

I N D E X

| | PAGE |
|-----------------------------------|------|
| Notice of Appeal | 1 |
| Judgment Record | 2 |
| Complaint | 2 |
| Answer | 5 |
| Reply | 6 |
| Postea | 6 |
| Judgment | 7 |
| Clerk's Certificate | 7 |
| Testimony | 8 |
| PLAINTIFF'S TESTIMONY: | |
| James E. Morrison—Direct | 9 |
| Cross | 21 |
| Re-direct | 33 |
| Re-cross | 36 |
| Charles M. Levister—Direct | 37 |
| Isabel Rogan—Direct | 40 |
| Dr. Stanley Brown—Direct | 42 |
| Cross | 51 |
| George C. Broadwater—Direct | 52 |
| Cross | 59 |
| Re-direct | 66 |
| Re-cross | 67 |
| Motion for Non-suit | 68 |
| DEFENDANT'S TESTIMONY: | |
| Alfred Anderson—Direct | 70 |
| Cross | 79 |
| Re-direct | 87 |

| | PAGE |
|---|------|
| Officer John H. Dickerson—Direct | 88 |
| Cross | 93 |
| Re-direct | 97 |
| Trooper John A. Kopf—Direct | 98 |
| Cross | 101 |
| Hugo Vonder Tann—Direct | 102 |
| Cross | 106 |
| Re-direct | 107 |
| Frank H. Ahern—Direct | 108 |
| PLAINTIFF'S REBUTTAL TESTIMONY: | |
| James E. Morrison—Direct | 110 |
| Defendant's Motion for Direction of Verdict.. | 111 |
| Charge to the Jury | 112 |
| Defendant's Exhibit A, Photograph | 117 |
| Defendant's Exhibit B, Photograph | 118 |
| Defendant's Exhibit C, Photograph | 119 |
| Grounds of Appeal | 121 |

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

JAMES E. MORRISON,

Plaintiff,

v.

GEORGE R. VAN SCIVER,

Defendant.

} Action at Law.
Notice of Appeal.

10

*To Leonard H. Savadove, Esq., Attorney for Plaintiff,
James E. Morrison:*

20

Sir:

Take notice that the defendant, George R. Van Sciver, appeals to the Court of Errors and Appeals, in the last resort in all cases in New Jersey, from the whole of the judgment entered in this cause in the New Jersey Supreme Court on the 29th day of May, 1934.

Your obedient servants,

STARR, SUMMERILL & LLOYD,
Attorneys for Defendant.

30

Dated June 14th, 1934.

JUDGMENT RECORD.

COMPLAINT.

NEW JERSEY SUPREME COURT.

10

CAMDEN COUNTY.

| | | |
|---|---|---|
| <p>JAMES E. MORRISON, <i>Plaintiff,</i></p> | } | <p>Judgment Record. Action at Law. On Postea.</p> |
| v. | | |
| <p>GEORGE R. VAN SCIVER, <i>Defendant.</i></p> | } | <p>Leonard H. Savadove, Attorney.</p> |

20

George R. Van Sciver, the defendant in this cause, was summoned to answer unto James E. Morrison, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued April 16, 1931.)

The plaintiff, James E. Morrison, a resident of
 30 the City and County of Philadelphia, and State of Pennsylvania, says that:

1. On or about the 6th day of August, A. D. 1930, at or about four o'clock in the morning he was the driver of a certain motor car, said car was being

Judgment Record—Complaint

operated in the business of the plaintiff in a general southeasterly direction on a State Highway known as White Horse Pike and had reached a point near the town of Berlin, in the County of Camden, while proceeding along the highway before mentioned.

2. On or about the above mentioned time the defendant George R. Van Sciver, was the owner of a certain motor truck, being driven by his agent, servant or employee in the same direction and along the same highway herein before mentioned, said truck being driven about the business of the said defendant. 10

3. It was the duty of the defendant as owner through his agent, servant or employee to operate said motor truck at the aforesaid time and place in a careful and prudent manner, to use proper lights, to signal for a stop of his motor vehicle and to keep the said vehicle under control, and if the said car was not in motion to move said car to the side of the road, and particularly did the defendant through his agent, servant or employee owe this duty to the plaintiff, at the time and place above mentioned. 20

4. At the time and place herein mentioned the said defendant through his agent, servant or employee was grossly negligent in that the said motor truck of the defendant was negligently and carelessly parked on the highway herein mentioned, without having any lights displayed, and without giving any notice of its position on the said highway, without signal- 30

ling or giving any warning that the said truck was parked on said highway; without regard for the rights of others using the said highway and particularly without regard for the rights of the plaintiff herein.

5. By reason of the premises aforesaid the plaintiff, James E. Morrison, sustained severe injuries by being thrown to the ground and out of his motor car after the collision between the car of the plaintiff and the truck of the defendant. The plaintiff sustained two compound fractures to his right leg, right hand and arm were lacerated, torn and injured, right knee lacerated and ligaments torn, cuts and lacerations of the head, body and limbs, injuries to the head resulting in concussion of the brain. He suffered numerous other injuries both internally and externally and also suffered a severe shock to his nervous system, and was otherwise crippled and maimed and was made to suffer great pain and injury and still suffers great pain and from shock due to the permanence of his injuries. Defendant was obliged to outlay considerable moneys for doctors and medicines for treatments in efforts to recover from his injuries and will be compelled to outlay additional moneys.

30 Plaintiff demands as damages from the defendant, George R. Van Seiver, under the premises aforesaid the sum of \$50,000.00.

LEONARD H. SAVADOVE,
Attorney for Plaintiff.

(Filed April 27, 1931.)

ANSWER.

Defendant, George R. Van Sciver, answering the plaintiff's complaint, says that:

1. He has no knowledge or information sufficient to form a belief as to the allegations contained in 10 paragraph one and leaves the plaintiff to his proof.

2. He denies the allegations contained in paragraphs two, three, four and five.

FIRST DEFENSE.

1. Defendant performed each and every duty and obligation he owed to the plaintiff.

20

SECOND DEFENSE.

1. Plaintiff was guilty of contributory negligence.

2. Plaintiff contributed to the injuries complained of.

3. Plaintiff drove and operated a certain automobile at a high and excessive rate of speed under the circumstances without looking where he was going and drove into the rear of a certain truck and, thereby, caused the injuries complained of. 30

STARR, SUMMERILL & LLOYD,
Attorneys for Defendant.

(Filed May 26, 1931.)

REPLY.

Plaintiff, James E. Morrison, in reply to the answer of the defendant heretofore filed in this cause, says that:

10 1. He denies the affirmative allegations contained in the defendant's answer and joins issue in the cause.

2. He denies paragraph one of the first defense and paragraphs one, two and three of the second defense.

LEONARD H. SAVADOVE,
Attorney for Plaintiff.

(Filed Jan. 30, 1932.)

20

POSTEA.

This case was tried before Judge V. Claude Palmer, with a jury, in the Camden Circuit on May 23rd and 24th, 1934.

30 The jury rendered a verdict against the defendant, George R. Van Sciver, and in favor of plaintiff, James E. Morrison, for Fifteen thousand dollars (\$15,000.00).

JUDGMENT.

Whereupon it is adjudged that the plaintiff, James E. Morrison, do recover of the said defendant, George R. Van Sciver, the sum of fifteen thousand dollars damages together with his costs 10
\$15,000.00 which have been taxed at the sum of
74.82 seventy-four dollars and eighty-two
cents, making in the whole the sum of
\$15,074.82 fifteen thousand seventy-four dollars
and eighty-two cents.

Judgment entered and signed May 29, 1934.

THOMAS J. BROGAN,
Chief Justice.

20

I, FRED L. BLOODGOOD, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the notice of appeal and also a copy of the judgment entered in the above-stated cause as the same remains on file and of record in my office.

In testimony whereof I have set my hand and the seal of said Court at Trenton, this twentieth day of August, A. D. nineteen hundred and thirty-four. 30

(Seal) FRED L. BLOODGOOD,
Clerk.

TESTIMONY.

NEW JERSEY SUPREME COURT.
CAMDEN COUNTY.

10

| | | |
|--|---|---|
| <p>JAMES E. MORRISON, <i>Plaintiff,</i></p> <p style="text-align: center;">v.</p> <p>GEORGE R. VAN SCIVER, <i>Defendant.</i></p> | } | <p>Action at Law. No. 1. February Term, 1932.</p> |
|--|---|---|

May 24, 1934.

20

APPEARANCES:

For the Plaintiff, L. H. SAVADOVE, ESQ.

For the Defendant, MESSRS. STARR, SUMMERILL &
LLOYD.

Before PALMER, J., and a jury.

30

(Mr. Savadove opens the case for plaintiff to the jury.)

(Mr. Lloyd opens the case for defendant to the jury.)

PLAINTIFF'S EVIDENCE

JAMES E. MORRISON, SWORN.

By Mr. Savadove:

Q. Mr. Morrison, what is your full name? 10

A. James E. Morrison.

Q. Where do you reside at the present time?

A. 2607 Brown Street, Philadelphia.

Q. How old are you?

A. Thirty-five.

Q. Do you remember having a collision some time in 1930?

A. Yes, sir.

Q. By whom were you employed at that time? 20

A. The Cudahy Packing Company.

Q. Where?

A. Atlantic City.

Q. What were your wages?

A. \$40.00 a week.

Q. Where did this collision occur?

A. In Berlin, about a mile below the bank in Berlin.

Q. About a mile below the bank in Berlin, New Jersey? 30

A. Yes.

Q. Where were you going?

A. I was going to Atlantic City, my home.

Q. Were you working at that time?

A. Not at that time.

Q. I mean were you employed at that time?

A. Yes, sir, I was.

Q. And about a mile below Berlin you had a collision?

A. Yes, sir.

Q. What happened; explain to the Court and jury?

A. On August 5th I received a telephone call from
10 my sister stating that my father was very sick, so
knowing my father's age and condition I thought it
would be best to go right up as soon as possible,
and when I went up I found out that my father was
sick and I couldn't get in touch with the doctor
just to find out his condition, and I thought why,
well I had better stay at home, which I did do, and I
rested for a couple of hours. I had two or three
hours' sleep, and I left my father and told my fa-
ther that I had to be to work, and he told me that
20 he would be all right so I started back to Atlantic
City, and I stopped in a lunch car in Berlin on the
right-hand side. I had a cup of coffee and a piece
of pie. It was very dark and foggy, and when I
got about—well, we will say a mile, I judge it was a
mile, due to poor education I just don't know the dis-
tance, but I judge it would be a mile when I met
with this accident.

Q. What happened, Mr. Morrison? What do you
mean you met with this accident? What did you
30 do?

A. I ran into this truck.

Q. What kind of a truck was it?

A. Why, the name of the truck I wouldn't know,
but it was a very big truck. It was hauling freight.

Q. Hauling freight?

A. Yes.

Q. And you struck the truck?

A. Yes, sir.

Q. And then what happened?

A. Then I was thrown out of the car, and I laid on the road until somebody picked me up, but before I was picked up there was a lady came to me and said, "Oh, my gracious, son; you are all cut up." 10 I said, "Madam, I would like to get to a hospital; I am all bloody." She said, "My husband said —

Mr. Lloyd: I object to that.

The Court: Objection sustained.

By Mr. Savadove:

Q. You cannot testify as to what somebody else 20 said. You testify to what you know.

A. Yes.

Q. How fast were you proceeding?

A. Twenty or twenty-five miles an hour.

Q. As I understand you to say, you had stopped at the lunch wagon and had a cup of coffee?

A. Yes, sir.

Q. And about a mile and a half up the road you struck this big truck?

A. Yes, sir. 30

Q. Did you see the truck?

A. No, I positively did not see the truck.

Q. Why didn't you see the truck?

Mr. Lloyd: That is objected to as a conclusion.

The Court: Objection sustained.

By Mr. Savadove:

Q. Was there anything having to do with the condition of the road and the condition of the weather, and the condition of the truck, that would prevent
10 you from seeing it?

A. It was very dark and foggy.

Q. Were your lights lit?

A. My lights were lit, yes, sir.

Q. Do you remember whether or not the lights on the truck were lit, the rear lights?

A. No, sir; positively no light on the truck.

Q. And you struck the truck?

A. Yes.

Q. And then what happened?

20 A. I was—I laid on the road. When I struck the truck I was thrown out of the car and I lit on the road, and, of course, I might have been all nervous and all like that, but a fellow picked me up, a man picked me up and took me to the West Jersey Hospital.

Q. How long were you on the ground, do you know?

A. I couldn't say; I was there long, I couldn't say how long.

30 Q. What was the position of the truck with respect to the road?

A. The truck was on the right-hand side. I seen the truck when I was thrown on the ground. It was lying on the road, on the concrete of the road. There is a dirt road along the right-hand side, and it was on the concrete standing still.

James E. Morrison—Direct

Q. Where were you when you were proceeding, what part of the road were you on?

A. I was on the right-hand side.

Q. On what portion of it, on the concrete, macadam part?

A. I was on the concrete.

Q. You were on the concrete?

A. Yes, sir.

10

Q. Was there anybody at or near the truck at the time you struck the truck, do you know?

A. No, sir, absolutely no one.

Q. Was there anybody there having to do with the truck who assisted you or attempted to assist you after the collision?

A. No, sir, nobody.

Q. Now, a man came along then?

A. Yes.

Q. And picked you up, is that right?

20

A. Yes, sir.

Q. And were you conscious all the time?

A. Yes, sir.

Q. And what was wrong with yourself?

A. My bones were sticking out of my leg.

Q. You mean your leg was broken?

A. Well, I didn't know what was wrong with my legs.

The Court: He has answered the question.

30

By Mr. Savadove:

Q. What was the name of the man who took you to the hospital?

A. Mr. Broadwater.

Q. What hospital did he take you to?

A. The West Jersey Homeopathic.

Q. Who treated you there, do you remember?

A. Dr. Stanley Brown. The first doctor in the dispensary was Dr. Hogan.

Q. How long were you in the hospital, Mr. Morrison?

10 A. I was in six different times.

Q. You were in the hospital six different times?

A. Yes.

Q. What for?

A. For operations on my leg. I was in for two weeks, and then I went back and stayed six months, and I went back again and I stayed seven weeks. I went back again and stayed eight weeks and five weeks.

20 Q. What were the reasons for your going back to the hospital?

A. My leg wasn't healing up and I had to have a bone-graft operation performed.

Q. Who performed those operations?

A. Dr. Stanley Brown and Dr. Brooks.

Q. Who was the doctor that treated you most of the time at the West Jersey Hospital?

A. Dr. Stanley Brown.

Q. And you say he has performed several operations?

30 A. Six operations.

Q. And was it necessary after the operations that you remain in the hospital?

A. Yes, sir, it was, due to the fact that my leg was draining and the bone-graft operation was not successful at that time.

James E. Morrison—Direct

Q. Do you remember the approximate total of the bills at the West Jersey Hospital?

A. No, sir, I really do not know.

Mr. Savadove: Is there any objection to these bills?

Mr. Lloyd: The hospital bills? 10

Mr. Savadove: Yes.

Mr. Lloyd: No.

By Mr. Savadove:

Q. Those are the hospital bills for \$186.63 for one period, and another for \$124.00 for another period, and \$128.00 for another period; were the 20 bills received by you from the hospital?

A. Yes.

Q. You don't know whether that is the correct amount due, is that right?

A. No, sir.

The Court: Is that all of them, or are there more?

Mr. Savadove: I think there are more. We will have the hospital records here later. 30

By Mr. Savadove:

Q. Were any X-Rays taken, Mr. Morrison?

A. Yes, sir.

Q. And during the times that you went back to the clinic what did they do to you at the hospital?

A. Re-dressed it, re-dressed my leg, put the light treatments on it.

Mr. Lloyd: It is \$1116.00 as I figure it.

10 Mr. Savadove: The total approximates almost \$1200.00 upon completion of the records. Of course, we expect to show that.

The Court: I merely wanted to know if that was all of them or not. That is all right.

By Mr. Savadove:

20 Q. Now, about a year ago you were at the Homeopathic Hospital and they discharged you, is that right?

A. No, they never discharged me.

Q. They never discharged you?

A. No.

Q. What is the condition of your leg at the present time?

A. You see had another bone-graft performed at the Jefferson Hospital.

30 Q. Who performed that operation?

A. Dr. Davidson.

Q. How long ago was that done?

A. On the 23rd day of January.

Q. Of this year?

A. 1934.

James E. Morrison—Direct

Q. How long were you in the hospital at that period, Mr. Morrison, do you remember?

A. I was there nine weeks.

Q. And what did they do at the hospital?

A. Performed a bone operation.

Q. A bone-graft operation?

A. A bone-graft operation. In medical terms they stated it was a bone-graft taken from this leg 10 and put in my right leg.

Q. As a consequence now you have got two bad legs?

A. Yes, sir.

Q. Have you been able to do any work since the accident occurred?

A. No, sir.

Q. Have you received any compensation or remuneration from any source?

A. No, sir. 20

Q. Is that the reason why you have been over in Philadelphia?

A. I am living there because I have no money; that is my father's home.

Q. Mr. Morrison, during the course of this broken leg situation was it necessary that you should spend any other monies outside of the hospital bills?

A. I had medicines prescribed that were expensive, but my father had to buy all that because I had no money. 30

Q. Do you know what the total of that was?

A. No, sir.

Q. You don't know what the total was?

A. No, sir.

Q. Can you walk now?

A. I walk with pain, but I cannot walk with one leg—with only one leg.

Q. You mean you use crutches?

A. Yes.

Q. You get about with them?

A. Yes, sir.

Q. Do you know whether or not this last operation was successful?

A. Well, I still have an opening in my leg and I cannot stand.

Q. During the course of the trip immediately after the accident, Mr. Morrison, were you conscious or unconscious?

A. I was conscious.

Q. I wish you would explain to the Court and jury just what transpired on the trip down, if you remember?

A. Well, after I left the lunch car, of course, before I got there —

Q. I mean after the accident?

A. After the accident?

Q. Yes, when Mr. Broadwater picked you up and put you in his car and took you down to the hospital?

A. Mr. Broadwater came to my assistance. There had been another car passed me and he didn't stop to pick me up, and I kept hallooing, "Please take me to a hospital." Mr. Broadwater came and said, "Well, I will do my best," he says, "I don't know where the nearest hospital is," but he says, "I will get you there as soon as possible," so he got me in the machine and saw the bones were extending out of my leg. He said, "Well now, the best thing you

James E. Morrison—Direct

could do," he says, "Is to put your leg out the window of the car," he said, "because I don't know anything about this, but I will stop at the State Troopers' Barracks," he said, "and will notify them." So he pulled up to the State Troopers' Barracks and there was no one there. There was some one there but they were asleep, and Mr. Broadwater stated to them that he had just picked up a boy 10 who was in an accident down on White Horse Pike, he said, a short distance from here.

The Court: This conversation is not competent, Mr. Savadove.

Mr. Savadove: We have the testimony of the driver, which substantiates this.

The Court: His conversation with these people 20 is not competent.

Mr. Savadove: It is to show the extent of the injury and what Mr. Broadwater did. All right.

By Mr. Savadove:

Q. When was the first time you saw any one that had anything to do with the motor truck with which you collided? 30

A. I was lying on the table in the hospital, the doctor was fixing me up, when two State Troopers brought in the man. First one State Trooper came in—in fact there was only one came to me and asked me what had happened, and he said, "Did you fall

asleep?" I said, "No, sir." He said, "How fast were you going?"

Mr. Lloyd: I have not objected, but I must object to all this conversation; none of it is material.

The Court: The objection is sustained.

10

By Mr. Savadove:

Q. Who was with the State Trooper, if any one?

A. It was a colored gentleman.

Q. And who was it, do you know?

A. I didn't know until the State Trooper told me, "Was this the man that picked you up?" and I said, "No, sir." I pointed to Mr. Broadwater.

Q. Who did he say was the colored fellow? Did
20 he mention who the colored fellow was?

Mr. Lloyd: If your Honor please, I object to this.

The Court: Objection sustained.

By Mr. Savadove:

Q. Was that the first time that you had seen any-
30 body other than Mr. Broadwater after the collision?

A. Yes, sir, not until I got to the hospital.

Cross-examination.

By Mr. Lloyd:

Q. What time had you received this message to come to Philadelphia?

A. Six o'clock.

Q. On the morning of the 5th? 10

A. No, the evening.

Q. On the evening of the 5th?

A. Yes, sir.

Q. And what sort of work were you doing?

A. I was a salesman, a meat salesman for the Cudahy Packing Company.

Q. What sort of work do you do as a meat salesman?

A. I go around to different stores and solicit business. 20

Q. Where is your territory?

A. My territory was all South Jersey.

Q. And you worked out of Atlantic City?

A. Yes, sir.

Q. Now, on that day where did you go?

A. That day I was—I started from Atlantic City. to Pleasantville, Mays Landing, up to Millville.

Q. Do you use an automobile?

A. Yes, sir.

Q. And did you stop between Mays Landing and 30 Millville?

A. Oh, yes, sir, I made stops there, I stopped there.

Q. You make stops all along, do you?

A. Yes, sir.

Q. Where did you go from Millville?

A. I went back to Atlantic City.

Q. So that you practically live in an automobile, don't you?

A. No, sir.

Q. Well, you use your car every day?

A. Not every day.

10 Q. Well, quite a little?

A. I only use it when I go out of town.

Q. Then this day on the 5th, that is the day before you came up to Philadelphia, you used your car all that day?

A. Yes, sir.

Q. And you were making these calls on various merchants?

A. Yes, sir.

Q. What time did you get back to Atlantic City?

20 A. Five-thirty—five o'clock; between five and five-thirty.

Q. And you started at what time in the morning?

A. In the morning, eight-thirty.

Q. What time did you go to work?

A. Eight-thirty in the morning. You must report to the office at eight-thirty.

Q. Eight-thirty?

A. Yes, sir.

Q. That was on the 5th?

30 A. Yes.

Q. Now, on the morning of the 6th you had to go to work earlier, didn't you?

A. No, eight-thirty.

Q. I thought there were some days that you had to go to work at five o'clock?

James E. Morrison—Cross

A. Yes, there are some days.

Q. Well, wasn't this one of the days?

A. No, sir.

Q. Weren't you at work at five o'clock on this morning?

A. No, sir.

Q. You had to start there at six that morning, didn't you? 10

A. Beg pardon?

Q. You had to start there at six that morning?

A. I had to be there at six.

Q. You had to be there at six.

A. Yes.

Q. What time did you leave Atlantic City to go to Philadelphia?

A. A quarter to nine.

Q. And you got up there about half past nine, half past ten or a little after ten? 20

A. No, sir, I got up there at eleven-thirty.

Q. Then you didn't go straight from Atlantic City to Philadelphia?

A. Yes, sir.

Q. Well, it didn't take you two hours and three-quarters, did it?

A. Well, it took me two hours and three quarters, whatever the time amounted to, that is how long it took me.

Q. Did you stop somewhere? 30

A. No, sir.

Q. It took you two hours and three-quarters to go from Atlantic City to Philadelphia, and then you were with your people until about three o'clock or a little before?

A. No, I took a couple of hours' sleep after I saw that my father—after I had saw my father.

Q. How long did you stay with your father before you went to sleep?

A. Well, I would say half an hour.

Q. And then you slept for a couple of hours?

A. Yes.

10 Q. And then started back?

A. Yes, sir.

Q. What time did you leave Philadelphia?

A. What time did I leave Philadelphia?

Q. Yes.

A. I left ten minutes to three, I left my father's home.

Q. This accident happened about five minutes after four, didn't it?

A. No, sir, it happened twenty minutes to five.

20 Q. Twenty minutes to five?

A. Yes, sir.

Q. Your mind is a little hazy or quite hazy, isn't it, now after four years?

A. No, my condition, what I went through, I couldn't say that.

Q. You saw the Troopers there that morning?

A. Where?

Q. At the scene of the accident?

A. No, sir.

30 Q. Did you see the man that took you up hit another man in the jaw?

A. Would you just repeat that?

Q. (Repeated.) Did you see the man that took you up hit another man in the jaw?

A. No, sir.

James E. Morrison—Cross

Q. You didn't see that?

A. No, sir.

Q. You remember a big car stopping with a man and a woman in it?

A. In what direction? Yes, coming down the lady came to my assistance. It was in back of me.

Q. And you were picked up and put on the running board of that car, or weren't you, or don't you remember that? 10

A. No, sir, I wasn't. I was laying on the ground and Mr. Broadwater picked me up.

Q. This lady spoke to you?

A. Yes.

Q. And there was a man in the car with her?

A. So she stated.

Q. And that man didn't take you to the hospital, did he?

A. What man? 20

Q. The man in that car?

A. No, sir, I didn't see that man.

Q. You didn't see him at any time?

A. No, sir.

Q. Was it Broadwater you say who took you to the hospital?

A. Yes, sir.

Q. You didn't see Broadwater hit him because he wouldn't take you to the hospital?

A. Could I ask to have that repeated? 30

Q. (Repeated.) You didn't see Broadwater hit him because he wouldn't take you to the hospital?

A. No, sir, I was lying on the ground.

Q. And you were dazed, of course, weren't you?

A. No, I wouldn't say that I was dazed. I might have been a little nervous.

Q. Now, this accident happened in what month?

A. It happened June—on August 6, 1930.

Q. And what kind of a day was August 6th?

A. What kind of a day?

Q. Yes.

10 A. Well, just a nice day.

Q. A nice day, and you had been riding around all that day, hadn't you?

A. Yes, sir.

Q. Now, this night was a clear night, wasn't it?

A. No, sir, it was a foggy night.

Q. When did you get this idea about fog, who put that in your head?

A. Nobody put that in my head.

Q. When was that suggested to you?

20 A. It never was suggested to me.

Q. Do you remember telling me the story about this accident on August 24, 1931?

A. August 24th? No, sir, there wasn't no accident on the 24th.

The Court: Listen to the question.

Q. (Repeated.) Do you remember telling me the story about this accident on August 24, 1931?

30 A. I remember being in your presence, yes, sir.

By Mr. Lloyd:

Q. And you were under oath at that time, were you not?

A. Yes, sir.

Q. And it was what we call testimony taken in advance of trial?

A. Yes, sir.

Q. At that time you didn't make any mention at all of any fog, did you?

A. I cannot state whether I did or not.

Q. Did you ever see any fog in August, in the 10 middle of the summer?

A. Yes, sir.

Q. What kind of a truck was this that you ran into?

A. It was a very large truck, a big truck.

Q. A big body?

A. Yes, sir.

Q. And what were the lighting conditions on the road at that time?

A. There were absolutely no lighting conditions. 20

Q. No lights?

A. With the exception of my car.

Q. With the exception of the lights on your car?

A. Yes.

Q. What kind of a car were you driving?

A. A Ford.

Q. Model "A"?

A. Model "A" coupe.

Q. What kind of lights did it have on it?

A. It had very good lights. 30

Q. Electric lights?

A. I just don't understand when you say electric lights?

Q. Were they electric lights, gas lights or oil lights?

A. No, they wasn't gas and they wasn't oil.

Q. Well, did they work from a battery?

A. Yes.

Q. And a switch?

A. Yes.

Q. And what lights did you have on?

A. I had my headlights on; there was only two
10 lights.

Q. Well, you have bright and dim lights, don't
you?

A. I had my bright lights.

Q. Did you have your bright lights on or your
dim lights?

A. I had my bright lights.

Q. And they are the ones that throw the light for-
ward?

A. Yes.

20 Q. Now, I show you a photograph purporting to
show the view in a southerly direction along the
White Horse Pike and taken about opposite the
Troops' Barracks, and ask you if you recognize
that picture?

A. Yes, I believe this is the State Troops' Bar-
racks. (Indicating.)

Q. That is right, and where you are pointing at
the extreme left part of the picture, you recognize
that picture, do you?

30 A. Yes.

Q. And can you show us on there where the col-
lision took place?

A. Why, down here further than that picture
shows. (Indicating.)

Q. Further than the picture shows?

A. Yes.

Q. Are you a little hazy on that?

A. It is a mile distant from the State Troopers' Barracks.

Q. It happened a mile away from the Trooper Barracks?

A. Yes.

Q. Are you sure of that?

10

A. That is my judge of distance.

Q. You haven't been down there since the accident?

A. No, sir.

Q. Then you might be mistaken on the distance away from the Troops' Barracks?

A. I really just don't know what to say.

Q. Well, you are not certain how far away you were from the barracks?

A. At the time of my accident, when the man 20 picked me up and brought me to the State Troopers' Barracks, I judge it was a mile.

Q. That is your best recollection of it?

A. Yes, sir.

Q. But you might be mistaken about that?

A. Yes, I could be mistaken.

Q. Now, I show you another photograph which is taken from a point about opposite the State Police Barracks looking diagonally across the road and in a southerly direction; do you recognize that picture? 30

A. This would be the State Troopers' Barracks here?

Q. That is where they live, on the extreme left-

hand side of the picture. You recognize that picture, do you?

A. I couldn't recognize this.

Q. You don't recognize that?

A. No, sir.

Q. But you do recognize the first one?

A. Yes, sir.

10

Mr. Lloyd: I ask that the first one be marked for identification.

The Court: It may be marked.

(Photograph above referred to marked for identification Defendant's Exhibit "A".)

By Mr. Lloyd:

20

Q. Now, as I understand it, you never saw this truck until after the accident?

A. No, sir.

Q. And as you now say you were lying in the road and you looked up and saw the truck?

A. Yes, sir.

Q. Do you recognize that as a rear view of the truck?

A. The truck wasn't in that condition when I
30 was lying on the ground.

Q. Well, do you recognize that as a picture of the truck?

A. Yes, sir.

Mr. Savadove: I think he has answered the ques-

tion, he cannot tell. He cannot recognize it from that picture.

The Court: He is asked whether or not he can recognize it, and he may answer yes or no.

A. Yes.

Mr. Lloyd: I ask that this be marked for identification. 10

The Court: It may be marked.

(Photograph above referred to marked for identification Defendant's Exhibit "B".)

By Mr. Lloyd:

Q. So that this was a very large truck, wasn't it? 20

A. Yes.

Q. It had a very large body on it?

A. Yes, sir.

Q. And when you were lying in the road you were lying on the concrete?

A. Yes.

Q. Your automobile was there?

A. Why, it was in back of the truck.

Q. It was behind, right in under the truck, wasn't it? 30

A. The tail-board of the truck was on top of my car. The tail-board was down level with the floor of the truck.

Q. Was there any portion of your car extending beyond the truck?

A. Beyond?

Q. That is to the left of the truck?

A. Yes, sir.

Q. About twelve inches, about a foot of your left fender, wasn't it?

A. That I couldn't say.

Q. Now, it was dark?

10 A. Yes, sir.

Q. You have testified where this happened?

A. Yes, sir.

Q. And you had your bright headlights on?

A. Yes, sir.

Q. Were there any automobiles coming towards you?

A. No, sir.

Q. To blind you?

A. No, sir.

20 Q. You are certain of that?

A. Yes, sir.

Q. No automobiles at all?

A. No, sir.

Q. Were there any lights of any description coming towards you?

A. No, sir.

Q. To blind you?

A. No, sir.

30 Q. So that it was dark and you were proceeding with your bright headlights on?

A. Yes, sir.

Q. How fast were you going?

A. Twenty to twenty-five miles an hour.

Q. What was the condition of your car, its running condition?

James E. Morrison—Re-direct

A. It really had been overhauled just a week previous to that in Philadelphia.

Q. What was the condition of the brakes?

A. Very good, very good.

Q. Very good?

A. Yes, sir.

Q. And coming at twenty-two to twenty-five miles an hour, did you say? 10

A. Twenty to twenty-five.

Q. Twenty to twenty-five miles an hour, with your brakes in that condition how quickly could you stop?

A. I just don't know, but I could have stopped if I had saw the truck.

Q. No, I didn't ask you that. How quickly could you stop with your brakes in the condition that they were in on the night of that accident?

A. I could have stopped very quick.

Q. Well, in how many feet about? 20

A. Well, five feet I could stop.

Q. Do you mean to say with your brakes in the condition that they were in that night, that you could have stopped in five feet?

A. I could have stopped from five to ten feet, yes, sir.

Q. You are certain of that?

A. Yes, sir.

Re-direct examination. 30

By Mr. Savadove:

Q. Mr. Morrison, do you drink?

A. No, sir, I never drank in my life.

Mr. Lloyd: I object to that. It is immaterial and there is no claim or allegation of anything of that sort in this case.

Mr. Savadove: There was an attempt to show there was something else —

10 The Court: The question was answered without any objection. I will strike out the answer. There is no allegation or charge of that kind in the case.

By Mr. Savadove:

Q. What was your condition before the accident, Mr. Morrison?

A. Pertaining to health?

20 Q. To your health?

A. I was very healthy, very good; I had very good health.

Q. Had you had any illnesses previous to the accident?

A. Beg pardon?

Q. Had you had any serious illnesses previous to the accident?

A. No, sir.

Q. Have you had any diseases?

30 A. Never.

Q. Now, how fast does your car go, or how fast could your car go?

A. The company I work had a governor on that car and it wouldn't allow it to go any more than forty miles. They had a governor on the car.

Q. And at this time you were driving twenty to twenty-five miles an hour?

The Court: He said that two or three times.

By Mr. Savadove:

Q. There was a question concerning the lighting 10
situation on the pole. Do you remember whether
or not there was a light on every pole on the Pike?

A. Not on every pole.

Q. There was no light on every pole?

A. No, sir.

Q. Do you remember whether or not the truck
was parked? That is, from the position you were
on the highway were you able to tell whether or not
the truck was parked at or near a light?

A. There wasn't no light near the truck. 20

Q. You testified it was a foggy night?

A. Yes, sir.

Q. I didn't understand that. I just want to qual-
ify it and find out whether or not it was foggy all
the way down or as far as you had gotten?

A. From the time I entered Camden until I got
to the lunch car it was foggy and then again it
wasn't foggy.

Q. You mean there was intermittent fog in some
sections? 30

The Court: Do not indicate to him the form of
answer you want.

Mr. Savadove: Answer the question.

The Court: He has answered it. He said at intervals there was fog and at other intervals there was no fog. Proceed.

By Mr. Savadove:

Q. At the section where you struck the truck of
10 the defendant it was foggy?

A. Yes.

Q. Was it very thick?

A. Yes, sir.

Re-cross examination.

By Mr. Lloyd:

Q. How far could you see through this fog that
20 you are talking about?

A. I couldn't see through the fog.

Q. How far?

A. That I couldn't say.

Q. Could you see your radiator cap?

A. No, sir.

Q. You couldn't see your radiator cap at all?

A. No, sir.

Q. Of course, if you couldn't see the radiator cap
you couldn't see anything in front of that, could you?

30 A. No, sir.

(Recess for five minutes.)

(After recess.)

CHARLES M. LEVISTER, SWORN.

By Mr. Savadove:

Q. What is your full name? 10

A. Charles M. Levister.

Q. With whom are you associated or by whom are you employed?

A. The West Jersey Homeopathic Hospital.

Q. Do you have the records of the case of James E. Morrison?

A. I do, yes, sir.

Q. Arising out of an accident which happened in 1930?

A. Yes, sir. 20

Q. What record do you have, Mr. Levister?

A. I have the record of his admission to the receiving ward when he was hurt, and the time he was in the hospital, and the treatments that he had while he was there.

Q. Do you have the bills which have accrued?

A. I have, yes, sir.

Q. Will you show me the bills, please?

Mr. Lloyd: What is the full amount? 30

Mr. Savadove: The total is \$1196.00.

By Mr. Savadove:

Q. I notice here the total of these bills on this statement is \$1196.00; is that correct?

A. That is correct.

Q. Has this bill been paid?

Mr. Lloyd: Objected to as immaterial.

The Court: Objection sustained.

10 By Mr. Savadove:

Q. Mr. Levister, can you tell me when Mr. Morrison was admitted to the hospital?

Mr. Lloyd: Now, may I cross-examine Mr. Levister? I think I know the practice of the hospital and maybe we will eliminate his testimony.

The Court: What is your objection at this time?

20

Mr. Lloyd: It doesn't appear whether he is testifying from his own knowledge or from hearsay knowledge.

The Court: As to the length of time that he was in the hospital?

Mr. Lloyd: As to any portion of the record, if your Honor please.

30

The Court: What have you to say?

Mr. Savadove: If your Honor please, they have admitted the bills from the hospital, and for that reason I can see no reason why we should not admit

the record, because the bills themselves are evidence of the record, and if they have admitted that, they have admitted the record.

The Court: It does not admit the whole record by any means.

Mr. Savadove: The other portions of the record 10 that have to do with medical testimony, and so forth, however, we will have the doctor here who will testify to that. As far as the medical testimony is concerned, of course, we will have Dr. Brown go further on that.

The Court: Why do you need the hospital record then?

Mr. Savadove: We would like to show your Hon- 20 or and the jury just exactly what was done to this man from the hospital records from the time he was admitted to the hospital until the time they told him he could go and come back for clinical treatments.

The Court: The objection will be sustained.

ISABEL ROGAN, SWORN.

By Mr. Savadove:

Q. Are you connected with the hospital?

A. The Jefferson Hospital.

10 Q. The Jefferson Hospital in Philadelphia?

A. Yes, sir.

Q. Do you have a record of the admission to the hospital of James E. Morrison, 2607 Brown Street?

A. I have the records.

Q. What records do you have, medical records?

A. I have his clinic record and also his admission to the hospital.

Q. Do you have a bill?

A. I have.

20 Q. I notice that the total amount of the bill—are these two separate bills?

A. Yes, sir.

Q. Will you please tell the jury the balance?

Mr. Lloyd: Let me see the bills.

A. They are two separate bills. The patient had two admissions to the hospital.

30 Mr. Lloyd: Just total them up.

By Mr. Savadove:

Q. Will you give me the total of these bills, please?

A. The total bill, you mean?

Q. Yes, the total bill.

A. It would be \$653.50.

Q. Now, from this record can you tell the Court just when Mr. Morrison was admitted to the hospital?

Mr. Lloyd: Answer yes or no.

10

A. Yes.

By Mr. Savadove:

Q. When was he admitted?

Mr. Lloyd: I object, unless it is shown that the records were made by this witness.

By Mr. Savadove:

20

Q. Do you keep any of those records?

A. I am custodian of the records, but the doctor writes the record.

Q. Under supervision of the doctor?

A. Yes.

Q. Who makes the record?

A. The interne on service.

Q. Do you make any portion of that record?

A. Not any.

30

Q. Has that bill been paid?

Mr. Lloyd: I object to that as immaterial.

The Court: Objection sustained.

DR. STANLEY BROWN, SWORN.

Mr. Savadove: Are you satisfied with the qualifications of Dr. Brown, Mr. Lloyd?

Mr. Lloyd: Sure.

10

By Mr. Savadove:

Q. Dr. Brown, do you recall a patient by the name of James Morrison?

A. Yes, I do.

Q. I wish you would explain in detail with respect to the injuries sustained by Mr. Morrison around the date in August that he was taken to the West Jersey Homeopathic Hospital?

20

A. It has really been some time since I have seen the records, so I might be a little while in recalling.

By Mr. Lloyd:

Q. Are the records in your handwriting, doctor?

A. The operative sheets, the discharge sheet, and all that business, are in my handwriting.

30

By Mr. Savadove:

Q. You have treated the patient almost wholly, is that right?

A. Yes. He was brought into the hospital, according to the records, on the 6th of August, 1930

at five o'clock in the morning. The records show 5 A. M., and he was operated by me shortly thereafter. At that time he was suffering with a compound fracture of his right leg; that is, the bones were broken and protruding through the skin. He was placed in a plaster cast. X-Rays taken subsequently showed that the bone was in very good position in every direction in the case, and that he apparently healed up very nicely. No evidence of any infection. He was discharged from the hospital the first time on September 9, 1930, having been in the hospital thirty-four days. He was discharged to report back to the orthopedic dispensary, of which I have charge. X-Rays were taken subsequently, an X-Ray on June 3rd. I have a record of an X-Ray on the 21st—that goes into 1933—the 13th of November, 1931, and at that time the bone had not united. In other words, everything was apparently favorable; there was no infection of the wound, the skin was all cleared up and the bone was in perfect condition, and still there was no new bone forming, in other words, it wasn't possible to walk on that leg in position without the bone that was necessary. We carried him along that way, and on the 14th of December in 1931 he was re-admitted for a graft, and on the 15th of December in 1931 I again operated him and we put in an inlay graft. In other words, we took a piece of bone and with a rotary saw we cut it out of the leg and transposed it so that it crossed the line of break in the bone. In that condition many times the bone will unite, needing the stimulation of an operative procedure with some active support. That was in December, 1931.

Subsequent to this operation the wound sloughed out; in other words, the wound became infected and it was necessary to remove the pack which had been placed in position to hold the wound, and he was kept in the hospital until August 8, 1932, at which time he was discharged to return to the orthopedic dispensary. At that time he was still in plaster, and, 10 of course, still unable to walk. He had been in the hospital two hundred forty-five days at that time. As I say, the pack sloughed out, and we just had to wait and see whether new bone would form around that bone which had been operated. He was subsequently admitted on the 7th of October, 1932. He was only in the hospital two days, and there was some broken-down bone on the front part of the leg which was removed. The wound was packed and the plaster cast redressed, and he was again dis- 20 charged on the 8th of November, 1932 and again returned to orthopedics. During these visits to the dispensary, of course, there were a lot of things done, his blood was constantly watched and everything was done that was possible that medical science knows to further the growth of new bone, because after all that was what was necessary, and we have a record here of treatments in the dispensary from time to time all during this period.

Now, an X-Ray taken on the 20th of December 30 in 1932 made of the right leg in two views shows the fibula fragments, that is the bone that was broken, the large bone of the leg, to be in alignment but with poor union; there is still no evidence of any new bone formed. There doesn't appear to be any union; in other words, the bone was apparently

healed and still was not uniting. He was re-admitted to the hospital on the 18th of October, 1932. That was simply for the application of a plaster cast and an X-Ray, and the last time I saw Mr. Morrison was on the 27th of February in 1933, and at that time we were treating an open wound on his leg which had not united perfect, and, of course, the bone had not still united properly, and it was a question what we would have to do from that point. That is the last time I recall seeing Mr. Morrison. 10

Q. During all this period the bone had to be good bone, as I understand it, in order to make these transfers from the upper part of the bone to the lower part, is that right.

A. That is right.

Q. Now, have you had an opportunity to examine Mr. Morrison recently? That is, you haven't examined him lately? 20

A. No, I have not.

Q. What was the condition of his leg at that time, the last period at which you saw him?

A. Well, he had a slight open wound on his leg, as I recall, and he was in a brace to hold the fragments in position as well as possible, and the bone had not united, he still had no union, he was still unable to walk on it.

Q. What was his physical condition at the time he was admitted to the hospital? I mean assuming he had a great deal of shock as a natural outgrowth of an accident of that type, what was his physical condition; was he in good health, would you say? 30

A. Yes.

Q. Had he suffered from any diseases, or did he have any symptoms of any diseases in his body?

A. Not that we could determine.

Q. He was in the natural condition which medical science knows about?

A. That is right.

10 Q. And but for the fact that the leg was broken, of course, there would have been no necessity for the operations?

A. That is true.

Q. Along the same lines, doctor, assuming that you have not been able to do anything up to date, what would be the chance of this man ever being able to walk again or a union ever being able to be made as far as that leg is concerned?

20 A. That is a matter of conjecture. I mean I would not want to give a prognosis that was good and I wouldn't want to give one that was poor.

Q. Would you say then that if a union did occur it would be a very fine thing, and if it did not occur there was nothing that could be done except to try again and again?

A. That is the answer, by massive bone grafts.

Q. Would too much attention to massive bone grafts tend to damage the bone structure?

30 A. Well, after all each massive bone graft calls for the cutting away of the upper and lower fragments in order to place the bone grafts, and sometimes it is only after repeated endeavors that you succeed in getting union in such a condition.

Q. Then from your standpoint Mr. Morrison cannot use his leg as yet, is that right?

Dr. Stanley Brown—Direct

Mr. Lloyd: The doctor hasn't said that. He doesn't know; he hasn't seen him.

The Court: He said that at his last examination he had no use of it. That is as far as he testified, I think.

Mr. Savadove: Mr. Morrison, will you stand up? 10

By Mr. Savadove:

Q. Would you be able to tell whether or not there was any condition of his leg that was either precluded from forming a union, or could you from his condition now state whether or not a union would work out in its present condition?

A. Do you mean from my general view of the man? 20

Q. Yes.

A. No, I cannot tell.

Q. Could you, doctor, by an eye view of the injury itself?

A. I could tell by looking at the injury whether the fragments had united or not, but as to whether they ever would I could not tell.

Mr. Savadove: I would like to ask the Court's permission to show to the jury the condition of this man's leg. 30

The Court: I think that is quite all right. I do not think there is any objection to that.

(The plaintiff presented himself before the jury and was examined by the witness.)

The Witness: Sometimes we put the patient in what we call a walking caliber thinking perhaps constant irritation at the seat of fracture will cause an irritation and cause union. As I say, I have
10 not seen this for some time. Of course, this incision on the left leg that you see here in the site of taking the bone and placing it in the other leg. You can see that it is still quite tender. He has a bone sinus here. (Indicating.) That means there is probably a little bone broken down inside there. Here is a place that is healed up. We feel an enlargement of the interior portion of this shin bone, as we call it, which still has a little motion in there, but
20 I have seen that much knitted before myself and it never got any farther. Apparently I had that much motion in there before, and yet after taking X-Rays the X-rays disclosed that there was still not enough new bone in there to permit him to walk on it, and as long as that condition exists, of course, we have to keep him off of it, have to treat it expectantly. Normally the massive bone graft in eight or ten weeks' time will produce bony union, but whether the X-Ray will show that he has enough new bone
30 to walk on it or not I do not know.

By Mr. Savadove:

Q. Then from your diagnosis at the present time his condition is the same as it was at the time you actually treated the foot and leg?

Dr. Stanley Brown—Direct

A. It looks very similar. In the give as I see the chances, it is a possibility. It may unite firmly and it may not. We have seen it apparently solid before, but not enough bony union in there to give support.

Q. Dr. Brown, assuming from your investigation and diagnosis at the present time, would you say that the chances of a union are as far away as they were at the time you completed your operation in 1931 or 1932? 10

A. Apparently, yes, but that could only be substantiated by X-Rays.

Q. Now, assuming that the bone does not form a perfect union, what would then be necessary with respect to the bone?

A. It would probably have to receive another massive graft.

Q. And before they do that what do they do, do they break the bone? 20

A. It is not necessary to break it, because after all there is no union there. You simply clean out the interval, the space between the bone, clear out the bone that is no good and put new bone taken from some other site in the body in its place.

Q. And would continued working up of the bone tissue tend after while to break down the bone tissue itself to such an extent that it might be necessary at some future date, if this condition continues would it be necessary then from your diagnosis to amputate the leg? 30

Mr. Lloyd: We are not dealing with possibilities; that, of course, we do not do.

Mr. Savadove: The possibility is only to the extent —

The Court: I think the question in its present form is objectionable. I think you might ask that question in a better form.

10 By Mr. Savadove:

Q. Dr. Brown, assuming a person has a break in the leg, he has a condition in which the bone fails to knit, aside from this particular situation the bone fails to knit, and it is necessary then to form or try to form another union, so we take the next step and try to perfect that union, after that step has been taken and the bone goes on for a period of time there is still another condition and the bone
20 refuses to knit, that comes off on maybe five or six times, each time we are trying to build up the bone tissue, and I want to know whether or not at any time in the stage of the building up of the bone tissue would it be possible that the bone instead of building up would break down to the extent that it would be impossible to make a union regardless of what medical science did in respect to that leg, to the extent that the leg would have to be amputated?

30 Mr. Lloyd: I object. It is dealing with the same thing.

The Court: What is the objection?

Mr. Lloyd: It is dealing with a possible question not found in this particular case.

The Court: Objection overruled.

(Exception noted for defendant.)

A. It sometimes happens that after repeated operative procedure and failure of the bone to unite that it is far preferable to have part of the leg amputated, with an artificial leg applied with which they can get around to all intents and purposes apparently normally without the aid of crutches or any external form of support other than the artificial leg. 10

Cross-examination.

By Mr. Lloyd:

Q. Doctor, when you first set his leg and took pictures, that as I understand it the setting was perfect and you had nothing to do except wait for union? 20

A. That is right.

Q. And what is the normal time that union takes?

A. In compound fractures I would say six to eight weeks.

Q. Then in six to eight weeks there would be solid bone normally?

A. Enough to permit a certain amount of weight bearing. 30

Q. And it would be just a question of time until he would be able to use his leg as well as ever?

A. That is right.

Q. These cases generally take about three to four months, do they not?

A. That is right.

Q. What was the reason, if you were ever able to ascertain it, that you couldn't get bony union or callus in this fracture?

A. We are still wondering.

Q. You don't know?

A. Do not know.

10 Q. But ordinarily would a fracture like this in four months do you testify that there would be a complete union and a man would be normal again?

A. That is right.

GEORGE C. BROADWATER, SWORN.

20 By Mr. Savadove:

Q. Mr. Broadwater, where do you live?

A. 7021 Edmond Street, Tacony, Pa.

Q. By whom are you employed, Mr. Broadwater?

A. The Philadelphia Rapid Transit Company.

Q. Do you recall picking up a party who was lying on the roadside on August 6th, about four-thirty in the morning, on the White Horse Pike, at Berlin?

A. I don't exactly recall the date. I do recall picking a man up and taking him to the hospital.

30 Q. Is that man in Court?

A. Yes.

Q. Do you recognize him?

A. I know him now, yes, sir.

Q. Is that the gentleman? (Indicating plaintiff.)

A. The man with glasses.

George C. Broadwater—Direct

Q. Have you seen Mr. Morrison since the time you took him to the hospital?

A. No, sir.

Q. I wish you would explain to the Court and jury exactly the situation you found Mr. Morrison in at the time you were proceeding along the road at the hour that I mentioned and which you say you remember?

10

A. At the time as I first saw him?

Q. Yes.

A. I was driving down to Cape May, going fishing. I stopped at the lunch car at Berlin and had a bite to eat, and after I made the bend at Berlin, it was foggy. I was driving down in a little Essex coupe, I don't know how far I had got, probably a quarter or a half mile, and something loomed up on the ground in front of me, I thought it was an animal, something that had been hit, and I had to swing out in the road to get around it, and as I did I saw what looked like a wall in front of me to the right side. I jammed on my brakes, I thought something was wrong here, and I turned around and when I come back I found this man lying in the road and the car jammed into the back end of the big truck, just what kind I don't remember, and I proceeded to see what it was, and I seen it was a man torn all up and moaning, and then I tried to set him up, in fact I did get him sitting up, and I tried to flag two —three machines down, and I think the first two didn't see me on account of the condition of the weather, but the third car he knocked two buttons off my overcoat, that close, and I don't know what he halloood, but it didn't sound very congenial.

20

30

So I gathered this man up and put him in the car. I drove on up probably—I don't know—it was in a fog, it seemed like it might be a quarter mile and might be less than a half, anyway it was more than a couple of squares, I am looking for the State Police Barracks, and I think they call that Berlin Barracks, I believe, or Auxiliary. I overshoots my
10 mark and I falls over to the side and goes over and walks right past the entrance to their place, if I am not mistaken. I pounded on the door and didn't get any answer. I went back and got to what looked to me like the entrance to the office. I banged again and somebody said, "What do you want?" I think that is the words; I can't say positive. I asked for a high-powered car and they said they didn't have any. I told them what had happened down the road, I found a man, there was an accident. I
20 said, "I am going up to Cooper Hospital with the man because he is in a bad way," so I says, "you go down where it is, the accident, and found out the particulars of the accident, and I will go up to Cooper Hospital and I will be up there."

Q. And you proceeded to the Cooper Hospital?

A. I started up to the Cooper Hospital, but when I got as far as Haddon Heights the little Essex car I had couldn't stand that 58-60 the way I was making, and she started to thump. I started praying.
30 Just about that time this man that is sitting over there he was mumbling something or moaning and it gives me the idea that it was his leg that was bothering him.

I had his leg hanging on the running board, hanging down, of course, out of the car and saw what

George C. Broadwater—Direct

it was. I put a handkerchief around his foot and pulled it up and rolled it so the foot went black like this. (Indicating.) He didn't say no more. I gets up where the trolley tracks are, I believe—the trolley tracks turn off the Pike. I gets along there and it come to my mind there was a hospital at the Black Horse Pike there, and I go back. God only knows how I got in there, I don't know myself. When I got in there she got to the entrance to the elevator and went dead, all the main bearings shot, my own car. I goes in and walks up to three people that were around. The elevator man was sleeping underneath the floor there and he got out and brought the elevator down and two nurses come and we took him upstairs, and just about that time he was getting his senses and he wanted to fight. 10

I don't know whether it was the doctors or nurses said to shoot something in his arm. He was fighting back. He says, "You ain't going to put me to sleep, because you ain't going to cut my leg off." I stood there and they started sewing him up. I don't know what they did. They put something around him. They got his brother's address and called him up and told him where he was. 20

Q. Do you know how soon after the collision occurred between Mr. Morrison and VanSeiver's truck when you reached that place? 30

Mr. Lloyd: Answer yes or no.

A. I don't know exactly, no.

By Mr. Savadove:

Q. During the time that you were around the site of the accident you hailed several trucks or cars, you said, and nobody stopped?

A. Yes.

Q. How long a period were you there before you
10 got Mr. Morrison in your car?

A. Well, I judge it would take three or four minutes at least after I decided to pick him up off the ground, because he was in such a condition, bloody and cut up and his face all torn up here, blood on there. I was half afraid to pick the man up.

Q. Did you see anybody that had any semblance to being the driver of the truck that was around there?

A. No, I did not. In fact, I only looked at the tail end of the truck. I didn't bother then. My only
20 concern was with the man that was hurt.

Q. Where was the truck with respect to the road itself? Was it off the road or on the road, or was it all the way over to the left or the right?

A. The cars was headed south on the White Horse Pike, that is out of Berlin you turn at the bank, and at that time there was a yellow dirt crown on the road, and then I had been driving trucks and I know a truck can't get far. This truck had the right side all the way off the road but the left tire wasn't off
30 the concrete itself.

Q. The left —

A. The left wheel wasn't, that is heading south.

Q. What kind of a tire was it?

A. That I don't know. I know a truck has a wide tire. I believe at that time it couldn't have been a

George C. Broadwater—Direct

dual, because I don't believe they used duals at that time. As to what tire it was I couldn't say.

Q. This purports to be a picture of the truck. Do you recognize it?

A. That is the kind of tires that would have on, but as far as saying that is the actual look of the truck I couldn't say, because it was a big truck. I know this, that this wheel was—this was the edge of the road—this tire would probably be like that, standing over this way. (Indicating.) That would leave this part of the body on the side of the road off the concrete. 10

Q. Assuming this is the corner of the truck, how much of that truck would you say was over this side, how much of that truck would you say was on the dirt?

A. I judge about to here. (Indicating.)

Q. You judge to about the middle of the second panel from the left? 20

A. Right in there. I wouldn't say for sure. The fact there was a man lying there moaning is what attracted my attention more than anything else. I was heading for a fishing trip and I was pretty sore.

Q. And nobody appeared from the time you got there and took the man, except the cars that had passed you?

A. No, sir. I put the man in the car myself.

Q. Did you see the driver at all? 30

Q. Not at the accident. The State Police brought him up to the hospital and asked me if I recognized him, and I told them no.

Q. That was the first time you saw the man?

A. That was the first time I saw the man. They

told me then they found him over in the cornfield. They know that is a fact.

Q. How long have you been driving?

A. Over fifteen years.

Q. Did you ever drive in your capacity as a professional chauffeur along the White Horse Pike?

A. Yes, sir, I drove many a time both day and
10 night down there with special consignments for both Greyhound and P. R. T.

Q. Are there any lights on the road from Berlin down that you can remember?

A. You mean now?

Q. Yes.

A. At that time the lights would run probably every other one or every three would be a light with a white painted reflector over the top of it.

Q. Do you remember whether or not the truck was
20 parked near the pole or in the vicinity of a pole that had a light on it?

A. I couldn't say that. It was foggy. I didn't see any pole that I was looking for, because I wouldn't be looking for that.

Q. What do you mean it was foggy, where was it foggy?

A. It was foggy from about where the Public Service garage is now down. That is where I ran into the fog first. It was a drifting fog.

30 Q. It was a drifting fog?

A. Yes, sir.

Q. Prior to that time do you remember much fog between Camden and Berlin?

A. Yes, down near Overbrook where the old tool factory was, there is a hotel there now, that was the

George C. Broadwater—Cross

only place you would hit it. It was on a downgrade. Upon on high ground it wasn't.

Cross-examination.

By Mr. Lloyd:

Q. Was there anybody with you? 10

A. No, sir.

Q. Where were you going?

A. Cape May, by way of Egg Harbor.

Q. Where was the truck when you first saw it?

A. When I first saw the truck it was there up against or right against the Ford, with the Ford into the back end of it. That was the first I saw of it.

Q. It was right practically up against a telegraph pole, too, wasn't it? 20

A. I didn't see no pole.

Q. You didn't look for any pole?

A. No, sir, I wasn't even thinking of it.

The Court: He said he did not look or pay any attention to the pole.

By Mr. Lloyd:

Q. The truck was on the right side of the road? 30

A. The truck was on the right side of the road. The first actual view of it was when I was passing it, out of my window.

Q. You didn't hit it?

A. No, I swerved out for the man lying on the ground.

Q. The man who was lying on the ground was on which side of the truck?

A. On the left side, the rear of it.

Q. On the left side of the truck, how far?

A. I couldn't say that. I would say from the rear
10 door of the Ford coupe to the truck. I could say it was positively that far from the truck.

Q. It was six feet?

A. I couldn't say that. I never measured a Ford.

Q. Would you say six inches or five or six feet?

A. I have told you just exactly the distance I think. I wouldn't venture to say it was six inches or six feet.

Q. But in your opinion it was about the distance from which door of the Ford?

20 A. On a Ford coupe there is only the one door on it. I could safely say it was that far.

Q. And you are familiar with Ford coupes?

A. No, I never owned a Ford in my life. I don't handle such stuff.

Q. Any small coupe ——

A. No, sir, Buick coupe, Chrysler, Jordan, Packard and such is the only cars I have had.

30 Mr. Savadove: I object to this line of questioning. The man has testified that he cannot tell, not being a judge of distance, whether it is six feet or six inches.

The Court: He may be cross-examining him for the purpose of testing his knowledge.

George C. Broadwater—Cross

By Mr. Lloyd:

Q. It is your idea it was that far apart, from the door of the coupe to the front of the car?

A. Yes, I would say it was that far anyhow.

Q. How many feet is that about?

A. I don't know.

Q. You can give us some idea whether it is one 10
foot or six feet?

A. No.

Q. You haven't any idea whether it is one foot or six feet?

A. I couldn't say exact, and you are after the exact number of feet, and I couldn't say that.

Q. I asked you your best judgment on how far

A. I couldn't say that. If I say five feet and it is six feet, you have got me on the record that it is 20
five feet.

The Court: He has told you that he cannot judge that distance. I think that is sufficient cross-examination on that point.

By Mr. Lloyd:

Q. I show you a photograph marked Exhibit "A" 30
for identification. Do you recognize that?

A. Yes, that is the State Trooper's Barracks there.

Q. Do you recognize the point where the accident happened?

A. In regards to this, the accident happened down

there somewhere on that right side, as I remember that.

Q. Can you mark on the picture ——

A. No, sir.

Q. —about where it was?

A. No, it was somewhere up in here. (Indicating.)

10 Q. Do you want to put a crossmark on that?

A. Is that perfectly legitimate? I don't know. I am not used to court.

The Court: If you can.

The Witness: I can't mark positive.

Mr. Lloyd: Mark the place in your best judgment where the collision occurred.

20

The Court: This man has said he does not know that the photograph itself shows him where it was. I do not see how he can mark it.

Mr. Lloyd: He points to a place on the photograph where he says it happened.

The Court: I did not so understand his testimony. Now, does he say that?

30

Mr. Lloyd: Put a mark with this pencil on the photograph the point where you pointed to a few minutes ago.

The Witness: Do you want me to mark on here

George C. Broadwater—Cross

where the accident happened or where I think it happened?

The Court: Where you think it happened.

The Witness: The only thing I can do is mark about the distance, that is all. Somewhere right in that vicinity. I didn't count the poles and in the fog I couldn't see my wheels turn forty turns or turn twenty. 10

By Mr. Lloyd:

Q. What time did you leave Philadelphia?

A. I don't just recall that now. It was after two o'clock I know.

Q. What time did the accident happen?

A. I don't know the exact time. The hospital could give you that record. 20

Q. How long did it take you to drive from Philadelphia down to the point of the accident?

A. I generally make Berlin in about forty-two or forty-five minutes normal weather, but the exact time I don't know. I believe at that time I was working a late run and I got done around a quarter to two. In the meantime you go home, change your clothes, throw your fishing tackle in your car and make up your lunch. I always have made it a rule to stop at Berlin and get a cup of coffee and ask if there is anybody going on the way down, and I take them with me. 30

Q. That is what you did this night?

A. Yes, sir.

Q. Now, did a car with a lady and gentleman come up while you were there?

A. While I am actually down at the scene of the accident?

Q. Yes, where you picked him up.

A. No, sir.

Q. Did you see that lady that he spoke about?

10 A. No, sir, I didn't hear anybody speak about

The Court: He said no car came, Mr. Lloyd.

The Witness: I didn't see no cars at all.

By Mr. Lloyd:

Q. Did you have a fight down there with anybody
20 that night about taking him up to the hospital?

A. No. The only —

The Court: You have answered the question.

By Mr. Lloyd:

Q. Now, do you want to qualify that?

A. What do you mean by "qualify"?

30 The Court: You were asked if you had a fight with a man down there at the scene of the accident. Did you or didn't you?

The Witness: No, sir, the only words that were

said to me was the car that knocked the buttons off my coat, that was the only words.

By Mr. Lloyd:

Q. You didn't hit anybody down there?

A. No, sir, I didn't.

10

The Court: That is not cross-examination, Mr. Lloyd.

By Mr. Lloyd:

Q. Now, what kind of headlights did you have on your car?

A. Standard Essex headlights, 1928.

Q. Electric headlights?

A. Yes.

20

Q. Did you have your bright lights on?

A. No, sir, I don't drive with bright lights in a fog.

Q. This night you didn't have your bright lights on?

A. Not at that special time. I had them on before, I guess, because you drive faster when it is clear. You couldn't see with your hand in front of you with bright lights in a fog.

Q. As you approached this truck you didn't have your bright lights on that night? 30

A. When I hit the fog I didn't have my bright lights on.

Q. You had your dimmers on?

A. I had my dimmers on.

Q. You didn't hit the truck, did you?

A. No, sir.

Q. How far ahead of you was the truck when you first saw it?

A. It wasn't in front of me. The first vision I had it was at my shoulder, alongside of it.

Q. In other words, you were on the concrete?

10 A. Yes.

Q. And the truck to your right side?

A. I had swerved out near the center of the concrete to avoid hitting what I thought was an animal, and I saw this looked like a wall there in the fog to me. It was dark. That was the first vision I had of the truck.

Q. Were you there when the Troopers came there?

A. I was down there and knocked on the door and woke the Troopers up, but I didn't see no
20 Troopers there. I sent them down to the accident.

Q. You didn't see any Troopers at all?

A. No, sir, until after I got to the hospital they brought this colored chauffeur or man up and asked me if I knew him.

Re-direct examination.

By Mr. Salvadove:

30 Q. With respect to the rear of the truck where was Mr. Morrison or the object that you tried to avoid in the road? Was he in front of the truck or parallel with the back of the truck, or was he thrown more to the left and behind the truck?

A. He was lying in the road a short space be-

George C. Broadwater—Re-cross

tween the truck and towards the center of the road. In other words, he was in back of the truck to the left on the concrete.

Re-cross examination.

By Mr. Lloyd:

10

Q. And he was near the center of the road, was he?

A. I don't know exactly. I know when I swerved out from him I was still on the concrete, I hadn't went off on the left side of the road, and he was somewhere in that position.

Q. He had swerved to his left?

A. I had swerved more to my left to avoid hitting what I found out afterwards was a man.

Q. How far ahead of you in the road was he when you first saw him? 20

A. Oh, underneath me. If I hadn't yanked the wheel over to the left I would have run over him.

Q. How far in front of you or your car was he when you first saw him?

The Court: He has answered that a couple of times, Mr. Lloyd.

By Mr. Lloyd:

30

Q. How many feet—I will change the question—was he in front of your car when you first saw him?

A. A distance of the dim light rays in a fog, that is all I could say positively. I know that.

Motion for Non-suit

Q. How many feet was he from the front of your car in your best judgment when you first saw him?

A. That is the distance you would see in a fog.

The Court: If you can tell the distance, say so, and if you cannot, say so.

10 The Witness: I can't tell exact in feet, no, sir.

By Mr. Lloyd:

Q. Indicate in this room as closely as you can, not exactly, but as near as you can come to it from where you sit to where he was ahead of your car when you first saw him?

A. About to the edge of that desk is as far as you could see from me.

20 Q. How far would you say that is?

A. I don't know.

PLAINTIFF RESTS.

Mr. Lloyd: (At side bar.) I have a motion to make, if your Honor please, I move for a non-suit on the ground that it now clearly appears from the
30 plaintiff's own testimony that as a matter of law he was guilty of contributory negligence.

(Argument.)

The Court: I think under the testimony that the

Offer of Evidence

question of whether or not the plaintiff was guilty of contributory negligence is a question for the jury. and not a question of law for the Court. The motion will therefore be denied.

Mr. Lloyd: May I have an exception?

The Court: Yes. 10

(Exception noted for defendant.)

DEFENDANT'S EVIDENCE.

Mr. Lloyd: I offer in evidence the two photographs which have been marked for identification. 20

The Court: Is there any objection?

Mr. Savadove: I have no objection whatever to the identification. I would like to ask Mr. Lloyd where the photographs were taken?

The Court: At this point the offer is made of the photographs marked for identification. Is there any objection? 30

Mr. Savadove: There is objection until I find out where the photographs were taken.

The Court: As I recall the testimony with reference to Exhibit "A" for identification there was

testimony on the part of the plaintiff that it represented the road at the point of the Barracks and from then on south. As to the other photograph I do not recall testimony sufficient to make this justifiable, Mr. Lloyd.

Mr. Lloyd: The same witness identified that as 10 being a rear view of the truck, as I recall it.

Mr. Savadove: No, he did not.

The Court: I do not recall with regard to that testimony as to this being the rear of that truck. As I recall it, he said it looked like the truck. As to the one marked Exhibit "A," it may be admitted. That which is marked Exhibit "B" will not be admitted at the present time.

20

ALFRED ANDERSON, SWORN.

By Mr. Lloyd:

Q. Where do you live?

A. 1931 Rodman Street.

Q. You live in Philadelphia, do you?

30 A. Philadelphia.

Q. And whom do you work for?

A. Van Sciver Transportation.

Q. Is that George Van Sciver?

A. It is not.

Q. That is a company that he has since formed.

Alfred Anderson—Direct

Mr. Savadove: This is immaterial.

The Court: I think it is perfectly competent.

Mr. Savadove: George R. Van Sciver is the man we are suing. He was doing business in 1930.

The Court: There is no denial of that. 10

By Mr. Lloyd:

Q. How long have you been working for Mr. Van Sciver?

A. About eighteen years.

Q. Doing what sort of work?

A. Driver and helper.

Q. Were you the driver of the truck the night this accident happened? 20

A. Yes, sir.

Q. Now, what did you do when you reached Berlin?

A. I stopped in a lunch car and had coffee.

Q. What was the condition of the weather that night?

A. Fair.

Q. What do you mean by fair?

A. There wasn't any fog. I didn't run into any fog. 30

Q. What about the sky? What was the condition of the stars?

A. Clear.

Q. Did you run into any fog anywhere?

A. Not all the way down, not to Berlin.

Q. After you had gotten your coffee and started down the Pike again what did you do?

A. I had to stop and I went in a field. I pulled off to the right-hand side of the road and stopped in front of an electric light off of the concrete.

Q. You came down and stopped under a light, is that right?

10 A. Yes, sir.

Q. What part of the road were you on when you stopped under the light?

A. Off the concrete on the shoulder.

Q. How far on the shoulder?

A. All the way off and two feet on the soft dirt on the right-hand side.

Q. With relation to this light which you spoke of, where was the light?

A. Shining on the back of the truck.

20 Q. What was the light on?

A. On a pole.

Q. How did it hang with respect to the road?

A. It hangs down.

Q. I show you this photograph marked Exhibit "A" in evidence, and ask you if you can see the light on that photograph?

A. That is the second light down there. (Indicating.)

30 Q. The second light down there?

A. Below this white pole, and there is another pole, and there is a light here. (Indicating.)

Q. There is a light on the pole with the white band around it?

A. Below the white band.

Alfred Anderson—Direct

Q. Then it was the next light below that, you say?

A. Yes.

By the Court:

Q. The next light or the next pole?

A. The next light. There is a pole or two poles 10 between it.

By Mr. Lloyd:

Q. There are one or two poles between it, and how close to that pole did you park?

A. As near as I could get without hitting, without the truck would be on a slant.

Q. How far would that be in your best judgment?

A. I should say two to three feet. 20

Q. Then what did you do?

A. I had to go in the field.

Q. Now, when you were in Berlin getting something to eat were your lights on?

A. They were.

Q. What kind of lights did you have?

A. Prestolite.

Q. How do they work?

A. From a tank.

Q. What is that? 30

A. From a tank.

Q. Well, are they a gas light?

A. Yes.

Q. And where did you have the tank?

A. It was on the left fender.

Q. How do you turn the light on and off?

A. With a key.

Q. You turn it on from a tank with a key?

A. With a key.

Q. And then it goes to feed something else?

A. Well, whatever you have it on, your two head-lights and your rear light.

10 Q. If the connection from the tank to one of those lights comes off or breaks what happens to the lights?

A. Ordinarily it causes your lights to go out.

Q. As you left the lunch car in Berlin and started down the Pike were your lights lit?

A. They were.

Q. How many lights were lit?

A. I had a lantern and the tail light.

Q. How about your front lights?

20 A. They were lit.

Q. What was the lantern?

A. We always carried a lantern.

The Court: You were asked what the lantern was at this particular time.

By Mr. Lloyd:

Q. What kind of a lantern was it?

30 A. An oil lantern.

Q. And where was that lantern on your truck?

A. On the tail gate, fastened to the chain.

Q. Fastened to the chain?

A. Yes.

Q. On which side of the truck?

Alfred Anderson—Direct

A. The left-hand side.

Q. And did it hang under the tail gate?

A. Under the tail gate.

Q. Now, when you got off your truck to go into the field what lights that you could see were lighted?

A. I could see the red light and see the reflection from the tail light, the white light that shines on your license.

10

Q. How about your headlights?

A. They were lit.

Q. Then you went into the field?

A. Yes.

Q. What was the next you knew?

A. I heard a crash, and when I came out I saw a man sitting in the road hallooing that he was killed, There was a car pulled up, a Packard, and I helped him to go over and sit him on the side of the car, and then went to the Police Barracks.

20

Q. When you went to the Police Barracks did you talk to the police?

A. The police were not there. I rang the bell and some one in the house poked their head out. I told them that I had had an accident. They said all right, they would be right down. As I came out of the yard the police came into the yard.

Q. They came right out, did they?

A. Yes.

Q. Had Mr. Broadwater been there yet when you picked him up and set him on the running board of the other car?

30

A. Not at that time.

Q. Did you see Mr. Broadwater, the man who testified here?

A. The first I saw him was in the hospital.

Q. That was the first time you saw him at all?

A. Yes.

Q. What did you do after you notified the Troopers?

A. Why, I went back to my truck with the Troopers. I walked on back and they drove back.

10 Q. About how far was that from the Barracks?

A. Well, I should say —

Q. Can you tell us in telegraph poles?

A. No, I couldn't. I should say between three and five hundred feet from the Barracks.

Q. Now, do you recognize this photograph marked Exhibit "A"?

A. Yes, sir.

Q. And do you recognize that photograph?

A. Yes, sir, I do.

20 Q. Where is that picture taken from?

A. Here is the Barracks here. (Indicating.)

Q. Indicating the lower left-hand side?

A. Yes, sir, and here was the light here. (Indicating.)

Q. Now, I want you to put a mark on that light. Put a cross mark at the top of the pole that had the light on it that you have indicated?

A. (Witness does as requested.)

30 Q. Now, you are certain that is the pole, are you?

A. That is it.

Mr. Lloyd: I now offer that photograph in evidence, if your Honor please.

The Court: Admitted.

Alfred Anderson—Direct

(Photograph above offered in evidence marked for identification Defendant's Exhibit "C.")

By Mr. Lloyd:

Q. You went down with the Troopers to your truck, is that right?

A. Yes, sir. 10

Q. Where was the automobile?

A. The Ford?

Q. Yes.

A. Under the tail gate.

Q. And was any of it extending beyond the left side of the truck?

A. I really couldn't say to that.

Q. Was it plumb underneath?

A. Plumb under the tail gate.

Q. Plumb under the tail gate? 20

A. Yes.

Q. Were your lights lighted then?

A. When he hit the rear light that put out my headlights, as he knocked the hose off the rear light and bent the rod under the truck and broke the lantern off the truck.

Q. Is this a photograph of the truck there that night?

A. I can't say it was that truck; it was similar to that. 30

Q. One like this?

A. One like this.

Q. Did it have the same kind of a tail light on it as that picture shows?

A. The same kind.

Q. Was that light damaged?

A. This light?

Q. Yes.

A. The glass was broken out of it. There was a red light and a white light, and the light bent under.

Q. What about the connection to the hose?

A. That was knocked off. I had to tie it before I
10 could light up and go to the Police Barracks.

Q. How do those lights work when one is disconnected?

A. The only way you can get service out of them is to tie a knot in the hose, and then you can get lights.

Q. Why is that?

A. Because you lose so much gas. You see it takes the light away from the headlight or whatever light it is.

20 Q. How big a hole is in the jet that fits the headlights?

A. About the size of a pin point.

Q. And this tubing is how big?

A. About the size of a lead pencil.

Q. Was the gas flowing out of that when you got back?

A. When I came back I shut the tank off and tied a knot in the hose so I could light the lights.

30 Q. If one light goes out on these gas lights, that is the connection is broken, will that put the other lights out?

A. It really does.

Q. Was your truck moved any?

A. When I went back it was in the same place.

Alfred Anderson—Cross

Q. It was in the same place after the accident as it was before the accident?

A. Yes, sir.

Cross-examination.

By Mr. Savadove:

Q. Now, Mr. Anderson, by whom were you employed in 1930, at the time of this accident?

10

A. George R. Van Sciver.

Q. Now, what kind of a truck were you driving?

A. An A. C. Mack, five and a half ton.

Q. A five and a half ton Mack?

A. Yes.

Q. Is that a big truck?

A. It is.

Q. What kind of a body did you have on the truck?

20

A. What we call a stake body.

Q. That is an open body, isn't it, with the sides covered by canvas?

A. That is right, and a tarpaulin over the top.

Q. And it has a tail gate, is that right?

A. That is right.

Q. Now, what was the size of your tires?

A. 40 by 7.

Q. Rear tires?

A. Dual.

30

Q. Dual 40X7?

A. Dual 40X7.

Q. And double dual wheels?

A. Yes.

Q. Now, do you know how wide your truck is?

A. I do not.

Q. Can you judge by the distance from where you are sitting to any object here how wide your truck would be, not how long, but how wide?

A. Well, the truck would be about five and a half feet wide.

Q. How tall are you?

10 A. Me?

Q. Yes.

A. Five feet eleven.

Q. Now, what I want to know, I want to know the distance, using this for an example, you say this is like the truck—the distance from here to here, if you know? You say this was like your truck?

A. Yes.

20 Q. The distance from here to here and the distance from here to here (indicating) where would the five and a half feet be?

The Court: Ask him one at a time and indicate what you mean. The record does not show anything.

By Mr. Savadove:

30 Q. What would the distance be from one end of your tire to the other side of your tire, taking in the full space from one end of the tire to the end of the tire, irrespective of the chassis—of the body—how wide would that be?

A. On a body like this?

Q. Was the other truck like that?

A. Five and a half. The body extends right even with the wheels.

Alfred Anderson—Cross

The Court: Oh, no, you were asked about the distance between the wheels measured from the outside of one to the outside of the other. How far is that?

The Witness: Well, I should say it would be like that. (Indicating.)

10

By Mr. Savadove:

Q. About how much in distance from here to any objects that you have here, would that be? Could you judge?

A. No, I couldn't.

Q. Would it be the length of your body if you laid down from end to end, would you be able to stretch from one end to the other?

A. Not five and a half feet. I am five feet eleven. 20

By the Court:

Q. Do you know the distance between the wheels or not?

A. I do not.

By Mr. Savadove:

Q. You are five feet eleven inches tall, is that 30 right?

A. Yes.

Q. Assuming you would lie down alongside there, would your body reach from here to here (indicating) or would it reach beyond?

A. It would reach beyond.

Q. Measuring your height as five feet eleven?

A. Yes.

Q. How about your distance from the edge of the body on the rear part to the edge of the body on the other side, not from front to back, but from side to side, was it eight feet overall, the back of the truck?

10 Was this a five and a half ton truck?

A. I couldn't tell you about the rear of it.

Q. Now, you testified that on this picture with the mark "X" that you were practically under that pole, is that right? That is your testimony?

A. Under this light. (Indicating.)

Q. Now, with respect to this other picture which was taken around the same time and which picture was admitted in the testimony, was this road open at the time in 1930, when you had your accident?

20 A. Was this road here open?

Q. Yes.

A. It was.

Q. You mean this wing here on the road?

A. Yes.

Q. Do you know how wide that is?

A. I should judge it is about feet.

Q. Eight feet?

A. Eight or ten feet, I couldn't say for sure.

30 Q. You say about eight or ten feet, and you don't know how wide the truck was, do you?

The Court: He said he did not.

By Mr. Savadove:

Q. Would you say the truck was eight feet wide from end to end, as far as the body was concerned?

Alfred Anderson—Cross

A. I really couldn't say, because I don't know.

Mr. Lloyd: I will offer this photograph in evidence, if your Honor please.

Mr. Savadove: No objection.

The Court: Let it be marked. 10

(Photograph above referred to offered in evidence was marked for identification Defendant's Exhibit "B.")

By Mr. Savadove:

Q. The record shows this truck was eight feet wide. Would you say the road was that wide?

A. The road was wider than the truck. 20

Q. How far away were you from the light according to your testimony—three feet you said, didn't you?

A. From the light?

Q. Yes.

A. Three feet from the pole.

Q. And how far up would you say the light was on the pole?

A. Well, I couldn't say. It was high enough for the truck to pass under. 30

Q. Just enough for the truck to pass under?

A. With plenty of clearance.

Q. How high is your truck?

A. Why, I think—I don't know for sure, but around seven feet.

Q. Your truck is around seven feet?

A. That is the body.

Q. How about the top of the truck, what would be the distance from the top of the truck to the ground?

A. About ten feet.

Q. You wouldn't say it was fifteen feet, would
10 you?

A. I said about ten feet.

Q. Now, did I understand you to say that you had stopped in Berlin and had proceeded down along the road to the point under the pole, as you said, under the light?

A. Yes.

Q. Before or right after you got off the truck to go into the field did you look at the lights?

A. I did not, but I could see them when I walked
20 off the truck.

Q. See the lights?

A. The rear light and the lantern.

Q. The rear light and the lantern?

A. Yes.

Q. What kind of a rear light do you have? I don't mean the make, the kind of power you use, but what type of lamp do you have? Is it all red or all white?

A. The red showing on the back and white showing on the license.
30

Q. Which side of the truck did you go to in the field?

A. The right-hand side.

Q. In other words, the way the truck was facing you went to your right?

Alfred Anderson—Cross

A. My right.

Q. How far out in the field did you go?

A. I judge it to be about fifty yards.

Q. That is about one hundred fifty feet?

A. Yes.

Q. Well off the road?

A. Yes.

Q. And were you in front of the truck? 10

A. The side of it, you might say nearer to the rear of the truck.

Q. And what did you see as far as the rear light was concerned? What color light did you see?

A. I could see the white from the rear light and the reflection of the red lantern.

Q. You carry a red lantern on your truck?

A. Yes.

Q. Why did you carry a red lantern if your other light was in good condition? 20

A. Why, in case of an accident we had something to guard the back of it.

Q. Isn't it true, Mr. Anderson, that very often when you drive your truck along and your truck hits a bump that once in a while it has put the acetylene lamp out?

A. No, sir, it never occurred with me.

Q. And you say your acetylene lamp was in good condition?

A. Yes. 30

Q. I understood you to testify that the car was up with the tail gate. What was the position of your tail gate with respect to being up or down or half-way?

A. Straight out.

Q. Do you have a light on it?

A. Light on it.

Q. A light on the tail gate?

A. Yes, sir.

Q. After the accident did Mr. Morrison see you?

A. After the accident?

Q. Yes.

10 A. He saw me in the hospital.

Q. Did he see you before?

A. He did, but I don't know whether he recognized me or not.

Q. But you were there?

A. That is right.

By the Court:

Q. Where did you see him?

20 A. Sitting in the road.

By Mr. Savadove:

Q. Right in the road?

A. Yes.

Q. Did you talk to him?

A. I helped him up to the car that came up.

Q. Did you talk to him?

A. No, I didn't say anything to him.

30 Q. You didn't ask him where he was hurt?

A. I set him down —

By the Court:

Q. You say you did not say anything to him?

Alfred Anderson—Re-direct

A. I set him on the side of the car and went to the Police Barracks.

The Court: That has been testified to several times.

By Mr. Savadove:

Q. When did you see the site of this accident last? 10

A. When did I see the site of the accident?

Q. Yes, when were you around that locality last?

A. About three weeks ago.

Q. Did you go out there specially to look at the land and see what was what?

A. No, sir, I was on my way to Atlantic City.

Q. Have you spoken to anybody with respect to this accident?

A. I have not.

Q. And you testify that the road condition as it shows in the picture is the same condition that it was four years ago, is that right? 20

A. Yes, sir.

Re-direct examination.

By Mr. Lloyd:

Q. Have you ever had any other accident than this, Alfred? 30

Mr. Savadove: Objected to.

The Court: The objection is sustained; it is not proper examination.

(Recess until 1:30 o'clock P. M.)

AFTER RECESS.

OFFICER JOHN H. DICKERSON, SWORN.

By Mr. Lloyd:

10 Q. You are a member of the New Jersey State Police?

A. Yes, sir.

Q. And in what capacity now?

A. Detective now.

Q. And what were you on August 6th?

A. A Trooper.

Q. 1930?

A. Trooper.

20 Q. Where were you stationed?

A. In Berlin.

Q. Do you recall the early morning of that day?

A. Yes, sir.

Q. Do you recall an accident having happened near your Barracks?

A. Yes, sir.

Q. Now, what was the first that you knew of any accident?

30 A. If I recall correctly, Trooper Kopf and I had just come in from an investigation at about ten minutes to four that morning, and we had just barely got to bed. I don't know whether we heard the crash or somebody woke us up. We had to get up right away, anyway. I don't recall just how it was that we found out all about it. Either we heard the crash

Officer John H. Dickerson—Direct

or somebody else in the house heard it and woke us up.

Q. What did you do when you either heard the crash or somebody woke you up?

A. Why, went to the scene right away.

Q. How far was your Barracks from the scene of the accident?

A. Approximately three hundred, four hundred 10 feet.

Q. I show you Exhibit "A" and "C," and ask you if you recognize those pictures?

A. Yes, sir.

Q. Does the house in which you were living at that show in Exhibit "A"?

A. Yes.

Q. The first house from the left-hand side?

A. Right.

Q. Now, does the photograph marked "C" show 20 the pole where this accident happened?

A. It does, yes.

Q. Is that the pole that has an "X" marked over it?

A. I am not sure whether it is that one or the one further east. It is one of those poles with the light on it.

Q. Do you recall whether it was the pole with the white band around it or whether it was the next pole south? 30

A. No, I couldn't say now.

Q. Do you recall the old house that is on the right-hand side near the pole?

A. This house?

Q. There are two houses; one was new at the time of this accident.

A. Yes, sir.

Q. Does that refresh your recollection any as to the pole, or as to the position of the truck?

A. It has been too long ago to say definitely. It is either one of those two poles.

10 Q. It is either one of the two poles in the middle of Exhibit "B" with the light over it?

A. Yes, sir.

Q. Now, when your attention was first attracted to this accident what did you do?

A. We went right down to the scene where the truck and the car were together.

Q. As you came out of the house what was the condition of the weather?

A. It was clear.

20 Q. Was there any fog?

A. No, sir.

Q. From the house in which you were living could you see the truck?

A. Yes, sir.

Q. Was there anything to block your view of the truck from that point?

A. Not from the yard in front of the station, no.

Q. And you went straight to the scene then, did you?

30 A. Yes, sir.

Q. Now, when you got there what did you find?

A. There was this large Mack truck on the right side of the road with the Ford jammed against the back of it.

Q. Speak louder, please.

Officer John H. Dickerson—Direct

A. I say there was a large Mack truck standing on the side of the road, the right side of the road, and the Ford coupe had smashed into the back of it.

Q. How close to the telegraph pole was that truck?

A. As near as I can recall, about two or three feet.

Q. It was on its extreme right side of the road, 10 was it, then?

A. Yes, sir.

Q. And did the pole have anything on it?

A. A light.

Q. Did that light reflect on the truck?

A. Yes, sir. The truck was directly under the light.

Q. And did the light also reflect on the Ford car?

A. Yes.

Q. So that at the distance from your Barracks 20 over to the accident could you see both the Ford and the truck?

A. Yes, sir.

Q. What had been the condition of the weather all night up to that time while you were out?

A. As far as I can recall, it was clear, no rain, no fog or anything.

Q. And you investigated this accident, did you?

A. Yes, sir.

Q. Now, did you make notes at that time?

30

A. Right.

Q. And have you a copy of those notes with you?

A. I have a copy of my report, yes, sir.

Q. That is made up by you, is it?

A. It is, yes, sir.

Q. You can refer to your report to refresh your recollection. Refreshing your memory as you do with that, what was the condition of the weather?

The Court: He has testified as to that, Mr. Lloyd.

10 Mr. Lloyd: If your Honor please, he was not quite sure, as I understood it, and this is refreshing his memory from something that was made that night.

The Court: He has not said he was uncertain about anything he testified to. If there is anything more in his report he may testify, but as far as his testimony has gone it is very clear.

By Mr. Lloyd:

20 Q. Did you see Morrison that night at the scene of the accident?

A. I am not certain. I am pretty sure he had gone to the hospital before we got out there.

Q. And you then went to the hospital, did you?

A. Yes, sir.

Q. Before going to the hospital did you observe whether or not there were any lights on the truck?

A. There were no lights on the truck.

30 Q. None at all?

A. No, sir.

Q. What about the rear light, was that broken or damaged?

A. The rear tail light had been broken, yes.

Q. And the Ford was directly under the tail gate, was it?

Officer John H. Dickerson—Cross

A. That is right.

Q. How much of the Ford was extending to the left of the truck?

A. Very little. I would say maybe one or two feet, not much more.

Q. Did you see Anderson turn off the gas to his acetylene lights?

A. Yes, sir. 10

Q. And you could smell the acetylene in the air there?

A. Right.

Q. Now, you then went up to the hospital with Anderson, did you?

A. Yes, sir.

Q. Took him up?

A. That is right.

Q. And as I understand it you asked the driver if he fell asleep? 20

A. Yes, sir.

Q. Did you run into any fog anywhere that night?

A. No, sir.

Cross-examination.

By Mr. Savadove:

Q. You made one statement that when you came there there were no lights on the truck, and you made another statement immediately thereafter and said when you arrived you saw Anderson turn the lights off. 30

The Court: He did not say so. He said he saw him turn the gas off.

Mr. Savadove: All right.

By Mr. Savadove:

Q. Is that so?

A. That is so.

Q. The lights were out, is that right.

A. The lights went out when I got there, yes, sir.

Q. Now, as a matter of fact, this matter is so
10 long ago that everything is pretty hazy to you, isn't
it?

A. No, sir.

Q. Certain parts of it apparently are. You don't
remember whether you heard the crash or whether
somebody waked you up?

A. I can't recall, no.

Q. You can't recall, yet you would say definitely
that the accident occurred at this pole that is
designated on one of these pictures, is that right?

20 No, you said you were not sure whether it was one
pole or the other.

The Court: That is what he testified.

By Mr. Savadove:

Q. If it wasn't this pole, the pole under the light,
and was the other pole, it wouldn't be the pole
under the light?

30 A. It was that pole or that pole, and each had a
light on it.

Q. This other pole is pretty close to the Barracks,
isn't it?

A. It is not very far. Neither pole is very far.

Q. You wouldn't say the accident happened a few
poles up from where they designated, would you?

Officer John H. Dickerson—Cross

A. No, either one of those two poles.

Q. As far as the condition of the road was concerned, was this road that wide? Did you have all those sections at the time the accident occurred in 1930?

A. The road was the same.

Q. I was just concerned with whether it was as wide as it is now? 10

A. Yes.

Q. You are sure about that?

A. Quite positive.

Q. And was back in 1930?

A. Yes, sir.

Q. When you got to the scene of the accident no one was there—that is, Morrison had already gone, is that right?

A. I am pretty certain he had, yes, sir.

Q. Now, did you see how big the truck was which was struck by the Ford? 20

A. I beg pardon?

Q. Did you see how big the truck was?

A. Yes, sure.

Q. How much of that road section that I showed you did it take up, or how far was it from the pole?

A. You mean the shoulder?

Q. Yes.

A. The truck took up the whole of the shoulder. 30

Q. And how much of the other?

A. The concrete?

Q. Yes.

A. Why, very, very little.

Q. Was one wheel over?

A. The left wheel of the truck was just about on the edge of the concrete.

Q. Now, the picture here shows that the body extends over beyond the wheel. In that event then the body would be over on the concrete say maybe a foot or two, wouldn't it?

A. That is what I said. This wheel was just about
10 on the edge.

Q. This wheel was just about on the edge of the concrete, which would bring this out on the concrete?

A. About a foot.

Q. How much light does one of those lights on the pole throw, Trooper Dickerson?

A. You mean candle power?

Q. About how far distant would it cover, one of the lights? Not on the truck, I mean the light on the pole?

20 A. Oh, I can't say.

Q. When you saw the truck did you testify as to how tall or how high you think the truck is?

A. I did not.

Q. Well, can you?

A. I can guess at it, yes.

Q. Well, how close could you come? About how high would you say it was?

A. I would say eleven or twelve feet high.

Q. How high is that light on the pole?

30 A. Oh, that is higher, maybe eighteen or twenty feet.

Q. And the first you saw of Mr. Morrison was in the hospital?

A. Yes.

Q. How soon after the crash or somebody told

Officer John H. Dickerson—Re-direct

you about this thing, did you get to the scene of the accident?

A. Just as long as it took me to get dressed and get out there—five minutes.

Q. What was the position of the truck, and the Ford at that time?

A. What do you mean condition?

Q. The position? 10

A. The truck was on the right-hand shoulder facing west—east; the Ford was directly behind it.

Q. As though they had not been moved, is that right?

A. That is right.

Re-direct examination.

By Mr. Lloyd:

20

Q. By the way, at whose house did you and Trooper Kopf live?

A. Mr. Vonder Tann.

Q. Did Mr. Vonder Tann go out with you that night?

A. He was there, yes, sir.

30

TROOPER JOHN A. KOFF, SWORN.

By Mr. Lloyd:

Q. You are a Trooper in the New Jersey State Police?

10 A. Yes, sir.

Q. And you have been in the State Police how long?

A. About five years.

Q. Were you on duty at Berlin on the early morning of August 6, 1930?

A. I was.

Q. Do you recall an accident having happened near the Barracks that night?

A. I do.

20 Q. What time or approximately what time had you gotten in the Barracks?

A. Between a quarter of four and four o'clock in the morning.

Q. And where had you been during the night?

A. We had been out on an investigation.

Q. Well, had you been patrolling any of the roads?

A. We had been on the White Horse Pike.

Q. What was the condition of the weather that night?

30 A. Fair.

Q. What was the condition of the heaven so far as the stars were concerned?

A. Clear.

Q. Did you run into any fog anywhere that night?

A. No, sir, we did not.

Trooper John A. Koff—Direct

Q. What was the first knowledge that you had of an accident or this accident?

A. Why, as I stated before, we had just come in from an investigation, and I was not asleep yet, I was undressed, and I heard the crash of the accident.

Q. Then what did you do?

A. Immediately got up and started to dress. 10

Q. And when you went out of the house could you see the truck and the Ford from the house?

A. Yes, you could see them from the front porch of the house.

Q. What was the condition of the weather at that time?

A. Clear.

Q. Was there any fog?

A. There was no fog.

Q. What did you do when you came out of the house? 20

A. We went right down to the scene of the accident.

Q. And did you see Anderson, the driver of the truck, there?

A. I don't remember as to whether we saw the driver there or not, this was so long ago.

Q. Do you recall whether or not there were any lights on the truck when you got there?

A. No, sir, I don't remember that. 30

Q. Do you remember smelling the odor of any gas there?

A. I do not.

Q. Did you go near the tail light at all?

A. I noticed that the tail light was broken.

Q. And where was the Ford at that time?

A. The Ford was rammed in underneath the rear end of the truck.

Q. Now, what position on the road was the truck?

A. A small portion of the left wheel of the truck—the truck was facing Atlantic City or east on the White Horse Pike—was on the concrete; the rest of
10 the truck was on the shoulder of the road.

Q. How close would you say the right side of the body was to the telegraph pole?

A. I would say between two and a half to three feet possibly.

Q. About as close as it could get with safety?

A. Without the body striking the upper part of the pole.

Q. Was there anything on that pole?

A. There was a light on the pole.

20 Q. Was that light lighted?

A. Yes, sir.

Q. From your position at the house where you came out did that light reflect on the truck and the Ford?

A. It did.

Q. Was there anything at all to obscure your view of the truck and the Ford from the point of the house?

A. There was not.

30 Q. And about what would you say that was, that distance?

A. I would say between three and four hundred feet, maybe.

Q. I call your attention to Exhibit "C," and more

Trooper John A. Koff—Cross

particularly to a pole with a cross mark in ink over it, and ask you if you recognize that pole?

A. Well, I don't recognize that pole particularly.

Q. Well, I will ask you whether or not that is the pole near which this truck was parked?

A. I don't know whether that was the pole or not. I know where the truck was parked near this pole, a certain pole that had a light on it. I don't know 10 whether that is the pole or whether it is this pole up here. (Indicating.)

Q. Or whether it is the pole with the white line on it?

A. I don't know which one it is.

Q. Did you go to the hospital with Trooper Dickerson?

A. I did.

Q. And there you saw Mr. Morrison?

A. I didn't talk with him there. 20

Q. You just went up there with Anderson?

A. Yes, sir.

Cross-examination.

By Mr. Savadove:

Q. Trooper Kopf, where did you find Mr. Anderson?

A. I don't remember as to whether he was right 30 at the scene of the accident or not when we arrived there.

Q. Was there anybody else around? Was Morrison there when you got there?

A. Morrison?

Q. Yes, the man who was injured?

A. No, I don't think he was. I think he had been taken to the hospital already.

Q. And you testified that the truck was parked part of it out on the road with the projecting side of the body out still further?

A. A small portion of the wheel out on the concrete.

HUGO VONDER TANN, SWORN.

By Mr. Lloyd:

Q. Mr. Vonder Tann, where do you live?

A. Berlin.

20 Q. How long have you lived there?

A. Since 1920.

Q. I show you a photograph marked Exhibit "A," and ask if your house appears in that picture?

A. Yes, this house here. (Indicating.)

Q. Won't you put a crossmark over that house, please? Make a large one, won't you, please?

A. (Witness makes crossmark on photograph.)

Q. Who lived in that house with you at that time?

A. The State Police.

30 Q. Were Troopers Dickerson and Kopf on duty and living with you at that time?

A. They were.

Q. Now, do you recall the early morning of August 6, 1930?

A. I do.

Hugo Vonder Tann—Direct

Q. There was an accident near your house on that morning?

A. There was.

Q. What was the first knowledge that you had of any accident?

A. Some one came to the door and knocked on the door and said, "There is an accident right below our house." Afterwards it appeared it was this colored gentleman who was driving the truck. 10

Q. When you were told that what did you do?

A. I reported the accident to the men in charge of the office.

Q. Did you then dress and go to the scene of the accident?

A. I did.

Q. And do you recall which pole it was, whether it was the pole with the white line around it or whether it was the next pole down with the light on it? 20

A. Why, it is the second right from this old house here. (Indicating.)

Q. Then it is the one under the crossmark?

A. That is right.

Q. Where was the truck?

A. On the right side of the road.

Q. What was the condition of the weather?

A. Clear.

Q. When you came out of the house could you see any fog? 30

A. No, no fog.

Q. Did you look in the direction of the accident when you came from your house?

A. I did.

Q. And could you see the truck and the Ford?

A. You could.

Q. From your house?

A. You could.

Q. Was there anything at all to obstruct your view from your house to the truck and the Ford?

A. No.

10 Q. Did you notice the condition of the skies that night?

A. The stars were shining.

Q. When you went down to the scene of the accident whereabouts was the truck with relation to the pole?

A. It was parked almost right direct under the light.

Q. Was that light lighted?

A. It was.

20 Q. And did that illuminate both the truck and the Ford?

A. Yes, it did.

Q. Now, what is your business, Mr. Vonder Tann?

A. In the garage business.

Q. And how long have you been in the garage business?

A. Since 1910.

Q. They had Prestolites those days, didn't they?

A. They did.

30 Q. Are you familiar with the Prestolite systems?

A. Yes.

Q. How are they connected up to the lights from the tank?

A. Well, by copper tubing and rubber hose.

Hugo Vonder Tann—Direct

Q. How large are the jets through which the gas comes to make the light?

A. Very small, about the size of a pin.

Q. About the size of a pin?

A. Yes.

Q. And how large is the pipe?

A. Well, that varies. It may be three-sixteenths, one-eighth. 10

Q. What happens, assuming that all lights are lighted, two headlights and a tail light on the truck, in the event the pipe is broken between one of those lights, what happens to the other lights?

A. They go out.

Q. And why do they go out?

A. Because the pressure is released; it goes out of the biggest outlet.

Q. And that is always true with acetylene?

A. Yes. 20

Q. Did you observe the tail light on the truck after the accident?

A. It was broken.

Q. Did you smell the odor of gas around the truck as you got there?

A. Well, there was the odor around there of gas.

Q. That was acetylene gas, you could recognize it?

A. There was some gasoline spilled from the car, too. I didn't take particular notice to that. 30

Q. There was some odor of gas?

A. Yes, some odor.

Q. Did you see what Anderson did with respect to the tail light?

A. No.

Q. You didn't notice that?

A. No.

Q. When you got down there were there people there?

A. There was no one there.

Q. Nobody there?

A. No.

10 Q. You were the first one there?

A. I was the first one there. I walked up right in back of Mr. Anderson.

Q. Was Anderson there?

A. Yes, he walked ahead of me.

Q. He is the one that came and woke you up?

A. He came and woke me up.

Q. That is the colored boy?

A. That is the colored man, the man that drove the truck.

20 Q. And you went back with him?

A. I went back with him.

Cross-examination.

By Mr. Savadove:

Q. Who went with you when you went back?

A. Anderson.

Q. Were there any troopers with you?

30 A. No.

Q. Was Morrison there?

A. No.

Q. Isn't there some other way of tying up these acetylene lamps besides tying a knot in the tube?

A. What is that?

Hugo Vonder Tann—Re-direct

Q. Is there any other way of shutting off one of these acetylene lamps besides tying up the rubber tube to shut off the flow?

A. Well, you can shut the tank off.

Q. Here is the picture of an acetylene lamp. What is that directly under there? It looks like a valve there to me.

A. It looks like a valve to me. 10

Q. Would that valve shut it off?

A. That valve would shut it off, yes.

Q. There wouldn't be any necessity to tie up the rubber tube, would there?

A. Sometimes they make vents or cuts in the tubing and they put rubber tubing in.

Re-direct examination.

By Mr. Lloyd: 20

Q. I don't think I asked you what position the truck and automobile were in on the road?

A. They were off the road.

Q. And how far from the telegraph pole?

A. Do you mean the front end of the truck or the side of the truck?

Q. No, the side of the truck.

A. Within about a foot or so from the telephone pole. 30

Q. As close as it could safely get?

A. What is that?

Q. As close as it could safely get?

A. Yes, because the shoulder leans and the truck

being large, from ten to twelve feet high, would almost touch a pole if you attempted to go by it.

FRANK H. AHERN, SWORN.

10 By Mr. Lloyd:

Q. Mr. Ahern, you are connected with the Weather Bureau at Philadelphia?

A. Yes, sir.

Q. And have you the records of the weather at four o'clock in the morning of August 6, 1930?

A. I have the Philadelphia local record, yes, sir.

Q. What was the temperature —

20 Mr. Savadove: I would like to object to this line of testimony, if Your Honor please.

The Court: Why?

Mr. Savadove: If Your Honor please, there is nothing in our record that shows that the weather at the time was not clear in certain places. This man is from the Philadelphia Local Weather Bureau. He would not be conversant, even though he
30 would have his knowledge, as to whether or not there was intermittent fog in sections or places other than the City of Philadelphia, and I don't think his testimony is relevant.

The Court: The question was asked the temperature?

Frank H. Ahern—Direct

Mr. Lloyd: Yes, Your Honor.

The Court: Objection sustained.

By Mr. Lloyd:

Q. What was the velocity of the wind at that time
in the morning? 10

Mr. Savadove: If Your Honor please, I would
like to object to this line of questions.

The Court: Is this entirely in Philadelphia?

The Witness: Yes.

The Court: I do not think it is competent testi-
mony, Mr. Lloyd. 20

By Mr. Lloyd:

Q. Is there any difference in the velocity of the
wind or the temperature between Philadelphia and
Berlin, New Jersey?

Mr. Savadove: I object to that. He cannot tes-
tify to that. 30

The Court: Why not? He may know.

Mr. Savadove: Well, I think a personal opinion
would be physically impossible.

The Court: That is your idea of it, but he is asked whether he knows. He may say yes or no.

By Mr. Lloyd:

Q. (Repeated.) Is there any difference in the velocity of the wind or the temperature between
10 Philadelphia and Berlin, New Jersey?

A. We have no comparative observations between the two places, so I could not answer the question.

(No cross-examination.)

DEFENDANT RESTS.

20 PLAINTIFF'S REBUTTAL EVIDENCE.

JAMES E. MORRISON, recalled in rebuttal.

By Mr. Savadove:

Q. As I remember, I understood you to say immediately after the accident you were conscious?

The Court: He said that he was conscious during
30 all the time that he was on the road.

By Mr. Savadove:

Q. Do you remember being placed on the running board of an automobile by Mr. Anderson?

*Defendant's Motion for Direction of
Verdict*

A. No, sir.

Q. Were you placed on the running board of an automobile?

A. No, sir.

Q. Did anybody touch you outside of the man who took you to the hospital?

A. Only Mr. Broadwater. 10

(No cross-examination.)

Mr. Savadove: I offer in evidence, if Your Honor please, the examination of the plaintiff taken in advance of trial.

The Court: No objection?

Mr. Lloyd: No, Your Honor. 20

The Court: It may be admitted.

PLAINTIFF RESTS.

TESTIMONY CLOSED.

(Counsel for defendant moves for a directed verdict in favor of the defendant for the same reasons previously mentioned in his motion for a non-suit.) 30

(Motion denied; exception noted for defendant.)

(Argument.)

CHARGE TO THE JURY.

PALMER, J.:

Ladies and gentlemen of the jury. This is a suit brought by James E. Morrison, as plaintiff, against
10 George R. Van Sciver, as defendant, to recover damages and compensation for injuries alleged to have been caused by the negligent operation of a truck owned by the defendant, Van Sciver, and driven by his servant and employee. There is no question in this case but that the defendant, George R. Van Sciver, was the owner of the truck involved in the collision, and that his servant and employee was in charge of that truck at the time of the accident.

The allegations on the part of the plaintiff, James
20 E. Morrison, are that on or about the 6th day of August, 1930, he was driving his car in a general southeasterly direction on the White Horse Pike at or near a point shortly below or eastwardly from the Town of Berlin, and that as he was driving along the road he came into collision with the truck owned by the defendant, which according to the allegation of the plaintiff was parked on the road and without any lights on it.

The defendant on the other hand alleges that the
30 truck was not parked on the concrete portion of the road, but was parked on the shoulder to the right of the concrete section of the road, and that it did have on it both headlights and a tail light. Those are substantially, ladies and gentlemen, the allegations on the part of the plaintiff and defendant.

Charge to the Jury

This case like others that you have had and others that you will have is founded upon negligence. As I said to you in the beginning, the claim arises by reason of an allegation of the negligent operation of an automobile truck at the time and place in question, and negligence in the law of this State has been defined to be the failure to do that which a reasonably prudent man would do under the circumstances with which he is confronted, or the doing of some act that a reasonably prudent man should not do under the circumstances with which he is confronted. It is the failure to observe for the protection of another person that degree of care, precaution and vigilance which the circumstances justly demand, whereby such other person suffers injury. 10

The allegation in this case is that the defendant left his truck parked on the road without a light. I say to you that the first question for you to consider is whether or not there was negligence in the operation of the truck at the time and place in question, or in the management of that truck. If you find that there was no negligence on the part of the defendant at the time and place in question, that, of course, ends the case and there should be a verdict of no cause of action. If, on the other hand, you find that there was negligence on the part of the defendant, your next question is whether or not that negligence was the proximate cause of the injury of which the plaintiff complains, and by proximate cause is meant that cause which naturally and probably led to and which might have been expected to produce the result. It is the efficient cause, the one 20 30

that naturally or necessarily set the other causes in motion.

Ladies and gentlemen, the burden is upon the plaintiff to satisfy you by the greater weight of the believable testimony of the truth of his allegation. By that burden is meant not necessarily the greater number of witnesses; it means the quality rather
10 than the quantity of the testimony, but that burden is upon the plaintiff in this case.

If you find that the defendant was negligent, and that his negligence was the proximate cause of the injury of which the plaintiff complains, and that the plaintiff has carried that burden, then before you can find a verdict for the plaintiff you have to consider the question of contributory negligence. It is alleged on the part of the defendant that the plaintiff by his own negligence contributed to his injury.
20 Our law provides that where one through his own negligence has contributed to the cause of his injury in such a way that but for his own negligence the injury would not have occurred, then he cannot recover. The law does not recognize any differences in degrees of negligence, so that if from the testimony you find that the plaintiff was negligent within the definition that I have given you of negligence, then, of course, he cannot recover and there should
30 be a verdict of no cause of action.

As to this defense of contributory negligence, the burden of proving it is upon the defendant. The defendant must satisfy you by the greater weight of the believable testimony that the plaintiff was negligent in such a way that he contributed to his injury

Charge to the Jury

in order for this definition of contributory negligence to be effective.

If you find that the defendant was negligent, that his negligence was the proximate cause of the injury of which the plaintiff complains, and that the plaintiff has carried that burden, and that the plaintiff was not guilty of contributory negligence, then you come to the question of damages. 10

If you find that the plaintiff is entitled to a verdict, he is entitled to reasonable compensation for the hospital and medical bills that have been incurred in an effort to have himself cured of his injury. It makes no difference whether they have been paid or not, if you find that he is entitled to a verdict he is entitled to reasonable compensation for those bills. He is entitled to reasonable compensation for the pain and suffering that he has endured since the date of the accident to the present time, 20 and any pain and suffering that he will endure in the future, if you find from the testimony that such pain and suffering will endure from this injury, and if you find that the injury came as a result of the negligence of the defendant. He is also entitled to reasonable compensation for any permanent injury that there may be to him, if you find from the testimony that that permanent injury is due to the negligence of the defendant. If you find a verdict for the plaintiff it will be one sum of money, taking into consideration 30 in your deliberation the things that I have told you may be considered by you in arriving at that verdict.

Ladies and gentlemen, you are the sole judges of the facts. What counsel may have said or what I

may have said with regard to the testimony is not controlling upon you. You are to take your recollection of the testimony as it has been given to you by the witnesses, and having found the facts apply the law as I have given it to you to those facts. This case should not be decided by reason of any sympathy, passion or prejudice for or against either of
10 the parties to this suit. In a case of this kind neither sympathy, passion or prejudice has any place. It is to be decided upon the testimony that has been presented to you, and upon that alone. There may be in this case, ladies and gentlemen, a verdict for the plaintiff for such sum of money as will be reasonable compensation for the things that we have indicated to you may be considered by you, or a verdict of no cause of action. You may retire.

20

30

Off. Ex. a.
w
H. J.

Off. Ex. A.
Admitted



2
08/15/55

Slip 13
Z



28-31

111

1
off 30

Self & c
Z



721



Grounds of Appeal

GROUNDS OF APPEAL.

(Filed Sept. 6, 1934.)

NEW JERSEY COURT OF ERRORS
APPEALS.

10

| | | |
|--|---|--|
| JAMES E. MORRISON, <i>Respondent,</i> v. GEORGE R. VAN SCIVER, <i>Appellant.</i> | } | Action at Law. On Appeal from Supreme Court. Grounds of Appeal. |
|--|---|--|

20

The appellant, George R. Van Sciver, states the following grounds of appeal:

1. The trial Court erred in refusing the appellant's, George R. Van Sciver, motion for a non-suit at the conclusion of the plaintiff's testimony upon the grounds stated therein as follows:

"I move for a non-suit on the ground that it now clearly appears from the plaintiff's own 30 testimony that, as a matter of law, he was guilty of contributory negligence."

2. The trial Court erred in overruling appellant's, George R. Van Sciver, motion for a directed verdict

in favor of the defendant, George R. Van Sciver, at the conclusion of the entire case upon the grounds stated therein.

3. The trial Court erred in permitting the witness for the plaintiff, Stanley Brown, over defendant's, George R. Van Sciver, objection, to answer the following question:

20 “Q. Dr. Brown, assuming a person has a break in the leg, he has a condition in which the bone fails to knit, and it is necessary then to form or try to form another union, so we take the next step and try to perfect that union, after that step has been taken and the bone goes on for a period of time there is still another condition and the bone refuses to knit, that comes off on maybe five or six times, each time we are trying to build up the bone tissue, and I want to know whether or not at any time in the stage of the building up of the bone tissue would it be possible that the bone, instead of building up, would break down to the extent that it would be impossible to make a union regardless of what medical science did in respect to that leg, to the extent that the leg would have to be amputated?”

30 “A. It sometimes happens that after repeated operative procedure and failure of the bone to unite that it is far preferable to have part of the leg amputated, with an artificial leg applied with which they can get around to all intents and purposes apparently normally without the

Grounds of Appeal

aid of crutches or any external form of support other than the artificial leg.”

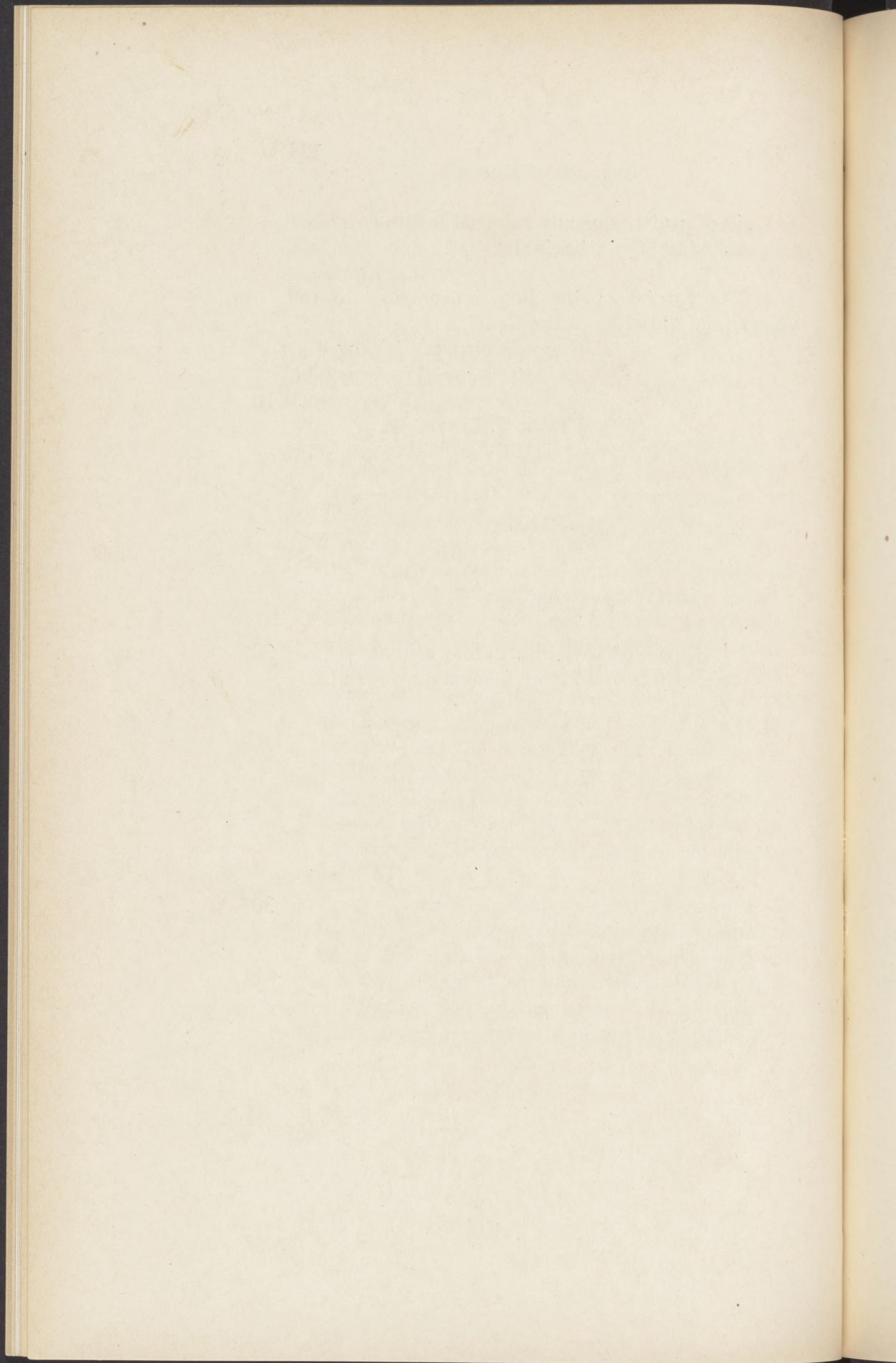
4. The verdict of the jury is contrary to the charge and direction of the Court.

STARR, SUMMERILL & LLOYD,
Attorneys for Appellant,
George R. Van Sciver. 10
 FRANK T. LLOYD, JR.,
Of Counsel.

[ENDORSED]

Service of the within hereby acknowledged this 4th day of September, 1934. 20

30



NEW JERSEY COURT OF ERRORS
AND APPEALS.

JAMES E. MORRISON,
Respondent,

v.

GEORGE R. VAN SCIVER,
Appellant.

ACTION AT LAW.

ON APPEAL FROM NEW JERSEY SUPREME COURT,
CAMDEN COUNTY.

DEFENDANT'S APPEAL FROM PLAINTIFF'S JUDGMENT IN
THE AMOUNT OF \$15,000.

BRIEF OF DEFENDANT-APPELLANT.

(Italics ours unless otherwise noted.)

STATEMENT OF THE RECORD.

This case was tried before Judge V. Claude Palmer, with a jury, at the Camden Circuit. The jury returned a verdict in favor of the plaintiff, James E. Morrison, in the sum of \$15,000.

STATEMENT OF FACTS.

The controversy in this case arises as the result of a rear end collision which occurred on August 6, 1932, on the White Horse Pike at about 4 A. M. in the morning when a Ford coupe being operated by the plaintiff in an easterly direction toward Atlantic City ran into the rear end of a truck owned by the appellant. At the time of the accident this truck was parked upon its right-hand side of the road facing toward Atlantic City.

Plaintiff's testimony discloses that it was dark and very foggy and that because of this fog the plaintiff could not see as far as the radiator cap of the car he was driving (C., p. 36, l. 30). Plaintiff testifies that he was proceeding through this fog at a speed between twenty and twenty-five miles an hour (C., p. 11, l. 24) and that the truck which he struck was pulled over on the right-hand side of the road with the greater portion of it off the concrete, although the left-hand wheel and the body over the wheel was on the concrete (C., p. 57, l. 10). Plaintiff states that because of the heavy fog which completely cut off his view he did not see the truck until he collided with it (C., p. 30, l. 20). Plaintiff testified he saw no lights.

The defendant's testimony places the truck in the same relative position, except that it was parked all the way off the concrete portion of the highway (C., p. 72, l. 10) and directly under a street light,

Brief of Defendant-Appellant

and that its rear light, together with an additional rear lantern, were lit, and that the night was clear (C., p. 71, l. 20; C., p. 90, l. 20).

ISSUE ON APPEAL.

It is submitted that the plaintiff was clearly guilty of contributory negligence as a matter of law, that the alleged negligence of the defendant was not the proximate cause of plaintiff's injury. These questions are presented to this Court by virtue of the exceptions taken by the defendant to the refusal of the trial Court to grant defendant's motion for a non-suit and a directed verdict.

ARGUMENT.

THE COURT ERRED IN REFUSING TO GRANT
DEFENDANT'S MOTIONS FOR A NON-
SUIT AND A DIRECTED VERDICT.

The questions involved upon this appeal have to do with the proximate cause of plaintiff's injury and the contributory negligence of the plaintiff in the operation of his automobile immediately prior to the time when he ran into the defendant's truck.

Brief of Defendant-Appellant

The only eye-witness as to what took place prior to the collision was the plaintiff himself. He testified that he had gone to work in Atlantic City on the morning preceding the accident and had driven his car practically all day. Upon his return to Atlantic City in the evening he received a telephone call advising him that his father was sick in Philadelphia. Thereafter he drove from Atlantic City to Philadelphia and after only two or three hours' sleep in Philadelphia started back in the early morning for Atlantic City. Plaintiff repeatedly testified that it was dark and foggy and that he was driving between twenty and twenty-five miles an hour. Plaintiff never saw the truck which he struck until after the collision. As the plaintiff explains it (C., p. 11, l. 22):

“Q. How fast were you proceeding?

A. Twenty or twenty-five miles an hour.

Q. As I understand you to say, you had stopped at the lunch wagon and had a cup of coffee?

A. Yes, sir.

Q. And about a mile and a half up the road you struck this big truck?

A. Yes, sir.

Q. Did you see the truck?

A. No, I positively did not see the truck.

Q. Why didn't you see the truck?

Q. Was there anything having to do with the condition of the road and the condition of the

Brief of Defendant-Appellant

weather, and the condition of the truck, that would prevent you from seeing it?

A. It was very dark and foggy.

Q. Were your lights lit?

A. My lights were lit, yes, sir.

Q. Do you remember whether or not the lights on the truck were lit, the rear lights?

A. No, sir; positively no light on the truck.

Q. And you struck the truck?

A. Yes."

And on page C., p. 36, l. 19:

Q. How far could you see through this fog that you are talking about?

A. I couldn't see through the fog.

Q. How far?

A. That I couldn't say.

Q. Could you see your radiator cap?

A. No, sir.

Q. You couldn't see your radiator cap at all?

A. No, sir.

Q. Of course, if you couldn't see the radiator cap you couldn't see anything in front of that, could you?

A. No, sir."

Assuming the plaintiff's testimony to be true with regard to his speed, he was moving between twenty-nine and thirty-six feet a second through a fog so thick as to make it impossible for him to see his own radiator cap. Under these circumstances his

opportunity for observation as pointed out by the Supreme Court in the case of *Bacharde v. Homusiok*, 9 Misc. 747, was practically non-existent.

It will be remembered that defendant's testimony, like defendant's testimony in the *Bacharde* case, *supra*, discloses that the defendant's truck was equipped with a Presto-lite system of lights, that these lights were lighted, and that in addition to the regular rear light there was a lantern, which was also lighted. The uncontradicted testimony discloses that these lights were broken as a result of the collision. Officer Dickerson and Trooper Koff testified that the plaintiff's Ford was jammed under the rear end of the truck, that the defendant's lights were broken. Further, Officer Dickerson testified that he saw the driver of defendant's truck turn off the gas and could smell the acetylene in the air. While under these circumstances it is strongly urged that there was no evidence of negligence on the part of the defendant and, therefore, defendant's motion should have been granted, nonetheless appellant at this time desires to present at the outset the question of plaintiff's CONTRIBUTORY NEGLIGENCE.

It is submitted that the testimony of the plaintiff in this case unquestionably convicts him of contributory negligence. His testimony that he was proceeding through a dense fog blindly with no vision at a speed which made it impossible for him to stop his car within the scope of his vision, is an admission that plaintiff did not have his car under proper control. More than that, in his failure to take any

Brief of Defendant-Appellant

steps for his own protection when faced with a complete loss of vision, it discloses a complete disregard on the part of the plaintiff for his own safety and the safety of others on the highway. In the face of known danger the plaintiff continued on without checking his speed, or taking any precaution whatsoever for his own safety.

This Court has on many occasions held that where it appears by the plaintiff's evidence that his own negligence proximately contributed to his injury, it is the duty of the trial Court to grant a non-suit or to direct a verdict.

New Jersey Express Company v. Nichols,
33 N. J. L. 434 (Errors and Appeals,
1867);

Pennsylvania Company v. Righter, 42 N.
J. L. 180, 181 (Errors and Appeals,
1880);

James v. D. L. & W. R. R. Co., 92 N. J. L.
149, 164 (Errors and Appeals, 1918);

Damus v. Public Service Railway Co., 102
N. J. L. 644, 646 (Errors and Appeals,
1926);

Branigan v. Demarest, 109 N. J. L. 123, 124
(Errors and Appeals, 1932);

Walling v. General Woodcraft Co., 110 N.
J. L. 561, 563 (Errors and Appeals,
1933);

*Trimboli v. Public Service Co-ordinated
Transport*, 111 N. J. L. 481, 486 (Errors
and Appeals, 1933).

Mr. Justice Reed, in delivering the opinion for this Court in the case of *Pennsylvania R. R. Co. v. Righter, supra*, stated the rule as follows, p. 183:

“The legal rule that where a person receiving an injury has, by his own negligent conduct, partly aided in occasioning the injury, he cannot recover from the other party whose act assisted, has been so often asserted in the courts of this State, that a restatement of the doctrine, on the ground upon which it rests, would be wasted labor. *Moore v. Central R. R. Co.*, 4 Zab. 824; *Runyon v. Central R. R. Co.*, 1 Dutcher, 556; *Telfer v. Northern R. R. Co.*, 1 Vroom, 188; *Harper v. Erie R. R. Co.*, 3 Vroom, 88; *Mathews v. Pennsylvania R. R. Co.*, 7 Vroom, 531; *Toffey v. Del., Lack. and West. R. R. Co.*, 9 Vroom, 525; *Bonnell v. Del., Lack. and West. R. R. Co.*, 10 Vroom, 300.”

Likewise it was stated by this Court in its opinion in the case of *Branigan v. Demarest, supra*, affirming a judgment of non-suit granted because of plaintiff's contributory negligence, p. 124:

“If the injury was occasioned in any degree by the plaintiff's own negligence, he is without redress, unless the act of the defendant amounted to willful trespass or intentional wrong.”

Where it clearly appears from the testimony that contributory negligence does exist and that it has

Brief of Defendant-Appellant

a causal relation to an injurious accident the question becomes one of law for the Court.

Sharpe v. Public Service Ry., 103 N. J. L. 583, 585 (Errors and Appeals, 1927).

This Court has on many occasions stated that the test of contributory negligence is the absence of such caution as a person of ordinary prudence would exercise under the circumstances.

CONTRIBUTORY NEGLIGENCE has been defined by the American Law Institute in its recent Restatement of the Law of Torts (1934), as follows:

“Contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection and which is a legally contributing cause, co-operating with the negligence of the defendant in bringing about the plaintiff’s harm.”

The standard of conduct to which the plaintiff must conform for his own protection is determined in the same manner and subject to the same rules as the standard to which a defendant must conform for the protection of the plaintiff or the class to which the plaintiff belongs. The same rule is applied to determine the contributed negligence of the

plaintiff as is applied to determine the negligence of the defendant. The only distinction between contributory negligence and negligence which subjects a defendant to liability for harm upon others is that negligence is conduct which creates undue risk to others, while contributory negligence is conduct which involves an undue risk of harm to the person who sustains it. In the one case the reasonable man, whose conduct furnishes the standard to which all normal adults must conform, is the person who pays reasonable regard to the safety of others, while in the other case the reasonable man is a reasonably prudent man, who pays reasonable regard to his own safety.

Specifically the American Law Institute has stated in its restatement (Section 474, p. 1247):

“If the defendant wrongfully deals with a highway so as to make it dangerous for public travel, a traveler injured thereby is barred from recovery by his failure to exercise reasonable vigilance to ascertain the condition of the highway.”

When the negligent act of the plaintiff is necessary to make a dangerous situation negligently created by the defendant effective in harm, the plaintiff's negligence is always a contributory factor in producing his harm and as such prevents him from recovering against the negligent defendant.

AN APPLICATION of these fundamental rules of contributory negligence to the present case dis-

Brief of Defendant-Appellant

closes without question that this plaintiff in driving recklessly on with his vision completely obscured at a speed of twenty-five miles an hour was acting not only in complete disregard of his own safety but the safety of others on the highway. His testimony discloses that he had failed to take such precautions as a reasonable man could be expected to take in view of his lack of vision.

Assuming for the moment that the plaintiff, notwithstanding his lack of visibility and opportunity for observation, was correct in his statement that there were no lights, nonetheless as a matter of law he was guilty of contributory negligence, by his reckless disregard of his own safety.

STANDARD OF CARE.

Essentially we are dealing with the standard of care required of a plaintiff using the highway under the conditions set forth in the testimony. As was stated by Mr. Justice Holmes in delivering the opinion of the United States Supreme Court in the case of *Baltimore & Ohio R. R. Co. v. Goodman*, 275 U. S. 66, 67, reversing the judgment of the Circuit Court of Appeals on the ground that a verdict should have been directed for the defendant because of the contributory negligence of the plaintiff, *where we are dealing with a standard of conduct and that standard is clear, it should be laid down once and for all by the courts.* This doctrine has been recognized by our courts in numerous cases.

Sharpe v. Public Service Ry. Co., 103 N. J. L. 583, 585 (Errors and Appeals, 1927);

Brief of Defendant-Appellant

Branigan v. Demarest, 109 N. J. L. 123, 124
(Errors and Appeals, 1932);

Stryker v. Pennsylvania R. R. Co., 104 N.
J. L. 299.

This Court in the case of *Sharpe v. Public Service Ry. Co.*, *supra*, in its opinion delivered by Justice Lloyd, referred to such a standard of care in the following language, p. 586:

“There was evidence in abundance of the defendant’s mistake in that he was operating at high speed and without warning; on the other hand, there was, as we have said, also conclusive evidence of the failure of the plaintiff to use that ordinary degree of care which, if it had been exercised, would have saved him from the untoward consequences which resulted.”

As Justice Lloyd points out in the *Sharpe* case, *supra*, it was the heedless proceeding by the plaintiff in the face of danger which, in part at least, brought him to his misfortune. Time after time this Court has held that under no circumstances is the plaintiff relieved of the duty of exercising the highest degree of care in avoiding danger to himself. As was explained in the *Sharpe* case, *supra*, the fact that defendant may be negligent does not relieve the plaintiff of the duty of acting as a reasonable man should under the circumstances and taking due regard for his own safety.

In the case of *Trimboli v. Public Service Co-ordinated Transport*, 111 N. J. L. 481, this Court

Brief of Defendant-Appellant

in its opinion delivered by Judge Wells makes this statement:

“It may well be that the facts as to the negligence of the defendant Goeckel raised a question for the jury to decide. If, however, it appeared by plaintiff’s evidence when she rested her case, as we think it did, that the decedent’s own negligence contributed to the injury in such a manner that if he had not been negligent, he would have received no injury from the negligence of the defendant, it was the duty of the Court to non-suit. *New Jersey Express Co. v. Nichols*, 33 N. J. L. 434; *Branigan v. Demarest*, 109 Id. 123.

It is clear that had decedent looked either before he left the trolley car or before he started to walk to the sidewalk, he could have seen the approaching truck.

The decedent was under obligation to look. He could not blindly walk across the highway without making an effective attempt to observe the traffic conditions thereon and to act on that observation according to his best judgment.

The plaintiff’s witnesses proved he made no observation at all, at a time when an observation would have acquainted him with the dangerous situation into which he was precipitating himself.

The fact that decedent was alighting at or near a crosswalk and thereby had a superior right under the Traffic Act, did not relieve him of his duty to exercise reasonable care for his

Brief of Defendant-Appellant

safety. *Bora v. Yellow Cab Co.*, 103 N. J. L. 377; *Venghis v. Nathanson*, 101 Id. 110.

This Court recently held in *Branigan v. Demarest*, *supra*, that *it was the duty of a person walking on the highway to make some observations that would be reasonably effective for her own safety, and that her failure so to do, constituted contributory negligence as a matter of law, precluding a recovery, though the defendant negligently operated the automobile with which she collided.*

The evidence of contributory negligence on the part of the decedent, as regards the defendant Goeckel, is clear and convincing.”

Nor does the fact that plaintiff had a right to anticipate that the defendant would obey the provisions of the Traffic Act relieve plaintiff of his responsibility to act cautiously for his own safety.

Branigan v. Demarest, 109 N. J. L. 123, 126
(Errors and Appeals, 1932);

Bora v. Yellow Cab Co., 103 N. J. L. 377
(Errors and Appeals, 1927).

Likewise this Court has held that the plaintiff is not relieved of his obligation to refrain from contributing to his own injury because of the alleged negligence of the defendant in failing to comply with some statutory requirement.

In the case of *Pennsylvania R. R. Co. v. Righter*, 42 N. J. L. 180, this Court reversed a judgment for

Brief of Defendant-Appellant

the plaintiff on the ground that he should have been non-suited because of his contributory negligence, notwithstanding the fact that the defendant had failed to provide or give the statutory signal.

In the case of *Conkling v. Erie R. R. Co.*, 63 N. J. L. 338, 341, this Court, in its opinion written by Judge Hendrickson, stated the rule as follows:

“And it is equally well settled that if a plaintiff has failed in this duty, and his negligent act has proximately contributed in any degree to the occurrence that has caused his injury, he cannot recover, no matter if it appears that the defendant was also negligent. *Pennsylvania Railroad Co. v. Matthews*, 7 Vroom, 531.”

“When this act of contributory negligence clearly appears in the plaintiff’s testimony, it becomes the duty of the Court to direct a non-suit. *Pennsylvania Railroad Co. v. Righter*, *supra*; *Merkle v. New York, &c., Railway Co.*, 20 Vroom, 473; *Pennsylvania Railroad Co. v. Leary*, 27 Id. 705; 3 Ell. Rail. 1163, 1179.”

This Court has on several occasions pointed out the standard of care which forbids parties using a public highway from proceeding blindly in the face of apparent danger at their own peril and the peril of other parties using the highway.

Osburn v. DeYoung, 99 N. J. L. 204 (Errors and Appeals, 1923). In the above-cited case the plaintiff was struck while standing alongside of a truck on a very stormy, foggy night. The defendant at the time he first saw the truck was going at a speed of about fourteen or fifteen miles an hour and stated that his view was blinded, that he put on his brakes but could not stop in time and that he saw no lights on the rear of the truck. This Court, in its opinion written by Mr. Justice Kalisch, said:

“It is further urged, on behalf of the appellant, that the trial Judge in commenting in his charge to the jury upon the duty of the driver in operating his car on a public street under the conditions which then prevailed, with the additional fact that the driver testified that a brightly burning arc light blinded him so that he did not see the truck until he got within eight or ten feet of it, committed prejudicial error in saying to the jury: He says (referring to the driver), one reason he did not see the people was that his vision was obscured by a street light, and upon that phase of the case our Courts have said that if his vision was temporarily destroyed it was his duty to stop his car and endeavor to so adjust his means of vision that his vision was restored. This statement of the duty of the driver was stated with legal accuracy. *Newark Passenger Railway Co. v. Block*, 55 N. J. L. 605; *Consolidated Traction Co. v. Haight*, 59 Id. 557; *Conklin v. Erie Railroad Co.*, 63 Id. 338; *Hackney v. West Jersey and Seashore Railroad Co.*, 78 Id. 454.”

Brief of Defendant-Appellant

Likewise in the case of *Hammond v. Morrison*, 90 N. J. L. 15, the excuse set up by the defendant as an exoneration of liability for his act which was complained of as tortious was that just before the collision he was blinded by a street light. Justice Gummere, who delivered the opinion of the Supreme Court, stated:

“No man is entitled to operate an automobile through a public street blindfolded. When his vision is temporarily destroyed in the way in which the defendant indicated, it is his duty to stop his car and so adjust his windshield as to prevent its interfering with his ability to see in front of him. The defendant, instead of doing this, took the chance of finding the way clear and ran blindly into the trolley car behind which the decedent was standing. Having seen fit to do this he cannot escape responsibility if his reckless conduct results in injury to a fellow-being.”

In the case of *Cordts v. Vanderbilt*, 7 N. J. Misc. 856, decedent was killed on a dark, snowy night by a driver of a car who stated that he could not see more than two feet ahead of him, although his windshield wiper was working and his headlights were on; that he did not see the decedent until after the collision. The Supreme Court, in its opinion, stated:

“We agree with plaintiff’s counsel that the defendant’s own testimony convicts him of negligence; for if the physical condition prevented him from seeing what was ahead of him, he was under a duty of greater care commensurate

Brief of Defendant-Appellant

with the increased danger. (Citing among other cases *Osburn v. DeYoung*, 99 N. J. L. 204.)”

In the case of *Peasley v. White*, 152 Atl. 530 (Me.), it was held that a person driving an automobile through a fog at a speed of approximately twenty-five miles an hour was negligent as a matter of law.

Nikoleropoulos v. Ramsey, 214 Pac. 304 (Utah). In the latter case, on a dark and stormy night the defendant struck a pedestrian whom he did not see until he was within six feet. At the conclusion of the evidence the plaintiff requested the Court to charge the jury as follows:

“You are instructed that it is negligence as a matter of law for a person to drive an automobile upon a traveled public highway, used by vehicles and pedestrians, at such a rate of speed that said automobile cannot be stopped within the distance at which the operator of said car is able to see objects upon the highway in front of him.”

Upon appeal it was held that the refusal to grant this request was prejudicial error, the Court stating in its opinion:

“Besides this, we are of opinion, *as matter of law, under the facts disclosed by the record*, that at the time of the injury and immediately before, defendant was not exercising reasonable and ordinary care in the operation of his car, and that if any emergency whatever existed it was due entirely to his own negligence. *Huddy on Automobiles (Sixth Ed.), Sec. 285.*”

Brief of Defendant-Appellant

Bearing in mind that the same test is applicable to determine whether or not the plaintiff has been guilty of contributory negligence as is applied, to determine the negligence of a defendant, it is apparent that the cases just previously cited are authority for the proposition the plaintiff, in driving at a speed of twenty-five miles an hour, with his vision totally obscured, was acting in a negligent manner which proximately contributed to his own injury. Had the plaintiff struck a pedestrian crossing the highway because of his inability to stop within the limit of his vision, there can be no question but what such a pedestrian could have recovered from this plaintiff.

It was the duty of this plaintiff to operate his car as a reasonable man would have under the circumstances, with due vigilance to protect himself from harm. If that which the plaintiff did was not negligence contributing to his injury in such a way that had he not been so negligent he would have received no injury, it is difficult to conceive of such a case.

There is no evidence in this case that the plaintiff took any precautions for his own safety after his vision had been totally obscured. On the contrary, the evidence discloses that he was driving at a speed in excess of the minimum speed permitted under the most favorable circumstances by the Traffic Act, Article IX (f), Pamphlet Laws 1931, Chapter 247, as amended. The exhibits in this case, D1 and 2, disclose that the accident occurred in a residential district. However, the Traffic Act provides further in Section 3:

“Any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater nor less than is reasonable and proper having due regard for traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or the property of any person.”

Thus the twenty-mile speed requirement is specifically subject to a much lower speed where conditions such as fog or lack of vision makes such lower speed prudent and advisable for the safety of users of the highway.

Had the plaintiff's testimony disclosed that because of his lack of vision he had decreased his speed or increased his vigilance conceivably, a jury question might have been raised as to whether or not his conduct in the face of such an emergency conformed to the conduct which a reasonable man might be expected to take when faced with such loss of visibility. However, in the entire testimony, there is not one iota of evidence that this plaintiff, when faced with a loss of vision, took the slightest precaution for his own safety. With speed unchecked he proceeded blindly without apparently making any effort to increase his vigilance or safeguard himself. In the language of the American Law Institute, in its definition of contributed negligence, **THE CONDUCT OF THIS PLAINTIFF FALLS BELOW THE STANDARD TO WHICH HE SHOULD**

HAVE CONFORMED FOR HIS OWN PROTECTION.

Had plaintiff diminished his speed there can be no question but what he would have escaped many of the serious injuries which he sustained. His negligent conduct was a contributing cause, and as this Court in the case of *Branigan v. Demarest, supra*, pointed out, if plaintiff's injury was occasioned in any degree by his negligence he is without redress.

Where the plaintiff's visibility was impaired, no matter what the reason, he was under a special burden of unusual care, *Cordts v. Vanderbilt*, 7 N. J. Misc. 857; *Anderson v. Public Service Corp.*, 81 N. J. L. 700 (Errors and Appeals, 1911); *Leiber v. Pennsylvania R. R. Co.*, 58 F. (2nd) 970, 973. This added burden the plaintiff failed to assume.

It may be suggested that the plaintiff was entitled to assume that other users of the highway would obey the law and the plaintiff having testified that he saw no lights, although all the creditable evidence is to the contrary, the plaintiff is on this theory relieved from the responsibility of his own negligence. We know of no case where a verdict in favor of the plaintiff under a similar state of facts has been sustained by this Court.

One or two cases have been reported where the facts are somewhat analogous and a judgment for the plaintiff sustained, but in every one of these cases the plaintiff when faced with a limitation of

his vision recognized his peril and took some intelligent step for his own protection and the protection of others using the highway. In every one of these cases the plaintiff materially decreased his speed commensurate with the lack of visibility and increased his watchfulness for impending danger. In the case at bar plaintiff continued on between twenty-five and thirty miles an hour. He could not see his own radiator cap. He made no reasonable move for his own safety.

In the final analysis it is submitted that while the plaintiff may have had a right to assume that other motorists would not obstruct the highway unlawfully and would show the statutory lights if they stopped, plaintiff could not for that reason omit any of the care that the law demanded of him. The suggested rule applies only in favor of one whose own conduct measures up to that of a prudent and careful man under the circumstances. This Court has recognized this explanation of the rule in a long line of railroad cases wherein it has held that the plaintiff is not relieved of the duty of exercising the highest degree of care in avoiding danger to himself because of the neglect of the defendant in failing to give the proper statutory warnings. There is no reason why the general principles of law previously enunciated by this Court should not be applicable to accidents arising on the highway. This was the view taken by this Court in *Bora v. Yellow Cab Co.*, 103 N. J. L. 377; *Branigan v. Demarest*, 109 N. J. L. 123, 126, and *Trimboli v. Public Service Co-ordinated Transport*, 111 N. J. L. 481, 486.

Brief of Defendant-Appellant

It was not sufficient for the plaintiff without taking any steps for his own protection to rely upon the assumption that all other users of the highway would obey the law. There are fundamental objections to this theory.

The first of these has been pointed out and sustained by our courts. The rule applies only where the plaintiff by his own conduct measures up to that of a prudent and reasonable man.

In addition, it is respectfully submitted that the suggested theory immediately establishes a distinction between negligence which makes a defendant responsible for his tortious act and contributory negligence which holds a plaintiff responsible for his own act. The true test of negligence is the same in either case. Had this plaintiff been the defendant he would have been guilty of negligence as a matter of law. *Cordts v. Vanderbilt, supra*. Plaintiff in failing to exercise the care that a reasonable man could be expected to exercise was guilty of contributory negligence.

Such a suggested theory also overlooks the fact that many lawful users of the highway are not required to carry lights, for example, pedestrians. As to this class of users the action of the plaintiff in proceeding blindly at a speed in excess of the maximum allowed by the statute clearly convicts him of negligence.

Likewise had the plaintiff struck an unlighted freight train occupying a crossing. *Morris v. Atlantic City Railroad Co.*, 100 N. J. L. 328 (Errors and Appeals, 1924), the assumption would not have

saved him from serious injury as a result of his lack of caution.

There are many other illustrations that might be cited to like effect. Possibly not the least of these is the probability that some automobile may have just broken down and its lights extinguished without its driver having had an opportunity to give adequate warning. As suggested by the American Law Institute in its restatement, Comment b to Sec. 473, the plaintiff must not only exercise reasonable care to avoid dangers which are obvious or of which he has knowledge but he must be alert to observe the actual condition of the roadway.

The Courts of this State have frequently pointed out that if the action is negligent as to one member of a class the party is responsible for his negligence irrespective of what member of that class is injured.

If we are to believe plaintiff's testimony, he was proceeding blindly because of a heavy fog. The defendant's testimony, supported by defendant's driver and Officers Dickerson and Koff, has the night clear. This conflict in the testimony, however, is of no assistance to the plaintiff since it does not change the undisputed fact that plaintiff, whatever the cause, immediately prior to the accident, could not see as far as his radiator cap. The explanation of his lack of vision is not the important consideration. The important point is that without checking his speed plaintiff proceeded blindly on.

If we accept the defendant's testimony with regard to the state of the weather we must also accept the testimony which clearly discloses that defen-

Brief of Defendant-Appellant

dant's truck was equipped with lights which were burning immediately prior to the collision, as were the street lights.

If it was so foggy that the plaintiff could not see where he was going, he was not justified in proceeding blindly at the rate of twenty-five miles an hour on the public highway and taking the chance of injury and disaster which that involved. Certainly, as a reasonable man, he was negligent when faced with this danger, in not taking some precaution for his own safety. On the other hand, if it was perfectly light and the standing truck could be seen at such a distance as where it was located from the troopers' barracks, plaintiff could have seen it plainly and avoided it if he had been exercising reasonable care for his safety. The only reasonable inference, on defendant's version, is that plaintiff was paying no attention at all to the condition of the roadway or that he was asleep.

The plaintiff was not only under a duty for his own protection to observe the highway but to observe in such a way as to make the same effective. *Trimboli v. Public Service, supra, Central Railroad Co. v. Smalley*, 61 N. J. L. 277, 279 (Errors and Appeals, 1897).

Under either theory of the case the plaintiff is convicted of contributory negligence by his failure to take due care for his own protection in the face of his loss of vision.

If the verdict in favor of the plaintiff is to be sustained it is because the jury had a right on the evidence to say that the plaintiff in proceeding at

a speed of twenty-five miles an hour, virtually blind-folded, was exercising the care of a prudent and reasonable man for his own safety and the safety of others.

The great weight of opinion supports the well established rule that it is negligence, as a matter of law, to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within the distance that objects can be seen ahead of it.

MICHIGAN.

In the case of *Spencer v. Taylor*, 188 N. W. 461, the facts disclosed that the plaintiff collided with the rear of an unlighted truck standing along the margin of the highway. The Supreme Court of Michigan held that the plaintiff having testified that he had practically no vision at all he was guilty of contributory negligence. The opinion of the Court covering this point reads as follows:

“We think the Court was right in holding plaintiff guilty of contributory negligence as a matter of law. It is well settled that it is negligence as a matter of law to drive an automobile along a public highway in the dark at such speed that it cannot be stopped within the distance that objects can be seen ahead of it. *Fisher v. O'Brien*, 99 Kan. 621, 162 Pac.

Brief of Defendant-Appellant

317, L. R. A. 1917 F. 610, 15 N. C. C. A. 350; Lauson v. Fond du Lac, 141 Wis. 57, 123 N. W. 629, 25 L. R. A. (N. S.) 40, 135 Am. St. Rep. 30; Serfas v. Lehigh & N. E. Ry. Co., 270 Pa. 306, 113 Atl. 370, 14 A. L. R. 791; Ott v. Wilson, 216 Mich. 499, 185 N. W. 860; Harnau v. Haight, 189 Mich. 600, 155 N. W. 563, 13 N. C. C. A. 566.

“It is said in Huddy on Automobiles (5th Ed) p. 377: As was said in one case: ‘It was negligence for the driver of the automobile to propel it in a dark place in which he had to rely on the lights of his machine at a rate faster than enabled him to stop or avoid any obstruction within the radius of his light, or within the distance to which his lights would disclose the existence of obstructions, * * *. If the lights on the automobile would disclose obstructions only 10 yards away, it was the duty of the driver to so regulate the speed of his machine that he could at all times avoid obstructions within that distance.’—citing *West Const. Co. v. White*, 130 Tenn. 520, 172 S. W. 301.”

See also

Thompson v. Southerly Michigan Transport Company, 261 Michigan 440, 246 N. W. 174;

Moore v. United States Truck Co., 260 Mich. 60, 244 N. W. 228;

Holsaple v. Superintendents of Poor, 232 Mich. 603, 206 N. W. 529.

PENNSYLVANIA.

In the case of *Cormican v. Menke*, 306 Pa. 156, 159 Atl. 36, it appeared from the facts that the defendant, Menke, with whom was riding the plaintiff, on a wet, foggy night, ran into the rear end of an unlighted truck.

Defendant testified that while he had a vision of fifty feet in front of him he did not see the truck until he was within ten or twelve feet of it.

On appeal to the Supreme Court of Pennsylvania, that court held that these facts clearly showed that both the truck driver and defendant, Menke, were guilty of negligence.

See also *Farley v. Ventresco*, 103 Pa. Super. Ct. 98, 157 Atl., p. 1.

See also *Serfas v. Lehigh & New England R. R. Co.*, 270 Pa. 306, 113 Atl. 370.

In the latter case the Court, in its opinion, said:

“A driver of an automobile must keep in mind that an obstacle may appear in his path at any time and so drive his car as to be able to avoid it, under ordinary circumstances. *Filer v. Filer*, 301 Pa. 461, 152 A. 567. What would be safe speed in daylight or at night under ordinarily favorable conditions may be very unsafe when the range of the driver's vision is limited. The Supreme Court and this court have steadfastly held that it is the duty of the driver of an automobile, when he is driving at night, to have his car under such control that he may stop or turn it away when objects inter-

Brief of Defendant-Appellant

cepting his passage come within the range of his lights.”

Sinnell v. Eschenbach, 303 Pa. 156, 154 Atl. 369, 371;

Mason v. Lavine, 302 Pa. 472, 153 Atl. 754;

Filer v. Filer, 301 Pa. 461, 152 Atl. 567.

IOWA.

Luidquist v. Thierman, 248 N. W. 504, 1933.

In this case it was held that the plaintiff was guilty of contributory negligence as a matter of law because of his inability to stop his car within the assured clear distance ahead.

VERMONT.

Upon the same subject the Vermont Supreme Court in *Steele v. Fuller*, 104 Vt. 303, 158 A. 666, in a case where defendant's car was parked without a tail light, said, p. 668:

“Another rule is that one who drives an automobile along the public highway in the dark must drive at such a speed that it can be stopped within the distance that can be seen ahead of it, *i. e.*, within the range of its headlights.”

Likewise the same Court in the same opinion points out, p. 667:

“While the plaintiff had a right to assume that other motorists would not obstruct the

Brief of Defendant-Appellant

highway unlawfully and would show the statutory lights if they stopped, he could not for that reason omit any of the care that the law demanded of him; as the rule applies only in favor of one whose own conduct measures up to that of a prudent and careful man in like circumstances. Page v. Mazzei (Cal. App.), 299 P. 119; Cushing Refining, Etc., Co. v. Deshan, 149 Okl. 225, 300 P. 312."

It is interesting to note that the Vermont Supreme Court in this case reversed the lower Court for its failure to direct a verdict in favor of the defendant notwithstanding the finding of negligence on the part of the defendant.

LOUISIANA.

Raziano v. Trauth, 131 So. 212;
Safety Tire Service, Inc., v. Murov, 140 So.
879;
Castille v. Richard, 102 So. 398.

WISCONSIN.

Engebrecht v. Bradley, 247 N. W. 451, 1933.

Brief of Defendant-Appellant

NEW YORK.

Albertson v. Ausbacher, 169 N. Y. S. 188.

In this case the Court said:

“Moreover, if we assume that that night an unusual fog existed which would have prevented the defendant’s chauffeur from seeing the plaintiff’s car until he struck it, then the defendant’s chauffeur is convicted of negligence out of his own mouth for he has testified that his car was going at the rate of about twelve miles an hour, and I think, as a matter of law, it is negligent for a chauffeur to proceed at the rate of twelve miles an hour in Central Park on a night when he cannot see beyond the hood of his car.”

MISSOURI.

Solomon v. Duncan, 185 S. W. 1141.

KANSAS.

Fisher v. O’Brien, 162 Pac. 317, 99 Kan. 621.

In the above case the Court said:

“Independently of any statute it is negligence as a matter of law to drive an automobile along the highway on a dark night at such speed that

Brief of Defendant-Appellant

it cannot be stopped within the distance that objects can be seen ahead of it.”

MAINE.

House v. Ryder, 129 Me. 135, 150 A. 487.

UTAH.

Nikoleropoulos v. Ramsey, 214 Pac. 304.

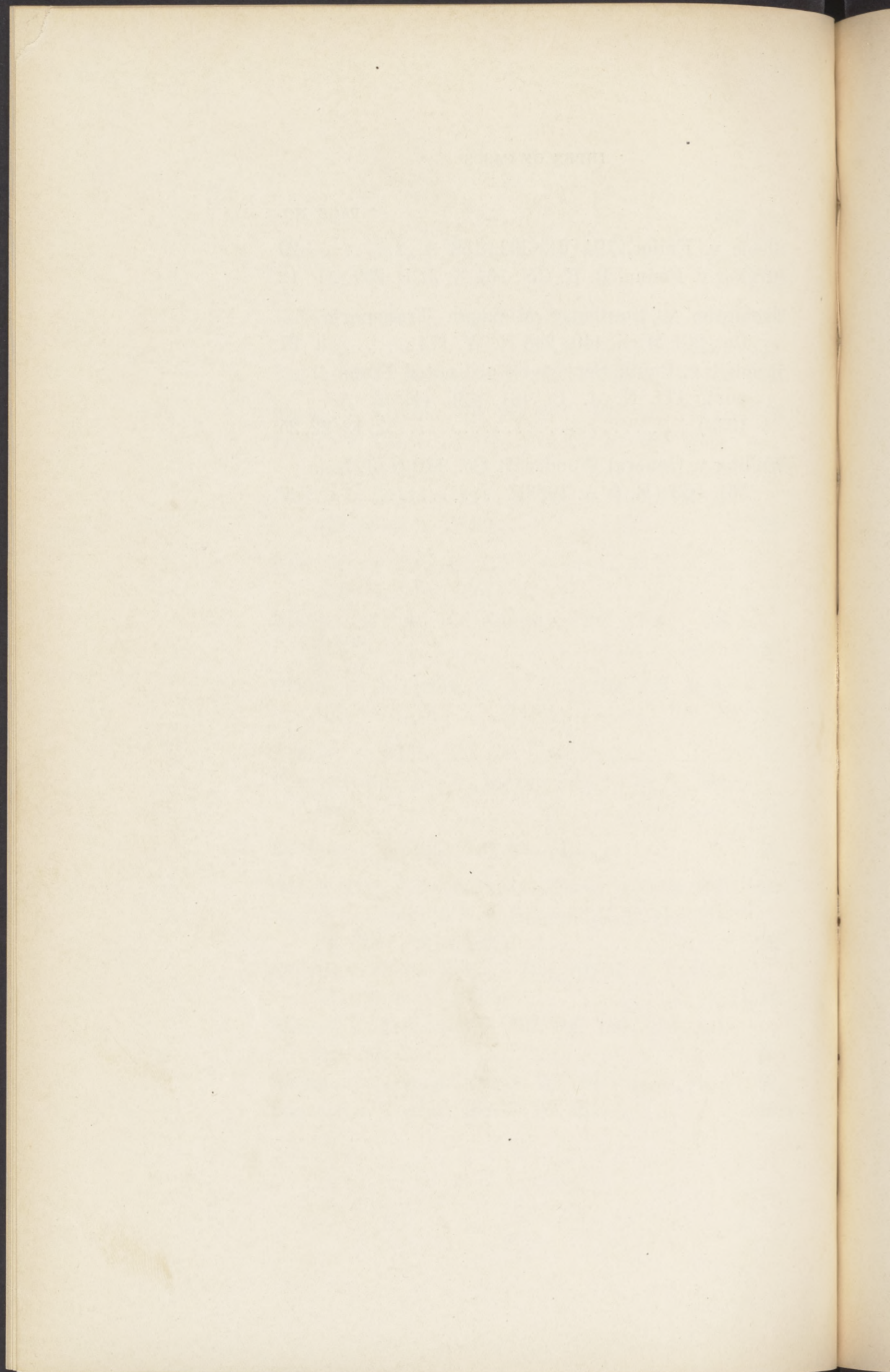
For the foregoing reasons it is respectfully submitted that the trial Court erred in refusing to grant defendant's motions for a non-suit and directed verdict on the ground that plaintiff was guilty of contributory negligence as a matter of law and that the alleged negligence of the defendant was not the proximate cause of the plaintiff's injury.

Respectfully submitted,

STARR, SUMMERILL & LLOYD,
Attorneys for Defendant-Appellant,
George R. Van Sciver.
ALFRED E. DRISCOLL,
FRANK T. LLOYD, JR.,
Of Counsel.

INDEX OF CASES.

| | PAGE NO. |
|---|----------------------|
| Albertson v. Ausbacher, 168 N. Y. S. 188.... | 31 |
| Anderson v. Public Service Corp., 81 N. J. L. 700 (E. & A. 1911)..... | 21 |
| Bacharde v. Homusick, 9 Misc. 747..... | 6 |
| Balt. & Ohio R. R. Co. v. Goodman, 275 U. S. 66, 67 | 11 |
| Bora v. Yellow Cab Co., 103 N. J. L. 377 (E. & A. 1927) | 14, 22 |
| Branigan v. Demarest, 109 N. J. L. 123, 124 (E. & A. 1932) | 7, 8, 12, 14, 21, 22 |
| Castile v. Richard, 102 So. 398..... | 30 |
| Central R. R. Co. v. Smalley, 61 N. J. L. 277, 279 (E. & A. 1897)..... | 25 |
| Conkling v. Erie R. R. Co., 63 N. J. L. 338, 341 | 15 |
| Cordts v. Vanderbilt, 7 N. J. Misc. 856..... | 17, 21 |
| Cormican v. Menke, 306 Pa. 156; 139 Atl. 36.. | 28 |
| Damus v. Public Service Railway Co., 102 N. J. L. 644, 646 (E. & A. 1926)..... | 7 |
| Englebrecht v. Bradley, 247 N. W. 451, 1933.. | 30 |
| Farley v. Ventresco, 103 Pa. S. Ct. 98; 157 Atl. 1 | 28 |
| Filer v. Filer, 301 Pa. 461; 152 A. 567..... | 28, 29 |
| Fisher v. O'Brien, 162 Pac. 317; 99 Kan. 621.. | 31 |
| Hammond v. Morrison, 90 N. J. L. 15..... | 17 |
| Holsapple v. Superintendents of Poor, 232 Mich. 603; 206 N. W. 529..... | 27 |
| House v. Ryder, 129 Me. 135; 150 A. 487.... | 32 |



NEW JERSEY COURT OF ERRORS
AND APPEALS.

JAMES E. MORRISON,
Respondent,

v.

GEORGE R. VAN SCIVER,
Appellant.

ACTION AT LAW.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT,
CAMDEN COUNTY.

BRIEF FOR PLAINTIFF-RESPONDENT.

STATEMENT OF FACTS.

Plaintiff makes the following correction of, and addition to, appellant's statement of facts:

Plaintiff's testimony was that the accident happened at 4:40 A. M. (C. 24, l. 19), August 6th, 1932, on the White Horse Pike, about one mile south of Berlin; that he was driving a 1928 Ford coupe towards Atlantic City, on his right side of the road, and crashed into the rear of a truck parked without any lights, front or rear, and with no attendant, partly on the concrete in plaintiff's line of traffic; that it was dark and foggy, "at intervals"; "a

drifting fog," said the witness, Broadwater, for plaintiff; there was no street light, nor light on a pole near the accident.

Plaintiff did not say he could not see "as far as his radiator cap"—he said he could not see his radiator cap in the dense fog, where the accident happened; and he did not say that he was "proceeding through" the fog at twenty to twenty-five miles per hour at the time of the accident. There was no evidence of the speed he was going at the time of the collision. Appellant's statement is his inference. Plaintiff left Brown Street, Philadelphia, at 2:50 A. M. (C. 24, l. 15). He was one hour and fifty minutes, including a stop at Berlin for coffee, driving to the scene of the accident, a much less distance than that which Broadwater says he drives (from Tacony, Philadelphia, to Berlin), in forty-two minutes, under normal conditions. Plaintiff's car had been overhauled a week before, and at the rate he was going, he could stop in five to ten feet.

Defendant's testimony was that the truck was an open stake body, canvas sides, with tarpaulin top (not like "Exhibit B"), with the tailboard straight out on a level with the floor of the truck (C. 79, l. 21, C. 80, l. 33, C. 85, l. 35).

ARGUMENT.

The appellant argues only the refusal of the trial Court to grant defendant's motion for a non-suit and for a directed verdict. We are not concerned,

Brief of Plaintiff-Respondent

therefore, with the weight of evidence, nor with the credibility of witnesses, but we are concerned with whether any facts have been established from which the trial Judge can say that negligence, either primary or contributory, may be reasonably inferred. If so, "it is for the jury to say whether, from these facts, when submitted, negligence ought to be inferred." *Fanshawe v. Rawlins*, 87 L. 667-669.

"And unless the proof of the negligence, charged as contributory, is so clear and convincing, that the minds of reasonable men cannot reasonably differ, the case is one for the jury to determine."

Ryan v. Deans, 114 L. 199-201.

"Motions for non-suit and to direct a verdict for the defendant for the purpose of the motions in effect, admit the truth of the evidence and of every inference of fact that can be legitimately drawn therefrom *which is favorable* to the plaintiff, but deny its sufficiency in law; and where such evidence or inference of fact will support a verdict for the plaintiff, such motions must be denied."

Zochowski v. Zukowski, 114 L. 437-438;

Grauss v. Alpert, 12 Misc. 67-69.

Appellant, in his brief, has taken two bits of testimony, isolated and not tied up with the rest of the testimony so that their inference is clear, and has then proceeded to draw inferences, from these bits of testimony, most favorable to appellant, and to argue from the inferences as though the inferences were proved facts.

Appellant argues that the plaintiff was running

twenty to twenty-five miles per hour through a fog so thick that he couldn't see his radiator cap nor anything in front of that, and, therefore, he was guilty of contributory negligence.

There is no testimony that plaintiff ran any distance whatsoever in such fog. He was not asked, either on direct or cross-examination, how fast he was running when he struck the truck. He had testified that he was running twenty to twenty-five miles per hour; that his brakes had just been overhauled (C. 33, l. 3, l. 21), and that at the speed he was going, he could stop within five to ten feet (C. 33, l. 25), certainly a careful proceeding under conditions obtaining that night, down the White Horse Pike, at 4:30 A. M., when there is little traffic. The accident happened about a mile below Berlin, and Berlin, under normal driving, is forty-two minutes from Tacony, Philadelphia (C. 63, l. 24). This night, plaintiff was one hour and fifty minutes driving from Brown Street, Philadelphia, a much shorter distance to the scene of the accident, including his stop for pie and coffee at Berlin. This fact admits of an inference of careful driving. A further inference of careful driving is that the truck did not move when plaintiff struck it. It was in the same place after as before the accident (C. 78, l. 35). Then, there was no damage whatsoever to the truck. The only evidence as to the damage to the truck is the bending under and the breaking of the glass of the tail-light. There was no evidence whatsoever as to the damage to the Ford coupe. The truck was open straight through, with no partition back of the

Brief of Plaintiff-Respondent

driver's seat, as in "Exhibit B," the canvas sides blending with the fog, the tail-board straight out, offering little obstruction to the view, except the four edges of parallelogram. Broadwater, who followed the plaintiff down the pike, only missed hitting it because he saw plaintiff on the roadway and yanked his wheel to the left, and his first view of the truck was from the side. As to the fog, plaintiff testified that it was foggy and then again, it was not foggy (C. 35, l. 27). At "intervals," there was fog (C. 36, l. 4). Broadwater said it was a "drifting" fog (C. 58, l. 29). A drifting fog, or a fog at intervals, or in spots, is quite common and well-known to everyone. The truck driver said there was no fog, but later, he gave a significant answer of "not all the way down, not to Berlin" (C. 71, l. 35), and quite significant as to the fog is the fact that the defendant called Ahearn (C. 108), of the Philadelphia Weather Bureau and asked him about the temperature and the velocity of the wind, but not a word about foggy conditions!

A reasonable inference from the testimony, is that the drifting of the densest wave of fog and the collision came at about the same time.

Plaintiff had testified that there were no lights on the truck and that he ran into it without seeing it. At the last of his testimony, on re-direct (C. 36, l. 12), he said that the fog was very thick at the section where he struck the truck. On re-cross, the attorney for the defendant asked him how far he could see through the fog. He replied that he couldn't see through the fog. The next question

and answer show that he meant by this, he could not see through the fog to the clear beyond (C. 36, l. 23). He was then asked: "Could you see your radiator cap?" and he said, "No." In a thick fog, in the dark, he probably could not see the radiator cap. The headlights are directed ahead and the reasonable inference is that he meant exactly what he said, and it isn't a court question to determine the distance that one can see through the fog at night, without lights. The attorney of the defendant then said: "Of course, if you couldn't see the radiator cap, you couldn't see anything in front of that, could you?" And plaintiff answered, "No, sir."

The attorney for the defendant wheedled the answer to his coaxing, equivocal question, and then stopped. Plaintiff had testified that he had hit the truck without seeing it, and the reasonable inference is that he thought the plaintiff was driving at that, and that fact was in his mind, and he meant that he couldn't see the truck ahead of him. Certainly, the Court can't draw the inference that he could not have seen the rays of a red light on a truck in front of him a sufficient distance to permit him to stop within five or ten feet. The question was so worded that the plaintiff, who had in mind his testimony that he had hit the truck without seeing it, could not disassociate the truck from the question.

The inference that plaintiff meant that he couldn't see the truck in front of him when he said he couldn't see anything, must have been the inference understood by the attorneys, the Court and the jury. If the answer had conveyed the meaning defendant now seeks to infer, the attorney for the defendant

Brief of Plaintiff-Respondent

would have instinctively asked: "How far had you proceeded in a fog of such density?" He didn't ask any such question, because he knew plaintiff was referring to the truck, and if he thought the question and answer might mean what he now infers, and was afraid to ask the question for fear of loss of the chance to draw the inference favorable to the defendant, which the defendant has now drawn, no such consideration would affect the Court. What can be inferred from cold print, after study and seclusion in the law library, is quite different from the meaning conveyed by a witness on the stand in the atmosphere of the case, as it is being developed. If the inference at the trial was what the defendant now seeks to infer, and if there had been any doubt about the inference after the motion for a non-suit, the Court could have called plaintiff back to the stand.

The fact that plaintiff's Ford was on its side of the road and on the concrete when the collision happened is a strong circumstance to show that plaintiff drove no distance in a fog as dense as at the place of accident. It is impossible to keep in the road and in the proper lane in a fog as dense as plaintiff says existed at the scene of the accident. Broadwater said the left wheels of the truck were on the concrete (C. 56, l. 29), and that that part of the truck from the extreme left side of its body to the second panel in the tail-board, was over the concrete (C. 57, l. 20). All of defendant's witnesses, except the driver of the truck, said that the left wheels of the truck were on the edge of the concrete, and Officer Dickinson said the Ford ex-

Brief of Plaintiff-Respondent

tended to the left of the truck *not much more* than two feet (C. 93, l. 6). The tread of a 1928 Ford is fifty-six inches. It is clear, therefore, that plaintiff was on the concrete on his right side of the road, in his proper lane, which permits the strong inference that he had proceeded no distance except carefully, in the dense fog. No one could drive a few seconds at twenty to twenty-five miles per hour, in a fog so dense he could not see beyond his radiator cap, and stay in the road. Broadwater and another car followed plaintiff and Broadwater tried to flag three cars coming the other way.

The inferences defendant has drawn favorable to himself, may be drawn by a jury, but they are not proved facts.

The fact that plaintiff testified he was running twenty to twenty-five miles per hour, although said speed was not tied up with the time of the accident, and the fact that he answered the above equivocal question "No, sir," are facts to go to the jury from which contributory negligence may be inferred, but they are facts which must accompany all the other facts in the case, and the inferences are for the jury.

Kerner v. Zerr, 103 L., pp. 424-426.

Anderson, the "colored boy" (as defense attorney called him) (C. 106, l. 17), driver of the truck, said that his lights were lighted, and there was a lantern, in addition to the red tail-light, in the rear; that he stopped on the right-hand side of the road, opposite and three feet (C. 83, l. 26) from a pole with a light on it, and all the way off the concrete, and two

Brief of Plaintiff-Respondent

feet in the soft dirt. All the other defense witnesses say his left wheels were on the concrete. It is only necessary to look at the small car parked in "Exhibit C" and then at the truck in "Exhibit B" to conclude that if he were parked as closely to the pole as he could get, his wheels would be on the concrete.

No witness saw the lantern. Anderson said he heard the crash, came out of the field, saw a man sitting in the road "hollering that he was killed"; helped him to sit on the side of a Packard that drew up; tied a knot in the rubber hose that was disconnected from the rear light, and lighted up and then went to the barracks (C. 78, l. 10). But the officers said there were no lights on the truck (C. 92, l. 30). It was necessary, therefore, to prove facts from which the jury might infer that the acetylene had leaked out between the time Anderson heard the crash and came out of the field. A knot in the rear tubing would permit the headlights to work if Anderson's acetylene tank wasn't spent. So Officer Dickerson is questioned as follows:

"Q. Did you see Anderson turn off the gas to his acetylene lights?

A. Yes, sir.

Q. And you could smell acetylene in the air there?

A. Right."

Vonder Tann did not see Anderson do anything with respect to the tail-light (C. 105, l. 33), and no one was at the scene of the accident when Vonder Tann got there (C. 106, l. 7). Officer Koff doesn't

remember whether he saw the driver at the scene of the accident: "this was so long ago" (C. 99, l. 26); and he doesn't remember smelling any odor of gas (C. 99, l. 31). Dickerson's "right" in answer to the leading question is weak and the defense tries to make Vonder Tann say he smelled acetylene, but Vonder Tann would not agree (C. 105, l. 27).

Did Anderson put plaintiff on the side of the Packard? Broadwater, a P. R. T. bus driver (C. 52, l. 24), with fifteen years' experience as chauffeur (C. 58, l. 6), who had driven Greyhound and P. R. T. buses "many a time" day and night up and down the White Horse Pike (C. 58, l. 10), in his little Essex (C. 53, l. 16) on his way to Cape May for a fishing trip (C. 53, l. 13), about one-quarter to one-half mile below Berlin, saw something in the road "underneath me." "If I hadn't yanked the wheel over to the left, I would have run over him." The plaintiff was lying somewhere near the middle of the concrete highway (C. 67, l. 13) back of the truck towards the left (C. 67, l. 4). Broadwater didn't see the truck, nor did he hit the truck, because he swerved to the left to avoid the plaintiff (C. 59, l. 34, C. 60, l. 3). The first view he had of the truck was "out of my window" on the right (C. 53, l. 22). Plaintiff was all "torn up and moaning" (C. 53, l. 28). His right leg was broken in two places, with the bones at both fractures protruding through the skin (C. 13, l. 25, C. 43, l. 7); bruised, all cut up and bloody (C. 11, l. 10; C. 56, l. 14). Broadwater was half-afraid to pick plaintiff up at first (C. 56, l. 15). The "colored boy" driver had probably stopped to find out why his lights went

Brief of Plaintiff-Respondent

out when the crash came, and when he saw the mangled plaintiff and heard him crying he was killed, he took to the "cornfield," where the officers, who took him to the hospital, said they found him (C. 58, l. 3). He never touched the plaintiff nor did he go to the barracks. It was Broadwater who banged on the barracks door. Vonder Tann (C. 103, l. 8) says some one banged on the door and told of the accident, and he then says, as a conclusion, "afterwards, it appeared it was the colored gentleman who was driving the truck." There was only one banging on the door and Broadwater had done that, and was on his way to the hospital when Vonder Tann got to the scene of the accident and found no one there. Yet, Anderson says he rang the barracks bell, notified someone, who poked his head out, of the accident, and as he came out of the yard, the police came into the yard (C. 75, l. 27), and that he went back to the scene with the troopers. He walked and they drove (C. 76, l. 9). Vonder Tann went down after the banging and no one was there, he says (C. 106, l. 7). He later says he "walked up" after Anderson, but that is evidently a conclusion like the conclusion of who banged on the door. Officers did take Anderson to the hospital and Broadwater's statement that the officers said they found him "over in the cornfield" was not denied. Neither did Anderson identify the officers who testified, as the officers who took him to the hospital, although he did identify Broadwater and Broadwater hadn't seen the plaintiff from the time he left plaintiff at the hospital until he saw him in the court room. A fair inference is that

Anderson stopped because his lights went out. And he stopped opposite a cornfield, a half mile to a mile below Berlin, where plaintiff and Broadwater said; that he stopped on the highway because he stopped to investigate. If he had had to stop in answer to a demand of nature, he wouldn't have stopped in Berlin. He had just stopped in Berlin for coffee. He would wait until he got out of Berlin, and if he were going into a field, he would have drawn to the side of the road. There was no curb where he said he did stop and if he had stopped where he said he stopped, he could have parked between the poles and he would then have been two feet off the concrete.

Anderson marked an "X" over the pole where he said the accident happened. Exhibits "A" and "C" show that the two evergreens in Exhibit "C" are on the lawn of the house next to the officers' barracks and the entrance from the highway into the driveway of the barracks is shown on the lower left-hand corner of Exhibit "C." There is a pole almost directly opposite the barracks' driveway and the next pole, south seventy-five to one hundred feet, is the pole with the white band and light. Now, the officers couldn't say whether the truck was parked opposite the pole with the white band or the next-but-one pole below. Officer Dickinson said he investigated the accident and had his report with him (C. 91, ll. 28, 33) yet he said it was too long ago, to say definitely alongside of which pole the truck was parked (C. 90, l. 8). "As far as I can recall," he said, "it was clear, no rain, no fog" (C. 91, l. 26). He was not certain whether he

Brief of Plaintiff-Respondent

saw Morrison, the plaintiff (C. 92, l. 23). Officer Koff didn't know whether the truck was opposite the pole with the white band (C. 101, l. 13), and he wasn't sure whether the plaintiff was there when he got there. He thought he had gone to the hospital (C. 102, l. 5) and he didn't remember whether the truck driver was there (C. 99, l. 26); yet a little further on in his testimony (C. 101, l. 22) he said "Yes, sir," to the question: "You just went up there (hospital) with Anderson?" and Officer Dickinson, who did not say he saw Anderson at the scene of the accident, answered "Yes, sir," to the question: "And you then went up to the hospital with Anderson, did you?" (C. 93, l. 14). But the troopers who took Anderson to the hospital found him "over in the cornfield" (C. 58, l. 3).

The pole identified by Anderson with the cross mark is where he said the accident happened. Plaintiff said the accident happened further down than the picture shows, and Broadwater couldn't mark the place on the photograph, and the Court said: "This man has said he does not know that the photograph itself shows him where it was" (C. 62, l. 21). If the accident happened opposite the pole marked with an "X," it happened not over three hundred feet from the barracks, amidst houses on both sides, about 4:40 A. M. on an August night, people sleeping with windows up all around the scene, with probably some men going to work. There was a crash, with a broken and bloody man lying in the road, "hollering he was killed," moaning and crying to be taken to the hospital; Broadwater trying to stop three cars and banging on the

barracks' door, and calling for a high-powered car and telling of the accident, and then off to the hospital with the injured man, and yet, no one around when Vonder Tann gets there, although he followed the driver down and the driver went with the officers who drove and he walked. Yet, the officer investigated, had his report, with no word as to the damage to the Ford, no details of any character as to the accident, and even "Exhibit B" is not like the truck which was in the accident. The officers could positively remember the truck was parked opposite a pole with a light. Which pole, not positive. But they couldn't remember whether they saw the injured plaintiff nor the driver of the truck, nor any of the details no matter how arresting, though they investigated and had their report.

Anderson said he was parked three feet off the concrete. The defense witnesses proved this statement untrue. A jury could, therefore, disregard all his other testimony. He said he had a lantern on the rear. No witness saw the lantern after the accident. The fact that his lighting system was acetylene and that he could get no headlights after the accident, though there was no damage to the acetylene system, and that Vonder Tann, who said he was the first witness there after the accident, could smell no acetylene gas, would permit a reasonable inference that Anderson was out of acetylene gas. Disregard Anderson's testimony, and all that is left is the testimony of the officers who knew no more than any stranger who looked at the accident the next day, and a reasonable inference is that the barracks sent two officers to testify, who

Brief of Plaintiff-Respondent

either confused the accident with some other accident, or who went down and inspected the wreck after the two officers who had found Anderson "over in the cornfield," had taken him to the hospital.

The proof is clear that the truck was parked on the highway in plaintiff's line of traffic. Plaintiff said there was no tail-light and defendant's testimony reasonably supports plaintiff's testimony that there was no tail-light. There was plenty of proof to submit to the jury the question of defendant's negligence. Plaintiff's answers to the defendant's questions, quoted in defendant's brief, would admit of an inference that he was negligent, but the favorable inference from that testimony is, we think, the inferences we have drawn above. The Court also submitted the question of plaintiff's negligence to the jury. But defendant says the plaintiff's answers to the two equivocal questions required the Court to find that he was guilty of contributory negligence.

"The vice * * * (of this) * * * is taking a single circumstance from the many that bore upon the question at issue in the testimony, from which the Court is asked to tell the jury the plaintiff is guilty of contributory negligence."

Work v. Phila. Supply Co., 95 L. 193-196.

Can the Court say anything about the distance of vision in a fog because plaintiff said he couldn't see his radiator cap? There is no testimony as to the size of the cap. It may have been one of those caps flush with the contour of the radiator. There is no testimony that there was any light from inside

the car nor that there were any cowl lights. Anything to be drawn from this testimony is pure inference and for the jury. The "No, sir" to the other question that if he couldn't see the cap he couldn't see anything in front of that, admits of the inference that plaintiff had in mind the truck. The plaintiff, permanently incapacitated, broken and a stranger to the court room, was facing a skillful attorney, and like all inexperienced in the law, his one idea was not to have the attorney make him out a liar, and his thought, reasonably, was that the attorney was trying to make him contradict his testimony that he had not seen the truck.

But Broadwater, a skillful driver, a forceful personality, the hero of this accident, didn't see the truck and when he came down the pike, the Ford was telescoped under the tailboard of the truck, and presumably, there was more obstruction to the view than the hollow parallelogram, with sides and top the color of the fog, that plaintiff ran into. Broadwater said:

"I don't know how far I had got, probably a quarter or a half mile, and something loomed up in front of me; I thought it was an animal, something that had been hit, and I had to swing out in the road to get around it, and as I did, I saw what looked like a wall in front of me to the right side" (C. 53, ll. 17 to 23). "The first actual view of it was when I was passing it, out of my window" (C. 59, l. 32). "Q. Did you hit it? A. No, I swerved out for the man lying on the ground" (C. 60, l. 3). Could the Court say, as a matter of law, that Broad-

Brief of Plaintiff-Respondent

water was guilty of contributory negligence if he had hit the truck, as he would have done, had he not swerved out for the plaintiff?

There is no testimony as to how far the rays of a red tail-light could have been visible to plaintiff, who could stop within five or ten feet. Plaintiff was one hour and fifty minutes driving a shorter distance than Broadwater usually drives, under normal conditions, in forty-two minutes. Plaintiff was on the concrete in his lane of traffic, and no damage was done to the truck except the tail-light; two facts which show plaintiff was feeling his way when he hit the truck. He may have just run into the densest patch of fog as he hit the truck. He must have been alert, because he had stopped for pie and coffee a half-mile back.

The "straight-out" tail-board did the damage. The momentum of the Ford, though it had been moving slowly, would drive the edge of the tail-board through the windshield and its light construction, splinter the body, burst open the door and sweep plaintiff out on the concrete, cut him up and break his leg, tangled in the clutch and brake pedal levers and steering post with the door jamb and body parts forming a fulcrum for the force exerted.

All of the above facts, from which the above inferences are drawn, are for the jury. There are plenty of facts from which a jury could infer that plaintiff was not negligent and that the proximate cause of the accident was the parked truck on the highway, without the red tail-light. The trial Judge heard the witnesses, observed their demeanor on the

stand, gathered the force of the proofs as the trial proceeded and certainly drew no such inferences from the plaintiff's answers to the two equivocal questions, as the defendant now draws, else he would have asked a few questions himself.

As was said by this Court in *Dickerson v. Mutual Grocery Co.*, 100 L. 118:

“An attempt is made to differentiate the case on the facts (inferences in this instance) from the ordinary run of highway collision cases, in which, as has many times been said, the disposition of these questions of primary and contributory negligence is, as a rule, pre-eminently for the jury. * * *”

“The view taken by our Courts of this class of cases is well-illustrated by three very recent decisions. *Osburn v. DeYoung*, 99 L. 204; *Seibert v. Goldstein*, 99 L. 200; *McCartney v. British American Co.*, 99 L. 375.”

In the *Seibert v. Goldstein* (*supra*) case, the driver testified it was very dark and snowing so that the street lights shed very little light, and he could not see through his windshield and had to look out the side, and all of a sudden, he ran into, and without seeing, a truck parked without rear light. The Court held that both primary and contributory negligence were jury questions.

In *Shinn v. Chiaccio*, 8 Misc. 43, the Supreme Court reversed a judgment of non-suit where the plaintiff, on a dark and foggy night, proceeding at twelve miles per hour on his right side of the road, keeping a careful lookout, ran into defendant's truck parked without light. Plaintiff testified that he

Brief of Plaintiff-Respondent

could see only three or four feet ahead and at a speed of twelve miles, he could stop in ten feet. The Court said:

“The plaintiff was not bound, as a court question, to regulate the movement of his car with reference to the possibility of an unlighted motor ahead of him.” * * * “In other words, plaintiff was normally entitled to assume that a car ahead of him would show the statutory lights, and to drive on that assumption, coupled with the diminished visibility of such lights, due to fog conditions; but was not required, at least as a court question, to proceed as though an unlighted car, at a standstill, was to be expected.”

And in *Bianchi v. Richer*, 3 Misc. 829, the Supreme Court held that the question of whether plaintiff was guilty of contributory negligence was left properly to the jury, where the plaintiff testified he was driving on his right side of a sixty-foot-wide street, on a dark and foggy night, running twelve to fifteen miles per hour, with dimmed headlights, and could see only fifteen feet ahead, that is, five feet ahead of his radiator, and at the speed he was going, he could stop in fifteen feet. He ran into the rear of defendant's truck parked at the curb without lights. On cross-examination, he testified he was “in the center of the road,” and then answered “Yes, sir,” to the question: “And did you continue right in the center of the road all the way until you struck the truck?”

In *Brigden v. Pirozzi*, 97 L. 535, decided by this Court, plaintiff testified he was driving seventeen miles per hour at 8:25 P. M., and could see with

his lights two hundred fifty feet ahead; that an oncoming car with lamps casting a side glow, prevented him from seeing an unlighted parked truck which he ran into. This Court said:

“From the testimony given in the present case, it was possible for the jury to have found that the plaintiff should have seen with the lights upon his car, the truck, within time to have averted the collision by the application of his brakes, or that he was negligent in proceeding at the speed he admits, if the lights of the car so blinded him that he could not see where he was going and that his carelessness was the proximate cause of the accident which befell him, and for this reason, to have found a verdict for the defendants. On the other hand, it was equally possible for the jury to find that the proximate cause of the accident was defendant’s failure, when stopping the truck, to draw it to the side of the road, in accordance with the provision of the Traffic Act * * * or the failure to have the red light on the rear of the truck burning, as required by law. A jury could also find, from the testimony, that the side glow of the lights of the passing car did not so obstruct the vision of Brigden that he should have stopped his car and waited until the approaching car had passed, although this would have avoided the collision with the truck. Other questions are suggested by the evidence, but those alluded to will suffice to show that plaintiff’s negligence was a fairly debatable question and that the trial Court ruled correctly in submitting the case to the jury and in refusing to grant defendant’s motion to non-suit the plaintiff and direct a verdict for defendants.”

Brief of Plaintiff-Respondent

See also *Treftz v. Kirby*, 7 Misc. 555.

This Court said, in *Seibert v. Goldstein* (99 L. 202), quoting from *Napodensky v. West Jersey Railroad*, 85 L. 338:

“Negligence is not an *ex cathedra* pronouncement with which an act may be arbitrarily branded in the abstract, as the judicial eye may conceive it. It presents a concrete proposition for the jury to solve where the facts vary as narrated by opposing witnesses, and from which different minds may conjecture differently, as they may view the conduct of a man in a difficult or trying situation, harassed and confused in the compass of seconds, with conflicting and contending view for self-preservation and deliverance from a zone of danger in which he is charged by law with the natural duty presumably uppermost in his mind, of observing due care for himself and his property.”

There are proofs to show that plaintiff has been permanently incapacitated by an accident involving a truck parked on a dark, foggy night in the highway, with no rear red light. The parking, as well as the absence of tail-light, are both negligent acts as well as acts in violation of the Road Act (L. 1915, p. 287, Part II, Sec. 9; Cum. Sup., Vol. 2, p. 3058), and of the Traffic Act (L. 1924, p. 449, Sec. 3; Cum. Sup., Vol. 1, p. 1983), respectively. And the complaint is that the plaintiff was guilty of contributory negligence, as matter of law, because defendant draws inferences from two equivocal questions he asked, and from the answers he received, which, if his inferences be accepted as proved facts, he claims convicts the plaintiff of contributory negli-

Brief of Plaintiff-Respondent

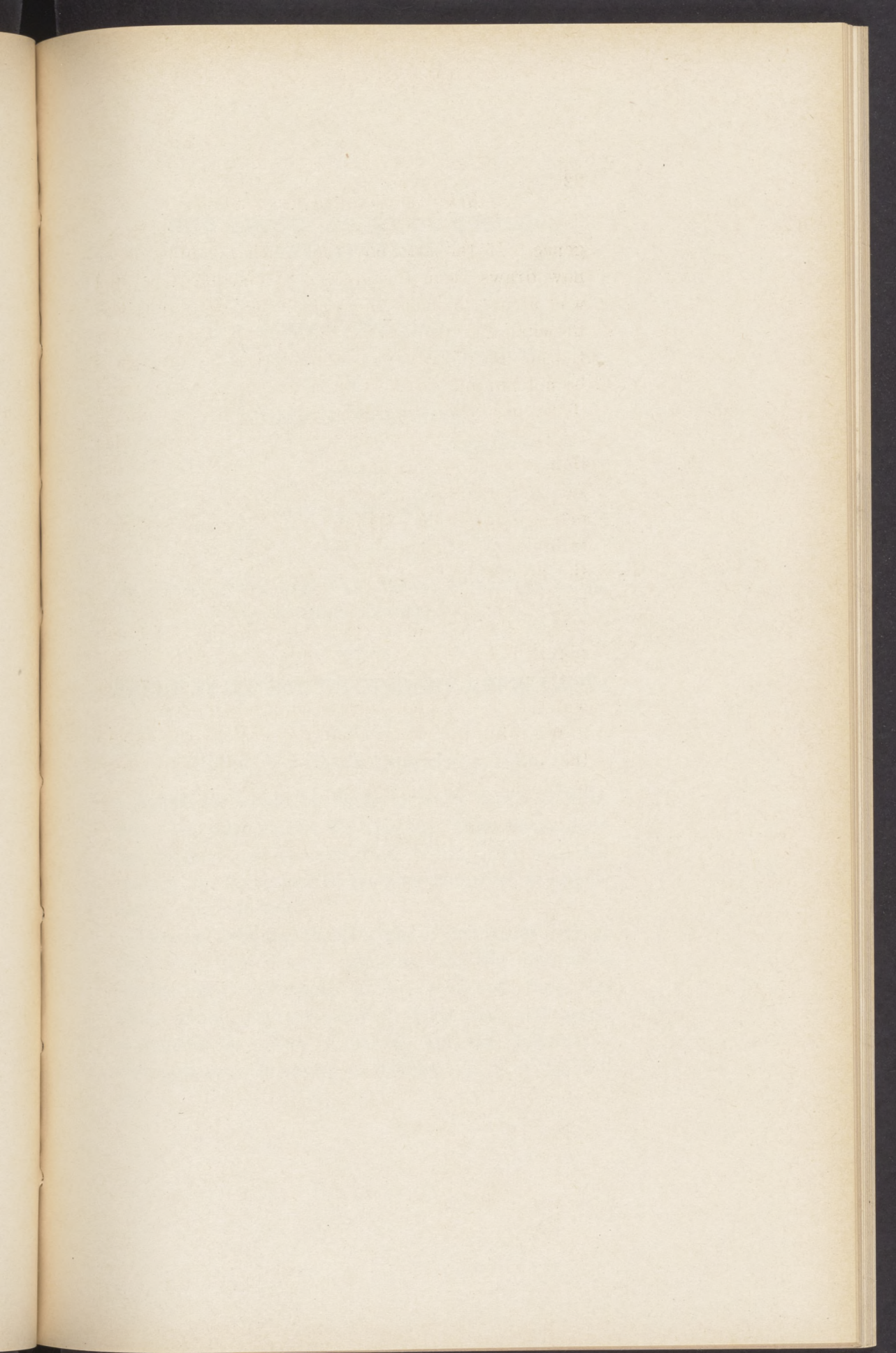
gence. If the attorney took such meaning as he now draws from the answer to his questions, and was afraid to make them clear, lest he might lose the chance to use his inference in his argument for the motion, he cannot complain that his inferences be not binding on the Court, as proved facts. And if he used his inferences in his motions, at the trial, it is fair to presume that the Court concluded that other inferences could be drawn, and was not seriously enough impressed with defendant's inferences to question further the plaintiff. And certainly the Court, as matter of law, could not, on the proofs, find that the colliding by plaintiff, who could stop at the rate he was going in five or ten feet, with the rear of defendant's truck parked in plaintiff's lane of traffic, on a dark and foggy night, without rear red light and without an attendant, was the proximate cause of the accident.

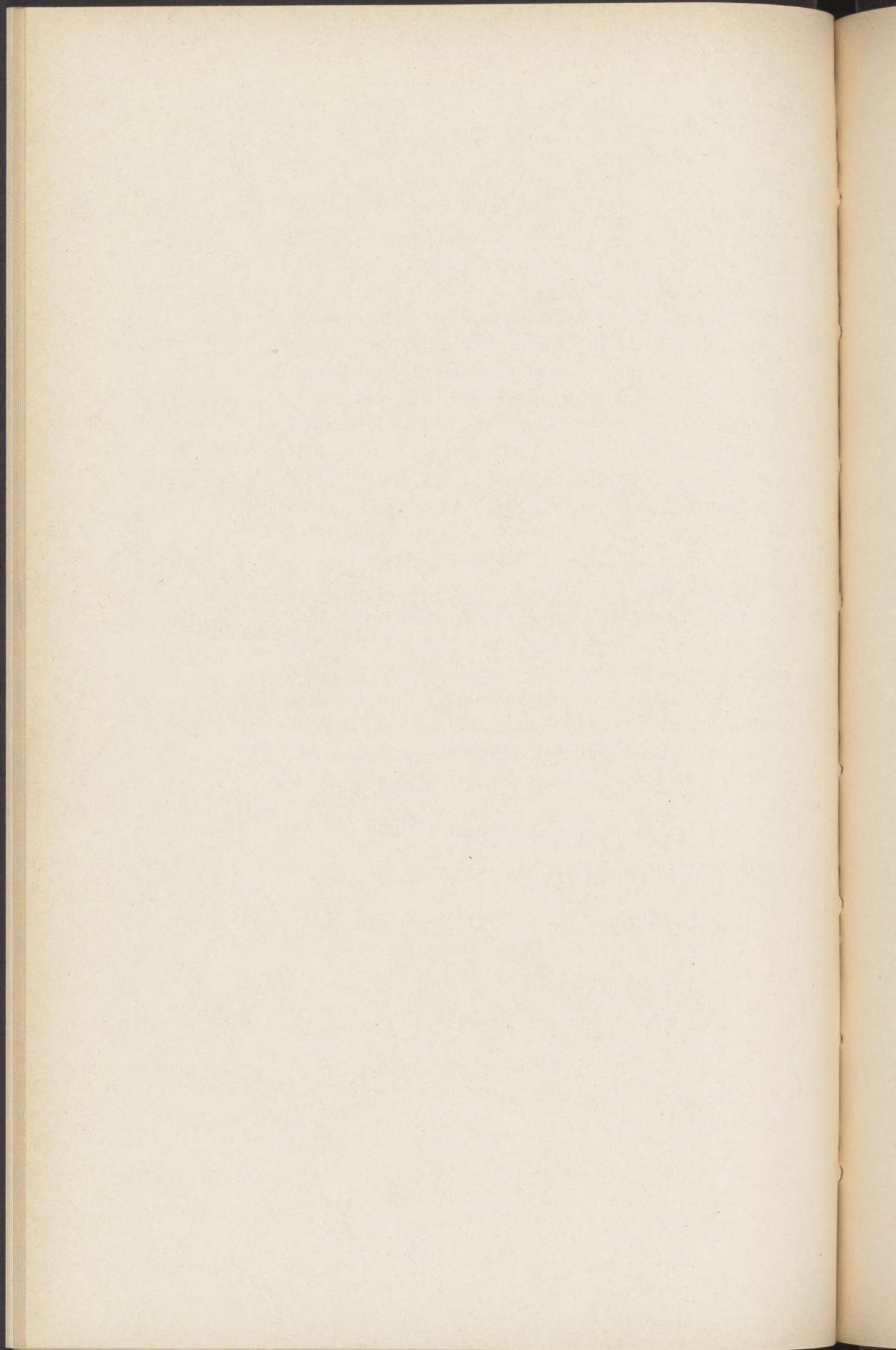
We think the Court made no error in submitting the questions of both primary and contributory negligence to the jury.

Respectfully submitted,

LEONARD H. SAVADOVE,
*Attorney for Plaintiff-
Respondent.*

JOHN A. RIGGINS,
Of Counsel.





NEW JERSEY COURT OF ERRORS
AND APPEALS.

JAMES E. MORRISON,
Respondent,

v.

GEORGE R. VAN SCIVER,
Appellant.

ACTION AT LAW.

ON APPEAL FROM THE NEW JERSEY SUPREME COURT,
CAMDEN COUNTY.

REPLY BRIEF FOR DEFENDANT-APPELLANT.

(Italics ours unless otherwise noted.)

Appellant would be loath to file a reply brief in this case were it not for the fact that respondent has raised a serious question in his brief with respect to the statement of facts as contained in appellant's original brief.

There is perhaps no principle of law better settled than that if it clearly appears that the plaintiff's conduct did contribute to the accident, then the Court should exercise control of the case and grant a non-suit or direct a verdict for the defendant. *Pennsylvania Company v. Righter*, 42 N. J. L. 180, 181.

Reply Brief for Defendant-Appellant

Since the conduct of the plaintiff and the question of his contributory negligence is vital to this appeal, it is natural that the respondent should endeavor to smooth over testimony which discloses the utter recklessness and disregard of personal safety on the part of the plaintiff below.

The truth of the matter is that when the plaintiff was asked by his own counsel to state what happened immediately preceding the accident, he stated (C., p. 10, l. 20):

“A. * * * I started back to Atlantic City, and I stopped in a lunch car in Berlin on the right-hand side. I had a cup of coffee and a piece of pie. *It was very dark and foggy*, and when I got about—well, we will say a mile, I judge it was a mile, due to poor education I just don't know the distance, but I judge it would be a mile when I met with this accident.

Q. What happened, Mr. Morrison? What do you mean you met with this accident? What did you do?

A. I ran into this truck.

Q. What kind of a truck was it?

A. Why, the name of the truck I wouldn't know, but it was a very big truck. It was hauling freight.

Q. Hauling freight?

A. Yes.

Q. And you struck the truck?

A. Yes, sir.

Q. And then what happened?

A. Then I was thrown out of the car, and I laid on the road until somebody picked me up, but before I was picked up there was a lady came to me and said, ‘Oh, my gracious, son; you are all cut up.’ I said, ‘Madam, I would

Reply Brief for Defendant-Appellant

like to get to a hospital; I am all bloody.' She said, 'My husband said' —

By Mr. Savadove:

Q. You cannot testify as to what somebody else said. You testify to what you know.

A. Yes.

Q. *How fast were you proceeding?*

A. *Twenty or twenty-five miles an hour.'*

(Counsel for the respondent have tried to the best of their ability to show that this statement with regard to speed refers to some time other than immediately preceding the accident. Even a casual reading of the plaintiff's story reveals the utter futility of such an effort. Plaintiff was referring to his speed immediately preceding the collision.)

Plaintiff was then asked by his counsel (C., p. 12, l. 7):

“Q. Was there anything having to do with the condition of the road and the condition of the weather, and the condition of the truck, that would prevent you from seeing it?

A. *It was very dark and foggy.’*”

(Plaintiff thus testifies directly that it was dark and foggy in Berlin, a mile or so up the road, and that at the point of collision it was very dark and foggy.)

Not satisfied with this statement, counsel for the plaintiff again asked (C., p. 36, l. 7):

“By Mr. Savadove:

Q. *At the section where you struck the truck of the defendant it was foggy?*

A. Yes.

Q. Was it very thick?

Reply Brief for Defendant-Appellant

A. Yes, sir.

Re-cross examination.

By Mr. Lloyd:

Q. How far could you see through this fog that you are talking about?

A. I couldn't see through the fog.

Q. How far?

A. That I couldn't say.

Q. Could you see your radiator cap?

A. No, sir.

Q. You couldn't see your radiator cap at all?

A. No, sir.

Q. Of course, if you couldn't see the radiator cap you couldn't see anything in front of that, could you?

A. No, sir."

Here is direct, positive evidence, given by the plaintiff himself, to the effect that at the point where the accident occurred it was so foggy he could not see beyond his radiator. Further, the testimony of this plaintiff is that he was proceeding through this fog at the rate of between twenty and twenty-five miles an hour.

It is almost inconceivable, in view of these statements of the plaintiff himself, that he should now attempt to argue that there was no evidence of the speed at which the plaintiff was going at the time of the collision or that there was no evidence as to the condition of the atmosphere at the point of the collision. It is important to note that throughout his entire testimony, on both direct and cross-examination, plaintiff adheres steadfastly to the fact that he was proceeding at a speed of between twenty and twenty-five miles an hour.

Reply Brief for Defendant-Appellant

There is no testimony in this case as to any other speed on the part of the plaintiff—absolutely none. Respondent is forced to infer a lesser speed, notwithstanding these repeated statements of the plaintiff, because of plaintiff's statement that he could stop within five or ten feet. However, this statement represents merely the plaintiff's conclusions as to what he thought he could do, whereas his testimony as to his speed is his statement of fact as to what he was actually doing. The fact that plaintiff's Ford had sufficient momentum to drive the tailboard of the truck clear through the windshield, together with the frame of plaintiff's car, burst open the door and sweep the plaintiff out on the concrete, clearly substantiates plaintiff's testimony with regard to his speed.

Respondent's insistence on emphasizing that portion of the testimony which indicates that the fog was of an intermittent or drifting character handicaps the plaintiff's case rather than assists it because it places the case squarely within the well-established decisions of this Court which hold that where the obstruction to view is temporary, the duty of the driver is to stop. As was well stated in the opinion in the case of *Robinson v. Mutnick*, 102 N. J. L. 22, at 25:

“The law requires the driver of a vehicle to stop when his vision is entirely obstructed by a temporary obstruction such as a dust cloud or smoke screen, when his failure to do so would jeopardize the safety of others, and to remain at a standstill until the temporary obstruction has come to an end.” Citing *Anderson v. Public Service Corp.*, 81 N. J. L. 700.

Whereas, if the obstruction was permanent, this Court has pointed out that the driver of a car is required to proceed with "unusual" care and caution.

Incidentally, it should be noted that this testimony with respect to the intermittent character of the fog came as an afterthought and that on at least one occasion counsel for the plaintiff was warned not to indicate to the plaintiff the form of the answer he desired (C., p. 35, l. 30).

Two important facts stand out uncontradicted. First, plaintiff's statement to his own counsel that it was very foggy; and, secondly, that at no time did the plaintiff make any effort either to reduce his speed or take any precaution for his own safety.

A careful examination of the cases cited by the respondent discloses that they are either distinguishable upon their facts or that the attention of the Court was not directed to the legal question involved in the case at bar.

The case of *Osburn v. DeYoung*, 99 N. J. L. 204, cited on page 18 of respondent's brief and on page 16 of appellant's brief, affords a particularly good illustration of the attitude of this Court on a similar legal question. It will be remembered that the positions of the parties in the cited case were the reverse of that in the case at bar. In other words, the plaintiff, while standing alongside of a truck, was injured and brought a suit against the car which struck him. The Court charged:

Reply Brief for Defendant-Appellant

“He says” (referring to the driver) “one reason he did not see the people was that his vision was obscured by a street light, and upon that phase of the case our courts have said that if his vision was temporarily destroyed it was his duty to stop his car and endeavor to so adjust his means of vision that his vision was restored.”

What the respondent has apparently overlooked is that this charge by the trial Judge was a statement of a legal principle which is as applicable to the case at bar as it was to the facts in the Osbun case. In effect, the Court is saying that the negligence of the defendant in that case consisted of his violation of his duty to stop his car when his vision had been temporarily destroyed. In other words, the trial Court refers to a standard of care which has been approved by this Court and is applicable to the case at bar and to all other cases of a similar nature.

Likewise, in the Osbun case, *supra*, the trial Judge refused to charge “that if the jury believe there was no tail light on the Martin truck at the time of the accident * * * the plaintiff was guilty of contributory negligence and cannot recover.”

This Court, on the appeal, held:

“Moreover, in view of the driver’s testimony that he was blinded by the arc light so that he could not see ahead more than eight or ten feet, it becomes impossible to conceive how there could be any causal connection between the absence of a tail light or an obscuration of *it with the driver’s negligent conduct in failing to stop his car until his vision was improved, or at least*

Reply Brief for Defendant-Appellant

to reduce the speed of the car so that it could be stopped in time to avoid a collision with an obstacle in the way eight or ten feet ahead."

The Court, in its opinion above cited, is emphasizing the very points now raised; namely, the plaintiff's negligent conduct in failing to stop his car until his vision was improved or at least to take some steps to protect his own safety. This failure lies squarely within the definition of this Court that contributory negligence is conduct on the part of the plaintiff which falls below the standard to which he should conform for his own protection.

An extremely important question in this case is whether or not the doctrine established in the case of *Sharpe v. Public Service Railway Co.*, 103 N. J. L. 583, 585, is to be followed. In that case it was held, page 586:

"There was evidence in abundance of the defendant's mistake * * * on the other hand, there was, as we have said, also conclusive evidence of the failure of the plaintiff to use that ordinary degree of care which, if it had been exercised, would have saved him from the untoward consequences which resulted."

Judgment of non-suit in the Sharpe case, *supra*, was affirmed.

In the cases cited by the respondent, it is important to note that in every instance the plaintiff, when faced with the loss of vision or a dangerous condition, took some steps for his own protection. In these cases the Courts properly held that a question of fact was raised as to whether or not the

Reply Brief for Defendant-Appellant

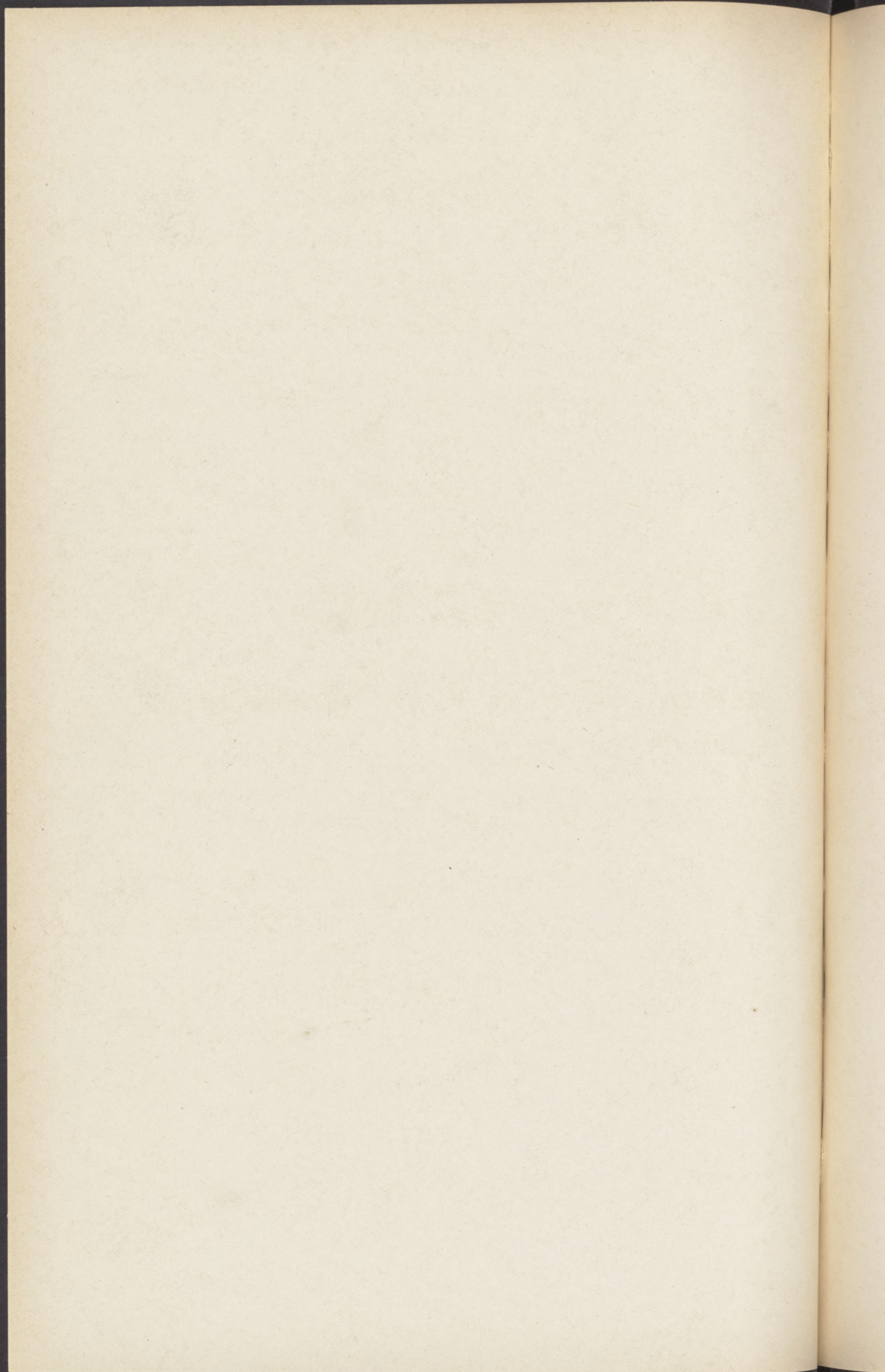
steps taken were sufficient to relieve plaintiff of the charge of contributory negligence when measured by the yardstick of normal conduct.

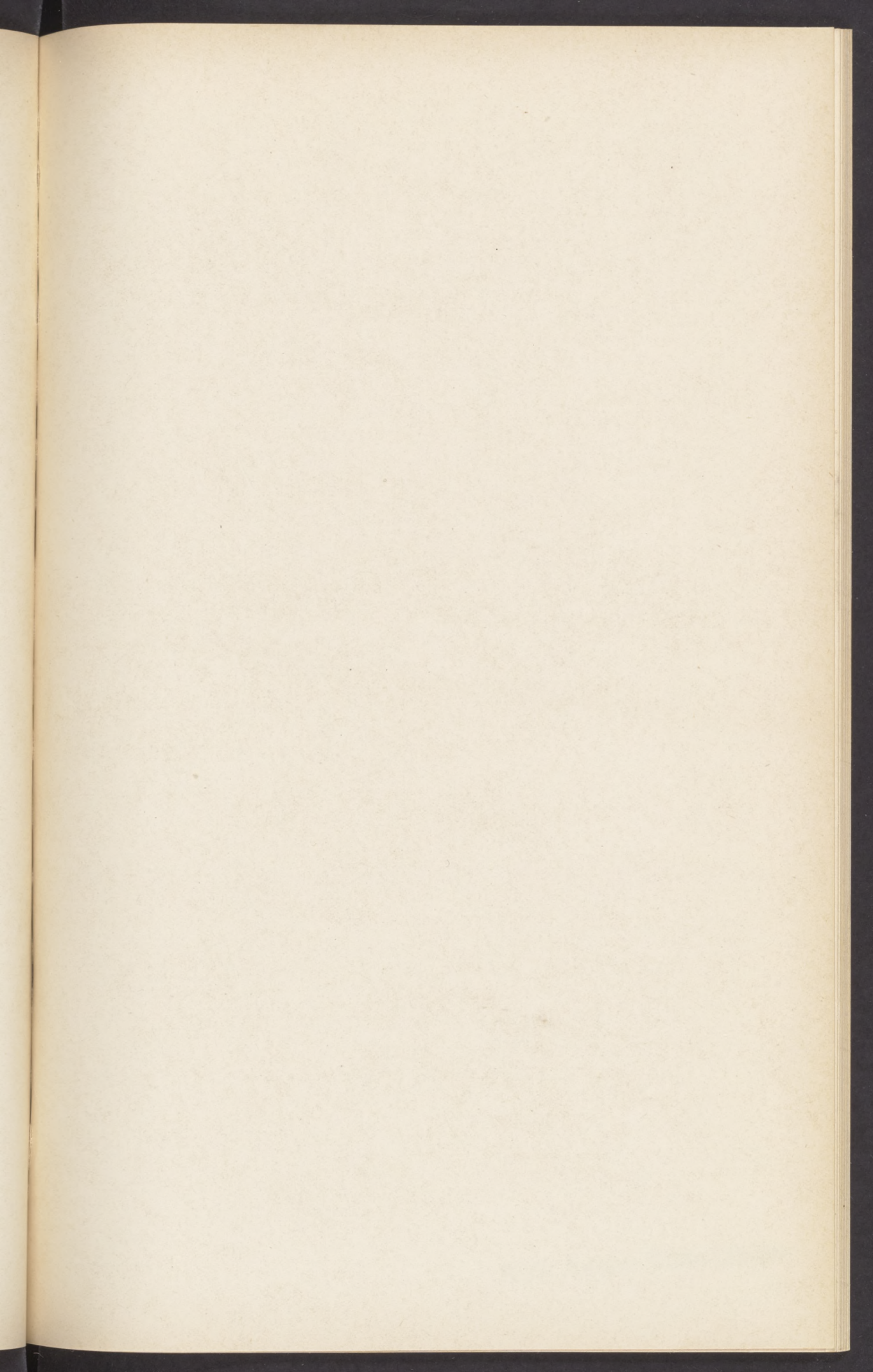
In the present case this all-important factor is completely lacking and it is therefore apparent that the plaintiff's conduct falls below a standard to which he should have conformed for his own protection. This presented contributory negligence as a question of law for the Court and upon which it should have entered either a non-suit or a directed verdict.

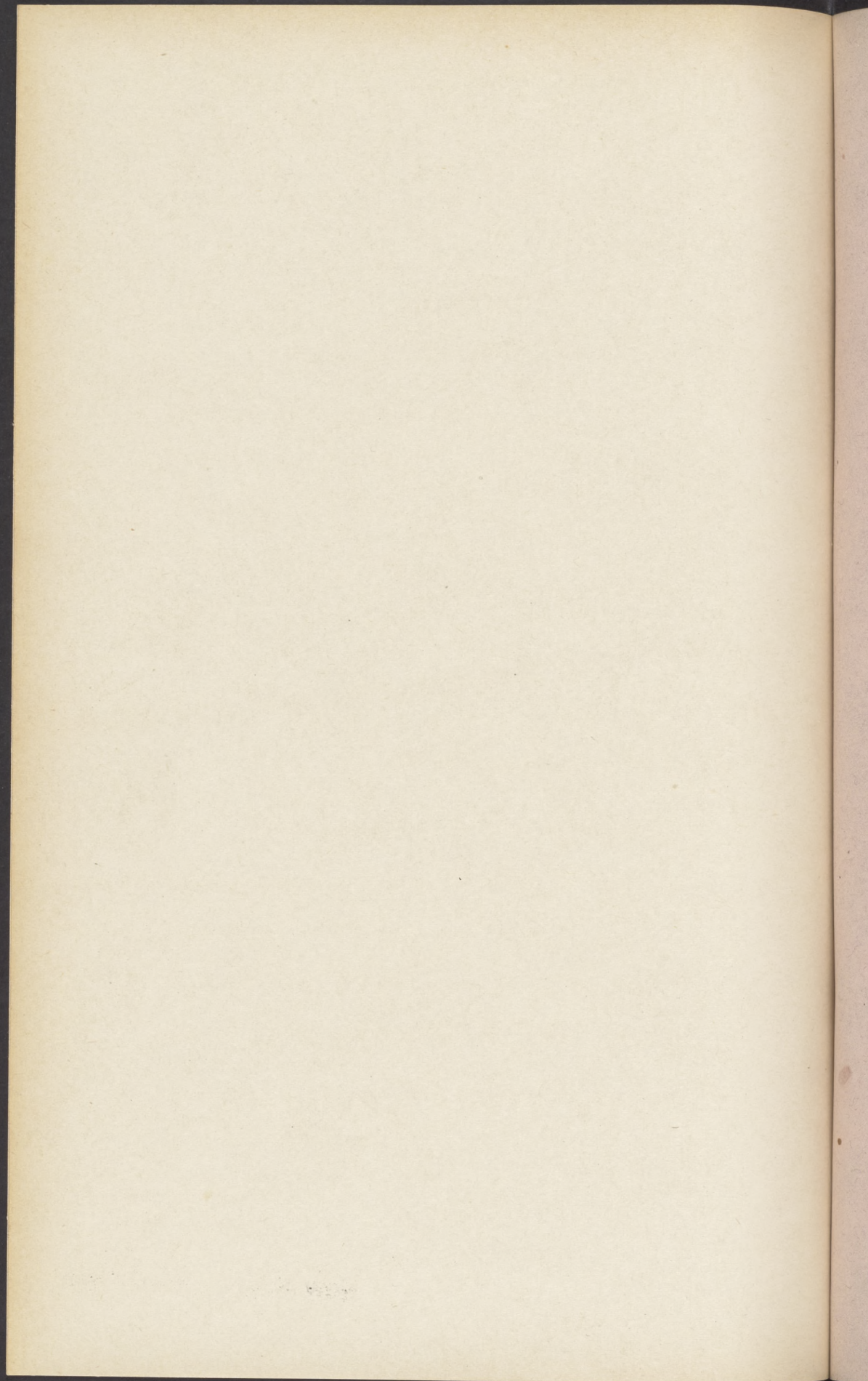
Respectfully submitted,

STARR, SUMMERILL & LLOYD,
*Attorneys for Defendant-
Appellant.*

ALFRED E. DRISCOLL,
Of Counsel.







New Jersey State Library

New Jersey State Library