

1963

Grant Scott Haslam v. Paul Paulsen et al : Brief of Appellant

Utah Supreme Court

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IN THE SUPREME COURT OF THE STATE OF UTAH

GRANT SCOTT HASLAM, **FILED**

Plaintiff and Appellant, 1963

VS.

Clerk, Supreme Court, Utah

PAUL PAULSEN, P. H. PAULSEN, AND BYRON PAULSEN
dba ACME CRANE RENTAL
COMPANY, HYRUM PETERSEN, THE CORPORATION OF
THE PRESIDING BISHOP OF
THE CHURCH OF JESUS
CHRIST OF LATTER-DAY
SAINTS, a corporation sole, and
FRANK COTTRELL,

No.
9938

Defendants and Respondents.

BRIEF OF APPELLANT

Appeal from an Order vacating a Verdict and Judgment and
granting a new trial in the Third Judicial District Court for
Salt Lake County, Honorable Merrill C. Faux, Judge.

UNIVERSITY OF UTAH

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GRANT SCOTT HASLAM,
Plaintiff and Appellant,

vs.

PAUL PAULSEN, P. H. PAULSEN, AND BYRON PAULSEN
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THE CHURCH OF JESUS
CHRIST OF LATTER-DAY
SAINTS, a corporation sole, and
FRANK COTTRELL,

Defendants and Respondents.

No.
9938

BRIEF OF APPELLANT

Throughout this Brief, all emphasis is ours.

STATEMENT OF THE KIND OF CASE

This is an action for personal injuries to plaintiff who was injured when he received a charge of elec-

tricity from a crane boom cable and bucket owned by defendants Paulsen and operated by their agent, defendant Petersen, while the plaintiff was delivering ready-mix concrete on premises to which he had been invited as a business invitee.

DISPOSITION IN LOWER COURT

The case was tried to a jury. Following a verdict and judgment for the plaintiff against the respondent defendants, not including the Church, the trial court vacated the verdict and judgment and ordered a new trial. From this order plaintiff appeals.

RELIEF SOUGHT ON APPEAL

Plaintiff seeks a ruling that the trial court's order granting a new trial was an abuse of its discretion, and for a reinstatement of the full amount of the judgment which the trial court vacated.

STATEMENT OF FACTS

Late in 1959, construction of an L.D.S. chapel was commenced on Wasatch Boulevard just south of Thirteenth South. The property was owned by the Church and the Church itself was the builder. On or about December 18, 1959, at the request of the Church, three 7200 volt power lines were installed on the premises carried by utility poles from a point on the north side of Thirteenth South. The poles were erected on a line more or less north and south until they reached

approximately 52 feet from the building foundation. From this point the line continued to a pole a distance of 60 feet in a west southwest direction. Four wires, anchored by the top cross bars on the poles, ran side by side. The line on the south side and the two north lines were live. The other line was neutral, and each of the three live lines carried 7200 volts (R. 194) and were exposed and uninsulated. (R. 196). They were approximately 26 to 27 feet above the ground. (R. 195, 337).

A month after the lines were installed, the Church ordered some ready-mix concrete from Utah Sand and Gravel Company, to be delivered in the latter company's trucks and by its personnel. The Church also arranged with defendant, Acme Crane Rental Company, to furnish a crane, a crane operator and an oiler to lift the ready-mix concrete from the delivery trucks to the foundation of that part of the building which was adjacent to the high voltage wires. Defendant, Frank Cottrell, an employee of the Church, was the foreman in charge of the operation and he and defendant, Hyrum Petersen, the crane operator, conferred as to where to put the crane for the concrete lift job. They both knew of the exposed high voltage wires and because of the proximity of the wires to the area where the concrete was to be poured, they discussed the problem of where the crane should be placed. (R. 353-354, 389-390). The crane had a sixty-foot boom with a 30-foot jib extension (R. 356) from which a cable hung. A bucket was attached to the end of the cable for carrying the concrete. Cottrell and Petersen agreed

that the only place to put the crane was between the wires and the foundation forms, and that is where it was placed. (R. 353-354, 366, 385-389). The distance between the wires and the forms was approximately 40 feet. (Exhibit 2 D). They further agreed to, and in fact did, proceed with the unloading of the concrete without arranging for the de-energizing of the south wire which could have been done without depriving the workmen of necessary power. (R. 354, 196). Although the south line could have been insulated in two and one-half to three hours time with fibre eels (R. 196-198, Exhibit 3 P), Petersen and Cottrell proceeded with the unloading operation without insulating any of the wires against the danger that they knew existed (R. 390); and, finally, they proceeded to allow the invitee truck drivers, including plaintiff, to come into the danger zone without warning them of the dangerous nature of the area into which they were invited to unload their concrete. (R. 354, 248). The defendant Petersen, as Paulsen's agent, also proceeded to operate the crane with the boom swinging over to, and making contact with, the wire in an arc capable of extending several score feet beyond the wire (R. 401, and Map Exhibit 2D), even though he knew that the safety custom of crane operators was never to let any part of the crane or boom get within eight feet of a utility wire (R. 397), and also even though he knew it was impossible for him to see and have a clear vision of the cable when it came close to the wire. (R. 405-406, 423-424). Defendants Paulsen had furnished the

Church with an oiler whose job, among other things, was to assist the crane operator and people delivering concrete for pouring and to keep the operation safe. (R. 432, 237, 383-384). But when the Utah Sand and Gravel drivers, including plaintiff, arrived and unloaded, this oiler was not at the scene of the electrical danger to assist. (R. 248).

In such restricted area for a 90-foot boom to operate, the defendant, Hyrum Petersen, commenced unloading ready-mix concrete between noon and 1:00 p.m. on January 19, 1960. (R. 206, 366). The trucks had been loaded at the Utah Sand and Gravel Company's North Plant on Beck Street, and its employees, the drivers of the trucks, had received their orders from the company's North Plant personnel as to where to deliver the concrete. The driver of the truck carrying the first load was Dave Walker (R. 355, 390), who backed his truck up to a point underneath the exposed high voltage wires. He was not aware that he was near any wires, nor, of course, that they were of high voltage and exposed. (R. 208).

While Walker was unloading, the plaintiff drove onto the site with the next load of concrete to be unloaded. He drove in from Thirteenth South, turned his truck to the west, then backed it up so that he was facing north and ready to back up as soon as Walker was finished. (R. 242-243). He waited for approximately 10 to 15 minutes and remained in the truck where it was warm. It was a cold day and plaintiff knew of no reason to get out of the truck. (R. 249,

212). Then, after Walker pulled out, plaintiff backed his truck up in the same path along which Walker had driven. He also did not see the wires because like Walker, he had to concentrate on spotting the truck to the bucket, which took his complete attention. (R. 247-248, 207). They both backed up by use of the side view mirrors and the terrain was uneven. (R. 243, 207). Neither the poles nor the wires were within the view of their side view mirrors, nor had they become aware of the wires from any other view. (R. 247, 208). After backing to the point indicated by the place where the bucket rested, plaintiff got out of the truck, went to the back thereof, and swung the pouring chute from the east side of the truck, where it had been fastened, to a point where it could pour into the bucket. But the chute, thus extended out from the truck, was approximately one foot short of the bucket. (R. 244, 248). The crane operator, Hyrum Petersen, then caused the bucket to be swung closer to the truck but in doing so the bucket went too far and struck the truck. (R. 246). Plaintiff, who was standing on the ground at the west side of the chute, involuntarily and spontaneously reached for the bucket to push it away from, and to the south of, the back end of the truck where it had just made momentary contact. (R. 246, 451). As he grabbed the lip of the bucket with his right hand to push it away from the truck (R. 246), he received an electrical charge. (R. 246, 249). The cable holding the bucket extending from the 90-foot boom had made contact with the south 7200 volt wire. (R. 210, 211).

Plaintiff momentarily remained conscious just long enough to make a tremendous effort to break loose from the juice (R. 249) and he also remembers falling backwards and lighting on the frozen ground on his left shoulder before losing consciousness. (R. 249). He was wearing rubber overshoes or galoshes (R. 249) and he also had rubber soles on his shoes. (R. 457). His hands were protected by gloves. (R. 249, 252). The truck, of course, had rubber tires, and it is conjectured that these protections prevented plaintiff from getting the full force of the 7200 volts, which otherwise, presumably would have caused his immediate death.

Dave Walker, who had been cleaning the pouring chute of his truck, ran over to the plaintiff (R. 209), and he describes him as unconscious, with the pupils of his eyes rolled back so that only the whites of his eyes were seen. (R. 209). He also said that the bucket was just above the ground, that a blue flame was running from the bucket to the ground, and that the cable was in contact with the utility wire. (R. 210). He then saw the crane operator, Hyrum Petersen, pull the cable and bucket away from the wire and thus break the electrical contact. (R. 211). The crane itself was on rubber wheels and also resting on out-riggers. (R. 398, 273). Breaking the contact before he stepped to the ground from the crane undoubtedly saved Mr. Petersen from getting the electrical current. (R. 425-426).

Plaintiff soon regained consciousness and after some delay was driven to see Dr. Silas Smith at South Temple and Fifth East. Plaintiff was able to get around

under his own power. (R. 452). His hands were burned (R. 250-251), and he had pain in his left shoulder. (R. 250, 453). He was examined, X-rays were taken, and his burns were treated. (R. 250). He returned to the doctor next day (R. 250, 252) and he continued to see Dr. Smith until April 1, 1960, making about 12 visits during that time. (R. 252). While making these visits, plaintiff continued to work, but it was difficult and painful and he was given limited duties on the job. (R. 254). Dr. Smith, in diagnosing the source of plaintiff's continued pain, told him that he had arthritis in his shoulder and that is was something he would have to live with. (R. 252, 340, 382). For the next several months plaintiff did live with the pain thinking there was nothing he could do about it. (R. 340). But the pain continued to get worse (R. 340), his left arm and shoulder were getting smaller (R. 262), and in November, 1960, (R. 254-255) he decided to seek further medical help. (R. 340, 262). After spending a month or two with a chiropractor, he saw his family doctor, Dr. Wilson, who sent him to Dr. Pemberton, an orthopedic specialist. (R. 297-298). Plaintiff gave Dr. Pemberton the history or source of his injury as of January 19, 1960, when he received the charge of electricity and was thrown on his left shoulder and said that his injury had caused him to have pain in his shoulder which had been getting worse. (R. 298). Dr. Pemberton observed a prominence of the outer aspect of the left clavicle or collar bone. There was tenderness over the joint between the collar bone and the shoulder blade, and over the front end of the shoul-

der and out to the outer aspect. There was weakness in lifting the arm up and some restriction of motion in pulling it straight up into the air. (R. 298). After some preliminary treatment, Dr. Pemberton recommended surgery (R. 122) which he performed on or about February 8, 1961. He found that the pain was caused by (1) an inflamed bursa under the deltoid muscle, the muscle that lifts the arm out and forms a cap over the top of the shoulder (R. 299), and (2) adhesions or scar tissue which had formed between the muscle layers and the bone ligaments about the ball or joints between the collar bone and the shoulder blade. (R. 301). This scar tissue occurred from a jerking and strain on the attachment of the muscles and created inflammation or periarthritis about the joint. (R. 301).

Dr. Pemberton was able to remove the inflamed bursa and thus remove the cause of the pain from that source (R. 300) but there was nothing that surgery or any known treatment could do to eliminate the pain from the adhesions. (R. 301). Both Dr. Smith and Dr. Pemberton believed that this latter pain would remain during plaintiff's lifetime. (R. 301, 340, 382). Dr. Pemberton makes specific reference to the plaintiff's injuries which occurred on January 19, 1960, as the source of his disability (R. 302, 318), and suggests that the muscle damage may have occurred from a jerking or contracting of the muscles when they were stimulated by the electrical impulse rather than from a jar or fall. (R. 301, 314, 320). He estimates a 10 to 15 per cent permanent

partial disability of the arm at the shoulder due to muscle weakness. (R. 303).

Plaintiff was unable to work for three months following the operation. (R. 257). His left arm had shrunk to about the size of his wrist and during his convalescence he performed certain exercises to restore as much as possible the muscles and the normal size of his arm. (R. 257-259). Among the things he did to help build up his arm was to assist in a very limited way in some construction work which he had contracted out in the building of an addition to his home. He undertook this upon the recommendation of the doctor. (R. 289-290, 337-338, 456). While the effect of the operation has been to reduce the pain in his shoulder and arm, it has not eliminated it. His efforts to restore his muscles during convalescence was accompanied with much pain (R. 259-260), and upon his return to work as a truck driver, he was again forced to use his shoulder and arm muscles, and such use was constantly associated with pain (R. 259-261), although not so great as before the operation. (R. 259-260). Inasmuch as the pain is not as constant and intense now as it was before the operation, plaintiff believes the operation was very beneficial. (R. 262-263). Nevertheless, plaintiff can avoid much of the pain only by not using his arm and shoulder muscles, and he has chosen to use them to the extent required by his work, and to the extent required to keep, as much as possible, a healthy and normal size arm and shoulder. As a result of such use he has suffered, he does suffer, and will continue to suffer pain; the more he uses his

arm and shoulder, the more they pain him; the less he uses them, the more the muscles atrophy and “waste away” on him. (Unnumbered page between R. 261 and 262).

His pains and disabilities have had certain effects on his daily life and activities which may be listed as follows:

1. He reduced the amount of working time as an employee of Utah Sand and Gravel Company as much as it was possible and still keep his job (R. 260), which resulted in an annual wage loss of approximately \$957.00. (Exhibit 16 P).

2. Prior to January 19, 1960, he liked his work, even overtime hours, which he could have to any extent desired because of his seniority (R. 241), but he changed to not liking his work at all because of the pain associated with his work. (R. 260). He avoided overtime hours when it was possible. (R. 260).

3. Finally he took another job on the suggestion of his doctor (R. 264), which resulted in less pay than the reduced amount he had most recently been earning as a truck driver.

4. At home he has become nervous and irritable with his wife and children and prone to “blow up over little things that never bothered him before,” as if he didn’t have any control over it. (R. 263, 350).

5. His sleeping, which had been “sound and still,” changed to a condition of constant “turning and jerking around, just moving all night.” (R. 350-351).

6. He used to enjoy bowling as a recreation, but now he no longer enjoys it and avoids it. (R. 349, 351). As a hunter he became considerably limited in what he could do. (R. 340, 348).

7. He is now unable and restricted in doing, or is not inclined to do, the chores and work around his home. (R. 348).

8. He avoids stripping to the waist in public in sport situations where it is customary to do such for he is self-conscious about the large incisional scar resulting from the operation. (R. 349, Exhibits 10 P, 11 P, 12 P).

He cannot now trust his arm and shoulder to lift things above his head. (Unnumbered page between R. 261-262).

10. He cannot rest any object on his left shoulder because of the pain from contact with the bony prominence at the joint due to the muscle atrophe. (Unnumbered page between R. 255-256, R. 320).

The foregoing are the results of a fixed and permanent condition, the central feature of which is pain in the shoulder and arm when they are used.

When plaintiff was injured in January, 1960, he was a young man of 26 years, a high school graduate as of June, 1951, married and the father of three young children. Since then they have had one more child. (R. 239). His occupational experience since high school has been limited (except for a year's work at Dugway, where he operated heavy equipment) to his work for

Utah Sand and Gravel Company, driving ready-mix trucks. He had built up good seniority by the time of the accident. He was the 11th or 12th in seniority out of 50 or 55 men. (R. 240). He was not skilled in any other work. He liked his work as a truck driver driving ready-mix trucks and, prior to his injuries, liked to, and did, accept as much overtime work as he could get, which work was generously available for him because of his seniority. (R. 240-241).

The mortality tables show his life expectancy from the time of the trial when he was 29 years old to be approximately from 40 to 44 years.

His wage loss in 1961, the year of his operation, as compared with 1959, his last normal year, was \$1381.00. (R. 264-269, 347-348, Exhibit 16 P). This is figured by using his 1962 wage rate as a norm.

All during 1962 plaintiff was as well and as fully recovered as he will ever be, and his wage loss that year was \$957.00 (R. 264-269, 347-348, Exhibit 16 P), as compared with his last normal year of 1959. Note the similarity of his income in 1957, 1958 and 1959. Plaintiff's 1962 wage loss is arrived at by using his rate of hourly wage in 1962 for all years figured, and charting such income from the hours actually worked.

Plaintiff's special damages amounted to \$558.80 but plaintiff's counsel neglected to ask Dr. Smith if \$101.50 charged by him together with X-rays taken under his auspices were reasonable, so the court reduced

the special damage to \$457.30 which was the amount that Dr. Pemberton accounted for. (R. 303-304).

At the close of the evidence, each of the defendants presented certain motions to the court. Some motions were granted, others were denied. (R. 479-492). Among the motions made by the defendants Paulsen and Petersen, was a motion to dismiss plaintiff's action upon two grounds:

1. That plaintiff was contributorily negligent as a matter of law in failing to examine the place where he unloaded the truck. (R. 479).

2. That plaintiff failed to prove at the time of the accident that defendant Petersen, the crane operator, was an employee of Paulsens'; that in fact plaintiff was a servant of the Church. (R. 480).

These defendants also moved the court

“to strike from the record all testimony relating to loss of earnings on the part of plaintiff, past or future, all exhibits on special damage, testimony relating to Dr. Pemberton's treatment and operation charges, including hospital bills, and all claims that plaintiff has for permanent disability or pain arising from Dr. Pemberton's operation and treatment of plaintiff.” (R. 491).

As to the motion to dismiss, the court saw no merit to either of the grounds given and denied the motion. (R. 481-482, 486). As to the motion to strike, the court denied that motion, but expressed serious reservations as to his ruling, and invited defendants to move for judgment notwithstanding the verdict if the verdict

did not satisfy them. (R. 492). In making this recommendation, the court added its own view that because plaintiff did not return to Dr. Smith for further treatment, but instead went to other doctors following the 1960 deer hunt, the jury could infer that his injury occurred at that time rather than in January. The court bases this observation upon Dr. Smith's statement as related by the court:

“I told him if this continued to hurt him to come in and see me.” (R. 491-493).

Neither respondent moved for a directed verdict, but the Paulsens did request instructions covering their objections on grounds which were the basis of their motions for judgment n.o.v.

In its instructions the court presented the jury with special interrogatories and the jury made the following specific findings (R. 142-145):

1. That each defendant was negligent.
2. That defendant Petersen's negligence was the proximate cause of plaintiff's injuries, and that defendants Paulsen were also proximately responsible because Petersen was their agent acting within the scope of his employment.
3. That each defendant was guilty of wanton and reckless conduct.
4. That plaintiff was not contributorily negligent.
5. That plaintiff's special damages amounted to \$558.80, and his general damages amounted to \$50,000.00.

In submitting its special interrogatories it appears that the court did not give the jury an opportunity to answer specifically whether the Church's negligent conduct was also a proximate cause of plaintiff's injuries. Since the jury did not, therefore, make such a finding the Church moved the court for judgment in favor of the Church and against plaintiff, "no cause of action." (R. 148-149). Judgment was accordingly entered in favor of the Church. (R. 150-151).

Responding to plaintiff's motion for judgment, the court entered judgment in his favor and against the Paulsens and Petersen in the sum of \$50,457.30, and also entered judgment in the same amount in favor of the Paulsens and against the defendant Petersen. (R. 166-167).

Following the verdict and the judgment, respondents moved the court to grant judgment in favor of the defendants, respectively, and against plaintiff of "no cause of action" non obstante verdicto on the specific grounds that

"as a matter of law, the evidence showed the plaintiff's exclusive remedy was workmen's compensation", and

"As a matter of law, the evidence showed that plaintiff was contributorily negligent in proximately causing his own injury, and likewise, as a matter of law, plaintiff failed to show wanton and wilfull misconduct". (R. 157, 164-165).

In connection with this motion, respondents also moved for a remittitur of all special damages and

\$49,000.00 of the general damages. The court refused to grant these motions. (R. 157, 164-165).

Respondents also moved the court, pursuant to Rule 50(b), to set aside the verdict and judgment on the two grounds listed above and the further ground that

“As a matter of law, the plaintiff failed to prove by a preponderance of the evidence any damages, except general damages for the pain and the burn on hands or the bruise on his shoulder.” (R. 157, 164-165).

Respondents also filed a motion for a new trial upon the following grounds:

1. Excessive damages appearing to have been given under the influence of passion and prejudice.
2. Insufficiency of the evidence to justify the verdict, and that it is against law.
3. Error in law. (R. 159, 162).

These latter two motions were granted as appears in the following Order:

“IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the verdict herein and the judgment entered thereon in favor of the plaintiff and against the defendants, Paul Paulsen, P. H. Paulsen and Byron Paulsen, dba Acme Crane Rental Company, and the defendant, Hyrum Petersen, on April 24, 1963, be set aside and vacated as against the defendants Paul Paulsen, P. H. Paulsen and Byron Paulsen and Hyrum Petersen, and the verdict and judgment against these defendants are

hereby set aside and vacated, and the defendants, Paul Paulsen, P. H. Paulsen and Byron Paulsen, dba Acme Crane Rental Company, and the defendant, Hyrum Petersen's motion for a new trial on issues of liability and damages is hereby granted.

Dated this 15th day of May, 1963.

Merrill C. Faux, Judge" (R. 171)

ARGUMENT

POINT I

THE EVIDENCE SUPPORTS THE FINDINGS: (1) THAT DEFENDANT, HYRUM PETERSEN, WAS NEGLIGENT; (2) THAT PLAINTIFF WAS NOT CONTRIBUTORILY NEGLIGENT; (3) THAT DEFENDANT PETERSEN'S NEGLIGENT CONDUCT WAS THE PROXIMATE CAUSE OF PLAINTIFF'S INJURIES; (4) THAT DEFENDANT PETERSEN'S CONDUCT WAS ALSO WANTON AND RECKLESS; AND (5) THAT PLAINTIFF WAS INJURED BY DEFENDANT HYRUM PETERSEN WHILE SAID DEFENDANT WAS ACTING AS AGENT FOR THE DEFENDANTS PAULSEN AND WITHIN THE SCOPE OF HIS EMPLOYMENT.

A case unusually similar as to the essential factual elements of this case is Johanson vs. Cudahy Packing Company, 107 Utah 114, cited in 69 ALR 2nd 170.

In the trial court a motion to dismiss the complaint was granted. There was, therefore, no trial and the appeal was taken on the strength of the allegations in the complaint. The action was to recover for the death of a truck driver who was delivering a load of salt to Cudahy. His death occurred when the truck he was driving made contact with a live, uninsulated electric wire stretched across an alleyway as the deceased was backing up the truck to the point where delivery was to be made. Factual details of importance as well as the law with respect to business visitors are contained in the following excerpt from the court's opinion:

“The complaint alleges that the deceased was delivering a load of salt which the defendant had ordered from the deceased's employer. Drivers delivering goods purchased by the occupier of premises are invitees. * * * The best statement of the liability of the occupier of premises toward an invitee which has come to our attention may be found in Bohlen, ‘Studies in the Law or Torts’, page 183. The rule is there stated as follows:

‘The position of the ‘business guest’ is somewhat better than that of the ‘bare licensee’. While the owner is bound to disclose to both any defect of which he knows and which he should recognize as creating a risk of injury to either, he may assume that the bare licensee, knowing that the owner has no interest in his visit and, therefore, cannot be expected to have made special preparations for his coming, will be on the alert to discover for himself the true condition of the premises; while a business guest, being entitled to expect to find the

premises put in order for his visit, is not to be expected to discover defects unusual in a properly prepared business premises. And the owner having an interest in the business invitee's visit, must by inspection ascertain the actual condition of the premises, so that ignorance due to a failure in inspection will not excuse his failure to give warning, while he owes no such duty to a bare licensee, it being immaterial that it would cost the owner a very slight effort to make an effective inspection and that it would be impossible for the licensee to make such an inspection in the course of his very temporary use of the premises'.

“Here the defective portion of the premises consisted of the very approach which was prepared by the defendant for the deceased's use. *The deceased, as an invitee, had the right to expect to find the premises in a reasonably safe condition and should not be expected to discover defects unusual in a properly prepared business premises.* The alleged defect does not arise from a natural condition of the lands. It is true that if the defective or dangerous condition is obvious so that any reasonably prudent person would be expected to see it and appreciate its danger, the occupier of the land would not be negligent in failing to warn said person of said defect or danger. But it does not appear from the allegations of the complaint that these wires were so located that any reasonable person backing a truck through the alleyway would be reasonably expected to see them, *or if he saw them, to assume that they were highly dangerous.* * * * It also appears that these wires were above eye level—that is, that they were approximately 11 feet

from the ground. Under these circumstances, we are not prepared to hold that the defendant had no duty to warn the deceased of the presence of these wires and of their high voltage or that deceased could be held as a matter of law to be guilty of contributory negligence”.

“It likewise cannot be said that the defendant was free from negligence in permitting this dangerous condition to exist as distinguished from the mere failure to warn. *This approach was prepared for the very purpose for which the deceased was using it. He had the right to expect the defendant to inspect it and to prepare for his coming. One cannot with prudence maintain a highly dangerous condition on a portion of the premises which business invitees are expected to use and travel. It is dangerous and negligent to maintain a high voltage wire across an approach at such a low level that persons reasonably expected to travel there as business invitees will come in contact with it. This would be dangerous even though it was obvious and even though a reasonably prudent person would be expected to see it.* Of course, in nearly every case where the occupier of land warned the invitee of the presence of danger, he could escape liability for any ensuing injury happening to the invitee thereafter. Anyone knowing of the existence of the danger and proceeding anyway might under certain conditions be guilty of contributory negligence. * * *

But the mere fact that these wires might have been so located that the deceased should have seen them did not disclose that the defendant was free from all negligence in maintaining the wires across this approach. * * *

”

In the case of *Kelley vs. Summers*, 210 Fed. 2nd 665, 672, 10th Circuit (Kansas), 1954, two men, Jones and Martin, were victims of an electrical current. Defendant, Kelley, sought to escape liability on the ground of contributory negligence on the part of Jones and Martin.

“The point,” said the court, “is amplified by the argument that Jones and Martin had the clearest view and opportunity to observe the high tension line and to avoid the danger by simply dropping their hold on the hooks and that their failure to keep a proper lookout and assert reasonable care to avoid danger constituted negligence on their part. *Wray was operating the tractor and boom. It was his duty to know the position of the boom, to exercise reasonable care in observing conditions immediately adjacent to the boom, to exercise reasonable care to discover the presence of the high tension line, and to exercise like care to prevent the boom coming into contact with the wire.* The duties of Jones and Martin were to place the hooks in the ends of the pipe lying on the ground, to guide the pipe when elevated to its position on the truck, and then to disengage the hooks from the pipe. *It was not their duty or responsibility to keep a lookout to see that the boom did not come into contact with a high tension wire or other object above the work being done.* * * * ”

In the *Kelley vs. Summers* case it appears that the men who received the charge had the better opportunity to see the wires if they had been looking for them. But their job was such as to keep their attention otherwise occupied, and this prevented their being contributorily negligent.

But suppose a case where a plaintiff knew of the wires, and in fact had worked in close proximity thereto for several weeks. Such is the situation in *Erbes vs. Union Electrical Company*, 353 SW 2nd 659, (Mo.), 1962. This was an action for injuries sustained by a construction worker when a cable he was holding contacted the defendant-electrical company's overhead sub-transmission line. The wires were in plain sight, the plaintiff and other workmen all worked around and under the wires and knew of the wires. However, the plaintiff's foreman said he did not know the wires carried electricity or that they were uninsulated or that they were high-voltage wires. A plaintiff admitted that he had seen the wires but did not know that they were uninsulated and didn't think they carried electricity, although he said he would not have touched them deliberately. He had worked on the job in the vicinity of the wires for about five weeks. Plaintiff recovered a judgment and it was affirmed on appeal.

In *Brown vs. Arrington Construction Company*, 262 Pac 2nd 789, cited at 69 ALR 2nd 182, (Idaho), 1953, the plaintiff was not a business invitee and he knew of the power line and of its danger when he approached the area where the machinery was working near the power line. Even so, the court upheld his recovery for damages. In that case the defendant was hired by the county to remove debris from a canal over which a new bridge was to be constructed. The county loaned one of its employees to the defendant to operate the crane and drag line. The canal ran north and south,

the road, east and west. There was a power line 28 feet above ground carrying 7200 volts of electricity on the south side of the road also running east and west. The crane was placed in a position south of the road and under the power line. It had a 40-foot boom. The plaintiff was sent by the county with a road grader to build a detour around the bridge site so that the flow of traffic would be uninterrupted during bridge construction operations. The crane was east of the canal. About noon plaintiff completed his job and drove the grader a short distance east of the work area and then on foot returned, and approached the drag line. At this point there is a conflict in the testimony as to whether the drag line was then in operation. It was Brown's testimony that it was not and that the bucket was on the ground when he approached. He said that he knew it was dangerous to approach the drag line when it was in operation under the power line. After talking briefly with Skinner, the drag line operator, he started to leave. As he left Skinner put the drag line in operation and moved the bucket. "Brown saw a corner of the drag line suddenly seem to be afire. Contact was made, not knowingly, between Brown and the drag line and he was knocked unconscious and thrown to the ground."

The foregoing cases entirely support the validity of the verdict as to the defendants' negligence and as to the absence of contributory negligence on plaintiff's part. As to the latter proposition, we offer the following reasons:

1. As a business invitee plaintiff was entitled to

expect that the premises were safe for the purpose for which he had been invited.

2. He, in fact, did not know of the existence of the wires.

3. If he had seen the wires, he would not have known they were dangerous, and having seen them, unless some fact had come to his attention indicating that the defendants had not made the wires safe, plaintiff was entitled to expect that they were safe.

That plaintiff's position as a business invitee gives him this protection is emphasized also in the Restatement of Torts, Section 343:

“A possessor of land is subject to liability for bodily harm caused to business visitors by a natural or artificial condition thereon if, but only if, he

(a) Knows, or by his exercise of reasonable care could discover, the condition which, if known to him, he should realize as involving an unreasonable risk to them, and

(b) Has no reason to believe that they will discover the condition or realize the risk involved therein, and

(c) Invites or permits them to enter or remain upon the land without exercising reasonable care

(i) to make the condition reasonably safe or

(ii) to give warning adequate to enable them to avoid the harm. * * .”

In comment (d) the restaters state: "A business visitor is entitled to expect that the possessor will take reasonable care to ascertain the actual condition of the premises and, having discovered it, either to make it reasonably safe by repair, or to warn of the actual condition and the risk involved therein. *Therefore, a business visitor is not required to be on the alert to discover defects * * *. This is of importance in determining whether the visitor is or is not guilty of contributory negligence in failing to discover a defect. * * * .*"

In view of plaintiff's ignorance of the wires, of the lack of notice of danger even if he had seen the wires, of defendants' high degree of responsibility to plaintiff to give him warning and of plaintiff's right to rely upon the defendant to give a warning when there is danger, and in view of the law as above set forth, we submit that the evidence in this case fully and amply support the findings by the jury that respondents were negligent, the plaintiff was not contributorily negligent and that the defendants' negligence was the proximate cause of plaintiff's injuries.

DEFENDANTS' CONDUCT COMES WITHIN THE DEFINITION OF RECKLESS AND WANTON CONDUCT

The jury also found that defendants' conduct was reckless and wanton. The pertinent facts on this issue are that all of the defendants, either directly or through their agents, knew of the danger and then deliberately

failed either to correct the situation or to give plaintiff any warning of the danger. The Restatement of Torts, Section 500, reads as follows:

“The actor’s conduct is in reckless disregard of the safety of another if he intentionally does an act or fails to do an act which it is his duty to the other to do, knowing or having reason to know the facts which would lead a reasonable man to realize that the actor’s conduct not only creates an unreasonable risk of bodily harm to the other but also involves a high degree of probability that substantial harm will result to him.”

“Special Note: The conduct described in this section is often called ‘wanton or wilful misconduct’ both in statutes and judicial opinions.”

“COMMENT:

* * * *

“c. In order that the actor’s conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.

“d. If the actor’s conduct is such as to involve a high degree of chance that serious harm will result from it to anyone who is within range of its effect, the fact that he knows or has reason to know that others are within such range is conclusive of the recklessness of his conduct toward

them. It is, however, not necessary that the actors should know that there is anyone within the area made dangerous by his conduct. It is enough that he knows that there is strong probability that others may rightfully come within such zone.

“e. * * * In order that the breach of such statute shall constitute reckless disregard for the safety of those whose protection it is enacted, the statute must not only be intentionally violated but the precautions required must be such that their omission will be recognized as involving a high degree of probability that serious harm will result * * * .

“f. Reckless conduct differs from intentional wrong doing in a very important particular. While an act to be reckless must be intended by the actor, the actor does not intend to cause the harm which results from it. It is enough that he realizes or, from facts which he knows, should realize that there is a strong probability that harm may result, even though he hopes or even expects that his conduct will prove harmless.

* * *

“g. Reckless conduct differs from negligence in several important particulars. It differs from that form of negligence which consists in mere inadvertence, incompetence, unskillfulness or a failure to take precautions to enable the actor adequately to cope with a possible or probable future emergency in that reckless misconduct requires a conscious choice of a course of action either with knowledge of the serious danger to others involved in it or with knowledge of facts which would disclose this danger to any reasonable man. * * * ”

This section of the Restatement is cited with approval in *Ferguson vs. Jongsma*, 10 Utah 2nd 179. It is also cited with approval in Idaho as appears from the Utah case of *Wood vs Taylor*, 8 Utah 2nd 210.

When the defendants knowingly and deliberately placed and worked the crane so close to 7200 volt wires which were live and uninsulated, knowing that plaintiff and others whom they had invited for their, the defendants', business interest would be exposed to great and substantial harm of the type which in fact did occur, then such conduct comes within the definition of reckless and wanton conduct.

DEFENDANTS PAULSENS' RESPONSIBILITIES AS BUSINESS INVITORS ARE THE SAME AS THOSE OF THE CHURCH

Paragraph 383 of the Restatement (Torts) reads:

"One who does an act or carries on an activity upon land on behalf of the possessor thereof, is subject to the same liability, and enjoys the same immunity from liability, for bodily harm caused thereby to others within and outside the land as though he were the possessor of the land.

"COMMENT:

"a. The words 'acting on behalf of the possessor' are used to indicate that the person in question is acting not only for the purpose of the possessor but also by his direction or consent and therefore by his direction or consent and therefore by his authority. One acting on behalf of

the possessor may do so as a servant or as an independent contractor.”

POINT II

THE EVIDENCE SUPPORTS THE FINDINGS THAT THE SERVICES, OPERATION AND TREATMENT PERFORMED BY DR. PEMBERTON WERE FOR INJURIES SUSTAINED BY PLAINTIFF ON JANUARY 19, 1960, AS A RESULT OF THE NEGLIGENT CONDUCT OF DEFENDANTS PETERSEN AND PAULSEN.

We come now, under Point II, to two of the reasons for the new trial order of the court. A third reason will be discussed under Point III. Inasmuch as the court did not give reasons for its action in the Order itself, we felt somewhat obligated to present the matters discussed under Point I.

Nevertheless, from what the trial court has said, both on and off the record, its only reasons for granting a new trial, together with our comments thereon are as follows:

1. That the plaintiff, in the court's view, did not produce adequate medical testimony to show that Dr. Pemberton treated the plaintiff for injuries received on January 19, 1960.

To support this theory, the court observes that after April 1, 1960, plaintiff did not go back to Dr. Smith

although Dr. Smith testified: "I told him if it continues to hurt him to come in." (R. 492). Thereafter, plaintiff saw no doctors until November (R. 255) when he went to doctors other than Dr. Smith. The court believed that it was possible during this period from April to November that some other injury may have caused the trouble Dr. Pemberton treated, and that one possibility was that plaintiff was injured anew while deer hunting. (R. 340, lines 8-12). The court, in support of this theory, refers to the case of *Alvarado vs. Tucker*, 2 Utah 2d 16. (R. 492). The court was so concerned about this problem that it seriously considered directing a verdict in favor of the defendants, but then decided to submit the case to the jury, but only after it had invited defendant to file motions for judgment, notwithstanding the verdict, if the judgment was "not to the liking of defendants." The verdict was "not to the liking of defendants," and respondents did file motions for judgment n.o.v. The court did not grant their motions, but this problem still bothered the court and it is a reason for granting a new trial as gathered from statements made by the court from the bench during arguments on the post verdict motions and in chambers in the presence of counsel of both sides.

The principal announced in the *Alvarado* case is, we submit, quite inapplicable to this case. In that case, the defendant's liability depended entirely upon whether, at the time he drove his car into the plaintiff, he was exceeding the statutory speed limit of 25 miles per hour. The only evidence produced by plaintiff to prove ex-

cessive speed was a witness who estimated defendant's speed as anywhere from 25 to 30 miles per hour. This court held that such evidence, standing alone, left the court with nothing but speculation and conjecture upon which to determine defendant's speed. The reasoning of the court was that if the only evidence as to speed is from a witness whose testimony was that defendant was as likely to be driving within the speed limit as it was that he was not within the speed limit, then plaintiff had not presented enough evidence from which a fact finder could do anything but speculate. It is a case where *weighing* evidence is impossible, and whatever decision the fact finder made, it would rest upon nothing but conjecture and speculation.

The evidence which supports the findings that Dr. Pemberton's services to the plaintiff were for the injuries plaintiff received on January 19, 1960, is certainly not to be considered in the same class or of the same nature as the speculative nature of the evidence in the Alvarado case. We first observe that there is no need to speculate as to why plaintiff failed to respond to Dr. Smith's invitation to return to him in case of continuing pain and symptoms which originated on January 19, 1960. Plaintiff explained why he didn't return and the explanation was given while the doctor was in the court room and before he was released as a witness. Plaintiff testified: "Well, last time I was to Dr. Smith, he told me I had arthritis in my shoulder and that it was something I would have to live with." (R. 382). After this testimony, the Doctor was excused

without making any effort to rebut this testimony. This was confirmatory of testimony plaintiff gave earlier (R. 252) :

“Q. How long did you keep in touch with Dr. Smith?

A. I went to him about 12 times.

Q. Over what period of time?

A. From the time of the accident until April.

Q. Would that be about the first of April?

A. Yes, sir.

Q. What treatment did he prescribe for you?

A. Oh, he gave me some vitamin shots and prescribed some pills, which I took.

Q. And did this help?

A. No; no—didn't to any extent.

Q. Did he encourage you to—that there was anything else he could do for you by April 1?

A. No. He told me that is all he could do and it is just something I would have to live with the rest of my life and that I had arthritis.

Q. Did he say where your arthritis was?

A. He said it was in the shoulder.”

Before plaintiff took the stand and said what he is here quoted as saying at R. 382, Dr. Smith, at R. 374, on direct examination testified as follows:

“A. Exactly April 1 was the last time I saw him.

Q. And at that time, did you tell him that he

needed no further help from you or any physician?

A. No , I told him to would take a little time for the rest of it to get well and advised him to wait.”

The evidence as to plaintiff’s pain and what he did about it following the injury of January 19, 1960, may be summarized as follows:

(a) Plaintiff testified that from the time of the accident, the more he used his arm and shoulder, the more it hurt, and consequently, he developed a tendency of putting his left hand in his pocket and not using that side any more than he had to. (R. 253-254).

(b) It pained him to shovel, so he avoided shoveling. (R. 254).

(c) His arm would pain from doing most of the duties required of him as a driver and operator of a ready-mix truck. (R. 254).

(d) From the date of this injury, because of its pain, he avoided overtime whenever the circumstances of the work permitted. (R. 259, line 28 to R. 260, line 44; also R. 260, line 20, to R. 261, line 1).

(e) Beginning with plaintiff’s injury of January 19, 1960, and continuing to the present, with a certain amount of relief from the operation performed by Dr. Pemberton, Plaintiff has been unusually nervous and irritable with his wife and children as a result of his frayed nerves, which in turn is caused by the pain. “He

acts like he really doesn't have any control over it," and when he sleeps, instead of being "sound and still" as he was before the accident, he, since the accident, "is constantly turning and jerking around; just moving all night." (R. 350-351).

(f) Dr. Pemberton not only found and removed an inflamed bursa which brought a relief to plaintiff which he had not had since the injury of January 19, 1960 (R. 259, lines 24-27; R. 299-300), but the Doctor also found, independent of the inflamed bursa, that the ligaments of the "ball" between the collar-bone and the shoulder blade were stretched or torn and that adhesions had formed their own scar tissue which stood between the muscle layers and the ligaments around the joint, a condition known as perio-arthritis. These adhesions, the Doctor believed, found their origin more likely not so much from a fall or bump as from a jerking of the muscles such as would occur when they were stimulated by an electrical impulse. (R. 301, lines 3-6; R. 320, lines 22-26). This, of course, is the source of the pain and the disability that has persisted not only since the accident, but has also continued since the operation and is the basis of his permanent partial disability and the source of the pain he will have as long as he lives. (R. 301-303).

2. A second reason for granting a new trial, as expressed by the court off the record, is that defendant produced evidence that plaintiff had hurt his left shoulder on two or three occasions prior to January 19, 1960,

and that this also created a causation problem in the court's mind tending to defeat plaintiff's showing that Dr. Pemberton's services were for injuries other than plaintiff received on January 19, 1960.

Defendants' witness, Jacobsen, personnel manager at Utah Sand and Gravel, testified that one of his duties was to receive injury reports for the State Insurance Fund (R. 432), and that in such capacity he had received a report from plaintiff in November, 1957, which stated:

“While turning truck around in small area, I pulled back muscles of upper back and left shoulder”.

He is reported by this witness as not having seen a doctor at that time. (R. 434). This witness also furnished a report that in July, 1957, plaintiff “had lifted the mixer chute and wrenched his back,” and again no showing of plaintiff having seen a doctor. (R. 434). Finally, in September, 1957, a report was made to witness, Jacobsen, by Haslam and reported by the witness as follows:

“While lifting chute, fellow worker dropped his end of chute causing patient to swing around and be hit by a 2x4 board in left shoulder, causing pain; pain developed more when employee returned to work Monday, 9-16-57, and was lifting chute again”.

For this injury, the witness reported, the plaintiff saw a Dr. Parker. (R. 436).

The witness, Jacobsen, also testified that none of these injuries kept plaintiff from his work. (R. 440). Plaintiff, in explaining the effect of these injuries said they were minor, and had caused him discomfort for only a "day or so." (R. 477-478). Thus, these injuries reported by witness, Jacobsen, were strictly minor accidents and had occurred approximately 21½ years prior to January 19, 1960. This explains why plaintiff had not testified of them earlier in the trial and also why he had said nothing about them to Dr. Pemberton — they were not worth the mention.

Mr. Berry asked Dr. Pemberton that if plaintiff had had previous injuries to the shoulder wouldn't it be a reasonable assumption that one of those injuries had caused the inflamed bursa. The doctor said it was possible, and that doctors always have to rely on the history the patient gives. (R. 311-312). Then later when plaintiff's counsel asked Dr. Pemberton to assume that plaintiff had no difficulty in operating the ready-mix truck and doing the work he was accustomed to do as such a truck driver would he have an opinion as to what really caused the inflamed bursa, Dr. Pemberton replied, "I believe it was, assuming that this history that I got from him was true, it was my judgment, *and still is*, that the inflamed bursa was due to the injury he suffered in January, the year before I saw him—1960." (R. 318).

It is worthy of note at this point, that the bulk of the damages awarded plaintiff by the jury was for shoulder injuries which were independent of the in-

flamed bursa injury. The operation corrected and cleared up the inflamed bursa but the permanent damage to and around the ligaments and muscles is damage that cannot be corrected by surgery or any other treatment now known, and is the source of his continuing pain and disability.

Summarizing the issues under Point II, Dr. Pemberton's services corrected an inflamed bursa in the left shoulder which was injured January 19, 1960. There is negligible evidence submitted by the defendants Paulsen by which it was attempted to prove that plaintiff's inflamed bursa might have happened in 1957, or possibly in October or November of 1960. Both plaintiff and Dr. Pemberton established the bursa pain as originating on January 19, 1960, and whatever the conflict as to when the injury treated by Dr. Pemberton occurred, such conflict was obviously a matter to be resolved by the jury. Inasmuch as the jury gave plaintiff special damages covering Dr. Pemberton's services, we must conclude that the jury resolved the conflict, if any, in favor of plaintiff. This issue in no way involved the more serious damage in plaintiff's shoulder, for which medical science has no cure. There is no basis here for a new trial.

POINT III

THAT THE EVIDENCE SUPPORTS
THE AMOUNT OF THE VERDICT AS TO
BOTH SPECIAL AND GENERAL DAM-
AGES AND NO PART OF THE AMOUNT

THEREOF CAN BE ATTRIBUTABLE TO THE INFLUENCE OF PASSION AND PREJUDICE ON THE PART OF THE JURY.

A third reason for the new trial order, as expressed both on the bench and in chambers, but off the record, the court thought that the jury was under the influence of passion and prejudice in arriving at the amount of damages because the jury at first awarded the plaintiff \$50,000.00 general damages and \$558.80 special damages against the Paulsens, and only \$100.00 general damages and \$58.00 special damages in favor of the Paulsens in their action against Petersen (R. 145), although the court had instructed the jury that damages in the one case must be the same as in the other. When the verdict was read, the court immediately reminded the jury of its instruction on this point, whereupon the jury promptly corrected the error and then rendered its verdict the same in both cases.

We can only speculate as to why the jury did what it did in its first effort; and such speculations are not proper or valid, simply because they are speculations, and are not a sound basis for a new trial. If one is to speculate, however, it is inconceivable to us as to how one can arrive at the inference suggested by the trial court. In view of the jury's subsequent action, wherein it made the correction and rendered judgment *against Petersen for the full amount*, there is only one reasonable inference (other than that the jury at first simply misunderstood the court's instructions), which is that

the jury's first effort was probably the result of sympathy for the defendant Petersen, because he was a laborer undoubtedly without sufficient resources to pay a judgment of \$50,000.00, or of any amount. The jury, however, in spite of such obvious sympathy, corrected itself and rendered the verdict *against* him, thus removing even the ground from which the trial court so dubiously speculates.

When the trial court speaks of passion and prejudice, it, of course, raises the problem of whether the evidence supports the amount of the verdict. We therefore feel obligated to discuss this problem. An excellent statement by this court as to the principles with which we are here involved is found in *Duffy vs. Union Pacific Railroad Company*, 118 Utah 82, 218 Pac 2d 1080:

“Previously decided cases are of little value in fixing present day standards or in assisting courts in determining excessive awards. Both the court and jury are required to deal with many unknown factors and a good guess is about the best that can be hoped for. The permissible minimum and maximum limits within which a jury may operate for a given injury are presently far apart and must continue to be wide spread so long as pain and suffering must be measured by many standards. If the jurors awarded damages which all reasonable persons would conclude were not outside permissible limits, we cannot invade their province by substituting our judgment for theirs, but when we believe that all reasonable minds would conclude the limits have been exceeded, we are permitted to correct the error”.

Surely, in the instant case, all reasonable minds would not conclude that proper limits have been exceeded. The fact is that the jurors followed the evidence very carefully. To attack the amount of the judgment based upon passion and prejudice of the jurors is to ignore the evidence. The facts show that plaintiff's injuries caused pain, especially from the use to which he had to subject his arm and shoulder in his work. The pain caused him to reduce his working time when it was practical to do so. As often as not, he would have to keep on working even though the work aggravated the pain. Even so, there was a drop in his working time of from 10 to 15 per cent. The last full year of work under this handicap showed an actual relative loss converted into wages at his present rate of pay of \$957.00 (Exhibit 16 P), which, with his normal life expectancy, indicates a future wage loss of approximately \$40,000.00. And this does not reflect a further loss by virtue of taking other employment, as recommended by the Doctor, (R. 264) which may only be temporary, but which pays less than what he actually earned in 1962. Then, added to this is the loss of wages during the year 1961, the year he had the operation which amounted to \$1381.00 (Exhibit 16 P).

This evidence treats only of prospective and actual wage loss. Dr. Pemberton said the permanent partial disability was from 10 to 15 per cent. This presents an interesting correlation with the percentage of his reduced working time and future wage loss.

There can be no question that the permanent par-

tial disability of his arm relates directly to his impaired earning capacity. His arm and shoulder hurt him when he works and this fact, along with the weakness, is directly responsible for his wage loss and for the advice of his doctor to seek other employment.

The pain and suffering have taken, perhaps, even a more serious toll in the family than the wage loss, as serious as that is. The effect of this constant, daily irritation from pain has been to make him irritable as a father and husband and has brought a disquieting influence and nervous strain into his home. This shows up not only in his sharp and sudden criticism of his children's normal behavior but also in frequent complaining about his job and of his pain, whereas before the injury he liked his work. He used to be able to handle his job with ease, and he had a relish for the work. After the accident, it was a painful chore and a source of his frequent complainings in the home. Then there was the fact that he was a sound and restful sleeper before the injury, but after, it was fitful and disturbed. There is also an ugly incisional scar at the shoulder which will always be a source of mental suffering when the shoulder is exposed to public gaze. There is also the atrophy of the muscle around the shoulder joint which makes the end of the clavicle more prominent and very tender. These things are all permanent.

This court, as above quoted, has listed the elements, any one or a combination of which have caused jurors, quite properly, to return, in the words of the court, "very

substantial verdicts.” These elements as stated are: large wage losses, considerable medical costs, permanent disability, a loss of bodily function, prolonged pain and suffering.” After giving this list, the court adds, “or a combination of all such consequences.” In the Duffy case, from which this language is taken, the court found none of these elements as listed, yet the court was willing to permit \$8500.00 of the general damages to stand. In the instant case, we have all the elements listed — a large wage loss, permanent disability, loss of bodily function, and prolonged pain and suffering. In the Duffy case the court adds: “Courts in sustaining the verdicts have given consideration to those elements of damages, and in addition, to such factors as the decreased purchasing power of the dollar, the increased cost of living, the possible continuation of the present inflationary spiral, the social betterment of the individual, and the humiliation flowing from the loss of limbs or any other disfigurement.”

In view of all the foregoing, we submit that the jury in this case very carefully considered the evidence as to damages, and applied that evidence with considerable care and judgment to the instructions of the court in reaching its verdict. There was and is no evidence of their being influenced in their judgment by passion and prejudice.

As a final thought on this point, we mention the important fact that plaintiff was entitled to a judgment of punitive damages in this case, in view of the jury's

finding of wanton and reckless conduct, if he had asked for it. And because he did not ask for it, there has not been a breath of talk in this case which would even suggest to the jury that they should return a verdict involving a punishment of the defendants. The record of this case is sound and fully supports the amount of the verdict, independent of any consideration of punishment. When one carefully considers all the evidence one must conclude that "all reasonable persons would conclude that the damages awarded here are not outside permissible limits"; in which case, says the court, "We cannot invade the province of the jury by substituting our judgment for theirs."

POINT IV

THE TRIAL COURT ABUSED ITS DISCRETION IN ITS ORDER GRANTING A NEW TRIAL; AND THE JURY'S VERDICT AND JUDGMENT SHOULD BE RE-INSTATED.

Plaintiff's position is that the record herein entirely supports the verdict of the jury and the right of the jury to render that verdict, and that the court in ordering a new trial exercised a power which was not within its discretion, or within its constitutional right to exercise; and that it is appropriate for this court to give relief from such order at this time by nullifying the new trial order and by re-instating the verdict and judgment thereon.

In *Montgomery Ward and Company vs. Duncan*, 311 US 243, the United States Supreme Court states that Rule 50(b) “was adopted for the purpose of speeding litigation *and preventing unnecessary retrials.*” Where a motion to vacate a judgment raises the same questions as those raised in a motion for a new trial, then disposition by the appellate court of an order vacating the judgment is also determinative of the new trial order. Thus, if an appellate court restores to a plaintiff the verdict and judgment which a trial court has vacated, then the need for a new trial is eliminated. This principle was recognized in *Vearn vs. Crane* (1940, C.C.A. 7th), 114 Fed 896 where the court said:

“It is well known that Rule 50(b) was promulgated largely with the view of avoiding unnecessary new trials, and it may well be that if a motion for a directed verdict raises the same questions as those raised by a motion for new trial, final disposition of the motion for directed verdict likewise will work conclusive determination of the questions presented by the motion for new trial.” See annotation 85 Law Edition, 155 at p. 172.

In *Moist Cold Refrigeration Company vs. Lou Johnson Company* (1957), 249 Fed 2d 246, cert. denied, 356 US 968, 69 ALR 2d 540, the Ninth Circuit Court of Appeals considered the appeal problems created where a trial court simultaneously grants both motions of a party asking for judgment n.o.v. together with a new trial under Rule 50(b). The court summarized the possibilities open to the appellate court as follows:

“Disposition of an appeal, where the trial court granted both a motion for judgment, notwithstanding the verdict, and a motion for a new trial, may take any of three alternative courses: The appellate court may (1) Affirm the trial court’s action in granting judgment, notwithstanding the verdict; (2) remand the case for a new trial, in accordance with the alternative order of the district court; or (3) *hold that the alternative order granting the new trial was an abuse of discretion and reinstate the jury verdict.*”

In the instant case the trial court set aside the verdict and judgment based upon defendants’ motion pursuant to Rule 50 (b). It did not grant defendants’ motion n.o.v. If under Rule 50 (b) it is proper, indeed desirable where a trial court has abused its discretion, for the appellate court to reinstate a judgment for plaintiff and to nullify the new trial order where the trial court has granted judgment to the defendant n.o.v. and also granted a new trial, a fortiori, an appellate court can and should re-instate the verdict and judgment, which has only been set aside, and also nullify the new trial order.

Even before the Utah Rules of Civil Procedure were adopted and at a time when Utah had a statute declaring that a new trial order was not an appealable order, this court recognized in *Hirabelli vs. Daniels*, 44 Utah 88, 138 Pac 1172, that an appellate court should not withhold relief from a trial court’s abuse of its discretion in granting new trials. This court said:

“No matter how often or how whimsical or baseless the ground may be on which the trial court may set a verdict aside and grant a new trial, nevertheless, an aggrieved party will be compelled to accept what the court may choose to allow or impose upon him or abandon his cause or defense; for no matter how often a case may be tried, the trial court, for mere capricious notions that the verdict is too large or too small, may set it aside until a jury is found to respond to the court’s notions of what the verdict and damages should be; and if, perchance, the proceedings on the last trial are without error, neither party can complain. Surely the statute does not contemplate no relief can be granted from such a prostitution of the constitutional trial by a jury.”

Inasmuch as one of the purposes of Rule 50(b) is to prevent unnecessary trials, and in view of the opinion of the Ninth Circuit Court of Appeals that an appellate court may nullify a new trial order and re-instate a judgment which has been set aside under a Rule 50(b) motion, the time has fully arrived for this court to give relief from a trial court’s new trial order without first having to go through a useless retrial before obtaining such relief.

CONCLUSION

The good sense in our request that this court act now in this case to give relief, rather than later, is enhanced by the fact that neither party here contends that a new trial would produce any more or any less

or any different evidence than is now before the court. The same package of facts which the court now has before it will be no different after a new trial. If there is error in the record which has prejudiced the respondents, as they contend, this court can deal with such errors now to a much greater advantage than later, because without the guiding direction of this court we have no reason to hope that the same errors of law would not again be made in a new trial. If, on the other hand, there is no error in the record adverse to respondents, if they have had a fair trial, if they have not been prejudiced, and if the trial court abused its discretion in vacating the judgment and ordering a new trial, it would be most useless and most oppressive for plaintiff to be subjected to a new trial before this court gives relief. We appeal for relief now.

Respectfully submitted,

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