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**NOTICE OF APPEAL.**

**New Jersey Supreme Court**

ESSEX COUNTY.

ROBERT GILBERT, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 5px 0;"><i>vs.</i></div> JUNIOR TRUCKING CORPORATION, a corporation, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>  <i>Notice of Appeal.</i>	10
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To JOHN J. BRESLIN, JR., attorney for plaintiff-appellee: 20

SIR:

PLEASE TAKE NOTICE, that the defendant in the above-entitled cause appeals to the Court of Error and Appeals in the last resort in all causes in New Jersey from the whole and every part of the judgment entered in this cause on the 4th day of November, 1927.

Dated, November 21, 1927.

STEIN, McGLYNN & HANNOCH, 30  
 Attorneys for Defendant-Appellant.

SUMMONS.

The State of New Jersey to Junior Trucking Corporation. GREETING:

10 You are summoned to answer the (SEAL) annexed complaint of Robert Gilbert in an action at law in the New Jersey Supreme Court and take notice that unless you file your answer to said complaint with the clerk of said New Jersey Supreme Court at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment will be entered against you.

20 WITNESS, WILLIAM S. GUMMERE, Esquire, Chief Justice of the Supreme Court, at Trenton, New Jersey, this 25th day of November, nineteen hundred and twenty-six.

EDWARD J. KELLEHER,  
Clerk.

JOHN J. BRESLIN, JR.,  
Attorney.

30

40

COMPLAINT.

Filed December 3, 1926.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10

ROBERT GILBERT,  <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> JUNIOR TRUCKING CORPORATION,  <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>  <i>Complaint.</i>
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The plaintiff residing in the Township of Lyndhurst, County Bergen and State of New Jersey, says: 20

1. That on or about the 24th day of September, 1926, the plaintiff was lawfully upon an automobile truck owned by the defendant company.

2. Said automobile truck was upon the premises of Thomas Smith and Romeo Bianco, trading as Bianco & Smith, in the Town of Nutley, County of Essex and State of New Jersey. 30

3. Said automobile truck was operated by an agent of the defendant company, who was acting within the scope of his employment.

4. On the above-mentioned date, due to the carelessness and recklessness of the defendant's agent in the operation of said automobile, the plaintiff was suddenly thrown from said truck to the ground.

40

*Complainant.*

5. The carelessness and negligence of the defendant consisted in this:

(a) To keep a lookout for persons in the vicinity of said automobile.

(b) To control the motion thereof so as to avoid striking persons in the vicinity thereof.

10 (c) To give warning of the fact that the truck was about to start.

(d) To propel same at rate of speed safe to persons in the vicinity thereof.

(e) To equip his car with proper brakes as required by law.

6. As the result of the careless and negligent driving of the defendant's agent the plaintiff became sick, sore, lame and disordered and has 20 suffered from the results of said injuries ever since that time.

7. By reason of said injuries sustained the plaintiff has suffered and undergone great pain and torment both of body and mind and still suffers therefrom.

8. As the result of the careless and negligent driving of the defendant's agent the plaintiff has been compelled to expend a considerable sum 30 of money for doctors, nurses, medical services, hospital expenses and other surgical assistance.

9. As the result of the injuries sustained plaintiff was and is now and will in the future be prevented from going about his regular occupation and in consequence thereof plaintiff has and will in the future suffer great damage.

Wherefor, plaintiff demands the sum of fifty thousand (\$50,000) dollars with costs.

40

JOHN J. BRESLIN, JR.,  
Attorney for Plaintiff.

**ANSWER.**

Filed December 14, 1926.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10

ROBERT GILBERT,

*Plaintiff,*

*vs.*

JUNIOR TRUCKING CORPORATION,  
a corporation,

*Defendant.*

*Action  
at Law.*

*Answer.*

Defendant a corporation having its principal office in the Town of Rutherford, County of 20 Bergen and State of New Jersey, answering the complaint says that:

1. The defendant admits paragraph one of the complaint.

2. The defendant admits paragraph two of the complaint.

3. The defendant denies each and every allegation contained in paragraph three of the 30 complaint.

4. The defendant denies each and every allegation contained in paragraph four of the complaint.

5. The defendant denies each and every allegation contained in paragraph five of the complaint.

6. The defendant denies each and every allegation contained in paragraph six of the complaint.

40

*Answer.*

7. The defendant denies each and every allegation contained in paragraph seven of the complaint.

8. The defendant denies each and every allegation contained in paragraph eight of the complaint.

9. The defendant denies each and every allegation contained in paragraph nine of the complaint.

FIRST SEPARATE DEFENSE.

The defendant was not guilty of any negligence.

SECOND SEPARATE DEFENSE.

The plaintiff was guilty of contributory negligence in that he did not exercise the proper care for his own safety and in that he failed to alight from the automobile truck involved in the accident when the proper signal was given and the further fact that he failed to notify the driver of the truck that he was still on the truck at the time that the truck started.

THIRD SEPARATE DEFENSE.

At the time of the alleged accident this defendant was not in control and custody of the said automobile truck.

FOURTH SEPARATE DEFENSE.

At the time the alleged accident happened the automobile truck in question was hired out to another party and was not operated by this defendant.

*Answer.*

FIFTH SEPARATE DEFENSE.

The plaintiff was injured solely through his own negligence and the negligence of his fellow employees employed by Bianchi & Smith and not connected in anyway with this defendant.

E. R. McGLYNN, 10  
Attorney for Defendant.

20

30

40

REPLY.

Filed December 17, 1926.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10

ROBERT GILBERT,

*Plaintiff,*

*vs.*

JUNIOR TRUCKING CORPORATION,  
a corporation,

*Defendant.*

*Action*

*at Law.*

*Reply.*

20

By way of reply to the answer of the defendant the plaintiff says:

1. He denies the truth of the allegations contained in the first separate defense.

2. He denies the truth of the allegations contained in the second separate defense.

3. He denies the truth of the allegations contained in the third separate defense.

30

4. He denies the truth of the allegations contained in the fourth separate defense.

5. He denies the truth of the allegations contained in the fifth separate defense.

JOHN J. BRESLIN, JR.,  
Attorney for Plaintiff.

40

POSTEA.

Filed November 4, 1927.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10

ROBERT GILBERT,

*Plaintiff,*

*vs.*

JUNIOR TRUCKING CORPORATION,  
a corporation,

*Defendant.*

*Postea.*

20

This case was tried before the Honorable Edwin C. Caffrey, and a jury in the Bergen County Circuit on November 1st and November 2nd, 1927.

The jury returned a general verdict in favor of the plaintiff, in the sum of Ten Thousand (\$10,000.00) Dollars.

EDWIN C. CAFFREY,  
Judge.

30

40

Order for Judgment.

NEW JERSEY SUPREME COURT.

ROBERT GILBERT,	}	<i>Plaintiff,</i>	<i>Action</i>
<i>vs.</i>			
JUNIOR TRUCKING CORPORATION,			<i>at Law.</i>
			<i>On Postea.</i>

10

It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of ten thousand dollars, besides costs to be taxed nisi.

Entered November 4, 1927.

20

On motion of

JOHN J. BRESLIN, JR.,  
Attorney.

Damages	\$10,000.00
Costs	_____
	\$_____

30

40

Judgment.

NEW JERSEY SUPREME COURT.

ROBERT GILBERT,	}	<i>Plaintiff,</i>	<i>Action</i>
<i>vs.</i>			
JUNIOR TRUCKING CORPORATION,			<i>at Law.</i>
			<i>On Postea.</i>

10

John J. Breslin, Jr.,  
Attorney. 10

Judgment entered this fourth day of November, A. D. nineteen hundred and twenty-seven in favor of plaintiff and against defendant for the sum of ten thousand dollars damages and..... costs.

WM. S. GUMMERE,  
C. J. 20

\$10,000.00  
\$\_\_\_\_\_

30

40

Testimony.

NEW JERSEY SUPREME COURT.

BERGEN COUNTY.

10	ROBERT GILBERT, <div style="text-align: right; margin-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; margin: 5px 0;"><i>vs.</i></div> JUNIOR TRUCKING CORPORATION, <div style="text-align: right; margin-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>
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Hackensack, New Jersey,  
November 1, 1927.

Before Honorable Edwin C. Caffrey, Judge,  
and a Jury.

20 Appearances:

For the plaintiff, John J. Breslin, Jr., Esq.,  
and James S. DeTurck, Esq.

For the defendant, E. R. McGlynn, Esq.

(A jury was empanelled.)

Mr. McGlynn: (To jury.) Do any of the  
jury as at present constituted—are any of the  
jury as at present constituted clients of Mr.  
30 Breslin?

Mr. Breslin: Objected to as being immaterial.

Mr. McGlynn: I asked them if they were  
clients.

Mr. Breslin: I respectfully submit that is im-  
material under the decision of *Boyd v. Hoos*.

Mr. McGlynn: I understood that was know-  
ing, not clients.

The Court: The same thing.

Harold Sturgess, direct.

Mr. McGlynn: I ask an exception to your  
Honor's ruling on that.

(A jury was accepted and sworn.)

Mr. Breslin opened the case to the jury on  
behalf of the plaintiff, during the course of  
which the plaintiff, upon a stretcher, was brought  
into the court room. 10

Mr. McGlynn opens the case to the jury on  
behalf of the defendant.

The Court: Mr. Breslin, is the plaintiff going  
to testify?

Mr. Breslin: Yes. Not just now, if your  
Honor please. I am going to call a few other  
witnesses first.

The Court: The only thing is I do not want  
to have him in that position in court any longer  
than necessary. 20

Mr. Breslin: That is the reason I do not  
want to call him until I really need him.

HAROLD STURGESS, sworn as a witness on  
behalf of the plaintiff, testified as follows:

Direct examination by Mr. Breslin.

Q Mr. Sturgess, where do you live? A 500 30  
River Road.

Q What town? A Lyndhurst.

Q And during the month of September, 1926,  
by whom were you employed? A By Mr.  
Allen.

Q Who is Mr. Allen? A Mr. Allen is the  
Town Engineer for Rutherford.

Q And on the morning of September 24,  
1926, were you in the yard of Bianchi & Smith  
in Nutley? A I believe I was. 40

*Harold Sturgess, direct.*

Q On the day of the accident? A Yes, sir.

Q And what were your duties? A To look at the truck, to see that the truck was loaded, as a checker, a cement checker.

Q A cement checker? A Yes.

10 Q Now, did you see this man Gilbert on that morning? A Yes, I see him on that morning.

Q And what was Gilbert doing when you first saw him, or what were his duties as you observed them? A Well, he was a—what you would call a truck loader.

Q A truck loader? A A truck loader, yes.

Q What do you mean by a truck loader? A He was dumping cement on the trucks, dumping the bags on it.

20 Q Well, when he first got the cement, was it in a bag? A Yes, it was in a bag, yes.

Q And then what did he do with it? A Well, he didn't—I don't think he—

Mr. McGlynn: I object.

The Court: Just what you know.

Q What you saw him do. A Dumping the bags out on the truck.

30 Q Where did he dump the bags? A In the truck.

Q Now, can you describe the truck?

*By the Court.*

Q Did I understand he emptied the bags into the truck? A Yes, into the truck, yes. He dumped the bags out.

40 Q The contents, or the bags? A Yes; he dumped the contents.

*Harold Sturgess, direct.*

*By Mr. Breslin.*

Q Now, where was he when he dumped the contents of the bag into the truck? A He was on the back of the truck.

Q Can you describe what kind of a truck was it? Give us some idea as to its size, if you can. A Oh, it was a big truck, a five-ton truck. That is all they have for batches. 10

Q Now, how long had you been working on this particular job? A That I could not tell you.

Q Well, how long had you been checking up there, can you give us some idea? A Oh, for about a couple of weeks since they started the batch work; not as soon as they started, but right after they started; how long after they started I could not tell you. 20

Q Well, would you say that you had been there for about two weeks, approximately two weeks? A Yes; about two weeks, yes.

Q And while you were there, did you see Gilbert every day? A As to that, I could not say, because he might be in there, and I would not know him, you know, only being there a short time. I would not say that he was there every day; he might have been out a day, for all I know. 30

Q Well, was it customary for these trucks to come up every day?

Mr. McGlynn: I object to that.

Mr. Breslin: I will withdraw the question.

Q Well then, on this particular day, after you saw Gilbert on the rear of the truck unloading the contents of a cement bag into the truck, 40

*Harold Sturgess, direct.*

did you see the driver of the truck? Did you see the driver of the truck that morning? A Did I see him?

Q Yes. Did you see him in the yard? A I suppose I seen him on the truck.

10 Q Did you see Glock that morning? A Who is Glock?

Q All right.

Mr. Breslin: Is Mr. Glock here?

A Voice: Right here (a man stands).

Q Did you see Glock that morning? A Yes. I believe that is the gentleman, yes.

20 The Court: Now, Mr. Breslin, do you mean the driver of the Bianchi-Smith truck?

Mr. Breslin: No. This is the Holman truck, when I speak of truck, and I understand from Mr. McGlynn's opening there is no dispute this was a Junior Trucking Company's truck.

Mr. McGlynn: It was a Junior Trucking Company truck.

30 The Witness: I do not know what truck he is talking about.

Q Well, the truck that I am speaking of is the truck that Glock was operating. A Yes.

Q All right.

Mr. McGlynn: That is what; that is what?

40 Q Did you see Glock get into that truck that morning? A Did I see him get into the truck?

*Harold Sturgess, direct.*

Q Yes. A Well, that is pretty hard to remember, too.

Q Just tell us in your own words what you saw happen to Gilbert that morning, and what did the truck do? A Well, I saw the truck start off, and I saw the—them go to pick the man up. 10

Q Who picked the man up? A Well, I helped pick him up.

Q Where was he when you picked him up? A On the ground in back of the truck.

Q Now, before the truck started, did you hear any signal or any warning given? A Did I hear any signal or warning given?

Q Yes. A Just what do you mean?

Q Well, did anybody say anything? A I didn't hear nobody say anything. 20

Q You did not hear anybody say anything? A No.

Q What did you do with Gilbert? A I helped pick him up, and I called for somebody to give me a hand and take him in the office, because the man was laying there alone; and I believe it was Billy that come up and give me a hand and took him in. It was either Billy or one of the colored fellows that was on the job.

30 Q Now, while you had been working there for two weeks, was there any customary signal given before a truck would start after the cement had been poured into the truck? A I believe it was.

Mr. McGlynn: Oh, no.

The Court: Just if you know.

Q Give us your best recollection. A Well, the saying was, and it still is today, which you hear, is one—"roll 'em, roll her." 40

*Harold Sturgess, direct.*

Q "Roll 'em, roll her?" A Yes.

Q And on the morning in question, before the truck was started, did you hear that signal or warning given? A I did not, no.

*By the Court.*

10 Q Had you heard it before this morning? Had you heard that sound before at any time before the morning of the accident? A Why, it was the signal to go. I must have heard it before.

*By Mr. Breslin.*

Q Now, did you see the driver of the truck get in the truck? A Did I see him get in the truck?

20 Q Yes. A I believe I must have seen him get up in the truck.

Mr. McGlynn: I object to that.

The Court: No. We were not there. We must rely on you, insofar as you know about it.

The Witness: Oh, I see. Well, I tell you; I cannot remember whether I did see him get up on the truck or not.

30 Q Did you see the truck start forward? A Yes. I see the truck go ahead.

Q And as the truck started forward, what, if anything, did you say? A Did I say?

Q Yes. Did you say anything? A No.

Q You do not remember that? A No.

Q I see. That is your signature, isn't it (handing paper to the witness)? A Yes.

Q All right.

40 Mr. McGlynn: Now, that is all you were asked, you know. I object, if it please the

*Harold Sturgess, direct.*

Court, to counsel interrogating the witness with a statement before him, his own witness.

The Court: I will permit you to direct the witness's attention to something, and then the question arises as to its relevancy; but at this time you cannot show the witness 10 a statement, because there is not enough yet before me to indicate that it is required.

Mr. Breslin: Yes.

Q You made a statement to Mr. Calderwood, didn't you, after the accident? A I believe that is the gentleman, yes.

Q And you signed the statement? A Yes; I signed the statement, sure; that is my signature on there. 20

Q And that is your signature? A Yes.

Q And you read it over before you signed it? A I did, surely.

Q If I show you this memorandum, will it refresh your recollection?

Mr. McGlynn: Do not show it to him yet, please, Mr. Breslin.

The Court: No. He is your witness.

30 Q What you said in the statement was true? A Certainly.

Q And if you read this statement, it will refresh your recollection, won't it?

Mr. McGlynn: I object. It is his own witness.

The Court: The situation has not presented itself yet that requires the refreshing of his recollection. 40

*Harold Sturgess, cross.*

Mr. Breslin: We won't press it any further at this time. That is all.

*Cross-examination by Mr. McGlynn.*

Q What did you say your duties were, to  
10 check the cement? A Yes. Check the cement  
as it went on the truck.

Q Did you keep a list of the number of bags?  
A Yes. I believe I did have a list.

Q Well, what was your duty? A To check  
the cement on the truck.

Q Did you check the number of bags put in  
each compartment? A Yes, surely.

Q What did you have? What did you have,  
some sort of a tally sheet or a book? A Yes.  
20 I had a little book that I put down everything  
that went on the trucks.

Q I see. Everything that went on the truck,  
or just the cement? A Just the cement.

Q Somebody else checked the sand and stone?  
A Yes. It was checked, I believe, down at the  
other end.

Q I see. A That I do not know.

Q Now, you say that you had never seen  
30 Glock there that morning. He had been there  
before that morning, hadn't he? A Well, guess  
he had if he was driving.

Q Don't you remember, sir? A Well, I do  
remember a few things, but I cannot—I can  
recognize the face of the man, but whether he  
was there the day before, or another chauffeur,  
I couldn't tell you that.

Q I do not mean the day before. But you  
had seen him in that yard driving a truck, get-  
ting material? A I seen him there before.  
40

*Harold Sturgess, cross.*

Q Now, on this morning in question, what-  
ever the date of it was, when this thing hap-  
pened, you were talking to him and Billings  
alongside of Glock's truck, weren't you? A  
The morning it happened, I was talking to Billy?

Q Now, do not make me repeat the question.  
You heard my question. A Well, I want to  
10 understand it.

Q You just told us that you saw Gilbert  
laying on the ground? A Yes.

Q And you went back and picked him up?  
A Yes.

Q Now, just before that, hadn't you been  
talking to Glock and Billings alongside of  
Glock's truck? A Gee! I don't remember  
that.

Q Sir? A I don't remember that. 20

Q Well, where were you standing? A  
Alongside of the truck, but I don't remember  
whether I was talking with him or not.

Q If you were not talking with him, you were  
standing alongside of the truck near them,  
weren't you? A I stood right near the truck,  
but—

Q Well, where were they? A Well, he must  
have been alongside of the truck.

Q Never mind "must have"; where was he? 30  
A He was by his truck.

Q Well, was he alongside of you? A He  
must have been alongside of me.

Q Not "must." Where was he? I am ask-  
ing your best recollection. You are testifying  
here. A I cannot tell you just where he was.

Q Well, was he near you? A He must  
have been.

Q Or far away from you? A Yes; he was  
near me. 40

*Harold Sturgess, cross.*

Q He was near you? A Yes.

Q And was Billings near you or far away from you? A Well, I do not remember Billings being there.

Q You do not remember Billings at all? A I do not remember him being there.

10 Q Do you know him? A I know the man if I see him.

Mr. McGlynn: Stand up, will you, Mr. Billings?

(A man stands.)

Q Of course, he is all dressed up today and not in working clothes. Do you recognize him? A Yes; I recognize him.

20 Q You had seen him in the yard driving a truck, getting materials, hadn't you? A Yes.

Q Whose truck was behind Glock's truck on this morning this happened? A It was this gentleman's truck.

Q Billings'? A Yes.

Q Then Billings was there, wasn't he? A Yes. Billings was there, yes.

30 Q All right. Now, was there anybody else there besides you, Glock and Billings on the off side of the truck? A Well, on the off side of the truck?

Q Yes. Away from the shed? A I didn't see anybody.

Q Just the three of you. Let me ask you something to get myself straightened out here. This cement shed had a platform, didn't it? A Yes.

40 Mr. Breslin: I have some pictures here, Mr. McGlynn. Perhaps we can agree.

*Harold Sturgess, cross.*

Mr. McGlynn: All right. I have no objection to their being used.

Mr. Breslin: I would like to offer them at this time.

The Court: Yes.

Mr. McGlynn: Are they both the same? 10

Mr. Breslin: Yes; both the same.

(Photograph marked Exhibit P. 1 in evidence.)

Q Now, this Exhibit P. 1, Mr. Sturgess, that has been shown to us, is a picture of the cement shed; is that right? A Yes, sir.

Q And is this, indicating this thick thing in the center, the platform we are talking about? A That is the platform. 20

Q That is the platform. And is that the platform the trucks would stop at to get the cement? A Yes.

Q And would they stop close up to the edge of the platform? A Yes; they had to.

Q They had to? A Yes.

Q This cement shed and platform was on the property of Bianchi & Smith; is that right? A Yes, sir.

30 Q Where, with reference to this shed, was this hopper where they got the sand and stone? A The hopper is located on the back; they have to go into the hopper before they get to the shed.

Q Is the hopper quite a distance away from the shed? Down by the river, isn't it? A Yes, it is a distance of about—

Q That is also on the property of— A Bianchi & Smith.

40 Q —Bianchi & Smith? A Yes. He owns that property.

*Harold Sturgess, cross.*

Q Now, after the trucks load at that platform that you have shown us on that picture, would they go straight out of the yard of Bianchi & Smith, or did they have to make any turns? A No. They would go straight out the gate.

10 Q Was there any other way for them to come in on the same property, or did they use the same entrance? A No. A truck can go in on two other different entrances. There is two other ways to come in.

Q Where is the office with reference to this cement shed? A It is on the other side of the cement shed.

Q On the other side of the cement shed. Now, did you also see the drivers of these trucks, while 20 they were being loaded, or after they were loaded, get some sort of a ticket that they take away with them? A Yes. They got a ticket.

Q Where did they get that? A They got that in the office.

Q They got that in the office. And would you see what they would do with those tickets when they came back for another load? A They returned them in the office. They took them back to the office.

30 Q Now, this phrase "roll 'em, roll 'em," is that the only symbol you ever heard given to truck drivers when the load was completed when they were to proceed away from the platform, or do you know whether they used any other, "Let it hop," or something like that? A "Roll 'em, roll her," seemed to be the word.

Q I know we all seem to agree on that. Did they ever use any other nice expression like "Let it hop," or something like that? A Hop? 40 No, I couldn't—

*Harold Sturgess, cross.*

Q What? A They might have said something else, but I don't think that they did.

Q Well, whatever they said, Mr. Sturgess, the signal to the truck driver as to when he was to go away from the platform, was given by whose employees? A Well, it was always been 10 given by the fellows in the shed.

Q And who were they employed by? A Bianchi & Smith.

Q Now, you said on your direct examination that you did not hear anybody say anything on this particular occasion. Do you want to go any further than that and say that nobody did say anything, or just that you did not hear it? A No. I did not hear it, that is all.

Q That is all? A Sure.

Q You won't say that nobody did give a 20 signal for the truck to go,— A No.

Q —will you? A I won't say that, but I say I didn't hear it.

Q You did not hear it? A No.

Q Before you saw this man Gilbert on the ground, the last place you saw him was in the rear compartment of the truck, or which compartment of the truck? A He was in the rear compartment; he was on the back of the truck.

Q Well, the truck body was all enclosed, 30 wasn't it? A All enclosed.

Q In order to keep this material from spilling out, wasn't it? A Yes. It is a regular dump truck.

Q A regular dump truck? A A regular dump truck. That is all they use.

Q And was it divided into a certain number of compartments? A Yes.

Q How many? Do you remember? A About four. There was four to a batch truck. 40

*Harold Sturgess, cross.*

Q Four? A Yes.

Q And your recollection is, that the last time you saw him before he was on the ground, he was in the last compartment toward the rear of the truck; is that right? A Well, the last time I saw him, I saw him step off the truck.

10 Q You saw him, what? A The last— I didn't see— I see him step off the truck.

Q You saw him step off the truck? A Yes. That is the last time I can remember seeing him.

Q Well, he stepped off the truck to the what? A Onto the platform. That is the only place he could step.

Q And did he reach the platform? A Why, surely.

20 Q Well, was he on the platform when you saw him last? A He was on the platform when I saw him last, yes.

Q And the next time you saw him, he was on the ground? A The next time I saw him, he was on the ground, when I went down for the bags, the bags which were on the back of the truck.

Mr. McGlynn: Well, I think that is all.

30 Mr. Breslin: That is all for the time being.

*Robert Gilbert, direct.*

ROBERT GILBERT, the plaintiff, sworn as a witness on his own behalf, testified as follows:

(This witness was sworn and testified while on a stretcher placed in front of the jury.)

*Direct examination by Mr. Breslin.* 10

Q Mr. Gilbert, how old are you? A 40.

Q 40? A 41.

Q Can't you talk a little louder? A 41.

Mr. McGlynn: Can't you raise that blanket?

Q Now, Mr. Gilbert, try to talk as loud as you can. The judge and the jury have to hear you. You are 41 years? A 41. 20

Q And have you been married? A Yes, sir.

Q Is your wife alive or dead? A Dead.

Q Have you any children? A Two.

Q How old are the children? A One is 17, and the other one is 12.

Q This one that is 17, where is he? A He is in school on the college now at Georgia.

Q College at Georgia? A Down in Georgia.

Q Where is the child 12 years of age? A Well, with his step-mother. With my step-mother. 30

*By the Court.*

Q With his step-mother? A Yes.

The Court: With the witness's step-mother.

The Witness: My father married a step-mother. 40

*Robert Gilbert, direct.*

Q You remember that, don't you? A I remember that; yes, sir.

Q Tell us what else you remember. A Well, I remember somebody picking me up. I heard somebody say, "Pick him up," and they took me somewhere, I cannot say exactly where, but I  
10 guess to the office, and I heard them telephoning for the ambulance, and when the ambulance got there, I don't know nothing else.

Q Where were you when you came to, next? A I was in Saint Mary's Hospital.

Q Do you know whether you came to the next day or the same day or— A Well, about the same time I got hurt; eleven, or maybe a little after, or something like that.

Q The next day? A The next day, about  
20 the same time I got hurt; yes, sir.

Q Now, before the accident, were you able to do your work? A Yes; ever since I been working now, for five years now.

Q Before the accident, did you ever have a doctor? A I never had a doctor.

Q Now, just tell us how you felt when you woke up in the hospital the day after the accident. A When I woke up, I didn't know where I was. I looked around for the nurse, and she  
30 says—the nurse was standing, and I says, "Where am I?" And she says, "In the hospital." I says, "Why?"

Q Never mind. Please do not tell us what she said, but just tell us how you felt and you could do. A I went to move myself and I couldn't move, and I asked her what is the matter; she said—

Q Never mind what she said; you cannot tell us that, Mr. Gilbert. Just tell us what was the matter with you. A I couldn't move myself.  
40

*Robert Gilbert, direct.*

Q Could you move your legs? A I could move just a little bit; not very much.

Q Could you move your arms? A I move my arms a little bit; not very much.

Q Now, how long were you in the hospital? How long have you been in the hospital? A  
10 Ever since last September 24th.

Q Since the day of the accident? A The day of the accident, 1926.

Q About a year ago? A Yes, sir; thirteen months; a little over.

Q And during that time, have you been able to walk? A Well, from then—two months, I guess, just creep around, not able or nothing; I cannot walk long on my legs.

Q Creeping around? A Creeping around.

Q Have you been able to move your arms? A  
20 Just a little.

Q How high can you raise them? A Well, about that much, just a little higher (indicating).

Q (Indicating)? A Sometimes, a little higher sometime.

Mr. Breslin: Can't we agree on this?

Mr. McGlynn: I can.

The Court: What is it? The stenographer hasn't it.  
30

Mr. Breslin: I guess we can stipulate that he can raise his arms about the level with his shoulders.

A Juror: Ninety degrees.

Mr. Breslin: Ninety degrees.

Q Are you able to do any work? A No, sir.

Q Now, just tell us whether or not you could feel things after you got into the hospital, could you feel things? A I couldn't feel nothing.  
40

*Robert Gilbert, cross.*

Q Can you feel things now? A Just a little bit.

Q How can you feel them? Show the jury how you grab now.

The Court: Take his arm out.

10

Q Show the jury how you grab. A (Indicating.)

Q Can you grab any stronger than that? A That is all I can do.

Q That is all you can do? A Yes, sir.

Q Do you know the names of the doctors that have been treating you? A Doctor Whelan.

Q Doctor Whelan from Nutley? A Yes, sir.

20

Q All right.

*Cross examination by Mr. McGlynn.*

Q You say you never had a doctor before this accident, Mr. Gilbert? A I never had one in my life.

Q When were you married? You say you were married? A I was married in 1906.

Q 1906. And your wife died, you say? A Yes, sir. She died in nineteen—

30

Q Now,— A —seven.

Q Ninteen— A I mean 1912, something like that.

Q 1912. Where were you living at the time of the accident? A Well, I was living in Lyndhurst. 749 Main avenue.

Q 749 Main avenue, Lindhurst. And who was the man at the cement shed who was in charge of you three boys that were working there? A John—I cannot think of his name  
40 now.

*Robert Gilbert, cross.*

Q Craft? Was it some such name as that?

A That is the name.

Q Was he foreman? A Yes, he was the superintendent.

Q So there were two—how many boys would bring the cement out from the shed to the platform? A Two.

10

Q Two would bring it out from the shed to the platform in bags, is that right? A Yes.

Q Paper bags or canvas bags? A Canvas.

Q Canvas bags? A Yes, sir.

Q Then two boys would put it in the truck? A Yes, sir.

Q And would both the boys go in the truck with the cement and dump it, or just one go in the truck and one hand him a bag? A They had two men sitting in the doors. We all stood in the door.

20

Q You all what? A The two men throwed it from the door in the truck; two men on the truck would dump.

Q Two men would bring it to the door, throw it into the truck, and two men in the truck would dump? A Yes, sir.

Q Well, was it all dumped in the rear of the truck, or was it dumped into various compartments? A Four parts.

30

Q Four parts. So you dumped some cement in each one of the four parts? A Five bags to a part.

Q And just leave it there after you dumped it, or level it out, or what? A Level it out a little bit so it wouldn't waste out.

Q You always take the rear compartments? A Naturally; yes, sir.

Q What? A Yes, sir.

40

*Robert Gilbert, cross.*

Q The last two or the last one? A All the time, all the time.

Q What? A All the time I loaded the rear.

Q One or two compartments? A Two parts.

10 Q Two parts? A The other boy—

Q So you would load first the one at the rear end, or the one next to the rear end? A The next to the rear end, because you always throw it the first thing in there.

Q Throw the cement in the one next to the rear? A Yes.

Q And dump that what was there between the compartments? A Well, they had a partition.

20 Q A partition. What would you do, have to step over them until it was even with the level of the concrete? A With the sand and gravel about four inches above the top.

Q This material inside would raise it up so you did not have to do anything more than just take an ordinary step? A Sure.

Q Who would give this signal, "Roll 'em, roll 'em," when the truck was loaded? A Well, the other fellow next to me, a colored fellow.

30 Q Is that all he did was yell "Roll 'em, roll 'em," when the truck was loaded, or did he do something else? A He emptied bags himself.

Q Where was he, in the front two compartments? A He was in the front two.

*By the Court.*

Q I understand you said the signal was always given? A Always given.

40 Q By whom? A I do not know. He wasn't there very long. He left there. I don't know his name. I couldn't call his name.

*Robert Gilbert, cross.*

*By Mr. McGlynn.*

Q But he was the man that worked with you?

A Worked with me.

Q He was the man that dumped in the front two compartments? A Yes.

Q While you were dumping in the rear? A 10 Yes.

Q And how long had he been there? A About a couple of weeks, I guess.

Q Now, you say that the other man that worked in the front two compartments gave the signal for the truck to go every time? A I used to give that myself.

Q You used to give that yourself. How long did it take you to load a truck with cement at the shed? A Oh, it wouldn't be over two min- 20 utes, I guess.

Q What? A About two minutes, I guess, at least, not quite that long, hardly. We just had to empty ten bags and let her go.

Q How long had this truck been standing there that day before it started? A It drive right in up to the door, and we started loading right at once.

Q Didn't the driver have to go get a ticket at the office? A He goes get a ticket every time 30 the driver stopped.

Q Stopped at the shed? A Yes.

Q Stopped his car. Would he stop his motor? A Sometimes he would and sometimes he didn't.

Q Was the motor stopped this day? A Yes.

Q And then, while you were loading, he would go in the shed and get this ticket; who would he get that from, Craft? A Craft.

Q And Craft had an office or desk or something inside? A Yes.

*Robert Gilbert, cross.*

Q And do you remember whether there were any other trucks lined up behind this truck that morning? A One.

Q What? A There was one. I disremember now who it was.

Q Do you know Mr. Billings when you see him, the driver of the truck behind? A Sure.

Mr. McGlynn: Stand up. (A man stands.)

Q Do you know Billings when you see him?

A Sure.

Q Was he behind this other truck? A Yes.

Q Do you know whether he was standing alongside of this Junior Trucking Company truck talking to the driver while you were loading?

The Court: You said "the other truck." Do you mean the truck he was standing on?

Mr. McGlynn: I mean the truck immediately behind the one you were standing on.

The Witness: The truck driver was sitting in the truck.

Q You mean in the truck behind? A He was sitting inside of the truck.

Q Let us get straightened out. Let us go back to the truck you were loading which I understand was being driven by Glock; do you know him? Do you know Glock? A I do not know him.

Q Now, the truck that you were loading at the platform— A Yes.

Q —which you say moved out from under you— A Yes.

Q —you say that driver was sitting on the seat? A He was on the seat; he must have been.

*Robert Gilbert, cross.*

Q No. Now, wait, Mr. Gilbert. A Well?

Q Don't give me any "must have beens."

A Well?

Q I want to know what you remember, if you can. A Yes.

Q If you cannot, just say so, and help me out. A Yes, sir.

Q What is it, now, must have been, or did you see him? A He was on the truck.

Q While you were loading, I mean, not afterwards; while you were loading? A While I was loading, he went to the office and got a slip and came back and got in the cab and started the car going.

Q Started his car going. How near through were you then? A Well, I had two bags emptied in.

Q Two bags dumped; that was in the third compartment, the one next to the rear? A Yes.

Q And were the other two bags in the rear compartment? A Why, they had them all empty but two bags; we had them all dumped but two bags.

Q Had your partner who did the dumping in the front two parts finished his? A He was on his last bag, because he got his before I got mine.

Q In other words, they threw the cement in the first two compartments before they did the last two? A Yes.

Q Well, did you see the man in the front two compartments finish and get out of the truck? A No.

Q Did you see the man in the front two compartments finish and get out of the truck? A He hadn't got out when I was loading mine. I never see him. I never looked around to see. I was doing my work.

*Robert Gilbert, cross.*

Q You did not look around to see? A No.

Q You do not know whether he finished or not? A No.

Q Now, you say you did not hear any signal given by this other man? A No, sir; no signal whatever.

10 Q What? A No signal whatever was given.

Q Do you want to swear that he did not give one, or you did not hear it; which? A I swear I did not hear it; if he had given it, I could have heard it.

Q If he had given it, you would have heard it. What were you doing when the truck started?

A Emptying the last bag.

Q Inside the truck? A On top.

20 Q On top. You say the driver was on the seat of his car? A Yes.

Q The motor was going? A The motor was going.

Q Did this truck, where the driver sat, have a cab on it? A Yes, sir.

Q A covered cab? A A cab.

Q The cab itself had no top; just a dump truck? A Just a dump truck.

Q Now, you say that Doctor Whelan is your doctor, is he? A Yes, sir.

30 Q When did he become your doctor? A Well, I do not know exactly.

Q What? A I could not tell you exactly when he started.

Q Well, you were being treated at the hospital, weren't you? A Yes, sir; but the house doctor first treated me.

Q Didn't Doctor Whelan treat you at the hospital? A Sure, he treated me, too.

Q When did you hire Doctor Whelan? A I didn't hire him.

40

*Robert Gilbert, cross.*

Q What? A I didn't hire him.

Q You did not hire him? A My foreman.

Q Just a second; that is all. I did not ask any other question. You remember being examined at the hospital a few days ago by Doctor Russell? Do you remember Doctor Russell? A Yes, sir. 10

Q Examining you on October 21st, that is, about ten days ago? What? A Yes, sir.

Q When he examined you on October 21st, you were dressed and about the ward, weren't you? A I had the same clothes on I have on now.

Q You were walking, weren't you? A I walked in the room there. I can walk a little bit.

Q How long is it since you have been walking around the hospital? A I do not know. I only walked about two months, I guess, maybe a little longer. 20

Q A little longer than two months, isn't it? A Maybe a little longer. I cannot say.

Q Quite some longer, isn't it, sir? A Not longer than two months; maybe three months; I couldn't say exactly.

Q Isn't it a matter of fact, haven't you been out of bed as long as nine months after the accident, walking around? A I have been up in the chair. 30

Q What? A Up in the chair now.

Q You can walk now, can't you? A Not so good.

Q But you can walk, can't you, sir? A I can walk a little bit.

Q And you have been walking around the hospital in the ward? A A little bit.

Q For at least two months? A Yes. 40

40

*Steve Jeannette, direct.*

Q Every day? A Not every day. Some days I don't.

Q Well, almost every day? A Some days I feel bad, I couldn't get up.

Q I think that is all, sir.

10 Mr. Breslin: With your Honor's permission, I would like to show the jury just how this man can walk, as long as Mr. McGlynn has brought that out on cross examination.

The Court: I am not inclined to do that.

Mr. Breslin: All right. That is all.

*By Mr. McGlynn.*

20 Q Just one more question: Have you, since the date of the accident, received any wages from your employer?

Mr. Breslin: I think we can stipulate as to that.

Mr. McGlynn: I want it on the record.

Mr. Breslin: I object on the ground it is immaterial.

Mr. McGlynn: It is very material. I withdraw the question.

30 Mr. Breslin: All right. That is all.

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STEVE JEANNETTE, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Breslin.*

40 Q Mr. Jeannette, on the day of this accident, where were you working? A Bianchi & Smith.

*Steve Jeannette, direct.*

Q What town? A In Nutley, New Jersey.

Q Will you talk up a little louder? A Nutley, New Jersey.

Q And what were your particular duties? A My particular duties was to throw the bags on the truck, the cement.

Q Did you work alongside of Gilbert? A 10 I worked there. He dumped the bags, I throw them on, see?

Q You threw them on to him, and he dumped them? A He dumped them.

Q Can you give us some idea of the length of time that these trucks had been coming up there and getting the cement? Was it a month or a year or how long? A Well, I give you an idea, so long as I was there.

Q How long were you there? A I was there 20 about four weeks.

Q About four weeks? A Before the accident.

Q And during that time that your trucks moved after they had been loaded, was any signal or warning given? A During the time since I were there?

Q Yes. While you were there. A Yes. They give a signal.

Q What was the signal? A "Roll 'em." 30

Q "Roll 'em." Now, had that signal been given on other days before the accident? A We didn't start to give that signal until after he got hurt.

Q What did you say? A We didn't start to give them that signal until after he got hurt.

Mr. McGlynn: What was that?

Mr. Breslin: They didn't start to give the signal until after he was hurt. 40

*Steve Jeannette, cross.*

Q I mean, on the other days before the accident. A We didn't start to give that signal, "roll 'em," until after he was hurt.

Q I am talking about the days before the accident, was any signal given? A Every day he give the signal, every time a truck load.

10 Q On this particular morning, did you see Gilbert on the back of the truck? A Yes; I seen him.

Q And while he was on the back of the truck, what did the truck do? A The truck pull off, and he—

Q Where did he go? A He dropped over the bottom of the truck, over behind the truck.

Q Where did he fall? A On the ground.

20 Q Before the truck started, just before Gilbert was thrown off the truck, as you say, was the customary signal or warning given? A No.

Mr. Breslin: That is all.

*Cross examination by Mr. McGlynn.*

Q Where did you get these bags of cement from? A They were in the shed.

30 Q In the shed. You would walk inside of the shed, you would walk inside of this shed shown on Exhibit P. 1, inside that door, and get the bags of cement, come out here to the doorway and throw it in the truck, is that right? A You don't have to walk there. The bags be sitting out the door; you don't have to walk inside; they was already inside.

Q The bags were inside of the house, weren't they? A Inside.

40 Q Inside the house. You take them from there, and throw them into the truck? A The

*Steve Jeannette, cross.*

truck come right up side of the door, like this.

Q Just this little platform in between; is that right? A There ain't no platform on that side. It is just even with the building.

Q That don't— A It don't stand out at all.

10 Q It don't extend out at all. What makes it look so thick? Is it thicker than the rest of it? A Because that is a drawing.

Q That is a picture of it, sir. Don't it go out a little bit beyond the side of the building? A The truck comes right up even, and that little piece does come out.

Q You say they did not start to give the signal until after this accident happened? A They didn't start saying "roll 'em"; they just said "Go ahead." 20

Q What? A They just said "Go ahead." After he got hurt, they said, "Roll 'em, roll 'em."

Q Oh, they changed the tune after the accident to "roll 'em, roll 'em"? A Yes.

Q Who would give this signal? A A big fellow named Brown.

Q Did he have a good, loud voice? Did he? A Sure, he had a loud voice.

30 Q Was he the man that worked on the truck with Mr. Gilbert, dumping bags? A He threw Mr. Gilbert the bags.

Q He threw Gilbert's bags? A Yes.

Q They were in the back of the truck, the last part, is that right? A Yes.

Q Some other fellow threw them in the front of the truck? A Yes.

Q Now, the fellow in the front of truck, the big fellow, is the one that yelled "Go ahead," is it? A Yes; that is the fellow. 40

*Steve Jeannette, cross.*

Q And did you see him get out of the truck before Gilbert fell, the big fellow? A Did I see him get out of the truck?

Q Yes, sir. A He threw bags to the other fellow.

10 Q Did you see the big fellow get out of the truck, the front part of the truck, before you saw Mr. Gilbert fall? A The big fellow, he didn't dump bags.

Q Now, did you see the man in the front of the truck, whether he was a big fellow or a little fellow, get out of the front of the truck before you saw Gilbert fall? A He didn't get on the truck, the big fellow, he didn't get on the truck.

20 Q Well, just forget the big fellow for a minute, will you. There were two boys loading or unloading cement, weren't there? A Yes, sir.

Q One in the front and one in the back; is that right? A That is right.

Q Gilbert is in the back. Now, did you see the other fellow in the front of the truck get out of the front of the truck before you saw Gilbert fall? A Sure. He unloaded there first. I seen him get off.

30 Q He was off, was he? A He was off.

Q And is he the fellow that gave the signal to go ahead or "roll 'em, roll 'em?" A No, he wasn't the fellow.

Q He wasn't the fellow, eh? A No, sir.

Q Who did give the signal? A The big fellow what throwed in the bags, he give the signal.

40 Q And was he standing alongside of you, or close to you? A Sure. He was standing alongside of me; after we had thrown the bags on, we

*Steve Jeannette, cross.*

was standing there waiting until he dumped them and then he gave the signal to go ahead.

Q Did you see another truck behind this truck that morning? A Sure. There was a truck behind, I guess.

Q What? You only guess it, or was there one? A Yes. There was a truck behind us. 10

Q There was a truck behind. Did you see that truck start up for the platform? A Yes. It started for the platform.

Q Did he start for the platform before Gilbert fell or afterward? A He started after he fell.

Q After he fell. I mean, did you see him start at all before Gilbert fell? A No. I didn't see him start.

Q How far behind the other truck was he? A 20 I don't know. Just a little distance.

Q What? A Well, he was about 20 feet.

Q Twenty feet behind. Did you see the truck driver before this accident happened? A No. I didn't see the truck driver.

Q You did not see him at all. Did you see the truck driver of the truck that was being loaded and the truck driver of the truck behind talking to a man alongside of this truck that was being loaded? A No. 30

Q Before the accident happened? A No, I did not see.

Q Did you see the inspector, Mr. Sturgess? A I did not see him.

Q You did not see him? A No.

Q You say you did not hear any signal given? A No.

Mr. McGlynn: That is all.

Mr. Breslin: That is all. 40

*Edward P. Whelan, direct.*

EDWARD P. WHELAN, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Breslin.*

Q Doctor, you are a physician licensed to  
10 practice medicine and surgery in the State of  
New Jersey? A Yes, sir.

Q And where is your office? A Nutley.

Q And are you connected with any hospitals?  
A One of the visiting surgeons to Saint Mary's  
Hospital, Passaic.

Q Now, during the month of September,  
1926, did you have occasion to examine the  
plaintiff in this case, Robert Gilbert? A Yes,  
sir.

20 The Court: What date was that, Mr.  
Breslin?

Mr. Breslin: September twenty—

The Witness: Twenty-fourth.

Q Did you have occasion to examine him? A  
Yes, sir.

Q Where did you examine him, Doctor? A  
At the hospital.

30 Q Will you please tell us his condition as you  
found it on that particular day? A I saw him  
on the evening of September the 24th, 1926, with  
a history of having been admitted during the  
afternoon; the man was in a semi-conscious con-  
dition, and we ordered X-rays taken; and I saw  
him again on the following morning.

Q And what was his condition on the follow-  
ing morning? A Well, the following morning  
he was conscious, but he was paralyzed from his  
40 neck down to his feet.

*Edward P. Whelan, direct.*

Q And where has he been from that day down  
to the present time? A At the hospital, under  
my care.

Q Under your care. And have you treated  
him alone or have you called other doctors in?

A I have had several other consultants to see  
him. 10

Q And based upon your treatment of the case  
and upon your observation of this man, in your  
opinion, what is the cause of his present condi-  
tion? A An injury which he received to a sec-  
tion of his spinal cord up in his neck region  
called the seventh cervical segment of the spinal  
cord.

Q Now, doctor, will you please explain to the  
Court and to the jury just what you mean by the  
seventh cervical cord; just tell us what it is? 20

A The spinal cord running through the spinal  
canal, we designate certain parts of it as the—  
up in the neck, the cervical region was down the  
lower part of your back, the lumbar region; there  
is other regions in between; but this region of  
which I speak is up in here in the neck.

Q Now, Doctor, this condition that he is in  
now, is it permanent or temporary? A Per-  
manent.

Q Permanent. Have you any idea how long 30  
it will take for the condition to clear up? A I  
do not believe he will ever get better.

Q I see. Now, this injury which you describe,  
in your opinion, could that have been caused if  
Gilbert were suddenly thrown from the truck  
upon which he was working to the ground? A  
Repeat that question again, please?

Q (Question read.) A Yes; I think so.

Q Now, Doctor, please describe his condition  
if you can briefly, from the time that he en- 40

*Edward P. Whelan, direct.*

tered the hospital down to the present date; in other words, has he progressed any, has he changed any and, if so, what is it? A Well, from the time he entered the hospital,—of course, when I first saw him the evening he came in, he was in a semi-conscious condition. The next  
 10 morning when I saw him he had recovered consciousness, and was paralyzed from his neck down. He had absolutely no control over his bladder or his bowels. The man remained in bed for several months. At the end of about six months or seven months—I am not quite certain—we got him out of bed and put him in a wheel chair and got him out on the porch to give him fresh air. During all that time, of course, he was receiving massage and electrical  
 20 treatments from some other physician at the hospital. The—after about eight or nine months, he began to walk around the hospital. He walks—

Q Will you please describe his walking? A It is kind of hard to describe. He walks in a very peculiar manner. He walks on his heels. He cannot walk very far. He can only walk, probably, around the ward, maybe a distance of maybe fifty or one hundred feet, when he has to sit down. When he does sit down, he just  
 30 throws himself into the chair, falls into the chair, because he has not full control over his back muscles, and when he rises, he has some difficulty in arising. When he begins to walk, he throws his foot forward, and walks practically on his heels, a jiggling type of gait.

Q What would you say as to his ability to grip objects? A He has a type of hand due to the injury of the nerve called a claw hand, and he is not able to close his hand completely. He holds  
 40 his hand in some manner like this (illustrating).

*Edward P. Whelan, direct.*

Q Now Doctor, in your opinion, could the plaintiff in this case, Robert Gilbert, come to court in any other manner than he was brought in today? Could he have walked from downstairs up here? A I do not believe he could.

Q Doctor, what is your bill in this case? A  
 Seven hundred and— 10

Mr. McGlynn: I object. Just a second. The plaintiff distinctly said he had never hired Doctor Whelan.

The Court: Well,—

Mr. McGlynn: He is a hospital patient.

The Court: —not necessarily. It does not necessarily follow that because he has not hired him there is no obligation. There may be an implied obligation. 20

Mr. McGlynn: The first time I ever heard of a hospital patient having an implied obligation to pay a doctor who he never hired. He distinctly said on his cross examination he never hired him.

The Court: I will allow the question.

Mr. McGlynn: Exception.

The Court: Subject to it being reasonable. 30

Q Doctor, what is your charge in this case?  
 A \$750.

Q Is that a fair and reasonable charge? A Yes, sir.

Q And will this man require medical attention in the future? A Some, from time to time, yes.

Mr. Breslin: Mr. McGlynn, I do not think there is any dispute about the hospital bills. If there is, I can prove them by the doctor. That is all for the present, Doctor. 40

*Edward P. Whelan, cross.*

*Cross examination by Mr. McGlynn.*

Q Doctor, when does a patient in the hospital  
cease to become a charity patient and become re-  
sponsible to a physician for compensation? A  
I was engaged by his employer to take care  
10 of him.

Q Oh, by his employer? A Mr. Bianchi.

Q Now, I notice you have not said anything  
about certain phrases of his condition with regard  
to venereal disease. Have you omitted that pur-  
posely, or don't you, in your opinion, think it has  
anything to do with his present condition? A  
No, I did not omit it purposely. I did not think  
of it. When he was admitted, during the course  
of our examination, we took a blood on him and  
20 found that he had what we call a four plus  
Wasserman. The man, when he was admitted,  
had an unhealed lesion of syphilis on his penis.  
Following the finding of this lesion, we took his  
blood and found it to be a four plus Wasserman,  
which showed that he had syphilis.

Q No question about it, was there? A None,  
absolutely.

Q Isn't that a rather unusual condition, a four  
plus Wasserman? A No, sr.

30 Q Not unusual? A Not with syphilis.

Q This man had a very violent case of it,  
didn't he? A I do not believe so.

Q You do not believe so? A For the reason  
that his lesion was still unhealed. That is the  
primary, the initial lesion of syphilis. The lesion  
being still unhealed shows he was in the early  
stage of it, not more than three or four months.

Q When did you take him away from the  
hospital? A I took him away this morning.  
40 Doctor Riordan, would you mind handing them

*Edward P. Whelan, cross.*

to the gentleman? (Papers handed to the wit-  
ness.)

Q I understood you to say that you examined  
him first at the hospital within how long after  
he was admitted? A A few hours. I saw him  
that evening.

Q And did the history of the case which was  
10 given to you at that time—was the history of the  
case which was given to you at that time  
taken from the hospital records? A Well, the  
history was given to me by the interne.

Q Was the interne the man who made the  
hospital record? A The interne is the man  
who made the hospital record, yes.

Q Will you turn to the first record which you  
examined in connection with your obtaining the  
20 history of this case from the hospital record?  
A Will you read that? I did not get the first  
part of your question.

Q Will you turn to the first entry in the  
hospital record which you looked at when you  
were getting the history of this case? A Why,  
I probably did not look at any record when he  
came in at all.

Q Well, you looked at it after that, didn't  
you, doctor? A I probably did, yes.

Q And what was told to you was the same as  
30 was on the hospital record? A That I do not  
know. I have not read the records.

Q Do you mind looking at it, sir? A (Re-  
ferring to papers.) Do you want me to read it?

Mr. Breslin: Just a minute, doctor.

Q I want you to read it to yourself, first. I  
am going to ask you a question about it in a  
minute. Would you mind just showing it to me  
40

*Edward P. Whelan, cross.*

so I will know we are both talking about the same thing? I am looking for the one dated September 24, 1926. A There is the first sheet that is usually written when he comes in.

Q But that has a date of February 4, 1927, on it. I am looking for one dated September 24, 1926, beginning "Patient admitted," and winding up with some figures.

Mr. Breslin: I object.

Mr. McGlynn: I am just giving the first and last word, that is all.

Mr. Breslin: All right.

A Is this the one you mean?

Q Just this part (indicating). A All right.

Q Now, doctor, I understood you to say on your direct examination that you found this man on the occasion of your first examination and also I believe the following morning, if I remember rightly, suffering from paralysis, paralyzed from his neck, as I remember it, down to his toes? A Not on the occasion of my first examination.

Q Sir? A Not on the occasion of my first examination. On the occasion of the second examination.

Q Oh! A I said, when I saw him, he was semi-conscious, the first night; and I ordered him to be X-rayed. And I saw him the following morning, and he was unconscious from his neck down.

Q Did the history of the case show there was any paralysis when he was admitted? A From my examination that night, I thought there was. The man was semi-conscious.

*Edward P. Whelan, cross.*

Q Did the history of the case by the man who made the first examination show there had been any paralysis on the occasion of his admission to the hospital?

Mr. Breslin: I object to that.

The Court: I sustain the objection. 10

Q Did the X-ray show any fractures? A No, sir.

Q What were the names of the physicians in the hospital who treated him? A Do you mean the internes or the physicians connected with the hospital? The internes have only charge of the patient under the supervision of the visiting surgeon or the visiting physician. I was the visiting surgeon at that particular time.

Q Well, do they change? A They change from month to month, yes; but I kept this man all through from the fact, as I told you, Mr. Bianchi engaged me to take care of him; but Doctor John Riordan of East Rutherford saw him in consultation with me.

Q What I meant by my first question was, doctor, the hospital attendants, the internes, nurses, and so forth; who were they? Who had charge of him during this period? A I do not recall, but from this chart it seems it was Doctor Gordon.

Q Don't you know who had charge of him? A No. The internes change from month to month.

Q Didn't you, in a case of this kind, when you went there on various occasions, examine the charts, and so forth, kept by the hospital attendants to find out what had happened in the interim while you were away, the temperature,

*Edward P. Whelan, cross.*

and so forth? A I read the chart, certainly, but I wouldn't—

Q You certainly knew, during that period of time, who was making those charts, didn't you?

A The charts are made by the nurses.

Q The internes have nothing to do with them?

10 A They make progress calls first.

Q Did you read those? A Rarely.

Q Rarely. Well, are you willing to say that the gonorrhoeal and syphilitic condition this man was suffering from had anything to do with his present condition? A I did not say he had gonorrhoea. I said he had syphilis.

Q Did he have any gonorrhoea? A Not to my knowledge.

Q Well, did the syphilitic condition have anything to do with his present condition? A Absolutely no.

Q None? A None whatsoever.

Q It did not make the slightest difference?

A Not a bit.

Q When did he first start to walk around the ward? A When did he? Was that your question? When did he?

Q Yes. A About the ninth month, I would say. I am not quite certain about it, though.

30 Q Nine months after September? A Yes.

Q How often have you seen him since he started to walk around the hospital? A Every day when I am at the hospital.

Q Has he been walking practically each day since then? A A little each day. Those are my instructions to him, to walk.

Q Has he been walking more lately than before? A No. About the same amount.

Q What part of the day is he up, how much of the day? A Well, I do not know. Probably

40

*Edward P. Whelan, cross.*

he is up several times during the day, but he has to rest very frequently.

Q Dressed all day? A He is dressed.

Q When he is not in the ward, where is he?

A Out on the porch.

Q Would you say that his walking is any better today than it was nine months after the accident when he first started to walk? A Oh, 10 yes; there is some improvement.

Q Well, what is this condition of his fingers, the wrist, that you mentioned? What do you call that? A That is a condition of his—a spastic condition of his hand, a claw-hand, due to an injury of his nerve in his neck.

Q Anything to do with arthritis? A No, sir.

Q You are sure of that? A Positive. 20

Q On what do you base your diagnosis, please? A Nerve injury, and not what was commonly called arthritis, because his joints are freely flexible. With the arthritic joint, the joint is stiff.

Q How are his nervous reflexes? A His knee jerks are increased.

Q Can he stand steadily with his eyes closed?

A Fairly so.

Q Can he lift his hands to his head? A Yes. 30

Q Are his hip and knee joints normal in motion? A Yes, they are.

Q Any trouble with his bladder at this time?

A Yes.

Q What? A Inability to hold water for any length of time. He wets the bed quite frequently. He wets himself quite frequently.

Q Can you tell from your examination how long he had been suffering from syphilis?

A I said before not more than three or four 40 months.

*Edward P. Whelan, cross.*

Q He had had it three or four months before September? A I should say so.

Q Does your history show he had been getting any treatments for it?

Mr. Breslin: Objected to as to what the history shows. 10

The Court: I sustain the objection.

Q You based your diagnosis on the history which was given to you, didn't you, coupled with your own examination? A I am basing the diagnosis on that lesion I found on his body.

Q Did you find any cuts or bruises on the body, or wound, when you examined him the first time? A He had some lacerations on his scalp. 20

Q Were they minor or severe? A That I do not recall.

Q Does he complain of pain now when he walks or moves around? A Now?

Q Yes. A Yes. He complains of considerable pain in his feet. I have got to give him something for pains in his feet almost every other day.

Q His feet? A Yes, sir.

Q How about the muscles of his feet and arms and legs? How are they right now? A There is slight atrophy of all the muscles, of all the muscles of his lower part. 30

Q Very slight? A Yes, yes.

Q Very slight? A Yes, yes.

Q Hardly noticeable? A It is very noticeable to examine.

The Court: Doctor, for the purpose of the jury, what do you mean by "atrophy?" 40

*Edward P. Whelan, re-direct—re-cross.*

The Witness: A wasting away of the muscles.

Q How are his eyes, doctor, right now? A The pupils are contracted, but they react to light and accommodation. I would say they were normal. 10

Q Any indication of intracranial nerves being affected? A No, sir.

Mr. McGlynn: That is all, Doctor.

*Re-direct examination by Mr. Breslin.*

Q Doctor, when he was taken into the hospital, what stage was the syphilitic condition in?

A The beginning of the second stage, I would say. 20

Q And since he has been in the hospital, has that condition been cleared and checked? A So far as we could, it is cured.

Q Cured. And about how long ago was it cured? A I do not recall, but I think the last negative Wasserman that we took on him was about three months ago.

Mr. Breslin: That is all. 30

*Re-cross examination by Mr. McGlynn.*

Q Cured or checked? A Cured, so far as we could, I said.

The Court: Was he treated for this as well as for the injury?

The Witness: Yes, sir.

Q Did you treat him for anything else beside the syphilitic condition? A That is all, and 40

*Ralph Pomeranz, direct.*

his injury, injury to his cord; he received massage and—

Mr. McGlynn: That is all.

*By Mr. Breslin.*

10 Q Doctor, with reference to this arthritis that Mr. McGlynn speaks of, did you have X-rays taken to ascertain whether or not he had that condition? A Yes, sir.

Q Have you the X-rays? Is the doctor here with them? A He will be. He is here now, yes, sir.

Mr. Breslin: Doctor, will you come down, please? (A man comes forward.)

20 Mr. McGlynn: Are you going to leave those records, Doctor?

The Witness: If you wish them, yes.

Mr. McGlynn: I tried to subpoena them.

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RALPH POMERANZ, sworn as a witness on behalf of the plaintiff, testified as follows:

30 *Direct examination by Mr. Breslin.*

Q Doctor, you are a physician licensed to practice medicine and surgery in the State of New Jersey? A I am.

Q And where is your office? A In Newark, on Broad street.

Q And do you specialize in any particular line of medical work? A Yes; in X-ray diagnosis.

40 Q X-ray diagnosis? A Yes.

*Ralph Pomeranz, cross.*

Q And during the last week, did you take some X-rays of Robert Gilbert in the presence of Doctor Whelan of Nutley? A I did.

Q Have you the X-ray pictures? A Right here.

Q All right.

Mr. Breslin: Have you any objection, Mr. McGlynn? I am going to offer them.

Mr. McGlynn: What objection can I have?

Mr. Breslin: Your Honor please, I offer the pictures.

The Court: Well, if there is no objection, I will admit them.

(Four X-ray films marked Exhibits P. 2, P. 3, P. 4 and P. 5 in evidence.)

Q Doctor, do these pictures show any evidence of gonorrhoeal arthritis? A They do not.

*Cross examination by Mr. McGlynn.*

Q Taken when? A On the 27th of October.

Q 1927? A 1927.

Mr. McGlynn: That is all.

Mr. Breslin: That is all.

*By the Court.*

Q Doctor, what is it that would be shown if there were gonorrhoeal arthritis? A Well, narrowing of the joint space.

Q What? A Narrowing of joint space.

Q Narrowing of joint space? A Narrowing of joint space, and loss of function due to the growth of the bones, of the joint bones together.

*Ralph Pomeranz, cross.*

They grow together, and that causes loss of function.

Q What part of the—what points are those?

A I took the knee joints and wrists.

Q Knee joint and wrist? A Yes. Both knee joints and both wrists.

10 Q Are those the only joints that are affected?

A They are usually the joints which are affected in cases of gonorrheal arthritis.

Mr. Breslin: That is all, Doctor; thank you.

*By Mr. McGlynn.*

Q Would that condition you have just described be any different with ordinary arthritis than with gonorrheal arthritis? A The condition which I described?

Q This growing together of the bones? A Yes.

Q Is that general arthritis, or gonorrheal arthritis? A This will be gonorrheal arthritis.

Q What? A Gonorrheal arthritis.

Q How does that differ from ordinary arthritis? A Ordinary arthritis does not show any growth of bones together.

30 Q Sir? A They do not grow together in general arthritis.

Q What would the picture show if it was general arthritis? A It would show productive bone changes.

Q What? A Productive bone changes.

Q Do these show productive bone changes? A No.

Mr. McGlynn: That is all.

Mr. Breslin: That is all, Doctor.

*Ralph Gilday, direct.*

RALPH GILADY, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination by Mr. Breslin.*

Q Doctor, you are a physician licensed to practice medicine and surgery in the State of New Jersey? A Yes, sir. 10

Q And where is your office? A 205 Union street, Hackensack.

Q How long have you practiced in Hackensack? A Twelve years.

Q Are you connected with any particular hospital? A Hackensack Hospital.

Q In what capacity? A Pathologist, and attending physician.

Q Well, what does "pathologist" mean? A In charge of the pathological laboratory—of all the laboratories, as a matter of fact,—of the hospital. 20

Q What does "pathology" mean? A Give the jury what "pathology" means. A A minute study of disease.

Q Oh, I see. Now, have you specialized in any particular kind of disease? A I do internal medicine, including the syphilis end of venereal diseases in the hospital. 30

Q You have had a lot of experience along those lines? A Nine years.

Q And did you examine Robert Gilbert at Saint Mary's Hospital last week? A I did.

Q And what did you find as to his condition? A I found a male adult, colored, and when I came into the hospital, he was in bed, and I attempted to get him out of bed, and he was unable to get out of bed by himself. This was my first observation. I proceeded to examine him in 40

*Ralph Gilday, direct.*

bed, and I found out that he had no lesion of the lung or heart.

Q What do you mean by "lesion," Doctor? A Lesion? No disease.

Q I see. A His eyes were negative. The positive evidence were a spastic paralysis, with  
10 atrophy of the muscles.

Q Now, what does "spastic" mean? A Rigid.

Q Stiff?

Mr. McGlynn: Rigid.

Q Rigid? A Stiffness.

Q And what does "atrophy" mean? A It means loss of substance.

Q All right. Proceed. A In his upper ex-  
20 tremities and his lower extremities. He had a claw shape deformity of his hands, and he had a peculiar gait when I got him up and tried him to walk about the room. Then I made a neurological examination of him.

Q You made what? A I examined the nerve—the nervous system.

Q Yes. A And he showed marked exaggerated reflexes of the upper extremities and of the lower extremities; his knee jerks were very  
30 markedly exaggerated.

Q Would you say that condition is temporary or permanent? A From the history of the case and the condition as I found him, I think the condition is permanent.

Q Have you any idea how long it will take to clear up? A I cannot tell.

Q Now, in your opinion, Doctor, could this man's present condition result if he were thrown from the back of a truck, while he was working, suddenly to the ground? A Yes.  
40

*Ralph Gilday, cross.*

Q It could? A (The witness nods head in the affirmative.)

Q Now, with reference to syphilis: If this man had syphilis in the primary stage, the first stage, when he went in the hospital, would that have any bearing upon the injury to the spine?  
A No. He shows no evidence of syphilitic dis-  
10 ease of the central nervous system.

The Court: No. That is not the question. It is not the fact you found. It is your opinion on the assumption of the fact.

The Witness: I did not understand the question, your Honor.

Q (Question read.) A No.

Mr. Breslin: That is all.  
20

*By the Court.*

Q Would it have any bearing on the results as you observed them? A No. That is why I made the other statement.

*Cross examination by Mr. McGlynn.*

Q In other words, Doctor, you want this jury  
30 to believe that a man in ordinary, normal health, with this injury, which was given to you, and the history of this case, would take just as long to recover and be in the same condition this man is today as if a man was in the primary or secondary stages of syphilis when it happened? A The same results.

Mr. McGlynn: That is all, Doctor.

The Witness: Yes.  
40

*John Riordan, direct.*

JOHN RIORDAN, sworn as a witness on behalf of the plaintiff, testified as follows:

*Direct examination* by Mr. Breslin.

10 Q Doctor, you are a physician licensed to practice medicine and surgery in the State of New Jersey? A Yes.

Q And where is your office? A Rutherford.

Q Rutherford? A Yes.

Q Whereabouts in Rutherford? A Ames avenue.

Q I see. How long have you been practicing medicine, Doctor? A Some 29 years.

Q Are you connected with any hospital? A Yes.

20 Q What hospital? A Saint Mary's Hospital, Passaic.

Q In what capacity? A Attending physician.

Q Do you know the plaintiff in this case, Robert Gilbert? A Yes.

Q Have you ever treated him in the hospital? A No.

Q Have you ever examined him with Doctor Whelan? A Yes.

30 Q And can you give us some idea as to the date of your first examination? A I saw him the day—the morning after he was admitted.

Q All right. Now, will you please tell the Court and jury what his condition was on that day? A The morning after he was admitted, the man had complete paralysis from the neck down. He was conscious.

Q Did you see him after that? A Yes.

Q About how soon after that? A I saw him, I think, about a week after that.

40 Q Had his condition changed any? A No, no.

*John Riordan, cross.*

Q Now, Doctor, you said a few moments ago that when you examined him the first time you found a complete paralysis of what? A Of his whole body, from the neck down.

Q And could that complete paralysis of the body from the neck down have been caused by syphilis in the primary stage? A No. 10

Q Now Doctor, you examined him other times, I presume? A Yes.

Q And what can you say, in general, as to his improvement? A There was a long time that he could not feed himself. He had to be fed. He could not lift his hands to his mouth. He had lost the control of the functions of his bladder and bowels.

Q Did that condition become better? A Yes.

Q I see. What would you say as to his condition, Doctor, and is it permanent or temporary? A I would judge it to be permanent. 20

Q Can you give us any idea as to the length of his incapacity? A I do not think he will ever be able to work.

Mr. Breslin: That is all.

*Cross examination* by Mr. McGlynn.

Q Doctor, you say you examined him the night after, or the day after, the injury? A The day after. 30

Q And what did the examination develop with reference to a Wasserman test? A There wasn't any Wasserman test taken at that time.

Q When was it taken? A Later on.

Q What did it show? A It showed that he had syphilis.

Q In what stages? A The Wasserman does not indicate the stage. The lesion on his body 40

*John Riordan, cross.*

indicated that he had practically—that he was in the primary stage.

Q What does the Wasserman test prove or disprove? A It proves that a person has syphilis.

10 Q What is the medical term of three plus, or four plus, what does that mean? A Severity of the infection, or—

Q What did this Wasserman show? A It showed that it was very positive.

Q Four plus? A Yes.

Q That is a very positive— A Quite positive.

Q Quite positive. And did you think that condition retarded the cure of his other injury?

A No.

20 Q To no extent whatsoever? A No.

Q It had nothing to do with it? A Nothing.

Q In other words, this man recovered in just the same time that an ordinary, healthy man without any syphilis in his blood would take to recover? A Yes. He recovered from the syphilis while he was in the hospital.

Q But the fact that he had syphilis did not retard or aggravate his other injuries at all. A I do not think so.

30 Q You do not think so? A No, sir.

Mr. McGlynn: That is all.

Mr. Breslin: That is all.

*By the Court.*

40 Q Doctor, syphilis affects some parts of the body more than others, isn't that so? A Yes. In the primary stage of syphilis, the body is not so thoroughly poisoned as it is later on, what we call the—

*John Riordan, cross.*

Mr. McGlynn: Nobody is hearing you.

A (Continuing.) In the primary stage of syphilis, the body is not so thoroughly poisoned from the effects of syphilis as it is later on. If I may be allowed to say, we have three stages of syphilis. There is, first, the primary stage which shows 10 the sore or lesion. The body itself, generally, or the system, is not poisoned during that stage. The secondary stage, it is a little more. Then, the tertiary stage, there are exudations or syphilitic growths which affect—which can affect the nervous system, which can affect any of the vital organs. This man was in the primary stage, so the poison had not affected the nervous structures or the essential organs and, for that reason, the syphilis was cured comparatively easy under 20 this early treatment.

Q Doctor, is there any scar tissue now? A The scar tissue? I presume there would be a slight scar where the initial sore of syphilis is.

Q What would the scar indicate? A It would simply indicate that there had been a sore there, and it was now healed.

Q And did that help to determine whether or not the disease had been checked? A No; because that will heal up after a certain time, any- 30 way, whether the man has treatment, or not; and then he goes into the other stages.

Q All right.

Mr. Breslin: That is all, Doctor.

*William F. Willoughby, direct.*

WILLIAM F. WILLOUGHBY, sworn as a witness on behalf of the palintiff, testified as follows:

*Direct examination by Mr. Breslin.*

10 Q Doctor, you are a physician licensed to practice medicine and surgery in the State of New Jersey? A Yes, sir.

Q And where is your office? A 29 Armory street, Englewood.

Q How long have you been practicing in Englewood? A 12 years.

Q Have you specialized in any particular line of work? A Genitourinary disease.

Q What is that? A Genitourinary disease.

20 Q That includes venereal diseases? A Venereal diseases, syphilis.

Q I see. And are you connected with any hospitals? A Englewood, and Holy Name Hospital.

Q I see. And recently, did you examine Robert Gilbert at Saint Mary's Hospital in Passaic? A Yes, sir.

Q Do you recall when you examined him? A About a week ago today.

30 Q I see. And tell us his condition as you found it? A I found him sitting up in a chair. After making further examinations, I found that he had a muscular atrophy.

Q A muscular atrophy. And what do you mean by that? A Wasting of the muscles.

Q This muscular atrophy, is this temporary or progressive? A It is a progressive type of muscular atrophy.

40 Q All right. Proceed. A He had a rigidity of the muscles of the shoulder and practically

*William F. Willoughby, direct.*

down through the body, which they call plasticity. The reflexes of the knee jerk were exaggerated. The eyes were fibrillary, twitching of the muscles of the eyes.

Q What does that mean? A The tremor, twitching.

Q I see. Was he able to walk? A He walked 10 just a little, after I tested out his gait, and so on, his equilibrium.

Q Can you describe his walk? A He had a—he would drag his foot, one foot, and he was on his heels at times, walking with a claw-hammer, what you call raising and walking, and his propulsion was very sluggish and clumsy.

Q Is his condition permanent or temporary? A Permanent.

Q And in what length of time do you think it will clear up? A He will never clear up. He will get better at times, and then he will go right back again as he is today.

Q In your opinion, doctor, when is the cause of his present condition? A By traumatic injury.

Q Traumatic injury? A Yes.

Q And what do you mean by traumatic injury? A By the fall that he had.

Q Now, can you tell from your examination 30 where this nerve is situated in the body?

The Court: There is no objection to that, but we do not know how this doctor knows anything about that.

Mr. Breslin: Well, if your Honor please, I will lay the basis for that.

The Court: You will have to.

Mr. Breslin: All right.

*William F. Willoughby, cross.*

Q Did you get the history of the case? A I got the history of the case.

Q He told you how the accident happened? A Told me how the accident happened.

Q In the light of your experience as a doctor, — A Yes, sir.

10 Q —and in the light of your examination, and in the light of the history of the case, in your opinion, what is the cause of his present condition?

Mr. McGlynn: I object.

The Court: I will sustain the objection. Do you want the doctor to testify of his own knowledge, if he can give an opinion based upon his own examination?

20 Q Well, can you give us your opinion, based on your own examination, doctor? A Yes, sir.

Q And in your opinion, based upon your own observation? A In my opinion, the present condition is due to traumatic injury of the spine, and possibly around the seventh cervical segment, with an irritation of the practical lumbar and sacral region.

30 Q Could syphilis in its primary stage be responsible for his present condition? A No.

Q Could syphilis in its primary stage influence his injury in the slightest? A No.

Mr. Breslin: That is all.

*Cross examination by Mr. McGlynn.*

40 Q How much of this opinion that you are so positive about is based upon your own examination, and how much on what somebody else told

*William F. Willoughby, cross.*

you about this man's condition and injuries? A I beg your pardon?

Q How much of this opinion you are so positive about is based upon your own examination?

A Why, my examination, by my own personal examination made about a week ago. I saw him twice; about two weeks prior to last Tuesday, I saw him. 10

Q I see. But in the last two weeks, the only time you ever saw this man? A Yes, sir.

Q How long did you see him the first time? A First, about two weeks ago.

Q How long did you see him the first time? A Oh, practically about an hour.

Q How long did you see him the second time? A Probably a little over an hour.

20 Q Would your opinion be any different if the syphilitic condition we are discussing, instead of being primary, was in the secondary stage? A Yes, sir. My opinion would be different.

Q Supposing he was suffering from syphilis in the secondary stage, what would your opinion be? A If he is suffering from syphilis?

Q Was, not is. A If he is suffering from syphilis of the secondary stage, there is absolutely no lesions formed in the secondary stage.

30 Q Now, you did not get the question, Doctor. You were asked on direct whether, in your opinion, syphilis in its primary stage would have in any way affected this man's injuries or his recovery. Now, I am asking you whether your opinion would be any different if, instead of having syphilis in the primary stage, he had had it in the secondary stage? A It would be the same.

Q It would be the same? No difference between the two stages? A No, sir.

40 Q With respect to his condition? A No, sir.

*William F. Willoughby, cross.*

Q One is just as slight and minor as the other? A Yes, sir.

Q I see.

Mr. McGlynn: That is all.

10 Mr. Breslin: That is all. Your Honor please, Mr. McGlynn hasn't any objection to the—

Mr. McGlynn: My objection—I had no objection to what you are doing now. I said you would not have to bring the Sisters here to prove it. You offer that as the account of the hospital, don't you?

20 Mr. Breslin: Yes. I will offer it for that purpose; it is \$565.45, and since the bill was rendered, thirty days have elapsed, at \$3.00 a day; so that would make it \$90 plus \$565.45.

Mr. McGlynn: I object to it because I assume that the bill is a copy of a record of the hospital, and shows that the charge was made to Bianchi & Smith, and not to Mr. Gilbert.

Mr. Breslin: Well, I will bring the Sisters here if you want them.

30 Mr. McGlynn: I am only going by the account there.

The Court: I will allow it.

Mr. Breslin: And the ownership of this truck is admitted as being in the Junior Trucking Corporation?

The Court: He has admitted it in the pleadings.

40 Mr. McGlynn: Yes; by the first paragraph.

*Motion for a Non-suit.*

Mr. Breslin: If it please the Court, the Plaintiff rests.

(The Plaintiff rests.)

Mr. McGlynn: I would like to make a motion for a nonsuit, and I would like to ask your Honor to excuse the Jury, while the motion is being made. 10

(Conference between Court and counsel.)

Mr. McGlynn: I respectfully ask that a judgment of nonsuit be entered, based upon the fact that the employe, the plaintiff Gilbert, and the operator of the truck, at the present stage of testimony, shows that they were both fellow servants of Bianchi & Smith, and that the defendant in this case was not responsible legally for any injuries sustained by anybody while the truck was in that yard for the process of loading. Any injury sustained by the plaintiff was sustained by him in the course of his employment, if by any negligence, was by the negligence of his fellow servant and operator of the truck. 20

The Court: I understand from the testimony Glock is referred to as the driver of the truck, but I further understand he was employed by the Junior Trucking Company. 30

Mr. McGlynn: No; Holman.

Mr. De Turek: No proof in the case, now. It shows the ownership of the truck, and under the cases, that is sufficient.

The Court: The name on the truck.

Mr. Breslin: They admitted ownership of the truck.

The Court: Well, that under the cases calls upon the defense, because it raises a 40

*Griswold B. Holman, direct.*

presumption of ownership, of a servant working within the scope of his duty.

Mr. McGlynn: Does your Honor rule on the motion? I did not hear you.

The Court: Yes. I will rule, in view of the fact that that is admitted, I will have to rule that way. 10

Mr. McGlynn: I ask for an exception.

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THE DEFENDANT'S CASE.

GRISWOLD B. HOLMAN, sworn as a witness on behalf of the defendant, testified as follows:

20 *Direct examination by Mr. McGlynn.*

Q Mr. Holman, where do you live? A At 65 Lincoln avenue, Rutherford, New Jersey.

Q And are you an officer of the Junior Trucking Company, the defendant in this case? A Yes, sir.

Q What office do you hold? A President.

Q The truck which was being driven by Glock on the day of September 24, 1926, who owned that truck? A The Junior Trucking Company. 30

Q By whom was this man Glock employed? A He was employed regularly by the George B. Holman & Company.

Q As what? A As a mechanic and a fill-in-driver.

Q How did this truck come to be in the yard of Bianchi & Smith on the morning of September 24, 1926? A The truck was working for Bianchi & Smith; it was there under their orders. 40

*Griswold B. Holman, direct.*

Q Who, on behalf of the Junior Trucking Company, or whatever company sent the truck—who did anyone on behalf of Bianchi & Smith talk to about the arrangement? Who was it made the arrangement? Did you make the arrangement with Bianchi & Smith for the hiring of the truck? A No. As I understand— 10

Q What? A Can I tell how arrangements were made, perhaps?

Q Yes. How did the truck come to be there?

Mr. Breslin: Well, I object unless this witness knows of his own knowledge.

Mr. McGlynn: He is president of the corporation, I understood.

The Court: All right. You may testify. 20

Mr. Breslin: Exception.

A I have an office in the George B. Holman Company office, that is, I am an officer of the George B. Holman Company.

Q Yes? A And very often 'phone calls are received by my office people asking whether or not trucks are available. It is the custom of contractors to call up.

Mr. Breslin: I object, your Honor please. 30

The Court: We do not want the custom; we want the instance.

Q How did this truck come to be down to Bianchi & Smith's? That is what I want to know. Did you give it to them, sell it to them, loan it to them, or what? That is what I want to know.

A Well, it was rented to them.

Q By the— A Junior Trucking Company. 40

*Griswold B. Holman, direct.*

Q — load, day, week, or hour? A On a daily basis, to be paid for according to the hours that it worked.

Q And did the compensation that was received include anything with reference to the driver?

10 Mr. Breslin: I object to that, if your Honor please, on the ground it is leading.

The Court: Oh, I will allow it. That is the only way you can find that out, I take it.

Mr. Breslin: I pray an exception.

A The truck and driver were furnished for a certain stipulated sum per day.

Q I see. Now, who was the regular driver of this one particular truck?

20 Mr. Breslin: I object to that. I fail to see the relevancy of that.

The Court: I sustain the objection.

Q Who was driving the truck on this particular day? A George Glock.

Q Was he the regular driver of this particular truck?

Mr. Breslin: I object to that.

30 The Court: That may be admissible and not effect this relationship; but it may be admissible for some purpose and, your objection being general, I will have to overrule it.

Mr. Breslin: May I ask the stenographer to read the question, please?

(Question read.)

Mr. Breslin: I object on the ground it is immaterial, and on the further ground it calls for a conclusion.

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*Griswold B. Holman, cross.*

The Court: The objection because it is immaterial, if it is material for anything, it is admissible. I do not know; it might be material as bearing upon custom as to starting or stopping. I will admit it.

Mr. Breslin: I pray an exception.

10

A The question?

Q (Question read.) A No.

Mr. McGlynn: That is all.

*Cross examination by Mr. Breslin.*

Q Now, you are an officer of the Junior Trucking Company. It was their truck that was involved? A Yes, sir.

20

Q And Glock was employed by the Junior Trucking Company? A No, sir.

Q Well, he was driving their truck? A He was.

Q I see. And he was carrying on their work, and the truck was rented by the day, and by the Junior Trucking Company? A (The witness nods head in the affirmative.)

Q And that included the salary of the driver? A Yes, sir.

30

Q The daily sum included the salary? A Yes, sir.

Q And when the money was paid for the use of the truck and for the services of the driver, it was received by the Junior Trucking Company? A Yes, sir.

Mr. Breslin: That is all.

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*Griswold B. Holman, cross.*

*By the Court.*

Q Just a minute. Do I understand you to say that the money received from the Bianchi-White Company—A. Bianchi & Smith Company.

10 Mr. Breslin: The Bianchi & Smith Company.

The Court: I used Bianchi-White, because that is White, translated.

Q The Bianchi-Smith Company, that the money you received from them for the hire of this truck went to the Junior Trucking Company?

A That was paid to the Junior Trucking Corporation; was that the question?

20 Q Yes. Was paid to the Junior Trucking Company? A The checks from the Bianchi & Smith were paid to the Junior Trucking Corporation.

*By Mr. McGlynn.*

Q Had Mr. Glock been sent by the Holman Company with this truck of the Junior Trucking Company to this job before this particular day?

30 Mr. Breslin: I object as being immaterial. The Court: I sustain the objection.

Mr. McGlynn: Exception.

Q Did Mr. Glock make any objection to his being sent by the Junior Trucking Company with this truck to this particular job?

Mr. Breslin: Objected to on the ground Mr. Glock is not a party to the action.

The Court: I sustain the objection.

40 Mr. McGlynn: Exception.

*George Glock, direct.*

Q Did Mr. Glock assent to being sent by the Junior Trucking Company with this truck to this particular job?

Mr. Breslin: I object on the same ground.

The Court: Sustained.

Mr. McGlynn: Exception. That is all. 10

Mr. Breslin: That is all.

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GEORGE GLOCK, sworn as a witness on behalf of the defendant, testified as follows:

*Direct examination by Mr. McGlynn.*

Q Mr. Glock, where do you live? A 509 20  
Second street, Carlstadt.

Q And by whom were you employed on September 24, 1926? A George B. Holman Company.

Q As what? A Mechanic.

Q And did anyone on behalf of your employers request you to drive a truck on that particular day?

Mr. Breslin: I object to this as being im- 30  
material.

The Court: I will allow it.

Mr. Breslin: I pray an exception.

A What was that question?

Q Did anyone of your employers, anybody on behalf of your employer, request you to drive this truck on September 24th? A Send me out on the truck?

Q Yes? A Yes. 40

*George Glock, direct.*

Q And were you willing to drive this truck on that day? A Yes.

Mr. Breslin: Oh, I object to that.

The Court: He answered it. He said "Yes."

10 The Witness: Yes.

Mr. Breslin: I withdraw the objection.

Mr. McGlynn: All right.

Q Now, had you been down to this yard of Bianchi & Smith's before— A Yes, sir.

Q —this particular day? What was the practice when you arrived at the yard with the truck?

A We waited for orders to see what we were to do that day.

20 Q And would you get those orders before you got in the yard, or after you got in the yard of Bianchi & Smith? A After we got in the yard.

Q And on this particular day, September 24, 1926, did you receive orders from somebody in Bianchi & Smith's as to what you were to do on that particular day? A Why,—

Mr. Breslin: I object to that.

30 Q Just yes, or no? A Yes.

Q And by reason of those orders, what did you proceed to do that day, what kind of work? A We proceeded to ride batch work, sand, stone and cement.

Q Where would you pick up the sand and the cracked stone? A Under a hopper in the rear of the yard.

40 Q And from there, where were you told to go? A To the cement shed.

*George Glock, direct.*

Q And what were you told to do when you got there?

Mr. Breslin: I object to that. It is not binding on the plaintiff at all in any way.

The Court: Well, we do not know from whom. 10

Mr. Breslin: That is it.

Q Did anyone—

The Court: Why not have him describe what was done there?

Q From whom would you get your orders at Bianchi & Smith's as to what you were to do? A Why, the man under the hopper told me to pull 20 up to the shed.

Mr. Breslin: I object to that.

The Court: I will allow it as forming part of the res gestae.

Mr. Breslin: Exception.

Q Pull up to what? A Pull up to the shed, up to the cement shed, and get cement. 30

Q When you got to the shed, what would you do? A Why stop the car, shut off the engine, go in the office and get a ticket. If I had made a previous load, if I had made a previous load I would return the previous ticket, and get a new ticket for the load I was getting.

Q What would you do with these tickets that you got from Bianchi & Smith's man when you got the load? A We would have them signed by the man that was receiving the batch work at 40

*George Glock, direct.*

the mixer, the concrete mixer; he would sign that slip.

Q Where were you delivering the stuff to that day? A On Orient Way, Rutherford.

Q To whose mixer were you delivering it? A Why, Bianchi & Smith.

10 Q What time that morning did you start to work, about? A I do not remember.

Q The first load, what time was your first load, about; do you remember? A I do not remember.

Q Well, between 10 and 11, had you been working before that, or was that the first load? A Why, I had been working before that.

Q I see. Now, getting down to this particular trip that we are talking about here this morning, what did you do when you arrived at the cement shed that time? A I put the brake on and put the car in neutral, shut the engine off, and went in the office with the ticket from the previous load.

Q Do you know the name of the man who was in there? A Why, I believe I do.

Q What was his name? A Mr. Craft.

Q Mr. Craft. Now, after you delivered the ticket, what did you do then? A We had—we got another ticket for the load I was getting, and I went back to take the truck if it was ready; if not, why waited until it was ready.

Q Now, when you got outside, did you see anybody out there? A Yes, sir.

Q Who? A Mr. Sturgess was standing on the ground.

Q Is he the road inspector that was here this morning, road inspector or cement inspector? A I did not know just his occupation, but he stood there.

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*George Glock, direct.*

Q Was that the same man that was seated here this morning? A That is the man.

Q Was there anybody else there besides Sturgess? A Billings was there, the man from the truck, from the following truck.

Q How far back of you was his truck, about? A Oh, I do not know; about ten feet, maybe.

Q Now, where did you three men stand? A On the left of my truck, on the ground.

Q And were you all together, or separated? A Why, we were all together.

Q How long did you stand there? A I do not know.

Q Well, I do not mean by my question, right down to the number of seconds; but was it a long time or a short time or what? A Well, it was a couple of minutes, maybe.

Q A couple of minutes. Now, what were you told by Bianchi & Smith's foreman or any of his employes as to when you were to go away from the shed? How would you know when to go away from the shed?

Mr. Breslin: I object to that on the ground there is not evidence he knew who the employes were, or whether these people were authorized.

The Court: That is your difficulty.

Mr. McGlynn: There has been testimony by practically every witness for the plaintiff who testified on everything but the medical testimony that they were all Bianchi & Smith's men, two of them loading, two of them throwing out the bags, Mr. Craft the superintendent.

The Court: Your question is too general. If you pick somebody, the plaintiff, probably

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*George Glock, direct.*

if they knew, might be able to meet it if occasion arose.

Mr. McGlynn: All right.

Q How many men were working on that cement shed where your truck was stopped alongside of it? A About four I always saw there. 10

Q What were they doing? A Well, two put the bags in the truck, and two dumped them.

Q Now, were those four besides this man Craft that you mentioned, or does that include him? A Those four, besides him.

Q Were there any other men around that cement shed doing anything at that time, up in the shed, I mean? A Not that I know of.

Q And is that the same number that usually were there, you say? A I usually saw four men there. 20

Q I see. What would they do? Two of them would do what? A Two of them would put the bags in the truck, and two would go on the truck and dump the bags of cement.

Q What would they do next, these four men, or any one of them? A Why, I imagine they would get off the truck.

Mr. Breslin: I ask that that be stricken out. 30

The Court: Strike it out.

Q How did you know when to leave the shed? A I would get a signal to go ahead.

Q From whom? A From one of the men in the shed.

Q These four that you have described? A Yes, sir. 40

*George Glock, direct.*

Q What would the signal be? A "Roll 'em, roll 'em."

Q "Roll 'em, roll em"? A Yes, sir.

Q When you got that signal, what did you do? A I got on my truck, started my motor, went ahead. 10

Q How would you know where to take the stuff to? A Why, we had been—we had got orders where to take it when we first started. The first time you came in there, you got those orders, and if there was any changes, why, you was instructed to make the change.

Q By who? A By Bianchi & Smith's man.

Q Now, on this particular load, I think I got you off out of the trucks down alongside of the truck talking to Sturgess and Billings. Now, did you hear the signal given? A Yes, sir. 20

Q What did you do then? A I got on my truck, started the motor and put it in gear and went ahead.

Q How far did you get? A Oh, about 15 or 20 feet.

Q Had you passed the cement shed? A Why, I do not think I had.

Q What happened then? A I heard somebody hollering. I got—I stopped the truck and I got off, and on looking back, I saw two men pick up the colored fellow. I asked them what happened. They said he fell off the truck. 30

Q And where was Billings then? Had this truck started? A I do not know. There was such excitement.

The Court: What was the testimony how far he had gone before?

Mr. McGlynn: About ten or fifteen feet.

The Court: Ten or fifteen feet? 40

*George Glock, cross.*

The Witness: About that. It is the end of the shed.

Mr. McGlynn: That is all.

*Cross examination by Mr. Breslin.*

10 Q You are absolutely positive that you heard a signal given? A I am.

Q Do you remember signing a statement on November the 20th, 1926? A Yes, sir.

Q That is your signature? A (Referring.) Yes, sir.

Q Do you remember giving the statement to that gentleman sitting down there in the front row (indicating)? A Yes, sir.

20 Q Do you remember saying to him, "I thought I heard a man holler 'Roll 'em, roll her' "? A No, sir.

Q Do you deny that you said that? A I deny that I said—well, I don't know if I said it or not, but I don't remember it.

Q Did you read this statement over before you signed it? A Well, I believe I did.

Q You read it over, didn't you, before you signed it? A Why, I must have, I guess.

30 Q This man did not force you to make any statement, did he? A Why, no; he—

Q You made it of your own free will, didn't you? A I didn't make the statement; he made it.

Q You read it? A I read it.

Q You gave him the information? A (No response.)

Q You gave him the information, didn't you, Mr. Witness? You told him what to write. A No, sir.

40 Q Who told him? A He wrote it.

*George Glock, cross.*

Q You gave him the information? A I didn't tell him what to write.

Q All right. We will start and see. Did you say this to him: "I am employed by Mr. G. B. Holman, doing business as the Junior Trucking Company, at 151 Park avenue, Rutherford"? A I don't remember what was in that statement at the present time. 10

Q Do you remember saying anything to him? A No, I do not.

Q You gave him a statement, didn't you? A I imagine so.

Q And it was true at the time you made it, wasn't it? A Well now, I don't know, the excitement was so great, I don't know.

Q The excitement was so great? A Yes. 20

Q The accident happened on September the 24th, 1926? A Yes.

Q And you made this statement on November the 20th, 1926. Were you still excited on November the 20th? A I don't know.

Q Did you have to go to a doctor in the meanwhile for any nervous ailment? A No, sir.

Q You had been working every day from the day of the accident, hadn't you? A Yes, sir. 30

Mr. Breslin: I would like to have this marked for identification at this time. That is all.

(Statement marked Exhibit P. 7 for identification.)

*By Mr. Breslin.*

Q A few others questions, Mr. Glock: You had been there other days? A Yes, sir. 40

*Charles H. Billings, direct.*

Q When you had been driving the same truck for the Junior Trucking Company? A Not the same truck.

Q Well, other trucks of the Junior Trucking Company? A Yes, sir.

10 Mr. Breslin: That is all.

CHARLES H. BILLINGS, sworn as a witness on behalf of the defendant, testified as follows:

*Direct examination by Mr. McGlynn.*

Q Mr. Billings, where do you live? A East Rutherford.

20 Q What is your business? A Chauffeur.

Q For whom? A For William Toomer.

Q Who were you working for on September 24th? A John H. Houghton, or John R. Houghton.

Q And were you on Bianchi & Smith's job that day? A Yes, sir.

30 Q What would you do the first thing in the morning when you arrived at Bianchi & Smith's property? A I would pull in, go down to the hopper and get a load of stone and a load of sand.

Q How would you go to go to the hopper?

Mr. Breslin: I object to this. He was not employed by the defendant company. I do not see where it has any bearing on this case. How can it bind the plaintiff?

40 The Court: Well, there is testimony that this truck was behind the one—

*Charles H. Billings, direct.*

Mr. Breslin: All right. I will withdraw the objection.

Q How would you know what— A The first day we started the job, we was told where to load up.

Q By whom? A By Bianchi & Smith's, Bill Craft. 10

Mr. Breslin: I object to that as not binding on the plaintiff.

The Court: I will allow it.

Mr. Breslin: Exception.

Q Now, after you got through at the hopper, where would you go? A Up to the cement shed.

Q And that cement shed had a platform alongside of the door? A Well, no, you wouldn't call it a platform. It had a sliding door on it, and it had to be a sill so the door would slide on it. It stuck out about three or four inches. 20

Q Three or four inches beyond the side of the building? A Yes, sir; it is meant for the sliding door, on a roller.

Q I show you a picture marked Exhibit P. 1. Does that look like the door? A That is the sill, yes, sir. 30

Q This is the sill you talk about here in the center? A Yes, sir. The sill is in the middle.

Q The sill is in the center? A Yes, sir.

Q How close would the trucks go to that sill? A Eight inches.

Q And were they the regular dump trucks? A Yes, sir; standard body.

Q How about the driver, a cab up in front? A A cab, yes. 40

*Charles H. Billings, direct.*

Q Now, do you remember the time Gilbert was hurt? Do you remember that time of the morning when Gilbert was hurt? A Yes, sir.

Q Where was your truck with reference to—  
A Right on behind the Junior Order—or the Junior Trucking Company, that is, in a truck  
10 length.

Q About a truck length behind the other truck? A Yes, sir.

Q And was your car stopped there, your truck? A My car was running.

Q You mean the motor was running? A Yes, sir.

Q But were you on it? A No, sir.

Q Where did you go? A On the side, talking to George Glock and the inspector.  
20

Q Talking to George Glock and the inspector. Where were you standing talking, Mr. Billings?

A On the left hand side of my truck.

Q Yours or Glock's? A Glock's truck.

Q And how long did you stand there? A Until the truck was loaded.

Q What happened then? A He was told to go ahead, and you say "Roll 'em, roll 'em," and go ahead.

30 Q What is this "Roll 'em, roll 'em"? A Well, it meant to go ahead, to roll the truck ahead, it was loaded.

Q Who yelled "Roll 'em, roll 'em"? A A man in the shed.

Q Was there any other words they used besides "Roll 'em, roll 'em"? A That is all I heard, "Roll 'em, roll 'em", and "go ahead."

40 Q Those two expressions? A I heard it that morning when he pulled off with his load.

*Charles H. Billings, cross.*

Q When you heard this "Roll 'em, roll 'em," and "go ahead", what did Glock do? A He got on his truck and started it and pulled up.

Q Yes? A As he did, that gentleman fell off the rear end.

Q Where did you go? A I started for my own truck. I didn't pull up. If I had pulled up  
10 I would run over the colored man on the ground.

Q How far did Glock's truck get before it stopped? A At the end of the shed, going out towards the gate.

Mr. McGlynn: That is all.

*Cross examination by Mr. Breslin.*

Q Who are you working for now? A Wil-  
20 liam Toomer.

Q How long did you work for John Houghton? A About a year, a little over a year.

Q And where do you live? A East Rutherford.

Q How long have you lived in East Rutherford? A All my life.

Q Now, Glock's truck was facing west, or towards Nutley, wasn't it? A Up towards the hill, Washington avenue, yes.  
30

Q Up towards Washington avenue. And where was your truck with reference to Glock's truck? A Right on behind, in the same direction.

Q Behind Glock's truck? A Yes.

Q I see. And where were you standing talking with Glock? A On the side of his truck.

Q On the side of his truck? A Yes. We had to get out of the way. When they throw the cement bags off, they was full of dust, so we stood just so we wouldn't get the dust in our  
40 face.

*Charles H. Billings, cross.*

Q You saw the colored man fall off the back?

A Yes. I saw him fall off.

Q And you saw him fall to the ground? A I seen him fall to the ground, yes.

Q There was no doubt he was thrown from the back of the truck, in your mind? A Well, 10 when the car pulled up, he was thrown off.

Q Thrown off the truck onto the ground? A He was just dumping out his last bag of cement, and they told him to "roll 'em, roll 'em," and "go ahead."

Q And he fell in that position from the back of the truck to the ground? A Yes.

Q And there is no doubt in your mind that he fell from the back of the truck onto the ground? A Well, where could he fall?

Q I am not asking you that. Didn't he fall 20 from the back of the truck to the ground? A Yes. From the tailboard to the ground.

Q You are not chewing gum now, are you? A No, I am not chewing gum.

Mr. Breslin: That is all.

Mr. McGlynn: I would like a recess at this time.

The Court: Yes. We will take a recess 30 until two o'clock.

(Recess.)

*George Glock, further cross.*

AFTER RECESS.

2:00 O'Clock P. M.

Mr. Breslin: If your Honor, please, I realize it is within your Honor's discretion. I omitted to ask Mr. Glock a few questions, and I was wondering if we could recall him 10 now or recall him later?

The Court: Recall him later, unless the defense might have to meet what you are going to ask, so we will call him now.

GEORGE GLOCK, recalled for further cross examination, testified as follows:

*By Mr. Breslin.*

Q Now Mr. Glock, you remember the morning 20 of this accident that you saw Mr. Craft inside of the shed? A Inside of the shed?

Q Or in the office, you saw him? A In the office.

Q He gave you a slip? A Yes, sir.

Q And told you where to go? A Yes, sir.

Q And then you took the truck and went on? A No, sir. 30

Mr. Breslin: Well, I withdraw that.

Q You remember talking to Mr. Craft in the office that morning? A No, I don't. I just got the slip; that is all I remember.

Q Will you positively say, and do you deny that you made the following assertion, that you were not going to take any more from Bianchi, and that you were going to clip him on the chin if he got too flip? 40

*Abel Gordon, direct.*

Mr. McGlynn: I object, if it please the Court.

The Court: I sustain the objection.

Mr. Breslin: Laying the foundation to affect his credibility, to show just prior to the accident the mental condition this man was in. 10

The Court: No. I sustain the objection.

Mr. Breslin: That is all.

Mr. McGlynn: That is all.

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ABEL GORDON, sworn as a witness on behalf of the defendant, testified as follows:

20 *Direct examination* by Mr. McGlynn.

Q Doctor, were you connected with the Saint Mary's Hospital at Passaic on September 24, 1926? A Yes, sir.

Q In what capacity? A Interne.

Q And what, if anything, did you have to do with the making or keeping of the hospital records concerning this case of—

30 Mr. McGlynn: What is his first name?

Mr. Breslin: Robert Gilbert.

Q —Robert Gilbert? A Well, I wrote most of the record.

Q And I show you a folder which was handed to me this morning by Doctor Whelan, and ask you if you will look through those papers and tell me, if you can, if those are the hospital records on this case? 40

*Abel Gordon, direct.*

Mr. Breslin: I object to that.

Q Yes, or no?

Mr. Breslin: I object to that.

The Court: He can answer that yes, or no. 10

A Yes, sir. These are the records. I do not know if it is the complete record or not, but whatever is here is part of the record, if it not the complete record.

Q How much of those papers that you have just looked at were made by you? A Well, a good part of these. The history has been made by me, the physical diagnosis,—the physical examination was made by me, the treatment record was made by me, the progress record was made by me, the admission note was made by me, and a good deal of it. 20

Q Who examined this man at the time of his being admitted to the hospital the first time he arrived there? A I believe, at the time he was admitted, Doctor Whelan was present.

Q Doctor who? A Doctor Whelan. Doctor Whelan was present, and myself was present, and probably several other physicians. This man was brought in, if I recall correctly, in the morning. However, that would be stated on the chart. 30

Q Well, can you tell by looking at the chart what time he was admitted to the hospital? A If it is written on the chart, I can tell.

Q Will you look at the chart and tell me? A (Referring.) He was admitted on September 24, 1926. 40

*Abel Gordon, direct.*

Q At what time? A Just a moment. (Referring.) At 12:45 P. M. That means about noon time.

Q Will you please read your notes on the admission of this patient?

10 Mr. Breslin: I object to that.

The Court: I sustain the objection.

Q Can you tell me his condition at the time of his admission without refreshing your recollection from the record which you made? A Well, I would not say that I can do it accurately; I have some impression, but—

Q Could you tell me if you refreshed your memory by an examination of the record made by you at that time? A Yes.

20 Q And then I ask the witness, refreshing your memory by the record made by you at the time, what was the condition of the plaintiff at the time of his admission?

Mr. Breslin: I object on the ground that the memorandum has not been sufficiently qualified and proved.

The Court: He said he wrote it himself.

30 Mr. Breslin: As I understand it, he wrote some of the sheets; he did not write it all.

The Court: Do you say you wrote that memorandum, doctor?

The Witness: Yes sir.

Mr. McGlynn: Anything he has not written, Mr. Breslin, I do not intend to ask him about.

*Abel Gordon, direct.*

Mr. Breslin: All right.

The Court: I think it has met the test. He may use it to refresh his recollections.

A Do you wish me to read it, or merely tell you?

Mr. Breslin: I object to the witness reading it aloud. 10

Mr. McGlynn: I just asked him for the instruction.

The Court: The Chancellor said you may read it.

Mr. Breslin: I pray an exception, if that is your Honor's ruling. I understood the rule to be the witness would be allowed to read the memorandum, and then, by the means of refreshing his recollection from the memorandum, to testify without the memorandum. 20

The Court: No. The Chancellor said—there is not much sense in that—he may refresh his recollection to the extent of reading it.

Mr. Breslin: All right. I pray an exception. 30

A Patient admitted on September 24, 1926, with the history of having fallen twelve feet while at work. The patient was conscious. The pupils reacted and—contracted and reacted well to light. He complained of pain in the chest and in the extremities, with inability to move the extremities. He complained of much pain on passive motion in all extremities. At that time, there was no evidence of paralysis, as the patient could move the extremities on repeated attempts, al- 40

*Abel Gordon, direct.*

though accompanied by much pain. No evidence of fractures nor of dislocations. A few scalp lacerations. Multiple indurated genital lesions on the foreskin, with a purulent urethral discharge. Patient put to bed and given treatment. Pulse sixty-eight, and regular. Blood pressure, 125 over seventy-eight.

10 Q Just so that I may straighten out that finding there toward the end, about the purulent urethral discharge: Did that indicate gonorrhea or syphilis? A Gonorrhea.

Q Did this man have gonorrhea? A He did.

Q Was there any test made, medical test made for syphilis? A Yes, sir.

Q What was the name of the test? A The dark field test was made, and the Wasserman.

20 Q What? A The dark field test. The test, for your information, means the obtaining certain serum from lesions which he had at that time in finding the organism there, the spirochetea, which is the cause of syphilis.

Q Now, how long did you have anything to do with this patient while he was in the hospital?

A From the time he was admitted until July 1, 1927.

Q What work did you take up on July 1, 1927?

30 A I beg your pardon?

Q What work did you take up on July 1, 1927?

A I began to do pathology for the hospital.

Q That took you out of your duties as interne? A Yes, sir.

Q Did you have anything to do with the treatments which were given to him from September until July? A Yes, sir.

40 Q What treatment, if any, did you give him for syphilis? A We gave him what we call the intensive antiluetic treatment.

*Abel Gordon, direct.*

Q Did you give him any treatment for gonorrhea? A Yes, sir.

Q Under whose orders and directions were these treatments given? A Under the directions of Dr. Whelan.

Q What, if anything, was done to ascertain how far this syphilis had extended? I understand it is divided into some sort of stages; which stage was he supposed or found to be in upon his admission? A The record will show that.

Q Will you refresh your memory by turning to the record and tell us what it was? A The physical examination is written on February 4, 1927.

Mr. Breslin: In your handwriting, doctor?

The Witness: Yes, sir.

Mr. Breslin: All right.

A (Continuing.) Temperature, 98; pulse rate 76.

Q Not too fast, doctor, will you? A Temperature, 98. Pulse rate, 76, character, regular. Blood pressure, 125 over 80. Respiratory rate, 20; character, regular. Nutrition: well-developed and well-nourished. Colored individual. Muscular and robust. Head normal in shape and size. External: Ears and nose, negative. Eyes: The extraocular movements were normal. No ptosis. Sclera was clear. The conjunctiva at that time was thickened. The pupils were regular. The mouth: The teeth were very poorly kept. Neck: No abnormal pulsations; no abnormal masses or nodes.

Q No abnormal what? A No palpable masses or nodes in the neck. Chest well developed and symmetrical; good and equal expansion. Lungs

*Abel Gordon, direct.*

are clear throughout. Likewise, no cardiac pathology.

Q No what? A No cardiac—no heart pathology.

Q Yes. A Abdomen: No masses, no tenderness and no rigidity. Extremities: Weakness in upper and lower extremities, with paraesthesias; bilateral—

Q Wait a minute. Paraesthesias. What is that? A That is a term used to indicate abnormal sensations; for instance, a feeling of numbness in an extremity or hand, or any part of the body, an abnormal sensation. Ordinarily, we feel temperature as being cold or hot, and we have an idea of the environment about us from our ordinary sensations, our ordinary cutaneous sensations; but sometimes these are disturbed by diseased conditions, and then we feel that there is a feeling of numbness, or a feeling of extreme heat, extreme—a feeling of extreme cold or pain, something like that.

Q All right. I think I will know him if I meet him again. Now, will you go down, next—what is your next finding? A Bilateral and symmetrical peripheral nerve lesions in upper and lower extremities.

Q What does that mean? A There was some nerve disturbance to the supply of the muscles of the extremities, as I recall, at the beginning; after—and when he came into the hospital, you will note on my record, I said he had no evidence of paralysis. I did not read the progress record, with the notes made on the following days. He developed a paralysis from his neck down, involving, in other words, the upper and lower extremities. That developed in a day or so later. And he was ex-rayed. The paralysis was due to

*Abel Gordon, direct.*

pressure. Of course, from our clinical findings, it was due to pressure on the spinal cord.

Q Let me interrupt you a second. What did the ex-ray show, any evidence of fracture? A No. The ex-ray showed no evidence of fracture. There was no fracture.

Q There was no fracture. How long did this paralysis condition last? A There is a question in my mind whether there is some paralytic condition still there or not. I doubt whether there is.

Q Well, you have got down to the—what was the next finding on the record, with reference to his condition? A I merely made a note, on admission, the patient had the classical findings of active secondary lues. Lues means syphilis.

Q What does that mean? A It means he was in the secondary stage of syphilis. He had the active lesions which denoted that stage. He had, at the same time, an unhealed chancre, which is the primary sore.

Q That is the primary sore? A Yes. He had an unhealed one. He had secondaries. That is not an unusual thing.

Q I see. A He also had an outspoken Neisserian urethral and conjunctival infection. The blood Wasserman was four plus.

Q Well, go back to that urethral conjunctival infection. What does that mean? A The Neisserian refers to the fact that the infection was caused by the bacillus of Neisseria, which is another name for the gonococcus. That is another name of the bug causing gonorrhoea. Urethral infection of the conjunctiva, referring to the conjunctiva of the eye, the ocular conjunctiva.

Q Do the records made by you indicate when this Gilbert first started to walk? A I do not

*Abel Gordon, direct.*

know. I would have to look over the record to tell you that.

Q Suppose you do it.

*By the Court.*

10 Q You cannot tell without the record, I take it, doctor? A I beg your pardon?

Q You could not tell without the records? A I did not get his question.

*By Mr. McGlynn.*

Q Have you any recollection as to whether you ever saw this man walk? A Oh, yes, sir; oh, yes, sir.

Q When do you remember that you first saw him walk? A I could not place the date at all.

20 Q I see. A My memory for dates is very poor.

Q What? A My memory for dates is very poor.

Q Did you see him walk on more than one occasion? A Oh yes. Do you want me to look up the chart and tell you that accurately?

Q If you could quickly.

The Court: Yes.

30 A On January 6, 1927, I have a note here having given him treatment, Neosalvarsan. The general condition is improving. There is amelioration of the severity of the wrist and foot drops. No other complaints.

Q What date was that, again? A January 6, 1927.

Q Now, will you just— A No.

40 Q Pardon me, doctor. Just a second. Something about that I think I would like to have

*Abel Gordon, direct.*

you explain. Just show me the entry, so I won't have to waste a lot of time. Where is it? A (Indicating.)

Q What is this here, amelioration of what (indicating)? A Of the severity of the wrist and foot drops. At the time when he came in, he held his hand like this (illustrating) with the fingers outstretched, which he still has; he still has that deformity, the extensor deformity; but he has a flexion at the wrist, with the extension at the fingers, and this flexion deformity at the wrist, which we call a wrist drop, has ameliorated; that is, it diminished. 10

Q Now, let me ask you in there: Was there anything the matter with his kidneys at the early stage of this case? A No, sir. Nothing the matter with the kidneys at all. 20

Q All right. Now, getting back to the walking again: You started to find, if you could, some record of when he first started to walk. A Well, according to my record, he was given electrical treatments in February; the exact date does not make any difference.

Q What? A He was given electrical treatments in February, according to the record here, I notice.

Q What is that? A Well, we applied a certain form of electrical therapy. 30

Q What has that got to do with his walking? A That has a lot to do with the walking.

Q What? A That has a lot to do with the walking. We usually don't give this form of electrical therapy unless the patient is up, you see, up and about.

Q I see. You started to give those in February, you say? A Yes. We began giving them in February. 40

*Abel Gordon, direct.*

Q Is there any indication on those records as to how many hours a day he was out of bed?

A Probably on the nurses' record.

Q Not yours, then?

The Court: Unless you know that to be so, doctor, you cannot use that. 10

The Witness: Well, he was up; there is no question about that.

Q Did you actually see him yourself? A Yes, sir.

Q At the time you ceased to have anything to do with this particular case, what was the condition then of the gonorrhoea and syphilis end of it? A The last Wasserman we took (and there is a report of it on the chart) was negative. The Wasserman was negative. 20

Q That means? A That means that there was an improvement, tremendous improvement in the luetic and syphilitic condition. The eye condition, the gonorrhoeal eye condition, was cured rather promptly. We took active measures towards curing that, because it is so infectious. It is a very severe infection, and it spreads very easily. Likewise, the gonorrhoeal urethral condition, the discharge was—the discharge stopped within a few months. 30

Q Within a few months. Well, according to your records, doctor, the principal thing, the principal treatment this man was receiving was for the venereal disease, or for the other injuries?

Mr. Breslin: Objected to on the ground it calls for a conclusion.

The Court: I sustain the objection. 40

*Abel Gordon, direct.*

Q The treatments that were given to him, doctor, under your direction, for what were they given, principally?

Mr. Breslin: I object on the ground there is no evidence before the Court that any treatments were given under the direction of this witness. He has not testified— 10

The Court: I think he said Doctor Whelan—

Mr. McGlynn: He directed him.

The Witness: I gave the treatment. He gave the directions what to be given, but I gave the treatment.

Mr. McGlynn: I do not ask this witness what treatments he prescribed. This young man is just telling us what he actually did. 20

Mr. Breslin: I have not any objection to that.

Mr. McGlynn: That is all I want.

*By the Court.*

Q What did you do for this patient? A What did I do for him? 30

Q Yes? A We used to give him, weekly, or bi-weekly, at the beginning, injections of an arsenical preparation. We gave him mixed treatment in the form of potassium iodide, or mercury bichloride.

Q I do not think they hear you. A We gave him treatment for syphilis, modern, up-to-date treatment for syphilis. We treated his gonorrhoeal condition and, later, we applied electrical treatment for his muscular condition. 40

*Abel Gordon, cross.*

*By Mr. McGlynn.*

Q When did that start? A In February, we gave him electrical treatment.

Q From September until February— A We gave him no electrical treatment.

10 Q And from September to February, the only treatment you did give him was for these two diseases you just mentioned? A Well, indirectly, we treated his general condition, too, being that he was in bed; and that is the primary thing in treatment is rest.

Q I see. A He got treatment for that, too.

Q Well then, from February on to,—I think your connection ceased about July first. A Yes, sir.

20 Q Did these treatments you just described continue, or did they cease? A I do not know.

Q Can you tell by refreshing your memory whether they continued? A Can I tell?

Q From February up to July, not after July? A Oh, yes. Yes, these treatments continued until July, until I left.

30 Q And the only treatment that was given him for his muscles, and so forth, would be electrical therapy? A Electrical therapy, massage, passive motions.

Mr. McGlynn: I think that is all, doctor.

*Cross examination by Mr. Breslin.*

Q Doctor, you are licensed to practice medicine and surgery in the State of New Jersey? A Yes, sir.

40 Q How long have you been so licensed? A Several months.

*Abel Gordon, cross.*

Q Several months. And you did not have anything to do with the exact handling of this case, did you? Doctor Whelan was the physician in charge? A What do you mean by the exact handling of this case?

Q You took your orders from Doctor Whelan? A Yes, sir. 10

Q Doctor Whelan was the attending physician? A Yes, sir.

Q Now, you say that you have been licensed for several months. When were you licensed?

Mr. McGlynn: I cannot quite see the force of Mr. Breslin's cross-examination, because I have asked this young man for no opinions, nor did I qualify him in any respect at all, except he was an interne in the hospital, and I asked him to testify from the records of things that he actually did, and there is no opinion or— 20

The Court: Well, that all goes to his credit.

Mr. McGlynn: It is just a waste of time. We can save that time. I certainly shall object to any opinion testimony given by him.

The Court: The only question is, was he a licensed physician? I will allow it. 30

The Witness: Yes, sir.

Q When were you licensed, doctor? A In the summer of 1926.

Q In other words, when you last treated this man in July, 1926, you were licensed then. A Yes, sir.

Q You had been licensed since December? A Not in the State of New Jersey. 40

*Abel Gordon, cross.*

Q Where were you licensed? A In the State of New York.

Q Have you ever been licensed in the State of New Jersey? A Yes, sir.

Q How long have you been licensed in Jersey?

A Approximately four to six months.

10 Q Well, the point I want to get, doctor, is whether or not you were duly licensed to practice medicine and surgery in the State of New Jersey when you treated this man last. A Yes, sir.

Q And how long a time prior to that? A From the time I began my internship, I have a right to practice medicine and surgery in the Saint Mary's Hospital, the place where I was interne.

20 Q You were not licensed, though, doctor? A I did not have a license to practice.

Q Yes or no, doctor? A In the State.

Q Yes, or no? That is all. A Yes or no, to what?

*By the Court.*

Q Doctor, when did you get your license from the State Board of the State of New Jersey? A Several months ago.

30 Q Can't you tell us? A In September, 1927.

*By Mr. Breslin.*

Q That is what I want to get, doctor. In July, 1927, you were not licensed in New Jersey to practice medicine and surgery, were you? Yes, or no? A No, sir; no, sir.

Q And you were taking all your orders in the handling of this case from Doctor Whelan, weren't you? A Yes, sir.

40 Mr. Breslin: That is all.

*Henry H. Lucas, direct.*

*By the Court.*

Q Doctor, your initial diagnosis was gonorrhoea, syphilis? A Yes, sir; and traumatic injury.

Q Traumatic injury? A Yes, sir.

Q And where was the evidence of the trauma? A From the history. 10

Q From the history? A Yes, sir.

Q Did you find any lacerations there? A Yes, sir.

Q Where? A Lacerations of the scalp.

Q Then I think you said, in a day or so, there was evidence of paralysis? A Yes, sir.

Q How soon after the admission did you determine there was paralysis? A The very next day.

Q The next day. What were the symptoms of paralysis? A Inability to move the extremities. 20

Q That is the feet and hands? A The feet, legs, the hands, and thighs; upper and lower extremities.

Q What was his posture for a time after that? A Recumbent, flat on his back.

Q Could he move? A No, he could not.

Mr. Breslin: That is all, doctor. 30

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HENRY H. LUCAS, sworn as a witness on behalf of the defendant, testified as follows.

*Direct examination by Mr. McGlynn.*

Q Doctor, you are a physician of the State of New Jersey? A I am.

Q And have been for how long? A 30 years. 40

*Henry H. Lucas, direct.*

Q Have you specialized in any particular branch of the subject since your admission? A Nervous and mental diseases.

Q Nervous and mental diseases? A Yes, sir.

10 Q That is what you call nerology, is it? A Neurology, yes.

Q Neurologist? A Yes.

Q At the request of the defendant in this case, did you make an examination of this man Gilbert? A I examined him on two occasions, on the 21st and 24th of September.

Q Nineteen— A Last.

Q 1927? A Yes.

Q And where was he when you examined him? A At Saint Mary's Hospital, Passaic.

20 Q Was he in bed? A He was not.

Q Where was he? A He was up and around.

Q Did you on either or both of these occasions see this man walk? A I did.

30 Q Will you please describe the walking? A Well, in order to make my tests, I had him walk up and down the room. He walked up and down the room, and he walked somewhat stiffly; but he did not complain. He did not complain of pain or any distress. He did not ask me to sit down.

Q And how long a time were you there on both of these occasions? A On each occasion, about—on each occasion, about an hour. I do not mean to say that he was up on his feet all that time, though.

Q No. But you were there for an hour at each time, about? A Yes.

40 Q And in your opinion, from an examination that you made of him last, would he have been

*Henry H. Lucas, direct.*

able this morning to have walked into this court room? A Well, I was surprised when I saw him on the stretcher when I came in. I felt that he could walk in here.

Q Now, getting down to his condition from your viewpoint as a nerologist, what did you find his condition on each examination that you made? A My purpose was to determine— 10

Mr. Breslin: I ask that that be stricken out, what his purpose was.

The Court: Just tell us, doctor; answer the question.

A I examined him; I examined his nervous system—

Q Yes. A —to make every and all tests. 20

Q Well, what were some of those tests, so that the jury will have some idea what sorts of tests you put him through? A The tests were made to determine if there was any paralysis or loss of sensation, which would indicate some cord lesion, some cord disease.

Q Cord? A Cord, spinal cord.

Q Spinal cord disease? A Yes.

Q Well, what did you find? A I found no indication of any nervous disease at present. 30

Q On either one of these occasions? A On both occasions.

Q Both occasions? A Yes, sir.

Q To what do you attribute his present condition?

Mr. Breslin: I object to that.

The Court: Well, he is privileged to say that if it is from his examination. 40

*Henry H. Lucas, direct.*

Mr. Breslin: As a result of his examination solely, I take it?

The Court: Oh, yes. That is the only way he can testify to it from the form of the question.

10 A I attribute his present trouble to arthritis.

Q What kind of arthritis, if there are different kinds? I do not know. A Well, there are different kinds.

Q Well? A He had an arthritis, and I—my diagnosis would be gonorrheal arthritis.

Q Let me ask you right there, doctor: In gonorrheal arthritis, is it possible by way of X-rays to determine whether or not there is a condition of gonorrheal arthritis, in your opinion? A Generally, yes.

Q How do the pictures show this up, the X-ray pictures? A They may show—the pictures may show productive bone formation; then there is sometimes a change in the relative position of the joint bones where they come together.

Q Is there any muscular atrophy of this man? A No, sir.

Q Well, if his present condition, doctor, were due to a spinal cord injury, and if he has been confined to the hospital now for practically thirteen months, would there or would there not be some well-defined evidence of muscular atrophy at this time? A Well, if there was any diseased part of the cord anywhere, even a slight area, it would show some loss of function in the way of loss of sensation or loss of motion.

Q Now, did you find any such evidence in this case? A None.

Q What effect, if any, would this condition that you attribute his present state to, have on

*Henry H. Lucas, direct.*

his joints and his wrists, for instance, and fingers? A Which? The injury to the cord?

Q No. The condition that you find, to which you attribute his present condition, gonorrheal arthritis; what effect would that have on his fingers and wrists? A A soreness and stiffening, some swelling, and mal-position of the joints. 10

Q What did you find about his hand? What was the result of your examination? A They were very much deformed; his fingers turned in all directions; some were extended, and some were flexed.

Q Is that the— A There was some difficulty of movement of his wrist; he did not have the free motion that he would have with a normal wrist.

Q Is it possible for that condition to also result from this gonorrheal arthritis that you are talking about? A Yes, sir. 20

Q And not from spinal cord injury? A No.

Q Did you examine him for the purpose of finding out whether there was any indication of any of the other cranial nerves being affected? A Other what?

Q Cranial nerves. A Cranial nerves?

Q Cranial nerves, yes. A There is no indication of it at all. 30

Q How are the functions? A All intact.

Q How did you find the eye reflexes? A Normal.

Q Both ways, light and accommodation? A Yes, sir.

Q What about the nerve reflexes of the extremities? A They were exaggerated.

Q Well, were they there? A They were there; they were intact, yes. 40

*Henry H. Lucas, direct.*

Q How long do you think it will be before this condition disappears? A Well, that is hard—a hard question to answer positively. I feel this man will get well in time from his disability.

10 Q Is it a condition which will or will not respond to treatment? A It will respond to treatment.

Q Under ordinary circumstances, how long a time would it be for this treatment to create the proper response and remove these difficulties? A I should think, ordinarily, this man ought to be able to be up and around and be well in a year.

Q There has been some testimony—did you hear Doctor Whelan this morning testify? A I did; yes.

20 Q There has been some testimony given here concerning a condition of paralysis attributed to a spinal cord hemorrhage, I think they called it; I may be wrong on that. A Yes.

Q I think that is what they called it. In your opinion, was he suffering from any such condition when you made your first examination? A Not when I saw him.

Q Nor on the second? A No.

30 Q Did you discuss this case with Doctor Whelan, also, before you were here today? A I did.

Q From the examination you made of him, what sort of a hemorrhage would you say he had suffered from originally?

Mr. Breslin: I object to that.

The Court: What was the question?

Mr. McGlynn: From his examination, what sort of a hemorrhage would you say he had suffered from as a result of this injury?

40

*Henry H. Lucas, direct.*

The Court: I do not know whether the doctor said that was part of his evidence.

Mr. Breslin: I withdraw the objection.

The Court: All right.

A Why, I should say, considering the history of the case that the man was injured and brought in— 10

Mr. Breslin: I ask that that be stricken out.

The Witness: I beg your pardon.

Mr. McGlynn: I do not see how you can get a medical man to drop a curtain over something that he hears in consultation with other physicians; you cannot do it; it is physically impossible to do it. 20

The Court: Are you familiar with *Birt-whistle v. Public Service*?

Mr. McGlynn: I never can remember the names of cases, sir.

The Court: Well, the Supreme Court and Court of Appeals seem to think differently from that, so we will have to follow what the upper courts have said.

Mr. McGlynn: I did not ask him any- 30 thing about that.

The Court: He is predicating his opinion upon some data, and it is not before the Court, or before the other side, which they might hope to examine him on. I will permit you—

Q Well, the history you started to talk about, doctor—

40

*Henry H. Lucas, direct.*

The Court: Mr. McGlynn, why not include a hypothesis?

Q Assuming, doctor, that this man fell from the rear of a truck several feet above the ground, landed, I believe, on his shoulder, striking the  
10 back of his head,—

Mr. Breslin: No.

Mr. McGlynn: That is the testimony, as I recall it, on his shoulder and on the back of his head. That is his own testimony.

Mr. Breslin: All right. Go ahead.

Q He was taken to the hospital and found to be semi-conscious; the next morning, I believe, he was in a paralyzed condition from his  
20 neck down to his toes, and that condition continued apparently up to about January or February, at which time he was able to move about, and given electrical treatments, electrical therapy treatments; what sort of a hemorrhage would you say that was of the spinal cord? A A spinal—or a hemorrhage into the spinal canal.

Q A hemorrhage into the spinal canal? A Causing a pressure on the spinal cord.

Q That would be what we call sometimes a  
30 blood clot, a clot of blood? A Yes.

Q And so long as that clot of blood pressed on the spinal cord, would that same condition continue? A Yes.

Q And upon that clot of blood being dissipated by treatment or by nature, would that effect disappear? A There would be a recovery of the functions.

Q I see.

*Henry H. Lucas, cross.*

*By the Court.*

Q Doctor, where would you say this blood clot was? A In the region of the cervical part of the spinal cord, in the neck portion.

Q The symptoms resulting from the blood clot are the same symptoms as paralysis, are they not, doctor? A The blood clot, if sufficient  
10 pressure resulted, would result in paralysis.

Q You would say, then, that the formation of a blood clot would produce paralysis? A Yes, sir.

*By Mr. McGlynn.*

Q Doctor, to what do you attribute his present manner of walking, as you have described it? A Arthritis.  
20

Q In the hospital ward? A Arthritis.

Q Any part of it due to this spinal cord injury you have just described? A I cannot see it.

Mr. McGlynn: Take the witness.

*Cross examination by Mr. Breslin.*

Q You say you were employed by the defendant company? A I was asked to examine the man, yes.  
30

Q I see. Do you know Mr. Holman, I presume? A I do not.

Q Where is your office? A In Paterson, New Jersey.

Q And I presume you testify in court a good deal? A Some.

Q And you usually testify for the defendant, don't you? A No, sir; not always.  
40

*Henry H. Lucas, cross.*

Q I see. Now, if this man had gonorrheal arthritis, the X-ray plates would show it, wouldn't it? A Not absolutely.

Q Not absolutely? A No, sir.

Q But in most cases? A Generally, yes.

10 Q Generally? A Yes.

Q I see. Now you can read X-ray plates, I presume? A I am not an expert at X-ray work.

Q Well, would you try and see if you could read these?

The Court: No, the doctor has the right to pass on that. He says he is not expert enough to read it.

20 Q Are you not expert enough to read these plates, doctor? A I would not express any opinion on my reading.

Mr. Breslin: Then I think we can show him the pictures and ask him to look at the pictures.

Q And you have been practicing for how many years, doctor? A Thirty years.

30 Q I see. Now, what are the general characteristics of gonorrheal arthritis? A Swelling, soreness, inflammation, some thickening.

Q And you positively say that this claw-like grip that he has is attributed to arthritis? A I believe it is.

Q Are you certain? A In my estimation, yes.

Q Have you specialized in venereal diseases? A I have not.

Q You have not specialized in venereal diseases? A No, sir.

40

*Henry H. Lucas, cross.*

Q Now, could you differentiate between chronic arthritis and gonorrheal rheumatism without the aid of a smear or culture? A No.

Q You could not. And you did not make any smear in this case, did you? A No.

10 Q Doctor, are the symptoms of concussion the same as the symptoms of syphilis? A Not at all.

Q Doctor, assuming that this man had worked for a period of approximately four years, and had worked steadily, and had not been to a doctor prior to the accident, and was suddenly thrown from the back of a truck, striking the ground, was taken to the hospital where he lapsed into unconsciousness, and paralysis set in the next day, would you, doctor, say that that paralysis was the result of syphilis? A No. 20

Mr. Breslin: That is all.

*By the Court.*

Q Doctor, assuming a man was suffering from arthritis, gonorrheal arthritis, would it interfere with his working at manual labor? A It does now, but he can recover so that he can return.

30 Q No, I mean,—suppose I put this question: How long after the infection of the gonococcus would arthritis develop? A It may develop years afterwards.

Q Years afterwards? A Yes, sir.

Q After the— A After the original infection.

Q In other words, seemingly cured, and then the sudden development? A Yes, sir.

Q Or is it gradual? A Gradual.

40

*Henry H. Lucas, re-direct—re-cross.*

*Re-direct examination by Mr. McGlynn.*

Q Doctor, you have been asked something about taking a smear. What does that mean?

A A microscopical examination.

10 Q Well, a microscopical examination, or a smear, in September, 1927, when you examined this man, assuming what the other physicians have testified to, that the gonorrhoea in his system had been cured, would not disclose any evidence of active gonorrhoea in his system, would it?

A A smear examination at that time might not disclose anything.

*Re-cross examination by Mr. Breslin.*

20 Q A blood culture would, though, wouldn't it, doctor? A In gonorrhoea?

Q Yes. A No, sir.

Q Well, a Wasserman test would? A A Wasserman test for gonorrhoea?

Q Yes. A No, sir.

Q Doctor, this concussion that the plaintiff suffered, that has an effect upon the loss of motion and the loss of function, hasn't it? A In concussion, there is no organic lesion.

30 Q I see.

Mr. Breslin: That is all.

A It does not affect the motion at all.

Mr. Breslin: That is all.

*By Mr. McGlynn.*

40 Q Doctor Lucas, did Doctor Whelan tell you this man had gonorrhoea?

*Charles B. Russell, direct.*

Mr. Breslin: I object to that.

The Court: I sustain the objection.

Mr. McGlynn: Just a minute. Doctor Whelan distinctly said the man did not have it.

Mr. Breslin: He wasn't asked whether or not— 10

The Court: Then that question is proper.

Mr. McGlynn: It is important, a discussion with another doctor who said the man did have gonorrhoea.

The Court: No. You should have laid the foundation while Doctor Whelan was on the stand.

Mr. McGlynn: All right.

Mr. Breslin: That is all. 20

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CHARLES B. RUSSELL, sworn as a witness on behalf of the defendant, testified as follows:

*Direct examination by Mr. McGlynn.*

Q Doctor, you are a practicing physician of the State of New Jersey? A Yes, sir.

Q And have been for how many years? A 30 20 years.

Q At my request, did you examine this plaintiff? A Yes, sir.

Q How many times? A Once.

Q Where was the examination? A Saint Mary's Hospital, at the same time that Doctor Lucas—

Q Do you remember the date? A The twenty-first of October.

Q 1927? A Yes, sir. 40

*Charles B. Russell, direct.*

Q Who, if anyone, was with you? A There was Doctor Lucas, the house surgeon, a couple of nurses; some other doctor, whose name I do not remember, walked in; Mr. Breslin.

Q This Mr. Breslin, or his brother? A I do not think he was there.

10

Mr. Breslin: No, I was not there, doctor.

The Witness: It is his brother, I guess.

Q All right. A Doctor Lucas. Did I mention him? And my stenographer.

Q While you were there, did the plaintiff—

A And the patient in the bed, the patient in another bed.

Q Sir? A The patient in the bed, with this man, another patient.

20

Q Another patient? A Yes, sir.

Q Now, this man do any walking while you were there? A He walked when I was there. We had him walk several times, back and forth, across the room.

Q In your opinion, from the way you saw him walk that day, October twenty-first,— A Pardon?

Q I say, from his condition at the time you examined him, when you saw him walk, would it be possible for him to walk into the court room this morning? A Why, he walked that day all right; he did not have any cane; he walked across the room; he did not walk rapidly, but he did not walk weakly. He walked right along. He walked back and forth several times.

30

Q In your opinion, should he have been able to walk into the court room this morning? A Unless something has happened to him since October twenty-first.

40

*Charles B. Russell, direct.*

Q I see. Now, you have not specialized in your practice, have you, doctor? A Yes. I have specialized in surgical work.

Q Surgical work. But you are not a neurologist, are you? A No, sir.

Q You do not profess to be? A No, sir.

10

Q All right. Your examination was what kind of an examination, do you call yours? A My examination was purely to see the extent and nature of his injuries from a bruise or trauma at the time that he received them.

Q I see. A The present condition.

Q Now, did you examine his body? A Yes, sir.

Q Were there any sores on any part of it at the time of your examination? A No, sir.

20

Q How did he talk? A He talked very intelligently.

Q How did his memory seem to be? A Very excellent.

Q Did you examine his wrists and fingers? A Yes, sir.

Q What did you find about those? A His wrists are considerably swollen or thickened from the conditions that appeared to be rheumatic in nature, or arthritic, which is the same word; and his fingers were stiff and he could not close his hands well. Some of his fingers were partly bent and some were out straight.

30

Q You say arthritic and rheumatic are almost alike? A No. Rheumatism has now been called arthritis, because we have found the various germs that sometimes cause stiff joints, and we used to call all stiff joint rheumatic.

Q What did you find about his legs? A His legs?

40

*Charles B. Russell, direct.*

Q Yes. A Well, I made quite a number of the tests, but not all, that Doctor Lucas made. I tested his nervous reflexes of his legs and found that—no sign of paralysis. I found his knee jerks present and active.

10 Q What, if anything, did you discover with reference to the forearm muscles, arms or shoulders? A Well, he had, I should say, some disuse and weakness of the various muscles of the body from being—from not having any use of them; but I did not find any injuries or any what you would call marked muscular shrinkage or atrophy.

Q That is what atrophy is, shrinkage? A Yes, muscular shrinkage.

20 Q Now, in the case of a person who had seen in bed almost—had been in the hospital, rather, almost thirteen months as a result of an injury, if that was the result of a spinal cord injury, would there be a marked condition, or would there not, of this shrinkage that you speak of present? A Well, in all actual paralysis, all conditions of paralysis of the entire body, you see marked loss of the muscle development and shrinkage of the muscles, and very frequently of groups of muscles.

30 Q Groups of muscles? A He did not have that.

Q He did not have that? A No.

Q What I mean is, by thirteen months, would that get to a condition where it would be marked?

A Oh, yes; if he had had paralysis for any length of time, it certainly would show.

40 Q What did you attribute his condition to, when you examined him? A Well, I thought that his wrist condition was due to gonorrheal rheumatism that he had had, or gonorrheal arthritis; both names are perfectly good. We some-

*Charles B. Russell, direct.*

times say gonorrheal rheumatism instead of gonorrheal arthritis, although the latter is the more technical way to say it. And he had these swollen wrist joints, and some of his finger joints were all swollen, and I attributed that to his gonorrhea.

10 Q Is such a condition, doctor, permanent, or does it respond to treatment? A Well, it responds to treatment as regards function, but there is a permanent swelling, to some extent, of the wrists and fingers for life.

Q In your opinion, any of that swelling that you discovered the result of any injury to the spinal cord? A Well, no; I—I do not think so; but I am not a nerve specialist. It seemed to me to be wholly gonorrheal.

20 Q What effect, doctor, would it have on a man's responsiveness to medical treatment for injury if he had gonorrhea and syphilis in his body at the same time? A Well, in the early stages that he had it,—he had a fresh dose of gonorrhea and he had a recent infection of syphilis and it probably would not affect him very much, his general constitutional condition, at the time he was recovering; but it would show up some months later, possibly affecting his joints or his general bodily condition. 30

Q In other words, it takes time for it to show? A It frequently takes several months for gonorrheal rheumatism to develop.

Q Now, would the taking of a smear that has been described here be of any assistance in coming to a diagnosis? A Well, he had no discharge from which to take a smear at the time I examined him.

40 Q Is that what you take a smear from? A Yes.

*Charles B. Russell, cross.*

Q Well, would this condition of gonorrheal rheumatism remain in the system even after gonorrhoea is cured or arrested? A Indefinitely.

Q What? A The joint changes remain indefinitely.

10 Mr. McGlynn: Take the witness.

*Cross examination by Mr. Breslin.*

Q Doctor, you are a regular practicing physician? By that, I mean you make your daily calls each day, don't you? A I beg your pardon. I do not—

Q You are— A I specialize exclusively in industrial surgery and in accident work, and to  
20 quite an extent in court work.

Q You testify in court a great many times?  
A Yes; a great many times.

Q In fact, that work has taken up so much of your time that you have given up general practice? A Well, no, I do not— I would not say that. Court work is perhaps ten per cent. or more of my regular work; but I specialize in accident work.

30 Q In accident work? A All accidents.

Q And I presume, during these twenty years you had a general practice; it is only recently you became a specialist in accident cases? A Well, I should say about twelve or fourteen years, I have been—perhaps fifteen years, I have been doing accident work.

Q You have testified in here a good many times, haven't you? A Lots of times.

40 Q Every term, you are in here? A Yes, I am in here every term.

*Charles B. Russell, cross.*

Q And I think I can very truthfully say, in 90 per cent. of the cases, you testify for the defendant? A That may be true.

Q I see. And I presume, from your long experience in surgery, that you can read X-rays?

A I am not an expert in X-ray.

Q So you cannot read these pictures? A 10  
Well, I am not an expert.

Q I see. All right. Doctor, you say that this man is suffering from gonorrheal arthritis. Do you say that? Do you want to stand on that? A That is my opinion.

Q Well, that is your opinion. Now, do you know, of your own knowledge, whether or not he had gonorrhoea when he came into the hospital? Do you, of your own knowledge, know that? A No. I did not see him when he entered. 20

Q If he did have this, doctor, wouldn't the X-rays be very helpful to ascertain whether or not your opinion was correct? A Yes.

Q I see. And the X-rays would portray that condition if it really existed? A Well,—

Q Wouldn't they, doctor? A It depends on what stage of the arthritis the X-rays were taken.

Q I see. A In certain stages, you can tell quite definitely what type of infection there is. 30  
After a while you cannot tell what the source of infection was, whether it was tubercular or gonorrhoeal, or any other form of infection.

Q You made your examination when, doctor?  
A Pardon?

Q When did you make your examination? Do you remember how long ago? A October twenty-first.

Q I see. And, in your opinion, the condition existed at that time; this gonorrhoeal condition existed? A The joints? 40

*Charles B. Russell, cross.*

Q Yes. A Yes.

Q And if the pictures were taken on October the 27th, 1927, they should portray that condition, shouldn't they? A October, 1927?

Q Yes. October 27th, after the date of your examination. If the pictures were shown, and  
10 he had that condition, the condition would show up in the X-rays, wouldn't it? A It would show the condition of arthritis, but I am not sure you can make a diagnosis as to what type it was. It would take an X-ray expert to tell that.

Q Doctor, the swollen joints that he has, what do you ascribe that condition to? A I have already said that, but I will say it over again. The poisons of the gonorrhoea, circulating in the blood, may affect various joints, the same as  
20 any infection of the blood from any cause, and produce a rheumatic or arthritic condition.

Q Doctor, what joints in particular are affected by gonorrhoeal arthritis? A Wrists.

Q What else? It would not affect the joints of the knee, would it? A I would not promise that it would. It might. I have seen it in a great many joints. I have seen it even in the malar bone joint.

Q Well, it is not usual, is it doctor? It is not usual? A Usual what?  
30

Q To have gonorrhoeal infection in the knee joints? A There is nothing usual about gonorrhoea. It might hit any joint. I think, in this particular case, the reason that it happened to hit the wrist,—if you would like to know?

Q Well, I do not want to know your opinion. How about the duration of recovery, doctor? A In regard to what?

Q His ability to do manual labor. A Well, I should say he ought to be able to work a  
40 year from now.

*Charles B. Russell, re-direct—re-cross.*

Q Just a year?

The Court: A year from now?

The Witness: Yes, sir.

Q Just a guess, doctor? A Just a guess.

Mr. Breslin: That is all, doctor. 10

*Re-direct examination by Mr. McGlynn.*

Q Doctor, you started to tell Mr. Breslin why you say that the wrists are more apt to get this condition in this particular man. A When he came into the hospital, it was reported he had a wrist drop.

Mr. Breslin: I object to what was reported to the doctor. 20

The Court: Unless the patient himself told him.

Mr. Breslin: Well, I presume he did not.

The Witness: He did.

Mr. Breslin: Pardon me for interrupting.

The Witness: I got most of this history from the patient. He had a dropping of the wrist, and that was from his injury, and the wrists, no doubt, or the hands, were  
30 no doubt in this dropped condition for some time. That strain on the joint was just enough to let an infection of the blood settle in that joint.

Mr. McGlynn: That is all, doctor.

*Re-cross examination by Mr. Breslin.*

Q Doctor, supposing this man had worked for approximately four years as a laborer, and  
40

*William H. Calderwood, direct.*

supposing he was suddenly thrown from the back of a truck to the ground, became unconscious, and the next day suffered complete paralysis of his body from the neck down, would you say that syphilis was the cause of the paralysis? Yes, or no? A At this time, or you mean his condition at this time or that time?

10 Q At that time? A Oh, his fall produced the paralysis.

Mr. Breslin: That is all.

*By Mr. McGlynn.*

Q What is the name of the young lady, doctor? A Pardon?

20 Q What is the name of your young lady? A Miss Kagemann; but she did not see him, I believe, at the time.

Mr. McGlynn: I close the defendant's case

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REBUTTAL.

30 WILLIAM H. CALDERWOOD, sworn as a witness in rebuttal, testified as follows:

*Direct examination by Mr. Breslin.*

Q Mr. Calderwood, on November the 20th, 1926, did you interview the witness George Glock? A I did.

Q And did or did not Glock say that he thought he heard a signal? A He did say that.

Q All right.

*Motion for Direction of a Verdict.*

Mr. Breslin: I offer the statement. Any objection?

Mr. McGlynn: Certainly.

The Court: The statement is not evidential, not made by a party.

Mr. Breslin: It is offered as it is signed 10 by this witness, and it contradicts his statement on the stand.

The Court: It does not require the entire statement, because it may be that the entire statement is not entirely contradicted; I mean, his entire testimony is not contradicted.

Mr. Breslin: All right. I won't press it any further.

The Court: Is that your case? 20

Mr. Breslin: Yes.

*Cross examination by Mr. McGlynn.*

Q Just a second.

Mr. Breslin: Let him read it.

Q Where do you live, sir? A Ridgewood, New Jersey. 30

Q Who are you employed by? A Why, I am employed by the Aetna Life Insurance Company.

Mr. McGlynn: That is all, sir.

Mr. Breslin: That is all.

Mr. McGlynn: Now, if it please the Court, I desire to make a motion for the direction of a verdict in favor of the defendant on the grounds that, as the record stands now, at 40

*Motion for Direction of a Verdict.*

the present time, it is uncontradicted the operator, the chauffeur, of the truck, as it was disclosed here today, was legally a fellow servant of the plaintiff. It appears from the testimony that Bianchi & Smith were the common employer, as a matter of law, in my opinion, of both Gilbert and Glock, and hired this truck by the day with the driver, and that the directions and legal control of the vehicle from the time it entered Bianchi & Smith's premises until the time it left were solely and exclusively with them. If that be the case, then, as a matter of law, Gilbert and Glock were fellow-servants, and Gilbert could not recover against the Junior Trucking Company.

(Argument and citing cases.)

Mr. McGlynn: I say the facts in this case absolutely prove that Glock, no matter who his employer was, A, B, or C, while he was on the property of Bianchi & Smith, the minute he came in there and said: "Here is my truck, here am I; what do you want me to do?" "Go down to the hopper, go to the sand and cracked stone, got to the cement shed and get your cement"; that up to the time he left that property, he was absolutely the legal servant of Mr. Bianchi & Smith, and any accidents, any injuries occurring to anybody on that property while so engaged, his master would not be made to respond. Once he got out on the street, that is a different situation. It might also be different—I mean, the place may not be so important in the legal principle as what he was doing. If he was going to load the truck with dynamite and went out on the street and the dynamite

*Motion for Direction of a Verdict.*

exploded, the same principle would not apply. But, in this case, when he goes into one gate and he comes out of the other, he is legally a servant of Bianchi & Smith, and if in the service of Bianchi & Smith he is injured while that truck is in there, he has no right of recovery; but the right of recovery is in the compensation court, under the Compensation Act.

The Court: Did Bianchi & Smith control the truck in the sense that they could have hired him and discharged him?

Mr. McGlynn: While he is in there, yes, sir.

The Court: I cannot agree with that. I will deny your motion.

Mr. McGlynn: I ask an exception.

The Court: Members of the jury, you are excused until tomorrow morning, and I will ask you, during the meantime, not to discuss this case, nor to permit anyone to discuss it with you.

(Adjournment until Wednesday, November 2, 1927, at 10:00 o'clock A. M.)

*Charge to Jury.*

Hackensack, N. J., November 2, 1927.

10:00 o'clock A. M.

## TRIAL RESUMED.

10 Mr. McGlynn sums up the case to the jury on behalf of the defendant.

Mr. Breslin sums up the case to the jury on behalf of the plaintiff.

The Court then charged the jury as follows:

**CHARGE.**

20 CAFFREY, J. Members of the jury, this action is by Robert Gilbert against the Junior Trucking Company, and he alleges that the defendant's agent was guilty of negligence, and as a result of this negligence he sustained injuries serious in nature and permanent in character.

30 There are some facts in the case which are not in dispute. There seems to be no dispute that on this day in question the plaintiff was employed by the Bianchi & Smith Company; there seems to be no question that the chauffeur, Mr. Glock, was in the Romeo Bianchi and Thomas Smith yard; there seems to be no question, either, that the truck was against the wall or near the door of the building, a picture of which is now in evidence and marked as an exhibit, and that Gilbert was engaged in throwing cement into one of the compartments of the truck.

40 The point which you will decide first is whether or not there is a cause of action. Of course, that

*Charge to Jury.*

will have to be determined by you as measured by the evidence, following the instructions of the Court with reference to the legal situation. As I said before, there seems to be no dispute that the truck in question was at this yard. Glock testified that he had been to this same place at other times, and described in detail as to the system of getting tickets, and I think he, too, testified that the signal which justified his starting the truck was "Roll 'em, roll 'em", some words like that. Mr. Holman, the president of the Junior Trucking Corporation, the defendant in this cause, testified that Glock was sent to this place pursuant to his orders, driving a Junior Trucking Corporation truck, and that the Bianchi & Smith Company paid the Junior Trucking Company so much per day for the use of the truck and the chauffeur, which was Glock in this case.

Now, what are the facts with relation to the negligence? It seems, as the testimony discloses, the plaintiff's job was to work on this truck. I think he testified that he worked at the rear of it, and some other men were working at another part of the truck and, as these bags of cement were handed out from the building, they were dumped into the four compartments. The plaintiff said, in his own language, that "the truck moved from in under me", and he fell out on his head and shoulders. He said he heard no signal, referring, of course, to the customary signal of "roll 'em", which has been described by several of the witnesses. He further testified that he remembers a few statements afterwards, something about taking him to the hospital, or "What is the matter?" or something of that import; and then he was taken to Saint Mary's Hospital.

*Charge to Jury.*

I think there was another witness, called by the plaintiff, named Jeannette, and he, too, testified in detail as to the circumstances, and he further testified that he heard no sound such as "roll 'em." On the other hand, the defendant's driver, Glock, said the sound was given, and he started  
10 off, and he was attracted that something unusual had happened when he had gone ten or fifteen feet; and I think Billings, another witness, testified that he, too, heard this sound of "roll 'em," and that he started in pursuance to that, and he was behind the truck on which Gilbert was standing.

By my reference to the testimony, of course, I do not want it understood that I am attempting to give you all of the testimony, nor do I want it  
20 understood that what I am saying must be followed by you in regard to that. You are to decide the case upon your own recollections and if, in my short summary, I have omitted any of the evidence, of course, that is not to be considered by you as limiting your right to consider all of the testimony. You ought to decide this case on all of the evidence, and it is your privilege as jurors to draw such inference from the facts that are proven as you see fit.

30 The plaintiff contends that, by reason of a negligent act on the part of the driver of this truck, this injury came about. So the first question to decide is, was there any negligence? In determining that, we ask ourselves whether or not a man (and in this case, whether the chauffeur, Glock) acted as a reasonably prudent man under the circumstances then existing; and that means every circumstance connected with the event.

40 As I mentioned before, and as disclosed by the testimony, a customary signal, which seemed to be understood by all as indicating the pro-

*Charge to Jury.*

priety of a truck driver starting, was "roll 'em". Now, at this point, you may ask yourselves, first, whether or not that signal was given. Then determine for yourselves whether or not, the defendant, through this driver, was guilty of negligence in the sense that he did something that a reasonably prudent man would not have done  
10 under the circumstances then existing. The next question you may consider, was the plaintiff himself guilty of contributory negligence?

Our court of last resort has used this language with reference to contributory negligence:

"To disentitle a plaintiff to recover, it must not only appear that he was negligent, but that his negligence proximately contributed to the defendant's negligence that caused the injury."  
20

So, with that in mind, ask yourselves whether or not the act of Gilbert caused this injury. It is the duty of the plaintiff to make out a case. The burden of proof is upon the one who affirms, and in this case the duty rests upon the plaintiff to establish by a fair preponderance of evidence what he alleges.

If you conclude that the plaintiff has failed to establish negligence on the part of the defendant, of course, your verdict should be no cause  
30 of action. On the other hand, if you are satisfied that he has made out a case, and that he has established negligence and that negligence was the proximate cause of his injury, you then may consider whether or not his contribution of negligence, in the language that I read to you, brought about the result, as well as the negligence of the defendant. In other words, if the defendant were guilty of negligence, and the  
40

*Charge to Jury.*

tion that you observed this plaintiff to be in was due to the fall which they claim was the result of the negligent act of the defendant, our Supreme Court has said:

10 "When it is claimed that a fall has produced disease, it should appear, in order to recover damages for the results of the disease, not only that the fall was the possible cause, but other causes should be so excluded and the circumstances should be such as to leave a reasonable inference that the fall was the actual cause."

20 On the other hand, you have a right to say, assuming the existence of these diseases and if the evidence warrants it, if that were his condition, whether or not the fall aggravated and brought about his present condition, taking into consideration the fact that he was suffering from the other diseases. Of course, if the fall was the producing cause by way of aggravation of his present state, then, of course, he is entitled to be compensated on that basis.

30 I am not going into the figures as to the losses sustained or claimed. You heard the testimony as to the expenses incurred through medical treatment, and you have heard the testimony of the expenses incurred as to the hospital and X-rays; and I think, too, there is in evidence the wages that this man received and the period of disability which he has suffered. You also have heard the testimony of the physicians that the plaintiff contends, through these physicians, that this injury is permanent in character. I think one of the doctors who testified for the defense said that the condition, as he observed it, was due to a blood clot and that, in his judgment, an-

40

*Charge to Jury.*

other year would produce a complete recovery. Of course, this being the testimony, you as jurors, in the exercise of your rights as jurors, can say that, and give such credit to testimony as you see fit.

10 The plaintiff is entitled to recover, if you are satisfied he has made out a case, not only for the actual monetary loss sustained by loss of employment, but for the expenses necessarily incurred. You have a right, too, to consider the nature of his injury, the pain and the suffering endured, and you have a right, in measuring your verdict, to take into consideration the future. Is this man permanently injured? Is this injury permanent in character? Of course, in assessing damages, if you conclude that is so, you have a right to take that into consideration in measuring his loss as best you can. On the other hand, if you conclude that it is not permanent, and you accept the theory advanced by one of the physicians for the defense that it is a year, of course, that, too, is a subject for your consideration. 20

This case, as I pointed out at the outset, is one essentially of fact. I have given to you certain principles of law which govern the legal situation. You as jurors must decide this case upon the facts, and your verdict should be based upon consideration of all of the evidence. 30

I have some requests to charge.

(1) If you find that the driver of the truck was given a signal to start by one of the employees of Bianchi & Smith, and that he thereupon acted as a reasonable man would act and was not negligent in starting his truck, the

40

*Charge to Jury.*

Junior Trucking Corporation is not responsible for the accident, and your verdict must be for the defendant. I so charge you.

The second I will deny.

10 The third I will deny because I have already charged the substance in the first.

(4) If you find that the presence of the plaintiff on the truck could not reasonably have been anticipated and that the driver did not in fact know plaintiff was on the truck, then he was not responsible for the injury to the plaintiff, and your verdict must be for the defendant. I so charge you.

20 The fifth I refuse because I have covered it in my charge on contributory negligence.

The sixth I will deny.

The seventh I will deny.

(8) If you should find that the Junior Trucking Corporation and Bianchi & Smith both exercised some control over the truck driver, but that this particular accident and injury to the plaintiff were due to the control and directions of Bianchi & Smith or their employees, then the  
30 Junior Trucking Corporation is not responsible for plaintiff's injuries, and your verdict must be for the defendant. I so charge you.

The ninth I deny.

The tenth I deny; and,

The eleventh I will deny.

You may take the case.

(Officer sworn and jury retired.)

*Exceptions to Charge.*

Mr. McGlynn: May I note, if your Honor please, on the record, an exception to that part of your charge with reference to aggravation; I think the sentence began "for an aggravated condition"?

The Court: Yes.

Mr. McGlynn: On the ground there was no proof of aggravation, or anything to do with the injuries.

And second, that part of your charge where you said expense necessarily incurred.

And to all your refusals to charge my requests as handed to your Honor?

The Court: Yes.

Mr. McGlynn, in his summation, desired to say to the jury, that if they found a verdict in this case for the defendant, this does not leave him without any remedy, as the Legislature of New Jersey has passed an act to provide him with compensation under the Workmen's Compensation Act. Upon objection by Mr. Breslin, counsel for the plaintiff, the Court instructed Mr. McGlynn to refrain from arguing that matter.

Mr. McGlynn: Along the lines of the above statement, I take an exception.

The Court: Yes.

(The jury returned.)

The Court: Members of the jury, I have your note reading as follows:

"Kindly send up Glock's signed statement." That cannot be given to you because it is not in the evidence. I excluded it, and at that time I excluded it because Glock was not a party to the action, but simply a witness. If that statement

*Further Charge to Jury.*

were offered in evidence, you would have before you something that was not made under oath, something made outside of the court room. I did permit in evidence testimony, if you recall, by the gentleman who took the statement, who testified insofar as Mr. Glock denied he made a part of the statement. That is the only part of the statement that can be considered by you. The statement is not in evidence, due to my ruling.

(The jury again retired.)

The Court: Mr. McGlynn is not here and, if he wants, he can have an exception to what I said.

(The jury again returned to the court room.)

The Court: Members of the jury, I have this note from you which reads:

“Is a driver responsible for any one on his truck under given signals by a second party according to law?”

I do not just quite understand the purport of that.

The Foreman: In the back of his truck.

The Court: Well, do I understand you want to know the responsibility of a driver for any one who might be on his truck?

The Foreman: On the back of his truck.

The Court: On the back of his truck. “Under given signals by a second party.” What do you mean by that?

The Foreman: If somebody else gave the signal, is he supposed to look behind to see if everybody is off of his truck?

*Further Charge to Jury.*

The Court: I will re-state the law to you again: Starting out that this is an action of negligence, there cannot be a precise definition of negligence. We say that in determining whether or not negligence has been shown, we look to the conduct of the person charged, and ask whether or not he acted as a reasonably prudent man under the circumstances then existing. Now, the circumstances then existing, of course, is what you heard of the testimony. You have heard the testimony as to the driver of the truck to this point, what was done with it, and the custom which all parties seem to have understood with relation to the starting signal. You recall the witnesses were agreed that the words “roll 'em, roll 'em” was the signal by which the driver of the truck knew that he was to start. Now, in considering whether or not the driver of this truck was negligent, you may ask yourselves whether or not he, as a reasonable man, should have anticipated more. There is in the case, as I said before, the agreed signal. Of course, there is a contradiction as to that. Did this truck driver start without hearing the signal, or was the signal given? You see, the difficulty about my position and yours, I have to give you a rule, and then you have to determine the facts. It is not my privilege to state to you my own views on the facts. I am within limitations, and I have gone as far as I can with reference to that.

Now, if there are any questions in the minds of the jury,—

The Foreman: Should the chauffeur look behind on his truck to see if there is anybody there before he starts?

*Defendant's Requests to Charge.*

The Court: Now, you must decide that under all the circumstances, whether or not an act of prudence on his part—in other words, you must decide from the circumstances whether, as a prudent man, he should have done that.

10 The Foreman: Is there any law on that subject?

The Court: That is the law.

The Foreman: That is the law?

The Court: That is the law. In other words, in determining the negligence, you look to the facts and circumstances, and you determine from all of these whether or not he acted as a reasonably prudent man under all the circumstances that existed.

20 (The jury again retired.)

The defendant's requests to charge, which were not charged, as presented to the Court, are as follows:

(2) If you find that the driver of the truck was given a signal to start by one of the employes of Bianchi and Smith, then this defendant is not responsible for the accident, and your verdict should be for the defendant.

30 (3) If you find that the driver of the truck was not negligent in starting his truck when he did, your verdict should be for the defendant.

(5) If the plaintiff himself was negligent in being on the truck, when the accident happened, or was otherwise guilty of negligence which contributed to the accident, he cannot recover from the defendant, and your verdict should be for the defendant.

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*Defendant's Requests to Charge.*

(6) If you find the facts to be that the defendant, Junior Trucking Corporation, exercised no control over the movements of the truck driver while he was in the yard of Bianchi & Smith, then the defendant is not responsible for the accident, and your verdict should be for the defendant.

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(7) If the truck driver was wholly under the control and direction of Bianchi & Smith or their employees at the time the plaintiff was hurt, then the Junior Trucking Corporation is not responsible for the injuries to plaintiff, and your verdict should be for the defendant.

(9) In order to give your verdict for plaintiff, you must find that the defendant controlled the driver, that the driver was negligent and the accident happened in the course of the driver's employment by the defendant; if the driver was not negligent, or if he was not acting under defendant's control when the accident happened, then you must find for the defendant.

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(10) You must decide whether the operators of the trucks owned by the defendant and the plaintiff were fellow servants of Bianchi & Smith at the time of the accident which caused the injuries to the plaintiff, and in so doing, the mere fact that the operator of the truck was hired and paid either directly or indirectly by the defendant, is not the only fact to take into consideration in making that decision.

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I charge you that the real test is "who was in control and operation of the vehicle at the time the accident occurred?" (Quotation taken from *Lacombe v. Cudahy Packing Co.*, Vol. 5, N. J. Advance Reports, p. 800.)

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*Defendant's Requests to Charge.*

(11) The complaint filed by the plaintiff only asks for a recovery of money expended by him for doctors, hospital expense, etc., and there is no proof that the plaintiff spent any money for such items of expense.

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**STIPULATION.**

**New Jersey Court of Errors and Appeals**

ROBERT GILBERT, <i>Plaintiff-Respondent,</i>  <i>vs.</i>  JUNIOR TRUCKING CORPORATION, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i>  <i>On Appeal.</i> <i>Stipulation.</i>	10    20    30    40
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It is hereby stipulated between John J. Breslin, Jr., Esq., attorney of the plaintiff, and Stein, McGlynn & Hannoeh, Esqs., attorneys of the defendant, that the Exhibit P. 1 which was a picture of the cement shed on the property of Bianchi & Smith, need not be printed or reproduced in the State of Case to be used on the appeal to the Court of Errors and Appeals.

JOHN J. BRESLIN, JR.,  
Attorney of Plaintiff-Respondent.

STEIN, MCGLYNN & HANNOCH,  
Attorneys of Defendant-Appellant.

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GROUNDS OF APPEAL.

NEW JERSEY COURT OF ERRORS AND APPEALS.

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ROBERT GILBERT,  
Plaintiff-Respondent,

vs.

JUNIOR TRUCKING CORPORATION,  
Defendant-Appellant.

Action at Law.

On Appeal from New Jersey Supreme Court, Bergen County.

Grounds of Appeal.

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The above-named defendant-appellant, Junior Trucking Corporation, assigns the following grounds of appeal from the judgment of the New Jersey Supreme Court, in the above case:

1. Because the trial court erred in sustaining the objection made by the attorney of the plaintiff to the question propounded to the members of the jury by the attorney of the defendant, to wit:

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“Are any of the jury as at present constituted, clients of Mr. Breslin?”

To the ruling of the trial court sustaining the objection to this question, an exception was taken.

2. Because the trial court erred in not granting the motion made by the attorney of the defendant for a judgment of non-suit, to which ruling, attorney of defendant took an exception.

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Grounds of Appeal.

3. Because the trial court erred in not granting a motion made by the attorney of the defendant for a direction of the verdict in favor of the defendant against the plaintiff, to which ruling an exception was taken.

4. Because the trial court erred in denying the seventh, ninth and tenth requests to charge submitted by the defendant, to wit:

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(7) If the truck driver was wholly under the control and direction of Bianchi & Smith or their employees at the time the plaintiff was hurt, then the Junior Trucking Corporation is not responsible for the injuries to plaintiff, and your verdict should be for the defendant.

(9) In order to give your verdict for plaintiff, you must find that the defendant controlled the driver, that the driver was negligent and the accident happened in the course of the driver's employment by the defendant; if the driver was not negligent, or if he was not acting under defendant's control when the accident happened, then you must find for the defendant.

20

(10) You must decide whether the operators of the trucks owned by the defendant and the plaintiff were fellow servants of Bianchi & Smith at the time of the accident which caused the injuries to the plaintiff, and in so doing, the mere facts that the operator of the truck was hired and paid either directly or indirectly by the defendant, is not the only fact to take into consideration in making that decision.

30

I charge you that the real test is “who was was in control and operation of the vehicle

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*Grounds of Appeal.*

at the time the accident occurred?" (Quotation taken from *Lacombe v. Cudahy Packing Co.*, Vol. 5, N. J. Advance Reports, p. 800);

to which ruling an exception was taken.

10 5. Because the trial court erred in not charging the eleventh request to charge submitted by the defendant, to wit:

(11) The complaint filed by the plaintiff only asks for a recovery of money expended by him for doctors, hospital expense, etc., and there is no proof that the plaintiff spent any money for such items of expense,

to which ruling an exception was taken.

20 6. Because the trial court erred in refusing to permit the attorney of the defendant in his summation to say to the jury that if they found a verdict for the defendant, it did not leave the plaintiff without any remedy as the Legislature of New Jersey had passed an act providing for compensation under the Workingmen's Compensation Act. To this statement the attorney of the plaintiff objected and the trial court sustained his objection. To this ruling the attorney of the defendant took an exception, which was  
30 granted.

STEIN, McGLYNN & HANNOCH,  
Attorneys of Defendant,  
Junior Trucking Corporation.

74 74 FEB.T.1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

**New Jersey Court of Errors and Appeals**

ROBERT GILBERT, <i>Plaintiff-Respondent.</i> <i>vs.</i> JUNIOR TRUCKING CORPORATION, <i>Defendant-Appellant.</i>	}	<i>Action at Law.</i> <i>On Appeal from Supreme Court, Bergen County.</i>
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**BRIEF OF DEFENDANT-APPELLANT.**

**Facts.**

This appeal brings before this Court for review a cause of action originally tried in the September term, 1927, at the Supreme Court Circuit, Bergen County, wherein a verdict was rendered in favor of the plaintiff and against the defendant in the sum of \$10,000.00. The plaintiff instituted his action to recover for injuries sustained when he fell from the rear end of an automobile truck as it started after being loaded at a cement shed.

The defendant corporation owned the truck from which the plaintiff fell. It rented the truck and driver to Bianchi and Smith (by whom plaintiff was employed) on a daily basis, for use in the latter's business, which was that of contractors engaged in building roads. It was the daily practice for the driver to take the truck to Bianchi and Smith's yard and there, each morning, get his orders for the day (State of Case, p. 80). On this particular day, he was instructed to "ride batch work, sand, stone and cement." (p. 80 l. 33). He would pick up the sand and

cracked stone under a hopper in the rear of the yard. A man under the hopper would then direct him to the cement shed for the cement (pp. 80 and 81). There the driver would shut off his engine and go into the office to return his last delivery ticket and get the new one for that particular load (p. 81, ll. 31-35.) At the shed, four men would load the cement,—two putting the bags on the truck and two dumping them. These were all Bianchi and Smith employees. When they had finished, one of these men would give the driver his signal to start, "roll 'em, roll 'em." The driver would then get on his truck, start his motor and go ahead (pp. 84-85).

The entire loading operation was performed and supervised by Bianchi and Smith employees. The driver took no part therein except to move the truck at their commands, and the defendant company obviously was completely out of the picture.

On this day, the driver, after getting to the cement shed "put the brake on, and put the car in neutral, shut the engine off, and went in the office with the ticket from the previous load" (p. 82, l. 21). When he had procured the ticket for the new load, he returned, and with one Sturgess and one Billings, stood on the ground on the left side of the truck, that is, on the side away from the shed (p. 82, l. 35; p. 83, l. 4; p. 90, l. 21). The driver and Billings, driver of the truck immediately behind, testified that they heard the signal. "Roll 'em, roll 'em" (p. 81, l. 19; p. 90, l. 28). Plaintiff's witnesses say they did not hear the signal (p. 25, ll. 13 to 24; p. 29, l. 30; p. 45, l. 36). Thereupon, the driver, hearing the signal, got on his truck, started the motor, put it in gear, and went ahead (p. 85, l. 21).

It is important to note that the driver of this truck sat within a covered cab (p. 89, l. 39), and that therefore, his vision being obstructed, he was necessarily controlled by the signal given him by the employees of Bianchi and Smith.

Plaintiff was still on the back of the truck at the time, and when the truck was started, fell backward to the ground. The driver, hearing the "hollering", stopped his truck, after a distance of ten to twenty feet (p. 85, ll. 24-40), all within the yard. Plaintiff was then taken to the hospital.

At the close of the plaintiff's case, defendant moved for a non-suit, and at the close of the entire case, for a direction of a verdict, both of which motions were denied, and exceptions taken (Non-suit State of Case, pp. 73 and 74; motion to direct, State of Case, pp. 131-133).

The defendant also noted exceptions to the Trial Court's charge to the jury, which exceptions present practically the same questions as the motions above described. (State of Case, p. 143.) The defendant will urge the following grounds of appeal, in the following order, the first ground being abandoned:

1. The refusal of the Trial Court to permit the attorney of the defendant to state to the jury certain facts in connection with the Workmen's Compensation Act (ground of appeal #6).
2. The refusal of the Trial Court to charge as requested on the question of medical fees and hospital expenses, as a proper item of damage (ground of appeal #5).
3. The defendant is not liable as a matter of law (grounds of appeal #2, 3 and 4).

**Point One.**

The Trial Court erred in refusing to permit defendant's attorney to state to the jury that if they found a verdict in favor of the defendant, this would not leave the plaintiff without any remedy, because the Workmen's Compensation Act provided him with compensation.

The defendant believes that in this case, as in all others, an attorney has the right to state in his summation to the jury the fact that certain laws have been passed or are in existence. As that either is or is not a fact, if the attorney misstates the situation, it can be readily cured by the Trial Court in its charge, but if the attorney is not permitted to mention the fact, and the Trial Court does not mention it in its charge, the side represented by the attorney has been deprived of an opportunity, which might seriously effect the verdict.

Surely, in the trial of an action arising out of the negligence of the operation of an automobile on a public highway, an attorney should have the right to mention the fact that the Legislature has passed an Act regarding traffic, which contains provisions which might seriously affect the deliberation of a jury. Why then, in this case, was it not entirely proper for the attorney of the defendant to state to the jury that even if they should find a verdict in favor of the defendant, that this would not necessarily mean that this plaintiff (who had been brought into the court room on a stretcher) was without any remedy because the New Jersey Legislature had passed an act to provide for just such cases, called the Workmen's Compensation Act.

"Counsel may, in arguing the case, to the jury, state the portions of law on which he

relies, and what he believes the law to be, if he does not encroach upon the province of the Court to finally state the law to the jury." (38 Cyc. 1480; Trial Scope of Argument and Comment.)

"Plainly, counsel, in his address to the jury, can, for the purpose of presenting his view of the law of the case, call to his aid and quote the language delivered from the bench." (*Allare v. Allare*, 39 N. J. L. 113.)

It is submitted therefore that the Court's action in refusing to permit counsel to call to the attention of the jury the existence of the Workmen's Compensation Act was error.

**POINT II.**

The Trial Court erred in not charging the eleventh request to charge submitted by the defendant, to wit:

(11) The complaint filed by the plaintiff only asks for a recovery of money expended by him for doctors, hospital expenses, etc., and there is no proof that the plaintiff spent any money for such items of expense.

The testimony concerning doctor's bills and hospital expenses is as follows:

*Robert Gilbert, direct* (State of Case, p. 38, l. 39):

Q "When did you hire Doctor Whelan?"

A "I didn't hire him."

Q "What?" A "I didn't hire him."

Q "You did not hire him?" A "My foreman."

*Edward P. Whelan, direct* (State of Case, p. 49, l. 39):

Q "Doctor, what is your charge in this case?" A "\$750.00."

Q "Is that a fair and reasonable charge?" A "Yes, sir."

*Edward P. Whelan, cross* (State of Case, p. 50, l. 3.):

Q "Doctor, when does a patient in the hospital cease to become a charity patient and become responsible to a physician for compensation?" A "I was engaged by his employer to take care of him."

Q "Oh, by his employer?" A "Mr. Bianchi."

The hospital bill of \$564.45 plus \$90.00, totaling \$655.45, was introduced into evidence and that showed that the charges were made to Bianchi and Smith, and not to the plaintiff (State of Case, p. 72).

That is all the testimony concerning medical or hospital expenses. Nowhere is there any evidence which would indicate that the plaintiff had disbursed any money or become obligated to pay any money on that score. The evidence, to the contrary, conclusively indicates that these obligations are the obligations of Bianchi & Smith, and not the plaintiff.

In the case of *Reilly v. Cohen*, decided last November in the Supreme Court (reported in 5 N. J. Misc. Rep. 991) the Court was faced with exactly the same situation.

The lower Court had permitted the jury to include the medical bill in their award. The Supreme Court reversed this and reduced the verdict by that amount, saying:

"The learned trial judge directed the jury to allow \$500.00 for medical services if the jury found for the plaintiff. We are unable to find any evidence in support of this claim. The charge was for a bill which the attending physician had rendered at the instance of the plaintiff's employer, the Standard Oil Company, by which company it had been voluntarily paid. There was no evidence from

which liability of the plaintiff for the moneys so paid could be inferred."

It is submitted, therefore, that the failure of the Court to charge the jury as requested was harmful error. It permitted the jury to include in its award a total of \$1,405.45, which was not properly an item of plaintiff's damage.

### POINT III.

**The defendant company is not, as a matter of law, responsible for the injuries sustained by the plaintiff.**

This assignment of error is based on grounds of appeal #2, 3 and 4 and presents to the Court the question of responsibility for the negligence of the driver of the truck. It is the contention of the defendant-appellant that Bianchi and Smith were then and there in complete control of the movements of the truck and its driver, and that therefore, as a matter of law, they, and not the defendant, were responsible for the injuries caused to plaintiff.

At this point, it is pertinent to again direct the attention of this Court to the testimony concerning the operation and direction of the truck while within the premises of Bianchi and Smith. This testimony as heretofore detailed, conclusively shows that from the moment the truck arrived at the yard, complete control was surrendered to Bianchi and Smith. The latter put the truck in line, directed the driver to the proper loading point, loaded the truck by its own employees, gave the signal to start by its own employee, and in every way completely controlled the operation of the truck while the same was within their yard. The driver of the truck stood on the ground and took no part in the loading operations.

It is not our intention in this memorandum to argue with, or take exception to, the settled doctrine of this Court as established in the cases of *Courtinard v. Gray Burial Co.* (98 N. J. L. 493); *Busch v. Seaboard By-Products Coke Company*, (100 N. J. L. 304) and *Lacombe v. Cudahy Packing Co.*, (5 Adv. Rep. 798); it is our intention, however, to argue, that the doctrine of those cases was never intended to cover a case of the type now before the Court. The facts are radically different.

The vital distinction lies in the fact that in each of those cases, the accident occurred at a point en route to the destination, that at that point the owner of the truck was in control and operation of the vehicle, and the driver therefore was acting for the owner. In the instant case, the accident occurred on the premises of the hirer, at a time and place where control and operation were completely surrendered to the hirer and therefore, that hirer, and not the owner, was responsible for the operation and control of the vehicle.

It has been said by this Court that the only justification for the responsibility of a third party for injury resulting from the negligent act of another is the legal conception of representation by which the employe practically becomes "*for that particular duty*" the *alter ego* of the master; and that this theory involves fundamentally the fact of control, direction and representation "*in the service at hand.*" (*Courtinard v. Gray Burial Co.*, *supra*, at pp. 494, 5).

It is also settled that the servant of one may become *pro hac vice* the servant of another

This rule is stated by our Courts in the following language:

"A general servant of one person may, for a particular work or a particular occasion become, *pro hac vice*, the servant of another person. What will suffice to prove the assumption of the dual service gives rise to question. I think the applicable rule is admirably expressed by Lord Watson thus: 'I can well conceive that the general servant of A might, by working towards a common end along with the servants of B, and submitting himself to the control and orders of B, become, *pro hac vice*, B's servant in such service as not only to disable him from recovery from B for injuries sustained through the fault of B's proper servants, but to exclude the liability of A for injury occasioned by his fault to B's own workmen. In order to produce that result, the circumstances must be such as to show conclusively that the servant submitted himself to the control of another person than his proper master, and either expressly or impliedly consented to accept that other person as his master for the purposes of the common employment. *Johnson v. Lindsay*, 1891 App. Cas. 371" (*D. L. & W. R. R. Co. v. Hardy*, 59 N. J. L. 35, 37.)

"The doctrine of *respondeat superior* applies only when the relation of master and servant is shown to exist between the wrongdoer and the person sought to be charged for the result of the wrong at the time and in respect to the very transaction out of which the injury arose. The fact that the party to whose wrongful or negligent act an injury may be traced was, at the time, in the general employment and pay of another person, does not necessarily make the latter the master and responsible for his acts. The master is the person in whose business he is engaged at the time, and who has the right to control and direct his conduct. Servants who are employed or paid by one person

may be *ad hoc* the servants of another in a particular transaction and that, too, when their general employer is interested in the work." (*Higgins v. Western Union Telegraph Co.*, 156 N. Y. 75 at 78.)

"The true test in such cases is to ascertain who directs the movements of the person committing the injury." (*Id.* at p. 80.)

"It is the quality, not the length of time or extent of the work, which fixes, in this respect, the character of the servant and service. The servant may be engaged by the day, week or year, or by piecework, yet if his employment is in the way of accomplishing a result which other employees are also working to bring about, their service is common. In no case have I discovered a suggestion that the length of time in which the person is engaged in work determines the question of service in respect to the liability of the master for his acts, or for injuries to him, at the hands of other servants." (*Ewan v. Lippincott*, 47 L. 192 at 198.)

To the same effect is *Rongo v. Waddington*, 87 N. J. L. 395; *Johnson v. Boston*, 118 Mass. 114.

The issue is thus presented: Whom did this servant represent at the time and place of the employment? Whose service was he performing? Who controlled and directed him?

In a hiring of this type, control of the driver and vehicle is necessarily divided, and with the control, the correlative duties. This division of responsibility is explained by Justice Cordozo of the New York Court of Appeals (and New York Courts are in accord with the theory of the Courtinard case) as follows:

"Where to go and when might be determined for the driver by the commands of the defendant (hirer). The duty of going carefully, for the safety of the van, as well as for that of wayfarers, remained a duty to the

master at whose hands he had received possession." (*Charles v. Barrett*, 233 N. Y. 127, 129.)

It is the duty of the owner to drive carefully. The fact that the vehicle happens to be going in one direction rather than another is not a proximate cause of an accident en route. The hirer does not control the driver and vehicle at that point. But in the yard of the hirer, a different situation exists. The driver enters the yard and then releases complete control to the hirer. Hirer puts him in line, directs him to move to the various loading sheds, loads the truck and controls every movement of the driver till the driver is again on the street and en route. Can it be said that while there in hirer's yard and wholly under his control, driver is the *alter ego* of the owner, that he represents the owner "for that particular duty"? Or is it not more logical and sound to hold that in that situation he is "*pro hac vice*" the servant of the hirer and represents him?

We have not found in the reported decisions of our Courts a case in which the injury occurred under circumstances similar to those in the case at bar. We have found the following New York cases which are directly in point.

*McInerney v. D. & H. Canal Co.*, 151 N. Y. 411 (Court of Appeals 1896): A railroad company's engine and crew went upon the shipper's track on the latter's land to couple and move cars there. While in the yard, the shipper directed the movement of the engine. One of the shipper's employees was hurt and brought suit against the railroad company. The Court held that:

"Willard (shipper) was the master on that occasion and the plaintiff was in his employ;

the track belonged to Willard and was built upon his property; the engine crew of the defendant came upon Willard's track at his request to perform a service for him, and during the time they were thus engaged and acting under his orders and subject to his control, they were in law his servants."

The other case to which we have reference is *Sexton v. New York Central & H. R. R. Co.*, 99 N. Y. S. 1118 (Sup. Ct. App. Div. 1906. Affirmed 189 N. Y. 519):

There, too, defendant's engine and crew were at work in the yard of a Corrigan Company. While so engaged, a girl of sixteen was killed. Citing the McIverney case and saying "the crew was under the direction of the yard foreman to whom they reported in the morning and looked for instructions in regard to their work each day," the Court decided that the crew was the servant of the Corrigan Co., and not of the defendant railroad company.

There can be no justification for holding the defendant in the case at bar responsible for the accident unless it was in control and operation of the truck by its servant at the time of the accident. This it was not. The truck was being loaded in Bianchi & Smith's yard, one employee of theirs, the plaintiff, was still on the truck as part of this loading job when the accident occurred (State of Case, p. 29, l. 35), defendant did not, and could not, exercise any control over the vehicle at that time and place. The driver there did not represent the defendant; he was *pro hac vice* the servant of Bianchi and Smith.

This theory of division of control and responsibility is not a novel one; nor need we look to the decisions of other states to support it; there is language even in the opinion of the *Lacombe*

*v. Cudahy* and *Busch v. Seaboard Co.* cases (*supra*), which indicates that this Court itself had that in mind.

In the opinion of Justice Katzenbach, speaking for a unanimous Court in *Lacombe v. Cudahy Packing Co.*, this language appears (at p. 800):

"The controlling question is *who was in control and operation of the vehicle at the time the accident occurred?* (Italics ours.) The one who is in control and operation, either personally or by a servant, is the one who must respond in damages to the person injured if negligent operation of the vehicle is proven."

And in the *Busch* case (*supra*) at pp. 304, 5, Parker, J., again for a unanimous Court says:

"It was absolutely clear that the seaboard company did not own the truck, or hire the driver, or pay him, or control him or the operation of the truck in any way *beyond loading it at the plant and giving the driver the address of its destination.*" (Italics ours.)

There we find a clear expression that the hiring company did in that case, and did in ours, too, "control the operation of the truck" at loading time; and had the accident in the *Busch* case occurred at the loading, on the hirer's premises, the inference in the language quoted is that the contrary result would have been reached.

Parker, J., continues the opinion as follows:

"Thereupon, the driver would stop with his load at Cullom's (owner's) office, *outside of the respondent's premises*, and Cullom would note on his books the contents of the delivery slip \* \* \* " (Italics ours.)

There is the point at which the Court considered that owner had resumed control. Driver took his truck and reported to his owner, *outside the premises* and from there on he was owner's

servant; once out of the yard, he again was doing owner's work and was again his *alter ego*. But while loading and while in the yard of hirer, under hirer's complete control and direction, he was not the owner's representative but the hirer's representative. Owner did not control and was not responsible for, the operation of the vehicle in hirer's yard.

It is submitted that it would be stretching the rule of the Courtinard case to a point never before reached if it is held that this case falls within the decision of that. The doctrine originally arose from coach and taxicab cases where it was held that the passenger, by engaging a taxicab, did not thereby make the driver his servant. (*N. Y. L. E. & W. R. R. Co. v. Steinbrenner*, 47 N. J. L. 161, etc.) This was obviously a just result. The doctrine was then extended to cases of the Courtinard type, where the vehicle and driver are rented to another and a third party is injured by the operations of the vehicle. The Court is now asked to extend the doctrine still further to a case where the vehicle and driver were on the hirer's premises, where the hirer was in complete control and direction of the operation of the vehicle, where the accident occurred as part of the loading operation which was done wholly by the hirer, where the injured person was one of hirer's employees who was engaged in that loading operation, where the owner exercised no control and could not have exercised any control at the time of the accident. Assuredly, this would be getting rather far from the common law theory which underlies the law of master and servant, *qui facit per alium facit per se*. The master is liable when he is the one who is really acting through his servant, his *alter ego*, in the "particular duty" or "service at hand."

The Junior Trucking Corporation was not so acting at the time of the accident in the case at bar.

As will be noted from the examination of the testimony in the State of the Case, all the facts in connection with the proof that Bianchi and Smith were in complete charge of the defendant's truck and driver, and of the loading operations at the time of the accident are undisputed, and as there was no question of fact raised with regard to whose duty it was to give the signal to the driver of the truck as to starting same after the completion of the loading operation, is respectfully submitted that the Trial Court should have granted either the motion for a non-suit or the motion for a direction of the verdict in favor of the defendant, and that it was error for the Trial Court to deny those motions.

It was additional error on the part of the Trial Court to refuse to charge the defendant's Seventh, Ninth and Tenth requests to charge, which contained the same elements as the motion to non-suit and the motion for a direction. It is respectfully urged that even if the facts above mentioned would not, as a matter of law, relieve the defendant from liability, then certainly the Trial Court should have charged the jury that the question of control of the defendant's truck at the exact time of the accident at which the plaintiff was injured, was a question of fact to be determined by the jury before it could render a verdict in favor of the plaintiff and against the defendant.

**Conclusion.**

In conclusion, the defendant insists that, for the reasons herein argued, with respect to Points One and Two the verdict in this case should be reversed and the case sent back for a new trial. It is also respectfully argued that with respect to the error of the Trial Court in refusing to charge the defendant's requests, the verdict should be set aside and the case sent back for a new trial.

The defendant, however, strenuously and respectfully argues that the real issue in this case is with respect to the defendant's liability as a matter of law as argued in Point Three of this brief and for the reason therein stated it is respectfully urged that the verdict be set aside with the direction that judgment final be entered in favor of the defendant and against the plaintiff.

Respectfully submitted,

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Attorneys of Defendant-Appellant.

EDWARD R. McGLYNN,  
Of Counsel.

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**New Jersey Court of Errors  
and Appeals**

ROBERT GILBERT,

*Plaintiff-Respondent,*

vs.

JUNIOR TRUCKING CORPORATION,

*Defendant-Appellant.*

Action at  
Law.  
On Appeal  
from Supreme  
Court.  
Bergen  
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**BRIEF OF PLAINTIFF-RESPONDENT**

JOHN J. BRESLIN, JR.,  
Attorney for Plaintiff-Respondent.

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BRIEF OF PLAINTIFF-RESPONDENT

FACTS

This was a suit for personal injuries suffered by the plaintiff as the result of his being thrown from the rear of a truck owned by the defendant company. The case was tried in the Supreme Court Circuit, Bergen County, and the jury rendered a verdict in favor of the plaintiff in the sum of Ten Thousand Dollars.

The plaintiff was employed by Bianchi and Smith, road contractors (State of Case. p. 28, l. 10). His duties consisted in loading upon trucks bags of cement (p. 28, l. 26). In order to load the truck with cement, it was necessary for him to go upon the truck (p. 28, l. 30). While upon the truck, before the truck moved, it was customary to give a signal of "Roll 'em" (p. 29, l. 20). On the day in question, the usual signal was not given (p. 29,

l. 30; p. 25, l. 13 to 24; p. 45, l. 36). As a result of the failure to give the customary signal, the plaintiff was thrown to the ground, striking his head. The plaintiff was immediately taken to the hospital and has been confined there for approximately thirteen months (p. 31, l. 21). He is suffering from a permanent paralysis of the spine (p. 47, l. 29).

The truck was the property of the defendant company (p. 74, l. 30). The driver, one Glock, was employed by the defendant. The driver and truck were furnished to Bianchi and Smith for a certain stipulated sum (p. 76, l. 18). This sum included the salary of the driver (p. 77, l. 30). It was paid by Bianchi and Smith to the Junior Trucking Company for the use of the truck and services of the driver (p. 77, l. 34).

While in the yard of Bianchi and Smith, the driver of the defendant would load the truck with sand, stone, gravel and cement (p. 80, l. 30 to 40). The driver would then secure a ticket from one Craft in the office and was instructed to deliver the load to a certain job on Orient Way, Rutherford (p. 82, l. 8). The truck was then loaded with cement, and at the customary signal would be driven away by the agent of the defendant (p. 84, l. 34). At the time of the accident, the startling signal was not given (p. 29, l. 30).

The grounds of appeal have been argued under three points.

The first point deals with the refusal of the Trial Court to permit the attorney for the defendant to state to the jury that if they found a verdict for the defendant, the plaintiff could still pursue a remedy before the Workmen's Compensation Bureau.

Point two deals with the Court's refusal to charge the eleventh request submitted, which is as follows:

The complaint filed by the plaintiff only asks for a recovery of money expended by him for doctors, hospital expenses, etc., and there is no proof that the plaintiff spent any money for such items of expense.

The third point questions the legal propriety of the Court in refusing to grant the motions for a non-suit and directed verdict on the ground that the defendant company was not as a matter of law responsible for the injuries sustained by the plaintiff.

## POINT ONE

The Trial Court erred in refusing to permit defendant's attorney to state to the jury that if they found a verdict in favor of the defendant, this would leave the plaintiff without any remedy, because the Workmen's Compensation Act provided him with compensation.

## ANSWER

The Trial Court was correct in the above ruling. The law of our state is that a tort-feasor cannot set up in mitigation of damages, the fact that a third party, with whom the tort-feasor has no connection, has indemnified in part or in whole the injured party. (See *Cornish vs. North Jersey Street Railway Company*, 23 N.J.L. 273). (*Weber vs. Morris and Essex Railroad Co.*, 7 Vroom 213).

The same reasoning is expressly followed in the following cases:

*Newark Paving Company vs. Klotz*  
(85 N.J.L. 342)

*A. Hollander & Son vs. Ruder*  
(Vol. 5 N.J.L. Advance Rep., p. 826).

Following the above citations, it is quite clear that the above objection is without merit.

## POINT TWO

The Trial Court erred in not charging the eleventh request to charge submitted by the defendant, to wit:

## ANSWER

A contract may be implied in fact. It may be presumed from their acts. (See 82 N.J.L. 411). The plaintiff was taken to St. Mary's Hospital, Passaic, on the day of the accident (p. 46, l. 30). He has been confined there since that day (p. 31, l. 13). During that period he was treated by Doctor Whelan, a reputable physician connected with the hospital (p. 46, l. 16). Doctor Whelan's charge was seven hundred and fifty dollars, which was fair and reasonable (p. 46, l. 31). The hospital expense was six hundred and fifty-five dollars and forty-five cents.

An implied contract is one in which it will be implied that the party did make such an agreement as under the circumstances disclosed, he ought in fairness to have made (13 Corpus Juris, p. 242). The mere fact that employer of the plaintiff called Dr. Whelan does not relieve the plaintiff of the responsibility for medical services rendered to him. Gilbert is still indebted to Dr. Whelan in the sum of Seven Hundred and Fifty Dollars. This money has not been paid.

The case of *Reilly vs. Cohen* (Vol. 5, N.J.L. Miscel., Rep. 991) is not in point. In that case the expense had been already paid by the employer. The situation in the case at bar is to the contrary.

Therefore the second point lacks legal foundation.

## POINT THREE

The defendant company is not, as a matter of law, responsible for the injuries sustained by the plaintiff.

## ANSWER

The respondent contends that the facts in the instant case bring it clearly within the scope of the following cases:

Courtinard vs. Gray Burial Company  
(98 N.J.L. 493)

Busch vs. Seaboard By-Products Coke  
Company  
(100 N.J.L. 304)

Lacombe vs. Cudahy Packing Company  
(5 N.J. Adv. Rep. 798).

A brief summary of the facts in the above cases, adequately proves the correctness of the Trial Court's rulings pertaining to the legal objections raised under second, third and four grounds of appeal.

In the Courtinard case, an undertaker, one Casey, hired an automobile hearse from the Gray Burial Company, to be used in a funeral from Plainfield to Brooklyn. The defendant company employed the driver of the hearse and Casey merely informed the driver of the destination of the funeral party. While the hearse was being operated in New York City by the driver of the Gray Burial Company, with Casey on the front seat, the plaintiff in question was injured. The Court of Er-

rors and Appeals held that Casey was absolved from responsibility, as there was no relationship of master and servant existing between him and the driver of the Gray Burial Company.

Mr. Justice Minturn stated in the opinion that the following elements were necessary to constitute the relationship of master and servant, to wit—hiring, control, direction, and power of dismissal. He cites the following cases as enunciating this principle:

Doran vs. Thompson, 76 N.J.L. 754

Missel vs. Hayes, 86 N.J.L. 348

Jennings vs. Okin, 88 N.J.L. 659

Karas vs. Burns Bros., 94 N.J.L. 59

Zampella vs. Fitzhenry, 97 N.J.L. 517.

The evidence in this case is undisputed that the defendant company hired and paid the driver of the truck (see p. 77, l. 30).

The mere fact that the one Craft employed by Bianchi and Smith gave the driver orders as to the destination of the truck after it was loaded, is not controlling. There is no evidence that Bianchi and Smith directed or controlled the driver other than in the one respect mentioned above. Glock had exclusive management, itinerary direction and control of the vehicle. Mr. Justice Minturn says these are factors which present the determinative tests for ascertaining the existence of the legal relationship of master and servant. (See Courtinard vs. Gray Burial Company, 98 N.J.L. at p. 496).

In the case of Busch vs. Seaboard By-Products Coke Company (100 N.J.L. 304) the facts are almost identical with circumstances in the instant

case. The Seaboard By-Products Coke Company rented and hired a truck from one Cullum. Cullum hired and paid the driver. The Seaboard By-Products Company loaded the truck and gave the address of its destination to the driver. The situation in the case at bar is actually similar. Bianchi and Smith, the employers of the plaintiff, hired a truck from the defendant. The defendant employed and paid the driver. Bianchi and Smith loaded the truck and Glock was given a slip by Craft, an employee of Bianchi and Smith, informing him of the destination of the load (see p. 82, l. 28). Bianchi and Smith in no other respect controlled and operated the truck.

Mr. Justice Parker in the above case stated that the mere fact that the Seaboard By-Products Coke Company loaded the truck and gave the destination to the driver, did not make the company responsible for the negligence of the driver. He further declared that it was absolutely clear that the Seaboard By-Products Company did not own the truck, hire the driver or pay him or control him or the operation of the truck in any way beyond loading it at the plant and giving the driver the address of its destination.

Applying this rule to the undisputed facts, it is evident that the instant case should be governed by the same rule of law. There is no relationship of master and servant present between Bianchi and Smith, and the driver of the defendant company.

In *Lacombe vs. Cudahy Packing Co.* (Vol. 5 N.J. Adv. Rep. 797), the facts were as follows: The defendant company, Cudahy Packing Company, hired a truck from the Dawkins Trucking Company. The Cudahy Packing Company sent upon the delivery route with the driver of the Daw-

kins Trucking Company, one Gibne, who instructed the driver of the Dawkins Trucking Company, where the deliveries were to be made. It was undisputed in that case, as it is in the present case, that the truck was owned by the Dawkins Trucking Company, and the driver employed and paid by that company. The appellant, in that case, strenuously urged that because Gibne, an agent of the Cudahy Packing Company, instructed the driver what stops to make and where to make the deliveries, that the driver of the truck was an agent of the Cudahy Packing Company.

Our Court of Errors and Appeals held that it was immaterial that the main facts were that the truck was owned by the Dawkins Trucking Company and the driver employed by them, and the driver was in no sense an agent of the Cudahy Packing Company. It is quite clear from this decision that the same rule should prevail in this case.

The appellant cites *Rongo vs. Waddington* (87 N.J.L. 395) as supporting the argument of the defendant. The legal soundness of this opinion was repudiated by Mr. Justice Parker in *Burch vs. Seaboard By-Products Coke Company* (100 N.J.L. 304 & 306). The appellant further cites cases of other jurisdictions to support the validity of this particular ground of appeal. The Courts of our State are not bound by the decisions of other jurisdictions. (See *Lacombe vs. Cudahy Packing Co.*, Vol. 5, N.J. Adv. Rep. 797, at p. 802).

It is illuminating to note that the Trial Court charged the jury that if Bianchi and Smith exercised some control over the truck driver and that the accident to the plaintiff was due to the control and directions of Bianchi and Smith, or their

employees, then the defendant was not responsible (see p. 142, l. 30). The jury found, as a matter of fact, that Bianchi and Smith did not exercise some control over the driver when it rendered a verdict in favor of the respondent.

From the reasons above expressed, it is respectfully submitted the judgment be affirmed.

JOHN J. BRESLIN, JR.,

Attorney for Plaintiff-Respondent.