

INDEX

	Page
Summons	iv
Complaint	1
Answer of Defendant Ralph E. Fowler.....	6
Answer of Defendant Bertrand H. Sommer..	8
Answer of Defendant Arrow Sanitary Laundry Co.	10
Reply	12
Order for Substitution of Attorney.....	13
Rule for Judgment	14
Notice of Appeal	15
Grounds of Appeal	16
Appearances	17
Motion for Direction of Verdict.....	111
Colloquy	113
Charge to the Jury.....	115
Defendants Exception to Charge.....	123
Plaintiff's Exception to Charge.....	123
Defendants Request to Charge.....	123
Plaintiff's Request to Charge	124

TESTIMONY FOR PLAINTIFF

Philip Sheridan,	
direct examination	17
cross "	29
direct "	107
cross "	108
re-direct "	109
Henry H. Kessler,	
direct examination	32
cross "	36
re-direct "	38

	Page
David Bernstein,	
direct examination	38
cross "	41
re-direct "	42
re-cross "	42
re-direct "	43
Laurence J. O'Brien,	
direct examination	44
cross "	46
Ralph Fowler,	
direct examination	47
Edward W. Markens,	
direct examination	47
cross "	52
Ambrose F. Dowd,	
direct examination	54
cross "	59
Frank Rocco,	
direct examination	61
Margaret Sheridan,	
direct examination	62
Thos. S. McCabe,	
direct examination	67
cross "	71
re-direct "	74

TESTIMONY OF DEFENDANTS

Arthur P. Sommer,	
direct examination	76
cross "	78
Joseph M. Rector,	
direct examination	81
cross "	87
re-direct "	94
re-cross "	95

	Page
Ralph Fowler,	
direct examination	95
cross "	98
re-direct "	103
re-cross "	103
re-direct "	106

REBUTTAL TESTIMONY FOR PLAINTIFF

Gustave Frommelt,	
direct examination	109
cross "	109
Jacob Goeller,	
direct examination	110

Summons

The State of New Jersey to: Arrow
(SEAL) Sanitary Laundry Co. (a corpora-
tion), Bertrand H. Sommer, trading
as the Arrow Sanitary Laundry Co., and Ralph E.
Fowler.

You are hereby summoned to answer the annexed complaint of Philip Sheridan in an action at law in the Essex County Circuit Court. And Take Notice, that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit, and judgment may be entered against you.

WITNESS, Nelson Y. Dungan, Judge of the Essex County Circuit Court, at Newark, this 6th day of February, A. D., one thousand nine hundred and twenty-eight.

JOHN H. SCOTT,
Clerk.

RICHARD SPITZ,
Attorney.

Essex County Circuit Court

Issued February 7, 1928

PHILIP SHERIDAN,

Plaintiff,

vs.

ARROW SANITARY LAUNDRY CO.
(a corporation), BERTRAND H.
SOMMER, trading as the ARROW
SANITARY LAUNDRY CO., and
RALPH E. FOWLER,

Defendants.

10

*Action
at Law.*

Complaint.

20

Plaintiff, Philip Sheridan, of the City of Newark, County of Essex and State of New Jersey, by way of complaint against the Arrow Sanitary Laundry Co. (a corporation), says that:

FIRST COUNT

1. On June 30, 1927, the defendant Arrow Sanitary Laundry Co. was the owner of a certain automobile bearing 1927 New Jersey car registration license No. X-8743.

30

2. On June 30, 1927, Ralph E. Fowler was the agent, servant or employee of the defendant in and about the operation and control of the aforesaid automobile.

3. On June 30, 1927, the plaintiff was lawfully upon the street or sidewalk on a public street or highway known as Bigelow Street at or near the intersection of that street with Jelliff Avenue, in the City of Newark, County of Essex and State of New Jersey, at or about the northeast corner.

40

Complaint

4. On June 30, 1927, the defendant by its agent, servant or employee, Ralph E. Fowler did bring its automobile to a stop at or near the southwest corner of Bigelow Street and Jeliff Avenue, in the City aforesaid, and it then and there became and
10 was the duty of the defendant by its agent, servant or employee, to properly park or stop the same on the highway so as not to endanger the lives and safety of persons lawfully in or about the same.

5. Disregarding its duty in that behalf, however, the said defendant, by its agent, servant or employee, did so carelessly and negligently stop or park the said automobile at or near the southwest corner of the intersection as aforesaid in such a
20 manner as to cause or permit the said automobile to start along the said thoroughfare and proceed along the said highway in such a manner as to strike the plaintiff with great force and violence, throwing him to the ground or pinning him against another vehicle.

6. The carelessness and negligence of the defendant by its agent, servant or employee consisted in this, in that the said automobile was stopped or parked on an incline, with engine running, in such a manner as to make it a menace to people lawfully
30 on the highway at the time; that the brakes were improperly applied; that the brakes on the said automobile were defective; that the defendant failed to keep proper control or supervision of the said vehicle on the highway at the time; that the defendant improperly stopped or parked the said automobile in such a manner as to make it a menace to the safety of persons using the highway and because of these and other acts of carelessness and negligence, the plaintiff sustained bodily injury.
40

Complaint

7. That the injuries sustained by the plaintiff as the proximate cause of the defendant's carelessness and negligence consisted of compound fracture of the left fibula; injury to the left knee involving the knee joint, in such a way as to impair its use; injury to the back and spine; bruises and contusions about the body and internal injuries; that the aforesaid injuries are of a permanent and lasting character from which the plaintiff will never recover. 10

8. As the result of the said injuries the plaintiff's nervous system was shocked and shattered; he suffered and will continue to suffer for a long period of time from the effects of the said injury; that the plaintiff has been unable to resume his former occupation since receiving the said injuries and will be unable in the future to resume his former duties during the remainder of his natural life; that the plaintiff has lost and will continue to lose such wages and other sums of money through employment, and has expended and will in the future be obliged to expend large sums of money in and about endeavoring to obtain a cure or relief of the injuries suffered by him. 20

WHEREFORE, plaintiff demands of the defendant the sum of One Hundred Thousand (\$100,000) Dollars, together with costs of suit. 30

SECOND COUNT

The plaintiff by way of complaint against Bertrand H. Sommer, trading as Arrow Sanitary Laundry Co., says that:

1. On June 30, 1927, the defendant Bertrand H. Sommer, trading as the Arrow Sanitary Laundry Co. was the owner of a certain automobile bearing 1927 New Jersey car registration license No. X-8743. 40

Complaint

2. On June 30, 1927, Ralph E. Fowler was the agent, servant or employee of the defendant in and about the operation and control of the aforesaid automobile.

10 3. Paragraphs Three to Eight inclusive of the First Count are repeated and re-alleged and made a part of this Count.

WHEREFORE, plaintiff demands of the defendant the sum of One Hundred Thousand (\$100,000) Dollars, together with costs of suit.

THIRD COUNT

Plaintiff, by way of complaint against Ralph E. Fowler, says that:

1. On June 30, 1927, the defendant Ralph E. Fowler was the operator of a certain automobile bearing 1927 New Jersey car registration license No. X-8743.

20

2. On June 30, 1927, the plaintiff was lawfully upon the street or sidewalk on a public street or highway known as Bigelow Street at or near the intersection of that street with Jeliff Avenue, in the City of Newark, County of Essex and State of New Jersey, at or about the northeast corner.

3. On June 30, 1927, the defendant Ralph E. Fowler did bring the said automobile to a stop at or near the southwest corner of Bigelow Street and Jeliff Avenue, in the City aforesaid, and it then and there became and was the duty of the defendant to properly park or stop the same on the highway so as not to endanger the lives and safety of persons lawfully in or about the same.

30

4. Disregarding his duty in that behalf, however, the said defendant, did so carelessly and negligently stop or park the said automobile at or near the southwest corner of the intersection as aforesaid, in such a manner as to cause or permit the

40

Complaint

said automobile to start along the said thoroughfare and proceed along the said highway in such a manner as to strike the plaintiff with great force and violence, throwing him to the ground or pinning him against another vehicle.

5. The carelessness and negligence of the defendant consisted in this, in that the said automobile was stopped or parked on an incline, with engine running, in such a manner as to make it a menace to people lawfully on the highway at the time; that the brakes were improperly applied, that the brakes on the said automobile were defective; that the defendant failed to keep proper control or supervision of the said vehicle on the highway at the time; that the defendant improperly stopped or parked the said automobile in such a manner as to make it a menace to the safety of persons using the highway and because of these and other acts of carelessness and negligence, the plaintiff sustained bodily injury.

6. That the injuries sustained by the plaintiff as the proximate cause of the defendant's carelessness and negligence consisted of compound fracture of the left fibula; injury to the left knee involving the knee joint in such a way as to impair its use; injury to the back and spine, bruises and contusions about the body and internal injuries; that the aforesaid injuries are of a permanent and lasting character from which the plaintiff will never recover.

7. Plaintiff repeats Paragraph Eight of the First and Second Counts and makes it part of this Count.

WHEREFORE, plaintiff demands of the defendant the sum of One Hundred Thousand (\$100,000) Dollars, together with costs of suit.

RICHARD SPITZ,
Attorney of Plaintiff.

10

20

30

40

Answer of Defendant Fowler

ESSEX COUNTY CIRCUIT COURT

Filed February 23, 1928

10	PHILIP SHERIDAN, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> ARROW SANITARY LAUNDRY CO. (a corporation), BERTRAND H. SOMMER, trading as the ARROW SANITARY LAUNDRY CO., and RALPH E. FOWLER, <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>Action at Law.</i> <i>Answer of Defendant Ralph E. Fowler.</i>
----	---	---	--

20 Defendant, Ralph E. Fowler, residing in the City of Newark, County of Essex and State of New Jersey for answer to the complaint herein says as follows:

ANSWER TO FIRST COUNT

1. As the first count purports to allege an action against some one other than defendant, no answer is made thereto, except the denial of all allegations of fault on the part of Ralph E. Fowler.

30

ANSWER TO SECOND COUNT

1. As the second count purports to allege an action against some one other than defendant, no answer is made thereto, except the denial of all allegations of fault on the part of Ralph E. Fowler.

FIRST DEFENSE TO THIRD COUNT

1. The first paragraph is admitted.
 2. On information and belief the second paragraph of the third count is denied and by way of
 40 explanation this defendant avers that plaintiff was

Answer of Defendant Fowler

stepping from the running board of his truck at the time mentioned in the second paragraph, but as to the precise location at that time with respect to the intersection, this defendant has no knowledge or information sufficient to form a belief.

3. The third paragraph of the third count is admitted in so far as it alleges the fact that this defendant stopped his automobile on Bigelow Street in the City of Newark, and admits the allegation of law as to his duty to properly park the same, and furthermore avers that he did properly stop and properly park said automobile. 10

4. The fourth paragraph is denied.

5. The fifth paragraph is denied.

6. This defendant has no knowledge or information sufficient to form a belief as to the matters alleged in the sixth paragraph of the third count, except the allegation that any injury to the plaintiff was proximately caused by this defendant's negligence, and this defendant further denies that he was guilty of any negligence whatsoever. 20

7. This defendant has no knowledge or information sufficient to form a belief as to the matters alleged in paragraph 8 of the first and second counts and accordingly denies the repetition of them made by the seventh paragraph of the third count. 30

SECOND DEFENSE TO THIRD COUNT

Whatever of injury and damage was suffered and sustained by the plaintiff at the time and place mentioned in the complaint was proximately caused by no negligence on the part of this defendant.

KELLOGG & CHANCE,
Attorney of Defendant,
Ralph E. Fowler. 40

Answer of Defendant Sommer

ESSEX COUNTY CIRCUIT COURT

Filed February 23, 1928

10	PHILIP SHERIDAN, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
10	<div style="text-align: center;"><i>vs.</i></div>		<i>Answer of Defendant Bertrand H. Sommer, sued as Bertrand H. Sommer, trading as the Arrow Sanitary Laundry Co.</i>
	ARROW SANITARY LAUNDRY CO. (a corporation), BERTRAND H. SOMMER, trading as the ARROW SANITARY LAUNDRY CO., and RALPH E. FOWLER, <div style="text-align: right;"><i>Defendants.</i></div>		

20 This defendant residing in East Orange, county of Essex and State of New Jersey for answer to the complaint herein says as follows:

ANSWER TO FIRST COUNT

30 This defendant denies ownership in him of the automobile mentioned in the first count, denies that Ralph E. Fowler was his agent or servant on the date mentioned in said first count, and furthermore denies all allegations contained in the first count, except that he admits on information and belief that one Ralph E. Fowler did bring an automobile to a stop near the corner of Bigelow Street and Jeliff Avenue, in the City of Newark, and thereafter collision occurred between said automobile and the plaintiff, and this defendant further denies any responsibility whatsoever for any matters alleged in the first count.

ANSWER TO SECOND COUNT

40 1. Answering the second count this defendant denies that on the date therein mentioned he was trading as the Arrow Sanitary Laundry Company.

Answer of Defendant Sommer

and avers the fact to be the Arrow Sanitary Laundry Company was a corporation at that date, except as thus admitted the first paragraph is denied.

2. The second paragraph of the second count is denied.

3. The third paragraph is denied and this defendant disclaims any personal connection with or responsibility for any of the matters inaccurately alleged by the second count.

10

ANSWER TO THIRD COUNT

As the third count does not properly state a cause of action against this defendant or anyone of a similar name to this defendant, or to any business formerly conducted by this defendant, no answer is made thereto other than a disclaimer of any personal interest in or responsibility for any matters alleged in the complaint.

20

SECOND DEFENSE TO ALL COUNTS

By way of explanation of the foregoing facts this defendant avers that prior to the date mentioned in the complaint the Arrow Sanitary Laundry Company, formerly conducted by this defendant as an individual, had been incorporated and this defendant as a matter of law cannot be held answerable for any claims which any person may have against the Arrow Sanitary Laundry Company, a corporation; and furthermore on information and belief this defendant avers that the injury to the plaintiff was not sustained under circumstances for which the Arrow Sanitary Laundry Company, a corporation, could be held liable.

30

KELLOGG & CHANCE,

*Attorneys of Defendant, Bertrand H. Sommers,
sued under the name Bertrand Sommer, trading
as Arrow Sanitary Laundry Co.*

40

Answer of Arrow Laundry Co.

ESSEX COUNTY CIRCUIT COURT

February 23, 1928

10	PHILIP SHERIDAN, <i>Plaintiff,</i>	}	<i>Action</i>
	<i>vs.</i>		<i>at Law.</i>
	ARROW SANITARY LAUNDRY CO. (a corporation), BERTRAND H. SOMMER, trading as the ARROW SANITARY LAUNDRY Co., and RALPH E. FOWLER, <i>Defendants.</i>	}	<i>Answer of</i>
			<i>Defendant</i>
			<i>Arrow Sani-</i>
			<i>tary Laundry</i>
			<i>Co., a</i>
			<i>corporation.</i>

20 Defendant, Arrow Sanitary Laundry Co. having a place of business at 338 Third Avenue, Newark, N. J., for answer to the complaint herein says:

FIRST DEFENSE TO FIRST COUNT

1. The first paragraph of the first count is admitted.
2. The second paragraph of the first count is admitted.
- 30 3. This defendant has no knowledge or information sufficient to form a belief as to the matters alleged in the third paragraph of the first count.
4. All allegations of fact of the fourth paragraph of the first count up to and including the words "City aforesaid" are admitted, but the remaining allegations being as to plaintiff's conclusions of law are neither admitted nor denied.
5. The fifth paragraph of the first count is denied.
- 40 6. The sixth paragraph of the first count is denied.

Answer of Arrow Laundry Co.

7. The seventh paragraph of the first count is denied, except that this defendant has no knowledge or information sufficient to form a belief as to the extent of any injury sustained by the plaintiff.

8. This defendant has no knowledge or information sufficient to form a belief as to the matters alleged in the eighth paragraph of the first count.

10

SECOND DEFENSE TO FIRST COUNT

Whatever of injury and damage were suffered and sustained by the plaintiff at the time and place mentioned in the complaint was without any negligence or fault on the part of this defendant, or any person for whom it is responsible.

ANSWER TO SECOND COUNT

20

The second count, alleging no cause of action against this defendant, this defendant makes no answer thereto other than the denial of fault on the part of Ralph E. Fowler named therein.

ANSWER TO THIRD COUNT

The third count, alleging no cause of action against this defendant, this defendant makes no answer thereto other than the denial of fault on the part of Ralph E. Fowler named therein.

30

KELLOGG & CHANCE,
Attorneys of Defendant,
Arrow Sanitary Laundry Co., a corporation.

40

Reply

ESSEX COUNTY CIRCUIT COURT

Filed February 25, 1928

10

PHILIP SHERIDAN,

*Plaintiff,**vs.*

ARROW SANITARY LAUNDRY CO.

(a corporation), BERTRAND H.

SOMMER, trading as the ARROW

SANITARY LAUNDRY Co., and

RALPH E. FOWLER,

*Defendants.**Action
at Law.**Reply.*

20

Plaintiff denies each and every allegation contained in the defendants' answers.

RICHARD SPITZ,
Attorney of Plaintiff.

30

40

Order for Substitution of Attorney

ESSEX COUNTY CIRCUIT COURT

Filed December 15, 1928

PHILIP SHERIDAN,

*Plaintiff,**vs.*ARROW SANITARY LAUNDRY CO.
(a corporation), BERTRAND H.
SOMMER, trading as the ARROW
SANITARY LAUNDRY Co., and
RALPH E. FOWLER,*Defendants.*

10

*Action
at Law.**Order for
Substitution
of Attorney.*

20

It being represented to the court that the plaintiff desires to substitute William E. Holmwood of Newark, New Jersey, as his attorney in the place and stead of Richard Spitz, attorney of record, and the consent of said Richard Spitz being hereto attached;

It is thereupon on this 5th day of December, 1928, on motion of William E. Holmwood, ORDERED, that the said William E. Holmwood be and he hereby is substituted as attorney for the plaintiff in the place and stead of Richard Spitz.

30

(Signed) WORRALL F. MOUNTAIN,
Circuit Court Judge.

I consent to the entry of the foregoing order.

(Signed) RICHARD SPITZ,
Attorney for Plaintiff.

40

Rule for Judgment

ESSEX COUNTY CIRCUIT COURT

Filed December 15, 1928

10	PHILIP SHERIDAN, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law. Rule for Judgment.</i>
	<i>vs.</i>		
	ARROW SANITARY LAUNDRY CO. (a corporation), BERTRAND H. SOMMER, trading as the ARROW SANITARY LAUNDRY CO., and RALPH E. FOWLER, <div style="text-align: right;"><i>Defendants.</i></div>		

20 The above entitled cause having been tried before the Honorable Worrall F. Mountain and a jury on Wednesday, the 5th day of December, 1928, the trial lasting until the 6th day of December, 1928, when the jury rendered a verdict in favor of the plaintiff and against the defendant Arrow Sanitary Laundry Co. a corporation, and Ralph E. Fowler in favor of the plaintiff, in the sum of Thirty Thousand Dollars (\$30,000);

30 It is thereupon on this 6th day of December, on motion of William E. Holmwood, Attorney for Plaintiff, ORDERED, that judgment final be and the same is hereby entered in favor of said plaintiff and against the defendants named in the sum of Thirty Thousand Dollars (\$30,000), together with costs of suit, to be taxed by the Clerk of this court.

On motion of

WM. E. HOLMWOOD,
Attorney for Plaintiff.

Notice of Appeal

ESSEX COUNTY CIRCUIT COURT

Filed December 31, 1928

PHILIP SHERIDAN,

Plaintiff,

10

vs.

ARROW SANITARY LAUNDRY CO.

(a corporation), BERTRAND H.

SOMMER, trading as the ARROW

SANITARY LAUNDRY CO., and

RALPH E. FOWLER,

*Defendants.**Action
at Law.**Notice of
Appeal.*

To:

20

William E. Holmwood, Esq.,

Attorney for Plaintiff.

Sir:

TAKE NOTICE that the defendants appeal to the Court of Errors and Appeals of New Jersey from the whole of the judgment entered in the above entitled cause, and that they will hereafter, in compliance with law and the rules of court in such case made and provided, serve and file grounds of appeal.

30

Dated, December 27th, 1928

Respectfully yours,

KELLOGG & CHANCE,

Attorneys of Defendants.

Endorsed:

Service acknowledged December 28th, 1928.

WM. E. HOLMWOOD,

Attorney for Plaintiff.

40

New Jersey Court of Errors and Appeals

<p>10 PHILIP SHERIDAN, <i>Plaintiff-Respondent,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>ARROW SANITARY LAUNDRY CO., <i>et al.,</i> <i>Defendants-Appellants.</i></p>		<p><i>Action at Law.</i></p> <p><i>On Appeal from Essex Circuit Court. Grounds of Appeal.</i></p>
--	--	---

20 The defendants-appellants Arrow Sanitary Laundry Co. and Ralph C. Fowler state the following grounds of appeal:

1. The trial court erred in denying defendants' motion for a direction of a verdict.

2. The trial court erred in refusing to charge defendants' second request to charge.

3. The trial court erred in refusing to charge defendants' sixth request to charge.

Dated, January 12th, 1929.

30 Respectfully yours,

KELLOGG & CHANCE,
Attorneys for Defendants-Appellants.

To:

William E. Holmwood, Esq.,
Attorney of Plaintiff-Respondent.

Endorsed:

Service acknowledged January 12 1929.

40 WM. E. HOLMWOOD,
Attorney of Plaintiff-Respondent.

Philip Sheridan, direct

ESSEX COUNTY CIRCUIT COURT

December 5, 1928

PHILIP SHERIDAN,

Plaintiff,

vs.

ARROW SANITARY LAUNDRY COM-
PANY, BERTRAND H. SOMMER,
and RALPH C. FOWLER,

Defendants.

10

*Action
at Law.*

Before Hon. Worrall F. Mountain, *J.*, and a jury.
For the plaintiff appears William E. Holmwood.
For the defendants appear Kellogg & Chance (by
R. Robinson Chance).

20

(A jury is called and sworn.)

Mr. Holmwood opens for the plaintiff.

Mr. Chance opens for the defendants.

PHILIP SHERIDAN, plaintiff, sworn in his own
behalf.

Direct examination by Mr. Holmwood.

30

Q What is your address? A 118 Madison
avenue.

Q Newark? A Irvington.

Q What was your business on the 30th day of
July, 1927? A Chauffeur for Mahon's Express.

Q As chauffeur were you operating a truck for
them on that day? A I left the garage that morn-
ing to go to work for that company.

Q Did you have a delivery at the Bernstein
Furniture Company? A I did.

40

Philip Sheridan, direct

Q Where is that? A Jelliff avenue and West Bigelow street.

Q Is the loading platform on Bigelow street or Jelliff avenue? A On Bigelow street.

10 Q How far below Jelliff avenue is that loading platform? A I should judge about twenty-five feet.

Q On the corner? A From the corner, yes.

Q On which side of Bigelow street is it? A On the left as you turn up the corner.

Q Would that be the north or the south side, do you know? A I don't know.

Q What direction? A It is on the lefthand side.

20 Q Going down? A Going down towards the railroad tracks.

Q Now, you were injured there that morning, were you not? A I was, severely. I was.

Q After you were injured where were you taken? A I was taken to St. Barnabas' Hospital.

Q How were you taken there? A By Mr. Bernstein.

30 Q In an automobile? A In a passing car; he was the man who took me from between the two cars when I was hit.

Q When you got there who attended to your injuries? A They wanted me to sign papers to go on the operating table to cut my leg off and as long as I had the strength to stand for it I wouldn't stand for it and I wanted to go to another hospital—

Mr. Holmwood. I object to that and I ask that the answer be stricken out.

40

The Court. Strike it out.

Philip Sheridan, direct

Q Did you get in touch with another physician? A A man I worked with I asked to take me to St. James' Hospital.

Q How long were you there? A I wasn't there more than half an hour.

Q You were taken to St. James' Hospital? A 10
I was taken to St. James'.

Q Who treated you there? A Dr. McCabe.

Q How soon after you got there did he see you?
A That I couldn't say, because after I got to St. James' Hospital I was so weak I must have gone right off.

Q You mean you lost consciousness? A I lost consciousness.

Q What was the next thing you knew after you got there? A I knew I was tied up and swing up to the ceiling with weights on my leg. 20

Q Did you see Dr. McCabe there? A I saw Dr. McCabe.

Q Do you know whether that was the same day?
A That was the same afternoon.

Q How long did you lay there with your leg tied up, as you describe? A Five and a half weeks.

Q (*By the Court.*) Which leg was that? A 30
The left leg.

Q (*By Mr. Holmwood.*) How long were you in the hospital altogether? A Two months and a half.

Q At St. James'? A At St. James' Hospital from June 30th until September 12th.

Q As soon as you returned from the hospital were you back there at all? A I have been back there a number of times.

Q To merely stay, or for treatment? A For 40
treatment.

Philip Sheridan, direct

Q Did you stay over night at any time? A No.

Q On an average, after you left the hospital, how many times a month did you return to the hospital? A I had to go down there once a week.

10 Q Was that for the treatment of your leg? A To have a doctor go over the leg and see how it was.

Q How long did you undergo that treatment? A Quite a while, for six or seven months and from there I was to go to Dr. McCabe's office after I left St. James'.

Q After you stopped going to the hospital you had to go to Dr. McCabe's office? A Yes, sir.

20 Q How often did you go there? A Once a week at first and then it came down to twice then three times a month.

Q Are you under any treatments now with your leg? A The leg has to be massaged.

Q Do you go to the doctor's? A I go occasionally, but not to Dr. McCabe. I go to a doctor in Irvington, because I can't get down there. I am subject to nervousness, and my wife has to take me down there.

30 Q Where is it in Irvington from your home? A About a block and a half away.

Q What is his name? A Dr. Goeller.

Q How often would you say you have consulted Dr. Goeller? A Sometimes twice a week, according to how I get those feelings.

Q When was the last time you saw him for these injuries? A About four weeks ago.

40 Q About four weeks ago? A Then I had the medicine renewed, when I had those feelings coming on again.

Philip Sheridan, direct

Q What was the medicine for? A For the nerves.

Q Were you injured anywhere else besides the leg? A It seems to me that my whole left side at times, my hip, I have lost all my teeth, my teeth gradually fell out. 10

Q All of the teeth? A On the top thirteen fell out.

Q Any of your lower jaw? A Only two one on each side.

Q How soon after the accident did this nervousness affect you? A Right after I left the hospital.

Q How did it affect you? A It comes to me sudden at nights. I cannot sleep, I have to get up and sit in the chair with my foot on another chair. 20

Q Have you worked at all since the accident? A No, sir; I have not.

Q Did you have any injury to any other part of your body than the leg, the thigh? A Only I have pains running up my shoulder.

Q What part of the body? A In the back.

Q Indicate where this pain affects your back, pointing from what point to what point so we can get an idea. A The pain starts here (indicating) and runs all the way up and reaches in here (indicating). 30

Q Under the shoulder blade? A Yes, weather like this it is more severe than in dry weather.

Q Have you suffered from that pain frequently since you were in the hospital? A I always had them pains.

Q Every day? A All the time. They never leave me.

Q Continuous pain? A All the time, running 40 up and down to the knee.

Philip Sheridan, direct

Q The leg, have you suffered any pain in the leg? A From the knee up. From the knee down I have no feeling at all. It is all from the knee up to the hip and from the hip up to the shoulder blade.

10 Q Have you done anything to the lower part of your leg, from the knee down to ascertain whether or not you have any feeling in that? A The leg is there for anyone to do that.

Q Have the doctors tested it? A Yes, sir.

Q You cannot feel anything from the knee down? A No.

Q While you are being treated in the hospital for this leg do you suffer pain? A Always.

20 Q You say your left leg was suspended. Can you describe to the jury just how it was suspended? A What do you mean by that.

Q Tell us how that was trussed up. A The leg was up in that manner (indicating) with weights holding it here (indicating) and braced down here (indicating) to keep the leg up and pulling at the same time.

Q Where was the other leg? A Laying alongside of it.

30 Q That was laying on the level? A That was laying on the bed.

Q You say you were that way for five and a half weeks? A In that position for five and a half weeks and I was in a cast for six weeks.

Q Were you, during that five and a half weeks, able to do anything for yourself? A By no means.

Q Was a nurse taking care of you? A They were there taking care of me.

40 Q Day and night? A Day and night.

Q How were you fed during that period? A

Philip Sheridan, direct

Well, I had to feed myself as much as I could.

Q Were you able to feed yourself? A When I was able to do it myself; before that the nurse done it.

Q After you returned to your home, which was two and a half months, were you able to help yourself at all? A I was on crutches all the time, I couldn't go upstairs to the bedrooms; I was on crutches until I got the brace. 10

Q How long were you on crutches? A From September 12th until June 30th, that is when I got the brace on my leg, then I was on crutches a week after until I started to go around with a cane and I have had a cane ever since.

Q When you first started to use the brace a year after the accident, you still used crutches a week after until you got used to the brace? A Yes. 20

Q Then, were you able to discard the crutches entirely? A I afterwards did that until I got more used to the brace.

Q Can you walk now without the aid of the brace or any other artificial assistance? A I could walk without a cane but it throws me to one side, and I am always afraid because if the bars on the hinges break it means my leg will go and without the brace the leg is no use, it will sway anyway with me. 30

Q Indicate to the jury just what section of your leg was broken. A From the knee up.

Q Roll up your trousers.

(Witness exhibits leg to jury.)

A Without the brace the leg will throw me. If this comes loose (indicating) and this comes loose I am practically useless. 40

Philip Sheridan, direct

Q So that you find it necessary to have the assistance of a cane in addition to a brace at the present time? A I have to have it because I am only depending on a lace.

10 Q Can you with the aid of a cane and with that brace go up and downstairs? A I can, slowly.

Q Do you have to use other assistance other than a cane? A The banisters.

Q After you returned home from the hospital were you able at first to do anything for yourself? A No, I wasn't able to do anything for myself at all.

Q Who took care of you then? A My wife.

Q Have you any children? A Yes, I have three.

20 Q What are their ages?

Mr. Chance. I object.

The Court. Sustain the objection.

Q Was anyone else in the family other than your wife rendering any assistance to you? A My mother was there for awhile, when she got a chance.

30 Q Did you employ any nurse to help you after your return from the hospital? A I had no means to do that.

Q Then, your mother or your wife took care of you practically day and night? A Yes, sir.

Q How long did they have to give that care? A That was all the time until I got the brace.

Q Now, since you have the brace you are able to do something for yourself? A I can get around the house; that's as far as I go, and then there is the worriment of the leg.

40 Q Before the accident were you active? A Always.

Philip Sheridan, direct

Q (By the Court.) Were you healthy and well before the accident? A Always.

Q (By Mr. Holmwood.) The kind of work that you are called upon to do on this truck, was it heavy or light work? A Very heavy.

Q Describe what your duties were. A I would be sent out in the morning, it would be a car of steel or furniture, and it didn't make any difference what it was I had orders to do it. 10

Q Did you insist on loading and unloading? A I never insisted, I always did it myself.

Q What kind of amusement did you follow before the accident? Were you active in any sort of amusements? A Always. Me and the wife when we had a chance went out to dances, and different things, amusements, when I found I had time after working, I would go home and go out. 20

Q You haven't been able to do that now? A No, it seems to annoy me now. I have tried several times and they had to take me home again; it seems to be on my mind, I can't go out that way no more.

Q Now, you say this nervousness you complain of prevents you from sleeping. Does it affect you in any other way? A It gets me during the day. I can be sitting in the front room with the radio on and all of a sudden it just gets me, I have to go up and lay down and I will practically be that way maybe an hour. 30

Q How is your appetite? A Pretty fair now, more so than it was before.

Q Have you lost any weight? A Around sixteen to nineteen pounds.

Q Did you give us your age? A My age?

Q Yes. A I was forty years old September 26, last. 40

Philip Sheridan, direct

Q That would make you 39 at the time of the accident? A Yes, sir.

Q The morning of this accident you were making a delivery to Bernstein Furniture Company?

A Yes, sir.

10 Q Where did you leave your truck just before the accident? A Right into the driveway, to the side of the building or platform.

Q Where is this platform with reference to Bigelow street? A Right off Bigelow street; you go right off the sidewalk.

Q This platform faces Bigelow street or the driveway? A Bigelow street, it is up against the building.

20 Q When you were backed into the platform where was the front end of your truck? A Right on West Bigelow street.

Q Into Bigelow street? A Yes, sir.

Q Did you make your delivery? A I made my delivery.

30 Q Then, what did you do? A I got signed for and I walked out on Jelliff avenue, turned to my left and walked down to my truck. I walked over to my truck and I put my hand in to throw the ignition key on and that's as far as I got when I was smashed into by the truck.

Q Where did the crash come? A It come and caught me here (indicating) and drove me part way under the truck.

40 Q Were you facing the object that hit you or facing the truck? A I was facing the truck. I had walked over to the truck and I put my hand down to throw the ignition key on and that was the position I was in when I was hit.

Philip Sheridan, direct

Q How far into Bigelow street had your truck projected? A It was so sudden I think that I don't know.

Q This loading platform, does it reach the curb? A No, my truck is up against the building.

Q The loading platform is between the building and the sidewalk? A No, the truck was up against the other. 10

Q The loading platform was within the wall of the building then? A Yes, sir.

Q So, your truck was right up against the building and extended across the sidewalk into the street? A Yes, sir.

Q How much in the street beyond the curb did it extend? A About two feet behind the front wheel. There is the curb (indicating) and there is my motor right there; I just stepped off. 20

Q Was the greater part of your truck between the curb and the building or was it beyond the curb into the street? A Between the curb and the building.

Q How much of your truck was in the street itself? A About five or four feet.

Q The point where you stood to lean into your cab to turn on the ignition, was that in the street or where? A Well, it was partly on, but I had one foot on the curb. 30

Q You had one foot on the curb? A Yes, I was going right over, because it was right alongside of the curb.

Q Were you conscious after this struck you? A After I was pinned all I could remember is that I hollered for help, and hollered as loud as I could and Mr. Bernstein is the man who came to my aid.

Q Did you see Mr. Fowler there at that time? A No. 40

Philip Sheridan, direct

Q Only Mr. Bernstein? A He got me out when they separated the trucks.

Q He took you to St. Barnabas' Hospital? A Yes, sir.

10 Q You say you came from the Jelliff avenue side, is that where the office is of this Bernstein Furniture Company, with the receipt? A Yes, sir.

Q Then you turned the corner and went down to your truck? A Yes, sir.

Q As you made that turn did you observe whether there were any vehicles in the street? A There was nothing over there at all.

Q There wasn't anything at all there? A No.

20 Q You looked, did you? A Just the same as an average man would come out, his mind was on the way he was going.

Q Where did you look when there was nothing there? A When I come out of a building I put my receipts in a paper and walked around the sidewalk down to my truck.

Q What street would you be looking into as you turned the corner? A As I turned the corner I looked at my receipts.

30 Q What street would you be looking into when you say you looked? A Into West Bigelow street.

Q Were your receipts in your pockets? A As I turned the corner.

Q How many feet would that be from where your truck was standing? A About twenty-five feet.

Q Did you walk or run to your truck? A I walked right down to my truck.

40 Q Did you hear any sound before the collision? A No.

Philip Sheridan, cross

Q Do you know whether or not there is a grade there on Bigelow street? A Oh, there is a grade there.

Q You do not know how much it is, do you?
A I don't know; driving a heavy truck I have no occasion to go up those grades.

10

Cross examination by Mr. Chance.

Q Did you see this Arrow Laundry truck at any time before you were struck? A Before I was struck I saw no truck.

Q Did you hear the Arrow Laundry truck at any time before you were struck? A No, sir.

Q Did you hear any other vehicle, the Arrow Laundry Company's truck or anyone else pass just before you were struck? A No, sir.

20

Q From the time you left the office at the corner of Jelliff avenue and West Bigelow street and went the distance from the office door to the walk on Bigelow street and from there on down to your truck, how many feet do you say you travelled? A I should judge about twenty-five feet.

Q Twenty-five feet your truck was from the corner? A Yes, sir.

Q How much more from the corner to the door?
A The corner of the door is right there practically as you turn, the door.

30

Q Was your health good before the accident?
A My health was good.

Q Were you involved in an accident on Mulberry street and River street in Newark on January, 1925? A I was.

Q Your truck and a trolley car came together?
A A trolley car hit my truck.

Q What injury did you get from that? A None at all.

40

Philip Sheridan, cross

Q No injury whatever from that? A No, sir.

Q Didn't you make a claim against the Public Service Railway Company that you were injured?

A I did not.

Q Didn't you claim \$350 settlement of injuries?

10 A It was necessary for the time I was in the hospital; I was shocked and that was what they had to pay the hospital and doctors' bills.

Q How long were you in the hospital from that injury? A About a week and a half or two weeks.

Q Then, you did sustain some injury at that time? A There was no injury, I could get right out, but they just held me there.

20 Q What did they pretend to be treating you for at the hospital during the time you spent in the hospital in 1925? A General shaking up, as far as I can remember.

Q Nervous? A No, it didn't bother me, the nerves.

Q Your legs? A No.

Q What was it? A They just held me there.

30 Q You do not know what you were supposed to be held for? A They just held me on account of the way I was hit, they took me out of the cab, but nothing happened to me as far as my health or limbs were concerned because I worked a good many years after that.

Q How did you get out of the bus after the accident, did someone help you out? A They helped me out of the truck.

Q Did you tell your counsel about that injury? A I had no injury.

40 Q Why didn't you get out of the truck yourself at that time instead of being helped out, if you were not injured? A If you were hit and

Philip Sheridan, cross

knocked down yourself someone would come and pick you up, wouldn't they?

Q I don't know. A I worked after that unloading cars of steel and furniture and all such stuff afterwards just the same; it was no trouble to me. 10

Q Did you get physical injuries in any other accident before this one? A I did not.

Q Now, what doctors have treated you from the accident involved in this case up to date? A Dr. McCabe treated me.

Q Is that the only doctor who treated you? A He was treating me all the way through and I was treated by Dr. Goeller when it was too far for me to get to Newark. 20

Q When did you quit your treatment with Dr. McCabe? A I was down to Dr. McCabe about three weeks ago and you were there yourself when I was there.

Q Were you there for treatment on that occasion or to be examined by the doctor produced by me? A I was going down there to have the leg looked over.

Q You were not down there for treatment by Dr. McCabe, were you? A He had some ray he put over the leg. 30

Q Did he do so on that occasion? A No.

Q When did Dr. McCabe last treat you? A The last time he seen my leg?

Q No, the last time Dr. McCabe treated you. A About five or six weeks ago.

Q You do not know what struck you at that time, do you? A No, I do not. 40

Henry H. Kessler, direct

HENRY H. KESSLER, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood.

Q You are a practicing physician of this city?

10 A I am.

Q Connected with what institutions? A I am assistant orthopedic surgeon of the Newark Beth Israel Hospital, Newark City Hospital; on the orthopedic staff of the Home for Crippled Children and consulting orthopedic surgeon to the Essex County Hospital at Overbrook and am medical director of the New Jersey Rehabilitation Clinic and advisor to the Workmen's Compensation Bureau.

20 Q Have you any speciality? A Orthopedic surgery.

Q You have examined the plaintiff in this case, Philip Sheridan, have you not? A I have.

Q How many times have you examined him?

A Three times.

Q At my request you made a report of these examinations? A I did.

Q When did you first see him? A In March of this year at the Workmen's Compensation Bureau at No. 9 Franklin street in Newark.

30 Q What did you find out as to his condition?

A He was suffering from the end result of a mal-united fracture of the left femur, or thighbone at its lower third with thickening and deformity at the site of fracture; with stiffness of the knee; with shortening of the entire leg amounting to about an inch and a half; with a tilting of the pelvis, which was a compensatory position and with an inflammatory condition of the muscles of the left thigh and buttock, which we call myositis. His
40 most serious disability resulting from the injury

Henry H. Kessler, direct

was a recurvation of the knee, a bending backwards of the knee. When he put his full weight on the entire leg, standing in a vertical position, the knee would bend backwards, and this was the most disabling condition of his injury.

Q Has he firm union there at the site of fracture? A I think union is formed clinically, I haven't seen the X-rays. 10

Q Then, it is the recurvation or backward tilting of the knee which causes instability of the leg? A Yes, the line of great weight bearing has been thrown out of gear.

Q Is that a permanent condition or not? A Permanent and irremedial.

Q It has been suggested that possibly an operation could help this man out. A I would not operate on him if he was my patient and I would not let anyone operate on me if I had the same condition. 20

Q He has complained of lack of feeling in the leg below the knee, what do you say about that?

A He has some diminution of sensation below the knee, but he also has a diminished sensation of the entire left side of his body, although it is more marked, that is, the leg sensation is more marked below the knee joint. He also has diminished sensation over the entire left side of his body. 30

Q What do you attribute that to? A To two things: the loss of sensation below the knee I believe is due to an injury to one of the abduction nerves, the loss of sensation over the left side of his body I believe is due to his nervous condition which is further accentuated by the anesthesia or loss of sensation or diminished sensation over the eyeballs and over the pharynx or throat. 40

Henry H. Kessler, direct

Q Did you make any tests to determine this anesthesia? A Just the objective tests of running a piece of wool or cotton over the side of the body and comparing it with the rest of the body and then the use of a pin and pin pricks to see
10 whether or not sensation was as definite on one side of the body as it was on the other and there seemed to be a very definite line of demarkation in the very center of his body from the top of his head to the bottom of his feet with the exception that sensation below the knee was more reduced on the left side than it was above the knee.

Q Did you find any evidence of injury to the back? A I found no injury on him, but he had this inflammatory condition of the muscles of his
20 back and the muscles of his thigh region generally. There is local tenderness and pain on movement of the same in all directions.

Q He has complained of pain extending up his back on the left side and just below the shoulder blade. Did you find anything that would cause such a condition? A He has tenderness over the muscles in that region and that I believe is due to the inflammatory condition of the muscles.

Q That in turn was due to what? A A condition of infection lighted up by the injury.
30

Q Was there any infection in this case? A By infection I do not mean local infection in the injured parts, but a focus of infection, a site of infection somewhere in the body which was feeding poisonous pus or defective material to that part of the body which because of this lowered resistance took it up. For example, pyorrhea of the mouth or infected tonsils would give that condition if an
40 injury caused at a local point would lessen resistance.

Henry H. Kessler, direct

Q In other words, if I understand you, the effect of a severe injury which you found in this man's leg upon a previous condition of infection would be to light it up or increase it? A Light it up or aggravate it.

Q Aggravate the condition generally throughout the system? A It would cause a lowering of the general resistance, more particularly than the site where the injury occurred. 10

Q He has complained of his nervous condition. To what would you attribute that?

Mr. Chance. I object to that question because that is too indefinite.

Q You found in your examination evidence of nervousness, did you not? A Yes. 20

Q What evidence did you find of that? A He was markedly apathetic and depressed and except the tremor of the extremities on the left side and a tremor of the facial muscles about the eyes and lips, there was a general increase in the reflexes of the entire body.

Q To what did you attribute that condition? A Both to the injury and circumstances surrounding the injury and following it.

Q Now, in your opinion will this man ever be able to resume his occupation as a truck driver? 30

A Of course, that is a very difficult question. It depends on the man himself, but I do not believe so.

Q Well, you have stated that the injury to the knee, the recurvation is permanent, is that true?

A The only thing I can answer in regard to that question is this: If that man was placed with me for training I would advise against it and advise that he be given work at something where he could be seated. 40

Henry H. Kessler, cross

Q Work that he could carry on while being seated would be all the work he would be eligible for in your opinion? A In my opinion that is what I would recommend.

10 Q Having in mind the nervous reaction of this condition what would you say as to the effect that might have on such employment?

Mr. Chance. I object to that as too speculative.

Q Would have then. A I don't know. All I can say is that during this period I have observed him from March of this year to the present date I have seen him only three times and he has not shown much of a change in his general mental attitude and general mental state; they have just
20 been about the same and it is very difficult to prognosticate any kind of mental condition.

Q What was the first date that you saw him?
A I believe it was March 4th, 1928.

Q You have seen him three times since then?
A Yes, sir.

Q Has there been any improvement in his condition from the first time you saw him until the last time? A No, his condition was about the same; perhaps he was more apathetic about his own
30 future or his own possibilities.

Q What does that indicate to you? A It doesn't indicate any improvement in his condition.

Q What would be the cause of his apathy? A His nervous condition, his mental state.

Cross examination by Mr. Chance.

Q You have been in court most of the morning when Mr. Sheridan was on the stand? A I was
40 in while he was on the stand, not the entire time, but while he was on the stand.

Henry H. Kessler, cross

Q Was his demeanor while you saw him on the stand substantially the same as it was at the time when you saw him on these three occasions? A I think he was rather much brighter than at any time I have seen him.

Q When was it you saw him last previous to to-day? A About a week or ten days ago. 10

Q Would there be any way for you to tell from your examinations on these three occasions whether any of the conditions which you found might have been caused by an accident in which Mr. Sheridan was involved in 1925, rather than the accident which is involved in this suit? A There wouldn't be any way of my telling that because I saw him almost a year after his last accident. 20

Q Did he tell you upon the occasions of your seeing him those three times of ever having had another accident previously? A I don't know that I questioned him about that.

Q Whether you questioned him or not, do you recall whether he told you such a thing? A No.

Q Did your examination involve any inquiry as to whether or not this man had infected tonsils or pyorrhea? A It just involved the fact that he lost a great many of his teeth. At the time I examined him he had already lost his teeth. 30

Q He had already lost his teeth at the time you examined him? A Yes.

Q That is an indication the man had pyorrhea before, isn't it, to you? A That in itself would not be. The loss of his teeth would not be; it may be due to other causes.

Q What kind of causes would cause the loss of his teeth? A It may have been an infection at the bottom of his teeth or pyorrhea. 40

David Bernstein, direct

Q It might be due to numerous things besides this accident, might it not? A It might.

10 Q Now, will you enumerate several things that this man should be put to work at based upon the injury you observed and your experience in the rehabilitation clinic? A I would say that it would depend on the co-operation of his mental attitude, but judging it on his leg alone, I would say that he would be suited for all forms of bench work requiring the manual use of his hands, not taking into consideration his mental condition.

Q There is nothing wrong with one of his legs, is there? A His right leg is normal.

Re-direct examination by Mr. Holmwood.

20 Q Would his nervous condition have anything to do with the loss of his teeth? A I don't know enough about his previous history to say that.

DAVID BERNSTEIN, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood.

Q You are connected with the Bernstein Furniture Company? A Yes, sir.

30 Q Where is your place of business? A 292 to 300 Jelliff avenue.

Q Is that at the corner of Bigelow street? A Yes, sir.

Q Which corner is that? A Northeast corner. Q The loading platform of your premises is on which street? A The particular platform you are interested in I believe is the receiving platform on Bigelow street.

40 Q On which side of Bigelow street would that be? A That would be on the north side of Bigelow street.

David Bernstein, direct

Q How far below Jelliff avenue? A Forty-five to fifty feet.

Q The office is facing on Jelliff avenue with it?

A The office is on the corner.

Q The entrance is where? A The entrance is right on the corner.

Q Do you remember Mr. Sheridan being there on the date of this accident? A I do. 10

Q He delivered some articles to your place? A He did.

Q After that delivery was made what happened?

A Mr. Sheridan left our building through the office and on his way out said, "Good morning," to myself in particular and waved a cheery good-bye. He had closed the door after him and in a period of one or two seconds I heard a terrible scream. I rushed to the door and as I got to the door I heard Sheridan holler, "Oh, Dave, help me." I went around the corner and I saw Sheridan pinned between two trucks, one facing down the hill with the front left wheel on the sidewalk, on the north sidewalk facing east, the Arrow Laundry truck and Phil Sheridan— 20

Q How do you know it was an Arrow Laundry truck? A I believe it said "Arrow Laundry" across the front door; it was an old Ford truck. 30

Q Go on, what did you do? A He was pinned in front of the car against the running board of his car and one foot was standing below and the other foot was lifted in the air. As I rushed around the corner, others were also rushing there and I started to push the truck away and I had a hold of the front right mudguard and others helped push it away and as we pushed it away Mr. Sheridan fell in my arms. I picked him up and carried him into a car which was passing and rushed him to St. Barnabas' Hospital. 40

David Bernstein, direct

Q What happened at St. Barnabas' Hospital?

A At the hospital he was laid on the table and he was given an efficient examination as far as I know, and they said he was in a serious condition. I immediately left and notified his employer.

10 Q You did not have anything to do with taking him to St. James' Hospital? A I left him there.

Q You telephoned to his employer that he had an accident? A I telephoned to his employer and I went immediately back to Jelliff avenue to see that the driver had made a proper report.

Q Now, when you came out there and found Sheridan between the two trucks how was Sheridan? Was one of those trucks Sheridan's? A One of the trucks was Mahon's truck which Sheridan was driving.

20 Q How was that standing? A Backwards to the curb, at least backed to the platform.

Q At what point of that truck was Sheridan pinned between the two trucks? A At what point?

Q Yes. A The footstep, or the running board.

Q Where is that on the front or rear? A There is only one running board on the truck, about three to four feet behind the front wheel. The position I saw him in would appear to me as if he
30 was attempting to get into his car.

Mr. Chance. I object to what it appears to him the plaintiff was doing. That is for the jury to say.

The Court. Do not tell us your conclusions, just tell us what you saw.

Q You can state which way his body was facing? A His body was facing, he was laying on the radiator of the truck; he had one arm on the floor of his truck and the other on the radiator of
40 the truck that hit him.

David Bernstein, cross

Q What part of the floor of his truck do you have reference to? A The floor at the foot of the driver's seat, on the right of the driver's seat.

Q Where would that be with reference to the ignition switch? A Directly below it, perhaps two feet below it.

10

Q About what time of day was it? A I don't recall offhand.

Q Was it morning or afternoon? A I would imagine that it was morning, but I couldn't tell you with any certainty. I in no way had any occasion to go over these details since that day until this morning and then I had to rush down here.

Q Do you know whether Bigelow street is a grade? A It is.

Q How much of a grade, do you know? A I couldn't state as an expert, but there is quite a grade.

20

Q In which direction? A Downhill towards Hunterdon street, down to Jelliff avenue there is a steep grade and a lesser grade from Jelliff avenue down to Badger avenue.

Q Give us some idea as to the width of Jelliff avenue at that point. A Jelliff avenue is around forty-five to fifty feet.

Q (*By the Court.*) Is that grade on Bigelow street a grade that descends in an easterly direction or ascends in an easterly direction? A It descends in an easterly direction.

30

Cross examination by Mr. Chance.

Q What were the words you said were on the side of the truck? A I believe it said "Arrow Laundry," or "Arrow Sanitary Laundry Company."

Q Who helped you to push the truck away? A I don't recall who the individuals were.

40

David Bernstein, re-direct, re-cross

Q When you got out there to the truck, that is, the truck which had this "Arrow" and whatever other words there were on the side of it. That truck was not running, was it? A The truck was standing still.

10 Q Its engine was not running at that time? A The motor at that time I do not think was running; it was not running.

Q Nobody was in it? A There was no driver in the seat.

Re-direct examination by Mr. Holmwood.

Q Did you have any trouble pushing it back?

A There was no trouble pushing the truck back as far as I could ascertain. There were, I believe
20 two others besides myself who pushed it back.

Q Do you know whether the brake was set up?

A I believe the brake was on, but I couldn't be certain of it because I caught the man and carried him away, I didn't examine the brake at the time.

Q You did not handle the brake, did you? A I did not handle the brake myself, or anything pertaining to the motor.

Q Was it necessary for you or any of those that helped you to do anything to the brakes for
30 you to push it back? A There was someone fumbled at the seat attempting to get in the seat, but I hollered "Speed," and everyone pushed, the three of us. I believe one of the men who helped push it back was a receiving clerk working for us and I believe the third man was the driver of the car who drove us to St. Barnabas Hospital.

Re-cross examination by Mr. Chance.

40 Q You do not know what they did, or whether they did anything in regard to the mechanism of

David Bernstein, re-direct

the Ford? A I couldn't be certain whether they put the brake on or off.

Q (*By the Court.*) Was Mr. Sheridan at the time he was pinned between the two vehicles, was he on the sidewalk or nearer your loading station than the sidewalk? A I can make a diagram for you exactly. 10

Q Will you do that? A The loading platform is forty-five feet from the corner (indicating).

Q Forty-five feet? A Forty-five to fifty feet; it is in the center of a 40-foot building. Mahon's truck was backed right there (indicating). This is the body and this is the motor (indicating). The wheel was there (indicating) and the running board was there (indicating). Sheridan was standing at that point there (indicating) with one foot standing below the running board and one above. The Ford was standing, or this truck had one wheel on the sidewalk and the radiator had Sheridan pinned against that running board with one foot hanging below the running board. The wheel of his car would be here (indicating) and the floor would be here (indicating) and the floor would be two feet below the ignition switch. 20

Re-direct examination by Mr. Holmwood. 30

Q Can you make a wavy line distinguishing the curb from the others? A Our office is here and I was sitting here (indicating) and when he said "Good-bye," he went out that way (indicating), a matter of approximately two seconds.

Laurence J. O'Brien, direct

LAURENCE J. O'BRIEN, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood.

10 Q Were you a police officer of the City of Newark on June 30, 1927? A Yes, assigned to the sixth precinct.

Q Where were you on duty that morning? A I was on the reserve trick.

Q Did you get word of an accident at the northeast corner of Jeliff avenue and Bigelow street? A At 10:15 on the morning of June 30th.

Q How did you get that word? A Through the telephone.

20 Q What did you do? A I immediately went down to Jelliff avenue and Bigelow street and seen an Arrow Sanitary Laundry truck a short distance away from a Mahon truck. The Mahon truck was backed up against the loading platform of the Buckingham Furniture Company, owned by Bernstein.

Q On which side of Bigelow street was the Arrow truck? A Not quite in the center of the street, pointing east on Bigelow street.

30 Q It was not against the Mahon truck when you got there? A Not when I arrived on the street, no, sir.

Q Did you see a man named Fowler, the driver of this Arrow truck there? A Yes, sir.

40 Q Where did you first see him? A Why, I made inquiries around the neighborhood there, there was several men trying to get a report of the accident and no one would give me his name to use it and Fowler comes running down the hill and he wanted to know where his truck was.

Laurence J. O'Brien, direct

Q Which side of Bigelow street was he on when he came running down the hill? A Fowler was on the north side of Bigelow street.

Q Which is Bigelow street, the street that runs east and west? A Yes, sir.

Q Was it east or west of Jelliff or where in reference to Jelliff avenue? A He was just at Jelliff avenue when I met him. I said, "Are you the driver of that truck?" and he said, "Yes." 10

Q On which side of Jelliff avenue? A He was close to the Bernstein Furniture Building.

Q Was he on the same side with the Bernstein Furniture Company Building when you saw him, or on the opposite side? A On the same side.

Q He was running? A Yes, sir. 20

Q Did he say anything to you?

Mr. Chance. I object.

Q Answer yes or no if he said anything. A Yes, he wanted to know what happened to his truck.

Q Did you take him over to where the truck was? A Yes, sir.

Q Then, did he say anything to you? A I asked him where he was and he said that he left his truck up on Bigelow street and I asked him to point out the house and it was No. 236 Bigelow street on the south side of Bigelow street, west of Jelliff avenue. 30

Q How far would that be from the westerly side of Bigelow street from Jelliff avenue? A It would be No. 236, that is, 100 feet from the corner.

Q That is on the opposite side of the street from where you found it? A Yes, sir.

Q Did he say anything further to you? A I took him to the station house to get a report from him. 40

Laurence J. O'Brien, cross

Q Did you examine his brakes? A No, sir.

Q Did he examine them in your presence? A No, sir.

Q Did he say anything to you about the brakes?

10 A No, sir; he said he left the car in front of No. 236 Bigelow street and went to the opposite side or the northerly side of Bigelow street to make a collection.

Q Did he make any statement to you as to how he left his car? A No, sir.

Mr. Holmwood. Is Mr. Fowler in the courtroom?

(A gentleman arises in the courtroom.)

20 *Mr. Holmwood.* Stand up, please.

Q Is this the gentleman (indicating)? A Yes, sir.

Cross examination by Mr. Chance.

30 Q Just in regard to this distance up the street, there, Officer, that you speak of as one hundred feet. Don't you think it might have been a little more than one hundred feet? A Well, I figured one hundred feet that distance the corner would be, and he was right at the small house in the rear of the Throne property.

Q You never measured the distance, did you? A No.

Q It might have been more or less than 100 feet? A I don't think it is over 100 feet; I figured the length of the lot.

Edward W. Markens, direct

RALPH FOWLER, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood.

Q By whom were you employed on the 30th of June, 1927? A The Arrow Sanitary Laundry Company. 10

Q Do you know whether or not that is a corporation? A I think it is.

Mr. Chance. I will admit that it is.

Q Had you prior to that time been employed by Bertrand Sommer trading as the Arrow Sanitary Laundry Company? A He was my boss.

Q Was he your boss at that time? A At that time.

Q Were you in charge of the truck that ran away? A I was. 20

Q Where did you find your truck? A I found it down into the other truck it hit.

Q What truck was that? A Mr. Mahon's truck.

Q Where was that with reference to the Bernstein Furniture Company's loading platform? A It was backed into the platform.

CROSS EXAMINATION WAIVED 30

EDWARD W. MARKENS, sworn in behalf of the defendant.

Direct examination by Mr. Holmwood.

Q You are a practicing physician of this State? A Yes, sir.

Q Connected with what institutions? A Essex County Prison, House of Detention, Essex Mountain Sanatorium, City Hospital, Beth Israel Hospital. 40

Edward W. Markens, direct

Q Have you specialized in any particular class of work? A Yes.

Q What? A Industrial surgery.

Q Does that include orthopedic work? A Yes, sir.

10 Q At my request you examined the plaintiff, Philip Sheridan in this case, did you not? A Yes, sir.

Q How many times did you see him? A I saw him three times.

Q Give us the date of your first examination. A I couldn't give a definite date, I haven't my records with me.

Q Approximately. A I judge two or three days after he was injured; he was at St. James' Hospital.

20 Q Were you able to make a complete examination of him then? A No, sir.

Q Why? A He was in bed, he had a cast on and he could not give any definite symptoms that he had. He was in bad shape at the time, was not able to talk very much.

Q In what way was he in bad shape so he could not give you any information? A At that time he was still suffering from shock.

30 Q Was there anything concerning the condition of his leg at that time, from the treatment of it, which would prevent an examination? A His leg was in a cast at that time.

Q When did you first see him after that when you could examine him? A About a week or ten days ago.

40 Q What did you find? A Why, he had a shortening of the left leg, about an inch and a half shortening of the left leg. He had recurvation of the left knee, that is, his knee went back, there is limi-

Edward W. Markens, direct

tation of motion in the left knee joint when the leg was flexed on the thigh. There was limitation of the motion of the left thigh when the leg was flexed on the thigh and the thigh on to the abdomen. There was a marked myositis, that is evidenced in pain on pressure over the duodenal muscles on the left side.

10

Q How much of these conditions are permanent in character? A I think these are always permanent.

Q Including the inflammation of the muscles?

A I think he will always suffer with that.

Q Is that a painful condition? A Yes, sir.

Q What, if any bearing, would that condition of the muscles have concerning the defendant's ability to get about or work? A It will retard his getting about, it will give him pain from time to time. That pain is not constant pain, but it is pain that indefinitely gives trouble.

20

Q Will it give trouble on motion? A It might give trouble by sitting quiet.

Q He still might suffer? A Yes, sir; that is where it will give him the most pain. If he sits down the pressure on the left side will cause pain.

Q Would that have any bearing as to whether or not it could give him continuous pain while he was sitting down? A It would annoy him.

30

Q It would not prevent him from sitting down at work entirely, would it? A Oh, no; he could do something; this man in my opinion can work.

Q You mean that it would interrupt his work?

A Yes.

Q How frequently would you say his employment would be interrupted? A That is hard to say.

Q Now, this tilting of the knee backwards, is that done on an angle or how? A It is simply a

40

Edward W. Markens, direct

lessening of the knee joint which normally can go so far this way; the knee itself can go back.

Q Which way would that throw the leg? A That way (indicating).

Q That is backward? A Yes.

10 Q Is that condition permanent? A Oh, yes.

Q Would an operation fix it, what is your opinion as to that? A I wouldn't have it done.

Q This brace he wears, is that a permanent proposition? Will he always have to wear that brace? A Yes, I think so.

Q What is your opinion as to whether or not he will be able to use that leg with the brace alone, without any other artificial assistance? A He will have to have a cane.

20

Q Now, he has complained of a nervous condition. What did you find as to that? A I found him neurotic; he was nervous.

Q What test did you make to determine that? A I didn't make any test. In speaking to him I noticed a tremor of the hands and tongue, that's all.

Q He complained of lack of sensation in his left leg below the knee? A There was some.

30

Q What did you do with reference to that? A Simply ran a pin along there and stuck it, and there was unquestionably a lack of sensation there.

Q That lack of sensation, is that a permanent condition or not? A I have seen sensation return in such cases.

Q Is there anything being done to restore that sensation? A I don't know, I am not treating him.

40

Q What can be the proximate remedy for that? A Why, absolute rest, heat and sometimes elec-

Edward W. Markens, direct

tricity, and that does not always correct it, but I mean that is the treatment usually.

Q Anything in the nature of massage? A Massage might help it.

Q Electrical treatments? A Yes.

Q But you would not guarantee a result? A No. 10

Q If it is not corrected, is it apt to be progressive? A Do you mean the loss of sensation?

Q Yes. A I do not think so.

Q Now, he has complained of the loss of teeth. Do you find anything to attribute that to? A No, I believe he lost his teeth after the accident, but I do not remember about that.

Q Did you find any evidence of injury to his back? A He had a tilting of the spine. 20

Q What? A He had a tilting of the spine which was perfectly natural whenever there is shortening, the spine tilts naturally to the left.

Q That is nature's effort to take up the shortening. It would sort of grow toward that side? A Yes, it compensates by bending.

Q What effect, if any, would that tilting have on the system? A Why, it usually gets worse and becomes more of a tilt. 30

Q That is more noticeable? A Yes.

Q Does that tilting condition have any tendency to create pain? A I wouldn't say so.

Q Would it have any effect upon the organs involved? A Well, it would, yes, it would have some effect, depending on the extent. It is perfectly natural, but suppose the organs have been in a certain position so many years and then from a tilting of the body they are displaced entirely and are pushed together on the side toward where the tilt is, usually. 40

Edward W. Markens, cross

Q Crowding the organs internally at that point?

A Yes.

10 Q What organs would be involved by that? A The intestines principally, I think it would have more effect on the intestines and liver, but this tilting, of course, is usually gradual.

Q Take a man forty years of age, would you say that that would have any bearing on his health as time goes on? A I do not think it would improve it any, but I should say it might be about the maximum now.

Q What effect would it have, if any, on the intestinal tract? A Well, it might cause chronic constipation.

20 Q In what way could it harm the liver?

Mr. Chance. I object to the possibilities.

Q Or, would it harm the liver? What are the reasonable probabilities of the liver and intestinal tract being infected of this condition? A Why, it could be affected, but I think this man right now is in the maximum. In other words, whatever trouble he might have from this tilting, I think he has now.

30 Q What do you find now? A Nothing, except his nervous condition and from his history, I believe it shows that he has had considerable indigestion, because he looks entirely different to-day than he looked when I first saw him when he was injured; I think he has lost a lot of weight due to indigestion.

Cross examination by Mr. Chance.

40 Q Was your examination in conjunction with the X-ray pictures? A I do not think I saw any X-rays.

Edward W. Markens, cross

Q Without an X-ray picture it is not practical to determine with any degree of certainty just what tilting there is, is it? A Oh, yes.

Q It is? A Sure.

Q Now, is it not equally certain that if a man wears built-up shoes to the same extent as the shortening that there will be no increase of the tilting as the years go by? A Yes, that is very likely. It is quite likely that it will not increase to any appreciable degree. 10

Q So of the possibilities in regard to the liver and intestines and these other things supposedly attributable to a tilting of the pelvis, would cease to be probabilities if built-up shoes were worn? A If constantly worn, yes, but they are not worn all the time. We have to take that as a consideration, for instance at night, this man will want to at night take off these shoes and will not want to walk about with raised slippers or shoes; that is common practice. 20

Q The fact that when he took it off when he went to bed, would not have any effect on the tilting, would it? A Depending on how much he walked around with it off.

Q I mean after he gets in bed? A Oh, no, that wouldn't hurt. In other words, if a man had corrective shoes and he wore them constantly from the time he got up until he went to bed at night, of course, his condition should not become aggravated to any degree. 30

Q You spoke of the effect that you would not guarantee that certain corrective measures would have the desired result. Physicians, you included, do not guarantee results, do you? A No.

Q So that questions and answers do not signify very much. Now, name some other things that oc- 40

Ambrose F. Dowd, direct

cur to you offhand that this man is physically able to do, despite this limp. A I think he can do, generally speaking, most any bench work. In fact, most anything that does not require him to stand.

Q So far as one of his legs is concerned, that is normal, is it not? A Yes.

Q The pain you believe to be present in his back is more or less subjective? A Well, just from my experience I would say that it is more than that, I think the man has myositis which gives pain there; I think he had pain on pressure when I examined him.

Q You are quite sure that that is not constant pain? A I do not think it is constant, I think he has relief at times.

Q That is not constant pain? A I do not think it is constant, I think he has relief at times.

AMBROSE F. DOWD, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood.

Q You are a practicing physician of this city? A Yes, sir.

Q Your office is where? A 239 Broadway.

Q You are connected with what institutions? A Connected with St. James', Mountainside, Irvington General Hospital, Bethany Home, New Jersey Department of Labor as a consultant on nervous and mental diseases.

Q Nervous and mental diseases constitute your specialty? A Yes, sir.

Q For how many years have you specialized in those diseases? A Ten.

Q At my request did you examine the plaintiff in this case, Philip Sheridan? A Yes, sir.

Ambrose F. Dowd, direct

Q What was the date of that examination? A November 10, 1928.

Q What did you find as to his condition at that time? A Objectively, he showed a shortening of the left leg about one and a half inches; a backward curvature of the left knee, total loss of sensation over the left foot and left leg, the lower two and a half inches of the left thigh. The left knee jerk is absent, the left plantar reflex is absent, the left Achilles reflex is absent, that is the ankle joint. The electrical reaction over the area where sensation is lost was greatly diminished and there is practically no muscular reaction by galvanic, direct or pulsating current. He has great difficulty in maintaining a station and gait because he cannot make any purposeful movements with his left foot, because he does not appreciate sensation with that foot. His hands and eyes were tremulous, and there was some slight disturbance over the left half of the abdomen, on the side of the head also. He was excitable, confused and conspicuously unstable at the time of my examination.

Q Given a history of this man being caught between two automobiles and his leg fractured and knee injured in the way you found it to be, on June 30, 1927, and the nervous symptoms you have described to what would you attribute those symptoms? A To the injury, the fracture of the femur and the anesthesia of the leg, loss of sensation of the left leg and lower part of the thigh is due to external and internal popliteal nerves at the site of injury.

Q That sounds all right, but that nerve did not mean anything to me. Describe that nerve and just how this man is affected by the injury to it. A Those two nerves are terminal nerves of the great

Ambrose F. Dowd, direct

10 sciatic and they supply the muscles and skin of the foot and leg, in this case, an injury to that nerve or those nerves will not permit sensation to travel up to the respective senses and be appreciated, and he therefore cannot make any purposeful movements or do anything definite with that foot, it interferes with walking and station.

Q Now, coming to the effects that you found about his nervous system, will you describe just how these injuries affected his nervous system and what the prognosis is for the future? A These injuries have made him excitable, unstable, easily confused and I think the outlook is not good, I think without being gloomy that he is more likely or this condition is more likely to get serious than
20 to get well.

Q Could this nervous condition that you have described have any effect upon his ability to enjoy the usual pleasures that a man of his age should enjoy? A Oh, yes; it would interfere with that very seriously.

Q To what extent? A The extent will vary. At times he will be able I believe to participate in the usual activities of life, diversions, in a
30 small way.

Q Will he ever be able to dance? A I do not think so, never.

Q What effect has this nervous condition upon his mental attitude towards life and things in general? A It will give him a sense of hopelessness and helplessness.

Q What effect, if any, do you think it has had upon his disposition? A Well, he is excitable and unstable now; I do not know what it was for,
40 but it is certainly that way now.

Ambrose F. Dowd, direct

Q What about his temperament? A That is subjective. He is unstable and confused.

Q Assuming that he was a man of a happy disposition prior to the injury, what do you say as to the future outlook of the disposition from that point of view? A I think I have said it is gloomy, it is not good; it is bad. 10

Q What is your thought, taking into consideration not only the physical injury, but the nervous and mental condition following this accident as to whether or not he will be able to pursue any steady occupation in the future? A Not constantly; perhaps, by brief periods.

Q By brief periods you mean he will work for a while and be off for a while? A Yes, intermittent. 20

Q Will the condition you found have any bearing upon the duration of his life? A Well, I wouldn't want to say that. He might live for a very long time in his condition.

Q This complaint that the teeth in his upper jaw had been removed since the accident and one or two in the lower jaw, is there any connection between that and the injuries sustained? A I do not know that there is any connection with the nervous condition from the injuries. 30

Q You wouldn't say there was? A I wouldn't say there was.

Q The condition of his back, the pain he suffers up the left side of the back, what bearing would that have upon his ability to work? A Well, pain will interfere with anyone's ability to work; constant pain.

Q Is that condition permanent? A Pain? 40

Q Yes. A I do not know, it may not be.

Ambrose F. Dowd, direct

Q This condition of insensibility of the left leg, which was tested in various ways with electrical energy, is that condition permanent? A Absolutely permanent.

10 Q Well, is the leg practically dead from the knee down? A It is.

Q Would it be better if the leg were removed?

Mr. Chance. I object as not being for the conclusion of the witness to draw.

The Court. Sustain the objection.

20 Q It has been suggested, Doctor, that possibly the operation on that leg might improve the present condition. What would be your opinion as to that? A I don't think so, I do not think it would help it at all.

Q Describe to the jury the tests you subjected that leg to to ascertain the insensibility of it? A Yes, I determined the absence of reflexes; then subjected it to galvanic pulsating current to determine what muscular reaction was present.

Q Did you examine him above the thigh on the left side as to sensation? A Yes, sir.

30 Q What did you find there? A Electrical sensation was normal above the site of injury. To ordinary touch there seems to be diminished sensation.

Q To what extent was it diminished? A To ordinary touch with cotton.

Q What would that indicate to you as to whether or not there would be a progressive condition of lack of sensation? A I do not think that would be progressive above the site of injury.

40 Q Will it be progressive below the knee? A It is total now.

Q It cannot get any worse? A No.

Edward W. Markens, cross

Q This nervous condition you found and have described, what effect will that have upon his general health? A It will probably cause a diminution in his energy, spontaneity, initiative. He will not be able to initiate things and carry them on.

Q That is practically the mental result of it? 10
A Yes, sir.

Q Aside from the mental result will there be any physical effect on his general health? How about his digestion? A That is conjectural.

Q That is conjectural? A Entirely so.

Q Given the history of loss of sixteen pounds since the accident, does that indicate anything to you? A In loss of weight it has so many points of origin that I wouldn't want to say so.

20

Cross examination by Mr. Chance.

Q At the time you examined Mr. Sheridan did he tell you he had been involved in an accident with a trolley car in 1925 as the result of which he was knocked about sufficiently so that he was taken to the hospital and kept there for some days? A Yes, sir.

Mr. Holmwood. I object.

The Court. I will admit the question. It 30
has been answered.

Q What did he tell you was the matter with him as the result of the 1925 accident? A He said he had sustained some minor physical injuries from which he had made a complete recovery and had no symptoms subsequently thereto.

Q What did he tell you the minor injuries were?
A Bruises about the body and head and shaken up, as I recall it.

Q Bruises about the head? A Yes. 40

Ambrose F. Dowd, cross

Q How many times did you see this man before you came to the Court House in connection with this case? A Once.

Q Upon the occasion of that examination was the confusion and excitement and nervousness
10 which he manifested of the same character which he manifested on the witness stand this morning?
A No.

Q Were you here when he was on the witness-stand? A Yes, sir.

Q You did not observe any confusion or excitability or nervousness then, did you? A Not to-day, no.

Q Where was he when you examined him? A
20 At my office.

Q How did he get there? A I don't know.

Q Well, when he was there how did he move about from one place to another? A He moved about with the aid of a cane, but after the brace was removed from his leg he moved about with my assistance and the assistance of Mrs. Sheridan.

Q But with the brace on the leg he moved in response to the request from you, himself? A He
30 moved about, yes.

Q You have testified frequently in court in connection with cases similar to this, have you not? A Yes.

Q Did you ever testify in court to seeing a man who was without something the matter with his nervous system? A Oh, yes, many a time.

Q You knew something about Mr. Sheridan's physical condition or previous experience prior to
40 the time of your examination, did you? A Certainly not.

Frank Rocco, direct

Q All you know with regard to his previous condition is based upon what he told you? A Oh, no, on what I found.

Q Where did you find it? A In my office, at the time of the examination.

Q Is all that you know in regard to his previous history what you found out in your office? A Yes. 10

Q You did not know how many other accidents he might have had? A No.

Q You did not know what else may have happened to him that might have affected various parts of his anatomy, do you? A No, I do not know.

Q Do you think he has quite some pain? A Yes.

Q Did you hear the last doctor say he did not think so? A Yes. 20

Q Now, how often did you observe these tremors of the eyelids you told us about? A Throughout the time he was in my office.

Q Did you notice his eyelids or not tremor at all when he was up on the witness stand? A I was too far off to know anything about that.

FRANK ROCCO, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood. 30

Q Are you the custodian of the records of the St. James' Hospital? A Yes, sir.

Q Have you the records there in the case of Philip Sheridan? A Yes, sir.

Q Are part of those records in your own handwriting? A No, sir.

Q You are just the custodian? A Custodian and interne.

Q Do those records you have there include the X-rays? A There is an X-ray here, yes. 40

Margaret Sheridan, direct

Q What physician had charge of the case? A I think it is Dr. McCabe.

Q Can you give us the date of his admission, Mr. Sheridan's?

10 *Mr. Chance.* Is this information you are giving us based solely on the records?

Witness. Yes.

Mr. Chance. Not kept by you?

Witness. I am the custodian of all the records.

Mr. Chance. I object to any records not kept by this witness, but merely handed to him.

Mr. Holmwood. I ask that the records be marked for identification.

20 (Same are marked P-1 for identification.)

Mr. Chance. No objection to marking them for identification.

MARGARET SHERIDAN, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood.

Q You are the wife of the plaintiff in this case?

A Yes, sir.

30 Q You recall that he was injured in June, 1927? A Yes, sir.

Q Did you visit him at the hospital? A Yes, sir.

Q How often did you see him at the hospital?

A I visited him every evening. Once I was able to see him.

Q Once every day? A Yes.

Q What did you observe as to his condition?

40 A Well, in the beginning very poorly I just about —well, in regard to saying anything to him, I wasn't able to say very much to him at the time.

Margaret Sheridan, direct

Q After he returned home from the hospital who took care of him? A I took care of him. I did not really have the finances to have a nurse; I had to take the responsibility on my own shoulders.

Q You took care of him? A Yes, with the help of his mother helping with the housework.

10

Q In the beginning while he was home was he able to do anything for himself? A Not without my assistance.

Q Was he confined to his bed or was he able to sit up? A He never left his bed until the afternoon and a couple of hours a day I would lead him around in regards to crutches with me and then he would have to go back to bed in the afternoon; it pained him constantly all the time.

Q Except for a short time in the afternoon he was confined to his bed in the beginning, is that correct? A Yes, sir.

20

Q I suppose that is when you were changing beds? A Changing the beds and massaging the leg.

Q What did you have to do for him in the beginning? A Keep the leg massaged, morning and evening.

Q Did you have to bathe it? A In a solution of Omega oil and wintergreen.

30

Q What was your observation as to whether or not he suffered any pain in that period? A Oh, my goodness, he was a nervous wreck and almost would go off from the pain.

Q How long was it after you got him home from the hospital that he remained in that condition, I mean until he was able to help himself? A He came home in September and with the help of me getting around the house and I didn't notice the nervousness until around June or July of this year.

40

Margaret Sheridan, direct

He has been a nervous wreck completely, instead of gaining and getting better he completely fell away to a complete bunch of nerves.

Q When was it, if you recall, he got this brace for his leg? A June 30th.

10 Q A year after the accident? A This June past he got the crutches, up and until then and with my assistance he got along.

Q After he got the brace was he able to get about the house? A I couldn't say so, no, sir, he couldn't, not without my assistance.

Q Now, what have you to say as to his physical appearance, has he lost in weight since the accident?

A Yes, considerable weight, yes.

20 Q What have you to say as to his disposition, his mental attitude toward life and things? A He is a regular failure.

Q What was his disposition before the accident? A Jolly, pleasant, already to go to a place of amusement; talked nicely to the children and entertained them any time he could and now it is a bother if the children just talk to him. It annoys him.

Q Now, it is a bother? A Everything confuses him.

30 Q Had you been in the habit of going to dances and other amusements together before the accident? A Occasionally, yes, enjoyed life wonderfully.

Q Have you been able to continue that custom since? A I tried a couple of times to take him out and in the meantime when we are enjoying ourselves I have to take him right back home.

4 Q After he came home from the hospital did he consult any physicians for a while? A We visited Dr. McCabe at the hospital and then for treat-

Margaret Sheridan, direct

ments, and then when we stopped going to the hospital I took him once a week to his office on Broad street.

Q Dr. McCabe? A Yes, sir.

Q How often did you do that? A Continually up until this summer I judge it to be, about four to five months ago, and then I took him to another doctor in Irvington that was nearer to me, when he got the spells. 10

Q This other doctor lived close by? A About a block and a half away.

Q How long have you been under the care of that doctor? A I judge it about May, just as I say, when I noticed that he went into faints, nervous spells.

Q What did he do for him? A Prescribed and I took him away a couple of weeks, and I thought it would relieve his mind and he thought it did, but I have been dealing with him, and I could tell by his actions that it did not. 20

Q After you took him to the hospital to see Dr. McCabe and subsequently took him from time to time to Dr. McCabe's office, how did you get him there? A In a taxi cab.

Q Since he has been using this brace and cane has he been able to go about alone? A I couldn't say. No, he never leaves the house alone, it would be impossible. 30

Q Who goes with him? A I go with him wherever we goes and it is very seldom we go any place, because he is not able and really fit to go; I am really confined on account of his accident.

Q Do you recall when it was he first had a spell which made it necessary for you to call in this local doctor, close by? A It was from May that he has been bad with his nerves. 40

Margaret Sheridan, direct

Q May of this year? A Yes, sir.

Q That is Dr. Goeller? A Yes, sir.

Q How often has he attended your husband?

A Well, he attended him four or five times and then I kept the medicine renewed in between. If I had more money I might have taken him oftener.

10 Q Did you take him once a week? A Yes, and then I skipped three or four weeks and kept the medicine renewed and then I would have to take him back when it was necessary that I seen him getting so bad again.

Q Would this medicine relieve him for any length of time? A Just for a time and after I stopped it I had to get it renewed again.

20 Q What did you say, for how long? A It wouldn't relieve him any more than two days at a time. I would imagine him getting around fine and then seeing him losing off again.

Q Have you observed anything concerning his appetite since the accident? A His appetite is poorly. When he sees me getting a meal ready it is just as though he didn't want to look at it. It is the indigestion and things that bears on that.

30 Q Have you observed anything due to his indigestion? A I think it is due to his being home so long, because he never had a pain, cold or anything—

Mr. Chance. I object.

The Court. Sustain the objection.

Q I am talking of the indigestion. A He cannot really get around, the indigestion and his foot is—

Mr. Chance. I object.

The Court. That calls for medical testimony.

40 Q Have you observed anything as to whether or not he is suffering from sleeplessness? A I

Thomas S. McCabe, direct

don't think the man gets a decent night's sleep. It is nothing to wake up and see him with his leg on a chair and I get up and walk around and I feel sleepy and when I wake up again I see him in the same position; he is from bed to chair.

Q How often would you say that happened? A 19
Especially when the weather is really bad I cannot always think that. If the weather is anywhere bad at all it affects him more so than on the nice days or any time it is not nice weather.

CROSS EXAMINATION WAIVED

At one o'clock P. M. the court takes a recess for one hour.

20

AFTER RECESS

THOMAS S. McCABE, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood.

Q You are a practicing physician of this city?

A Yes, sir.

Q Where is your office located? A 913 Broad street.

30

Q What institutions are you connected with?

A St. James' Hospital and the Essex County Hospital.

Q On June 30th, 1927, do you recall treating Philip Sheridan at St. James' Hospital? A Yes, sir.

Q What did you find upon your first examination of him? A Well, he was suffering from an injury to the left leg, a compound fracture of the lower third with a profuse hemorrhage and severe 40
laceration of the muscle tissues.

Thomas S. McCabe, direct

Q Of the lower third of the femur? A Yes, sir.

Q What treatment did you prescribe for him?

A At that time?

10 Q Yes. A He was bleeding so profusely that we were unable to take him to the operating room, so I clamped the vessel right in bed under an anesthetic.

Q What treatment did you follow that up with?

A And reduced the fracture at the same time.

Q Explain to the jury what you mean by reducing a fracture? A Trying to reduce the fragments and put them in proper position.

Q Setting the bones in position? A Yes, sir.

20 Q Is that done by hand? A Yes, sir.

Q Then, what did you do to hold them in position? A He was put up in what we call a box extension for some time.

Q Do you recall how long he stayed in the box extension? A I think until close to two or three weeks.

Q How was the leg held in that treatment? A With adhesive plaster on the side, and the proper weights to keep the fragments down.

30 Q Have you your records with you of this case?

A No, sir.

Q I show you the hospital records from St. James' Hospital which Dr. Rocco has identified P-1, and I ask you if any part of those records are in your handwriting? A Yes, sir.

Q Were some of those records kept by you and others under your immediate supervision? A Mostly under my supervision.

40 Q Referring to your records can you tell us how long he remained at St. James' Hospital?

Thomas S. McCabe, direct

Mr. Chance. I object to the question because no proper foundation has been laid for that question and he has not shown that the doctor cannot tell without looking at the records.

Q Can you tell of your own recollection? A Yes. 10

Q How long? A From June 30th until September 12th.

Q He was continuously under your care while there? A Yes, sir.

Q After he left the hospital on September 12th did he return to the hospital for any further treatment? A Yes.

Q Who took care of him on the further occasions? A I did. 20

Q Subsequent to that did you see him at your office? A I saw him several times, yes.

Q When did you last see him? A I think about two weeks ago.

Q When did you last see him for the purpose of treatment? A Two or three months ago, I guess.

Q That was at your office? A Yes.

Q Now, what is your opinion of his condition to-day? First describe it and then tell us whether or not it is permanent. A He has a permanent deformity in the leg. 30

Q What is the cause of that? A The shortening which is about an inch and a half shortened, I believe.

Q What about the condition of the knee? A The lower muscles are all atrophied on account of the laceration at the time of the injury.

Q This brace he wears, will that be permanent, the wearing of that brace? A Yes. 40

Thomas S. McCabe, direct

Q Is this treatment you gave him over the period of time you treated him painful? A Very painful.

Q Did you observe anything as to his nervous condition? A Yes.

10 Q What have you observed in that connection?

A I know he has been extremely nervous ever since the injury.

Q While you were treating him there were some X-rays taken at St. James' Hospital, were there not? A Yes.

Q Does the X-ray marked P-1 for identification, brought here by Dr. Rocco, your custodian—look at it and tell me if you have ever seen it before? A Yes.

20 Q Was that taken under your supervision? A Yes, my orders.

Q During your course of treatment of this man? A Yes.

Q What does it show? A I do not read plates.

Q You do not read them? A No, sir.

Q Who reads the plates down at the hospital?

A The roentgenologist, either Dr. Devers or Dr. Hood.

30 Q Can you tell us what part of the anatomy is shown on this plate? A Just the bone.

Q Which bone? A Femur.

Q Of the left leg? A Yes.

Q From your diagnosis what kind of a fracture was this? A Compound, oblique fracture.

Q Just explain to the jury what you mean by a compound fracture? A When the bone extends out to the external surface, the wound was through and through.

40 Q The bone comes through the skin? A Yes, sir.

Thomas S. McCabe, cross

Q Was the bone broken right off or completely fractured? A Completely fractured.

Q Is the roentgenologist Charles Hood? A I don't know his first name.

Mr. Holmwood. I offer this X-ray plate in evidence. 10

Mr. Chance. No objection.
(Same is marked Ex. P-2.)

Q You say this condition of the leg is permanent? A Yes, sir.

Q What would you say as to whether or not this man will be able to pursue a gainful occupation in the future? A His previous occupation?

Q His previous occupation you know, don't you, truck driver? A Yes. 20

Q Do you think he can resume that occupation? A No, sir.

Q Do you think he can pursue any gainful occupation? A I don't think so.

Cross examination by Mr. Chance.

Q Was that plate you have there taken immediately after the accident? A Yes, sir.

Q Have you any plates showing the condition at the end of your treatment? A There was a plate taken; not from the hospital, no, sir. 30

Q Is the X-ray we have in court here an X-ray which was taken before the bones had been set? A No, sir; afterwards.

Q How long after the bones were set was that X-ray taken? A That afternoon, I believe.

Q Subsequent to the taking of that picture was anything further offered you in the way of realigning the bone? A A little, not so much; the principal thing was to control the hemorrhage. 40

Thomas S. McCabe, cross

Q This X-ray we have here was that taken before the man was in the cast or after he was in the cast? A Before.

10 Q This nervousness which you speak of, as much as you observed has continued ever since the accident, has it? A Yes.

Q Has there been any stage in the interval between the accident and now when it seemed to you that there was any breaking down or sudden increase in the nervous manifestations? A I think it has increased.

Q Yes, but is there any particular period you can point to as a period where there was a marked sudden increase of nervousness? A Shortly after he left the hospital, yes.

20 Q When was that? A That was in September.

Q It was not May of this year, now, was it? A May?

Q Of this year? A Well, it has increased since that time of September.

Q Well, now, when was it you treated Mr. Sheridan last? A I guess about two or three months ago.

30 Q How many times have you treated him altogether during the year 1928, as near as you can recall? A I guess about twelve visits to the office.

Q Have you a record showing all of the visits that were made to your office by this man? A Yes.

Q Have you that with you? A No, sir.

Q Did you consult it before you came here? A No, I did not.

40 Q Do you recall? A I think there was about twelve visits.

Thomas S. McCabe, cross

Q How many times would you say it was to your best recollection that you treated him at your office during the last year after he was out from the hospital? A I think he came in the office at least twice a week.

Q For how long? A During that time.

Q Up until when? A Until January of this year.

Q Now, after you put the man's leg in the cast there wasn't anything else you could do particularly for that leg until the cast was removed, could you? A No, sir.

Q When was the cast removed, how long after the accident? A I will have to look at this (indicating); I don't know just when the date was.

Q Do not bother. A The cast was on about six weeks. 20

Q That is about the normal time for keeping a cast on, is it? A We put the cast on following the box extension; it was up in a box extension about three weeks.

Q I am afraid the jury might not know any more than I do about that. Tell us what that is, will you? A I explained it a little while ago.

Q I didn't hear it, if you did. Please explain it again. A The leg is put up with adhesive straps from the upper part of the lower fragment down to the lower limb and sufficient weights put on to keep it in extension. 30

Q He was in that some time before you put the cast on? A Yes, sir.

Q Was he X-rayed at the time the cast was put on? A No, it was done before that.

Q The purpose of this extension itself is to allow the bones to grow together in alignment, isn't it? A Yes. 40

Thomas S. McCabe, re-direct

Q What test was made to find out whether the bones were in alignment before putting the cast on?

A Callus had already formed.

10 Q How did you know that? A Well, after we finished with the drainage, the wound became infected shortly after the injury, that was the reason we kept it in a box extension, on account of keeping it on to dress it.

Q You did not feel it was necessary for you to call in a nerve specialist to help you treat that man, did you? A At that time, no.

Q You did not at that time call in a nerve specialist to help you treat that man, did you? A It was suggested, yes.

20 Q Did you at any time call in a nerve specialist to help you in your treatment of this man? A I did not, no; I suggested it.

Q So far as you know there was no specialist who rendered any treatment for nervous condition, was there? A Not that I know of until later.

Q Do you know of any time a nerve specialist treated this man, to your knowledge? A I think he consulted Dr. Dowd.

30 Q I am not asking about consulting him for the purpose of testifying in court, what I am asking about is, do you know of any treatment this man received for a nervous condition? A No, sir.

Re-direct examination by Mr. Holmwood.

Q Do you know of his treatment by Dr. Goeller? A Dr. Goeller, no, sir.

Q You stated that shortly after he was brought into the hospital there was an infection set up? A Following, yes.

40 Q Was that a serious infection or not? A Yes, it was.

Thomas S. McCabe, re-direct

Q How long was it before you got that under control? A About two weeks.

Q What was the nature of that infection? A It followed the protrusion where the bone came through the skin.

Q Describe the infection? A It was a septic infection which set in and meant continual drainage for two weeks. 10

Q Did the parts affected by it swell up? A It affected the whole knee joint.

Q It was swollen? A Yes, sir.

Q Was there excretion from it? A Yes, drainage.

Q Was it painful? A Yes.

Q Did it have any effect upon the preliminary treatment? A In lots of ways it did, yes. 20

Q Retarded the recovery, did it? A Yes.

Q How far did the infection spread? A As far as the hip.

Q Did it have any effect upon the general health of the patient? A Yes.

Q What was that? A Well, it caused him to run a temperature for two weeks and it caused a general emaciation in the whole body.

Q Would that affect him merely as a temporary nature or would that have any lasting effect on the system? A That is temporary. 30

Q Do you know anything about the loss of his teeth in the upper jaw, the loss of a couple of teeth in the lower jaw? A I don't recall, no, sir.

Q Did that occur while he was under your treatment? A I don't remember.

Q When you last examined him did you find anything as to lack of sensation in the left leg below the knee? A Yes, there always has been loss of sensation. 40

Arthur P. Sommer, direct

Q When? A From the time of the injury.

Q Is that a marked lack of sensation? A Yes.

Q Is there any loss of sensation above the knee?

A Except due to the atrophy of the muscles.

10 *Mr. Holmwood.* The plaintiff rests, reserving the right to call Dr. Goeller and the roentgenologist.

ARTHUR P. SOMMER, sworn in behalf of the defendant.

Direct examination by Mr. Chance.

Q Are you connected with the Arrow Sanitary Laundry Company? A Yes, sir.

20 Q What connection? A Vice-President.

Q On the 30th of June, 1927, did you know Ralph E. Fowler? A Yes, sir.

Q By whom was Ralph Fowler employed at that time, if you know? A The Arrow Sanitary Laundry Company.

Q Well, was he also employed by Bertrand Sommer or was the Arrow Sanitary Laundry Company his sole employer?

30 *Mr. Holmwood.* I object to the question as leading.

The Court. Sustain the objection.

Q On that date was there a Ford car used in the laundry business? A Yes, sir.

Q The Ford car which was said to have been in this accident? A Yes, sir.

Q Who was the driver of that car? A Ralph Fowler.

40 Q What was the first you knew that an accident had happened? A About eleven o'clock in the morning on June 30th.

Arthur P. Sommer, direct

Q Subsequently in the day did you see this truck which Fowler had been driving that day? A Yes, sir.

Q You knew this truck before the happening of the accident, didn't you? A Yes.

Q What was the practice that the Arrow Laundry Company claims with regard to the condition of their auto truck? A Why, there was an inspection, monthly inspection besides strict orders to all the drivers that any time their brakes did not hold they were to report it at once, besides the monthly inspection. 10

Q Were you present at the inspection of this particular automobile before and after the happening of this accident? A Yes, sir.

Q When, before the happening of the accident were you present at an inspection? A About three weeks. 20

Q Upon the occasion three weeks before the happening of the accident when you were present and an inspection was made, was there any difficulty in the brakes or mechanism in any way of this particular truck? A No, sir.

Q When after the accident did you make an inspection of the car? A Immediately, as soon as the car came into the shop. 30

Q That was the same day? A The same day.

Q About what time of day? A Around noon-time.

Q What was done in the making of this inspection by you? A The rear wheels were taken off and the brake alignment inspected and all the springs in the mechanism of the brakes, and also the ratchet on the handle of the brake.

Q Which brake are you speaking of? A The emergency brake. 40

Arthur P. Sommer, cross

Q Did you make any road tests of the car before taking it down to see whether it operated all right?

A It was driven in from the accident, and outside of the shop I drove it and it seemed to me to be perfectly all right.

10 Q Did you try the emergency brake before taking it down? A Yes, sir.

Q Did it hold? A Yes, sir.

Q What kind of a car was that? A A Ford truck.

Q Describe as well as you can about what kind of a body it had and how it was set up together.

A It is a regular standard Ford truck with what they call a panel body, a closed body.

20 *Cross examination by Mr. Holmwood.*

Q The concern you have described as the Arrow Sanitary Laundry Company of which you are vice-president, is a corporation? A Yes, sir.

Q Of New Jersey? A Yes, sir.

Q Now, you say this truck was last examined by you or in your presence three weeks before the accident, is that correct? A Yes, sir.

Q Describe the tests you made at that time. A We generally gave them a road test.

30 Q Not what you generally did. You were there three weeks before when this examination took place? A Yes, sir.

Q Do you keep a record of these examinations? A Yes, sir.

Q How many trucks have you running in and out there? A Three.

40 Q You keep a record of your inspection every month of these trucks? A We keep a record on the calendar and check the date when they are to be examined next.

Arthur P. Sommer, cross

Q You haven't any form on which you examine this part and that part? A No, sir.

Q You merely keep a record of the date you examine them? A Yes.

Q What did you do at the examination at which you were present three weeks before? A We gave it a road test. 10

Q Did you give it a road test? A I do it personally.

Q You got in and rode the car out and tested the brakes? A Yes, sir.

Q Is there any other test you give? A There is a hill on Park avenue that leads up to the canal on Fourth street and we take the trucks up there and pull up the emergency to make sure they hold.

Q How many tests did you do that with? A One for each truck every month. 20

Q Once each month for each truck you would try it on that hill? A Yes, sir.

Q This emergency brake is a hand brake? A Yes, sir.

Q You try the foot and the handbrake both? A Yes.

Q There had been no complaint made to you about this truck? A No, sir.

Q What was the condition of the emergency brake when you examined it three weeks before? A Very good. 30

Q You did not take off the wheels and examine the bands, did you? A Not three weeks previous, no.

Q When did you last have it off and have the bands examined? A Do you mean recently?

Q Yes, before the accident? A Before the accident? A few weeks before. No, we took the wheels off after the truck had come in; we did not 40

Arthur P. Sommer, cross

take the wheels off in the examination three weeks prior to the accident.

Q I know you did not, but prior to that when was it you last had the wheels off and had the bands examined? A Every month.

10 Q Did you take the wheels off each month? A No, sir.

Q Don't you take them off every month? A Occasionally we take them off to wipe off any grease that may get in there.

Q If there appears to be any weakness in the brakes do you take them off? A Yes.

20 *Mr. Chance.* I object to that because there is no evidence there seems to be any weakness in these brakes.

The Court. Sustain the objection.

Q Were you present at the examination of this car before the accident when the wheels were removed? A Yes, sir.

Q How long before was that? A About three months previous when new bands were put on.

Q How long is it before you do that with a Ford car? A About a year.

30 Q Was it new or second-hand when you acquired it? A New.

Q On the road every day? A Yes, except Sundays.

Q Making deliveries from early morning until late at night, that is so, isn't it? A Yes.

Q During every year you had the bands renewed once? A Yes.

4 Q Now, when it was brought into the shop after the accident you say you tested it again? A Yes, sir.

Q You gave it a road test yourself? A Yes.

Joseph M. Rector, direct

Q Did you test the emergency brake yourself?

A Yes.

Q It seemed to be all right, did it? A Yes.

Q Then, you brought it into the shop? A Yes.

Q Who examined it there? A I personally examined it. I had one of the colored fellows take the wheels off, and I personally examined the brakes.

10

Q Then, you put new brake linings on, didn't you? A No, sir.

Q You did not? A It did not need brake linings.

Q Did you put new bands in? A No, sir, we did not.

Q Who was present when you made this inspection? A The colored fellow and the driver.

20

Q By driver, you mean Fowler? A Yes, sir.

Q What is the colored man's name? A John T. McCall.

Q You put no new parts in at all? A No.

Q Put it together and sent it back on the road, is that right? A Yes, sir.

JOSEPH M. RECTOR, sworn in behalf of the defendants.

Direct examination by Mr. Chance.

30

Q Are you a physician duly licensed to practice in this state? A Yes, sir.

Q How long have you been such? A Thirty-five years.

Q Are you connected with any institutions? A Yes.

Q State the institutions with which you are now connected and with which you have been connected?

A I am active in the Jersey City Hospital, Greenville Hospital, consultant in the North Hudson Hospital; formerly consultant at Holy Name Hospital, Teaneck, and consultant at Morris Plains State In-

40

Joseph M. Rector, direct

stitution, and State Surgeon of the State of New Jersey.

Q In the course of your experience has surgery been one of the things you have given particular attention to? A Yes.

10 Q Did you at my request make an examination of Philip Sheridan, the plaintiff in this case? A Yes.

Q When was that examination made? A The 9th day of November of the present year.

Q Will you state to the court and jury what objective symptoms of injury you saw at the time of this examination? A The end result of an un-reduced fracture of the left thigh bone, commonly known as the femur.

20 Q What did you observe in regard to his nervous condition? A Nothing unusual other than you would generally find on examination. I should have said that there was a partial loss of sensation below the seat of fracture which was the lower third of the left thigh bone.

30 Q What examination did you make? Just tell the court and jury what you did to arrive at your conclusions. A I stripped the man from the umbilicus down and I noticed then that there was a shortening on the left side of the lower extremity and I noticed that there was a difference in the circumferential measurement of the muscles on the left side of the thigh and also the muscles on the left side of the leg and on the lower third of the leg there was an enlargement which was of a boney character, which is the usual result of fractures in which there has been an excessive amount of callus, bone formation, thrown out which always forms as a result of boney union from breaks. I measured
40 the limb, taking the measurements from the two

Joseph M. Rector, direct

boney points, one at the waist and one at the lower
 end of the leg and found one and a half inch short-
 ening which brought to my mind that there had
 been an old fracture of the thigh at the lower third
 at the position where I found an excessive amount
 of callus and the enlargement, and the difference in
 circumferential measurements due to loss of tone of
 the muscles from disuse of the limb which we al-
 ways find after fractures and where rehabilitation
 and use have not been properly entertained or prop-
 erly persevered in. In the knee I found there was
 a weakness of the knee joint which was due to the
 laxity of the ligaments which was due to the im-
 properly or unreduced fracture which the man had
 sustained prior to that time, which he told me was
 in 1927 some time. I examined him in Dr. Mc-
 Cabe's office, and Dr. McCabe produced a radio-
 graph picture of the limb he asked me to see and
 which I saw and read and found then that the thigh
 bone in this lower third had been fractured, but
 the reduction was not complete, that in the healing
 treatment it allowed the bones to overlap, as I show
 with my fingers, the upper fragment was projecting
 downward and forward and the lower fragment up-
 ward and backward a distance of about two inches,
 and there was a bridge of boney tissue between the
 approximating surfaces of the two fragments which
 were in opposition, that had caused a boney union
 which made the bone as regards this second condi-
 tion the same as if it had not been broken, that is
 as far as the boney union was concerned. The
 effect of this malposition allows the gravity of the
 body, as the lower part of the leg is rotated or
 turned outwards, as shown on the radiograph, which
 gave the man an inch and a half shortening in the
 limb and the changed gravity caused the laxity of

10

20

30

40

Joseph M. Rector, direct

10 the ligaments about the knee joints and such laxity resulted in what we call over extension or a bending back of the knee joint when any weight was placed upon it. I should have said that there was a scar on the outer side of the thigh at the position where the fracture was which made me believe originally that it was a compound fracture.

Q Now, in your opinion is it proper surgical treatment to allow a fractured femur to unite without making an alignment of the bone or rather permitting an overlapping of the fractured ends? A No, sir.

20 Q Would you say, in your opinion, that the permanent results have been made more severe because of the failure on the part of the attending surgeon to bring those bones in opposition and alignment? A That is the cause of the disability.

Q What have you to say in regard to the disability of certain operative measures to benefit the man in his present condition? A The man's disability can be entirely relieved with the exception of the shortening and the shortening will be necessitated because in the end of the bones there is a depression.

30 Q Now, in putting your fingers the same way as you did before, explain to the jury how mal-alignment could and should be formed. A Where a fracture occurs that first week a radiograph is taken immediately. If we find there is mal-alignment—

Mr. Holmwood. I object to the question. He is asking the Doctor to tell what can be done to-day, not what might have been done at the time of the original injury.

40. Q What can be done to relieve the present condition? A Separating the boney bridge which is

Joseph M. Rector, direct

present, cutting off the edges of the bone to get rid of the overlapping bone and pulling the limb down by countertraction and putting a steel band over the two edges of the bone.

Q About what would be the expense of such a treatment as that? A It depends on the surgeon who performed the operation; each man has his own price for his own work. 10

Q You are familiar with the reasonable value of such services and the charges made by physicians, I assume? A Yes.

Q What would you say was the reasonable value? A \$1,000.

Q Assuming there was a normal and proper sequence to such an operation what would be the result with regard to this man's disability? A All disability would disappear with the exception of the shortening of the limb. 20

Q What measures might be taken to relieve the effect of the shortening of the limb? A Building up of the shoe.

Q That building up of the shoe would help the patient's comfort? A I did not get the latter part of your question.

Q I say the building up of the shoe would add to the patient's comfort? A It would relieve the limp and relieve the tilting of the spinal column. 30

Q Going back to the time right after the accident, what would you say is the proper method to treat such a condition as the X-rays showed this man to have sustained?

Mr. Holmwood. That is objected to.

The Court. Sustain the objection.

Q What is the proper method of treating a compound fracture of the femur at the place where your 40

Joseph M. Rector, direct

10 examination showed this man's femur to have been fractured? A If there is infection immediately following the accident the treatment is that of dressing and water bags are placed upon the limb to prevent moving the fragments upon each other. If infection is present, as soon as the infection passes we then make attempts to pull by extension the fragments in apposition, that is, bring them instead of allowing them to overlap as they were by the picture, they are brought down with extension. If inside of a week or ten days, or even two weeks a picture is taken or shortening does not disappear, then, the extension is taken off, and what we call a bone reduction or operative treatment is pursued, cutting down on the bone and 20 bringing the two bones together and a wide plate or band put over them.

Q Now, you have observed this man in court here to-day? A Yes, sir.

Q You observed him at the time of this examination you tell us about? A Yes.

Q Upon any of these occasions have you observed any tremors or confusion or excitability? A No, sir.

30 Q From your observation of him what is your opinion as to the presence of any of those things last mentioned? A Excitability?

Q Excitability, tremors and extreme nervousness. A Nothing in regard to the traumatism which would cause any excitement or nervousness.

Q (*By the Court.*) Do you think you can tell that by examining the man a distance of twenty-five feet? A I am speaking about in the office 40 when I examined him.

Joseph M. Rector, cross

Q You are asked this morning about his appearance in court? A Yes, I watched him walk outside and when he went down the elevator.

Q You saw no signs? A No, he was smoking a pipe, walking with the brace, assisted by his wife.

Q (*By Mr. Chance.*) When he was in Dr. McCabe's office being examined by you was he able to walk around with the aid of his brace? A Yes, sir. 10

Q Were there any disabilities or injuries which you observed of this man other than the leg injury which could in reasonable probability be traced to the accident which he sustained in June, 1927? A None whatever.

Q What would you estimate to be the percentage of the loss of the leg which his present condition represents? A Taking the full percentage. 20

The Court. You mean the disability?

A. Referring to the entire lower extremity?

Q What percentage of loss of the leg would you say his condition is? A Fifty per cent.

Q If given the operative measures which you have spoken about what is the reasonable expectancy which would be the percentage of loss of the leg which would ensue? A About ten to fifteen per cent. 30

Cross examination by Mr. Holmwood.

Q I understand you to say that your office is in Jersey City? A Yes, sir.

Q When you examined this man you measured his leg for the atrophied condition you found there? A Yes, sir.

Q How much atrophy did you find in the injured limb? A Do you refer to the entire limb, or different parts? It was about a quarter of an inch difference. 40

Joseph M. Rector, cross

Q Give us the details, if you have them? A I cannot give you the difference. It was about one-quarter of an inch difference over the calf, and on the left side there was a difference in circumferential measurements of one-quarter of an inch.

10 Q By atrophy you mean the shrinkage in the muscles? A Yes.

Q Was this X-ray shown to you at Dr. McCabe's office? A No, sir.

Q Was this examination made by you at his private office or at the hospital? A At his private office.

Q Now, in the case of a fractured femur is it or is it not usual to have a shortening? A Why, if the bones are placed in apposition—

20 Q I say that in the case of a fractured femur is it or is it not usual to have a shortening? A If the bones are placed in apposition, no.

Q Have you seen a case without a shortening of the femur? A Yes.

Q Many cases? A Yes, sir.

30 Q (*By the Court.*) Your reference to the bones which were not in apposition is directed towards the fracture originally occasioned by this accident or the prior one? A I didn't know there was one prior at the time, but when I examined him on the 9th of November I found the shortening that I testified to, and Dr. McCabe showed me an X-ray which was lapping just like this (indicating); I measured that.

Q The leg, as far as you could tell had only been broken once? A Yes.

Q That is what you are talking about? A Yes, sir.

40 Q (*By Mr. Holmwood.*) What was the date of your examination? A The 9th of November.

Joseph M. Rector, cross

Q This year? A Yes, sir.

Q A couple of weeks ago? A Yes.

Q When you spoke of prior to the accident you meant the accident for which he came to the hospital and which occurred on the 30th of June, 1927?

A I didn't know there was a prior accident. 10

Q It was the accident prior to the date of this accident. A I didn't know there was two accidents. He gave me an accident as occurring on June 30th and then I examined him and that is what I found on November 9th.

Q He did not give you a history of an accident happening in 1925 where he was shaken up and no bones broken?

Mr. Chance. I object to that, "Shaken up and no bones broken." 20

Q This operation you say will cure this condition. That is merely to straighten the bones of the femur and bring the fractured ends together and put in what they call a plate? A Yes, either a plate or wide band.

Q And fasten them together with some kind of metal? A Yes, to hold it in apposition until it heals.

Q That means an open operation to cut down to the bone and file off the ends of the bone and put a plate in? A Yes, sir. 30

Q That is a simple operation, is it? A Yes.

Q Not at all apt to result fatally? A I never saw any result fatally.

Q That is not a major operation? A Yes, it is.

Q I thought you just said that it was a simple operation? A It is simple, but it is a major operation. 40

Joseph M. Rector, cross

Q In any major operation there is an element of chance as to survival, isn't there? A Yes.

Q Even if a person survives such an operation the period of disability is apt to be a considerable period? A We generally figure on three months.

10 Q Do you say this man is not nervous? A I said I found no objective symptoms of nervousness.

Q You found no objective symptoms of nervousness? A I found none except the site of the disturbed sensation below the seat of the fracture.

20 Q What is the cause of that? A I can only imagine that if it was caused by this accident it was due to a partial tear of the sciatic nerve which comes down over the seat of the fracture; there may have been two branches cut. In the sciatic nerve evidently the shaft of that nerve was injured and that would separate the branches, either that or it was caused by callus.

Q That would cause lack of sensation? A Yes, sir.

Q Isn't it true that when the nerves go that way they are never rejuvenated? A No, sir; only in the spinal cord.

30 Q What effect will such an operation you have described have upon the tilting back of the knee? A With the changed gravity, that is, the changed center, as it is now, the line of gravity goes to the center of the body and as the man places his weight on the left side his femur goes off on that side, and if there is no center of gravity it gives him difficulty in walking and throws his weight off and constantly doing that has given him a flail joint, and that is the reason he is relieved by wearing a brace which
40 extends from the middle of the thigh just below the calf of the left leg and without that the man

Joseph M. Rector, cross

cannot walk, and as soon as he puts his weight on it with that on he can walk but he does limp.

Q This injury of the ligaments, what is that?

A A strain which was caused by continual pressure on it.

Q Does that mean they are stretched? A Yes. 10

Q. Once they are stretched will they ever retain their tone? A Yes, because there is elastic fibre which bands together the ligaments, it is like a rubber band. Take the pressure off and it returns.

Q If an operation such as you have suggested was performed would this metal brace or wire be left in the wound or would that have to be removed?

A Sometimes they remain in them with them and sometimes they have to be taken out exactly the same as anything found in the body. Sometimes they give trouble and sometimes they do not. 20

Q You saw this man once only, didn't you? A Yes.

Q How long did you examine him? A I don't remember the time; but a sufficient length of time to make my examination and satisfy myself what was the matter with him.

Q Was anyone else present outside of Dr. McCabe? A I think there was a nurse there and I think Mr. Chance came in later; I had about finished when Mr. Chance came in. 30

Q After such an operation as you have described, assuming one could be made, would there be any shortening? A Yes.

Q How much shortening would there be approximately, in the leg? A It depends on how much of the ends had to be taken off, and after the ends have been taken off we saw off until we get the normal bone and then bring the bones into that position (indicating) until they come together. 40

Joseph M. Rector, cross

Q In other words, you would have to cut on either side of the callus formation? A Chisel it apart.

Q You have to cut that callus formation out?
A Just separate it.

10 Q Describe to the jury what that callus formation consists of. A The callus formation consists of a series of bone salts which are thrown out from the site of the bone, between the bone and covering the bone called periosteum. First, ordinary salts, known as bon salts and after a period of time, ten to fourteen days these bones are filled with lime salts, that is, the body deposits lime salts in this callus, at first off, and then it becomes hard and then it gets as hard as a rock.

20 Q So, this is merely the cementing process that nature indulges in to bring the broken ends of the bones together, is that right? A No.

Q I mean it heals in place the broken ends of the bone? A Just the same as you glue two sticks of furniture.

Q This callus fills in that space? A Yes.

30 Q Now, to operate on this man you would have to cut on either side of that callus and get the active bone? A No, that would not come in the treatment at all. If I could draw it on the board you will understand it. I am not much of a draftsman, though.

40 Q Draw a line where you would have to cut the bone off on each end. A You would have to cut here first (indicating). This is separated by a chisel being drawn down on the sides, an ordinary carpenter's chisel. This is sawed off here (indicating) and traction placed on this end (indicating) and on this end and this is brought down and placed

Joseph M. Rector, cross

in that position and then we put a band around them to keep them there.

Q How much shortening do you think you would have if you were successful with such an operation? A It usually takes a quarter of an inch. When they are first broken they are usually in this position and when they are run off in this position, so we have to saw this off and get below that area and then bring them together to heal in this position (indicating) by either a wire nail or a band. 10

Q Is such an operation a painful one? A Yes, following the anesthetic.

Q For what period of time would pain persist following an operation of that kind? A You know we usually use an anesthetic, but generally, I suppose it will last a period of eight to ten hours; the pain all disappears the minute the fracture is set. 20

Q You have not only the setting of the fracture and the bone put in apposition, but you have to make an incision in the leg, don't you? A Yes.

Q The tissues in the leg has to be taken away from the bones upon which the operation is performed? A Yes, they are separated. 30

Q That exists a long time after the bone is set? A The man is put to sleep afterwards.

Q How long do you keep them asleep after an operation? A We stop before we are through with the operation. It generally takes a half an hour to three-quarters of an hour at the longest.

Q How long does it take before the anesthesia wears off? A Eight to ten hours.

Q Then, the pain comes in? A Just after the effect of the anesthetic wears off. 40

Joseph M. Rector, re-direct

Q There is no pain from the healing process of the leg? A No, there is no pain in the healing process of the tissues.

Q Suppose infection sets in? A Then, you get pain.

10 Q You fail quite often in operations of that character? A No, if we did we would not operate, because then we destroy the limb.

Q Before you make a serious operation on this man you would take a blood count, wouldn't you? A No not unless there is infection.

Q You have a history of that in the beginning of the case? A Then you wouldn't need a blood count, you could see it with the naked eye.

20 Q Did you examine this man's heart? A I did.

Q With a view of seeing if he was strong enough to stand the shock of such an operation? A No.

Re-direct examination by Mr. Chance.

Q It has been suggested here that his foot, the lower limb below the place of the fracture is dead. Is there anything to that, in your opinion? A No, the man can walk on it. If it was dead it would be paralyzed.

30 *The Court.* There wasn't any testimony that it was dead. There was testimony that there was lack of sensibility there.

Q Was there a total lack of sensibility? A No, it was disturbed sensibility, but the motor action is perfect, except from its disuse and the sensation, there is lessened sensation by an anesthetic condition on the skin, but the motor action is perfect, the man can walk perfectly well if he has the support of his knee.

40

Ralph Fowler, direct

Re-cross examination by Mr. Holmwood.

Q Did you test him electrically? A No.

Q Did you test with a pin? A Yes, a pin and a handkerchief.

Q There is loss of sensation there? A Below the break. 10

RALPH FOWLER, recalled in behalf of the defendant.

Direct examination by Mr. Chance.

Q On the 30th of June, 1927, you were driving the Arrow Laundry Company's truck, weren't you? A Yes, sir.

Q On that day did you reach the vicinity of Jelliff avenue and Bigelow street? A Yes, sir. 20

Q Tell us where you stopped in that neighborhood? A I stopped coming in from Peshine avenue, I stopped on Bigelow street.

Q That is the last stop you made before you knew an accident had taken place? A Yes, sir.

Q Tell us how it was you went from the corner you passed at the time you stopped? A That is as I turned in this street?

Q Yes, how far down did you go before you stopped? A About fifteen feet, I should judge. 30

Q Why did you stop? A To make a delivery.

Q When you stopped just tell us what you did. A I stopped, pulled to the curb on an angle and pulled up my brake and shut off the motor.

Q (*By the Court.*) That is what you did that day? A Yes, sir.

Q (*By Mr. Chance.*) How far would you say your car was from the righthand curb when you did those things you just mentioned? A How far the rear was? 40

Ralph Fowler, direct

Q Well, all right, how far the rear of it was.
A About I should judge two or three feet.

Q How far was the front of your car? A The front was into the curb. My wheels were turned into the curb.

10 Q Now, with your car in that position with your front wheels to the curb and your engine turned off and the brakes set, what did you do? A I just put it that way and I walked up with my delivery; the car was there when I went in the house.

Q The car was there when you went in the house? A Yes, sir.

Q After you had gone in the house did you see anything more of your car before the accident? A Not until I came out.

20 Q How long would you say that you were in the house? A I guess about fifteen minutes.

Q Why were you so long? A Arguing over the deposit on a bag.

Q What do you mean by that? A I brought an old bag with the laundry and she paid a deposit on the new bag the week before.

Q When you came out front was your truck there? A No.

30 Q Where was it? A Down at the bottom of the hill into this Mahon's truck, or two feet from the truck, they were pushing it back.

Q Had Sheridan been taken away before you got there? A Yes, sir.

Q At any rate the car had gone down the hill during this fifteen minutes and the accident had occurred? A Yes, sir.

40 Q What was the condition of the emergency brake on your car at that time judging of the operation of the car before the accident? A At all the stops it always worked good, perfect.

Ralph Fowler, direct

Q There was a considerable grade on this street?

A There is quite a grade there.

Q Had this emergency brake held on grades of equal steepness? A Oh, yes.

Mr. Holmwood. I object to the question.

The Court. You mean just prior to the accident? 10

Mr. Chance. Yes.

Q When had you had this car on a hill as steep as this one where the accident happened, before the accident happened? A I don't know any as steep as that hill where I had my route.

Q After the happening of this accident you found your car down there, what did you do with the car? A I tried to start it. 20

Q Did it start? A Yes, and the officer took me up and rode in the car with me up to the precinct.

Q When you got back to the shop that day was Mr. Sommer, who was on the witness stand, in the plant? A Mr. Sommer had come over for me at the precinct and I rode in back of him.

Q When you and Mr. Sommer got back to the shop what inspection did you observe made in regard to this brake of yours? A The next thing we did was took the wheels off and looked at the brakes. 30

Q What did you find the condition of those brakes to be? A They were O. K.

Q The emergency brake was O.K.? A It was the emergency brake we were looking at.

Q Are you sure you had it on before going into the house? A I am sure of that.

Q What fixes it in your mind so clearly that you put that brake on? A I can remember that. 40

Ralph Fowler, cross

Q What makes you remember that? A I had so many stops down in there and you have to pull up your brakes now and then to stop a Ford car and I am sure the brake was up.

10 Q When you got down to the foot of the hill was your engine running? A No.

Q You are sure you turned your engine off when you went in the house? A Everything was turned off when I went in the house.

Q Can this car start itself? A No.

Q Were there any short circuits or anything that you know about this automobile that will start the engine itself? A No, sir.

Q Are you familiar with this neighborhood? A With that neighborhood, I am.

20 Q The place where the accident happened? A Yes.

Q Is that a neighborhood in which there are quite a number of children? A There is.

Q You have seen a number of children around there from time to time when you have been in that neighborhood? A Yes.

Q Of course, you did not see any children start your car that day, did you? A I did not.

30 Q But you know it could not start itself? A I know that.

Cross examination by Mr. Holmwood.

Q Did you see any children around there that day? A No.

Q As a matter of fact, you know that June 30th is the last day of school in this city, isn't it?

A I am not sure, some schools let out a little earlier and some a little later.

40 Q We are talking about the public schools? A Yes.

Ralph Fowler, cross

Q How long had you driven this particular Ford car? A About three months.

Q How long had you been in the employ of the Arrow Laundry Company? A About eight to ten months.

Q You say when you stopped, your rear wheel that is the one nearest the curb was only two to three feet from the righthand curb? A Yes, sir. 10

Q You were headed down Bigelow street? A Yes, sir.

Q That is facing in the direction in which the incline was? Are you positive you turned your wheels when you stopped there? A Sure.

Q Or did you rely on this good brake? A I parked in the way it should be parked on a hill or incline. 20

Q I am asking you how you parked it? A On an angle with the brakes pulled up and the motor shut off.

Q Were any of your wheels touching the curb? A The right front wheel.

Q That was turned very slightly toward the curb? A That was turned as far as it would go, towards the curb.

Q Your rear end was only two feet away from the curb or the front wheel was how close to the curb when you swung it to turn it? A Not far, about a foot, it had room enough to turn to go into the curb. 30

Q Did you take your load off from the rear or front? A From the rear.

Q Do I understand that you pulled up to the curb on an angle? A Yes.

Q And stopped your car? A Yes, sir.

Q Did you go for any package in the rear of your car? A One bundle, yes. 40

Ralph Fowler, cross

Q Did you have to open up the tailboard or anything of that kind? A The door.

Q You removed the bundle and went into this house? A Yes, sir.

Q That is Mrs.— A Nichols house.

10 Q Then when you came out the car had disappeared? A Yes, it ran down the hill into this other truck.

Q Now, when you stopped your car after you put on the hand brake, a Ford car of that type goes into high speed, doesn't it? A No, it releases or stops it.

Q While the emergency brake is on it is in neutral? A They were in neutral.

20 Q What do you mean by that? A They were on the same.

Q This particular car? A The Ford. If we placed it in neutral it releases the clutch and it will stop then if the brake is applied.

Q You are sure you stopped the motor? A Yes, sir.

Q You didn't expect to be very long there, did you? A No.

30 Q Why are you so sure you stopped the motor on this occasion? A I am sure I stopped the motor, I generally do every stop, stop the motor.

Q Was this your last delivery that afternoon, or that morning? A I had two more.

Q What time did you start up? A We started out about eight in the morning.

Q Then, you are due back about eleven o'clock? A There wasn't any certain time.

Q Did you have another delivery to make that day? A Yes, I had one on Waverly avenue.

40 Q You did not actually make that delivery, did you? A I made that going over to the laundry.

Ralph Fowler, cross

Q Now, when you took your car away from the scene of the accident you took it over to police headquarters? A Yes, the officer went with me.

Q Then, you took it back to the garage? A Yes, to the laundry.

Q When did you get it there? A About eleven o'clock. 10

Q When was it you made this examination, you and Mr. Sommer? A Mr. Sommer took the car himself that time and went up the street with it and then he tested it out; I didn't go with him.

Q When was it you made the examination, inside the garage? A That is the next morning or afternoon, I believe, the next morning.

Q You are not sure whether it was in the next day or the same morning? A I think we started the same afternoon and finished the next morning. 20

Q Why was it necessary to take off the wheels to examine the brakes? A To get at the bands.

Q You could not test the brakes without taking the wheels off, could you? A You can.

Q It was merely to examine the bands, is that it? A That is to examine the bands themselves.

Q Whether this examination took place that afternoon or the next morning, you are not sure? A I think it started that afternoon and was finished the next morning. 30

Q Who else was there? A Me and Mr. Sommer and Mr. Mahon was there in the morning, the man who owned the truck, and a couple of other gentlemen, I don't know who they were.

Q Was there a colored fellow there? A The colored fellow helped me.

Q After you made this examination when Mr. Sommer was present you put on new bands, didn't 40

Ralph Fowler, cross

you? A No, the bands were all right that we took out.

Q I show you a statement and I ask you if this is your signature at the bottom? A Yes, sir.

Q It is in three pages? A Yes, sir.

10 Q Is that your signature on page 1, page 2, and page 3, is that right? A That is my signature, yes.

Q Do you remember giving this statement to the gentleman who interviewed you about this accident? A I may, yes.

Q I don't know where he interviewed you, you remember signing these papers? A After he asked me something.

20 Q Do you remember signing these? A Yes, that's my signature.

Q Were they signed with— A That's the only one I remember.

Q I want you to refresh your recollection from this statement which is dated May 7, 1928, and see if your recollection is any better than it is now. Did you say in this statement. The day after the accident, Mr. Sommer told us to look at the brakes and see how they are. So, with the colored
30 fellow John D. and a fellow named, I don't know, we took the brakes out and found apparently they were all right. After we had taken the brakes out Mr. Sommer and another man looked at them and said they were all right, but said, "As long as you have the brakes out put in new ones, which we did." Do you remember saying that? A I don't remember saying that.

40 Q Do you remember Mr. Sommer telling you to put in new ones as long as you had those out? A No, sir.

Ralph Fowler, re-direct, re-cross

Re-direct examination by Mr. Chance.

Q This paper that has been shown to you, do you recall that at all? A I recall part of that, but I don't recall telling him about putting in new bands. I didn't write the statement, I only signed my name.

10

Mr. Chance. I offer this statement in evidence.

Mr. Holmwood. No objection to it.

(The statement is marked Ex. D-1.)

(Exhibit D-1 is read to the jury.)

Re-cross examination by Mr. Holmwood.

Q Now, you say there were no repairs made to the brakes during the time you drove the car which you say was three months? A I don't remember any.

20

Q Do you remember being present at another inspection of the car during that three months as to brakes? A No.

Q You say you had charge of taking care of the car yourself, didn't you? A Just minor repairs as needed.

Q You say you took up on the brakes? A Yes.

Q You mean by that the foot brakes? A The foot brake and the emergency, also.

30

Q Did you take up the emergency? A The emergency, too.

Q How do you do that? A You shorten the rod.

Q During the time that you had charge of it, that three months, you have no knowledge, when you were present, that the wheel was taken off and the bands examined? A That was after the accident.

40

Ralph Fowler, re-cross

Q I say before the three months you were taking care of it, during that period? A I don't remember that.

Q You were going around with a cracked commutator. How long had you had that condition?

10 A Maybe a week or so.

Q Did you report that? A I was supposed to put it in, the end of that week; it would run, but missed a little.

Q Can you give us any idea of how often during the three months you were operating this car that you took up on the bands? A The foot bands we took up as we thought it was needed, the way the brakes would work.

20 Q I am speaking of the emergency. A The emergency, I don't think I have had to.

Q You relied principally on the foot brakes? A That is the one you need.

Q How many days did you have to take up on the rods for the foot brake during that three months? A I never did it.

Q Not once during the three months? A No.

Q You did not take up on the emergency brake during the same period of three months? A That is what you just asked me, about the emergency.

30 Q I am talking of the foot brake. A Yes, the foot brake, maybe two or three times. I put new bands in the foot brake.

Q When?

Mr. Chance. I object. The foot brakes do not make any difference in this case.

The Court. I will admit it.

40 A I couldn't say when, but I know I put new brakes in it, I had the bands off and had them relined.

Ralph Fowler, re-cross

Q Just the foot brakes? A If the clutch was needed we put a clutch band in.

Q So, during the three months you had to renew the foot brake bands once? A Yes.

Q You took up on the rod how many times? A Never.

10

Q On the foot brakes? A It is not a rod on the foot brake, it is only a nut.

Q You never took up on the rod for the emergency brake? A No.

Q You used that car continuously, didn't you, day in and day out? A Yes.

Q How many days a week? A About five or four and a half.

Q From early in the morning until late in the evening? A Not so early in the morning.

20

Q What kind of pavement is on Bigelow street at the point where you stopped this car? A I think cobble or red brick, either one, I don't remember.

Q How far was it from the corner of Jelliff avenue? A I judge about a good block.

Q A good block? A Yes.

Q How wide is Jelliff avenue? A About thirty feet, I guess.

Q So, that your car travelled a distance of over a block from the point where you left it to the point where it came to rest. A As I turned the corner I was about fifteen feet from that corner and Bigelow street is twenty-five feet from there, a corner down there; you can make it a block anyway.

30

Q There is rather a steep grade all the way until you get to Jelliff avenue, isn't there? A Yes.

Q From Jelliff avenue on it is not quite so steep? A No, it goes down as far as the railroad and then goes up.

40

Ralph Fowler, re-direct

Q Did you notice when you got back to the car to start up to go away, did you notice whether the brake was on or off? A The brake was down, I think, because they had to push it back.

Q It was off? A It was in neutral position.

10 Q Was your motor running? A No.

Q About how many deliveries did you make a day? A That day, only ten deliveries.

Q Now, how much would you average a day in all your deliveries? A Mondays would be the busiest, we would have about 150 stops to pick up laundry and Tuesday delivering it.

Q During the three months before the accident, from June, back to April, would you average one hundred deliveries a day? A No, not deliveries.

20 Q Would you average over one hundred stops a day? A That is on Monday only.

Q Do you know what you average on other days? A Sure, you deliver what you pick up on Monday.

Q You would average altogether one hundred stops with that car a day? A What is that?

30 Q Would you stop your car on the route either to make deliveries or collect, would you stop it on the average of one hundred times a day? A On the average.

Q On the average? A Not every day, no.

Q I am talking of the average? A Yes.

Re-direct examination by Mr. Chance.

Q You wouldn't stop one hundred times on Bigelow street daily? A No, I used to go there twice a week.

40 Q When this statement was made by you did you talk straight ahead and tell your story or did they ask you questions as you went along? A I

Philip Sheridan, recalled, direct

don't know which statement that could be; I signed a statement at police headquarters.

Q Do you recall that paper? A Yes, I signed that in my house.

Q When you signed that in your house did you talk straight ahead or would you answer what he asked you in questions? A Yes, he asked me certain questions. 10

Q As he was asking the questions you would give him an answer and he would write it down on here? A Yes, sir.

Q Do you see the man in court who got this statement? A I don't remember now, I know he is a thin fellow.

Adjourned to Wednesday, December 6, 1928,
at ten o'clock A. M. 20

SECOND DAY

December 6, 1928.

Continued pursuant to adjournment.

Present counsel as before stated.

Mr. Chance. The defendant rests, your honor.

DEFENDANT RESTS

Mr. Holmwood. I would like to call the plaintiff for one question I overlooked, if I may. 30

Mr. Chance. No objection.

The Court. You may.

PHILIP SHERIDAN, plaintiff, recalled.

Q (*By Mr. Holmwood.*) I neglected to ask you what you earned per week as a truck driver for Mahon. A My wages were \$38 a week, but my 40

Philip Sheridan, recalled, cross

wages coming in my home was always \$50, I had a chance to make money on the truck I would drive.

Q Overtime work? A Yes.

Q Would you be paid extra for overtime work?

A That was the money I got for overtime.

10 Q During six months before the accident how much did you average a week overtime work? A \$49.

Q Including your regular pay? A Brought it up.

Q \$49 or \$50? A Yes, sir.

Cross examination by Mr. Chance.

20 Q I suppose you have no records of any kind which show exactly what you made from week to week, have you? A No.

Q You didn't keep any track of that? A No, I didn't think it was necessary.

Q Did you file an income tax return last year? A I didn't, other people did it for me, I didn't do it.

Q Where did you get the information you put in the paper as to exactly what you made? A What do you mean by that?

30 Q You know what an income tax return is, don't you? A Yes.

Q You have to put in how much your earnings are, don't you? Where did you get your information as to what you made? A According to my salary, what I had left. I had a wife and three children to take care of.

40 Q The fact that you had a wife and three children to take care of wouldn't show you how many dollars you put into your income tax return, would it? A Whatever I had left.

Gustave Frommelt, direct, cross

Q What you had left was what you put in your income tax return, is that it? What relation, if you have any, was your employer? A He is my wife's brother.

Q Does he, to your knowledge have a record of exactly what he has paid you? A That I don't know. 10

Re-direct examination by Mr. Holmwood.

Q When you mean you put in your income tax return what was left after you estimated the support of your wife and children you mean, do you not, you took an allowance—

Mr. Chance. I object to that as leading.

The Court. There are three kinds of questions which may be asked on re-direct, and one is to bring out the sense or meaning of what he said on cross examination. 20

Mr. Holmwood. I will waive the question.

GUSTAVE FROMMELT, sworn in behalf of the plaintiff in rebuttal.

Direct examination by Mr. Holmwood.

Q Are you connected with the Board of Education of the City of Newark? A Yes, sir. 30

Q Can you tell us whether the schools of the city were in session on the morning of June 30th, 1927? A They were.

Cross examination by Mr. Chance.

Q That was the last day of school, wasn't it? A Yes.

Q On the last day of school the schools close their sessions at irregular times, do they not? A One o'clock. 40

Jacob Goeller, direct

Q What time in the morning does school start?
A 8:45.

Q Do you know the school which is nearest the corner of Bigelow street and Jelliff avenue? A Bergen street school.

10 Q How far is that from the corner? A About five minutes walk, in the Bergen street district.

Q How many children attended that school, if you know? A I think Bergen covers about 1800 children.

Q That territory from which these 1800 children come is how large? A I know it runs from Ridgewood avenue as far as Osborne terrace, Clinton avenue to Hawthorne avenue.

20 Q Do you know of your own knowledge whether on the last day of school it is customary for different teachers to excuse their pupils? A They attend four hours that day and get credit for a full session.

Q You were not present at this particular school on that day, were you? A No.

Q What you have told us is the rule and theory as to what should be done? A I have an order here issued by the superintendent of schools.

30 Q But as to whether or not children actually were excused that you have no knowledge of whatsoever? A No knowledge whatsoever.

JACOB GOELLER, sworn in behalf of the plaintiff.

Direct examination by Mr. Holmwood.

Q You are a practicing physician of this state?
A Yes, sir.

40 Q Where is your office? A 1165 Clinton avenue, Irvington.

Defendants Motion for Directed Verdict

Q Do you know the plaintiff, Philip Sheridan?

A Yes, sir.

Q Did he call upon you for treatment within the last year or so? A Yes.

Q Do you recall when he first called upon you to be treated? A The first time I saw him was October, 1927. 10

Q For what did he seek treatment? A That was the first time I saw him. I was called in to take care of his son who at that time was suffering from an attack of acute appendicitis and he told me that he himself was ill and had not been fully well, and I told him to see me at my house some time after that.

Q How often after that did you see him? A Oh, a dozen times. 20

Q What did you treat him for? A Nervousness.

Q Did you prescribe for the nervousness? A I did.

Q Is he nervous? A Yes.

CROSS EXAMINATION WAIVED

PLAINTIFF RESTS

Mr. Chance. I respectfully move for the direction of a verdict— 30

The Court. If you make a motion you will understand that I will give my reasons for refusing it. Counsel frequently ignore the rule of the Supreme Court which requires the trial judge to give his reasons for denying the motion and sometimes when the trial judge has given his reasons counsel are very much disappointed after they sit down, so if you make a motion, do not forget that I have to give my reasons for denying it, if I do. 40

Defendants Motion for Directed Verdict

Mr. Chance. Yes, your Honor, but I respectfully move for the direction of a verdict on the ground first that there is no evidence in this case of negligence on the part of the defendants or any of them.

10 The second ground of my motion is that the proximate cause of the plaintiff's injury has not been shown to be negligence on the part of the defendants or any of them.

In making this motion I have in mind that it is fundamental that negligence will not be presumed and I have in mind also that it is a principle of law that the mere happening of an accident itself is not proof of negligence. I have in mind as I make this motion also the only case on the subject which I have been able to locate in New Jersey.

(Argument.)

Mr. Chance. For the reasons just argued and the grounds submitted I respectfully move for the direction of a verdict.

(Argument.)

30 *The Court.* Suppose the jury does not believe your driver, your argument is that you want me to say that this driver told the truth, the whole truth and nothing but the truth, as a matter of fact. I cannot say that. I cannot decide a fact and that he having told the truth a verdict should be rendered for the defendant. The credibility of that driver is for the jury. If he put that car the way he did and the way he said he did and locked his brakes and had the wheels turned in at an angle how did the car start?

40 *Mr. Chance.* You have the interval between the time he left the car and the time he went

Colloquy

into the house and was in the house and any number of things might have come along in the meanwhile.

The Court. Not one of those things has been suggested.

Mr. Chance. No, but the burden of proof 10
is upon the plaintiff to prove the happening of this accident.

The Court. The question as to whether the plaintiff has spoken for himself or not is a question for the jury.

(Argument.)

The Court. I cannot decide whether he told the truth or not, that is for the jury to determine. I say that if he put this car against the 20
curb as he said he did, the car never would have gone down the hill unless someone touched it and the other thought is if he did not put it that way and someone did not touch it, then he did not put it the way he says he did; either someone interfered with it or he did not put it the way he said he did.

I have looked at these two cases, but I do not believe the court should direct a verdict in this case.

The motion will be denied. 30
Exception noted by defendants as

Mr. Chance sums up for the defendants. *ground of appeal*

Mr. Holmwood. I would like to put on the record that counsel said, "You may return a verdict of no cause of action and send him to the compensation Bureau to get compensation from his employer." The matter of compensation is a matter that cannot be taken up in a matter of this kind, no recognition can be taken 40
of it in this case, and I think that remark is

Colloquy

entirely uncalled for and should be stricken from the record.

10 *Mr. Chance.* What I said was in substance that I suppose counsel for the plaintiff probably would argue to the jury in this case that this is the plaintiff's only opportunity and the jury must give him something now or send him away without any possibility of his ever collecting anything for his future support and what I asked the jury to do was nothing of that kind but to give me a verdict of no cause of action in this case and send the plaintiff to the Compensation Bureau so that he may receive compensation from his employer.

20 *The Court.* What does this jury know of that?

Mr. Chance. I presume that everyone knows the law that an employers is bound to provide compensation insurance for his employees.

30 *The Court.* Gentlemen of the jury you will entirely disregard that remark of whether this man is entitled to compensation or not, as a matter to be taken up by the statute and having nothing to do with this case whatever and should not have been introduced. The case just tried before you has been tried under the laws guiding civil trials in the Circuit Court and hasn't anything to do with any Compensation Bureau or anything of that kind whatsoever. You may disregard any remarks made by counsel of compensation in a Compensation Bureau. I will say that to you now.

Mr. Chance. May I except to your Honor's remark?

40 *The Court.* Yes, you may have an exception.
Mr. Holmwood sums up for the plaintiff.

Charge to the Jury

The court charges the jury as follows:

MOUNTAIN, J.:

The plaintiff in this case, Philip Sheridan has brought an action against the Arrow Sanitary Laundry Company and the driver of its car on June 30th, 1927, Ralph E. Fowler, an employee of that laundry company and alleges that the defendants were negligent. 10

The situation presented to you from the lips of witnesses must be judged in accordance with your oaths. The plaintiff alleges negligence and the burden of proof is upon the plaintiff to prove it; if the plaintiff proves negligence, then, the plaintiff is entitled to a verdict. In the absence of that, a verdict should be returned for the defendant. 20

As you know, under our system of procedure in civil courts, when one party believes himself to be aggrieved against another, certain papers are filed in the court setting forth the cause of action and the defendant may file an answer indicating his defense but, all that is done for the purpose of apprising the respective parties of the respective contentions, and does not prove anything. When the parties have arrived at an issue, then, a jury is summoned and the parties must prove their case by witnesses who are sworn and a jury is the sole arbiter of all questions of fact. The court in no case can decide any question of fact; the court can guide the case by ruling on the evidence and motions, but the Judge cannot decide one single question of fact. 30

Now, if you are going to decide facts, upon what grounds are you going to rest your decision. Well, obviously you haven't anything to decide that upon except the sworn testimony of the witnesses and the inferences you draw from that testimony. 40

Charge to the Jury

10 In this case the plaintiff alleges and I am not going into this accident in detail—the plaintiff alleges his truck, he was a truck driver, was backed into a loading platform on the northerly side of Bigelow street about forty-five feet east of Jelliff
20 avenue and that his truck was facing Bigelow street and was either partially on the street or almost on the street, that is, the front of it. That he had unloaded something from the truck and given it to the consignee and was about to enter his truck and start it up and be on his way, that he was on the righthand side of his truck, about to put his foot on the step, as I understood him, when, without any notice to him whatsoever, a truck without a driver
20 smashed him against his truck, a truck which is alleged came from a stationary position about a block away, you may find, down a hill of some steepness, or perhaps you will find it was not steep, into the plaintiff and the truck he was driving and he sustained injuries, he told us, and the character of his injuries I will refer to later.

30 Now, what was the negligence of the defendant; one of the defendants alleged that he was the driver of the truck, and the other admits it and says he was an employee; the latter alleged that he
30 stopped his truck, the one which did the damage, to make a delivery and of course, you may assume, I suppose, that at the time he was on the truck and at the wheel that the truck was more or less governed by his actions. What did he do at the time according to his story. He said he pulled to the curb on an angle, that he shut his motor off and put on his brake and that the front of the car was into the curb, and that the rear of the car was two
4 to three feet away. That he went into a house and was gone fifteen minutes and when he came out he

Charge to the Jury

missed his truck. There was testimony given on behalf of the defendant, among other things, by the vice-president of the Arrow Sanitary Laundry Company. He said that there were monthly inspections of these trucks and the one in particular which hit the plaintiff in this case had been inspected about 10
three weeks before the accident and it was not discovered that there were any defects in either the brakes or mechanism. After the accident it was testified by him that the rear wheels were taken off and the brake linings were examined and everything was found to be proper. There was an allegation on the part of the plaintiff, as I recall it, that the driver of the truck signed a written statement in which, among other things he said, "We took the brakes out and they apparently were all right. After 20
we had the brakes out Mr. Sommer and another man looked at them and said they were all right and then Mr. Sommer said, 'As long as you have the brakes out put on new ones,' which I did." The driver of that car was asked some questions as to what happened after he went down to the scene of the accident. He was asked if he noticed whether the brakes were on or off and his answer to that question was, "The brake was down, I think, because they had to push it back." The question was then asked, "It was off?" And his answer was, "It 30
was in neutral position." Mr. Bernstein, who when asked came out, he said, in answer to a scream which he heard as to particularly what was done, if anything with the brake had this to say. He was asked, "Did you have trouble pushing it back," meaning the car, to which he answered, "No trouble pushing the brake back, as far as I could ascertain, two others beside myself pushed it back." The 40
question was asked, "Do you know if the brake was

Charge to the Jury

set up?" The answer was, "I believe the brake was on, but I could not be certain." Then, in answer to another question he said, "Some one fumbled at the seat attempting to get in and I hollered 'Speed' and everyone pushed, the three of us."

10 Now, if I have misquoted any testimony you must take your recollection of what the witnesses have said and not mine. Negligence is never presumed, it must be proven, and if you find the driver of this truck was negligent, his employer can be held; if you find he was not negligent, then, the employer cannot be held.

It has been adjudicated in this state that a person who leaves an automobile in a public street un-
20 attended is under a duty to exercise such care in doing so as a person of ordinary prudence would exercise under the circumstances. Failure to exercise such care, whereby a machine without any wilful interfering act of another but by force of gravity, or some other cause reasonably to be anticipated guarded against, gets under way and inflicts injury, makes such person liable therefore in an action for damages. It seems to me that if you approach this question when you retire to the jury-
30 room, going in a straight line to the crux of the question, you will first discuss the manner in which the driver left that automobile at the curb. Was his engine shut off; was his brake on? Was the car on an angle so that even gravity could not start it? There is no proof that I recollect of anyone meddling with the car. There was some talk about children and schools and it being the last day of school and the children being in attendance there that day, but there was no proof that any child was seen,
40 as I recall it, around or near the car. Now, if no one touched the car and it was placed in the posi-

Charge to the Jury

tion I have indicated how did it start? Perhaps you will find that someone did meddle with it when it was placed that way but as I recall there is no testimony that shows that directly. At any rate we do know that whether someone touched the brakes or turned the wheels of this car the car eventually got under way and went down the hill and injured the plaintiff. The mere fact that the accident happened is not proof of negligence, and as I think I said, negligence is never presumed, so, we come back to the question of how this car was left. How about the brakes on that car? I think you have a right to consider the testimony, among other things, that indicates that this car made about one hundred stops a day, I think that was the testimony, that when the brakes were examined, as I understood it, the linings were renewed, although they said the brakes were all right. If those brakes were not all right, if the lining was old and worn, if you draw that inference, perhaps you will find that the force of gravity was so great that even if the brake lever was pulled up the mechanical force upon the drum, or whatever it was, or force against the lining was insufficient to hold the car and that if the car was in such position gravity would start it down the hill. Those are questions for you to determine and I have spoken of that because of the parts of the testimony I have particularly referred to.

The plaintiff in this case cannot recover unless it is proven to you by the greater weight of the evidence that the defendant's negligence was the proximate cause of his injury. If you find it was not, your judgment should be for the defendant. If you find for the plaintiff, what were the elements of his damages? He can recover, first of all, any nervous agitation which was proximately caused by

Charge to the Jury

the defendant's negligence. Secondly, he can recover for the bodily injury which he has sustained, if you find for him, and the effect of that injury upon his health as to degree and probable duration and the pain and suffering which he has had or will have as the result of the defendant's negligence. If you find for the plaintiff he would be entitled to recover any pecuniary losses that he has suffered by reason of his inability to attend to his vocation or business. There was testimony, I think, that on June 30th, 1927, this accident happened, that at that time his salary without overtime was about \$38 a week, that for the six months preceding the accident he had an average of \$49.50 a week. It is the duty, of course, or was the duty of the defendant to minimize his damages, if he was able to work. You will have to determine as to the amount of his disability.

There was testimony given as to the character of his injuries, which I will not go into, and there was testimony given indicating, or tending to indicate, you may find, that the treatment he received was improper; that it was someone else's fault that his leg was not in a better condition. The highest court in this state has this to say about that situation, "If the plaintiff, you find, employed a responsible and reputable physician he has a right to presume that the treatment was proper and cannot be kept out of damages because with a better physician he might have had better results. If he used reasonable care to select a reputable doctor it was enough."

I have been asked to charge by both side and I will deny the plaintiff's requests and charge you on behalf of the defendant as follows:

Charge to the Jury

"The mere fact that an accident happened to a plaintiff is not enough to entitle him to a verdict."

The second request I will deny.

The third, and fourth and fifth I will charge.

"3. To entitle a plaintiff to recover in a case like this he must establish by the preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury complained of." 10

"4. It is not as a matter of law negligence to leave an automobile unattended in a public street."

"5. It is not the duty of an auto driver to chain or lock his automobile to a post, or in some way fasten it so it is impossible for it to be started by the act of a third party, unless in the exercise of reasonable care you should find that such a thing existed. That is an abstract statement, which I perhaps would not have charged if I had read it twice. I can imagine perhaps where an automobile driver may not exercise reasonable care if he did not hitch his automobile in some way, but as an abstract proposition I do not think I can charge it. I will deny the last request because you have indicated certain factor which if resolved in favor of the defendant you wish me to tell the jury to bring in a verdict in favor of the defendant, but you have not included all of the factors and you have, in my opinion, omitted the duty of reasonable care as defined by the law." 20 30

The last request is this, that the refusal of the court to grant a motion for a non-suit or the direction of a verdict should in no wise prejudice you against the defendant. Lawyers have at all times the right to make a motion. The court, when such motions are made, must explain why it denies the motion and of course that explanation sometimes may sound to the jury like an argument against the 40

Charge to the Jury

particular person making the motion. I charge you that you must be impartial and that must not prejudice you, because I have no right to decide any questions of fact, that is for you to determine, therefore, I charge you that my refusal to direct a
 10 verdict should not affect your position in the case.

How about this third defendant? There is no proof of any such person as Sommers trading as the Arrow Laundry Company, Incorporated.

Mr. Holmwood. Only the driver was asked if he worked at the time for Sommers trading as the Arrow Sanitary Laundry Company. I am willing to have counsel state on the record that Sommers trading as the Arrow Sanitary Laundry Company no longer owns this business, that they transferred it prior to the accident, and to accept a voluntary non-suit as to that defendant, but it seems to me that the driver explained that Sommers was the boss.
 20

Mr. Chance. I will ask for the direction of a verdict in favor of that defendant. I started to ask questions about that in the case and my adversary objected to it.

The Court. I will grant your motion.

Mr. Holmwood. It seems to me that I should be permitted to take a voluntary non-suit, as far as Mr. Sommers is concerned.
 30

The Court. Very well, I will grant a non-suit as to Bertrand H. Sommer, trading as the Arrow Sanitary Laundry Company. That leaves two defendants, the Arrow Sanitary Laundry Company and Ralph E. Fowler, and, gentlemen of the jury, if you find a judgment against these defendants, I charge you that you cannot apportion the damages.
 40

(The jury retires.)

Defendants Requests to Charge

Mr. Chance. I respectfully pray an exception to the refusal of your Honor to charge the defendant's requests to charge which your Honor omitted.

Exception noted as ground of appeal.

Mr. Holmwood. I respectfully pray an exception to your Honor's charging the defendant's requests to charge which your Honor did charge. 10

Exception noted as ground of appeal.

DEFENDANT'S REQUESTS TO CHARGE

1. The mere fact that an accident happened to a plaintiff is not enough to entitle him to a verdict.

Charged. 20

2. Negligence on the part of the defendant is never presumed. It must be established by legal evidence.

Denied.

3. To entitle a plaintiff to recover in a case like this he must establish by the preponderance of the evidence that the defendant was negligent and that such negligence was the proximate cause of the injury complained of. 30

Charged.

4. It is not as a matter of law negligence to leave an automobile unattended in a public street.

Charged.

5. It is not the duty of an auto driver to chain or lock his automobile to a post, or in some way fasten it so it is impossible for it to be started by the act of a third party. 40

Charged.

Plaintiff's Request to Charge

6. Your verdict should be for the defendants if you find from the evidence that the defendant Fowler left his truck with the engine turned off, the brake securely set and the wheels turned toward the curb with the right front wheel against the curb.

10 Denied.

PLAINTIFF'S REQUEST TO CHARGE

1. One leaving an automobile in a public street upon a grade unattended is under a duty to exercise such care in doing so as a person of ordinary prudence would exercise in the circumstances. Failure to exercise such care whereby the machine, without any evidence of wilfull interfering act of another, but by force of gravity or some other cause reasonably to be anticipated or guarded against gets under way and inflicts injury, renders such person liable therefor in an action for damages.

20

 Denied.

2. A pedestrian standing at curb or stepping into gutter, when he was struck by defendant's automobile was not bound to anticipate that vehicle would be in operation along the wrong side of the street, and his failure to observe that it was on the wrong side of the street was not negligence per se, contributing to his injury.

30

 Denied.

Exhibit D-1 (admitted page 103)

Ralph E. Fowler, 63 Rutger St., Irvington, N. J.

On June 30th, 1927, at about 10 A. M., I made a stop at a customer's house, Mrs. Nichols, 357 Bigelow St., to deliver a bundle of laundry. I had stopped my truck across the street, about 358. I was in Mrs. Nichols' house 15 or 20 minutes, as she was arguing about a 50c. deposit on a laundry bag. When I came out the truck was gone, and looking down the street toward Jelliff Ave., I saw a commotion there and the cop was beckoning for me. As soon as I reached the cop he told me the truck hit a man.

10

The truck I was driving was a Ford, one-half ton body. This truck I had been driving for the past eight or nine months, and the brakes were always in working order, as every Friday the three of us drivers always took up on our brakes or in other troubles this was always looked after on Friday or Thursday, as it was known as truck day at the laundry, there being no deliveries or pick-ups on this day only in the mornings.

20

As to my knowledge I don't know of the brakes on this car that was involved in the accident having had any repairs done to them while I used the truck, as I never had any trouble with them.

When I stopped at this customer's house, I was facing east, as I was on a grade I pulled to the curb, and pulled up the brake and stopped the motor. I always stopped the motor, as Mr. Sommer instructed us to do so as we would save gasoline. Anyway, the motor generally stalled when I stopped as I had a cracked commutator and was forced to use extra gasoline to run the motor.

30

I have driven cars for the past 10 years.

The day after the accident, Mr. Sommer told me to look at the brakes to see how they are, so with

40

the colored helper "John D." (his full name I don't know), we took the brakes out and they apparently were all right. After we had taken the brakes out, Mr. Sommer and another man looked at them, and saw they were all right, then Mr. Sommer said, as long as you have the brakes out put in new ones, which I did.

- 10 I am no longer in the employ of the Arrow Laundry. I left around New Year's, having been layed off account of the routes being doubled.

(Signed) RALPH FOWLER.

Dated, 5-7, 1928.

20

30

40

New Jersey Court of Errors and Appeals

PHILIP SHERIDAN,

Plaintiff-Respondent,

vs.

ARROW SANITARY LAUNDRY, *et al,*

Defendants-Appellants.

Action at Law.

On Appeal

from Essex

Circuit Court.

BRIEF FOR DEFENDANTS-APPELLANTS

This appeal reviews a judgment for \$30,000.00 and costs rendered in the Essex Circuit Court in an action involving personal injuries.

FACTS

On June 30th, 1927, the plaintiff while standing beside an automobile truck of which he was chauffeur, with one foot on the curb and one in the gutter, was struck by an automobile truck belonging to the Arrow Sanitary Laundry (case, page 41, line 38). The place of the accident was a down grade (case, page 29, line 5) on Bigelow Street, near Jelliff Avenue, Newark. There was no testimony by any witness who saw defendants truck start.

At the conclusion of the plaintiffs case there was evidence that the truck which hit plaintiff belonged to defendant Arrow Sanitary Laundry and that at the time of the accident no driver was upon it. There was no evidence as to how defendants automobile got to the place of contact with the plaintiff or what started it.

The defense introduced testimony of the defendant Fowler (case, page 95 to page 107) who was the driver of the car, who explained among other things that he had parked his car to the right hand curb of Bigelow Street, had turned the wheels toward the curb (case, page 98, line 17; p. 99, line 21), had securely set the emergency or parking brake (case, page 97, line 40), and had turned off the power (case, page 98, line 12); that he had gone to the back of his car for some laundry and had gone into a house with it (case, page 99, line 34, to page 100, line 10); that he had some discussion in the house with a customer relative to the return of a laundry bag (case, page 96, line 22); that just before he went into the house the automobile was still standing where he had parked it (case, page 96, line 15); that his automobile had good brakes and was in good condition (case, page 97, line 34); and that it could not have started itself (case, page 98, line 14) from the position in which he left it and gone down the incline which all admitted was on Bigelow Street. He further testified to the effect that the neighborhood was a thickly populated one frequented by children (case, page 98, line 22), but could not testify to having seen children around his car on the day in question. Arthur Somers also told of the good condition of defendant's car (case, page 77, et seq.).

At the conclusion of the evidence the defendant's counsel moved for a direction of a verdict in favor of the defendant, Arrow Sanitary Laundry and Ralph E. Fowler, which was denied and exception was duly taken to this denial.

The plaintiff submitted to a voluntary non-suit as against the defendant Somers who has no further interest in the case.

APPELLANTS' POINTS

I.

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTION OF VERDICT IN FAVOR OF THE DEFENDANTS ARROW SANITARY LAUNDRY AND RALPH E. FOWLER.

II.

THE TRIAL JUDGE REFUSED PROPER REQUEST TO CHARGE.

ARGUMENT

POINT I

THE TRIAL COURT ERRED IN DENYING THE MOTION FOR A DIRECTION OF VERDICT IN FAVOR OF THE DEFENDANTS, ARROW SANITARY LAUNDRY AND RALPH E. FOWLER.

Under the law the plaintiff has the burden of proof. As stated in *Bien vs. Unger*, 64 N. J. L. 596:

"This right of the defendant to have his plaintiff bear the burden of the affirmative is a substantial one and not a mere matter of form."

As stated in *Stumpf vs. D. L. & W. R. R. Co.*, 76 N. J. L. 153;

" * * * negligence is not presumed, but must be proved. The difficulty of proving the negligence charged does not affect the principle."

In legal principle *Keber vs. Central Brewing Co.*, 159 N. Y. Supp. 986, cannot be distinguished from this case. Substantially the same facts were shown in both cases with a further fact that in the cited case there was some testimony about boys around the automobile that caused the damage. The Court said that the testimony about the boys would be enough to rebut an inference of fault on the part

of defendant if such an inference could arise. The Court continued to say, however, that there was no proof from which an inference of defendant's negligence could arise. Under the evidence in that case it was possible that the car started down the hill, either from negligence of the defendant or from the interference of others. With the evidence in such posture the Court ruled that liability had not been established. The basis of the ruling is stated in the syllabus as follows:

"The rule of *res ipsa loquitur* cannot apply where no negligence of defendant is shown by direct evidence, and it is apparent that there may have been other causes than the defendant's negligence which led to the accident."

The reasoning epitomized in that syllabus is well established in New Jersey. The first syllabus of *Suburban Electric Co. vs. Nugent*, 58 N. J. L. 658, reads as follows:

"In an action for personal injury, the plaintiff, in order to recover damages, must do more than show the possible responsibility of the defendant for the injury. In the absence of direct evidence he must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and *exclude the idea that it was due to a cause with which the defendant was unconnected.*"

In *Stumpf vs. D. L. & W. R. R. Co.*, 76 N. J. L. 153, the first syllabus is as follows:

"Where, in an action to recover damages for injuries alleged to have been caused by defendant's negligence, it appears that the injuries were occasioned by one of two causes, for one of which the defendant is responsible, but not for the other, plaintiff must fail if the evi-

dence does not show that the injury was the result of the former cause; if, under the testimony, it is just as probable that it was caused by the one as the other, he cannot recover."

In *Cass vs. Sanger*, 77 N. J. L. 412 at 414, this rule is stated as follows:

"Where negligence is alleged and the proofs of it are circumstantial and not direct, *the evidence must be such as to exclude all theories of accounting for the accident which would be inconsistent with the defendant's negligence.*"

In *Chester vs. Cape May Real Estate Co.*, 78 N. J. L. 131, at page 133, this rule is stated as follows:

"It must be conceded that the plaintiff was bound to show something more than that the defendant was possibly responsible for the decedent's death in order to entitle him to a verdict. *It was incumbent upon the plaintiff*, in the absence of direct evidence of the fact, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the death was caused by the wrongful act of the defendant, and would *exclude the idea that it was due to a cause with which the defendant was unconnected.* *Suburban Electric Co. vs. Nugent*, 29 Vroom 658; *Stumpf vs. Delaware Lackawanna & Western Railroad Co.*, 47 Id. 153; *Houston vs. Traphagen*, 18 Id. 23. And this, it seems to us, the plaintiff has not done."

In *Meyer vs. Lembeck & Betz*, 93 N. J. L., page 7, at page 10, the rule is stated as follows:

"As was said by the Court of Errors and Appeals in *Suburban Electric Co. vs. Nugent*, 58 N. J. L. 658, 'In an action for personal injury, the plaintiff, in order to recover damages, must

do more than show the possible responsibility of the defendant for the injury. In the absence of direct evidence he must show the existence of such circumstances as would justify the inference that the injury was caused by the wrongful act of the defendant, and *exclude the idea that it was due to a cause with which the defendant was unconnected.*' The doctrine thus laid down is, in our opinion, applicable to the case in hand."

In *McCombe vs. Public Service Railway Company*, 95 N. J. L. 187, at page 189, the rule is stated as follows:

"For the plaintiff to succeed it was incumbent upon him, in the absence of direct evidence, to show not only the existence of such possible responsibility, but the existence of such circumstances as would justify the inference that Saunder's death was caused by the wrongful act of the defendant, *and which would exclude the idea that it was a cause with which the defendant was unconnected.*"

In *Maphet vs. Hudson & Manhattan Railroad Company*, 98 N. J. L. 369, at page 370, the rule is stated as follows:

"If a plaintiff is to succeed it is incumbent on him, in the absence of direct evidence, to show not only existence of such possible responsibility, but the existence of such circumstances as would justify the inference that the plaintiff's injury was caused by the negligent act of the defendant, *and which would exclude the idea that it was a cause with which the defendant was not connected.*"

In *Cook vs. American Smelting & Refining Co.*, 39 N. J. L., page 81, at page 85, the rule is stated as follows:

“A plaintiff to succeed must show by evidence, not only such circumstances as would justify the inference of the defendant’s negligence, *but which would exclude the idea that the accident was due to a cause with which the defendant was unconnected.*”

In *Migliaccio vs. Public Service Railway Company*, 101 N. J. L. 496, it was said in a death case:

“It is incumbent upon the plaintiff to exclude the idea that death was due to a cause with which the defendant was unconnected.”

In the face of these authorities it cannot be questioned that the burden of proof requires the plaintiff to exclude the possibility of the accident having been caused by other things or persons than those for which the defendant is responsible.

Applying this rule to the present case we see that under the plaintiff’s evidence the cause which started the automobile down the hill was not shown. From plaintiff’s evidence one could only speculate that it was either because of negligence on the part of the defendant Fowler or by the act of a third party interfering, that the car started.

The defendant’s uncontradicted testimony was that the car was parked with its wheels toward the curb; its brakes securely set and the power turned off and that the car could not have started itself (case, page 98). In short fault of the defendant was excluded.

Since the plaintiff did not exclude the possibility of other causes than fault of the defendant, the defendant was entitled to a directed verdict.

The plaintiff can gain no assistance from the doctrine of *res ipsa loquitur*. That doctrine applies only where the existence of defendant’s negli-

gence is the only reasonable inference that could properly be drawn. In *Conover vs. D. L. & W. R. R. Co.*, 92 N. J. L. 602 at 604, this rule is stated:

“In well-considered cases resting upon the application of the doctrine of *res ipsa loquitur*, as tending to establish *prima facie* negligence and where liability was upheld, it will be invariably found that in every instance there was an essential element present, that is proof of the existence of the cause or thing which was alleged to have been the negligent act which produced the injury, or proof of such facts from which the existence of such cause or thing constituting the alleged negligent act *was the only reasonable inference that could be properly drawn*, and that such negligent cause or thing producing the injury was in the possession of and under the control or management of the person charged with negligence or of his servant.”

In the case at bar, that the proximate cause was negligence by the defendant was not the only inference possible. In fact that was not a proper inference. The driver's uncontradicted testimony showed due care by the defendant and that the car involved could not have started itself, leaving the only inference possible that somebody interfered with the car. Thus the failure of the plaintiff to exclude other possible causes than fault on the part of the defendants should have caused the granting of the motion for a directed verdict.

Judicial statement of the doctrine of *res ipsa loquitur* invariably includes the idea that the instrumentality causing the injury, was being operated and controlled at the time of accident by the defendant. As stated in *Slater vs. Barnes*, 241 N. Y. 284, 149 N. E. 859:

“Rule of *res ipsa loquitur* is predicated on condition that agency producing injury is within exclusive possession, control and oversight of person charged with negligence, raising inference that party so charged ought to be able to give explanation consistent with his freedom from negligence * * * ”

In the present case the evidence did not show possession, control and oversight by the defendants at the time the car started. The car had been legally parked by defendant Fowler and it is manifestly unsound to suggest that he ought to be required to give an explanation of what happened while he was in his customer's house and it was obviously impossible for him to tell who interfered with the car at that time. The whole logic on which *res ipsa loquitur* is predicated is absent from this case in view of the fact that Mr. Fowler and the other defendant were not in possession, control and oversight of the car at the time it started. In fact, however, Fowler's uncontradicted explanation should exonerate the defendants.

At the close of the plaintiff's case the proofs failed to show more than the happening of an accident. When the defendants' uncontradicted proofs were in, the situation was that if the defendants' witnesses were to be believed, the defendant was exonerated and free from negligence, while if the defendant's witnesses were not considered credible, the case simply stood as before, one in which the plaintiff had failed to exclude the possibility of other causes than fault of the defendant.

The case of *Spanko vs. Spitalnick*, 101 N. J. L. 5, is not in point. In that case there was direct proof of defendant's negligence for children testified that they heard the engine running and a police officer testified that he turned the engine off immediately after the accident. On the contrary in this

case Mr. Bernstein testified that the engine was not running when he arrived right after the accident (case, page 42, line 12), and there was no direct evidence of any negligence on the defendants' part. Furthermore in the case subjudice the defendants' uncontradicted evidence showed the exercise of reasonable care and left the only possible inference that some interfering willful act of another started the car.

Defendants' motion for a direction of a verdict did not require the trial judge to rule that the defendants' witnesses were telling the truth. In reality the motion signified that if the defendants' witnesses were believed the defendants were exonerated; if they were not considered credible their disbelief does not supply what the plaintiffs' proof lacks, namely, an exclusion of the idea that the starting of the car was due to interference by others, a cause with which the defendants were not connected.

On the authority of *Keber vs. Central Brewing Company*, 159 N. Y. S. 986, and the other decisions above mentioned, the verdict for the defendants should have been directed, because the plaintiff did not by proof exclude other possible causes than alleged negligence by defendants, the doctrine of *res ipsa loquitur* was inapplicable and the evidence offered by defendants exonerated them.

POINT II

THE TRIAL JUDGE REFUSED PROPER REQUEST TO CHARGE.

The defendants' sixth request to charge was:

"Your verdict should be for the defendants if you find from the evidence that the defendant Fowler left his truck with the engine turned off, the brakes securely set and the wheels

turned toward the curb, with the right front wheel against the curb." (Case, page 124, line 1.)

The proposition embodied in this request to charge is undoubtedly correct. A driver who does the things mentioned in the request is clearly free from negligence and entitled to a verdict and so is his employer. One case has described such conduct as that mentioned in the request to charge as "more than ordinary care" *Pesaty vs. James A. Hearn*, 202 N. Y. S. 264.

CONCLUSION

The refusal of a directed verdict was error as was the refusal of the sixth request to charge. The judgment appealed from should be reversed.

Respectfully submitted,

KELLOGG & CHANCE,
Attorneys for and of Counsel
with Defendants-Appellants.

100

New Jersey Court of Errors and Appeals

PHILIP SHERIDAN,
Plaintiff-Respondent,

v.

ARROW SANITARY LAUNDRY Co.
(a corporation), BERTRAND H.
SUMMER, trading as the
ARROW SANITARY LAUNDRY
Co., and RALPH E. FOWLER,
Defendants-Appellants.

Action at Law.

BRIEF FOR PLAINTIFF- RESPONDENT.

Facts.

While the statement of facts contained in the appellant's brief is substantially correct so far as it goes there are very important omissions of facts proved in the case which when considered in conjunction with other facts clearly present jury questions. For this reason, important facts which were omitted from the appellant's statement will be given in italics, so that the members of the court may readily refer to them.

On June 30th, 1927, plaintiff while engaged in his occupation as a truck driver was severely and permanently injured by being crushed between his

own truck and the truck of the defendant, Arrow Sanitary Laundry Company, which truck just prior to the accident had been in charge of the defendant Ralph E. Fowler. Plaintiff's truck was backed into the side of a building at the corner of Bigelow Street and Jellif Avenue, in the City of Newark, with the rear end of the truck at the receiving platform and the front end of the truck on the curb at the northerly side of Bigelow Street about forty-five feet east of Jellif Avenue. The front wheels of his truck were at or near the curb and he was in the act of bending over the front part of his truck to turn on his ignition switch when he was struck from behind by the defendant's truck, which was running easterly down hill on Bigelow Street without a driver and came up over the curb on the northerly side of the street pinning the plaintiff between it and the truck he was about to start. These facts are not disputed.

By way of attempted explanation of the running away of the defendant's truck the defendant produced as a witness the defendant Ralph E. Fowler, who had been in charge of the truck, who stated that he stopped the truck about fifteen feet below Peshine Avenue, which is a block above Jellif Avenue for the purpose of making a delivery. That he stopped, pulled to the curb on an angle, put on his brake and shut off the motor. *That the rear end of his car was two or three feet from the right hand curb at an angle, so that the front wheels were resting against the curb* (Case, p. 96, ll. 1 to 10). A suggestion was thrown out that possibly some children may have meddled with the car but no proof of any such meddling was introduced *and the defendant Fowler testified that he did not see any children around there that day* (Case, p. 98, l. 32), *and it further appeared from*

the testimony of Gustav Frommelt, an employee of the Board of Education, that the public schools of Newark were in session at the time (Case, p. 109, ll. 30 to 35).

Defendant Fowler testified that he was in the customer's home about fifteen minutes and that upon returning to the place where he left the car his truck was down at the bottom of the hill into Mahon's truck (meaning truck operated by Sheridan, Case, p. 96, l. 30).

When the plaintiff was struck by the defendant's truck he cried for help and Mr. Bernstein, who was the proprietor of the premises where he was making the delivery, came out and, assisted by others, pushed the defendant's truck away from the plaintiff releasing him. A passing automobile was then obtained to take the plaintiff to the hospital. It appears from the testimony of Officer O'Brien that he was on duty at the Sixth Precinct that morning and that he received a telephone message of the accident at 10:15 and immediately went down to Jellif Avenue and Bigelow Street and saw truck which plaintiff had been driving backed up against the loading platform at the Bernstein Building and that a short distance away from it was the truck of the Arrow Sanitary Laundry Company. That he made inquiry around the neighborhood trying to locate the driver and that Fowler came running down the hill and wanted to know where his truck was (Case, p. 44, ll. 30 to 40).

Mr. Bernstein testified that when he pushed the truck back he does not think the motor was running and that there was no driver in the seat, that there was no trouble pushing the truck back and further testified as follows (Case, p. 42, l. 20):

"Q. Do you know whether the brake was set up? A. I believe the brake was on, but I

couldn't be certain of it because I caught the man and carried him away, I didn't examine the brake at the time.

Q. You did not handle the brake did you?

A. I did not handle the brake myself, or anything pertaining to the motor.

Q. Was it necessary for you or any of those that helped you to do anything to the brakes for you to push it back? A. There was someone fumbled at the seat attempting to get in the seat, but I hollered, 'Speed,' and everyone pushed, the three of us."

The defendant Fowler testified that upon his arrival at the scene that the brake was in neutral position (Case, p. 106, ll. 1 to 10).

It is charged in the complaint that the defendants were negligent in the operation of their automobile, that the brakes were improperly applied, that it was improperly parked and that the brakes on the automobile were defective, and that the defendant failed to keep proper control or supervision of said automobile on the highway (Case, p. 2, ll. 25 to 40).

In an effort to meet this allegation of negligence the defendant Fowler testified as to the manner in which he claims to have parked the car and both Fowler and Arthur P. Sommer, Vice-President of the defendant company, testified as to inspection and general care taken of the car prior to the accident. *Mr. Sommers testified that the last examination was three weeks prior to the accident but that they did not at that time take off the wheels and examine the brake bands (Case, p. 79, l. 40 to p. 80, l. 10). That on the monthly inspection the wheels were not taken off and bands examined (Case, p. 80, ll. 10 to 20). That new bands were put in about three months prior to the accident*

(l. 25). *Defendant Fowler testified on this point that he had driven this car for three months and that he doesn't remember any repairs made to the brakes during that time (Case, p. 103, ll. 18 to 23). That he had charge of minor repairs to the car and took up the foot and emergency brakes when needed (ll. 25 to 35). That he never took up on the rod for the emergency brake (Case, p. 105, l. 12). That the car was on the road about 4½ or 5 days a week and was used continuously (Case, p. 105, ll. 10 to 20), and that it would average one hundred stops a day (Case, p. 106, ll. 25 to 32).*

Mr. Sommers, Vice-President of the defendant company testified that he examined the emergency brake almost immediately after the accident but he does not state in what condition he found them (Case, p. 77, ll. 30 to 40), except to say that he tried it on the road and that it seems to be all right (Case, p. 78, ll. 1 to 10). Defendant Fowler testified that after the accident he and Mr. Sommers examined the brakes to the wheels that were off and found them to be O. K. He changed the time when this alleged inspection of the brake bands was made until the following morning or afternoon (Case, p. 101, l. 120) and he stated that they did not put in new brake bands at the time this examination was made (Case, p. 101, l. 40 to Case, p. 102, l. 2). He was then confronted with a written statement signed by him dated May 7th, 1928, in which it appears that the examination of the brake bands took place the day after the accident and wherein he stated that Mr. Sommers said "as long as you have the brakes out put in new ones, which we did" (Case, p. 102, ll. 30 to 40, see statement Exhibit D-1, Case, p. 125). The defendants thereupon offered this statement in evidence as part of their proof and it was marked Exhibit D-1. The

proof on behalf of the defendant thereby showed, first, that they did not replace the bands, and, second, that they did replace the bands immediately after the accident.

RESPONDENT'S POINTS.

1

Respondent contends that the learned trial judge was not in error in refusing appellant's motion for a direction of verdict for the reason that there was proof of negligence and disputed questions of fact for the determination of a jury.

2

That the trial judge was not in error in refusing to charge defendant's sixth request in the language given.

POINT I.

The trial judge properly refused the motion for a direction of verdict.

In considering the question as to whether or not a verdict is to be directed, of course, there will be no dispute as to the general rule upon such a motion. All evidence is to be taken most strongly in favor of the plaintiff, and if there is any evidence in the case upon any proposition upon which reasonable men might differ or any honest man could have a difference of opinion thereon the case is for the jury. (See *Nell et al. v. Godstrey*, 90 N. J. Law 709, 101 Atl. Rep. p. 50 and cases cited therein.)

The general rule seems to be in a situation of this sort as stated by Mr. Justice Trenchard in the syllabus in the case of *Spanko v. Spitalnick* as follows (101 N. J. Law, p. 5, 127 Atl. p. 663) :

“A person who leaves an automobile in a public street unattended is under a duty to exercise such care in doing so as a person of ordinary prudence would exercise in the circumstances. Failure to exercise such care whereby the machine, without any willful interfering act of another, but by force of gravity or some other cause reasonable to be anticipated or guarded against, gets under way and inflicts injury, renders such person liable therefor in an action for damages.”

Appellant does not quarrel with the above statement of law but argues that this case is not applicable because there was testimony that the motor was running after the accident. An unknown and suggested meddler could start the motor as well as release brakes. If the evidence referred to made that case one for the jury, surely the evidence of Fowler that he found his brake in neutral after the accident, and the conflict in the testimony as to the renewal of the bands, the question of proper inspection and the various other matters in italics in the statement of facts given in this brief were questions for the jury.

In other jurisdictions it has been held that in the case of a runaway automobile where there is no positive proof of the way in which the car got underway the fact that the plaintiff was run into by the car raises a presumption of negligence on the part of the defendant and established a prima facie case for the plaintiff.

In *Elliott v. Seattle Chain & Manufacturing Co.*, 251 Pac. 117 this rule is laid down.

In that case the defendant contended that the prima facie case was destroyed completely, because of the testimony of its employee, that he had observed all the regulations both as to statute, ordinances and reasonable usage, in the manner in which he parked his car. As to this contention the court said:

“But this testimony on his part, although positively given, need not necessarily have been completely believed by the jury, which had a right to draw reasonable inferences from what actually happened, contrary to that positive testimony; for, if the Ford had been parked with its wheels cramped in a northerly direction against the curb, it would seem that the car would not have proceeded down the hill in the opposite direction, and, if the brakes were proper and had been set, as testified to, it is improbable that the car would have proceeded to the point of collision without something having happened to the brake mechanism, and there are other inferences which the jury might reasonably draw from the physical facts which could disprove the statement of the driver of the Ford as to what precautions he had taken in parking the car on the sidehill. These are all matters which the court was not warranted in withdrawing from the jury’s consideration. So, upon either theory, there was something which the jury had the right to pass upon and determine to have been the facts.”

In *Donovan v. Garvas*, 121 N. Y. Misc. 24, 200 N. Y. Supp. 253, there was evidence from which

the jury might infer that the brakes were defective, whereupon the court affirmed the verdict for the plaintiff.

In *Fuller v. Magatti*, 231 Mich. 213; 203 N. W. 868 plaintiff was struck by a runaway automobile which defendant claimed he had parked at the curb cramping the wheel so it rested against the curb, placing the gear in reverse and setting the brakes. Testimony of the witness that pulled the car off the plaintiff was that the brake was not set but that the gear was in neutral. In affirming a judgment for the plaintiff the court held that the question of defendant's negligence was clearly one for the jury.

This case seems peculiarly in point, in that the testimony of Fowler was that he found the brake in neutral when he reached the car after the accident. This was a circumstance that the jury had a right to consider to determine whether or not the brakes had been properly set in the first instance.

In *Kolbe v. Public Market Delivery & Transfer*, 120 Wash. 302; 226 Pac. 1021, defendant left his car in a private parking place containing a slight grade toward the street. There was no evidence as to what caused the automobile to start nor was there any evidence indicating meddling on the part of any third party. Upon judgment for the plaintiff the court affirmed the judgment, first, because of the rule *res ipsa loquitur*, and second, because, there was evidence tending to show that the brakes of the car were defective.

Another case is *American Express Company v. Terry*, which case is cited in the case of *Spanko v. Spitalnick*, supra, decided by the Court of Appeals of Maryland, reported 126 Md. 254, 94 Atl. 1026 and cases 1917 C. 650. In that case plaintiff was injured in trying to change the course of a motor

truck which, when the driver dismounted to deliver a parcel, had started and was running down a slight grade. The driver testified that he stopped the car with the front wheels in the gutter with his wheels turned in part of the way, as the law requires to stop on a hill. That he threw off the power and closed down the switch, and upon cross examination stated that he had applied the brake. The court held that had the machine been in good order, the current turned off and the brake properly applied it is difficult to see how it could have been seen running down the street in the manner described by the witness. That under the rule adopted in the case of *Scott v. London Dock Company*, 3 Hul & C. 596. "That where a thing is shown to be under the management of the defendant or his servant, and the accident, such as, in the ordinary course of things, those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident was from want of care," was applicable.

This case is also in point for the reason that there was evidence of the constant use of this car, evidence of failure to inspect the brake bands and conflicting statement by the defendant Fowler as to whether or not the bands were renewed immediately after the accident, together with the question as to whether or not inspections made by the defendant were adequate and reasonable inspections. These were all questions of fact bearing upon the charged defective condition of the brakes, which were properly submitted to the jury for its decision.

While an automobile is not regarded as a dangerous instrumentality per se the possibility of danger from careless or negligent handling is obvious.

Wilson v. Brauer, 97 N. J. Law 482, 117 Atl. 699.
The normal use of an automobile does not con-

template that a machine will descend a hill without a driver and going up on a curb strike persons lawfully attending to their business on the opposite side of the street. Such a condition obviously places upon the defendant the burden of making some explanation. In this connection the defendant contends that the only explanation necessary is a story from the driver of the car to the effect that in his opinion he parked the car properly, stating the manner in which he parked same, and that the court was required to take this testimony without reference to any other evidence in the case tending to show negligence on the part of the defendant.

At this point it would perhaps be advisable to emphasize the points in the evidence which respondent contends required the submission of the case to the jury. In the first place it is conceded by the appellant that there was no direct evidence in the case of any interference of the automobile by children or others, second, it is a clear and unmistakable inference to be drawn from the evidence that the defendant's truck must have left the position in which the driver left it almost immediately after he went away. He states that he was gone fifteen minutes and that upon his return he saw the truck at the foot of the hill. During that fifteen minutes the truck had proceeded down the hill and struck the plaintiff. Assistance had reached the plaintiff, the truck was pushed away from him and the plaintiff was removed to a hospital. A police officer who had been telephoned for arrived from the Sixth Precinct and was making inquiry in the neighborhood in an effort to locate the driver when he met Fowler running down the hill. As all this took place within the fifteen minutes that Fowler says he left the truck standing there it is a fair inference which a jury might

consider as to whether or not the truck started almost immediately after it had been left by the defendant Fowler. Therefore, it was for the jury to say under this evidence whether or not it was true that Fowler left his truck in the secure way in which he claimed he did.

Another important point in the evidence which was clearly for the determination of a jury rather than the court was the testimony of Messrs. Bernstein & Fowler, as to whether or not the brake was on at the time the car struck the plaintiff. This testimony has been quoted in the statement of facts at the head of this brief and indicates that while Bernstein thought the brake was on he was not sure and that they did not touch it. Fowler states that he found the brake in neutral. Under these circumstances if the jury were to have found as a fact that the brake was on they would be entitled to draw an inference from such fact that the brake must have been defective or it would have held. On the other hand, if they found as a fact that the brake was in neutral a fair inference from this testimony would be that the defendant Fowler had not properly set the brake before leaving the car. In either case these were circumstances which were peculiarly for the decision of a jury. Another important fact bearing upon the question as to whether or not the brake was defective is the statement made by Fowler in May, 1928, to the effect that they had replaced the bands. Although this statement was denied at the time of the trial it was for the jury to say which statement was correct. Still another important item upon the question of the alleged defective condition of the brake is the testimony of Mr. Sommer and of the defendant Fowler as to the inspections made of the car and the manner in which same were made.

It is a rule in this state that it is not enough merely to show inspections but the proof must go further and show that the inspections were reasonable and proper ones. Under the evidence of these two witnesses upon this point it was clearly a question for the jury as to whether or not reasonable care had been used by the defendant in the maintenance of this car (see case of *Battschlinger v. Robinson*, 83 N. J. Law 739; 85 Atl. 317).

A very important factor which was required under our rules to be submitted to the jury was the credibility of the defendant Fowler and the credibility of the testimony with reference to the inspection of the brake bands immediately after the accident and as to whether or not they were renewed. Fowler contradicted Sommer both in his testimony at the trial and in his statement made in May, 1928 as to the time when the alleged inspection was made. As to whether or not Sommer told Fowler to put in new brake bands and as to whether or not he put in new brake bands was not a subject about which there could be any doubt in Fowler's mind. He knew whether or not he replaced the bands and when he states in a written statement made in May, 1928 that the bands were replaced and contradicts same in his testimony at the trial it was for the jury to say which of these stories they will believe *and it was for the jury to say whether or not they will discredit the entire testimony of Fowler, because of his obvious misstatement of a known fact.*

The right of a jury to disregard the entire testimony of a witness under these conditions stated in the case of *Clark v. Public Service Electric Company*, 86 N. J. Law, page 144; 91 Atl. Rep., page 83. In that case a verdict was directed for the defendant upon the testimony of a witness named

Walsh. He claimed that he saw the plaintiff's intestate, after being warned not to do so, deliberately take hold of a live wire. The testimony of Walsh was uncontradicted as to this fact but in giving his testimony he stated that after discovering the live wire he asked some woman at 107 Clinton Avenue if any one had 'phoned for the police. The plaintiff thereupon produced two women who were occupants of the house in question, who stated that the conversation referred to by Walsh did not take place and that they had seen nothing of him. Applying the maxim "*Falsus in Uno, Falsus in Omnibus*", this court in an opinion by the Chancellor held that the question as to whether Walsh was telling the truth when he stated that he had talked to the occupants of that house or whether he was telling the truth in any other respect and as to whether it was reasonable to expect that a sane person would have committed the act with which it is stated plaintiff's intestate did were all questions for the jury. The court said:

"Now, if the witnesses, the Misses Baldwin, are to be believed, and the jury would have a right to believe them, the letter carrier was either in error or was falsifying as to what occurred between him and them, and, if he was in error in this respect, the jury would have a right to believe that he was in error in other respects; and, if falsifying in any respect, they would have a right to believe that he was falsifying in all other respects, applying the maxim, '*Falsus in uno, falsus in omnibus.*' *Addis v. Rushmore*, 74 N. J. Law 649, 65 Atl. 1036."

In the instant case the evidence on behalf of the defendants is most certainly controverted by other

evidence in the case. It is not only controverted but it is contradicted. The credibility of the witnesses and the determination of the facts, the existence of which is not omitted, is for the jury and not the court. In *Schmidt v. Marconi Wireless Tel. Co.*, 86 N. J. Law 183; 90 Atl. 1017 Ann. Cases, 1918 B 151, testimony was given by former Gov. Griggs as to an alleged admission of non-ownership of stock. This testimony was uncontradicted and the trial judge thereupon directed a verdict in favor of the defendant. Chief Justice Gummere in writing the opinion of this court stated as follows:

(2) But we cannot agree that it was so conclusively established that Miss Parsons was not the owner of stock at the time she made the assignment to Levy Bros., as to make that essential fact one to be determined by the court, rather than by the jury. There is nothing in the pleadings or the proofs to indicate that the plaintiff, who was the assignee of Levy Bros., had any knowledge that they had made the admission of the non-ownership of stock by Miss Parsons testified to by Mr. Griggs, or that he had reason to anticipate that there would be any attempt made to prove her nonownership by the admission of his assignors. None of the members of the firm of Levy Bros. were called as witnesses, and it does not even appear that they were in court at the trial. Not having been led to expect that the fact of nonownership by Miss Parsons would be attempted to be proved by the admission of his assignors, not even having any knowledge, so far as the case shows, that Levy Bros. had any information upon this subject, he apparently was com

pelled to permit the testimony to Mr. Griggs to go unchallenged. It cannot therefore be said that, by his failure to controvert it, he impliedly admitted its truth. Of course the testimony of a man whose character for truth and integrity is so universally known as that of Governor Griggs would always be accepted as a correct recital of the facts spoken to as he remembers them. But it will hardly do to say that the character of a witness is the determining factor upon the question whether the facts testified to by him shall be determined by the court or by the jury. It cannot be that, where the character of the witness for truth and veracity is known by the court to be unimpeachable, the facts sought to be established by his testimony are to be determined by the court, but that where, in the judgment of the court, the witness is not entitled to full faith and credit, the facts sought to be proved by him must be determined by the jury. No such rule or evidence exists. In every case where the issue depends upon the determination of facts, the existence of which is not admitted, the jury, and not the court, must determine them.

We conclude, therefore, that it was error for the judge to take from the jury the question whether or not Miss Parsons, at the time of her assignment to Levy Bros., was or was not the owner of stock in the defendant company, and that, for this reason, the judgment must be reversed."

The cases cited by appellant are not applicable to the instant case, because there is not the slightest evidence to indicate that any third person meddled

with the automobile. It is not a case where there is evidence of two probable causes, one of which would exonerate the defendants. There is no evidence of any cause for starting the car other than the negligence of the defendants. The principal case relied upon is the New York case of *Keber v. Central Brewing Co.*, 159 N. Y. Supp. 986, but this case is not in point as there was evidence in that case of the presence of boys around the car. Had the defendant's car been parked in the careful manner described it is difficult to see how any boy could start it without boarding it, releasing the brakes and turning the wheels away from the curb. Had any boy accomplished this his body would in all probability have been found in the car or along the line travelled by it. It seems useless to speculate as to such a possibility in the face of the evidence of the defendant Fowler that he didn't see any children around.

A line of cases analogous to the case at bar are those in which runaway driverless horses appear. It has been held by this court that the unexplained presence upon a public highway of a runaway horse harnessed to a wagon unattended by the owner or other person, raises a prima facie presumption of negligence on the part of the owner.

Dannery v. Great Atlantic & Pacific Tea Co., 82 N. J. Law 517; 81 Atl. page 861, *Kokall v. Lumber Co.*, 77 N. J. Law 169, *Franzcois v. Hauff*, 77 N. J. L. 364, *Marshall v. Suburban Daily Co.*, 96 N. J. L. page 81; 114 Atl. page 750.

If this doctrine is applicable to the case of a runaway horse and wagon it would seem to be even more applicable to the case of a runaway automobile. The suggestion which generally appears in these cases (merely by suggestion only and not by proof) is that some third person has meddled with

the conveyance. A horse and wagon is more readily susceptible to the meddling of children and others than is an automobile. Direct interference is not necessary. A child may frighten a horse from a distance by making unusual noises or by throwing some object at the horse. An automobile cannot be so influenced. Therefore the likelihood of interference by children or other meddlers with an automobile is not as great as that in the case of horses.

Appellant contends that the rule *res ipsa loquitur* is not applicable to the case at bar for the reason that the thing causing the injury (the automobile) was not at the instant of the accident being controlled and operated by the defendant. That is where the negligence is shown. Had reasonable care been taken would the car have gotten beyond the control of the defendant's servant? In the familiar cases of objects falling off buildings, barrels running down inclines, and similar occurrences the object inflicting injury had gotten away from its proper custodian. The courts have had no difficulty in applying the rule of *res ipsa loquitur* in such cases.

In *Mumma v. Easton & A. R. Co., et al.*, 73 N. J. L. 653; 65 Atl. 208, the court said: Case of engine blowing steam and whistle frightening horse.

“When, through any instrumentality or agency under the management or control of a defendant or his servant, there is an occurrence injurious to the plaintiff, which in the ordinary course of things would not take place if the person in control were exercising due care, the occurrence itself, in the absence of an explanation by the defendant affords *prima facie* evidence that there was lack of due care.”

Sheridin v. Foley, 58 N. J. L. 230; 33 Atl. 484, was a case where a brick fell from a building under construction. There was no proof as to what caused the brick to fall. In rendering decision Chief Justice Gummere said:

“While it is true, as a general principle, that mere proof of the occurrence of an accident raises no presumption of negligence, yet there is a class of cases where this principle does not govern,—cases where the accident is such as, in the ordinary course of things, would not have happened if proper care had been used. In such cases the maxim, ‘*Res ipsa loquitur*,’ is held to apply, and it is presumed, in the absence of explanation by the defendant, that the accident arose from want of reasonable care. A leading case on this subject is *Kearney v. Railway Co.*, L. R. 5 Q. B. 411; *Id.* (on appeal) L. R. 6. Q. B. 759. The facts were that the plaintiff was passing along a highway under a railway bridge when a brick fell from one of the piers on which the girders of the bridge rested, and injured him. A train had passed over the bridge shortly before the accident, but the evidence failed to disclose whether it was a train of the defendant company, or of another railway company which also used the bridge. The bridge had been built and in use for three years. The court of queen’s bench held that the maxim, ‘*Res ipsa loquitur*,’ applied; that, as the defendants were bound to use due care in keeping the bridge in proper repair, so as not to injure persons passing along the highway, so unusual an occurrence as the falling of a brick was *prima facie* evidence from which the jury might infer negligence in

the defendants; and the principle was unanimously affirmed by the court of exchequer chamber on the argument of the appeal. Another case, quite similar in its facts to the one now before us, where this principle was applied, is that of *Byrne v. Boadle*, 2 Hurl & C. 722. In that case the plaintiff was injured by the falling of a barrel from the window of the defendant's shop. There was no evidence to show what caused the barrel to fall, nor was there any direct evidence to connect the defendant or his servants with the occurrence. Pollock, C. B., in discussing the question of the defendant's liability, said: 'There are certain cases in which it may be said *res ipsa loquitur*,' and this seems one of them. * * * It is true that there are many accidents from which no presumption of negligence can arise, but this is not so in all cases. Suppose, in this case, the barrel had rolled out of the warehouse and fallen on the plaintiff. How could he possibly ascertain from what cause it occurred? It is the duty of persons who keep barrels in a warehouse to take care that they do not roll out; and I think that such a case would, beyond all doubt, afford *prima facie* evidence of negligence. A barrel could not roll out of a warehouse without some negligence, and to say that a plaintiff, who is injured by it, must call witnesses from the warehouse to prove negligence, seems to me preposterous. So, in building or repairing a house, if a person passing along the road is injured by something falling upon him, I think the accident alone would be *prima facie* evidence of negligence.' In our own state, in the case of *Bahr v. Lombard*, 53 N. J. Law, 233, 21 Atl. 190, and 23 Atl. 167, this maxim was

fully commented upon and applied. The facts in the present case bring it within the application of this principle. The bricks were in the custody of the defendant's servants at the time when this one fell, and it was their duty to so handle them as not to endanger others, who were engaged in other work upon the same premises. This brick could not have fallen of itself, and the fact that it fell, in the absence of explanation by the defendant, raises a presumption of negligence. If there are any facts inconsistent with negligence, it is for the defendant to prove them."

Cases involving the doctrine of *res ipsa loquitur* are for the jury. *Marmon v. Vesper Lodge*, 97 N. J. L. 215; 116 Atl. 784. *Higgins v. Goerke-Kirch Co.* 92 N. J. L. 424; 106 Atl. 394, *Hughes v. Atl. City Ry.* 85 N. J. L. 212; 89 Atl. 769, *Triebel v. Winslow* 88 N. J. L. 193; 95 Atl. 995, *Faushawe v. Rawlins* 89 N. J. L. 344, 98 Atl. 439.

There being conflicting evidence, and evidence from which reasonable men could draw inferences of the negligence of the defendants the case was clearly one for the jury and the trial court was not in error in refusing the motion for a direction of verdict.

POINT II.

There was no error in refusing to charge appellant's sixth request.

The request is as follows:

"Your verdict should be for the defendants if you find from the evidence that the defendant Fowler left his truck with the engine

turned off, the brake securely set and the wheels turned toward the curb with the right front wheel against the curb."

In refusing the request the court said (Case, p. 121, ll. 25 to 35) :

"I will deny the last request because you have indicated certain factors which if resolved in favor of the defendant you wish me to tell the jury to bring in a verdict in favor of the defendant, but you have not included all of the factors and you have, in my opinion, omitted the duty of reasonable care as defined by the law."

The position taken by the trial judge as to this request is obviously correct. One of the important allegations of negligence was that the brakes were defective. If the defendant's servant used reasonable care in parking the car, and it started because of a defective brake the defendant would be responsible, even if everything set up in the request were true.

All of the facts referred to in this request were mentioned by the trial judge in his charge, as were the other elements in the case and the jury was told that the plaintiff could not recover unless they found by the greater weight of the evidence that defendant's negligence was the proximate cause of the injury (Case, p. 119, l. 30). They were told that the mere happening of the accident was not proof of negligence (Case, p. 119, ll. 10 to 20). The rule of law as stated in *Spanko v. Spitalnick* supra was laid before them, as was the doctrine of reasonable care. The issues were clearly and fairly presented by the charge and as the matters referred to in this request were covered by the charge there

can be no error in failing to charge in exactly the same words the abstract proposition set forth in the request.

It is respectfully submitted that there is no error in the record and that the judgment of the Supreme Court should be affirmed.

WILLIAM E. HOLMWOOD,
Attorney for and of Counsel with Respondent.





