

1963

Jesse P. Hanson v. General Builders Supply Co. : Brief of Plaintiff and 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.

Woodrow D. White; Attorneys for Plaintiff and Respondent;

Hanson & Baldwin; Robert K. Brandt; Attorneys for Defendant and Appellants;

Recommended Citation

Brief of Respondent, *Hanson v. General Builders Supply Co.*, No. 9884 (Utah Supreme Court, 1963).
https://digitalcommons.law.byu.edu/uofu_sc1/4236

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.

IN THE SUPREME COURT
OF THE STATE OF UTAH

JESSE P. HANSON,
Plaintiff and Respondent,

—VS.—

GENERAL BUILDERS SUPPLY
COMPANY, a Utah corporation,
and STEPHEN G. KNIGHT,
Defendants and Appellants.

FILED

CT 1 - 1963

Supreme Court, Utah
Case
No. 9884

Brief of Plaintiff and Respondent

Appeal From Third District Court, for Salt Lake County,
HON. JOSEPH G. JEPSON, *Judge*

WOODROW D. WHITE

351 So. State Street
Salt Lake City, Utah

*Attorney for Plaintiff
and Respondent*

HANSON & BALDWIN and
ROBERT K. BRANDT

909 Kearns Building
Salt Lake City, Utah

Attorneys for Defendants and Appellants

INDEX

	Page
STATEMENT OF FACTS.....	1
ARGUMENT	
POINT I. THE APPELLANT, HAVING MADE NO OBJECTION TO THE INSTRUCTIONS GIVEN BY THE TRIAL COURT OR TO THE WITHDRAWAL OF THE ISSUE OF NEGLIGENCE FROM THE CONSIDERATION OF THE JURY, CANNOT NOW COMPLAIN OF ERROR IN THIS RESPECT ON APPEAL.....	13
POINT II. THE COURT DID NOT ERR IN FINDING THE DEFENDANTS NEGLIGENT AS A MATTER OF LAW	13
POINT III. THE DAMAGES ESTABLISHED BY THE JURY WERE NOT EXCESSIVE, WERE FULLY SUPPORTED BY THE EVIDENCE, AND SHOULD BE SUSTAINED	34
CONCLUSION	41

Cases Cited

Alarid v. Vanier (Cal.), 317 P. 2d 110.....	19, 20, 21
Albers v. Ottenbacher (S. D. 1962), 116 N.W. 2d 529.....	32
Best v. Huber, 3 U. 2d 177, 281 P. 208, (Utah).....	27
Eddy v. McAninch, 347 P. 2d 499 (Colo.).....	27
Eleganti v. Standard Coal Company, 50 Utah 585, 168 Pac. 266.....	35
Lockmoeller v. Keil, 137 S.W. 2d 625 (Mo.).....	26
McCall v. Kendrick, 2 Utah 2d 364, 274, P. 2d 962.....	16
McCoy v. Courtney (Wash.), 172 P. 2d 596 at P. 601.....	23
Meadows v. U. S., C. C. A. 4th Circuit, 144 F. 2d 751.....	17
Morgan v. Ogden Union Depot, 77 Utah 325, 294 Pac. 541.....	35
Nettleton v. James (Ore.), 319 P. 2d 879.....	31
Patton v. Evans, 92 Utah 524, 69 P. 2d 969.....	15
Paul v. Kirkendall, 123 Utah 627, 261 P. 2d 670 (1953).....	36
Pauly v. McCarthy, 109 Utah 431, 184 P. 2d 123 (1947).....	34
Pettingill v. Perkins, 2 Utah, 2d 266 272, P. 2d 185.....	15
Phillips v. Delta Motor Lines, 108 So. 409 (Miss.).....	28
Siegel v. Motor Vehicle Casualty Co., 4 N.E. 2d 805 (Ill.).....	17
Smith v. Kroger Grocery and Baking Company (Illinois, 1950), Ill. App. 501, 90 N.E. 2d 500.....	41

INDEX — (Continued)

	Page
Sothoron v. West, (Md.) 26 A. 2d 16.....	28
Stamp v. Union Pacific Railroad Co., 5 U. 2d 387, 303 P. 2d 279....	37
Steele v. Wilinon, 10 Utah 2d 159, 349, P. 2d 1117.....	16
Trudeau v. Sina Construction Company, 62 N.W. 2d 492 (Minn.)....	26

Texts Cited

8 Am. Jur. 2d Sec. 702.....	22
-----------------------------	----

Statutes Cited

Utah Code Annotated (1953), Section 41-6-144.....	21
Utah Rules of Civil Procedure, Rule 51.....	15

IN THE SUPREME COURT OF THE STATE OF UTAH

JESSE P. HANSON,
Plaintiff and Respondent,

—vs. —

GENERAL BUILDERS SUPPLY
COMPANY, a Utah corporation,
and STEPHEN G. KNIGHT,
Defendants and Appellants.

Case
No. 9884

Brief of Plaintiff and Respondent

STATEMENT OF FACTS

The respondent considers the Statement of Facts in appellant's brief to be incomplete, and to assist the Court in considering the points raised in appellant's brief and hereinafter discussed we are summarizing the facts as follows:

On August 31, 1960, at about 11:30 a.m., the plaintiff was stopped in the left-turn lane facing east at the intersection of 21st South and State Street. He was driving a one-half ton Dodge pickup truck. (R. 42, 43) The light

was red, and he was stopped jut before the crosswalk in the lane reserved for left turn only. After the collision he was knocked forward about 15 or 20 feet beyond the crosswalk so that his vehicle was knocked forward about 25 or 30 feet by the impact of defendant's truck. (R. 45, 46) Plaintiff's truck was completely stopped at the time collision occurred and had been *stopped for at least 30 seconds, . . . or maybe a little longer.*' His turn signals were on, and his brake lights were in operating condition at the time he stopped. (R. 47)

At the scene of the collision, the truck driver stated that his brakes failed and he couldn't stop. (R. 48)

The hinges were broken off of the end-gate of the plaintiff's truck, and there was damage to the tail-light and fender. (R. 50) Plaintiff's truck had a heavy angle bar welded across the back and under the frame and at the end of the frame to support the towbar attachment, and this heavy bar extended all the way out even with the end gate of the truck, and this angle iron was so situated on plaintiff's truck as to prevent a forcible impact from doing further damage to his truck. (R. 116, 117)

Plaintiff was probably 20 feet or so from the intersection when the light changed to red. Plaintiff was the first car there and was right at the crosswalk. (R. 159)

The defendant, Stephen G. Knight, testified that he had a Class A chauffeur's license which permitted him to drive big trucks and that the truck he was driving, at

the time of the collision, was a 1950 ton-and-a-half flat-bed Ford. (R. 171)

He was making a delivery on behalf of the defendant corporation but did not remember where he was going, but he was driving easterly on 21st South at about 11:30 in the morning when the accident occurred. (R. 172) He did not remember the route he took except that he had come from 255 West 27th South. He testified as follows:

“I was going east, as you say, up 21st South. Upon coming up to the intersection, I was going to stop; I knew this. I applied my foot-brake. There was no response, so I pumped it; still nothing; and I applied the hand-brake, which did slow me down; and that was when I ran into Mr. Hanson.” (R. 173)

The defendant claimed he was traveling approximately 5 miles an hour when he struck Mr. Hanson’s truck, and prior to that he was traveling approximately 30 miles an hour. (R. 173)

He did not recall seeing any other cars ahead of Mr. Hanson. The front end of defendant’s truck was still in the crosswalk after the impact. (R. 174)

He had previously driven this 1950 Ford on occasion. It was used for incidental deliveries. He had not noticed anything unusual about the brakes prior to the time he applied the brakes before contact with the plaintiff’s truck. (R. 176) He had no recollection of a brake application after leaving the yard up to the time of the accident. (R. 177) The General Builder’s Supply had about

eight newer trucks than the old model 1950 which was involved in the collision, and the defendant Knight had driven this 1950 truck a few times before the accident occurred. The truck generally was used for the delivery of merchandise to various areas in the ecity. Newer trucks in the yard were preferred to the use of the old one. (R. 180) He did not think the 1950 truck was as easy to operate as the newer ones. *He did not remember testing the brakes of the truck as he was driving it in the yard on the morning of the accident, and for all he knew at the trial or knew at the time of the collision, the brakes on the truck could have been defective before he ever took it out of the yard.* (R. 181)

The witness had been driving since 1956. He had had two years of driving experience with the defendant corporation. He had had frequent occasion, because of the proximity of General Builders Supply to the intersection of 21st South and State Street, to drive through that intersection prior to the accident and was thoroughly familiar with it. He knew of the semaphore controls, the area of the left-turn lane, and the usual condition of traffic at 11:30 in the morning. (R. 181, 182)

He had no recollection whether he saw the plaintiff's truck moving before he struck it, and as far as he knew, the plaintiff's truck could have been completely stopped when the defendant Knight first saw it. He did not recall which lane was occupied by the plaintiff's truck. He did not recall whether he was intending to make a delivery northerly up State Street on that morning. The left-turn lane on the west side of the intersection of 21st South is

for vehicles that intend to make a left-turn only. (R. 183) He had no explanation for the presence of his truck in the left-turn lane. (R. 184)

The red dotted line on Exhibit 1 represents the approximate location of the defendant's truck in the cross-walk after the impact, according to the defendant Knight, except that he can't remember which lane he was in. He could not be sure what caused him to apply the foot brake on his truck, whether it was the plaintiff's truck or the light. (R. 186) At the time he was applying his brakes he didn't know whether the light was green or whether it was red, and he doesn't remember whether he saw the plaintiff's truck before he applied the brakes or not. He did not believe there were any other vehicles ahead of him stopped at the intersection to the right of plaintiff's truck that would have prevented him from proceeding straight ahead if he had been in the southernmost lane. He did not believe there were any vehicles ahead of them. (R. 187)

In his deposition which was taken sometime prior to the trial, the defendant Knight testified as follows.

“Q. Now, what was the occasion for trying to stop; was it the presence of Mr. Hanson in front of you or the change in the traffic light that prompted you to start trying to stop?”

“A. It would have been the light.”

Then, on the next page:

“Q. In other words, you observed the light had turned red and you started to try and stop the forward movement of your truck?”

“A. Yes.

“Q. In doing so, your brakes had failed?

“A. Yes.

“Do you recall so testifying on that occasion?

“A. Yes, on that occasion.

“Q. So, at that time, you testified that it was the red light which prompted you to attempt to apply your brakes; and, today, you have testified that you didn't know whether it was the light or the truck in head of you; is that correct?

“A. Yes.

“Q. Are you in a position to tell us, after being refreshed by your deposition, which was the more likely reason for your first application of brakes?

“A. Been the light.

“Q. And, I take it, that you have no recollection of ever seeing Mr. Hanson's truck until the actual impact occurred?

“A. Yes.” (R. 188-189).

The witness Staley testified that he operated the Second West Garage R. 190), and he worked on maintenance of trucks as his specialty, and in that connection took care of the repair and service work for General Builders Supply trucks. (R. 191)

The witness identified Exhibit 16 as representing a work record on the defendant's 1950 model Ford truck. The exhibit is undated, but job sheets bearing a number before and after, with numbers of 1155 and 1192, indicate that the work may have been done between July 7,

1960, and July 12, 1960, inasmuch as the witness kept a numerical sequence on his work sheets. (R. 194, 195, 196)

The witness could not explain why the date appearing on Exhibit 16 was written in ink while the rest was written in carbon, and the witness does not know who put that date on. It was usual for the date to be written in at the time the work order was prepared. (R. 197)

Exhibit 16 contains the notation: "Change oil; the oil cartridge. Tighten bed, repair lights, tighten front spring, and repair signal lights; install front rear spring pin. Adjust brakes." (R. 199)

This work was done by the witness Staley. On cross-examination he stated that the \$12.50 on the Exhibit covered everything, and when asked what portion of the labor charge was for the adjustment of the brakes: "Oh, I'd say a good dollar and a half; dollar, seventy-five." (R. 200) He did not take the brake down to inspect the lining. He did not know what condition the lining of the brake was in at the time of this brake adjustment. He thought the lining was good in May of 1960, although he could not recall to what extent the lining was worn in May. The repair that he took only 20 minutes on was just a superficial adjustment of what brake was there, and the witness had no way of telling the extent the truck had been used between May and the time of his adjustment. (R. 200, 201)

The witness does all the service work for General Builders Supply trucks and has done for five years. He desired to continue repairing their trucks. (R. 201)

PLAINTIFF'S INJURIES

The force of the impact injured plaintiff's neck seriously and painfully. He supported his head and neck when he got out of the truck with his hand. He was dazed by the impact, but received no injury other than the injury to his neck. (R. 49)

After delivering the transmission which was in his truck, the plaintiff went home and lay down all that day and was still experiencing pain and discomfort in his neck. (R. 51) Plaintiff could not move his head and had terrific headaches. The pain in his neck was a sharp, cutting pain. Plaintiff's wife applied heat to his neck, which seemed to help some, but the pain was worse the next day. (R. 52) The following day, plaintiff remained in bed the biggest part of the day. (R. 53)

The pain and stiffness in his neck and pain on attempts to move it continued. For three months he could hardly move his head at all, and he went to a chiropractor for treatment. (R. 53). The visit to the chiropractor was about 10 days after the collision, and the chiropractor advised him to see a bone specialist or a doctor. On about September 15th, plaintiff went to Dr. Owen Reese, who examined him and gave him a drug prescription to relieve the pain. At that time, plaintiff could not move his head. (R. 54, 55)

About two weeks later he made another visit to Dr. Reese and X-rays were taken. Dr. Reese gave him some sort of electrical treatment which did not give him much

relief. Plaintiff was then referred to Dr. Boyd Holbrook, an orthopedic specialist. (R. 56) His condition at the time he went to see Dr. Holbrook was about the same, and it remained about the same for over a year without much change, impairing plaintiff's ability and giving him pain whenever he tried to turn. This pain and disability continues up to the present time. (R. 57)

About three months after the collision, plaintiff went to his garage to check the books and bills as he does his own bookkeeping and keeps his own records. (R. 58) Prior to the collision, plaintiff spent at least two-thirds of his working in overalls in his shop along with the other men working on cars in the shop, and one-third of the time taking care of the business. (R. 59) He received a certificate as "Doctor of Motors" from the Perfect Circle Manufacturing Company, which was one of the outstanding awards of the nation as an auto mechanic. Plaintiff is trained to do all kinds of auto repair. It was about a year after the accident before plaintiff could do any car repair at all, and then his work had been restricted to minor jobs — tune-ups and work which would not require him to get down under a car. It is now impossible for him to get under the dash of a car to fix any of the wires or change the gauges because he can't hold his head underneath. Plaintiff can't get under the car and take down a transmission. Plaintiff is unable to do any work "... where I have to be laying down or looking up under, where I have to hold my head in a horizontal position, or something of that type." He can tune up a motor or overhaul a carburetor, and can put in a new set

of points and set the timing, and put in blocks. It was at least a year after the accident before he started even to do that. (R. 60, 61) If there is a tune-up job in his garage, or if they have a job he can do, he does it; if they don't, then he doesn't. He usually works four or five hours a day if there is that kind of work to be done. He has had to employ another mechanic for two or three hours a day, four days a week, since about one year before the trial. (R. 62) He also hired another mechanic part-time during the year 1961 for about four hours a day, four days a week. (R. 63)

Plaintiff's wife gives him heat treatments and has made him a big flannel scarf which he always puts around his neck, and he wore a collar prescribed by Dr. Holbrook, which he wore constantly for two or three months. (R. 64)

There has been little or no improvement in the condition of plaintiff's neck for a considerable period of time, and prior to the collision on August 31, 1960, he had no problems in connection with his neck. He had never been unable to perform his work because of pain in his neck prior to the collision, and he had never seen a doctor in connection with injuries, nor had he been involved in an accident in which his neck was injured at all; he was not aware that he had any arthritic problem in his neck at all. Prior to August 31, 1960, he had not suffered any restriction of movement in his neck and was able to perform all of the work of a mechanic in and about an automobile or a truck without pain or discomfort to his neck. (R. 65, 66)

Plaintiff is 63 years old and has been an automobile mechanic for 45 years. (R. 131)

Plaintiff's son helped him an average of 15 or 20 hours a week up until Christmas of 1960 for a period of approximately 4 months (R. 166), and since 1960 and up to the time of the trial the son has worked for his father from 8 to 10 hours a week without making any charge. (R. 168)

Dr. Owen G. Reese testified that he first saw the plaintiff on September 19, 1960. (R. 69) At that time, the plaintiff had a stiff and painful neck with limitation of motion side to side and in a rotated manner of about 50 per cent, and he had about 80 per cent restriction of flexion and extension. (R. 70). There was also extreme tenderness of the musculature of the back of the neck, which was definitely in spasm. (R. 70-A).

The X-ray showed the patient to have a pre-existing osteoarthritis, not related to the accident. (R. 74) Dr. Reese testified, in answer to the hypothetical question based upon the evidence (R. 76, 77), that, in his opinion, the accident was wholly and solely responsible for the plaintiff's condition when the witness saw him. (R. 78). Dr. Reese, noting that soft tissue whiplash injuries usually heal within a year, expressed the opinion that his disability was permanent. (R. 79)

Dr. Reese described his findings, with respect to limitation of motion, as being objective and not based upon the subjective complaints of the plaintiff. (R. 84)

Dr. Reese testified that the osteoarthritis was not responsible for plaintiff's limitation of motion and was not consistent with it, in his opinion. (R. 85) Dr. Reese testified that the 20 per cent permanent disability was due to the arthritis that had been triggered from plaintiff's injury.

Dr. Boyd Holbrook, an orthopedic surgeon for 13 years in Salt Lake City, testified that he first saw the plaintiff on April 28, 1961, at which time his examination of the plaintiff disclosed marked restriction of the motion of the neck, moderate tenderness in the lower part of the neck and at the base of the skull. (R. 93, 94)

Dr. Holbrook saw the plaintiff on November 27, 1962 (about a week before the trial). (R. 96) *At that time, his examination disclosed about 50 per cent loss of motion to the neck, and there was some tenderness in the neck. This loss of motion involved all movements of the neck. He did not have to rely upon the complaint of the patient. It was an objective finding.* (R. 97)

In answer to the hypothetical question based upon the evidence, Dr. Holbrook testified that the symptoms exhibited by the witness were the result of the injury. (R. 99) He further testified that the *plaintiff suffered a permanent injury, and that his permanent disability was approximately 20 per cent bodily impairment — impairment of the body as a whole*, as it would be difficult to think of the neck as functioning separately from the body. He further testified that this permanent injury would impair plaintiff's ability to work as a mechanic. He recommended that the plaintiff have an operation on his

neck, which would require hospitalization. (R. 100-101). This operation would involve removal of the degenerated disc and installation of a bone plug from the hip bone and fusion of the vertebrae involved. Dr. Holbrook pointed out the various hazards of such an operation. (R. 102-103)

Dr. Holbrook was of the opinion that the operation would accomplish a 50 per cent improvement, but it was possible that the plaintiff would not obtain any, because all operations are not successful. Assuming that the operation would be successful, he would still have 10 per cent permanent body disability after the operation. He testified that the reasonable cost of such an operation would be approximately \$1,000.00. (R. 105)

When asked if he had an opinion as to whether there was a relationship between the necessity for the operation and the collision which occurred August 31, 1960, Dr. Holbrook testified that in his opinion the precipitating factor creating the plaintiff's present condition for which an operation is recommended was the result of the injury the plaintiff sustained. (R. 106)

ARGUMENT

POINT I

THE APPELLANT, HAVING MADE NO OBJECTION TO THE INSTRUCTIONS GIVEN BY THE TRIAL COURT OR TO THE WITHDRAWAL OF THE ISSUE OF NEGLIGENCE FROM THE CONSIDERATION OF THE JURY, CANNOT NOW COMPLAIN OF ERROR IN THIS RESPECT ON APPEAL.

The court charged the jury as follows in Instruction No. 9 D (R. 13) :

“For the purpose of this proceeding, it has been determined that the defendants are liable for any injury the plaintiff suffered proximately resulting from the automobile collision in question. Therefore, you are only required to determine what injury to the plaintiff, if any, has been so caused, and the amount of damages, if any, that plaintiff is entitled to recover as compensation therefor.

“Such a determination of legal liability should in no way influence or prejudice you either for or against the defendants. You should neither punish nor reward the defendant on account of such determination. The award you make to the plaintiff should be such sum as you find from a preponderance of the evidence will fairly and adequately compensate him for injury and damage proximately resulting from the negligence of the defendant.”

At the conclusion of the instructions to the jury, counsel for the defendant made the following statement in the presence of the Trial Court and counsel for the plaintiff:

“Defendants take no exceptions to the instructions as given by the Court.” (R. 206)

This was tantamount to an approval of the Court's charge removing the issue of negligence from the jury. At the time that the instructions were given before the jury returned with their verdict, it was the duty of the defendants to call to the attention of the trial judge any

error in the instructions given to which the defendants objected in order that the Trial Court may have had an opportunity to consider and weigh the objection and make appropriate correction if such correction was indicated. Indeed, this principle is recognized in Rule 51, *Utah Rules of Civil Procedure*, which, among other things provides:

“No party may assign as error the giving or failure to give instructions unless he objects thereto. In objecting to the giving of instructions, a party must state distinctly the matter to which he objects and the grounds for his objection.”

On several occasions this Court has ruled that it cannot consider on appeal any error in the instructions of the trial court to which no exception was taken.

In *Patton v. Evans*, 92 Utah 524, 69 P.2d 969, the Court held that where no exceptions were taken the error in the instructions was not subject to review.

More recently, in *Pettingill v. Perkins*, 2 Utah, 2d 266 272, P. 2d 185, the Court said:

“No exceptions were taken to these instructions, nor were they assigned as error in the motion for a new trial. The law as therein declared at the request of the plaintiff became the law of the case, especially as far as the plaintiff is concerned. . . .

“In order that a party may take advantage of an error in instructions committed by the trial court, he must make a proper objection. 53 Am. Jur. 606. Generally, appellate courts will not review a ground of objection not raised in the trial court. 3 Am. Jur. 116 Appeal and Error 381. The

duty is incumbent upon counsel to give the trial court the opportunity to correct the error before asking the appellate court to review a verdict and judgment thereon.”

Again, in *Steele v. Wilkinson*, 10 Utah 2d 159, 349, P.2d 1117, the Court said:

“Error is assigned to the giving of certain instructions to the jury. Many of the objections now urged on appeal were not urged in the trial court and thus need not be considered by this court, there being no showing of special circumstances why these objections were not made below.”

In *McCall v. Kendrick*, 2 Utah 2d 364, 274, P.2d 962, the Court said:

“It must be kept in mind that the language just quoted is not the rule but the exception. Normally the rules themselves must govern procedure and are to be followed unless some persuasive reason to the contrary invokes the discretion of the Court to extricate a person from a situation where some gross injustice or inequity would otherwise result.”

Counsel for the appellant may claim that he argued error in the Court’s ruling the defendants negligent as a matter of law at the hearing on the motion for a new trial, but we are unable to perceive how the appellants could inform the court before verdict that they took no exception to its instructions and then after verdict on a motion for a new trial, claim error in the instructions which should induce the trial court to grant a new trial on that ground.

For this court to hold otherwise in this case would require the negation of Rule 51 and the reversal of the firmly established principles incorporated in the rule.

See also *Siegel v. Motor Vehicle Casualty Co.*, 4 N.E. 2d 805 (Ill.).

In *Meadows v. U.S.*, C.C.A. 4th Circuit, 144 F. 2d 751, the Court said:

“On the second point, as to the charge of the judge to the jury, the record shows that there was no objection to the charge at the time it was made. Objections to the charge of the trial judge should be called to his attention at the time, and if this is not done, the objections cannot be raised for the first time on appeal. This rule was laid down by Taft, C. J., in the case of *Brevard Tannin Co. v. J. F. Moser Co., et al.*, 4 Cir., 288 F. 725, 731. In that case, Judge Taft said: ‘In the face of this formidable array of authority from the 2nd, 5th, 6th and 9th Circuit Court of Appeals, we should be inclined to hold that the exceptions in this record were not duly reserved and are not properly before us.’ That is, without exception, the rule in federal courts.”

Nowhere in the record on appeal does it appear that the appellant has, by appropriate objection or exception, preserved his right to complain of the trial court's ruling that the defendants were negligent as a matter of law. Indeed, counsel for appellants flatly told the Court that he did not have any exceptions to the instructions given;

and as we review the evidence summarized in the statement of facts pertaining to negligence, it would be remarkable if counsel for the appellants was not himself fully persuaded at the conclusion of the trial that the defendants were negligent as a matter of law. At any rate, it is difficult to perceive how any reasonable person could have absolved the defendants from the charge of negligence in view of the record, as it more fully and clearly will be established in a discussion of the point which follows:

POINT II

THE COURT DID NOT ERR IN FINDING THE DEFENDANTS NEGLIGENT AS A MATTER OF LAW.

The appellants assert in their brief that the collision resulted from a sudden brake failure without prior warning, and the question of negligence in this respect should have been submitted to the jury. The appellants cite several cases, all of which are distinguishable from the case at bar, and in their statement of facts, appellants are not altogether accurate in saying that the truck driver "applied the brakes on several occasions and noted nothing unusual about the brakes". (R. 176, 177). As a matter of fact, the defendant Knight stated on cross examination that he could not say definitely whether he recalled applying the brakes after leaving the yard up until the time of the accident. Previously he had testified that he had not noticed anything unusual about the brakes, but on

this 10-year-old Ford truck, it may have been usual for the brakes to have been in bad condition. On cross examination, the defendant Knight testified that he did not remember testing the brakes of the truck as he was driving it in the yard on the morning of the accident, and for all he knew at the trial or knew at the time of the collision, the brakes on the truck could have been defective before he took it out of the yard. (R. 181). In view of this, appellants' claim that the defendant applied his brakes on several occasions and noted nothing unusual about the brakes was both inaccurate and misleading.

In the case of *Alarid v. Vanier* (Cal.), 317 P.2d 110, quoted by appellants in their brief, the following facts appear:

“The brakes had worked perfectly on numerous occasions during the 10 miles traversed up to the point of the accident. The traffic was heavy and the driver could not turn out of his lane, either to the right or to the left.”

In that case, the driver saw the plaintiff's car before he applied the brakes. Much differently in the case at bar, the defendant Knight did not remember testing the brakes of the truck as he was driving it in the yard on the morning of the accident, nor did he recall using the brake at any time on the road prior to the accident; and for all he knew, the brakes on the truck could have been defective before he ever took the truck out of the yard. Furthermore, he did not see the plaintiff's truck (it had been stopped for approximately 30 seconds in the left-turn

lane) until the actual impact occurred. In the case at bar, there was nothing to prevent the defendant Knight from turning to the right to avoid hitting plaintiff's truck when his brakes failed, and if he started to apply the brakes when the light changed red, as his testimony seems to indicate, he had 30 seconds within which time to avoid running into the back of plaintiff's truck. The defendant Knight could not even explain his presence in the lane reserved for left turn only, and for all that appears in the record, he could have intended to continue easterly on 21st South, except for the collision which resulted from a combination of his defective brakes and extraordinary lack of attention to his driving.

It must be remembered that the condition of the brakes on defendants' 10-year-old truck was a matter peculiarly within their knowledge, and even if the self-serving claim that the brakes suddenly failed was altogether true, there was no testimony given as to the actual condition of the brakes on the morning of the collision or as to why they failed; and the fact that the driver pumped them indicates some previous awareness of their defective condition.

On a later opinion rendered in the case of *Alarid v. Vanier*, 327 P.2d 897, the California Court stated:

“In our opinion, the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary intelligence, acting under similar circumstances, who desired to comply with the law.”

The later decision repudiates in part the earlier decision cited by the appellants, although it arrived at the same result, and after citing the California statute with respect to brakes, which is comparable to our own, the California Court in the ALARID case made this further statement:

“The presumption of negligence which arises from the violation of a statute is rebuttable and may be overcome by evidence of justification or excuse. . . . There is no evidence of contributory negligence and, since it is clear from defendant’s admission that the failure of his brakes was a proximate cause of the accident, it follows that the defendant would be liable *as a matter of law* in the absence of a sufficient excuse or justification for violation of the code.

“A large number of cases, although varying considerably in the language used, stand generally for the proposition that where a person has disobeyed a statute he may excuse or justify the violation by evidence that he did what might reasonably be expected of a person of ordinary prudence under similar circumstances who desired to comply with the standard of conduct established by the statute. (Citing numerous cases)”

Section 41-6-144, Utah Code Annotated (1953), provides, among other things, as follows:

“Every motor vehicle, other than a motorcycle or motor-driven cycle when operated upon a highway shall be equipped with brakes adequate to control the movement of and to stop and hold such vehicle, including two separate means of applying the brakes, each of which means shall be effective to apply the brakes to at least two wheels.

If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels."

The statute then proceeds to describe the requirements for the performance ability of brakes, etc.

It is obvious in the case at bar that the brakes upon the defendants' truck did not comply with the statutory requirements and, under the weight of authority, the defendants' operation of the truck with defective brakes in violation of statute constituted negligence per se.

8 Am. Jur. 2d, Sec. 702, states:

"In most states there are statutes which set forth specific requirements as to brakes on motor vehicles. Before a motorist can be charged with negligence by reason of the violation of a statute relating to brakes, it must first of all be established as a fact that there was a violation. Where the violation of a statute containing specific requirements as to brakes is established, most authorities support the fact that such violation constitutes negligence per se. Under such a fact, where the motorist has done all that can be reasonably expected of a person of ordinary prudence to see that a vehicle is in proper condition, and an unforeseen failure of the brakes occurs, he is not usually held guilty of negligence as a matter of law.

"In a number of jurisdictions, the violation of a statute relating to brakes is merely evidence of negligence or makes only a prima facie case of negligence. Thus, a motorist's violation of a stat-

ute requiring his vehicle to be equipped with adequate brakes in good working order, and sufficient to control the vehicle at all times, does not conclusively establish negligence on his part. He may defend by showing proper inspection and a sudden failure of brakes without warning; thus showing that he did not know and was not chargeable with knowledge of the defective brakes. On the other hand, where it is in fact shown that he had knowledge of the defective condition of his brakes, or that he would have known of their condition if he had made reasonable tests, he is not excused from liability.”

McCoy v. Courtney (Wash.), 172 P.2d 596 at P.601, states that:

“Under the first of these statutes it was the positive duty of the respondents to have their automobile equipped with brakes capable of holding the vehicle on any plus or minus grade upon which it is to be operated, and a violation of that standard would constitute negligence per se. *Jacklin v. North Coast Transportation Company*, 165 Wash. 236, 5 P.2d 325.”

Whether the rule of negligence per se, presumption of negligence, or whether the California rule that a person who has violated the statute must sustain the burden of showing that he did what might be reasonably expected of a person of ordinary intelligence acting under similar circumstances who desired to comply with the law; whether this court accepts any of these rules, the defendants failed miserably and completely to explain or excuse their violation of the statute. In the first place, there is no direct evidence that the defendant ever applied

If these two separate means of applying the brakes are connected in any way, they shall be so constructed that failure of any one part of the operating mechanism shall not leave the motor vehicle without brakes on at least two wheels."

The statute then proceeds to describe the requirements for the performance ability of brakes, etc.

It is obvious in the case at bar that the brakes upon the defendants' truck did not comply with the statutory requirements and, under the weight of authority, the defendants' operation of the truck with defective brakes in violation of statute constituted negligence per se.

8 Am. Jur. 2d, Sec. 702, states:

"In most states there are statutes which set forth specific requirements as to brakes on motor vehicles. Before a motorist can be charged with negligence by reason of the violation of a statute relating to brakes, it must first of all be established as a fact that there was a violation. Where the violation of a statute containing specific requirements as to brakes is established, most authorities support the fact that such violation constitutes negligence per se. Under such a fact, where the motorist has done all that can be reasonably expected of a person of ordinary prudence to see that a vehicle is in proper condition, and an unforeseen failure of the brakes occurs, he is not usually held guilty of negligence as a matter of law.

"In a number of jurisdictions, the violation of a statute relating to brakes is merely evidence of negligence or makes only a prima facie case of negligence. Thus, a motorist's violation of a stat-

ute requiring his vehicle to be equipped with adequate brakes in good working order, and sufficient to control the vehicle at all times, does not conclusively establish negligence on his part. He may defend by showing proper inspection and a sudden failure of brakes without warning; thus showing that he did not know and was not chargeable with knowledge of the defective brakes. On the other hand, where it is in fact shown that he had knowledge of the defective condition of his brakes, or that he would have known of their condition if he had made reasonable tests, he is not excused from liability.”

McCoy v. Courtney (Wash.), 172 P.2d 596 at P.601, states that:

“Under the first of these statutes it was the positive duty of the respondents to have their automobile equipped with brakes capable of holding the vehicle on any plus or minus grade upon which it is to be operated, and a violation of that standard would constitute negligence per se. *Jacklin v. North Coast Transportation Company*, 165 Wash. 236, 5 P.2d 325.”

Whether the rule of negligence per se, presumption of negligence, or whether the California rule that a person who has violated the statute must sustain the burden of showing that he did what might be reasonably expected of a person of ordinary intelligence acting under similar circumstances who desired to comply with the law; whether this court accepts any of these rules, the defendants failed miserably and completely to explain or excuse their violation of the statute. In the first place, there is no direct evidence that the defendant ever applied

the brakes or tested the brakes prior to the time when it was claimed they suddenly failed, notwithstanding the fact that this was a 10-year-old truck which was used only when newer trucks were not available, and it is rather common knowledge that as trucks get older, brakes get poorer unless they are adequately serviced, inspected, and maintained.

A weak attempt was made by the defendants to show brake inspection and maintenance, and for this purpose they called the witness Staley, who claimed to have made an adjustment of the brakes on the defendant's truck some seven or eight weeks prior to the day of the collision, and there was no subsequent inspection or service. On cross examination, he admitted that he took only 20 minutes on just a superficial adjustment of what brake was there. He did not take the brake down to inspect the lining; he did not know what condition the brakes were in at the time he made the adjustment in July, and although he claimed the lining was good in May, 1960, he could not recall to what extent the lining had been worn. Could any reasonable person conclude from such evidence that the defendants exercised ordinary care to inspect the brakes on the defendants' 10-year-old truck or to maintain them in the operating condition required by the statute?

They did *not* excuse non-compliance with the statute; they did *not* rebut the presumption of negligence; they did *not* sustain the burden of showing that they did what might reasonably be expected of a person of ordinary

intelligence, who desired to comply with the law. The question of the defendants' negligence with respect to the failure of the brakes, therefore, became a matter of law which was correctly determined by the trial court as there was nothing upon which the jury, acting reasonably, could have based a finding showing that the defendants discharge their statutory duty with respect to adequate brakes.

It is generally understood by those who operate and maintain motor vehicles that brakes do wear out and become less efficient with prolonged use, and as the brakes wear, 20-minute brake adjustments become less effectual in establishing a brake condition that will last for as long as 8 weeks. There is no testimony in the record of any kind that the brakes on this particular truck were inspected, serviced, checked, or found to be satisfactory during any part of the period of time which intervened between the 20-minute adjustment in early July and the pumping of an ineffectual brake on the 31st of August.

Furthermore, the record shows that the defendant was not maintaining a proper lookout. It will be recalled that the plaintiff had been stopped in the left-turn lane for approximately 30 seconds waiting for the red light to change, during which time he was constantly delivering to vehicles behind him an electrical left-turn signal., If, as the defendant Knight claimed, he was prompted to put on his brake by the light turning red, he had approximately 30 seconds within which to determine that his brakes weren't going to work and to take other responsi-

ble action to avoid colliding with the plaintiff who had been in a stationary position for approximately 30 seconds. According to the defendant Knight's testimony, there were no vehicles in the two lanes of traffic to the right of the plaintiff which would have prevented his swerving to the right if he had seen the plaintiff's parked vehicle before the moment of impact. It is crystal clear that the jurors could not have possibly found that the plaintiff was other than negligent in maintaining a proper lookout and in operating a vehicle without adequate brakes in violation of this statute. The defendant did not know where he was going and could not explain his presence in the left-turn only lane. There was no dispute in the evidence nor was there a question of proximate cause, nor one of contributory negligence which would have warranted the trial court in submitting those issues to the jury.

The case of *Lockmoeller v. Keil*, 137 S.W. 2d 625 (Mo.) cited by the appellants is not in point, for in that case the vehicle in question had brakes, contemplated by the statute, which had been adjusted a week before the accident, and the brakes had been used a block east of the impact and had worked properly, and there appeared to be no evidence of inattention or failure to maintain a lookout in that case as well.

Similarly distinguishable from the case at bar is *Trudeau v. Sina Construction Company*, 62 N.W. 2d 492 (Minn.), cited by the appellants, in which the brakes had previously functioned properly and had been re-

paired two weeks before the accident, and in that case there was no evidence of failure to maintain a proper lookout.

The case of *Eddy v. McAninch*, 347 P.2d 499 (Colo.), does not sustain the appellants' position in the case at bar as that court held that the accident resulted from causes beyond the control of the defendant.

In the case of *Best v. Huber*, 3 U. 2d 177, 281 P.2d 208, (Utah), cited by the appellants, the Court said:

“ . . . Because of her self interest and a consideration of the improbability of a sudden and complete failure of brakes, which are in good working order, the jury might have disbelieved this portion of her testimony. Additionally, the fact that she says that she pumped the brakes two or three times in the instant between the claimed brake failure and the crash suggests that she knew of at least a weakness in the brakes . . .

“Plaintiff here produced evidence that there was adequate room on the street for the defendant to have turned to the right to avoid the accident. Defendant herself testified that the hand brake was in good working order, but she made no attempt to use it or to turn aside. The jury, from the undisputed facts, could have found her negligent in either of these particulars; under a general instruction of due care, could have found her negligent in failing to apply the foot brakes within a reasonable distance from the automobile she was approaching.”

The matter of the defendants' negligence as a matter of law was not raised in that case as the jury had re-

solved the question of negligence in favor of the plaintiff.

Finally, the appellant should take no comfort from the rule of *Phillips v. Delta Motor Lines*, 108 So. 409 (Miss.), cited by the appellants. In that case, the evidence showed that the truck had been inspected on April 26, 1956, on May 5, 1956, and on May 12, 1956, and the accident occurred on May 15, 1956. The May 12th inspection showed that the truck needed no repairs or attention of any kind. The brakes had been inspected three days before the accident and seemed to be in proper condition and were working properly before the accident and during the early morning of the accident. The driver had made several stops only a short time before the accident occurred and had experienced no difficulty in the brakes. Moreover, there was evidence which justified the jury in finding that the plaintiff was not even injured in that case. It occurs to us the only use that could be made of the *Phillips v. Delta* case is that the brakes on a commercial truck ought to be inspected about every week; at any rate, the weekly inspections in that case may be indicative of what should have been done in the case at bar. There is certainly no parallel in the facts.

We desire to call the Court's attention to the case of *Sothoron v. West*, (Md.) 26 A.2d 16. In that case, the Court had given judgment for the defendant, and the case was reversed and judgment entered in favor of the plaintiff because the appellate court held that there was negligence as a matter of law. The Court stated as follows:

“ ‘It is the duty of one operating a motor vehicle on the public highway to see that it is in reasonably good condition and properly equipped so that it may be at all times controlled and not become a source of danger.’ Huddy Automobile Law,

“In Blashfield’s Cyclopedia of Automobile Law and Practice, Perm. Ed., Vol. 2, Sec. 2, Sec. 826, it is said: ‘One operating an automobile on the streets or highways is bound to take notice that he may be called upon to make emergency stops, and even in the absence of express regulation, the driver is required, in the exercise of reasonable care, to have his car equipped with brakes in such good condition that they can, by the use thereof, aid in stopping the car or controlling the speed of the car.’

“In Maryland we have the express regulation contained in Article 56, Sec. 194 (1), which reads: ‘Every motor vehicle, except trailers and side cars, while in use on the public highways of this state, shall be provided with adequate brakes.’

“In some states having similar statutes, it has been held that driving with defective brakes is negligence per se. (See *William Harden, Inc. v. Harden*, 1940, 29 Ala., App. 411, 197 So. 94; *Kampee Grocery Co. v. Sauls*, 1928, 38 Ga. App. 487, 144 S.E. 403.)

“The better and more general rule seems to be that failure of brakes to operate makes only a prima facie case which the driver may defend by showing proper inspections and a sudden failure without warning. (Citing cases) . . .

“The kind of inspection required is stated in Restatement of the Law of Torts, Negligence, Paragraph 300, at comment (C. Inspection), as that: ‘. . . which a reasonable man should recognize as

necessary.' It is also said, 'The actor's negligence lies in his act of using the defective instrument without adequate inspection, not in his omission to perform his duty of inspection.'

"The appellate offered as an excuse for the accident the fact that her brakes would not hold. She offered no evidence of any inspection. She testified to a drive which carried her through a number of city blocks and intersections. It is almost inconceivable that during the course of such a drive she did not at some time or other have occasion to use the foot brake. Her testimony, however, negatives this. The question before us, therefore, is whether the fact that her brakes suddenly failed her excuses her from the charge of negligence, when she has driven a number of city blocks without making the slightest test of these brakes, and their first use in the descent of a steep hill where she has to rely on them for her safety and for the safety of the other occupants of the highway.

"We do not think the appellee is excused. This is not the case of a latent defect which could not have been discovered. A person driving a strange car for the first time owes a duty to the public to see that there are no obvious defects in its mechanism which are apt to cause injury to others. Defective brakes are obvious because they can be detected by the simple pressure of the foot. The test is so simple that anyone can make it. If such a test shows the brakes in working order and then they suddenly fail, the driver may not be liable for negligence in driving with them. If no test is made, if the brakes are not even tried, the driver cannot rely on a presumption that the machine is safe. He will not be excused from liability for the destruction he may cause upon the

public highway because he did not know his brakes were bad.

“For the reasons stated, the judgment will be reversed, and in accordance with the rule, a judgment will be entered for the appellant against the appellee for \$123.55 with interest from the date of trial and costs here and below.”

Similarly, in the case at bar there is no evidence that the defendant driver so much as applied his brakes on the morning of the accident while traversing the distance from his point of origin to the place of collision with the plaintiff, and even if we should apply the prima facie negligence rule rather than the more general rule of negligence per se, the *Sothoron* case is authority for the fact that the appellant in this case was negligent as a matter of law.

In *Nettleton v. James*, (Ore.) 319 P.2d 879, it was held that a violation of statute with respect to adequate brakes is negligence as a matter of law. We quote from the decision as follows:

“By unbroken line of decisions of this court, violation of a statute commanding a certain duty is negligence in and of itself . . . The rule was applied by this court in a case involving the adequacy of brakes and an instruction that violation of the statute was negligence per se was approved . . .

“The weight of authority supports the fact that violation by the driver or owner of an automobile of a statute containing specific regulations as to brakes is negligence per se. Annotation 170, ALR 611, 661, and cases there cited. 5-A Am. Jur.

382 Automobiles and Highway Traffic, Section 249."

We further quote from this decision at p. 884:

"... We think that it is one thing to say that a driver who, without fault on his part, skids over to the left side of the road, has not violated the law which requires motorists to keep to the right (for how could it be allowed that any such application of the statute was intended?); but quite a different thing to hold that, when the legislature declared that motor vehicles must be equipped with two sets of adequate brakes which shall be maintained in good working order, the statute was only intended to apply if the driver did not know, or had no reason to believe, that his brakes were insufficient. . . .

"It may be that where an accident is caused solely by latent defects in materials employed in construction of the braking system which the usual and well recognized tests afforded by science and art for the purpose failed to detect, the owner or operator of an automobile should not be held responsible . . ., but there is no evidence in this case of latent defects and that question need not be decided."

Another case very similar to the case at bar is *Albers v. Ottenbacher* (S. D. 1962), 116 N.W. 2d 529. In that case, the jury found against the plaintiff on the issue of liability and the plaintiff appealed, claiming that the failure of the defendant to comply with the statute with respect to maintenance of safe braking equipment constituted negligence as a matter of law. The appellant court so ruled, reversing the verdict and holding the defendant negligent as a matter of law.

In that case, the defendant testified that he had experienced no difficulty with his brakes in traversing the distance from his place of residence to the scene of the accident until his attempted stop to avoid the collision. He further stated that he started to slow his speed when he saw the light change and eased up behind the plaintiff's car; that when he applied the foot brake it failed, and he attempted to pump the brake.

We quote from the decision as follows:

“Defendant was required by the provisions of this statute to have his car equipped with brakes adequate to control the movement of and to stop and hold the vehicle and maintained in good working order. Defendant admittedly was operating his car with defective foot brakes and in violation of the statute. The question presented is whether the violation by the defendant of the statute containing specific requirements as to brakes constitutes negligence as a matter of law or whether the jury, under the facts and circumstances, could find that defendant was not negligent. . . .

“It may thus be said that when the driver or owner of a motor vehicle violates the specific regulations as to brakes contained in Sec. 44.0346 supra, he is guilty of negligence as a matter of law unless it appears that compliance was excusable because of circumstances resulting from causes beyond his control and not produced by his own misconduct. Evidence of due care does not furnish an excuse or justification. The court in *Bush v. Harvey Transfer Company*, supra, points out the difference: ‘Since the failure to comply with . . . safety statute constitutes negligence per se, a party guilty of the violation of such a statute

cannot excuse himself from compliance by showing that he did or attempted to do what any reasonable, prudent person would have done under the same or similar circumstances. A legal excuse must be something that would make it impossible to comply with the statute.' To the same effect, *Florke v. Peterson*, *supra*; *Gallicotte v. California Mutual Building Loan Association*, 4 Cal., App. 2d. 503, 41 P.2d 349."

The Court then cites with approval the case of *Nettleton v. James* and the case of *Sothoron v. West* previously cited in this brief, and in reversing the trial court made the further statement:

"The evidence as viewed most favorably to the defendant was not sufficient to make a question of legal excuse one of fact for the jury. The violation of the statute without legal excuse constituted negligence in itself, and the court erred in submitting an issue of negligence to the jury."

POINT III

THE DAMAGES ESTABLISHED BY THE JURY WERE NOT EXCESSIVE, WERE FULLY SUPPORTED BY THE EVIDENCE, AND SHOULD BE SUSTAINED.

This question has been before this court on numerous occasions. We have reviewed all the cases cited by the appellants in their brief and have no quarrel with the principles set forth in those decisions.

In the case of *Pauly v. McCarthy*, 109 Utah 431, 184 P.2d 123 (1947), cited by the appellants, the Court stated as follows:

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

In that case, the trial court remanded the net jury verdict of \$50,000.00 to \$35,000.00. The defendants not being satisfied with the remittitur appealed, claiming that the verdict was based on passion and prejudice. There was evidence of permanent back injury in that case.

The trial court has considerable discretion in the allowance or rejection of a motion for new trial based upon excessive verdict.

In the case of *Eleganti v. Standard Coal Company*, 50 Utah 585, 168 Pac. 266, also cited by the appellants, Justice Frick, in refusing to disturb the action of the trial court, said: (P. 269 of the Pac. Rept.)

“ . . . As pointed out in *Jensen v. Denver & Rio Grande R. Co.*, 44 Utah 100, 138 Pac. 1192, 1193, the power to grant new trials upon the ground of excessive verdicts can rarely be exercised by this court, and the only power we ordinarily possess is to determine whether the trial court has abused its discretion in refusing to grant a new trial on that ground.”

In the case of *Morgan v. Ogden Union Depot*, 77 Utah 325, 294 Pac. 541, in refusing to disturb a verdict sustained by the trial court, this court held:

“The question has been before this court a great number of times, and we have uniformly held that we are permitted to interfere with the verdict on this ground only when the facts are such that the excess can be determined as a matter of law, or that the verdict is so excessive as to shock one’s conscience and to clearly indicate passion, prejudice, or corruption on the part of the jury, and that the trial court, in passing on the question, clearly abused its discretion in permitting the verdict to stand. (Citing cases)”

In the case of *Paul v. Kirkendall*, 123 Utah 627, 261 P. 2d 670 (1953), in refusing to disturb the verdict in that case, which involved a \$20,000.00 award for a back injury to the wife and loss of consortium, this court, speaking through Justice McDonough said:

“Appellant claims here that damages awarded were so excessive as to appear prejudicial. Rule 59-A (5), Utah Rules of Civil Procedure, provides that a new trial may be granted on grounds of excessive or inadequate damages appearing to have been given under the influence of passion or prejudice. It is not enough, under this rule, nor nor under the code provision which it supplanted, merely to allege that the amount is excessive. The amount of the verdict is ordinarily a matter exclusively for the jury, and on the ground of adequacy of the verdict alone the court may not interfere with the jury’s verdict unless it clearly appears that the award was rendered under misunderstanding or prejudice. . . . Therefore, in reviewing the trial court’s ruling denying the defendant’s motion for new trial on grounds of excessiveness of damages awarded by the jury’s verdict, this court is limited to a determination of whether such ruling was an abuse of discre-

tion. The Supreme Court is slow to interfere with a trial court's ruling granting or refusing a new trial on questions relating to damages. *Hirabelli v. Daniels*, 44 Utah 88, 138 Pac. 1172; *Shatelan v. Thackeray*, 98 Utah 525 100 P. 2d 191. The question here on appeal, then, is a determination of whether the damages awarded bear no proper relation to the wrong suffered as shown by the evidence and in accordance with the instructions of the Court, so that this Court may exercise its power to set aside the verdict of the jury."

Again we have no quarrel with the principle discussed by this court in the more recent case of *Stamp v. Union Pacific Railroad Co.*, 5 U. 2d 387, 303 P. 2d 279, in which the court ordered a remittitur of the verdict from \$10,000.00 to \$6,000. That case involved a temporary eye injury with no permanent impairment of vision, and the court was of the opinion that the award made by the jury had no basis in fact and was so excessive as to shock the conscience and to clearly indicate passion and prejudice. In his specially concurring opinion, Justice Crockett made this pertinent observation:

"The first such rule is that courts should exercise great caution and forbearance in disturbing jury verdicts to the end that the important right of trial by jury is preserved. Moreover, after the lower court has given its approval to the award by refusing to set aside or modify the verdict, that much additional validity is thereby conferred upon it, and the appellate court, a fortiori, should be more reluctant to interfere with the jury verdict and the judgment of the court because of their advantaged position in having a first-hand view of the proceedings and will do so only when to per-

mit it to stand would work a manifest injustice. (Citing cases.)''

To briefly summarize the points discussed by the Utah decisions, it would appear that: (1) The appellate court should interfere with the verdict only when the facts are such that the excess can be determined as a matter of law; or (2) that the verdict is so excessive as to shock one's conscience and to clearly indicate passion, prejudice, or corruption on the part of the jury; (3) that the trial court, in passing on the question, clearly abused its discretion in permitting the verdict to stand; (4) the fact that the trial court has given its approval to the verdict should dispose the appellant court to be more reluctant in disturbing the verdict because of the "advantaged position" of the trial court in having a first-hand view of the proceedings; unless failure to interfere by the appellate court would permit a manifest injustice; (5) that there should be a proper relationship between the verdict and the wrong suffered as disclosed by the evidence, indicating that the jury faithfully followed the court's instructions.

We earnestly contend that the application of all of these principles to the case at bar would result in the affirmance of the verdict and of the action of the trial court in denying the motion for new trial. We have rather extensively summarized the medical evidence and the evidence pertaining to plaintiff's injuries to assist the court in arriving at this conclusion.

The plaintiff was 63 years of age and in the enjoy-

ment of excellent health, for his age, never having suffered from any serious health problem prior to the time of the accident. He was highly skilled in his vocation as an automobile mechanic, and although we agree that the X-ray pictures indicated arthritic degeneration in the plaintiff's spine, which is generally true as an incident to age, nevertheless the plaintiff had actively pursued his vocation without restriction of activity for 40 years prior to the collision, and although he owned his own garage and had some administrative duties, he spent two-thirds of his time working in overalls on the various repair jobs that came to him. He stated that it was about a year after the accident before he could do any car repair work at all, and then his work was restricted to manual tune-up jobs which would not require him to get down under a car. He further stated it is now impossible for him to get under the dash of a car to fix any of the wires or change the gauges because he can't hold his head underneath. He cannot get under a car and take down a transmission.

When he was examined by Dr. Reese on September 19, 1960, Dr. Reese observed that he had a stiff and painful neck with limitation of motion ranging from 50 per cent to 80 per cent, with definite muscle spasm, and Dr. Reese testified that, in his opinion, the accident was wholly and solely responsible for plaintiff's disability. He further expressed the opinion that the disability was permanent.

Dr. Boyd Holbrook, the orthopedic specialist, testified that the plaintiff has suffered 50 per cent loss of mo-

tion to the neck involving all movements of the neck, and he evaluated plaintiff's permanent disability as 20 per cent impairment of the body as a whole, which he stated would impair plaintiff's ability to work as a mechanic. Dr. Holbrook recommended surgery for fusion of the cervical vertebrae involved, and recognizing the hazards attendant upon such an operation, felt that if the operation was successful, plaintiff's permanent bodily disability would be reduced to 10 per cent, and he testified that the reasonable cost of such an operation would be approximately \$1,000. Dr. Holbrook stated that plaintiff's permanent injury was the result of the collision and that the factors creating the need for the operation of the plaintiff were caused by the collision.

There can be no question but what plaintiff sustained a serious, painful, and disabling injury which will greatly impair his ability to perform his work and his enjoyment of life for as long as his life shall continue. Having arrived at the age of 63 without any serious health problem and still pursuing an active and useful life, the jury would have been fully justified in concluding that he had a reasonable life expectancy of several years.

The amount of the verdict being fully justified by the evidence, does not even remotely suggest passion or prejudice or corruption on the part of the jury, and the appellants have brought nothing to the attention of the court, nor could they, which would justify this court in reducing the verdict or granting the motion for new trial, which the trial court, in the reasonable exercise of its judgment, saw fit to sustain. Certainly, as recognized by

the previous decisions of this court, the jury was entitled to take into account the present purchasing power of money and the present conditions of inflation which would make a present-day verdict worth only about a third as much as a verdict in the same amount rendered 10 or 15 years ago; and these cases, so far as discussion of the amounts involved are concerned, can be of little assistance to the court in determining what is just and proper today. However, for what it is worth, there is an Illinois case decided in 1950 (some 13 years ago) in which a \$20,000.00 verdict was upheld for a whiplash injury to a woman's neck in which the woman had received hospital care without surgery with continuing symptoms similar to those involved in the case at bar. *Smith v. Kroger Grocery and Baking Company* (Illinois, 1950), Ill. App. 501, 90 N.E. 2d 500.

We earnestly contend that under the evidence of injury in this case, fully substantiated by the doctors who examined and treated the plaintiff, the jury would have been altogether justified in allowing a verdict considerably greater than the one this court is asked to disturb. The amount of the verdict does not shock the conscience, nor does it indicate passion, prejudice, or a disregard of evidence or the Court's instructions.

CONCLUSION

The evidence clearly shows that the defendants were guilty of negligence as a matter of law through operating a motor vehicle on the highway with defective brakes and in approaching the intersection of 21st South and State

Street without maintaining a reasonable or proper lookout. The record discloses no evidence excusing the defendant's violation of his statutory duty with respect to the maintenance of his braking equipment. The evidence does not even show that the defendants exercised ordinary care in the maintenance of their braking equipment. The trial court, therefore, had no proper alternative but to withdraw the issue of negligence from the consideration of the jury.

If we should assume against the record that the court erred in its instructions, the defendants failed to make a timely or appropriate objection — indeed, they flatly stated approval of the instructions given. The verdict was not excessive and did not indicate passion or prejudice but was fully justified by the evidence.

The trial judge, having presided over the trial proceedings and having observed the witnesses, the parties, and the jurors in the exercise of his sound judgment and discretion denied the motion for new trial and refused to disturb the verdict.

We therefore respectfully conclude that in accordance with the well-established principles of law and justice set forth in this brief, the verdict and judgment of the trial court should be affirmed.

Respectfully submitted,

WOODROW D. WHITE

351 So. State Street

Salt Lake City, Utah

*Attorney for Plaintiff
and Respondent*