

1963

# Harry Walters and Betty Walters v. Robert W. Brandt : Brief of Plaintiffs and Respondents

Utah Supreme Court

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



Part of the [Law Commons](#)

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

---

## Recommended Citation

Brief of Respondent, *Walters v. Brandt*, No. 9880 (Utah Supreme Court, 1963).  
[https://digitalcommons.law.byu.edu/uofu\\_sc1/4231](https://digitalcommons.law.byu.edu/uofu_sc1/4231)

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

IN THE SUPREME COURT  
OF THE  
STATE OF UTAH

---

HARRY WALTERS and  
BETTY WALTERS, his wife,  
*Plaintiffs and Respondents,*

—vs.—

Case No.  
9880

ROBERT W. BRANDT,  
Administrator of the Estate of  
Barbara Best Pelly, appointed in Utah,  
*Defendant and Appellant.*

---

BRIEF OF PLAINTIFFS AND RESPONDENTS

---

STATEMENT OF THE KIND OF CASE

Defendant and Appellant appeals to the Supreme Court of Utah from a jury verdict entered in the District Court of Sevier County, August 17, 1962, and the denial of Defendant's Motion for New Trial. Plaintiffs were awarded damages for personal injuries and property damages resulting from an automobile accident August

22, 1953, involving a pickup truck driven by Plaintiff Harry Walters and in which his wife, Betty Walters, was a passenger, and an automobile approaching from the opposite direction driven by Barbara Best Pelly, who was killed in the accident and for whose estate the administrator was appointed.

### DISPOSITION IN THE LOWER COURT

The jury returned a verdict in favor of the Plaintiffs. Defendant filed a timely motion for new trial which was denied.

### RELIEF SOUGHT ON APPEAL

Plaintiffs and Respondents seek to have the judgment affirmed.

### STATEMENT OF FACTS

August 22, 1953, at approximately 5:15 o'clock, p.m., on U. S. Highway 89 in Sevier County, Utah, a 1953 Chevrolet automobile driven northerly by deceased, Barbara Best Pelly, and a 1953 Chevrolet pickup driven southerly in the opposite direction by Plaintiff and Respondent Harry Walters, and in which his wife, Plaintiff Betty Walters, was a passenger, collided.

The collision was head-on for all practical purposes, the right front "corner" (R-211, Line 22) of the Walters vehicle meeting the right front "just ahead of the door standard on the right side . . ." (R-208, Line 22) (Photos, Exhibit 5 of Pelly vehicle, Exhibit 6 of Walters vehicle), as the latter vehicle, the Pelly vehicle angled "30 to 40°

angle to the roadway . . .” (R-208, Line 12) across the highway into the opposing lane of travel.

The point of impact was four feet from the center of Plaintiff’s and Respondents’ side of the highway; on Defendant’s wrong side of the highway. (R-212, Line 2)

Plaintiff Harry Walters testified that as he approached the bridge, the scene of the accident, he was on “my own side” of the street (R-109, Line 21) (R-110, Line 14), and that he had been since leaving Aurora except for passing one car passed earlier (R-124, Line 24, 30; R-125, Line 5); that he “. . . saw dust made by the car,” (R-111, Line 18) on the shoulder of the highway beyond the bridge “about 130 yards away from me” (R-112, Line 17), Plaintiff Harry Walters marking the Plaintiff’s map Exhibit 3 (R-115, Line 6) where the dust arose, said point being where the physical evidence of tire tracks revealed the Pelly car for some reason, control or otherwise, was off the shoulder (officer’s testimony, R-179, Line 20) It’s speed was such that the Walters vehicle, itself traveling forty-five miles per hour (R-108, Line 21) was knocked backward ten feet (R-188, Line 7), sufficient that shortly before it passed a vehicle going in the same direction between forty-five and fifty (R-144, Line 13), that of the witness Averett, got ahead of the Averett automobile by one mile at one time and kept ahead of the Averett vehicle going “around that mileage [50]” (R-147, Line 20), Averett, however, having told the officer he was going the maximum (sixty miles per hour), when passed by the Pelly vehicle (R-201, Line 126). Then the Pelly automobile “veered sharply off the road so the wheels got off the shoulder there and it made a sharp

turn and shot across the bridge.” (R-145, Line 21) (In the words of the witness Averett.) Contrary to the statement of fact in Defendant’s brief, Page 3, Paragraph 3, Averett could not testify as to the position of the Plaintiff Walters’ vehicle at the time of the impact, Averett not being able to see the Walters’ vehicle. (R-156, Line 7)

Q. At the time the car collided were you able to see the pickup truck?

A. No, sir.  
(also R-146, Line 23)

Q But at that point you couldn’t see the Walters car?

A. That’s true.

The witness Averett testified (R-151, Line 7) he could see no indication of any marks left by the Pelly car, though the highway patrolman, Ted Hansen, carefully charted same (R-179, Page 18) and they appeared on the photographs. Notwithstanding the foregoing, the witness Averett testified indicating he worried over marks on the highway under the pickup after same had come to rest and after he had gone to summon help (R-159, Line 18); these marks were determined by the patrolman to “. . . not pertain to either of the two vehicles involved in this accident.” (R-186, Line 15)

Averett, however, contended had there been any such marks from the Pelly car he would have seen them. (R-165, Line 21)

As to the witness Roberts’ testimony concerning a third car being passed by the Plaintiff Walters and

which supposedly stopped at the scene of the accident, the witness Averett saw none and detailed that he saw none though in a position to see. (R-157, Line 19)

Q. How long was it after you left the scene that you returned?

A. Long enough for the ambulance to come from Salina because it passed me in that mile between Aurora and the accident.

Q. Just prior to the time that you saw this dust you indicate two to three car lengths south of the bridge, had any other car — did you observe any other southbound cars?

A. No, sir, not that I can remember.

Q. Did you observe whether or not — well from your position could you observe any cars that were approaching from the southbound from the north side of the bridge?

A. No.

Q. Was your visibility obstructed in any way?

A. That's right.

Q. As you approached the bridge the cars coming from the north, it would be on north of the bridge?

A. To make that curve and drop over you couldn't see over that bridge, at least I couldn't. All I could see was the Pelly car.

This third motorist, if there was one, was never produced at trial. Roberts' testimony generally is contrary to, and not sustained by, the physical evidence as outlined by the investigating officer who placed the point

of impact on Plaintiff Walters' side of the road (Exhibit 3, marked with X) (R-185, Line 13), within a foot of the center of Walters' lane of travel (R-207, Line 21, Line 30, and R-212, Line 3) with unmistakable marks from the Pelly car leading from off its right shoulder of the road, diagonally across the road to its wrong side, and with no marks discernible from the Walters vehicle except side skid marks made after impact. (R-185, Lines 21 to 30)

- A. Well, at the time we were making a recheck there were numerous short stopping marks made by different vehicles that had come to the scene. We found a very short mark made up to the point of rest of the Walters' pick-up, which showed a side skid as the car was turning after the impact. Other than that there were no discernable marks as to the tire making marks from the Walters' pick-up other than from markings that evidently that were made from the front wheels as it was pushed side-ways and around at the point of impact.

(R-207, Lines 20 to 30)

- A. Now at a point twenty-four feet north of the bridge, and four feet west of center line is this point of a variation in the travel of this curvature to indicate something causing it definitely to quickly change its movement and that's where this other side skidding, I assume, and deducted, came from the impact and moving sideways of the front wheels of the two vehicles, so that that would be four feet less to the center line and twenty-four feet south

of the north — from the north edge of the bridge, you see.

(R-212, Lines 16 to 19)

A. No, I didn't make a measurement. I just recall there was distance enough from the point of impact that I felt it had no connection with either of these vehicles.

(R-218, Lines 17 to 21)

THE COURT: His testimony is to the effect that he observed no marks there on his first investigation. Later on there were these well defined skid marks or brake marks, call them what you please that he noticed, of course, in the opposite lane or the right lane of the highway.

(R-225, Line 30, R-226, Lines 1-3)

Q. Just one more — Could I have you step to the board and show me where you saw the other heavy tire marks?

A. I don't recall at present of the proximity but they weren't close enough to be tied in.

Plaintiff Betty Walters testified she did not drive, has never driven, that her husband owned and paid for the car she was in (R-23), that she was in the front seat beside her husband, that the other car weaved (R-51, Line 2), that she then "... thought they had it back under control. We thought they were going to pass us." Cross examination failed to show she was or could be a joint venturer and chargeable with negligence, if any, of her husband, Harry Walters. (R-70, 71)



## STATEMENT OF POINTS

That the Court did not commit prejudicial errors as alleged by Defendant in his Brief, Points I to VI of Defendant's Brief, and as indexed heretofore; that the Defendant had a fair trial and that the judgment should be affirmed.

## ARGUMENT

## POINT I

ANSWER TO POINT I OF APPELLANT'S BRIEF, i.e. THAT THE COURT ERRED IN SUBMITTING INSTRUCTION 17 TO THE JURY, SAID INSTRUCTION BEING A VERDICT DIRECTING (FORMULA) INSTRUCTION WHICH DID NOT TAKE INTO ACCOUNT THE DEFENDANT'S THEORY OF THE CASE.

The instruction is entirely correct as to Betty Walters who could not have been contributorily negligent, and open to little criticism as to Plaintiff Harry Walters.

Defendant-Appellant at trial proposed no instruction either covering damages or enumerating alleged grounds of negligence. Plaintiffs submitted an instruction on each, Plaintiffs' requested instructions Nos. 11 ad 15, each framed according to JIFU forms. The Court framed an instruction covering both damages and enumerating possible grounds of negligence, Instruction No. 17, punctuating the same with cautioning language such as "... the plaintiffs have the burden of proving by a preponderance of the evidence one or more of the following . . ." and "The plaintiff has the *burden of*

*proving* by a preponderance of the evidence that one or more of the acts or omissions designated as A, B, C, D, and E was the *efficient and moving cause*, which in a natural and continuous sequence, *unbroken by any new, independent cause* produced the collision which resulted in the injuries. Except for a one-paragraph instruction, No. 16, three preceding instructions, 14, 15, and 15(a) were Defendant's requests, proclaiming Defendant's theory; No. 14 instructing as to "... hazard in the event another vehicle might approach from the opposite direction and when the view is obstructed upon approaching within 100 feet of any bridge . . .," and that if "Harry Walters drove to the left of the center . . . as to create a hazard . . . then Harry Walters was negligent"; Instruction No 15 cautioning that the fact of an accident does not justify a conclusion of negligence; and Instruction No. 15(a) detailing the grace extended to one confronted with unexpected peril. The following instruction, No. 18, then detailed that if joint venture was found the "contributory negligence of the plaintiff, Harry Walters, is imputed to the plaintiff, Betty Walters, and she cannot recover."

The foregoing would not all go on one page; it was read and submitted together; and as given could not have but fully apprised the jury of both Plaintiffs' and Defendant's theory of the case; it is not, in whole or in part, a formula instruction as that term is generally used to refer to an instruction detailing and intending to detail conditions of recovery; and can hardly be said,

as stated in Appellant's Brief, Page 9, to have "ignored completely the Defendant's theory and defense."

In the *Morrison vs. Perry* case, 104 Utah 151, 140 P. 2d 772, cited by Appellant, the Supreme Court deals with an elaborate nine-question instruction, Instruction No. 2, notes it to be incomplete, in and of itself, and also erroneous and confusing, directing the jury to ascertain if certain items of negligence were present, then asking them to decide if, in fact, such acts were negligence, the Court saying:

"The jury was told that if a person drove his car in a certain manner he was negligent, and also that if he drove his car in that manner they were then to determine whether or not he was negligent. Thus the jury was permitted to decide that acts of negligence as a matter of law were not negligence. These instructions were conflicting and the giving of such instructions constitutes error. *Sorenson vs. Bell*, 51 Utah 262, 170 P. 72."

The Court cites the foregoing error and at least four other separate items as error; Page 160, "The Court erred in instructing the jury that a constant lookout would be required"; Page 164, "such examination was misconduct on the part of plaintiff's counsel and is reversible error," referring to examination of jurors; Page 166, "Such questioning of the witness by plaintiff's counsel was misconduct and constitutes reversible error" referring to prejudicial manner of examining witness; Page 167, "We conclude that an action for the recovery of damages for the destruction of personal property sur-

vives. . . . The court erred in sustaining the general demurrer"; two of these errors being noted by the court, not just as error but "reversible error"; therefore, we wonder if the erroneous instruction above noted in *Morrison vs. Perry* would have alone warranted the new trial, especially where the evidence was such that on the first hearing, *Morrison vs. Perry*, 104 Utah 130, on the evidence as revealed, the Supreme Court's impression was that, Page 143, "the trial court should have granted defendant's motion for dismissal at the close of plaintiff's testimony."

*Morrison vs. Perry*, Supra, cites with approval, Page 163, *Toone vs. J. P. O'Neill Construction Co.*, 40 Utah 265, 121 P. 10, where the court agreed defendant was entitled to have his theory of the case presented in the instructions, but held that this theory — that the party injured by blast selected the place he stood, thus assuming the risk — was adequately presented by the instruction, "If you find from the evidence that the plaintiff upon his own judgment uninfluenced by any assurance of safety on the part of defendant's foreman, as to whether or not the place he was standing at the time he fired the shot was safe, or if you find that the plaintiff selected the place but he fired the blast without directions or suggestions of defendant's foreman, then the defendant is not liable, and you should return a verdict for the defendant"; that though the court might have charged the jury differently the "appellant's theory of the evidence was sufficiently covered by what the court

told the jury, and hence it was not prejudiced by the court's modification referred to."

*Ivie vs. Richardson*, 9 Utah 2d 5, 336 P. 2d 781, is cited in Appellant's Brief in support of the same idea. Instruction No. 17 is not really a formula instruction as defined in that case because in the same instruction the language is modified by discussion of "efficient and moving cause," "continuous sequence unbroken by any new independent cause," and other language modifying the same. Even if it were as constructed, it would be no grounds for a new trial as to Betty Walters and would not be sufficient grounds for a new trial as to the driver Harry Walters; and *Ivie v. Richardson* seems to make that clear. The language in that case is that such an instruction "is not generally a good type of instruction to give," (Page 11, Paragraph 3), and although the Court notes that the same is in error to that extent, the Court only found reversible error after noting many other grievous errors, (Page 12, Paragraph 1) "of more importance is the error assigned in giving instruction No. 10 . . ."; (Page 12, Paragraph 2) "There are additional circumstances in the instant case that are indicative of the fact that a fair trial was not had by the Defendant."; and others. Then the court reiterated a note it has frequently sounded, Page 13, Paragraph 3: "The errors must be real and substantial and such as may reasonably be supposed would affect the result."

Defendant could have at trial, but did not, submit or request special interrogatories, leaving the Court to

frame general instructions, which it did, and the language in Instruction 17, "unbroken by any new independent cause," etc., was as effective in modifying Instruction 17 as would have been the insertion of such words as "unless you also find contributory negligence on the part of Plaintiffs"; and the latter language was unnecessary as to Betty Walters and her cause of action and would have certainly rendered Instruction 17 acceptable to the most critical as to Plaintiff Harry Walters and his cause of action.

It does not seem reasonable that Instruction 17 must have, in order to convey its plain English meaning to eight intelligent men, also be interpolated with language on immediate hazard where the same is almost immediately previously covered.

In *Redd vs. Airway Motor Coach Lines, Inc.*, 104 Utah 9, 137 P. 2d 374, where a bus driver drove onto a lawn to avoid a bicyclist emerging from a driveway, the court said:

"We are frank to say that some portions of the instructions are not models, but the alleged incompleteness of some instructions was covered by giving others. The charge to the jury must be considered as an integral whole. . . ."

In *Startin vs. Madsen*, 120 Utah 631, 237 P. 2d 834, the court, in ruling on an assignment of error in the instructions said:

"It seems unnecessary and inadvisable to treat in detail the assigned errors relating to the giving

and refusal to give instructions. The instructions should not be susceptible of misconstruction as either comments on the evidence or arguments for either side of the case. It was the duty of the court to cover the theories of both parties in his instructions. *Martineau vs. Hanson*, 47 Utah 549, 155 P. 432; *McDonald vs. Union Pacific R. Co.*, 109 Utah 493, 167 P. 2d 685. If the instructions are considered as a whole, as they may be, *Walkenhorst vs. Kesler*, 92 Utah 312, 67 P. 2d 654; *Redd vs. Airway Motor Coach Lines*, 104 Utah 9, 137 P. 2d 374, the court adequately discharged this duty and fairly presented the issues to the jury."

Note that Defendant-Appellant himself submitted a so-called formula instruction, Defendant's requested instruction No. 14, the same not containing all conditions necessary to invoke the conclusion therein, that is, "... then Harry Walters was negligent and if you find his negligence was the proximate cause of the collision you must return a verdict in favor of the defendant and against the plaintiffs no cause of action"; for instance, one condition necessary to make the same entirely palatable would have been to add, "however, you may still find in favor of Plaintiff Betty Walters and against Defendant unless you also find the negligence of Harry Walters to be the sole proximate cause of the accident; and the instruction could be further interpolated with language on joint venture, if joint venture was an issue (and we believe it was not). This instruction, however, when read with the instructions as a whole, like Instruction 17 as so read, could not be misleading.



## POINT II

ANSWER TO APPELLANT'S POINT NO. 11, i.e. THAT THE COURT ERRED IN REFUSING TO INSTRUCT THE JURY IN ACCORDANCE WITH DEFENDANT'S REQUESTED INSTRUCTION NO. 13, RELATING TO THE STATUTORY DUTY OF A DRIVER OPERATING A VEHICLE TO THE LEFT OF THE CENTER OF THE HIGHWAY IN OVERTAKING AND PASSING ANOTHER VEHICLE TRAVELING IN THE SAME DIRECTION.

Defendant submitted two lengthy instructions, Defendant's request No. 13 and No. 14, detailing Plaintiff's duty to stay on his own side of the road, and Plaintiffs submitted instructions as to Defendant's same duty. The Court framed instructions relating to each driver's duty in this regard, Instruction No. 10, Instruction 11 at Part (c), and Instruction 14.

Instruction No. 10: Section 57-7-121, Utah Code, 1943, which was in effect at the time of the accident involved in this case, provides as follows: "Drivers of vehicles proceeding in opposite directions shall pass each other to the right, and upon roadways having width for not more than one lane of traffic in each direction, drivers shall give to the other at least one-half of the main traveling portion of the roadway as nearly as possible."

Instruction No. 11: It was the duty of the plaintiff and the defendant each to use reasonable care under the circumstances in driving his automobile to avoid danger to himself and others and and to observe and to be aware of the conditions of the highway, the traffic thereon, and to observe due care in respect to "... (c) to drive his automobile on his own right side of the highway. ..."



Instruction No. 14: You are instructed by the statutes of Utah that no vehicle shall at any time be driven to the left side of the roadway when approaching the crest of a grade, or upon a curve in the highway where the driver's view is obstructed with such distance, as to create a hazard in the event another vehicle might approach from the opposite direction, and when the view is obstructed upon approaching within 100 feet of any bridge, if you find from the preponderance of the evidence in this case that Harry Walters drove to the left of the center of the roadway upon approaching the crest of a grade or upon a curve in the highway and where his view was obstructed within such a distance as to create a hazard, when the automobile driven by Mrs. Pelly was approaching from the opposite direction, then Harry Walters was negligent, and if you find his negligence was the proximate cause of the collision, you must return a verdict in favor of the defendant and against the plaintiffs, No Cause of Action.

With the foregoing, especially the command in Instruction 14 that "If you find from a preponderance of the evidence in this case that Harry Walters drove the left of the center of the roadway . . . as to create a hazard when the automobile driven by Mrs. Pelly was approaching from the opposite direction, then Harry Walters was negligent, and if you find his negligence was the proximate cause of the collision you must return a verdict in favor of the defendant and against the plaintiffs, No Cause of Action" it does not seem Defendant needed the request No. 13 and No. 14, nor that the jurors needed such in order to fairly and intelligently weigh the evi-

dence. Certainly as to Plaintiff Betty Walters and her cause of action Defendant was not treated unfairly by these instructions.

*Beckstrom vs. Williams*, 3 Utah 2d 210, 282 P. 2d 309, cited by Defendant in his Brief, rules error, along with other items, for failure of the court to submit Defendant's last clear chance theory. We have no quarrel with the ruling of law therein.

*Startin vs. Madsen*, 120 Utah 631, 237 P. 2d 834, also cited by Defendant, is a case where plaintiff sues the executor for services to the deceased. It rules correctly that a party is entitled to have his theory covered, but rules that general coverage only is necessary, the court saying, with regard to the general instructions given relating to defendant's theory of the case and certain cautionary instructions: "... the instructions should not be susceptible of misconstruction as either comments on the evidence or arguments for either side of the case. . . . It was the duty of the court to cover the theories of both parties in his instructions. . . . If the instructions are considered as a whole, as they must be, . . . the court adequately discharged this duty and fairly presented the issues to the jury. . . ."

The court further said in that case:

"We must keep uppermost in mind the provision of our statute, Section 104-14-7, U. C. A. 1943 'the court must . . . disregard any error . . . which does not affect the substantial rights of the parties, and no judgment shall be reversed

or affected by reason of such error or defect.' See Rule 61, U. R. C. P. to the same effect. Before the appellant is entitled to prevail, he must show both error and prejudice; that is, that his substantial rights are affected and that there is at least a fair likelihood that the result would have been different. . . ."

Section 104-14-7, U. C. A. 1943, has been replaced by Rule 61, Utah Rules of Civil Procedure which reads as follows:

No error in either the admission or the exclusion of evidence, and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties, is ground for granting a new trial or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties. (Compiler's Notes. This Rule is based on former sections 104-14-7 and 104-39-3 (Code 1943) both of which were repealed by Laws 1951, ch. 58, Art. 3. The first of the former sections related to error in any stage of the proceedings, while the latter former section related to consideration of error on appeal.)

Instruction No. 14 as given may be open to the criticism of not including all of the propositions and possibilities covered in Defendant's requests No. 13 and No. 14. In this regard, a headnote from *Morgan vs. Mammoth Mining Company*, 26 Utah 174, 72 P. 688, is pertinent and reads as follows:

Where a charge, considered as a whole, states law applicable to case fairly and correctly, fact that one paragraph of charge, abstractly considered, does not state law with absolute precision does not constitute reversible error.

A headnote from *In re Richards' Estate*, 5 Utah 2d 106, 297 P. 2d 542, annotated under Rule 61, Utah Rules of Civil Procedure, is also relevant. It reads:

Refusal to give an instruction cannot be the basis for reversal unless the jury was insufficiently advised of the issue they were to determine, or it appears that they would have been confused or misled to the prejudice of the person complaining thereof.

Certainly *Startin vs. Madsen* does not rule that the statute, there the Dead Man's Statute, need be read to the jury. While in a proper case the statute may be and should be read, the practice may as well be error as ruled in *Shields vs. Utah Light & Traction Co.*, 99 Utah 307, 105 P. 2d 347. It is more general to refer to the law or rule as encompassed by the statute such as contemplated in JIFU No. 80.16, and prefacing such statutory or ordinance rules with such language as "The Federal Safety Appliance Act required that . . . , or provides that . . . or imposes. . . ." Here numerous statutory rules were involved but covered by the general instructions, i.e. lookout, control, road conditions, Instruction No. 9; passing to the right, yielding half of road to other car, Instruction No. 10; reasonable care, control, right side of highway, speed, Instruction No. 11; left side of road where driver's view obstructed, within one hundred feet

of bridge, approaching crest of hill, "when the auto driven by Mrs. Pelly approaching from the opposite direction . . .," Instruction No. 14; each or more of which items might have been, but need not be, covered by reading a section of the Utah Code. Paragraph 1, Reid's Bransons Instructions to Juries, Article 100, Page 289, reads:

"In most cases it is not deemed improper for the court to read or quote the pertinent statute. In some cases mere quotation is insufficient. An instruction on alleged negligence in violation of a statute should tell a jury what conduct amounts to such violation and not merely quote the statute. . . ."

and at Page 291: "At least one court has already declared that the court can substitute language of its own choosing equivalent to the terms of the statute." Citing *Morris vs. Fitzwater*, 187 Oregon 191, 210 P. 2d 104 (rear-end auto collision case), which case in turn cites a sauthority *Hoag vs. Washington and Oregon Corporation*, Oregon 144 P. 574, where the court in commenting on the lengthy reading of the employer's liability act said:

"Reading the law at length to the jury was likely to involve it in a determination of questions not relating directly to the issues."

*Randall's Instructions to Juries*, Art. 409, reads as follows:

". . . Instructions which correctly set forth a rule of law embodied in a statute are not erroneous because they do not use the exact language." (Citing several cases)

## POINT III

ANSWER TO APPELLANT'S POINT III, i.e. THAT THE TRIAL COURT ERRED IN SUBMITTING TO THE JURY THE QUESTION OF DEFENDANT'S SPEED AS NEGLIGENCE.

The Court did instruct the jury, Instruction No. 11, that it was the duty of, not just the Defendant, as indicated in Appellant's Brief, Page 25, Paragraph 2, but "the duty of the Plaintiff and the Defendant . . ." to use reasonable care . . . with respect to speed, that is "to drive at such speed as was safe, reasonable, and prudent under the circumstances having due regard to the width, surface, and condition of the highway, the traffic thereon, the visibility and any actual or potential hazards then existing." We know from the record that some of these potential hazards included the rise in the highway, the curve in the road, the bridge, the growth of vegetation along the highway, and the oncoming traffic. The speed limit would not necessarily be such speed as was "safe, reasonable, and prudent under the circumstances." The evidence, however, includes evidence of excessive speed, and some of which evidence could be interpreted by the jury as evidence of speed in excess of the limit, that is, sixty miles per hour, and all of which is evidence of speed excessive for the conditions. The evidence is that the Pelly vehicle had passed an automobile, that of Averett proceeding around fifty miles per hour and departed from the same by approximately a mile at one time. Averett had told the officer he was going the maximum when passed by the Pelly automobile. (R-201, Line 126)

The evidence as a whole indicates that the Pelly vehicle, when it struck the shoulder of the road, as testified to by Averett "veered sharply off the road so the wheels got off the shoulder there and it made a sharp turn and shot across the bridge." Betty Walters testified that the Pelly car "weaved" (R-51, Line 1) and caused dust to fly (R-47, 48). The Pelly vehicle tire marks further indicated that vehicle was out of control. The jury could conclude under the circumstances that this was a result of excessive speed. The speed of the Pelly vehicle was such that the Walters vehicle, itself traveling forty-five miles per hour (R-108, Line 21), was knocked backward ten feet (R-188, Line 7). The photographs are further evidence of the amount of speed involved, and the jury could make certain legitimate inferences therefrom.

In *Hunter vs. Michaelis*, 114 Utah 242, 198 P. 2d 245, cited by Appellant, the court correctly ruled that submission of speed was erroneous, but this was because of lack of evidence and in fact where all the evidence on the question was of moderate speed the court saying:

"The appellant cites as prejudicial the giving of such instruction for the reason that there was not evidence adduced to the effect that her car was being operated at an excessive or unreasonable rate of speed, or in violation of the cited statute. She points out that plaintiff offered no competent evidence of any excessive speed, that she in fact testified that she did not know how fast defendant's car was traveling. Defendant testified that she was going less than 25 miles per hour, and the officer testified that at the point where the brakes



were applied, the speed was from 20 to 22 miles per hour.

“The evidence shows that there were relatively few cars on the street at that time of night, and there was no evidence of any pedestrian traffic crossing the street other than plaintiff. There being a posted speed limit of 25 miles per hour, no evidence was presented to show that at that time the traffic was heavy enough to require a lesser speed to be reasonable. There is lacking any evidence which would show that a speed of 20 to 25 miles per hour was excessive or unreasonable. We think the evidence not such as to justify giving an instruction on the speed of defendant's car. The evidence clearly indicates that the negligence of defendant, if any, was in failing to keep such a lookout ahead as to see plaintiff in time to have avoided striking her.”

It is difficult to see how the general language in the instructions with respect to speed could be prejudicial, even if the Court accepts Appellant's view that the same was error. In *Hunt vs. P. J. Moran, Inc.*, 46 Utah 388, 150 P. 953, the Court pointed out that an instruction, though not founded upon issues and proof, is not ground for reversal if nonprejudicial.

A viewing by the jury of the scene of the accident, and the photographs, together with hearing the evidence respecting tire marks, etc., ought to entitle the jury to draw certain conclusions with respect to the speed of the Pelly vehicle.



## POINT IV

ANSWER TO APPELLANT'S POINT IV, i.e. THAT THE COURT ERRED IN REFUSING TO SUBMIT TO THE JURY DEFENDANT'S REQUESTED INSTRUCTION NO. 7, WHICH INSTRUCTION ENCOMPASSED THE DEFENDANT'S THEORY OF THE CASE THAT THE CONDUCT OF THE PLAINTIFF CREATED AN EMERGENCY SITUATION, AND WHICH THEORY WAS SUPPORTED BY COMPETENT, SUBSTANTIAL EVIDENCE.

Defendant's requested Instruction No. 7 was:

If you find from the evidence in this case, that Harry Walters was driving on the left side of the highway as the car driven by Harry Walters and Mrs. Pelly approached each other, and if this driving on the left side of the highway by Harry Walters resulted in an emergency, which caused Mrs. Pelly to turn to the left and resulted in the collision, that said turning to the left side of the highway by Mrs. Pelly would not constitute negligence on her part, and she would not be negligent for turning to the left, if the turning was a result of the hazard created by Harry Walters.

We submit this instruction as requested was incomplete and if given should be interpolated with language concerning the reasonable man test as modified by the alleged sudden peril and reduced accountability allowed because thereof.

Three cases cited by Defendant in his Brief, *Morrison vs. Perry*, 104 Utah 151, 140 Pac. 2d 772; *Beckstrom vs. Williams*, 282 P. 2d 309, 3 Utah 2d 210; and *Startin vs. Madsen*, 120 Utah 631, 237 P. 2d 834, as they relate to Defendant's contention regarding the theory of his

case, we have commented on in this Brief heretofore under Point No. I and Point No. II.

After the Court instructed the jury as to the duty of both drivers with respect to vigilance, road conditions, control, ability to stop, the prudent driver test (Instruction No. 9); duty to drive to the right, leaving the other half of the road open (Instruction No. 10); reasonable care, duty to observe, lookout, speed (Instruction No. 11); the Court, Instruction No. 14, detailed that if "Harry Walters drove to the left of the center of the roadway . . . within such a distance as to create a hazard, when the auto driven by Mrs. Pelly was approaching from the opposite direction, then Harry Walters was negligent, and if you find his negligence was the proximate cause of the collision you must return a verdict in favor of the defendant and against the plaintiffs, No Cause of Action."

This was followed with a sentence, Instruction No. 15, Defendant's request No. 5, diluting the impact as against Defendant of the fact of an accident, and then followed with Instruction 15 (a) on "unexpectedly confronted with peril arising from either the actual presence or the appearance of imminent danger. . . ."

Can anyone really doubt that the jury knew Defendant contended Plaintiff Harry Walters "drove to the left of the center . . .," "as to create a hazard . . ." and that Defendant was ". . . unexpectedly confronted with peril. . . ." (quoted verbatim from Instructions 14 and 15 (a))?

As to Plaintiff Betty Walters; Instruction No 14 was, in fact, heavily weighted in favor of Defendant, if we are correct that she was not capable of contributory negligence.

#### POINT V

ANSWER TO APPELLANT'S POINT V i.e. THAT THE TRIAL COURT ERRED IN REFUSING TO GIVE DEFENDANT'S REQUESTED INSTRUCTION NO. 3, WHICH INSTRUCTION SET FORTH THE STATUTORY RULE AS TO THE NATURE OF EVIDENCE REQUIRED WHEN THE TORT FEASOR IS DEAD.

Defendant's requested Instruction No. 3 as submitted reads as follows:

The plaintiffs, Harry Walters and Betty Walters, cannot recover judgment against the estate of Barbara Best Pelly except upon some competent satisfactory evidence other than their own testimony. The plaintiffs, Harry Walters and Betty Walters, have the burden of proving, by some other competent satisfactory evidence, other than their own testimony, that Barbara Best Pelly was negligent in one or more of the particulars set forth in these instructions and that such negligence was the proximate cause of their injury and damage, if any. If plaintiffs have not proved by some other competent evidence, other than their own testimony, that Barbara Best Pelly was negligent, as set forth in the instructions, and that such negligence, if any, was a proximate cause of the collision, then plaintiffs cannot recover and your verdict must be in favor of the defendant and against the plaintiffs, No Cause of Action.

The refusal to give this instruction was simply and correctly a ruling as a matter of law by the Court that there was other competent evidence other than the Plaintiff's own testimony. The physical evidence placed the Pelly vehicle on its wrong side of the road — could reasonable minds differ as to the existence of "competent satisfactory evidence."

The case, *Fretz vs. Anderson*, 5 Utah 2d 290, 300 P. 2d 642, cited by Defendant in his Brief as authority for alleged error in not submitting the instruction in question does not say nor indicate that such an instruction should be given. This case apparently concedes, as we contend, that the statute in question, 78-11-12, Utah Code Annotated, 1953, forces Plaintiff to prove his case by evidence other than his own testimony, and on failure to so do suffer a ruling as a matter of law by the Court of nonsuit. Plaintiffs Harry Walters and Betty Walters apparently proved their case adequately and almost wholly by "evidence other than the testimony of said injured persons," since they were precluded by application of the Dead Man Statute to this accident from testifying at all as to the actual accident, the same deemed by the Court a "transaction equally within the knowledge of the witness and the deceased" under the Dead Man Statute.

Traditionally, would not the question of whether there was "some competent satisfactory evidence other than the testimony of said injured person," be one for the Court and not the jury?

Other cases touching on the said statute, 78-11-12, Utah Code Annotated, 1953, are also not authority for the alleged error. *Meads vs. Dibblee*, 10 Utah 2d 229, 350 P. 2d 853; ULR, Volume 7, Page 362; *Meacham vs. Allen*, v Utah 2d 79, 262 P. 2d 285. In that case, the Court in dealing with a presumption said: "The question of whether a prima facie case has been made is the same here as in all other cases a question for the court and not for the jury to determine." In the instant case, if Plaintiffs had not survived the evidentiary obstacle in 78-11-12, they would have failed to make a prima facie case and the issues thus earlier resolved.

Furthermore, once the Court by invoking the Dead Man Statute limited the evidence by Plaintiffs of the accident to evidence other than their own testimony, would it not have been error to let the jury speculate on whether such evidence was either "competent" or "satisfactory" or "other than the testimony of said injured person." At least such ruling on the applicability of the Dead Man Statute made such instruction, Defendant's request No. 3, unnecessary and superfluous if not error.

#### POINT VI

ANSWER TO APPELLANT'S POINT VI, i.e. THAT THE TRIAL COURT ERRED IN GIVING REPETITIOUS INSTRUCTIONS WHICH PREJUDICIALLY EMPHASIZED PLAINTIFF'S THEORY OF RECOVERY IN THE CASE.

Defendant contends Instruction 1, explaining Plaintiff's claim, Instruction No. 11 concerning the duties of both Plaintiffs and Defendant, and Instruction No. 17

which was a combination damage and "if you find" instruction overemphasized Plaintiffs' claim.

If we concede that the rules of the road are approximately the same as they relate to each of the two autos approaching head-on, how can it be said that Instruction No. 11, commencing "It was the duty of the Plaintiff and Defendant each to . . ." and ending "Failure of the Plaintiff or the Defendant . . ." as in Plaintiff's favor?

Regarding Instruction No 1, the Court could do little else but instruct on Plaintiffs' claim in order to detail what issues had been raised by the pleadings, and the instruction covers the issues raised in the pleadings by *both* parties although Defendant in his Brief, Page 31, sets out only part of this instruction. *Reid's Bransons Instructions to Juries*, Volume 1, Page 285, reads: ". . . it is not error to incorporate a short concise statement of a party's position as found in the pleadings," citing among other cases *Taylor vs. Weber County*, 4 Utah 2d 328, 293 P. 2d 925, which case in turn cites *Bruner vs. McCarthy*, 105 Utah 399, 142 P. 2d 649, and the statement therein, "There is nothing inherently erroneous in reading the pleadings in order to present the issue. . . ." *Davis vs. Heimer*, 54 Utah 428, 181 P. 587, holds in general that the stating of issues by the trial court to the jury in language of the pleadings instead of giving a concise statement in its own language is not prejudicial error where the issues were simple and not involved. Regarding Instruction No. 17, the same seems necessary in order to let the jury know when and how

Plaintiffs should make out such issues, if at all. The necessity of such an instruction is apparent. The propriety of this particular one is discussed under Point No. I.

*Shields vs. Utah Light & Traction Company*, 99 Utah 307, 105 P. 2d 347, cited by Defendant, is hardly helpful. There the trial court read in its instructions pleadings comprising “. . . ten printed pages of the abstract,” Page 309, “. . . portions of the city ordinance to be read to the jury as well as certain identical sections of the statute in addition to having the court (further on in the instruction) repeat these laws in substance together with an explanation of just how these propositions were to be applied to the facts,” Page 313. The repetition was held to be unnecessary and was gross, and even then only deemed prejudicial error when weighed with several other apparently substantial errors. In *DeVine vs. Cook*, 3 Utah 2d 134, 279 P. 2d 1073 (1955) cited by Defendant, the court found “It was error to instruct the jury on an issue of contributory negligence of certain plaintiffs (Mrs. Gusinda and Mrs. DeVine),” that “the court’s instructions regarding contributory negligence were erroneous and prejudicial,” that “the trial court committed error in refusing to grant the motion of the defendant, W. S. Hatch Company, for a directed verdict.” The Supreme Court detailed the innocuous nature of instructions 5, 7, 8, and 9, in conjunction with instructions 1 to 4, saying “It can readily be seen that the instructions accentuated the duty of the plaintiffs and minimized the

duty of the defendants." In reading said instructions, we have no quarrel with the decision and agree with the criticisms and the principles laid down therein, but fail to find an analogy to the instructions being considered here.

Considering the dual nature of Instruction No. 1 (part only set out in Defendant's Brief), and the dual nature of Instruction No. 11 defining the duties of head-on drivers having similar duties, we are really only confronted with the propriety of Instruction No. 17 earlier discussed. As noted earlier, that instruction, Instruction No. 17, may be open to criticism, though we believe not of a prejudicial nature, as to Plaintiff Harry Walters, but certainly not as to Plaintiff Betty Walters.

## CONCLUSION

Instructions in any case in the clear vision of hindsight can be improved. Trial exigencies usually leave inadequate time for perfection in composition. Lengthy, unnecessary, and duplicitous requests further encroach on the Court's time. Failure of counsel to insist, even where objections are reserved until after the jury retires, on instructions deemed important, may amount to permissive error. All things considered, however, the one most qualified to instruct the jury, and to determine later if a new trial should be had, in light of the problems there at hand and having heard and seen as well as read the testimony of the witnesses, is, and is presumed to be, the trial judge.



The contentions of both sides were in plain English made clear; the claim of Defendant of emergency was forcefully put and could not have been misunderstood. Instruction No. 17 is correct as to the passenger, Plaintiff Betty Walters, and not prejudicial as to the driver, Harry Walters. Speed was a legitimate area of instruction. Competent evidence other than from Plaintiffs' testimony did as a matter of law not only exist but is conceded. (Appellant's Brief, Page 10, Paragraph 1). Matters were fully aired, the jury fully and fairly apprised, and Defendant had a fair trial.

Respectfully submitted,

GAYLE DEAN HUNT

Continental Bank Building  
Salt Lake City, Utah

*Attorney for Plaintiffs  
and Respondents*