as a result of her loss of earnings, although the evidence was clear and undisputed that at the time that she sustained the injury, she was earning the sum of \$10.00 each week and would have been able to continue to earn such sum from the time of her return to Vancouver, Washington, on July 6, 1956, up to the time that she and her husband and family moved to Kent, Washington, in November of 1957. Her earnings during this period would have amounted to \$680.00 (T-125, 127). The evidence is clear and without dispute that the total amount of the special damages suffered by plaintiff as a result of her injuries was the sum of \$3,471.50, but despite this uncontroverted evidence of such damages, the jury award to plaintiff for all special damages was the total sum of \$2,500.00.

It is submitted that the arbitrary failure of the jury to award Plaintiff the total of her medical expenses, the expenses incurred for household help, and the sums that she would have earned during this period is substantial evidence of passion and prejudice against the

plaintiff on the part of the jury, and it is further evidence of the failure on the part of the jury to fairly and justly consider her claim in the light of the court's instructions. Dr. Woodward testified that Plaintiff was a cooperative patient, and that she followed his instructions carefully in an effort to improve her own condition (T-99). The medical witness appearing on behalf of the defense indicated that in his opinion the plaintiff was not a malinger nor a neurotic (T-273).

The Supreme Court of the State of Utah discussed the responsibility of a trial judge in regard to his duty to pass on the adequacy of a jury verdict in the case of *Bodon vs. Suhrmann*, 8 Utah 2d 42, 327 P2 826, where the Court stated at page 830:

“* * * It is primarily the prerogative and the duty of the trial court to pass upon the adequacy of the verdict and to order any necessary modification thereof.”

In this case the Supreme Court recognized the long established practice of courts to exercise supervisory powers over the verdict where the damages awarded were in excess of those shown by the evidence. The Court stated at page 828:

“It has long been established that where the award is in excess of damages shown by the evidence it will not be permitted to stand. In such instances the courts exercise their inherent supervisory powers over jury verdicts, *which derive from their duty to see that justice is done; and make corrective orders necessary for that purpose.* This is done by the trial court, or upon

its failure to do so, by this court on appeal.”
(Emphasis ours.)

It is submitted that under the powers granted the trial court to order a new trial on all or part of the issues under our rules of civil procedure, that the duty of the trial court in respect to taking action in regard to an inadequate award of damages stands on the same sound legal basis as the trial court’s power to act in regard to a situation involving an excessive award of damages.

In the case of *Seydel v. Reuber*, 94 NW2 265, the Supreme Court of the State of Minnesota at page 270, recognized the rule adopted by the Utah Supreme Court in the *Bodon v. Suhrmann* case, *supra*, in the following language:

“We have fully taken into account, while considering the record in this case, that the granting or refusal of a new trial upon the ground of inadequacy of damages appearing to have been given under the influence of passion or prejudice is largely within the discretion of the trial court and that the ruling of the trial court will not be disturbed on appeal unless there was a clear abuse of discretion.”

The rule in regard to the manner in which an appellate court should examine the relevant evidence in determining whether there was substantial probative evidence to justify the ruling of the trial court is stated in the following language by the Supreme Court of the State of Missouri in the case of *Underwood v. Brockmeyer*, 318 SW2 192, at page 194:

“In determining whether there was substan-

tial probative evidence to justify the trial court, upon weighing all the evidence, to reasonably conclude that the \$1,250.00 awarded as damages was grossly inadequate, *we consider the relevant evidence from a standpoint favorable to the trial court's ruling, which in this instance, means that we consider the evidence from a standpoint favorable to plaintiff.*" (Emphasis ours).

Considering the evidence of Plaintiff's injury, pain and suffering, disability, and special damages from a standpoint favorable to the trial court's ruling, there is no reasonable basis to support defendant's contention that the order of the trial court on the motion for a new trial constituted an abuse of discretion on the part of the trial judge

POINT II.

THE TRIAL COURT PROPERLY FOUND THAT THE EVIDENCE BEFORE IT DID NOT JUSTIFY THE GIVING OF AN UNAVOIDABLE ACCIDENT INSTRUCTION.

The defendants in their Point II. apparently are of the belief that because they plead the defense of unavoidable accident in the Answer, and because at the pre-trial they relied upon this same defense, that they are thus entitled to have the jury instructed on the question of unavoidable accident, regardless of the state of the evidence before the trial court at the time the instructions to the jury were framed.

The only evidence before the appellate court that when the defendant driver reached the crest of the crucial hill that the nearest vehicle was 100 feet distant

is the statement to that effect contained on pages 4 and 22 of defendants' brief. Defendant Adams' testimony in regard to the distance was as follows:

(By Mr. Midgley)

“Q. How much distance separated your truck from the rear of the Cadillac at that time when you first *observed* them stopped or slowly moving? (Emphasis ours) (T-174)

A. About a hundred feet I would judge.”

It is submitted that the fact that defendant Adams was *about* a hundred feet from the automobile in which plaintiff was riding when he *observed* the Cadillac is a very different *fact* and presents a very different legal situation than the statement in appellant's brief on page 22 to the effect “that when he reached the crest of the crucial hill the nearest vehicle was only 100 feet distant”.

The trial judge in considering the applicability of the unavoidable accident instruction was certainly entitled to consider the further testimony of the defendant Adams as to why he did not see the Cadillac, the Studebaker, and the house trailer when his truck was at the crest of the “crucial hill”. On cross examination defendant Adams testified as follows:

“Q. Have you any explanation as to why you didn't see these automobiles and this house trailer at the point I have indicated, or, perhaps, at very best when your truck was at the point I have marked with X, rather than at the point you have drawn on the drawing?

A. Well, a man is always driving ahead of

himself, looking ahead at the traffic. And I come over the hill like I say, there was no indications whatsoever they were stopped. *I didn't realize they were stopped.* And as I came over the hill I glanced on up the hill and back down at them, and about that time I realized they were stopped." (T-194-195) (Emphasis ours)

The foregoing testimony of the defendant certainly justifies a finding on the part of the trial judge that the evidence did not support an unavoidable accident instruction. This finding is further supported by the testimony of the relief driver of the truck to the effect that the distance from the bottom of the swail to the easterly hill crest was 150 to 175 feet (T-233). Mr. House testified that the collision occurred not at the bottom of the swail but beyond the bottom of the swail on the westerly upgrade of the next hill (T-8). This testimony is not disputed by either Adams or the relief driver, Whitley. The only conclusion that can be drawn from the testimony is that the defendant Adams had a distance in excess of 150 to 175 feet past the crest of the "crucial hill" in which to stop. Plaintiff's witness places the distance from the crest of the hill to the point where the house trailer was parked at from 500 to 600 feet (T-7).

It is clear from all of the evidence that while the distance at which defendant Adams claims he first realized the Cadillac slowing was 100 feet; *the distance at which he saw or could have seen that the Cadillac was slowing and should have taken action to stop his truck was substantially greater than 100 feet.*

The matter of the propriety of the trial court instructing the jury on the question of unavoidable acci-

dent has occupied the attention of many appellate courts in recent cases. In the case of *Butigan v. Yellow Cab Company*, (California) 320 P. 2d 500, at page 504, the Supreme Court of California comments on the question of instructing the jury on unavoidable accidents as follows:

“In the modern negligence action the plaintiff must prove that the injury complained of was proximately caused by the defendant’s negligence, and the defendant under a general denial may show any circumstances which militates against his negligence or its causal effect. The so-called defense of inevitable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury. *Scott v. Burke*, 39 Cal. 2d 388, 401, 247 P. 2d 313; *Polk v. City of Los Angeles*, 26 Cal. 2d 519, 542-543, 159 P. 2d 931; see also *Jolley v. Clemens*, 28 Cal. App. 2d 55, 65, 82 P. 2d 51. The statement in the quoted instruction on ‘unavoidable or inevitable accident’ that these terms ‘simply denote an accident that occurred without having been proximately caused by negligence’ informs the jury that the question of unavoidability or inevitability of an accident arises only where the plaintiff fails to sustain his burden of proving that the defendant’s negligence caused the accident. *Since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on these issues in order to recover, the instruction on unavoidable accident serves no useful purpose.*

It is particularly significant that no decision in this state, either prior or subsequent to Parker

v. Womack, 37 Cal. 2d 116, 230 P. 2d 823, has held that refusal to give the instruction was reversible error. In several cases in which error had been claimed because of such a refusal, it was held that the instruction was superfluous.” (Emphasis ours)

In the Montana case of *Rodoni v. Hoskins*, 355 P2 296, cited in defendants’ brief, the court reversed a verdict for the defendant on the ground that the unavoidable accident instruction was erroneously given. In discussing the evidence the Court said at page 299:

“In the instant case, it appears from all of the testimony that an instruction concerning unavoidable accident was not appropriate. There was no testimony of negligence on the part of the driver of the Erickson vehicle, in which the plaintiff was a passenger. However, there was ample testimony from which negligence could be inferred on the part of the defendant. The defendant himself testified that he was familiar with the road and knew of the approximate location of the chuck hole and that it could ‘throw my car if I hit it’. He knew the streets were in a slippery and dangerous condition. He also testified that he saw the lights of the Erickson vehicle before going into the curve. However, the defendant, from the testimony, apparently did not slow his vehicle or let the Erickson vehicle pass before crossing the chuck hole. *Under these circumstances we conclude that there were no facts present concerning unavoidable accident to justify the instruction and the giving of such an instruction by the trial court was reversible error as to the plaintiff.*” (Emphasis ours)

A most comprehensive analysis of the unavoidable

accident instruction is found in the 1959, Kansas case of *Kreh v. Trinkle*, 343 P2 213, where at page 223 the Court said:

“In an ordinary negligence action the plaintiff must prove that the injury complained of was proximately caused by the defendant’s negligence, and the defendant under a general denial may show any circumstances which tend to militate against his negligence or, if negligent, its casual effect. The mere fact that the defendant pleads in his answer the defense of unavoidable accident does not entitle him to an instruction on the doctrine of unavoidable accident.

If the so-called defense of unavoidable accident is nothing more than a denial by the defendant of negligence, or a contention that his negligence, if any, was not the proximate cause of the injury, the pleading on this point is immaterial, since an instruction to the jury under these circumstances would inform the jury that the question of unavoidability or inevitability of an accident arises only where the plaintiff fails to sustain his burden of proving that the defendant’s negligence caused the accident. The instruction under these circumstances would serve no useful purpose, since the ordinary instructions on negligence and proximate cause sufficiently show that the plaintiff must sustain his burden of proof on the issues of negligence in order to recover.”

Where the evidence before the jury is confined to the issues of negligence, an instruction which informs the jury that the law recognizes what is termed an ‘unavoidable or inevitable accident’ may give the jury the impression that unavoidability is an issue to be decided, and that

if proved, it constitutes a separate ground of non-liability of the defendant. They may then be misled as to the proper manner of determining liability, that is, solely on the basis of negligence and proximate causation. The instruction under these circumstances is not only unnecessary, but it is confusing.

It would therefore appear to be the better practice, where the evidence is confined to issues of negligence, for the trial court to eliminate any reference to 'Unavoidable accident' in summarizing the pleadings of the defendant for the jury in its instructions since the defendant's pleadings on 'unavoidable accident' have become immaterial."

There was no contention that the plaintiff was negligent in any manner in the case now before the court. There was not even any contention that the driver of the automobile in which plaintiff was riding was negligent. The instructions of the court fairly and fully presented the issues of negligence to the jury, and stated that the burden was upon the plaintiff to prove the negligence of the defendant before he was entitled to recover.

The Utah Supreme Court has recently commented on the necessity of giving an unavoidable accident instruction in the case of *Porter v. Price*, 11 Utah 2d 80, 355 P2 66, at page 68:

"It is true that in most cases the usual instruction on negligence and proximate cause make it sufficiently clear that the plaintiff must sustain his burden of proof on these issues in order to recover, *and that in such instances an*

instruction on unavoidable accident serves no useful purpose.” (Emphasis ours)

There is no contention by the defendants that there was any error or inadequacy in the manner in which the trial court instructed the jury in regard to negligence and proximate cause, and that the plaintiff must sustain his burden of proof on these issues in order to recover.

Based on the evidence before the trial court and the instructions that were given to the jury on the foregoing matters, it is evident that the trial court properly determined that an instruction on unavoidable accident could serve no useful purpose.

CONCLUSION

The Order of the trial court granting plaintiff a new trial on the grounds that the jury disregarded the court’s instructions pertaining to damages, and that an inadequate award was given under the influence of passion or prejudice was amply supported by the law and the evidence. Appellate courts have constantly held that trial courts have broad discretion in such matters, and that their discretion will not be disturbed in the absence of a plain abuse thereof. No such abuse of discretion has been shown by the defendants.

We respectfully submit that the Order of the trial court should be affirmed.

DAVID K. HOLTER,
and
DAVID S. KUNZ
for Kunz & Kunz
*Attorneys for Plaintiff
and Respondent.*