

## I N D E X

	PAGE
Notice of Appeal.....	1
Notice of Grounds of Appeal.....	2
Summons . . . . .	5
Complaint . . . . .	6
Answer . . . . .	9
Reply . . . . .	10
Rule for Judgment.....	11
Rule to Show Cause.....	12
Order . . . . .	14
Testimony . . . . .	17

### PLAINTIFF'S TESTIMONY:

Max Rudel Tieger—Direct.....	26
Cross . . . . .	59
Dr. Harry Subin—Direct.....	98
Cross . . . . .	105
Re-direct . . . . .	108
Re-cross . . . . .	109
Recalled—Cross . . . . .	137
Dr. Edouard Lippe—Direct.....	111, 121
Cross . . . . .	120, 123
Recalled—Cross . . . . .	128
Recalled—Re-direct . . . . .	134
Recalled—Re-cross . . . . .	135

	PAGE
Samuel Deitch—Direct .....	127
Dr. C. Coulter Charlton—Direct.....	138, 148
Cross .....	140, 152
Re-direct .....	164
Allen Trasoff—Direct .....	166
Cross .....	171
Martin Kanefield—Direct .....	177
Cross .....	179
Motion for Non-suit.....	181
DEFENDANT'S TESTIMONY:	
Samuel Lundy—Direct .....	183
Cross .....	188
Defendant's Motion for Direction of Verdict..	193
Court's Charge to the Jury.....	194
Defendant's Requests to Charge.....	206

NOTICE OF APPEAL.

(Filed April 7th, 1934.)

ATLANTIC COUNTY CIRCUIT COURT.

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MAX TIEGER, 10  
*Plaintiff-Respondent,* }  
v. *Action at Law.*  
SAMUEL LUNDY, *Defendant-Appellant.* } *Notice of Appeal.*

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*To Max Tieger and John B. Baratta, Esquire, His  
Attorney, or to Whom It May Concern:* 20

Take notice, that Samuel Lundy appeals from the whole of the judgment entered in this cause to the Court of Errors and Appeals of New Jersey in the last resort in all causes.

BOLTE & TRIPICIAN,  
*Attorneys for Defendant-Appellant.*

Dated: Atlantic City, N. J.,  
March 29th, 1934.

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30

[ENDORSED]

Service hereby acknowledged this  
30th day of March, 1934.

J. B. Baratta.

## NOTICE OF GROUNDS OF APPEAL.

(Filed April 7th, 1934.)

10 NEW JERSEY COURT OF ERRORS AND  
APPEALS.

<p>MAX TIEGER, Plaintiff-Respondent,</p>	}	Action at Law.
v.		Notice of Grounds of
<p>SAMUEL LUNDY, Defendant-Appellant.</p>	}	Appeal.

20

*To John B. Baratta, Esquire, Attorney for Plaintiff-Respondent:*

Sir:

Take notice that the following are the grounds of appeal which the defendant-appellant hereby assigns and upon which he will rely at the hearing:

- 30 1. Because the learned trial Court refused to grant the defendant-appellant's motion for a non-suit at the close of the plaintiff-respondent's case where thereunto moved, whereas the said motion should have been granted, and to which refusal the defendant-appellant prayed an exception.

*Notice of Grounds of Appeal*

2. Because the learned trial Court refused to grant the defendant-appellant's motion for a directed verdict in favor of the defendant-appellant and against the plaintiff-respondent when thereunto moved, whereas said motion should have been granted, and to which refusal the defendant-appellant prayed an exception.

10

3. Because the learned trial Court denied the request of the defendant-appellant to charge the jury as requested in the second request as follows:

"2. While the plaintiff had a right to cross the street anywhere, if he crossed at a point other than a crossing, as in this case, he must exercise greater care than when crossing the street at a designated crossing because he had no greater preference than the defendant in the authorized use of the street. Greater care in this connection means that degree of care commensurate with the danger and conditions attendant which an ordinary prudent person under like circumstances would use."

20

and to which refusal the defendant-appellant prayed an exception.

4. Because the learned trial Court denied the request of the defendant-appellant to charge the jury as requested in the fourth request as follows:

30

"4. If you find from all the testimony that the defendant at the time and place in question was operating his automobile as an ordinary prudent person under like circumstances would

*Notice of Grounds of Appeal*

operate it and committed an act or failed to do something which did not proximately cause the plaintiff's injuries, then your verdict must be in favor of the defendant for no cause of action."

and to which refusal the defendant-appellant prayed  
10 an exception.

5. Because the learned trial Court denied the request of the defendant-appellant to charge the jury as requested in the fifth request as follows:

20 "5. In determining the proximate cause of the injuries to the plaintiff you must consider all the believable evidence, and even if you find that the defendant committed some act or failed to do something so as to charge him with negligence, the plaintiff can not recover if you also find from the evidence that the plaintiff did some act of negligence which was the proximate cause of his injuries."

and to which refusal the defendant-appellant prayed  
an exception.

6. Because the learned trial Court over the objection of the defendant-appellant permitted the  
30 witness, Max Tieger, to answer the following questions:

"Q. In your early years did you set out in some career or other?

Q. What career?

Q. At what age did you embark on this career?

*Summons*

- Q. What were the choir masters' names?  
 Q. And who else?  
 Q. Then what did you do?  
 Q. What else—could you or couldn't you continue on singing at thirteen, as you said?  
 Q. Why couldn't you?"

to which action of the learned trial Court the defendant-appellant prayed an exception. 10

BOLTE & TRIPICIAN,  
*Attorneys for Defendant-Appellant.*  
 HARRY MILLER,  
*Of Counsel.*

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[ENDORSED]

20

Service hereby acknowledged this  
 6th day of April, 1934.

J. B. Baratta.

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SUMMONS.

(Filed August 13, 1932.)

THE STATE OF NEW JERSEY TO SAMUEL LUNDY, 30  
 GREETING:

(Seal) You are hereby summoned to answer the annexed complaint of Max Tieger, in an action at law in the Atlantic County Circuit Court. And take notice that unless you file your answer to the said com-

*Complaint*

plaint with the Clerk of the Atlantic County Circuit Court, at Mays Landing, New Jersey, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

Witness, HONORABLE WILLIAM FRANK SOOY, Judge of the Atlantic County Circuit Court, this ninth day  
10 of August, nineteen hundred and thirty-two.

WM. A. BLAIR,  
*Clerk.*

J. B. BARATTA,  
*Attorney.*

---

 COMPLAINT.

## ATLANTIC COUNTY CIRCUIT COURT.

20

---

 MAX TIEGER,
*Plaintiff,*

v.

SAMUEL LUNDY,

*Defendant.*
 Action at Law.  
Complaint.

30

Plaintiff, complaining against the defendant, says that:

1. On or about August 7th, 1932, plaintiff, Max Tieger, was lawfully on a certain part of New York

Avenue, a public thoroughfare, between Pacific Avenue and the Boardwalk, in the City of Atlantic City, County of Atlantic and State of New Jersey.

2. At or about the stated time and place, the defendant was driving and operating an automobile.

3. It then and there became the duty of the defendant to use a reasonable degree of care in the management, operation and control of the said automobile. 10

4. Yet, nevertheless, the said defendant wholly failed in his duty so to do, but so negligently, carelessly and improperly managed, operated and controlled the said automobile in such a reckless and dangerous manner, at an excessively high and rapid rate of speed, without properly controlling the course and direction thereof, without making proper observations of the conditions in and about the path of said vehicle; without keeping a proper lookout; without proper brakes; without sounding any warning or signal of any kind, and in violation of the laws of the city and State aforesaid, each, all and several of which acts endangering the lives of the said plaintiff and other lawful users of said highway at said time and place, so that the said defendant caused the said automobile to run into, hit, strike, throw and knock the plaintiff about, around and to and upon the ground with great force and violence, and to injure the said plaintiff without the fault of the plaintiff. 20 30

5. So that as a result of the accident aforesaid, the said plaintiff was seriously and permanently in-

*Complaint*

jured, both externally and internally, about the head, back, neck, body, arms and limbs; suffered great shock to his nervous system and brain so as to be permanently injured in both, suffered great pain and anguish, and will continue to suffer great pain and anguish in the future; he was compelled to expend great sums of money in an effort to cure  
10 himself of his injuries so unlawfully sustained, and he will be compelled to expend great sums of money in the future in an effort so to cure himself; he was prevented from attending to the usual duties of his occupation and calling and he will be prevented from attending to said duties in the future. He suffered permanent disfigurement of the face and head.

Plaintiff demands of the defendant, Samuel  
20 Lundy, the sum of \$25,000.00 as and for his damages besides costs of suit to be taxed.

J. B. BARATTA,  
*Attorney for Plaintiff.*

ANSWER.

(Filed September 10th, 1932.)

ATLANTIC COUNTY CIRCUIT COURT.

MAX TIEGER,

*Plaintiff,*

v.

SAMUEL LUNDY,

*Defendant.*

Action at Law.  
Answer.

10

The defendant, Samuel Lundy, answering the complaint of the plaintiff filed herein, says that:

20

1. He denies each and every allegation contained in paragraphs 1, 2, 3, 4 and 5 of the complaint.

He denies that he is indebted to the plaintiff in the sum of \$25,000 or in any sum whatsoever.

FIRST DEFENSE.

The injuries and damages alleged to have been sustained by the plaintiff were caused solely and entirely through his own negligence.

30

SECOND DEFENSE.

The plaintiff, Max Tieger, was guilty of contributory negligence which was the proximate cause of the injuries and damage sustained by him.

*Reply*

## THIRD DEFENSE.

The injuries and damage alleged to have been sustained by the plaintiff were caused by an intervening agency over which this defendant had no control whatsoever.

10

BOLTE & TRIPICIAN,  
*Attorneys of Defendant.*

---

## REPLY.

(Filed September 13, 1932.)

## ATLANTIC COUNTY CIRCUIT COURT.

20

MAX TIEGER,

*Plaintiff,*

v.

SAMUEL LUNDY,

*Defendant.*

Action at Law.  
Reply.

---

30 Plaintiff, in reply to the answer of the defendant herein, denies each and every allegation of new matter therein contained and joins issue.

J. B. BARATTA,  
*Attorney for Plaintiff.*

RULE FOR JUDGMENT.

(Filed February 23rd, 1934.)

ATLANTIC COUNTY CIRCUIT COURT.

MAX TIEGER,

*Plaintiff,*

v.

SAMUEL LUNDY,

*Defendant.*

Action at Law.  
Rule for Judgment.

10

This action having been tried before Judge Wilfred H. Jayne, with a jury, in the presence of counsel of the respective parties, on February 19th, 1934, and February 20th, 1934, and the jury having returned a verdict in favor of the plaintiff, Max Tieger, for fifty-three hundred dollars (\$5300.00) damages;

20

It is ordered that judgment final be entered in favor of the plaintiff, Max Tieger, and against the defendant, Samuel Lundy, for the sum of fifty-three hundred dollars (\$5300.00) and plaintiff's costs to be taxed.

WILFRED H. JAYNE,

*Judge.*

30

On motion of

J. B. BARATTA,

*Attorney for Plaintiff.*

Rule entered this 21st day of February, 1934.



*Rule to Show Cause*

the verdict should not be set aside and a new trial granted on the sole ground that the damages assessed by the jury are excessive, and it is further

Ordered that the granting of this rule to show cause shall not operate as a waiver of any of the objections or exceptions granted to the said defendant, but that each of the said objections and exceptions is hereby expressly reserved to the defendant 10 for the purpose of taking an appeal to either the Supreme Court of the State of New Jersey or the Court of Errors and Appeals of the State of New Jersey, and it is further

Ordered that the granting of this rule shall not preclude the taking of such an appeal to either of said courts by the said defendant, and it is further

Ordered that pending the determination of this rule to show cause the plaintiff is hereby restrained from issuing an execution upon said judgment. 20

WILFRED H. JAYNE,  
*Judge.*

On motion of  
BOLTE & TRIPICIAN,  
*Attorneys for Defendant.*

## ORDER.

(Filed March 16th, 1934.)

## ATLANTIC COUNTY CIRCUIT COURT.

10

MAX TIEGER,  v. SAMUEL LUNDY,   	<i>Plaintiff,</i> }  <i>Defendant.</i> }	Action at Law. On Rule to Show Cause. Order.
--	--	---

20

A rule to show cause having been issued herein on the 28th day of February, 1934, on application of the above-named defendant, Samuel Lundy, requiring the plaintiff, Max Tieger, to show cause why the verdict in favor of himself as plaintiff for the sum of \$5,300 and against the defendant, Samuel Lundy, should not be set aside and a new trial granted for the reason that the damages assessed by the jury were excessive, and in which said rule to show cause there was reserved for appeal to the defendant, Samuel Lundy, each and every objection and exception taken by the defendant;

30

And the matter having been duly argued by counsel for the respective parties and the Court being of the opinion that the verdict in favor of the plain-

*Order*

tiff, Max Tieger, and against the defendant, Samuel Lundy, for the sum of \$5,300 is excessive and should by reason thereof be set aside and a new trial granted unless the said Max Tieger consents to accept the sum of \$4,300, together with his costs of suit to be taxed, in full satisfaction of the award made by the jury to him;

It is, on this 15th day of March, 1934, ordered 10  
that the aforesaid verdict in favor of the plaintiff, Max Tieger, and against the defendant, Samuel Lundy, for the sum of \$5,300 be and the same hereby is set aside and a new trial granted to the defendant, Samuel Lundy, unless the plaintiff, Max Tieger, shall within ten days hereafter file with the clerk of this court his consent in writing to accept the sum of \$4,300, together with his costs of this suit to be taxed, in full satisfaction of the verdict heretofore returned as aforesaid. 20

And it is further ordered that in the event the said plaintiff, Max Tieger, shall file his written consent to accept the said sum of \$4,300 in lieu of the amount awarded to him by the jury in the manner and within the time herein ordered, then and in that event only, it is hereby ordered that the judgment entered in pursuance of the said verdict shall be and remain in full force and effect, but only in the amount of \$4,300, together with costs to be taxed;

And it is further ordered that in the event the 30  
said plaintiff, Max Tieger, shall file his written consent to accept the said sum of \$4,300 in lieu of the amount awarded to him by the jury in the manner and within the time herein ordered, then and in that event, it is hereby ordered that the rule to

*Order*

show cause allowed herein be and the same hereby is discharged, provided, however, that the discharge of the said rule to show cause shall not operate as a waiver of any of the objections and exceptions granted to the defendant and expressly reserved for appeal by the defendant as set forth in the said rule to show cause.

10

WILFRED H. JAYNE,  
*Judge of Atlantic County  
Circuit Court.*

On motion of  
BOLTE & TRIPICIAN,  
*Attorneys for Defendant.*

20

30

TESTIMONY.

ATLANTIC COUNTY CIRCUIT COURT.

MAX TIEGER,

*Plaintiff,*

v.

SAMUEL LUNDY,

*Defendant.*

10

Before HON. WILFRED H. JAYNE, J., and a jury.

20

Atlantic City, N. J.

Monday, February 19, 1934.

APPEARANCES:

JOHN B. BARATTA, Esq., for the plaintiff.

MESSRS. BOLTE & TRIPICIAN, by ARTHUR G. BOLTE,  
Esq., and HARRY MILLER, Esq., for the defen- 30  
dant.

(The jury was empaneled and sworn.)

*Plaintiff's Opening Statement*

Mr. Baratta: If your Honor please, I have here a bill from the Atlantic City Hospital in the sum of \$83.25, and inasmuch as it is a lien of record, I don't think that my adversary would have any objection to its admittance at this time.

Mr. Bolte: I am perfectly willing to admit it. Are  
10 you going to make an opening?

Mr. Baratta: Absolutely.

Mr. Bolte: We will have no trouble about that.

Mr. Baratta: Now, if your Honor please, and ladies and gentlemen of the jury:

It seems that man has been glorified and he is distinguished from the lower animals by many attributes, and one of those attributes is the human voice.  
20 Now the repository of the human voice is in the human larynx. That is right above the wind pipe and immediately contiguous to the esophagus or the alimentary canal where your food goes down into the stomach.

I am going to show you a picture of the boy, I am going to take him from early childhood at the tender age of eight and I am going to take him on through Europe and here to these United States and trace  
30 his career step by step and show you how he was rising to fame in the musical world, and more particularly in that of song. I will show you how he came under the care of great masters and teachers and ultimately under one master, Dr. Lippe, who has developed I don't know how many stars that he will

*Plaintiff's Opening Statement*

enumerate to you when he takes the stand. I will show you in the midst of this meteoric rise, on August 7, 1932, to be exact, an accident befell this boy, not by virtue of any negligence in him, but by virtue of the defendant, as we shall depict for you. It so happened that that day he came down to Atlantic City in company with two other boys. They got off at the Reading Railroad station. They went to a rooming house on Columbia Place in this City. They disrobed there and went down to the beach. Having gone there and gone in the water, they came out upon the sand. From the sand they came back to the house with the idea of changing their clothes or, at least, two did, and one remained in the bathing suit, and from that house on Columbia Place they proceeded to the Boardwalk. When they got to the Boardwalk, naturally, being in improper attire, one of the boys in bathing suits and the other with just a pair of pants over their respective bathing suits, they were ordered from the Boardwalk by a policeman, and they wound their way to Pacific Avenue, and then on up Pacific Avenue to New York, turned at New York with the ultimate goal in view of reaching the Five-and-Ten-Cent Store, where they might partake of some food there at a very modest price. They went into the Five-and-Ten-Cent Store and after they were there a while and had eaten, they came out the back entrance which gives on New York Avenue. They had not walked a hundred feet before on that day, as I will show you, a cloudburst overtook them, and it was of such proportions that they were forced to seek shelter in a garage at New York Avenue and the Boardwalk. They stayed in this

garage until the storm subsided sufficiently to permit a reasonable man to come out and continue on his way. It subsided to such a point it was just a faint drizzle, but not enough to make people seek shelter as they proceeded along the Boardwalk. They came out, and by this time the streets were entirely flooded with water. Cars—and remember it was  
10 August 7, 1932, in the City of Atlantic City, and you can assume how traffic conditions must have been on New York Avenue at that time—so that the entire right-hand side of the street going towards Pacific Avenue was one entire mass of parked automobiles. And, aside from that, and to add to the deterrent and the obstacles in the way of crossing to the other side, as I have explained, the streets were entirely flooded—entirely flooded. Now, when the boys came  
20 out, one fellow seized upon the idea that right directly across from the garage was the little street known as Westminster Alley, I think it is. He thought that was a short cut, that he would cut through that street and wind his way on down town to Columbia Place, where they wanted to go, and where they were staying and had taken their clothes. But he was impeded—he couldn't cross there—first of all, as I have explained, by this flood of water and, secondly, by these parked automobiles along the  
30 curb. So, as boys will, they changed their minds about crossing there, and wound their way on down towards Pacific Avenue to continue in their course in the way they had come up to the Boardwalk to New York Avenue. They came down New York Avenue and perhaps walked a—I might say half a block, all the while with the object in view of crossing the

*Plaintiff's Opening Statement*

street for the reason, as they put it, that the shelter was better over there. Now this mass of parked automobiles confronts them as they wind their way to Pacific Avenue, and when they get about a half a block distant from that garage at New York and the Boardwalk, they find a space for at least two automobiles, and instead of the street being flooded as up near the Boardwalk, the puddle is comparatively narrower, giving one an opportunity to leap across. Now, what happened? Here we have them in the space the size of at least two automobiles, and the three boys near this spot. The one boy that was in the bathing suit, he, by way of precaution, and since he had his bathing suit on and no shoes, waded out into this puddle aside of the rear end of the car facing New York and Pacific Avenue, and about fifteen or twenty feet from the next car, and alongside of the same curb. So that there is a space, now, of fifteen or twenty feet. He waded out into the water and he looked to Pacific Avenue and he looked to the Boardwalk, and as he looked to the Boardwalk an automobile driven by the defendant is approaching, and as it approaches it gets to about twenty-five to thirty feet away and the car then slowly comes along, and at ten feet it comes to a dead stop and the driver of the car, as you do at cross walks, indicated to the boys all right; whereupon, the other two boys, one of which—both of which were standing on the curb, one aside of the other—one of those boys standing on that curb having also raised his hand to indicate to that driver of that car that he proposed to cross the street and to please allow him, and having also received the signal from the driver

*Plaintiff's Opening Statement*

of the car to proceed, leaped, and as he leaped, for some reason that I can't explain, the driver of the automobile perhaps put his foot on the gas instead of the brake and the car leaped forward, and the two bodies, that of the automobile and of the plaintiff, Max Tieger, came into contact. Max Tieger was injured. He had the right cheek, the opening of  
10 the mouth, cut and severed entirely all the way back here to what the doctors call the zygoma. That happens to be the bone up here. Had twenty or thirty stitches in it. Cut and severed entirely through and the muscle ripped asunder, and there followed a sequela of symptoms in the way of a swelling of the tongue and swelling of the larynx which is immediately contiguous to the tongue, as the doctors will show you, and that injury was manifested in the  
20 fact that the boy could not swallow and had to be fed through a tube over a period of months. And the injury to the larynx and the voice box that I have just spoken to you about a moment ago was manifested by what the doctors call aphonia, meaning a loss of voice and complete paralysis of the larynx or some of the organs therein which persisted over a period of time and then slowly responded to treatment by experts in Philadelphia, I think, as well as here.

Now, then, I have told you about the meteoric rise  
30 of the plaintiff and the rung in the ladder of success he had attained. Now came this accident and, of course, has dissipated all those hopes. I will show you he was in a position where he was singing what are known to the musical world as the comprinary parts, which are the minor roles in grand opera, and

*Defendant's Opening Statement*

engaged in various synagogues in the role of the cantor. And, above all, I will show you that in a man his size a most remarkable voice was reposed in the way of a basso, something that we don't see in singers of the size and dimensions of this boy. I will show you that now he is just a singer of many but that the promise that he had manifested of yore has been shattered. I will go further and will show 10 you what the loss of earnings must be to this boy. I will try to picture all those things as best I can. Of course, I am not a singer and I am not a medical man, but I do hope that I have given you enough of this picture, at least the scaffoldings upon which I can reasonably construct the edifice. And I will now turn you over to my adversary who will picture for you what he intends to prove.

Mr. Bolte: With the permission of the Court: 20  
I am neither a singer nor a doctor, and I doubt very much whether I am a lawyer. I work at this game, and I am defending here Mr. Lundy. I have listened to Mr. Baratta's opening of this case and heard him depict to you how this accident occurred. Now, the truth of the matter is the accident did not—did not, I say, occur in the manner in which he has told it to you. We will demonstrate to you that we knew absolutely nothing about these boys at all until this boy Tieger, who was in front of the other two boys, 30 suddenly leaped out from the sidewalk of New York Avenue, about midway between Pacific and the beach. Mr. Lundy was coming along, driving there. It had rained. There were puddles of water. He was driving along slowly, saw nothing of these boys,

and suddenly, between cars as they were parked there as Mr. Baratta tells you, this boy leaped out, and the first Mr. Lundy knew these boys were anywhere around and they had come between the cars was when the thud struck his car, struck at the side where the handle was, and just as soon as he felt the impact he stopped and he picked up this boy and  
10 took him to the hospital, and subsequently then the other two boys came to the hospital to meet him. There is nothing that Mr. Lundy did in the way of driving that in any manner, shape or form was negligent. He did not signal these boys. He did not see them. But he did just as any person would do driving along New York Avenue, that after a storm he drove along there, drove carefully. He does not live here; neither the plaintiff nor the defendant does, I believe, but he came along there and drove  
20 his car, and he did just exactly as any human being would do, and without any notice to him whatever this sudden impact came to his car when this boy leaped out from between these cars. Where they were going, why they were going on the other side of the street I don't know, Mr. Lundy doesn't know, and possibly no one else—possibly they do. But, so far as he having done anything, as he having seen them or talked to them or signalled to them, or anything of the kind—not at all. He never saw them.  
30 And if we show you and demonstrate to you that Mr. Lundy in no manner, shape or form did anything that he ought not to have done or he did something he ought not to have done, or failed to do something he should have done, there cannot be recovery. The negligence in this matter is entirely with this boy.

*Offer of Evidence*

I can appreciate that when some one is injured through the negligence of some one else, that there should be payment, but when some one is injured, just because they are injured it does not follow some one else should be called upon to pay, unless the person who did it did it to them, and did something they should not have done. We will demonstrate Mr. Lundy did nothing he ought not to have done, and 10 he was not negligent, and the negligence, if any, was entirely on this boy himself, and we will ask you to bring a verdict in favor of the defendant.

---

Mr. Baratta: Now, Mr. Bolte, I suppose we can introduce the hospital bill? Quite all right?

Mr. Bolte: I have already consented to it, Mr. 20 Baratta.

Mr. Baratta: Is it agreeable to the Court?

The Court: How much is it?

Mr. Baratta: Well, it is a bill for some ten days spent there after the accident. \$83.25.

(Hospital bill offered is received in evidence and 30 marked Exhibit P1.)

MAX RUDEL TIEGER, the plaintiff, called as a witness in his own behalf, being sworn, testified as follows:

Direct examination.

10 By Mr. Baratta:

Q. Mr. Tieger, where do you live now?

A. 831 North 7th Street, Philadelphia.

Q. You have resided there how long?

A. For about, more or less, six or seven months.

Q. And before that where did you live?

A. 1329 North 7th Street.

Q. In Philadelphia?

A. Yes.

20 Q. Were you living there August 7th, 1932?

A. No.

Q. Where were you living on that date?

A. 2541 South American Street.

Q. Philadelphia?

A. Yes.

Q. Mr. Tieger, do you remember August 7, 1932?

A. I do.

Q. What city were you in on that day?

A. I came to Atlantic City.

30 Q. And you had with you some companions?

A. I had two friend of mine's.

Q. What were the names of your companions?

A. Mr. Allen Trasoff and Mr. Martin Kanefield.

Q. Where did you arrive in Atlantic City?

A. At the Reading terminal.

*Max Rudel Tieger—Direct*

Q. And from the Reading Terminal you proceeded where?

A. Up to Columbia Place.

Q. And why did you want to go to Columbia Place?

A. My sister was staying there.

Mr. Bolte: I don't know this is important. I am 10 willing—I have no objection, but simply in the matter of cutting down time.

The Court: Preliminary, I suppose.

Mr. Baratta: Yes.

Q. And you went to Columbia Place?

A. Yes.

Q. Was this house on Columbia Place near the 20 Boardwalk or far?

A. It was near the Boardwalk.

Q. How far from the Boardwalk?

A. About, I judge, about, I would say a hundred, a hundred and twenty-five feet, something like that.

Q. And what did you do there?

A. I changed to a bathing suit.

Q. Who did?

A. All three of us.

Q. All three boys? 30

A. Yes.

Q. Having changed to bathing suits, where did you go?

A. Went down to the beach.

Q. At the foot of Columbia Avenue?

A. Yes.

Q. Place, I mean?

A. Yes.

Q. How long did you stay there?

A. Well, probably an hour or two.

Q. Then did you return to the place on Columbia Place?

10 A. Yes.

Q. And did you do something there?

A. I have put on a pair of pants and a pair of sneaks.

Q. Yes.

A. Mr. Trasoff put on a pair of pants and a pair of shoes, and Mr. Kanefield didn't put on anything.

Q. So how was Mr. Kanefield attired when you emerged from the Columbia Place house the second time?

20 A. Bathing suit only.

Q. And you had what on?

A. Pair of pants and pair of sneaks.

Q. And what did the other boy have?

A. Pair of pants and a pair of shoes.

Q. And what did you have covering your respective chests?

A. My bathing suit.

Q. And where did you go?

A. We went back to the Boardwalk.

30 Q. And how far did you proceed along the Boardwalk?

A. About—I would judge about a half a block.

Q. What happened after proceeding along the Boardwalk half a block?

A. Policeman stopped us.

*Max Rudel Tieger—Direct*

Q. What did the policeman say?

A. He told us that we are not allowed to go on the Boardwalk with bathing suits.

Q. As a result of that, what did you do?

A. We asked him where the nearest Five-and-Ten was.

Q. Did you receive a response?

A. Yes. 10

Q. Then what did you do?

A. And he told us we should go to the next street to the Boardwalk.

Q. And what street was that?

A. Pacific Avenue.

Q. And did you go from the Boardwalk to Pacific Avenue?

A. Yes.

Q. And having gotten to Pacific Avenue from the Boardwalk you proceeded along Pacific Avenue to 20 what point?

A. To New York Avenue.

Q. And having arrived at New York Avenue, what did you do then?

A. We went up to the Boardwalk till we came to the Five-and-Ten-Cent Store.

Q. Did you enter the Five-and-Ten-Cent Store at New York Avenue and the Boardwalk?

A. Yes.

Q. What was your purpose when you entered the 30 store?

Mr. Bolte: What difference does it make?

The Court: Well —

Mr. Bolte: I am perfectly willing to let it go.

The Court: There is none of this very material.

Mr. Baratta: I am getting right to the point.

Q. You stayed in the Five-and-Ten-Cent Store?

10 A. Yes.

Q. You emerged from the Five-and-Ten-Cent Store?

A. Yes.

Q. Then which way did you proceed?

A. We came down at the bank entrance of the Five-and-Ten-Cent Store.

Q. Yes.

A. And we started to go down to Pacific Avenue.

Q. Along what street?

20 A. On New York Avenue.

Q. What happened?

A. A storm broke out.

Q. Was it heavy, slight or moderate?

A. It was a very heavy—what I may say, which I have ever seen.

Q. A very heavy storm?

A. Heavy, yes.

Q. What did you do?

30 A. We ran down to the garage. There is a garage and we ran into the garage.

Q. On New York Avenue?

A. Yes.

Q. How long did you stay in the garage?

A. Probably half an hour or so, till the rain subsided.

*Max Rudel Tieger—Direct*

Q. Did the rain subside entirely?

A. No; it kept on drizzling.

Q. Then what did you do?

A. We decided we should get back to the place to get dressed.

Q. Then what did you do?

A. We kept on going for about a few feet.

Q. Yes.

10

A. And then we seen a small street across.

Q. Yes.

A. And we thought it would be able to make a short cut.

Q. Then what?

A. But we couldn't go across right exactly where the street was.

Q. Why?

A. Because there were machines parked there.

Q. Anything else?

20

A. It was big water, puddles on the curb, on the curb.

Q. Then what did you do?

A. We kept on going down towards Pacific Avenue.

Q. And how far did you walk towards Pacific Avenue?

A. Well, about the middle of the block.

Q. Middle of the block. And when you got to the middle of the block what struck your observation? 30

A. We seen an opening.

Q. How big was the opening?

A. I would judge about fifteen to twenty feet.

Q. And this opening was between two what?

A. Between two cars.

Q. And the cars were parked on your side of the street?

A. Yes.

Q. When you got to this opening, as you say, for two cars, fifteen to twenty feet, what happened at that point?

A. There was a small puddle there.

10 Q. Yes.

A. Mr. Kanefield ——

Q. That is the boy in the bathing suit?

A. In the bathing suit, yes. We have decided to go across there, to get across.

Q. Yes.

A. Mr. Kanefield was standing—started to walk out into the puddle, because he had no shoes on.

Q. Yes.

20 A. And he stopped about almost at the end of the car to the right side of the ——

Q. To his right side?

A. Yes.

Q. That was the car towards Pacific Avenue?

A. Pacific Avenue.

Q. And having gotten there, what did he do?

A. He looked up for the traffic.

Q. Which way?

30 Mr. Bolte: I object to that, if the Court please.

A. Both ways.

Mr. Baratta: Any way at all that counsel wishes.

Mr. Bolte: No, it is not as counsel wishes. I ob-

ject to that statement. It is a matter of law that we are trying the case, and not as counsel wishes.

The Court: That is true. I suppose this witness does not know whether he was looking or whether he was not. Describe what he saw and knew.

Q. Will you describe the conduct of Mr. Kane- 10  
field?

A. He was looking up to see if there is any ——

Q. No; which way did he look?

A. First down to Pacific and then out to the Boardwalk.

Q. Fine. Now, having looked to Pacific and looked to the Boardwalk, what did you do then?

A. I looked up myself. I was standing on the curb, while I had sneaks on.

Q. You were standing on the curb? 20

A. Curb.

Q. And with relation to Mr. Kanefield who was out in the puddle, as you have described, where were you standing on the curb?

A. I was standing right behind him, about within hand reach, right on the curb.

Q. To what way?

A. To his left.

Q. And who was standing on the curb next to you?

A. Mr. Trasoff. 30

Q. Which side of you was Mr. Trasoff standing?

A. To my right side.

Q. Did you look at all while you were on the curb?

A. Yes.

Q. Which way did you look?

A. Toward the Boardwalk.

Q. And having looked towards the Boardwalk what, if anything, did you observe?

A. I have seen that car coming.

Q. You saw a car coming. What did the car coming do?

10 A. It came down slowly.

Q. At what point did it come slowly?

A. Well, I would say it came very slow till about ten or fifteen feet, then it slowed down very much.

Q. Yes, and then what?

A. It came almost to a stop.

Q. And then what?

A. And then I put up my hand to say I wanted to get across.

Q. Yes. You did what?

20 A. I put up myself—I was about to put up my hand to signal to stop.

Q. Then what happened?

A. He nodded with his head.

Q. Who nodded?

A. The man in the car.

Q. With his head which way?

A. This way, to the left.

Q. What did you do?

A. Well, when Mr. Kanefield said to me, "All  
30 right, Max" —

Mr. Bolte: No; I object.

The Court: No.

Q. Mr. Kanefield said something?

A. Yes.

*Max Rudel Tieger—Direct*

- Q. What did you do then?  
 A. I jumped across the puddle.  
 Q. What happened?  
 A. That is all. I hit the car, I don't know how.  
 Q. Then they took you where, Max?  
 A. Atlantic City Hospital.  
 Q. Who took you?  
 A. The man in the car. 10  
 Q. I see. Mr. Lundy?  
 A. Yes.  
 Q. What?  
 A. Yes, that is right.  
 Q. I now direct your attention to the day of May 13, 1933, more particularly the Real Estate and Law Building in the City of Atlantic City, State of New Jersey, to the office of Bolte and Tripician. Do you remember that day?  
 A. Yes. 20  
 Q. You had an examination before trial, is that true?  
 A. Yes.  
 Q. In the room where you were examined before trial was Mr. Lundy present or wasn't he?  
 A. Yes, he was present.  
 Q. After you emerged from the room and came into the hall, who confronted you?  
 A. Mr. Lundy.  
 Q. And is this Mr. Lundy sitting here now? 30  
 A. Yes.  
 Q. Did Mr. Lundy have a conversation with you relative to the accident?  
 A. Yes.  
 Q. What did you say to him?

A. He said he seen me. I said, "If you seen me, why did you hit me?"

Q. What did he say?

A. Nothing. Just shrugged his shoulder. Nodded.

Q. You were taken to the Atlantic City Hospital, and will you describe your injuries?

A. Well, my jaw—cheek was cut open.

10 Q. I want you to step down here, please, because this is the critical point, and I want to show that. Just walk right along.

(Witness walks to the jury.)

Q. Now, will you please sit down? Now, then, will you describe your injuries for us, please?

A. Well, my whole cheek was cut open.

Q. How far?

20 A. Almost to the ear, on one side; and on the other side I had a small cut.

Q. Yes.

A. And some teeth has been knocked out.

Q. Yes.

A. And muscles have been torn.

Q. Yes.

A. Inside.

Q. Yes.

A. And my larynx has been damaged.

30 Q. Yes. What symptoms did you manifest?

A. Well, I—for weeks after the accident I hardly could speak.

Q. Yes. You hardly could speak, or couldn't speak?

A. I couldn't speak at all for the beginning for at least three or four weeks.

Q. Yes, and then what?

A. And I had a swollen throat, that I had to be—I have been fed through a tube, liquids.

Q. Yes.

A. And then I had my doctor in Atlantic City and in Philadelphia who treated me for that condition.

Q. Did the loss of voice respond to treatment? 10

A. Slowly it did respond.

Q. And what doctor treated you in Philadelphia?

A. Dr. Salzman.

Q. And what doctor treated you in Atlantic City?

A. Dr. Subin.

Q. And how many molars did you lose? How many teeth did you lose, do you remember?

A. About two on the right side and about three on the left side.

Q. Was it a painful injury? 20

A. Well, this is quite a question which is understood.

Q. Yes. I want to ask you now—direct your attention to your mental state since the accident; I want to ask you how you react to your injury.

A. This is a question which it is hard—which—after all, I couldn't —

Mr. Bolte: How he reacts to the injury, I don't know that question is—what the injury has done, 30 pain and suffering.

Mr. Baratta: How about mental anguish?

Mr. Bolte: As far as mental anguish is con-

cerned, I don't think it plays any part. Where he is nervous or something of that type, affect his nervous system; but so far as mental anguish is concerned —

The Court: Isn't it rather broad?

- 10 Mr. Baratta: I am just inviting his attention to his particular state because I have alleged that the plaintiff has suffered and undergone mental anguish and will in the future, and the injury is of such a type and nature that your Honor can well appreciate that such might be the state with a reasonable man. May I pursue?

The Court: Yes.

- 20 Mr. Bolte: Allow me an exception.

The Court: I will sustain the objection to the form of the question, unless you are going to pursue what you desire to elicit from the witness —

Mr. Baratta: All right.

Q. May I ask how you feel about your injury now?

A. Well, you are mortified.

- 30 Mr. Bolte: Same objection, if the Court please.

The Court: Yes. The objection will be sustained to the question in that form, how he feels about his injury.

*Max Rudel Tieger—Direct*

Q. Well, shall I say, how do you react to your injuries now; how do you react to your injuries now since the accident?

Mr. Bolte: I object. I think the proper way to interrogate the witness —

The Court: Counsel feels the question is too broad, entirely. 10

Q. May I put the question in the terms of the complaint: Do you or do you not undergo mental anguish as a result of your injury?

Mr. Bolte: That is a conclusion entirely.

The Court: Why not ask him how he felt immediately afterwards?

Q. How did you feel immediately after the accident? 20

A. Well, I still feel I can't go any place because, after all, my face is not what it used to have been; I am ashamed, simply ashamed of it. I can't go any place.

Q. I see. Now, you were born where, Max?

A. Budapest, Hungary.

Q. In your early years did you set out in some career or other? 30

A. Yes.

Q. What career?

A. Singing.

Mr. Bolte: If the Court please, I don't want to object too much; of course—I feel this is objection-

able. It goes back entirely too far. What he was at the time that the accident occurred, yes. Probably that may be testimony. But to go back from the time of his youth and take where he studied and all that sort of thing I don't think is beneficial at all.

The Court: Counsel wishes to show, I think, he  
10 trained himself for a certain pursuit in life, and it is alleged his injury has prevented him in pursuing that which he—for which he trained himself as an occupation.

Mr. Bolte: True, but the result is he has an occupation. How he got it or how anything else—he has an occupation, and the occupation is affected. I don't think this can go to the matter of damages at all; that it is not evidential of damages or of  
20 anything that he may have suffered. The result of his training may probably be brought into evidence, but what he has gone through in regards to it, that is an entirely different matter, and I don't think it is evidential or has any right to be put in the testimony.

The Court: The objection will be overruled.

Mr. Bolte: Allow me an exception.

30

The Court: Counsel may show what the qualifications of a person for the given occupation, because it may have some bearing upon his loss. Is there any capacity of which he is said to have been deprived? I will permit it.

*Max Rudel Tieger—Direct*

Mr. Bolte: Allow me an exception.

The Court: Yes.

Q. At what age did you embark on your ——

Mr. Bolte: Will you allow the exception to run to this entire course of questions, and allow me an exception on all of them? 10

Q. At what age did you embark on this career?

A. At the age of eight.

Q. And what did you do then?

A. While I went to school I have sang in a synagogue, one of the largest synagogues in Budapest, and I have studied with the cantor and a choir master there, Mr. ——

Q. What were the choir masters' names? 20

A. Mr. Gottlieb.

Q. And who else?

A. Mr. Hartman.

Q. How long did you sing there?

A. I sang there for about six years.

Q. Then what did you do?

A. Then at the age of thirteen Mr. Gottlieb advised me to stop singing because of the mutation of voice.

30

Mr. Bolte: Stop there.

The Court: Stop there, yes.

Q. What else—could you or couldn't you continue on singing at thirteen, as you said?

A. I could have, but he advised me ——

Q. Why couldn't you?

A. Because I was a ——

Mr. Bolte: Not what he could or couldn't. So far as this case is concerned, how can this line have any advantage—have any effect?

10

Mr. Baratta: May I be permitted?

The Court: Yes.

Mr. Baratta: I have a peculiar case in that I have a very, very peculiar occupation of which we know so little. I want to show how this boy was picked out, and the intervals that he did not pursue his occupation and the reason wherefore, and to  
20 take the injury—its nature and extent, and the quality.

Mr. Bolte: The entire question that the jury has to pass on is how much money he was earning at the time and what loss he suffered by reason of it.

Mr. Baratta: I beg counsel's pardon.

Mr. Bolte: And what he suffered as a result of  
30 this accident so far as physical pain is concerned and so far as probably his nerves are concerned. That is the entire standard on which we must try this action. We cannot go to Europe and find out evidence there, and things of that type. We cannot go all over the world. The only thing is, the entire

*Max Rudel Tieger—Direct*

question that can possibly come before the jury is, what was his earning capacity at the time this accident occurred.

The Court: Of course, his qualifications have some bearing upon that, I assume.

Mr. Bolte: If the Court please, a man may be 10  
ever so well qualified and not—at the time of the accident may not be earning any more than a certain sum of money—may not be earning a bit more. He may be qualified to be a most marvelous singer and not earn anything at that time, and never had earned anything of a large amount. The earning capacity and what he has been deprived of is the standard by which you must be governed.

The Court: I suppose counsel is going to reach 20  
that point.

Mr. Bolte: Therefore, I feel that is certainly immaterial and improper.

The Court: I will permit it.

Mr. Bolte: Allow me an exception.

The Court: Yes. 30

Q. Now, you stopped singing at thirteen for what reason?

A. Because my voice started to change.

Q. What do you call —

A. Mutation of the voice.

Q. Then you continued your studies where?

A. Then left for France to study Hebrew a year and a half.

Q. Hebrew for what reason?

A. Because my father wanted me to become a cantor.

10 Q. And did you study Hebrew?

A. Yes.

Q. How long did you pursue that?

A. Till I came to the United States.

Q. And when did you come to the United States?

A. When I was fourteen and a half.

Q. I see. What studies did you pursue here in the United States in the musical line and to fit you for your chosen career?

A. Well, till I came when I was sixteen I started  
20 to sing as a cantor.

Q. Here in the United States?

A. Yes.

Q. Where?

A. In Philadelphia.

Q. Whereabouts in Philadelphia?

A. Well, I sang Cantor Bougash, who is dead now, in 23rd and Walnut Street, and in 7th Street; different synagogues.

Q. Did you continued your studies at that time?

30 A. I have studied with him, yes, solfeggio, with Mr. Bougash.

Q. And solfeggio means what?

A. Sight reading.

Q. Sight-reading of which?

A. Of music.

*Max Rudel Tieger—Direct*

Q. And with Cantor Bougash you continued how long?

A. For about two years.

Q. What compensation, if any, did you receive from Cantor Bougash?

The Court: When was that?

10

Mr. Baratta: This was at the age of sixteen when he was in the United States and in Philadelphia.

The Court: Rather remote, isn't it?

Mr. Baratta: Yes, it is, your Honor, but I just wanted to give all of us an idea of what the earnings of these singers are.

Q. After you left Cantor Bougash, did you or did you not continue in the study of—to fit you for this? 20

A. I did study. I started with Miss Anna McDonough.

Q. And where was she; what was she connected with?

A. She had her sight-singing class.

Q. Yes, and you studied with her?

A. For two years, yes.

Q. And then where did you go from there?

A. Miss McDonough represented me for the Philadelphia Civic Opera Company. 30

Mr. Bolte: I object.

Q. Did you go to the Philadelphia Civic Opera Company?

Mr. Bolte: I ask it be stricken out.

The Court: Strike it out.

Mr. Baratta: I will acquiesce.

Q. Did you go to the Philadelphia Civic Opera  
10 Company?

A. Yes.

Q. How long did you continue with them?

A. Well, about a period of two, two and one-half  
years.

Q. What was your capacity with the Philadelphia  
Opera Company?

A. In the beginning I sang in the chorus.

Q. Then?

A. Later on I got small parts, comprimario parts.

20 Q. Comprimario parts?

A. Comprimario parts.

Q. And did you continue to execute these com-  
primario roles?

A. I did, yes.

Q. And for how long did that continue?

A. Practically to the date of the accident.

Q. Did you still continue to study?

A. Yes.

Q. Under whose tutelage did you come?

30 A. I came under tutor of Dr. Edouard Lippe.

Q. How long were you with Dr. Edouard Lippe?

A. For over two years.

Q. Were you to continue or were you not?

A. I was supposed to be continue.

Q. When were you to continue?

*Max Rudel Tieger—Direct*

A. In September following the—1932.

Q. That is it. Did you at the time you were singing with the Philadelphia Opera Company have engagements elsewhere?

A. Yes.

Q. Where?

A. I sang in a synagogue, 13th and Ludlow Street.

Q. And in what capacity? 10

A. As a baritone soloist, bass baritone soloist.

Q. How long did you continue there?

A. To the date of the accident.

Q. May I ask how—how much were you earning as a cantor at that time?

A. Well, I was a singer, a soloist; not a cantor; a soloist in a synagogue.

Q. And what were you earning there?

A. Depends at the synagogue I sang. With Mr. Bougash I got small compensation because he gave 20 me lessons for it.

Q. Gave you lessons for your compensation?

A. Yes, gave me lessons for my compensation.

Q. How much did Mr. Bougash charge for his lessons?

A. I really don't know.

Q. Can you give us some idea?

A. I cannot give you; I don't know how much he had.

Q. How much compensation did you actually receive, remuneration, while you were singing at the synagogue? 30

A. I got \$160 for a year's services.

Q. How often would you have to sing for that?

A. Once a week.

Q. And could you fill other engagements at the same time?

A. Yes.

Q. And did you?

A. Yes.

Q. And what did you earn filling other engagements?

10 A. Well, varies. I had average weekly from ten to twenty dollars.

Q. You are how old now?

A. I am—I will be twenty-four.

Q. And you were how old at the time of the accident?

A. At the date of the accident I was twenty-two.

Q. How much did you get for the comprimario roles that you executed in the opera company?

A. Well, the Philadelphia Civic Opera Company,  
20 I got ten dollars for the—as a—singing in the chorus.

Q. Yes.

A. And it was, I think, fifteen to twenty dollars for the small parts.

Q. How much?

A. Fifteen to twenty dollars.

Q. And how often would you sign these small parts?

A. The Philadelphia Civic Opera Company, once  
30 a week.

Q. Once a week. And at the same time you were studying, is that it?

A. Yes.

Q. Now, what is your repertoire, how many operas?

*Max Rudel Tieger—Direct*

A. Up to date I know thirty operas.

Q. Thirty. How did you come under the tutelage of Dr. Lippe?

A. By singing at the Philadelphia Civic Opera Company; as Alexander Smollins and Mr. Nelson Eddy —

Q. Never mind the rest. As a result of what did you go to Dr. Lippe? 10

A. Through the scholarship which I got.

Q. You received a scholarship and you came under the tutelage of Dr. Lippe?

A. Dr. Lippe.

Q. You were with Dr. Lippe how many years, did you say?

A. Over two years.

Q. And was your scholarship to continue or wasn't it?

A. Yes. 20

Q. And what intercepted it?

A. My accident.

Q. How much does Dr. Lippe charge for lessons?

A. Ten dollars.

Q. And in Philadelphia I don't think it is quite that, is it?

A. I don't know how much it is in Philadelphia. I had a scholarship.

Q. How often would he give you a lesson?

A. Once a week. 30

Q. And you were—and this accident intercepted it?

A. Yes.

Q. Have you returned to Dr. Lippe since?

A. Yes.

Q. When?

A. September of this year; September, 1933.

Q. And what—did you continue in your scholarship?

A. No, I did not.

Q. Why not?

10 Mr. Bolte: I object.

A. Because I had no voice to continue on.

Mr. Bolte: An absolute conclusion.

The Court: Oh, I don't know. I don't know what, of course, the answer is to be.

(The question was read by the stenographer as  
20 follows: "Why not?")

The Court: I will allow that.

Mr. Bolte: Allow me an exception, if the Court please.

The Court: Yes.

30 Q. You came under—you were identified with some other opera company, were you ever?

A. Yes.

Q. Which one?

A. French-Italian Opera Company.

Q. You traveled with this French-Italian Opera Company?

*Max Rudel Tieger—Direct*

A. Yes.

Q. What did you receive as compensation from them?

A. I had a contract for \$60 weekly.

Mr. Bolte: I object. The contract would be the best evidence of it.

10

The Court: Was this during the time of the occurrence —

Mr. Baratta: Of the which?

The Court: —of the accident, that he had this contract?

Mr. Baratta: No. There was a contract to continue on. The accident intercepted contract, intercepted scholarship, and we could not continue on. I am showing loss of earnings, and I am showing he lost by way of scholarship, its value, what he had. 20

The Court: You have removed from that now. Some contract.

Mr. Baratta: Yes, the contract that he had to open in the fall of the year—in the fall of the year that the accident happened. 30

The Court: 1932?

Mr. Baratta: Exactly so; 1932.

The Court: Counsel calls upon you to produce

such a contract if you have it, namely, the best of evidence, rather than have this witness testify that that is the contract.

Mr. Baratta: Of course, I appreciate that rule, your Honor, but there seems to be an exception, and the exception is that where there is no writing,  
10 either one of the parties is a good evidence to the contract.

The Court: Show that to be the fact.

Q. Was there a formal contract drawn up between you and the French-Italian Opera Company?

A. Yes.

Q. There was?

A. Yes.

20 Q. Well, now —

Mr. Bolte: Then, Mr.—that rule—the exception does not hold in this case.

Mr. Baratta: Oh, well, we will take care of that; I will take care of myself in the clinches.

Mr. Bolte: That is fine.

Mr. Baratta: I shall now show your Honor that  
30 what the witness considers to have been a contract subsisting and existing between the parties is not that at all, and I shall ask for a legal interpretation from your Honor of the document that he refers to.

Q. You told us a moment ago that there was a contract existing and subsisting between you and the

*Max Rudel Tieger—Direct*

French-Italian Opera Company, a formal written contract; is that true?

A. Yes.

Q. I show you here a paper and ask you what that is?

A. This is the contract what I had.

Mr. Baratta: Just a moment. I shall show this 10  
to my adversary.

Mr. Bolte: If the Court please —

Mr. Baratta: Now, I want now to ask the Court for an interpretation of the document, since it is a legal question.

The Court: Any objection?

Mr. Bolte: I object to it, yes. The date of the 20  
contract, of the agreement, is after—is October 1st, 1932, after this accident.

Mr. Baratta: If I may be heard, that is nothing more than a letter and a memorandum that was forwarded me by the man that was supposed to have engaged him, for my information. Now, what is the Court's ruling, please?

The Court: It is not permitted as a contract. 30

Q. Now, then, what was your arrangement with the French-Italian Opera Company?

Mr. Bolte: Of course, all I had to go by was his

statement that he had a formal agreement with these people.

The Court: Yes.

Mr. Bolte: A formal written agreement, and on that I base my objection. And as the record stands  
10 now, that is still the situation.

The Court: You may inquire if there is any other document, other than that to which his attention has been called.

Q. Was there any other document other than the one to which your attention has been called between you?

A. Not that I know, what I know of, because I had  
20 made a verbal agreement first with the company.

Q. You made a verbal agreement, and how much were you to receive in —

Mr. Bolte: May I examine him just a moment on that?

The Court: Well, all right.

By Mr. Bolte:

30 Q. After the verbal agreement was made, was there a written?

A. There was supposed to be sent an agreement to me.

Q. Was any sent to you, Tieger?

*Max Rudel Tieger—Direct*

A. No, I think Mr. Grigaitis has it, the man who signed it, he has it, because he took care of the company.

Q. Did you sign it?

A. No, I didn't sign it.

Mr. Bolte: Well, it is not a fulfilled contract, then, if the Court please. 10

The Court: Wasn't what?

Mr. Bolte: Isn't a completed contract.

The Court: Go ahead. I will permit you to pursue it, if he had a ——

By Mr. Baratta: 20

Q. Now, what were you ——

Mr. Bolte: Allow me an objection.

The Court: Nothing pending yet, I guess.

Mr. Baratta: No.

Q. What were you to receive pursuant to your agreement with the company? 30

A. \$60 a week.

Mr. Bolte: I object to that, because I don't feel there is—that it is in proper legal shape to put it in.

The Court: Let us suppose, as he says, there was

an oral agreement made to sing with the association beginning a certain time in the future. He certainly can testify to that, could he not?

Mr. Bolte: But if that were all. But here he says that there was an oral agreement which had been reduced to writing, which was to be the contract between these people. That is the only evidence that ought to go before this jury, as to what the contents of that contract is.

The Court: That is true, if there were one actually executed by the parties. But that does not appear to be the situation here, and I take it—I don't know—the purpose of counsel is to show his accident intervening was the occasion for the —

20 Mr. Bolte: The reason for it, if your Honor please—anything may have stopped that contract, and the mere fact that one was to be entered into, and until it was signed, it was not a contract. Anything may have occurred outside of this that may have stopped it, and we ought not to be, on that conjecture, called upon to respond in damages on something as uncertain as a contract in that shape.

30 Mr. Baratta: That comes with very poor grace from my adversary. He has an examination before trial in which his office went at length in this document and contract. There is nothing of surprise in it at all.

Mr. Bolte: I haven't plead surprise.

The Court: It is a question of whether or not he was so engaged. I take it it was not an agreement of the nature that the law would require put in writing necessarily, and may never have been in writing. The fundamental question is whether there was any such agreement of employment. I understand this witness testifies there was.

10

Mr. Baratta: Yes, your Honor.

Q. Now, you say you were to get \$60 a week pursuant to this agreement?

A. Yes.

Mr. Bolte: Allow me an exception.

The Court: Yes.

20

Q. This contract was to have begun at what point?

A. October.

Q. And as a result of the accident could you fulfill the contract?

A. No.

Q. How long was it to run?

A. It had to be run for one season.

Q. How long is a season?

A. About, probably, twenty-six to thirty weeks.

Q. Twenty-six to thirty weeks. Now, then, did you subsequently go with the opera company?

A. Yes.

Q. Did you go as a singer or in some other capacity?

A. Some other capacity; not as a singer.

Q. What was the capacity in which you went with the company?

A. Assistant librarian.

Q. That means what?

A. Taking care of music, orchestra music, music scores, and fixing up scores, if it comes any mistakes in the parts written for the instruments.

10 Q. You didn't sing?

A. No.

Q. How long did you continue with them?

A. I have continued with them —

Q. As the assistant librarian?

A. —as assistant librarian till April—around the beginning of May, following May.

Q. And you received as compensation for those services as assistant librarian what?

A. \$30 a week.

20 Q. \$30 a week. You have, subsequent to this accident, attempted to sing, have you, or have you not?

A. Yes.

Q. And in what way did you attempt, sir?

A. I have tried to sing in a chorus again.

Q. And what success have you met with?

A. I didn't—couldn't sing; I couldn't stand it.

Q. I see. Can you tell us precisely what is the matter with your voice now, Mr. Tieger?

30 A. Well, it lost its power, its carrying power, it lost its resonance, and it lost its beauty.

Mr. Baratta: Yes.

(Short recess.)

Mr. Baratta: Cross-examine.

Cross-examination.

By Mr. Bolte:

Q. What is the name of the opera company that you last referred to, Mr. Tieger?

A. French-Italian Opera Company.

Q. And what were they to do, go away to various 10 places?

A. Yes, travel, United States and Canada.

Q. Travel all over the United States and Canada. And did you go with them?

A. Yes, I did.

Q. What?

A. Yes.

Q. And where did you go?

A. Why, our first trip was to Toronto, Canada; Hamilton and Toronto. 20

Q. And then where did you go?

A. From there we came back to Philadelphia.

Q. Yes. Go ahead; tell us where you went.

A. Well, from there—the company kept on going for a while, but I didn't go with them then.

Q. I thought you said you went with them.

A. Yes, but we came back from Canada.

Q. Until you came back from Canada?

A. From Canada, when we came back from Canada. 30

Q. Where did the company go?

A. I don't know.

Q. How long was the company up in Canada?

A. Two weeks.

Q. And have you seen Mr. Grigaitis since then?

A. Yes.

Q. When it came back from Canada, you say you don't know where it went?

A. No.

Q. Do you know any place where it did go?

A. Went to various places.

Q. Do you know the places?

10 A. Well, after Canada, they went to small towns—Reading, Wilmington.

Q. Where else?

A. Washington—no; Baltimore.

Q. Do you know just exactly where they did go to all this time?

A. Exactly, I know when I traveled; I know where they went when I went with them.

Q. No, I mean when you were to go with them.

20 A. We had a complete list of the road, but I haven't got it. The company had a complete list made out for the road.

Q. And were they away from Philadelphia then all during that period?

A. I don't know.

Q. Weren't you in the office off and on right along?

A. Not that time I haven't been in off and on.

Q. What?

A. Not in that certain time.

30 Q. Haven't been in their office since this accident occurred?

A. Yes, I have been since the accident, but not that time.

Q. But from October of 1932 until what time was the season to be over?

*Max Rudel Tieger—Cross*

A. The original season was supposed to be over in March or April.

Q. During that time were you in the office, between October and March or April?

A. I was in the office in November of that year; from November till April I haven't been in the office.

Q. At all? And you have not seen Mr. Grigaitis during that time at all, have you? 10

A. That time.

Q. He is the manager of the opera company?

A. He is the conductor.

Q. Conductor of the opera company. And whether they went places or not definitely you don't know at all, do you?

A. I don't know.

Q. And whether the opera continued on—the opera company continued on, you don't know?

A. I don't know. 20

Q. Whether it was a success or failure, you don't know?

A. This is something, an embarrassing question to ask me; I was nothing but a comprimario.

Q. You don't know?

A. Just one of the workers there.

Mr. Baratta: The answer is "No."

Q. You don't know whether they had a season— 30 whether they continued on or not, do you?

A. From Canada we came back because conditions did not allow us to keep on going after that.

Q. What? Financial conditions?

A. Financial conditions, yes.

Q. So, whether they could have paid you during that time or not you don't know, do you?

A. I don't know.

Q. Opera has suffered very much, hasn't it, financially?

Mr. Baratta: I object, on the theory that the witness is not qualified as an expert on the depression.

The Court: Well, he may ——

Mr. Baratta: All right.

The Court: He may know.

Mr. Baratta: I will withdraw it.

20 (The question was read by the stenographer as follows:)

“Opera has suffered very much, hasn't it, financially?”

A. Well, you know, opera companies—off and on opera companies, they all travel.

Q. You don't answer the question.

A. Opera companies will travel.

Q. Will you answer the question?

30 A. Pardon me?

Q. Will you answer the question?

A. What question?

Mr. Bolte: I will have Mrs. Moore read it to you again.

*Max Rudel Tieger—Cross*

(The question was again read by the stenographer, as follows: "Opera has suffered very much, hasn't it, financially?")

A. I just answered. There are different opera companies which keep on traveling, but I could not say this is a failure. After all, people come to hear opera. 10

Q. Yes. As to how this opera companies does it, you don't know. Didn't you go to Washington with it?

A. Yes, I did.

Q. Didn't you sing there?

A. I sang in Washington before my accident, with that company.

Q. When did you sing for them before the accident?

A. About three or four days. 20

Q. Where is it located, the French-Italian Opera Company?

A. I don't know where it is located now.

Q. Where was it at the time?

A. They had office in New York, and branch office in Philadelphia, Presser Building.

Q. How long before this accident were you singing for them?

A. I gave an audition about two months before the accident. 30

Q. How long were you singing for them in any opera before the accident?

A. My first job with that particular opera company—with Mr. Grigaitis, rather, who takes care of it, was in Washington before the accident.

Q. Yes; and how long did you sing for it afterwards?

A. Afterwards I didn't sing with them exactly, but I was supposed to sing.

Q. Didn't you sing with them at all?

A. I sang in a chorus following April of the— following the accident, April following the accident.

10 Q. How long after the accident?

A. I would say about four or five months following the accident.

Q. Where was that?

A. That was in Baltimore, Wilmington and Reading, Baltimore.

Q. And you sang in the chorus there for about four weeks, didn't you?

A. No, it was not exactly four weeks. I don't exactly know how many weeks it was. It was off  
20 and on. Wilmington we played a few performances, and Reading we played a few performances; and Baltimore we had a full week.

Q. And so you sang for them all that time, didn't you?

A. In the chorus, I tried to sing.

Q. When you sang for this opera company before in Washington, what did you sing, what part?

A. I was the gypsy in *Trovatore*.

Q. That is quite a minor part?

30 A. It is a minor part, but it is essential to the opera.

Q. Oh, yes; but it is a minor part, isn't it?

A. Yes.

Q. It is not a lead at all, is it?

A. No, it is not a leading part.

*Max Rudel Tieger—Cross*

Q. And that is the only opera with which you sang for them?

A. For that opera company, yes.

Q. That is the only one?

A. Yes.

Q. And the choruses, in what operas did you sing?

A. All the operas which they produced.

Q. Name them.

10

A. Well, *Trovatore*, *Faust*, *Carmen*, *Boheme*, *Tosca*, *Cavalleria Rusticana*, *Pagliacci*.

Q. You sang in all those since this accident?

A. I have tried to sing.

Q. You did actually sing, didn't you, in the chorus?

A. Singing—they depended more on my knowledge that I should sing in the chorus.

Q. You were in the chorus then, at least a week in Baltimore?

20

A. Yes.

Q. And in Reading?

A. Yes.

Q. And Wilmington?

A. Yes.

Q. And you sang in the chorus there, didn't you?

A. Yes, sir.

Q. And you say that your voice today isn't what it formerly was?

A. Yes.

30

Q. You say it is not as loud?

A. Yes.

Q. Where does the volume come from in a voice, Mr. Tieger?

A. I am not an expert; I am just a student of music, of vocal; I am not an expert.

Q. You have been trained, haven't you?

A. Yes.

Q. Doesn't it come from the lungs?

A. No, it comes from the larynx and vocal cords.

Q. Doesn't the volume come from the lungs?

10 Aren't they the bellows through which the power comes?

A. No; the lungs is only one of the essential things to singing.

Q. That is true.

A. Just as well as to breathe.

Q. You speak of your volume. Now, volume, the lungs are the part that produce the volume?

A. No.

Q. What does produce volume, then?

20 A. The throat, the voice box, throat, larynx, palate, sinuses, and—rather, I may say the whole face.

Q. Doesn't the things that you describe produce resonance?

A. Resonance and volume.

Q. It produces both?

A. It produces everything.

Q. Has the lungs anything to do with it at all?

A. The lungs is only part of the essential things to breathe.

30 Q. Just to breathe; nothing else?

A. Well, primarily.

Q. Doesn't it also produce resonance, the lungs help to produce the resonance?

A. No.

Q. Not at all?

A. No.

Q. Aren't there three things in singing that produce resonance—the lungs, mouth and head?

A. No.

Q. Do not?

A. No.

Q. Isn't the top of the mouth the part that is most essential so far as resonance is concerned? 10

A. No, it is not. This is only one part, a small part, of the resonance.

Q. Isn't that the sounding board, the mouth, of the resonance?

A. No.

Q. Doesn't it play a part?

A. It plays a part, but not very essential.

Q. But so far as the head is concerned, the rest of the head is concerned, does that play any part at all?

A. Certain parts in the head; certain parts. 20

Q. What parts of the head?

A. In the back, right above the—right behind the tongue, and here, front, down here; and a small part of it, a very small part in here, in the front.

Q. The vocal cords, they—what do they produce?

A. They produce a small, very small, sound.

Q. Yes. And the rest of the body puts it into volume, doesn't it?

A. The rest—above the vocal cords.

Q. Entirely above the vocal cords, the rest of it? 30

A. Yes.

Q. And the mouth has nothing to do with it, you say?

A. Mouth? Without the mouth you can't sing; you can't talk, not only sing.

- Q. You say that the roof of the mouth is not the sounding board for the voice that comes out from the sounding board?
- A. It may have, certain part of it, but inasmuch as I have not studied anatomy, I don't know.
- Q. Don't you get that taught to you when you get taught as singers?
- 10 A. No, teachers don't teach anatomy.
- Q. Don't tell you anything about anatomy at all?
- A. No.
- Q. Do you know a teacher by the name of Wither-spoon in Philadelphia?
- A. No.
- Q. Ever study under him?
- A. No.
- Q. The vocal cords, is that where what you might term the music is located, the quality of the voice
- 20 originally?
- A. No, the quality is not located there.
- Q. Where is the quality located?
- A. The quality is located in different parts—the way it is produced, the way the teacher gets it out of the pupil to produce it.
- Q. Isn't there different—certain people have no tune or quality at all in the vocal cords, and others do?
- 30 A. As far as I know—I may sound foolish, but only dumb people have no quality in their voice; they cannot speak; they are impaired.
- Q. And it is only as people become smarter that they get some quality to their voice?
- A. I don't mean dumbness and smartness; I mean mute people, is the correct expression.

Q. Yes, but there is a difference in everybody's—the quality of everybody's voice, and some have a voice and some do not, don't they?

A. Everybody has a voice, but how much it is developed for singing purposes.

Q. The type of voice they have, doesn't it depend upon the vocal cord?

A. It does depend, yes, to a certain extent. 10

Q. The enunciation, that is, as you speak the words, as you sing them —

A. Yes.

Q. From where is that done?

A. It comes from the back of the throat.

Q. Doesn't it come—from the back of the throat?

A. Yes.

Q. Doesn't it come from the lips?

A. No.

Q. The lips have nothing to do with it at all? 20

A. Very small part of it.

Q. So when you sing, the lips, whatever they may say— so the lips have nothing to do with enunciation at all?

A. Very little.

Q. Teeth, either?

A. Teeth is something which has to do with resonance, already.

Q. I mean enunciation?

A. Enunciation of certain vowels, but not produce the vowels, has nothing to do with it. 30

Q. Now, at the time, then, that you would have been with the French-Italian Opera Company, you would have been out of the city, wouldn't you?

A. Yes.

Q. So, the other work that you may have had to do during that time would have been compelled for you to abandon?

A. What other work could I do?

Q. I mean if this accident had not occurred.

A. Yes.

Q. So, your work as a cantor —

10 A. No, I would have kept on studying. I went to University of Temple—Temple University.

Q. I mean your actual singing?

A. I would have done radio work, and singing in the synagogue.

Q. You were out of the city, weren't you?

A. When I was out of the city, yes.

Q. And didn't your contract call for you to be out of the city during the time you were with the French-Italian Opera Company?

20 A. They would allow me, where it comes—where I could earn more money, the synagogue allows me to put a substitute instead of me.

Q. Yes, so that would not be you?

A. It would be a substitute, yes.

Q. That substitute you would have to pay, depending on how much he wanted?

A. Depending on how much I get.

Q. And how much he wanted?

A. Yes.

30 Q. And you would have to pay somebody else?

A. Yes.

Q. You talked about another opera company, didn't you, Philadelphia Civic?

A. Yes.

Q. When were you with them?

A. Season 1929, 1930—1930.

Q. What did you sing with them?

A. And 1931. In the chorus; and at the end of the season 1931 I had comprimario parts.

Q. And the season of 1931, isn't that season just prior to the accident?

A. This is, I would say, not exactly prior to the accident, because the season closes in March. 10

Q. Well, was it March, 1932?

A. 1931.

Q. March of 1931?

A. I finish the singing with the Philadelphia Civic Opera Company.

Q. They closed up, didn't they?

A. Yes.

Q. So, they went out of business?

A. Yes.

Q. So, you were not—they were not in existence 20 then when you were with the French-Italian Opera Company?

A. No.

Q. And during the period then from the time that you were with the Philadelphia Civic Opera Company until you had an audition with the French-Italian Opera Company, you did not sing in an opera company, did you?

A. No.

Q. And what did you say that you earned during 30 that time that you were with the Civic Opera Company?

A. Philadelphia Civic Opera Company, I got \$10 a performance.

Q. Each performance, was it?

A. Yes.

Q. And you played every Friday?

A. No, it played every Thursday night.

Q. What did you do Friday nights during that time?

A. I sang in a synagogue.

Q. You were asked the question for how long a  
10 period of time after the Philadelphia Civic Opera  
Company closed did you sing at the West Commu-  
nity Center, and how long did you sing there?

A. I sang there for the period, I would say, about  
four years.

Q. At the Philadelphia—at the Philadelphia Com-  
munity Center?

A. West Philadelphia Community Center.

Q. How much did you get for that?

A. My first year I had \$160 for the season.

20 Q. Yes.

A. And for the second year I got \$175.

Q. Yes.

A. And kept on going, my pay, until the day of  
the accident.

Q. So that the—you obtained \$175 for the Friday  
night singing once a week, with the exception of the  
summer, I imagine?

30 A. Summer, and exception of from March—  
rather, from—yes, end of March until beginning of  
June, for two days, and then I had my complete  
summer vacation.

Q. At the time that this accident happened, where  
were you working?

A. I was working at a factory in Philadelphia.

Q. Yes; you were working with a fur concern, were you not?

A. No; cap making.

Q. Cap concern. How long had you been with them?

A. Oh, quite a number of years.

Q. Had been working with them quite some time, had you?

10

A. Yes.

Q. And that was your real work, wasn't it?

A. It was not my real work. It was the work which enabled me to keep on studying.

Q. That is the work that you steadily did, though, during that time you were studying?

A. Yes.

Q. And the music, so far as your actual time was concerned, was just incidental, wasn't it?

A. No, it was not incidental; it was my aim in life. 20

Q. I know, but so far as your actual time was concerned, it was incidental; your main part of your time you put in this work?

A. No, I did not.

Q. Did you work at positions in singing at longer hours than you did in the cap factory?

A. No, I did not, but while I was working at the cap factory, I have gone away quite a few times during the week, middle of the days, for my lessons, and for studying. 30

Q. I mean work, not lessons. I am asking you in regards to your work, have you worked for some one else and when you earned —

A. I just want to show my actual work was not cap

making; it was only essential in it helped me along to study.

Q. Exactly; but the time that you actually spent in singing for somebody else, for which you earned any money, was much less than it was during the time that you were at the cap making, wasn't it?

A. Yes.

10 Q. On this date of the accident, you say that you came down New York Avenue?

A. Yes.

Q. Now—and you wanted to go home, did you?

A. From New York Avenue home and back to Columbia Place, to get dressed.

Q. And you came all the way down—you couldn't go along the Boardwalk, you said?

A. Yes.

20 Q. And you came all the way down New York Avenue?

A. Yes.

Q. Did you try to cross at that time at any place?

A. I have been looking for the place to cross.

Q. The first time you came down New York Avenue?

A. New York Avenue, first time, we went up straight to the Boardwalk and crossed there.

30 Q. Didn't you testify on direct examination that you came—left the Boardwalk and came all the way down to New York Avenue and then went back again to the Five and Ten?

A. No, I didn't say that. I said I came up from Pacific Avenue and went up towards the Boardwalk, and I went into the Five and Ten.

Q. But where did you come from?

*Max Rudel Tieger—Cross*

A. I was coming up, it was on the right side of the street.

Q. Where from?

A. From Pacific Avenue, from Columbia Place, Pacific Avenue, up New York Avenue, on the right side.

Q. You walked all the way up —

A. Yes.

10

Q. —Columbia Place; from Columbia Place along Pacific Avenue —

A. Yes.

Q. —to the —

A. To New York Avenue.

Q. To New York Avenue, yes. And then went down to the Boardwalk?

A. Yes.

Q. What distance is that?

A. Why, it is a long block.

20

Mr. Baratta: At this time, I want to interpose an objection. This witness is not acquainted with Atlantic City, and yet Mr. Bolte insists on distorting the direct examination. He never said any such thing in his direct examination, from Columbia Place up. He said he went to the Boardwalk and was ordered off, and then went to Pacific Avenue.

Mr. Bolte: I have never been known to distort 30 or attempt to distort any testimony.

Mr. Baratta: I didn't say it was intentional.

Mr. Bolte: I have no desire to do so. My recol-

lection was, from both Mr. Baratta's opening and from what this witness stated, they had been in bathing, and couldn't come on the Boardwalk, they went down to Pacific Avenue, and then came back again. That was my recollection of the testimony. If I am wrong, I would be very glad to be corrected on it, and I am only asking the witness the distance  
10 from Columbia Place where he says he left—had gone to Pacific, to New York Avenue; that is all I am asking.

Mr. Baratta: He said he went from there to the Boardwalk, and was ordered off, and then went down to Pacific Avenue or some other street.

Mr. Bolte: That is the very thing I am trying to find out.

20 The Court: The objection will be overruled. Go ahead.

Q. So that there cannot be any attempt on my part to distort your testimony, you just tell the jury again, so I get to it, what you did from the time you left Columbia Place in your bathing suit.

A. In bathing suit?

Q. Yes, until the point where I tell you to stop.

30 A. May I ask, in the bathing suit when we came back from the Boardwalk?

Q. When you left Columbia Place originally.

A. Originally; originally we went—I went down with my friends to the beach, and played on the beach for a while, and then went into the water.

We came out and we tried up for a while on the sand, and we—it was about, you might say, one o'clock, we were quite hungry, we went down to Columbia Place to put on some clothes to look for a restaurant. We came back to Columbia Place, I have put on a pair of pants and a pair of sneaks, and one of my friends, Mr. Trasoff, has put on also a pair of pants and a pair of shoes, and the third party, he didn't put on anything, and we went back to the Boardwalk, trying to get a Five and Ten Cent Store on the Boardwalk. Coming on the Boardwalk, walking about, I may say, half a block or so, a policeman stopped us, and he told us —

Q. Never mind what he told you; just what you did.

A. He told us we cannot go on the Boardwalk in bathing suits.

Q. Never mind that. Go ahead from there. 20

A. I asked him which way was to go. He said go around the next block. And we went down, went back Columbia Place, and walked down to Pacific Avenue, and we came up to New York Avenue, we went up towards the Boardwalk, and just at the Boardwalk we crossed that small place on—crossing New York Avenue and the Boardwalk, and went into the Five and Ten.

Q. Do you remember how far you were on Pacific Avenue—how far Columbia Place is from New York? 30

A. Columbia Place from New York? About two blocks, if I am not mistaken.

Q. I see. And you went in the Five and Ten at

the foot of New York Avenue, you had something to eat there and you came out?

A. Yes.

Q. Now, as you came out, what happened?

A. We walked from, say about ten or fifteen, and it started to storm and we looked for shelter. We seen an open garage door, and we ran into it.

10 Q. Yes; how long did you stay there?

A. Short while, until the rain subsided a little bit, should be able to get out again.

Q. What did you do then?

A. It was still drizzling, and we kept on going. While going up to the Boardwalk, I have noticed there is a street between Pacific and the Boardwalk.

Q. Do you know the name of that street?

A. No, I do not.

Q. On what side of New York Avenue is it?

20 A. It is on the—coming up towards the Boardwalk it is on the right side.

Q. And how far, about, from the Boardwalk is it?

A. I might say about a quarter of a block from the Boardwalk.

Q. Yes. And the distance between Pacific and the Boardwalk is quite long, isn't it?

A. Yes.

30 Q. A good bit longer than the average block, isn't it?

A. Quite.

Q. And at the time that this happened, you were on the other side of the street from the small—where this small street was?

A. Yes.

Q. And there was no street on your side of the street, was there?

A. No.

Q. Go ahead.

The Court: That would be on the easterly side of New York Avenue.

10

Mr. Bolte: He was on the easterly side.

Mr. Baratta: And the little street is on the westerly side.

The Court: That is to say, on his right-hand side coming toward Pacific Avenue from the Boardwalk.

Mr. Baratta: That is where he was, yes.

20

Mr. Bolte: Yes, he was on the right-hand side.

Q. Now then, did you attempt to cross there?

A. We have looked for the place to cross just right near the street.

Q. Did you do your actual jumping across there?

A. No.

Q. How far away were you?

A. Well, we walked short distance down.

30

Q. About how far?

A. Well, I couldn't judge exactly in feet how far it is.

Q. Was it the middle of the block?

A. About.

Q. And there was no street there where you did attempt to jump across, was there?

A. No.

Q. Were you going back to Pacific Avenue? Is that what you were going to do?

A. No, I had intentions to—to go across and cut to that small street.

10 Q. Come back again, did you, to the Boardwalk?

A. Yes.

Q. You didn't know where that street went to?

A. No.

Q. But you did know where Pacific Avenue went to?

A. Yes.

Q. You had come that way. You knew where you were going there?

A. Yes.

20 Q. And you didn't know where this small street was going?

A. Yes.

Q. And still you were going to go on the other side of the street to come back to this small street?

A. There is usually a street, streets where usually cut across, and there is always a straight street.

Q. And you looked into the street and noticed it was not straight?

30 A. No, I didn't look into the street.

Q. Didn't notice that the street, as you looked into it a very short distance, it bends to the right as you face it?

A. No.

Q. And that as you look straight ahead, that there

*Max Rudel Tieger—Cross*

are hotels, making it impossible for the street to continue on, backs of hotels there?

A. No.

Q. You came down toward Pacific Avenue, you say, about halfway?

A. Yes.

Q. And cars parked along there?

A. There were cars parked along on the right 10 side of the street.

Q. Many of them?

A. Well, I may say quite many cars, almost the whole street.

Q. One right after the other, weren't they?

A. Yes.

Q. And were there no spaces between them at all?

A. Not as far as I know.

Q. No space where a person could cut through? 20

A. They may have been a place where a person could cut through, there may have been, but there was a puddle of water there, too much of water.

Q. And you were then anxious to find a place that was open and there was no puddle of water?

A. There was no puddle or a small puddle, where I could get across.

Q. And you were anxious to get back to this other street and wanted to get back to Columbia Place, because it was raining? 30

A. Raining, and we wanted to get dressed.

Q. You were getting wet, weren't you?

A. Yes, it was drizzling.

Q. And so was one of the other boys getting wet?

A. Yes.

Q. The boy—there was one that had a bathing suit on, wasn't there?

A. Yes.

Q. And you saw this space between two cars, you say?

A. Yes.

Q. And how wide was that space?

10 A. I would judge from fifteen to twenty feet.

Q. And you went across it—what part of it did you go across?

A. I didn't go—I jumped across.

Q. I know; what part did you jump across?

A. It was to the—towards—the nearest car toward Pacific.

Q. So you saw—as you looked, you saw the car toward Pacific, it was easier to cross, and you went down there to cross; is that it?

20

Mr. Baratta: There is no such testimony.

The Court: You may answer.

(The question was read by the stenographer.)

A. No, I would say that I—this was the best place to jump, because the puddle was narrowest.

30 Q. Correct. You noticed that, and you went right down there to get across?

A. Yes.

Q. Where was Kanefield at this time?

A. Kanefield kept on walking on the street because he had no shoes on.

Q. Where? Out in the street?

*Max Rudel Tieger—Cross*

A. Yes.

Q. He was not on the sidewalk with you at all?

A. No.

Q. Wasn't in back of you or anywhere near you?

A. He was near me, but in front of me.

Q. Walked in the street constantly?

A. Yes. Not constantly. In that place he stepped out from the curb to the street just to go across, 10 and stepped from the curb.

Q. Had he been walking on the curb?

A. We had been coming down on the pavement from the garage.

Q. Oh, Kanefield was on the pavement, then?

A. When we came down from the garage, yes.

Q. And he had been walking down, and you say that there he stepped out?

A. Yes.

Q. He stepped out first, did he? 20

A. Yes.

Q. You are positive of that?

A. Yes.

Q. And what did he do?

A. He stepped out for a—for this small distance, and he stopped.

Q. What small distance do you mean he stepped out?

A. About three or four feet.

Q. Out into the street? 30

A. Yes.

Q. Beyond the automobiles?

A. It is not beyond. It is the automobile which covers it—he stepped out almost to the end of the automobile.

Q. He didn't step out all the way?

A. Not all the way, no.

Q. These automobiles, were they the usual automobiles, of course, with the tops to them, and all that sort of thing?

A. Just regular automobile.

Q. Closed automobiles?

10 A. Yes.

Q. When he stopped there, is that when you jumped?

A. No.

Q. When did you jump?

A. I looked up, waiting for the traffic, to see if any traffic was coming.

Q. Yes.

A. And traffic was—there was no machines coming down, and I looked up, there is one machine  
20 coming down, Mr. Lundy came down, with the machine, slowly down.

Q. How far was he away from you when you first saw him?

A. I would say about seventy-five to one hundred feet.

Q. And he was traveling—when you first saw him, where were you at that time?

A. On the curb.

Q. Where on the curb?

30 A. I may say about —

Q. In relation to the two machines that were there that created this space?

A. About a foot from the right-hand side of the machine.

Q. Which one, the one nearer Pacific Avenue?

*Max Rudel Tieger—Cross*

A. Near to Pacific Avenue.

Q. You saw him that distance away from him?

A. Yes.

Q. And you were about what, seventy-five to a hundred?

A. About, yes.

Q. Did you observe him then?

A. Yes.

10

Q. Was he traveling slow or traveling fast?

A. He was traveling, I may say it was not slow, it was not fast; just the average mileage.

Q. What would you say that was?

A. I really don't—I don't drive a car, so I actually don't know how fast he may have gone.

Q. And did you watch him all the time coming down there?

A. Well, I seen him come, but I waited till he may pass, and then he slowed down. He probably 20  
seen me, and he slowed down.

Mr. Bolte: I object to that, whether he probably saw you or not. I ask it be stricken.

The Court: Yes, strike it out.

Mr. Baratta: I will agree.

Q. You say he slowed down?

30

A. Yes.

Q. To what rate did he slow down?

A. He slowed down to rate—almost to stopping, and just as you walking along.

Q. About eight or ten miles an hour?

A. I don't know how many miles it may have been.

Q. That is about the speed you make when you walk, or something like that, walk quite fast, or is it slower than that?

A. Well, I don't know.

Q. And then what did he do, that is, so far as  
10 stopping is concerned? Did he stop?

A. He stopped, yes.

Q. Entirely?

A. He came down very slow, then I put up my  
hand —

Q. Did he stop?

A. I am trying to tell how it happened.

Q. I know you are. We will get along all right.  
Did he stop his car entirely?

A. Where?

20 Q. At any time?

A. Yes.

Q. How far away from you was he when you  
say that he stopped his car entirely?

A. I may say about ten feet or so.

Q. Would you say more than that?

A. I don't know.

Q. Didn't you testify before that when he stopped,  
you testified before where he stopped, at this hear-  
ing, "I would say about fifteen to twenty feet from  
30 me, where I was standing"?

A. I may have said it, but I am not sure of it.  
After all, I couldn't take a line measure and measure  
it by the inches.

Q. I am not asking you to. I am asking you in  
feet.

*Max Rudel Tieger—Cross*

A. Well, even feet, I couldn't measure it, how many feet. That short a distance you put to the eye.

Q. It did impress you when you testified before as fifteen or twenty feet away from you?

A. I would say about ten to fifteen feet; not more.

Q. Now you say ten to fifteen; and that is when you jumped? 10

A. Yes.

Q. When he had stopped his car, either ten or fifteen feet, or, if your other testimony is correct, fifteen to twenty feet away from you, you jumped at that time?

A. I waited till he signalled me to go.

Q. Well, you jumped?

Mr. Baratta: That is important.

Mr. Bolte: Oh, yes, sure, Mr. Baratta, it is important. 20

Mr. Baratta: We won't strike that.

Mr. Bolte: I made no effort to strike it, Mr. Baratta, and I am perfectly willing that you should call to the attention of the jury that is important. You may again do it. If you so desire, before we adjourn you may again say that to the jury, if you 30 want to.

The Court: We will recess until 1:45 o'clock.

(Recess until 1:45 o'clock P. M.)

(After recess, 1:45 o'clock P. M.)

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MAX RUDEL TIEGER, resumed the stand.

10 Cross-examination (resumed).

By Mr. Bolte:

Q. Mr. Tieger, what is the names of the two men who were with you?

A. Mr. Martin Kanefield and Mr. Allen Trasoff.

Q. Are they friends of yours?

A. Yes.

Q. Have been of long standing?

20 A. Quite.

Q. And they came down here together with you, did they?

A. Yes.

Q. And are they in the court room here now?

A. Yes.

Q. To testify —

A. Yes.

Q. —in your case? And they were all at the scene of the accident, were they?

30 A. Yes.

Q. I think when we stopped, you were at the point where you had jumped?

A. Yes.

Q. Where did you land, so far as the car of Lundy was concerned?

A. I don't remember where I landed. I landed in the car.

Q. In the car?

A. Yes.

Q. And you don't know what—you mean by that, in the car, the side of the car?

A. I think so. I don't remember that.

Q. You don't mean you went all the way into 10 the car?

A. No.

Q. You landed on the side of the car, is that what you mean?

A. Yes.

Q. You don't know what part?

A. No.

Q. Whether it was the—at the door or where—or anything else, do you?

A. I don't know that.

20

Q. Do you know what part of the car struck you?

A. No.

Q. Or you struck?

A. I don't know.

Q. So as you left—took the leap from the curb—what did you do, jump from the curb?

A. Yes.

Q. About what distance did you jump?

A. I would say about three or four feet.

Q. As you jumped, after you—the car had stopped ten or fifteen feet away from you, you jumped, and as you did, then you landed in the car?

30

A. The car stopped about ten feet from me, not fifteen; about ten.

Q. In your previous examination you said ten or fifteen.

A. Slowed down at a distance, and came to a stop about ten feet from me.

Q. Yes. And it had come to a complete stop?

A. Yes.

10 Q. And after you—what did you do? Do you remember what happened afterwards, right after you hit the side of the car?

A. I was on the floor.

Q. You mean on the ground; you don't mean the floor of the car?

A. No; on the ground.

Q. On the ground?

A. Yes.

Q. And Mr. Lundy helped to pick you up, didn't he?

20 A. I picked up myself somehow, and I went into Mr. Lundy's car.

Q. He opened the car and took you right to the hospital?

A. Yes.

Q. Others go with you?

A. No.

Q. Just you and Mr. Lundy went to the Atlantic City Hospital?

A. Yes.

30 Q. You say in your direct examination that you signalled him.

A. Yes.

Q. How did you signal him?

A. By standing this way, and I had my hand this way.

*Max Rudel Tieger—Cross*

Q. And you were then on the sidewalk?

A. Yes.

Q. And there was a car towards the Boardwalk from you, wasn't there?

A. Toward the Boardwalk?

Q. Yes.

A. About a distance from fifteen to twenty feet.

Q. Was that the—what would you say, fifteen feet 10  
or twenty feet; which would you say?

A. About between fifteen and twenty feet, I cannot be exact.

Q. Were you all the way over toward the other car, the car toward Pacific Avenue, when you jumped?

A. A foot or two from the car.

Q. The car that was toward Pacific Avenue?

A. The car that was toward Pacific Avenue, yes.

Q. And then this car that you claim was to the 20  
south of you, or to the Boardwalk, back of that car there were a lot of other cars?

A. Yes.

Q. So that these cars were all parked there closely?

A. Yes.

Q. And about how high were those cars, have you any idea?

A. I can't tell you, about an average car is high; 30  
about an average car.

Q. How tall are you?

A. I am five-four.

Q. The top of the car was above you, wasn't it?

A. No, I don't think so.

Q. Could you look over the car?

A. Yes, I think so.

Q. Are you certain of it?

A. Well, I think I could look over a car, yes.

Q. And you say that you looked at him?

A. Yes.

Q. And what did you see him do?

A. Him? Nodded his head.

10 Q. You saw a shake of his head?

A. Yes.

Q. And seeing that shake of his head, you say you jumped at once?

A. Yes.

Q. And his car was stopped at the time?

A. Yes.

Q. And you landed in the side of it. In your examination that was taken on the 13th day of May, 1933, did you say anything at all in that examination that you signalled this man?

20

A. They didn't ask me, so I didn't say it.

Q. I am not asking that.

Mr. Baratta: I object; that is the answer.

The Court: No, that is not the answer. Did you or not? You may bring out why.

Mr. Baratta: Excuse me. I shall.

30

The Court: Did you say anything about it?

A. No.

Q. You told about the car stopping; did you say anything in that examination at all that he shook his head?

*Max Rudel Tieger—Cross*

A. I don't remember that; I don't remember if I said it.

Q. You don't remember whether you did or did not?

A. No, I don't remember if I said it; I don't remember if I said it at that time.

Q. What is your recollection in regard to it?

A. My recollection, I answered the questions 10 which have been put up to me to answer.

Q. Now, what is your recollection whether you said anything there that the man signalled you?

A. I don't remember. They didn't ask me, so I didn't answer it.

Q. You told everything that happened, that you jumped, and so forth, didn't you?

A. I only answered what the attorney asked me; I answered straight answers.

20

The Court: You say you were on the curb when you put up your hand?

A. Yes.

The Court: And the defendant's car had then stopped? Was it stopped then, at that time?

A. Yes; he keeps—kept coming slowly until he came to a short distance from me.

30

The Court: I know. Was the defendant's car in motion when you put up your hand or not?

A. Yes.

The Court: It was. And then stopped, did it?

A. Yes.

The Court: How soon after it stopped did you jump?

10 A. Right as he stopped.

The Court: I understood you to say he was ten or fifteen feet away from you when he stopped?

A. About ten feet. I don't think it was more.

The Court: Did you hit the ground first and then go into the car?

20 A. No, I hit the car right there.

The Court: Jumped right into the car?

A. Yes.

By Mr. Bolte:

Q. Where was Kanefield?

A. He was standing near the car.

30 Q. Near what car?

A. The car towards Pacific.

Q. And what direction was Kanefield at the time, was he facing?

A. He was facing—I think he was facing toward the Boardwalk; I think so.

*Max Rudel Tieger—Cross*

Q. You are positive that Kanefield was in the street at the time?

A. Yes.

Q. You didn't jump first while they were still on the sidewalk?

A. No. He was in the water already when I jumped.

Q. Where was the other man? 10

A. He was behind me on the curb.

Q. And the only reason you say that you didn't say anything about the—when you described this accident, that they didn't ask you whether you were signalled to?

A. That is right.

Q. And they didn't ask you whether he signalled to you?

A. That is right.

Q. And that is the only reason you didn't tell it? 20

A. That is the only reason.

Q. You told them all the rest of the accident?

A. Because the rest of it he asked me every detail of it.

Q. And that part, though, you didn't volunteer; you didn't say a word about it?

A. I am not supposed to volunteer.

Q. When they asked you—they said, "What did you do, wait?" And you said, "I waited till the man would either stop or pass." 30

A. Yes.

Q. You said nothing there in regard to giving him a signal?

A. The man didn't ask me if I gave any signal,

that I did anything besides that. I waited until he said it.

Q. When—"And at the time you jumped, were you still watching him," and your answer said, "At the time I didn't have to watch, because that man almost came to a stop."

A. To a stop, yes. Yes, he stopped.

10 Q. At that time he almost came to a stop. That is why you say you didn't watch?

A. I seen the man stopped, I didn't have to look at him while I was jumping across; I couldn't look one side and jump the other side.

Q. The question: "Where did he stop?" Your answer: "I would say about fifteen to twenty feet from me, where I was standing." Question: "And that is the time you jumped?" And your answer: "Yes." Is that correct?

20 A. I may have said it, but I am very sure it was not that distance.

Q. I am only asking you if that is what you said.

A. At that distance he slowed down; at that distance Mr. Lundy slowed down, and he kept then about —

Q. You can answer that question yes or no. The question was: "And at the time you jumped, were you still watching him?" Answer: "At the time I didn't have to watch, because that man almost  
30 came to a stop." Didn't you just testify that he was stopped entirely before you ever jumped?

Mr. Baratta: Don't answer that question. The witness may also say if he doesn't recollect saying that, he doesn't recollect saying it.

*Max Rudel Tieger—Cross*

Mr. Bolte: I object to that, if the Court please.

The Court: That is a very improper remark, Mr. Baratta.

Mr. Baratta: I am sorry if it is, I withdraw it, and I apologize.

The Court: I think you ought to. The man is not to be told he may conveniently forget. 10

Mr. Baratta: Oh, no; I didn't mean that at all.

The Court: If he hasn't any recollection, he may say so, and undoubtedly would. I don't know how he could answer if he didn't recall.

Mr. Bolte: No more questions, if the Court please. 20

Mr. Baratta: That is all.

By Mr. Baratta:

Q. You were asked when you worked—that you were working in a cap factory. How much did you make at that time?

A. About from sixteen to eighteen dollars weekly. 30

Mr. Baratta: That is all. I haven't any more questions. That is all.

DR. HARRY SUBIN, called as a witness on behalf of the plaintiff, being sworn, testified as follows:

Direct examination.

By Mr. Baratta:

10

Q. Dr. Subin, you are a practicing physician in the City of Atlantic City?

A. Yes.

Q. You are connected with the Atlantic City Hospital?

A. Yes.

Q. What capacity, Doctor?

A. Well, several. Assistant general surgeon, assistant orthopedic surgeon, and assistant to the chief of the surgical service.

20

Q. And were you so connected with the hospital in August, 1932?

A. Yes.

Q. And during the course of your connection with that institution, were you called upon to administer to one Max Tieger?

A. Yes.

Q. And I believe that was what date, if you recollect?

30

A. August 7th.

Q. 1932?

A. Yes, sir.

Q. When you first saw Max Tieger on that day, what was his condition?

A. He was in shock, suffering from an injury

*Dr. Harry Subin—Direct*

to the right side of his face and to the left side of his face, as the result of an automobile accident.

Q. I see. Could you describe the nature of the injury?

A. Yes. The injury was of such character that a cut was made by a blunt object from this, the right angle of the mouth, carrying the angle of the mouth back through the cheek, the tissues on the side of the mouth and the skin of the outside of the mouth, back to what we would consider the angle of the jaw and up to this cheek bone. The distance of that cut was approximately four inches from the angle of the mouth to its back limit, up under this cheek bone. The cut on the left side of the mouth was a much smaller one, including only the tissues on the inner side of the cheek and for a very short distance on the outside. 10

Q. Was that such—that was an injury as the result of the automobile accident, you say? 20

A. So I was told.

Q. Yes. That was the history you got?

A. Yes, sir.

Q. Am I to understand that the—what muscle was that chiefly involved at that point, well, that you have indicated on the right side?

A. There were several muscles involved. The muscles involved were those that make up the side of the face, namely, the cheek, the muscles in there. If you would like them named, all the muscles that we use in chewing and in giving facial expression; the muscles that render expression to the face that were cut in part on this side of the cheek were the platysma or risoid and the areolar tissue and fat, 30

the mucous membrane on the inside of the cheek and the skin on the outside of the cheek. The muscles involved in chewing, so-called, process of mastication, those two muscles were the buccinator and the masseter.

Q. Were they rent asunder or in some other state?

10 A. They were completely severed.

Q. Completely severed?

A. Completely divided, so that the lower portion hung free and the upper portion hung like a curtain, in a flap.

Q. I see. You proceeded to perform some sort of an operation at this point?

A. Well, I had the boy brought to the operating room as soon as his shock permitted.

Q. Yes.

20 A. And then proceeded to repair the damaged tissues under a local anaesthetic.

Q. Could we know how many sutures you took in that wound, if you have any way of knowing that?

A. We have no way of knowing. We don't count sutures, really.

Q. I see.

A. I mean that I could give you an estimate.

Q. Let us have an estimate about how many sutures that opening would take.

30 A. The wound of this character is sutured from the inside of the mouth first, making it necessary to sew down the mucous membrane covering the gum and covering the inner side of the cheek. As this is repaired first it would take approximately six or seven interrupted stitches, that is, not con-

tinuous stitches—one and a knot, and one knotted, and so on—approximately five or six to close the mucuous membrane on the inner side of the mouth. Then the muscles are sewn together by cat gut that is absorbed and not removed afterwards. These muscles would require the suturing of about eight or nine interrupted—about eight or nine interrupted stitches. The outside of the face, in order to avoid 10 as much scar as possible, is sutured by a black silk. They are also, as a general rule, interrupted. In this case, for this would, it would take probably twelve or fourteen sutures to close. The left side of the face only required two or three cat gut sutures on the inner side of the lip to close.

Q. Do you know how many molars were lost in this accident?

A. I am sorry, I do not. I recollect that there were one or two teeth dislodged. 20

Q. In what part of the jaw?

A. On the right side.

Q. Lower or upper?

A. Lower. I recollect from the history that the boy gave me that he had been wearing a bridge and that that bridge had been taken out, but I didn't see it.

Q. In the fore part of the mouth, in the anterior?

A. I assume it is in the anterior; I don't know.

Q. Was there a sequelli to this—of symptoms that 30 followed, a chain of symptoms that you could observe in this injury, attendant—I mean, did you notice the entire effect of the accident?

A. Yes. I think I did.

Q. May we have that, please?

A. You mean up to now?

Q. No; I mean during the course of your treatment. I am now referring to what else there may have been the matter, by way of deglutition or some other impairment around that area.

A. During the time this boy was in the hospital recovering from his wound sufficiently to permit him  
10 to leave the hospital, he had difficulty in chewing. He had some difficulty in swallowing, naturally, because of the impairment of the muscles of the side of his face. These muscles are definitely used in the process of chewing food and of closing the mouth tight and making a closed cavity so that food may be swallowed. Of course, there was some impairment in this respect.

Q. Now, do you know whether there was or was  
20 not any swelling at the place of the junction, or any edema?

A. There might have been some reactionary edema.

Q. How about —

Mr. Bolte: No, Doctor; do you know that? You don't know?

A. No, sir. I said there might have been. I didn't examine for it.

30 Q. You were interested in saving the life, I suppose, more than anything else?

Mr. Bolte: I object to that, if the Court please.

Q. Did you notice the voice?

A. During his —

*Dr. Harry Subin—Direct*

Q. Period ——

A. After the operation, you mean?

Q. Yes.

A. Yes.

Q. What was there there?

A. It was not as strong as it was.

Q. Did it respond under your treatment, Doctor,  
do you know? 10

A. I didn't treat him for the effects of his voice.

Q. He came back to you, did he, subsequently,  
after he left the hospital?

A. Only on two occasions.

Q. Had to come from Philadelphia?

A. That I don't know.

Q. Well, wherever it was. How long was he in  
the hospital?

A. Two weeks.

Q. And did he convey messages to you while he  
was there, Doctor, could you tell me? 20

A. Yes. He spoke, and spoke sufficiently so that  
we had an understanding of what the complaint or  
what his difficulties were that he might have had.

Q. Notice anything about the voice?

A. Nothing more than I have mentioned, namely,  
that the voice was a bit weak.

Q. I see. When did you see him last, Doctor?

A. I saw him last on January 27, 1934.

Q. And at that time did you examine him? 30

A. Yes.

Q. Did you get a good result anatomically, Doc-  
tor?

A. Well, I would consider he got as good result  
as I was able to give him.

Q. I see. Is the scar permanent or not?

A. Yes, that is permanent.

Q. Did you notice whether there was any impairment in the function of the jaws?

A. Yes.

Q. What impairment did you notice?

A. He has a little shortening of the structures on  
10 the right side of his jaw, and a little lessening of  
the angle in the mucous membrane between the  
gum process and the cheek.

Q. You did not interest yourself in the laryngeal aspect of the case, did you, or the pharyngeal aspect, shall I say?

A. You may say either one.

Q. But did you, Doctor?

A. No.

Q. You are primarily a surgeon, as I understand  
20 it?

A. Yes.

Q. You did not test the voice or anything like that; I mean in the sense of trying its resonance?

A. Only by conversation.

Q. Oh, I see. Or any of its vibration, or line—  
volume?

A. No, I did not.

Q. That impairment in the jaw, I suppose, is permanent, that you spoke of?  
30

A. Yes.

Q. Could you tell us whether or not such an impairment would affect a singing voice?

A. Well, I could if I knew anything about singing.

Q. Well, you are very frank about it. Do you know something about singing?

A. I am sorry to say I do not.

Q. How unfortunate.

Mr. Barrata: Cross-examine.

Cross-examination.

10

By Mr. Bolte:

Q. We are both in the same boat, then, Doctor. You did suture the muscles, didn't you, that you spoke of, all these various muscles?

A. Yes.

Q. And your result was good, was it?

A. I would say it was as good as I could have given the boy.

20

Q. Yes, but it was a good result?

A. I would say that.

Q. He has the use of them as a result of the work you did?

A. Yes, he has the use of them.

Q. And he can chew, in the chewing process? And the speaking muscles are functioning in the work that you did, they are functioning today?

A. Yes.

Q. And these various sutures came out, either were taken out or they dissolved of their own accord?

30

A. Yes.

Q. And the time he spent in the hospital, you say, was —

A. Two weeks.

Q. —two weeks. When you speak of the voice being weak, that would come from a—naturally, you would expect that from shock, wouldn't you?

A. Certainly; yes, sir.

Q. And it probably would be, no matter, probably, where the person was injured, that right after  
10 an accident a person would quite likely be of rather weakened voice?

A. That plus the local effects, namely, the impairment of the jaw muscles.

Q. Yes, and—but that condition has cleared itself, hasn't it?

A. With reference to the weakness of the voice?

Q. Yes, the talking, the speaking voice.

A. Yes.

Q. When you examined him recently, you found  
20 there has been a tremendous improvement from when he talked to you in the hospital?

A. Yes.

Q. And you did not hear him speak before the accident occurred, so you don't know just exactly what his speaking voice was prior to the accident; did you?

A. Well, he spoke to me before I operated on him.

Q. Yes, I know that, but not prior to the accident?  
30

A. Oh, no.

Q. Or whether his voice is in the condition today that it was prior to the accident, you don't know, do you?

A. That I have no way of knowing; no, sir.

Q. His enunciation is ordinarily—the ordinary enunciation, isn't it normal?

A. It may be normal with him; it is not an ordinarily clear enunciation today.

Q. As to whether he—the difference in natural—difference from the accident or whether it is his natural enunciation, you don't know?

A. I could not tell.

10

Q. Could not tell?

A. No.

Q. And you say you have examined him on two occasions since then?

A. Yes.

Q. When were they, Doctor?

A. September 13th and January—1932.

Q. September 13th?

A. 13th, 1932.

Q. And —

20

A. And January 27, 1934.

Q. Then you saw him about a month after the accident?

A. Yes.

Q. And then didn't see him again from that time until just prior to the trial, just recently?

A. That is all I have record of.

Q. And he has not come to you from a medical standpoint during all that period?

A. No.

30

Q. And so far as making any examination of his throat or anything of that type, you did not, did you?

A. No, sir.

Q. And what the condition of his throat was, or

anything of that type, or nothing of that type—you know nothing of that?

A. No, I didn't examine him.

Q. In fact, your work is not ear, eye and nose, is it, Doctor?

A. No.

Q. When you speak about orthopedic, it has to do with the setting of bones and things of that type?

A. Yes.

Q. And your work practically is surgical work?

A. That is right.

Q. And you don't specialize or pay any particular attention so far as eye, ear and nose are concerned, do you?

A. No special attention, no, sir.

Q. And he was in the hospital about how long?

A. Just exactly two weeks.

Q. Had the stitches been removed at that time, at the hospital?

A. They had not all been removed, but all those that were removable had been removed.

Q. Do you know where he went after that?

A. I do not.

Q. So far as you were concerned, your work was finished?

A. Yes, sir.

Mr. Bolte: That is all.

Re-direct examination.

By Mr. Baratta:

Q. Doctor, I just overlooked a little point here. When you were called upon to administer, or as

*Dr. Harry Subin—Re-cross*

long as the case remained an indigent one, you did not expect any compensation, did you?

A. No, sir.

Q. And when the patient is in the position and able to pay, do you expect him to pay you?

A. We do.

Q. I show you here what purports to be a bill from Dr. Allman, as well as yourself—incidentally, 10 may I ask who Dr. Allman is in this case?

A. My preceptor and chief on surgical service.

Q. And you are his assistant?

A. That is right.

Q. I see a bill from you and him, or that purports to be from you and him to one Max Tieger, in the sum of \$200, and ask you what that is, Doctor?

A. That is the fee for operation and for care in the hospital after operation.

20

Mr. Baratta: May I offer this?

Mr. Bolte: Let me see that.

Re-cross examination.

By Mr. Bolte:

Q. Did you render the bill, Doctor?

A. I did.

Q. This is made out to Mr. Baratta, isn't it?

30

Mr. Baratta: Is it? I didn't know that.

A. It is, but Mr. Tieger —

By Mr. Baratta:

Q. It is made out to Mr. Baratta. Well then, it was sent to Mr. Baratta.

Q. Is this the only bill you ever rendered?

A. That is the only bill I know of that was ever rendered.

10 By Mr. Bolte:

Q. It was rendered January 30, 1930?

A. If that is the date.

Q. At the request of Mr. Baratta?

A. No.

Q. Why was it made out to him?

A. Because the case then came to litigation, to my knowledge. Prior to then I had no notion of it.

Q. I don't quite catch the answer to the reason.

20 A. I say prior to that time the patient, so far as I knew, was entirely indigent.

Q. Has it changed any, Doctor, that you know?

A. Yes.

Q. Since January, 1930, has it changed?

A. No.

Q. Was Dr. Allman on this work at that time?

A. No.

Q. Took no part in it at all? Was he at consultation or anything of that type?

30 A. He is the chief on the service. He is thoroughly familiar on every case that I operate on or treat or admit to the wards.

Q. I see. But up until the time that you rendered the bill you had not expected to render any bill?

A. No.

*Dr. Edouard Lippe—Direct*

Mr. Bolte: That is all.

Mr. Baratta: May I offer it?

Mr. Bolte: No objection.

(Bill offered is received in evidence and marked Exhibit P2.) 10

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DR. EDOUARD LIPPE, called as a witness on behalf of the plaintiff, being sworn, testified as follows:

Direct examination.

By Mr. Baratta:

Q. Doctor, will you please tell us what your degree of doctor is in? 20

A. My degree, doctor, happens to be D. D. S., which I acquired at the University of Pennsylvania.

Q. And in your case as a D. D. S. or for the D. D. S. did you have to become acquainted with the anatomy of the throat?

A. Naturally.

Q. And in general the human body?

A. Well, particularly the mouth and throat. 30

Q. I see. Now, Doctor, you are identified with the musical world, are you not?

A. Yes.

Q. For how many years have you been so identified?

A. Well, that is rather a large question. Possibly twenty or thirty years.

Q. Twenty or thirty years. In what capacity, Doctor?

A. As a singer and now as a teacher.

Q. And how long have you been teaching voice?

A. Fifteen—possibly twenty years. I didn't keep  
10 track of that.

Q. Fifteen or twenty years. And you maintain a studio somewhere, Doctor?

A. In New York.

Q. And where else?

A. 160 West 73rd. And Philadelphia.

Q. And do you devote your time to both studios?

A. Yes. Wednesday in Philadelphia, and the rest of the time in New York, where I live.

Q. I see. Doctor, you have trained many of your  
20 pupils for vocal careers?

A. Yes.

Q. May we have you enumerate those that stand out for us?

A. Well, there is Nelson Eddy, Anna Roselle, Fregirio (?) at the Metropolitan, Mr. Eric Rhodes, who is singing now in London.

Q. Rhodes?

A. Eric Rhodes. Jerry Norris, who is the lead with one of the Schubert companies.

30 Q. Norris?

A. In Chicago. Anna Roselle, who has sung all over the world and is opening the season in Covent Garden this spring. I don't suppose it is necessary to go into all this. I am not advertising. I am sorry.

*Dr. Edouard Lippe—Direct*

Q. Now, Dr. Lippe, in the course of your profession as a musical teacher, did you or did you not come into contact with one Max Tieger?

A. Yes, I did.

Q. And how did Max Tieger come to your notice or attention?

A. Mr. Tieger was brought to my attention by Nelson Eddy, who was then the first baritone of 10 the Civic Opera Company, and also by Mr. Alexander Smollins, who is the assistant conductor of the Philadelphia Orchestra, and who was conductor of that opera company.

Q. And his attention having been—he having been brought to your attention, what did you proceed to do, Doctor?

A. Naturally tried the voice, asked the boy what his idea was in studying. He told me he wanted to have a career.

20

Mr. Bolte: I object to that.

The Court: Yes; you won't be able to say what he said to you.

A. I see. Sorry. What was the question, please, again?

(The question was read by the stenographer as 30 follows: "He having been brought to your attention, what did you proceed to do, Doctor?")

A. Well, to shorten it, I proceeded to give Mr. Tieger lessons because of the fact —

Mr. Bolte: Not because of the fact. Just what you did.

A. I proceeded to give Mr. Tieger lessons gratuitously, without pay.

Q. May we ask the reason?

10 Mr. Bolte: I object to that, if the Court please.

Mr. Baratta: May I be heard?

The Court: I don't suppose you are interested in his reason so much as the existence of something.

Mr. Baratta: One of the major elements of my case is the promise of the boy.

20 The Court: That is the condition to which he may testify, I think, but not whether that actuated him one way or the other.

Q. And you proceeded to give him lessons gratuitously?

A. Yes.

Q. How long did you proceed to do that, Doctor?

A. I would say offhand for a period of two years.

Q. What promise, if any, did the boy show?

30 A. The voice showed unusual promise, so much so that Mr. Smollins, the director of the opera company, took Mr. Tieger —

Mr. Bolte: I object to that, if the Court please. That is Mr. Smollins' testimony. What this man

may have done with him is perfectly proper testimony, but —

The Court: Well, go ahead. Not what somebody else said, and not what you do not know of your own knowledge, of course.

A. The voice developed to a remarkable degree. 10

Q. And can you give us some idea to what degree it developed?

A. It is rather difficult to go into technical detail that possibly the Court might not be cognizant of. It is a question of—pure technical one.

Q. Did he or did he not become identified with some musical organizations as a result of this promise that his voice showed?

A. He was identified with the Philadelphia Civic Opera Company at that time. 20

Q. Can you tell us the type and character of the voice that came to your notice and that you devoted your attention, and to what point you brought it?

A. Yes. The voice was an unusually deep, resonant bass baritone, very clear, and perfectly capable of filling the Academy of Music in Philadelphia against an orchestra of sixty or seventy-five or ninety pieces, whatever the opera happened to be. In other words, the voice was of sufficient size, volume, timbre and carrying quality to warrant it 30 for grand opera.

Q. And did you proceed to devote yourself to the culture of that voice?

A. Yes.

Q. Did it respond to your tutelage?

A. Yes.

Q. Do you know anything of Mr. Tieger's repertoire?

A. Mr. Tieger sang in all of the operas that were given by the Philadelphia Civic Opera Company, and I believe that his statement is correct with regard to the number of operas in which he is capable  
10 of singing. The work that Mr. Tieger had with me was entirely a vocal technique one. My work does not consist of teaching repertoire of opera.

Q. I see. Could you tell us how soon under your tutelage would Mr. Tieger have been ready to blossom forth as a full fledged artist?

Mr. Bolte: That calls for a conclusion, if the Court please. I object to it.

20 The Court: Yes.

Q. How soon would he have been ready for a comprimario artist's role, we will say?

Mr. Bolte: I object to that, if the Court please.

The Court: Well —

Mr. Bolte: It is purely a conclusion on the part  
30 of this witness, purely a matter of conjecture, and does not go to the measure of damages in any manner, shape or form.

Mr. Baratta: This man is an expert, if your Honor please. That is what he has given his life to.

*Dr. Edouard Lippe—Direct*

The Court: Well, haven't you disclosed the factual situation, just what this young man ultimately did, what he was capable of doing? You have done that, haven't you?

Mr. Baratta: Yes, I think so.

The Court: His activities with the Philadelphia Civic Opera Company and with the other opera company? 10

Mr. Baratta: Yes. Thank you very much for the suggestion. I think your Honor is quite right. I shall proceed on another trend.

Q. May I ask, now, when you came into—when this voice came to your attention again subsequent to this accident of August 7th, 1932? 20

A. I cannot give you the exact date. It was right after the return from my vacation in my Philadelphia studio, and that was the first that I had learned of Mr. Tieger's accident.

Q. Did you or did you not at the time try out the voice?

A. Yes.

Q. And have you tried it since then?

A. Yes, I have tried the voice again in New York, prior to my sending Mr. Tieger to one of our foremost laryngologists of New York. 30

Q. You did try the voice?

A. Yes.

Q. And what did you see in the voice subsequent to the accident and against what you saw in it prior to the accident?

A. In order that I might not get into any technical matters that possibly the Court might not understand—the development of a tone depends largely on the tonus of the muscles, not only those muscles that control the vocal cords, but the muscles that control the entire speech organ. It is like a person starting to walk, if they can start they walk and  
10 keep going very definitely, they go to a point. With Mr. Tieger, when he studied with me, the voice was large, round and full, and was able to arrive or establish itself to a given point. I find now that the voice will start and will attempt to give me the type tone that I have been accustomed to, and that I heard, and then that tonus of muscles seems to sag, there appears to be an impairment there of muscular or nerve functional activities in the throat.

Q. Could you—you say in the throat; could you  
20 tell us what part of the throat particularly?

A. Well, the entire throat.

Mr. Bolte: Now, I object to that, if the Court please, because this man is not qualified as a doctor on the throat condition.

The Court: Well, I don't know. Do you feel that you are?

30 The Witness: I feel that I am qualified as a teacher of singing and of phonation. I am not speaking of the question of injury. I am speaking of the question of actual condition, of how I found the muscles, the jaw, the tongue, and the throat, at the present time.

*Dr. Edouard Lippe—Direct*

Mr. Bolte: The human anatomy, if the Court please, that requires some one who knows about and has made a study of the throat and the mouth and so forth, and the muscles of it.

The Court: You don't mean anatomically?

The Witness: No, I mean functionally. 10

The Court: Functionally.

Mr. Bolte: He has already testified as to what he says are the results of it, and I think there he stops.

Mr. Baratta: That is exactly one of my allegations in my contention, that there is something functionally wrong by way of impairment to those 20 muscles and nerves, and whatnot—anatomical entities that go to give forth the voice; and that is what I am eliciting from the witness.

The Court: Well —

Mr. Bolte: He is not qualified to testify as to the throat.

The Court: That rests upon his qualifications. 30  
Apparently there is no question about his ability to compare the voice as it was before the accident and as he found it to be after the accident.

Do you feel you have special training, Doctor, to enable you to determine the function of the muscles

of the face and jaw and to discover any limitation in the function of those muscles?

The Witness: Naturally, your Honor, for instance —

Mr. Bolte: I object.

10

The Court: I am asking generally, whether he feels he has that knowledge; special training, I asked.

The Witness: I would say, your Honor, yes; that is training that one must have in order to be able to correct deficiencies that a student might have in the production of the voice.

20 The Court: Well, do you want to examine? It is purely functional.

Cross-examination.

By Mr. Bolte:

Q. You made no physical examination of the muscles at all?

A. None whatever.

30 Q. And you don't know how they physically react?

A. Oh, yes.

Q. As they are singing?

A. You mean each muscle, how they physically react in singing?

Q. Yes.

A. Yes, decidedly.

Q. You have made no—no information as to whether there has been any physical impairment of the muscles?

A. I merely judge from the results, what I hear.

Q. Yes.

A. And I hear there is an impairment there. There is a disturbance, a functional disturbance. For 10 instance, the one important thing in singing is the utmost relaxation and the dropping of the jaw. It is very, very important. I find that, for one thing, has been impaired.

Q. Yes. That is in the enunciation?

A. In the performance of a tone, that is of utmost importance.

Q. And what you are giving is just the result of hearing his voice, aren't you?

A. Naturally.

20

Q. Yes. I don't —

The Court: Well, is there anything further you want from this witness other than has already been said?

Mr. Baratta: Yes, I do.

Direct examination (continued).

30

By Mr. Baratta:

Q. Something has been said today about the lungs in reference to the volume of the tone that the singer

produces. What importance have the lungs, if any, in the production of volume?

A. The lungs play a very, very small part in the production of volume. Volume depends most entirely on the resonators. That is very much exemplified—one is Lily Pons, a little girl, very tiny, at the Metropolitan, one of our foremost sopranos  
10 there. It is the lack of breath that one needs, and the other resonation to that breath which causes a tone to be substantial, not the amount of force. Otherwise, the truck driver, with an enormous chest, could produce an enlarged tone.

Q. Where are these organs of resonance for the human voice? What part do you place them up in the throat?

A. In the larynx, in the pharynx, in the nasal pharynx. Then there is a resultant resonance which  
20 comes as a result of a perfectly produced vowel mold or tone that we get from the frontal sinuses, and the sinus here. But they play a very small part. They are resultant in the tone.

Q. The trained singer your size could produce a tone much greater in volume than, say, Mr. Bolte?

A. That is taking an unfair advantage of Mr. Bolte.

Mr. Bolte: You have not tried me, have you,  
30 Doctor?

The Witness: I am perfectly willing to.

Mr. Baratta: May I have the doctor illustrate exactly what we have in mind?

The Court: I don't think that is necessary. We would enjoy it some other time.

Mr. Baratta: Cross-examine.

Cross-examination.

By Mr. Bolte:

10

Q. The resonance does come from the chest and from the mouth and then from the head, doesn't it?

A. You are speaking now of two schools of teaching, as far as the voice is concerned. One is a school of the forward placement of the voice, which, unfortunately, I do not teach. The other is a school of teaching of voice where the pharynx and the larynx, the pillars of the fauces, the tongue, all play a very important part in the functioning of the voice for singing. 20

Q. In the school you teach, what does control it?

A. There are two sets of muscles that go into play of making a perfectly produced tone, one that could be used in singing for grand opera, we will say, or a finished artist. I will call them intrinsic and extrinsic muscles. The intrinsic are the ones that hold the tone perfectly tight. Now, the other muscles here in the neck, without going into the technical detail, they must be perfectly flexible, perfectly relaxed, so that the pharynx and larynx can swell or open itself to take the utmost size of the tone, and it is in there where the tone develops itself and where you get the timbre or resonance or ring. 30

Q. Would the injury to his cheek have any effect on that, Doctor?

A. It would have effect on flexibility or the possibility of the jaw dropping itself.

Q. Yes.

A. Also the formation, the true formation of the vowels which are made back in the throat; that is  
10 their inception, and not on the lips.

Q. And that goes to the enunciation, doesn't it?

A. Yes.

Q. And the—any damage that is done to the cheek does not affect the larynx, does it?

A. It might not affect it in a surgical way. It might affect it in a psychical way or functional way. It is possible that possibly some of those nerves might have been injured.

Q. Not possibly, Doctor?

20 A. I cannot make any statement.

Q. The injury to them would do that; the injury to the jaw wouldn't do it, would it?

A. Well, I believe my position here is to state whether or not I have found that there has been any impairment in the boy's voice.

Q. Yes, that is the thing we have been saying right along, Doctor, yes.

A. That is what I found.

30 Q. But there is nothing here, that is, so far as the injury is concerned, that you can say anything about any injury to the larynx and the pharynx, anything of that type, anatomically?

A. No. In order to be sure of my diagnosis, I sent Mr. Tieger to Dr. Alexander Levine, of New York.

*Dr. Edouard Lippe—Cross*

Q. I am talking about you, entirely, Doctor.

A. I see; I see.

Q. You know of no injury to his larynx; you know of no injury to his pharynx?

A. I did not ——

Q. Looking at the boy?

A. I did not examine either the larynx or the pharynx. I merely judged from my ear, from the 10  
tone.

Q. Merely judged from your hearing, results that you got?

A. Yes.

Q. And the results you got is, you say, his voice today is not what it was prior to that?

A. Yes, sir.

Q. Tell me just exactly when you made this examination, this examination since this man has had this accident? 20

A. The first time Mr. Tieger came to me was in— I would say it was in either September or October of 1933, the start of my season. See, I returned from the south some time then.

Q. That was how long after the accident?

A. That I don't know. I was not—I had no knowledge of the accident.

Q. If the accident occurred in October of—August, 1932, it was over a year afterwards, wasn't it?

A. Yes. 30

Q. And prior to that time you did not see him at all, did you?

A. No.

Q. In fact, you would not see him, would you?

A. It would be impossible for me to have seen

him from the first of June, 1932, until the first of October, because I was away. I took a four-months' vacation.

Q. Did your secretary tell him you would not see him?

A. When was this?

Q. Between the time of the accident and of May 10 of 1933, May 13, 1933?

A. I don't recall that.

Q. Don't you know that he came to your office and that your secretary stated she would not let him in even to see you?

A. I don't recall that. I don't see what you are trying to prove.

Q. I am simply trying to show in regard to these examinations that you made of him—do you know that between that time that your secretary told him 20 that his scholarship had been revoked, without you even examining him?

A. I know of no knowledge of any statement of that kind having been made.

Q. If your secretary—has she authority to do that?

A. She would be usurping her authority were she to make such a statement.

Q. If she told Mr. Tieger that, that she would not—that you had revoked the scholarship ——— 30

A. She would have no right to make such a statement unless that statement should come from me, and not from a secretary.

Q. The parts that he sang during the time that he was under your tutelage was in connection with

*Samuel Deitch—Direct*

cantor work—I don't know whether I am expressing that right or not, Doctor.

A. It is quite all right.

Q. In a synagogue.

Mr. Baratta: Do you mind getting off the stand? I should have asked the Court's permission. Does your Honor mind? I have a man from the United States Weather Bureau. 10

The Court: No.

(Short recess.)

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SAMUEL DEITCH, called as a witness on behalf of the plaintiff, being sworn, testified as follows: 20

Direct examination.

By Mr. Baratta:

Q. May I ask your full name?

A. Samuel Deitch.

Q. And you are associated with the United States Government in some capacity?

A. Yes, sir. 30

Q. And stationed here at Atlantic City?

A. Yes, sir.

Q. In what capacity?

A. Official in charge of the local office, United States Weather Bureau, Atlantic City, New Jersey.

Q. I direct your attention to August 7th, 1932, and ask you for the rainfall on the afternoon of that day between the hours of twelve and six.

A. August 7th, 1932, was on Sunday. During the afternoon hours, rain began at 2:02 P. M. standard time, and ended at 2:40 P. M. standard time. The amount of rain during that period was eight-tenths  
10 of an inch or eighty one-hundredths of an inch.

Q. Is that a heavy or a light rainfall?

A. A heavy rainfall.

Mr. Baratta: Cross-examine.

The Court: That is all.

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20 DR. EDOUARD LIPPE, recalled.

Cross-examination (continued).

By Mr. Bolte:

Q. Dr. Lippe, you didn't see him, then, from the time of the accident, August 7th, until over a year afterwards, October, 1933?

A. Yes, that is right.

30 Q. Does the palate have anything to do with singing, Doctor?

A. Yes, decidedly.

Q. And if the palate is affected by some condition outside of the accident, would it have an effect, so far as the singing voice is concerned?

A. Well, it would have an effect. I believe that effect would have been apparent when I saw ——

Q. I am just asking whether it would have an effect, Doctor, or not.

A. Some malformation of the palate.

Q. No.

A. Will you kindly repeat your question again?

10

Mr. Bolte: Ask the question.

(The question was read by the stenographer as follows: "And if the palate is affected by some condition outside of the accident, would it have an effect, so far as the singing voice is concerned?")

A. If the effect is one that would impair the palate from flexing, extending itself to any width, to the throat, I would say yes, it would impair the voice. 20

Q. Doesn't the palate have to be in excellent condition for a person to sing properly?

A. Functionally, yes.

Q. Yes. And supposing that this young man had a growth in the nose as a result of which there has been constant discharge onto the back, and the palate is affected thereby, wouldn't it affect his singing voice?

A. There are many singers today who are singing with growths in their nose. 30

Q. I am asking simply the question, Doctor, wouldn't it?

A. It would affect, but wouldn't impair permanently the singing voice.

Q. During the time that condition was in existence, wouldn't it affect it?

A. Not to an appreciable degree that would prohibit his singing, no.

Q. Would it affect the caliber of his voice and the quality?

A. It is possible the removal of such a growth  
10 would enhance the quality.

Q. Wouldn't the constant dropping of mucus, and so forth, from the nose and on the palate from some condition in the nose and affecting the palate, would that not affect the quality of his voice?

A. In a small degree, yes.

Q. Only in a small degree?

A. Yes.

Q. In other words, if that condition came—was in existence after you saw him, or he had been singing  
20 for you, it may have affected to some extent the voice at that time, might it not, when you again heard him?

A. Yes, that is possible.

Q. And do you know whether or not he had a growth in the nose?

A. No, I did not examine his nose.

Q. You don't know anything about that?

A. No, I did not examine his nose.

Q. Do you know whether there was a growth in  
30 his nose from which there was a constant discharge on to the palate?

A. No.

Q. Of that part you know nothing at all, do you?

A. We don't look for those things unless we find some condition that warrants our looking for it.

If there was something interfering with that, then I would have sent him to a nose and throat specialist to examine that.

Q. You believe that the lungs have practically very little to do, or the chest, with the power of the voice; is that correct, it does not have?

A. Yes, that is correct.

Q. And you speak of what—Miss Pons, was it? 10

A. Lily Pons.

Q. Lily Pons.

A. I merely mentioned the question of small stature.

Q. But can't a person of small stature have a lung expansion entirely different from a person of large stature, through training?

A. Yes, but it is not a question of lung expansion. It is a question of where the air that is in that lung is handled. 20

Q. But the lung does produce the volume, doesn't it, the power?

A. No, the lung does not produce the power.

Q. Do you use the lung at all?

A. Yes, the lung is merely used as a motor that starts this very, very tiny portion of air; in perfect singing very little actual air is used.

Q. So, for instance, listening, for instance, to Schumann-Heink singing, and hearing the intake of air, and so forth, that is not part of her lung ability? 30

A. No, I would say that is taking in a very bad breath, if one could hear it, a hiss of air.

Q. And the lung does as—plays but little part in the producing of volume?

A. Yes, that is correct.

Q. It is used—is the lung and the chest used, so far as the resonance is concerned; does it play a part there?

A. Only in the very, very lower part of the voice, the extreme low part of the voice, there is a resonance, not in the lung tissues, but in the trachea or wind pipe.

10 Q. Does the roof of the mouth play any part in the resonance?

A. In some faulty singing, yes, where the voice is projected against the roof of the mouth, it will play an important part.

Q. Is it sort of like a sounding board, Doctor?

A. No.

Q. Not at all?

A. No.

20 Q. Does any part of the head produce any part of the resonance?

A. Yes.

Q. What part of the head produces it?

A. The cavities in the pharynx, the nasal pharynx, and in the larynx, the entire cavities above the point where the vocal cords approximate, from that point on up until it leaves the nasal pharynx, that entire column of air functions as the producer of the vowel mould or sound of the voice. Then from there on it is shaped by the different soft tissues, the pillars  
30 of the fauces. Then the very last, color and shape-  
ment of the lips. Even that is unnecessary. A perfect *e* vowel can be made in the back of the throat without the movement of the lips at all.

Q. So that the entire function of singing is from the vocal cord on up into the head?

A. Yes.

Q. And no other part of the body has anything to do with it whatsoever?

A. Oh, yes. The diaphragm, which motivates the breath, which keeps the breath going at a constant stream and a very small stream. Singing of a loud tone or a sustained tone does not consist of a tremendous lung expansion and then a terrific drive of that breath. Otherwise great singers, the Wagnerian singers, would have to have a bellows the size of a desk. 10

Q. Are most Wagnerian singers big women, Doctor?

A. No; Gladys Swartout sings in grand opera. She is not very large. And she sings in —

Q. I know she does, but aren't most of them?

A. Unfortunately, they are great eaters, yes.

Q. Aren't most of them big people? 20

A. Yes.

Q. The people who usually sing Brunhilde, aren't they usually big people?

A. Yes.

Q. Big-chested women?

A. We have small ones.

Q. Schumann-Heink a big-chested woman?

A. Yes. She is quite old now.

Q. And she can produce a tremendous volume, can't she? 30

A. She was able to produce a tremendous volume.

Q. So far as you—from an anatomical standpoint you cannot say that any of these, larynx, pharynx, the palate, the muscles back there, were in any manner or shape affected by this accident?

A. I don't believe it is up to a vocal teacher to examine that.

Q. I am asking you simply from an anatomical standpoint whether you can say they were or not?

A. I cannot say, because I have not examined.

Q. It would require an injury to them so that they would affect the voice, wouldn't it?

10 A. It would require some type of injury to any one of the sets of muscles or any of the other structures that you have mentioned, any one would be sufficient to destroy or spoil.

Q. If they were in a normal condition, then, so far as any accident is concerned, it would not have the effect of having produced what you have testified to?

A. Exactly. The voice would continue on.

20 Mr. Bolte: All right. That is all.

Re-direct examination.

By Mr. Baratta:

Q. If this voice had come to you in its present state, would you be disposed to undertake its culture?

30 Mr. Bolte: I object to that, if the Court please.

The Court: That is the other way around the question that you attempted to ask a while ago.

Q. How big is Galli Curci, or was she, in her prime?

*Dr. Edouard Lippe—Re-cross*

A. Galli Curci is not a very large woman. She is quite small. She is quite thin. Galli Curci at the present time is not singing. She is singing in South America. But Lily Pons weighs about 105 or about 108; a little over five feet.

Q. Could Galli Curci give us volume?

A. Oh, yes. A little baby could give just as much volume at times as a grown person. Can be heard. 10

Mr. Baratta: That is all.

Re-cross examination.

By Mr. Bolte:

Q. I didn't finish with you at the time of recess. I think I started to ask parts that he sang while you were teaching. You say he sang in the syna- 20  
gogue?

A. I didn't say.

Q. And he sang with the opera company of the— did he sing with the Philadelphia Civic Opera Company at that time?

A. Yes.

Q. Did you hear him sing there?

A. Oh, yes.

Q. What parts did he sing?

A. I cannot say offhand, for this reason, that my 30  
work, as I mentioned before, is not teaching of roles, but teaching music, mine is a purely vocal one.

Q. You know sufficiently about operas, and so forth, Doctor, you are familiar with them, that you know the parts of these operas, don't you?

A. I believe there was a small role, in, I think it was "The Marriage of Figaro," possibly "Rigoletto"; one or two of the operas there that I happen to have heard at the time.

Q. Most of the work he did was singing in the chorus, wasn't it?

A. In the chorus at first, and then he was in the  
10 small roles, what are called comprimario roles.

Q. They are the minor roles?

A. But they are important in an opera.

Q. I understand that, Doctor, but they have not very much singing to do, have they?

A. Not as much as the principals.

Q. Not by any means as much, do they?

A. Well, there are some of the best comedy roles, you might say that, without having to use the Italian, that might sing a great deal, and they there consider  
20 comprimario roles.

Q. In what operas do they sing a great deal, these comprimario roles?

A. "Bartello" as quite a ——

Q. Do you hear him sing in that?

A. No.

Q. What operas have you heard him sing in?

A. As I recall, the parts were, as you say, minor, were minor roles.

30 Mr. Bolte: That is all, Doctor.

DR. HARRY SUBIN, recalled.

Cross-examination.

By Mr. Bolte:

Q. Doctor, from this wound that you saw, was 10  
it the type of wound that could have been caused  
by this young man jumping and landing in the side  
of a car and hitting the door of the car?

Mr. Baratta: I object.

Q. The handle of the car?

Mr. Baratta: I object at this time. I don't see  
any relevancy. 20

The Court: I am only assuming that it may have  
later in the case.

Mr. Baratta: Well, I would much prefer he would  
ask his own doctor, unless he wants to make Dr.  
Subin his witness for this question, I am satisfied.

Mr. Bolte: I certainly think I am entitled to ask  
it under cross-examination. 30

The Court: Yes; I am just wondering whether  
or not your question is sufficiently definite for the  
doctor to answer it. Perhaps he can. You have not  
made it very definite, as to what he came in contact  
with.

Q. Can you tell from the nature of the wound whether the—if he had come in contact with the door of the car, that it would have created that type of wound, in that jump?

A. No, sir.

Q. Cannot tell anything in regards to that?

A. No, sir.

10

Mr. Bolte: That is all.

Mr. Baratta: That is all.

Mr. Bolte: We are putting Dr. Charlton on so as to finish with the medical examination. As I understand, Mr. Baratta has finished with his medical, so that we can get the doctors out of the way.

20 

Mr. Baratta: Except rebuttal.

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DR. C. COULTER CHARLTON, called as a witness on behalf of the defendant, being sworn, testified as follows:

Direct examination.

30 

By Mr. Bolte:

Q. Doctor, you are a graduate of what school?

A. University of Louisville.

Q. You practice where?

A. Atlantic City.

*Dr. C. Coulter Charlton—Direct*

Q. How long have you practiced in Atlantic City, Doctor?

A. Since June, 1912.

Q. And prior to that time where did you practice?

A. I was studying in New York, Philadelphia, and Boston.

Q. What were you studying?

A. At that time, nose, throat and ear work. 10

Q. And since you have come to Atlantic City, to what have you devoted your practice?

A. Nose, throat and ear.

Q. Are you familiar with the throat?

A. Somewhat.

Q. And have you examined quite a few people in regards to the formation, and so forth, of their throats?

A. I have.

Q. Among them are there any of those who are 20 in the theatrical or singing game?

A. A few.

Q. And you know the formation of the throat, the muscles thereof?

A. I do.

Q. You know the larynx, the pharynx, palate, all the different parts that go to make up the throat?

A. Fairly well.

Q. Do you know the nose?

A. Nose. 30

Q. And the head generally, Doctor?

A. Especially the ear.

Q. Now, did you make any examination of Max Tieger, the plaintiff?

A. I did.

Mr. Baratta: Now, if the Court please, I am going to interrupt at this time. He is holding the doctor out as an expert, and I suppose going to try to qualify him as a laryngologist, so I want to cross-examine.

Mr. Bolte: Cross-examine.

10

Cross-examination.

By Mr. Baratta:

Q. Doctor, you say you are a laryngologist?

A. I do some of the work.

Q. You have some knowledge of laryngology?

A. A little.

Q. That brings you in contact with the human larynx, is that right?

20

A. Some.

Q. All right. Let us dissect it a little bit. Give me the cartilages of the larynx. Start with the cricoid.

A. Cricoid.

Q. Next?

A. Thyroid.

Q. Thyroid. Next?

A. They are the main ones. The arytenoids.

30

Q. Next?

A. They are the main ones that is used.

Q. Well, give me those discovered by Wrisberg.

A. Wrisberg is on the epiglottis.

Q. The epiglottis was discovered by Wrisberg?

A. No; Wrisberg's cartilage is attached to the epiglottis.

*Dr. C. Coulter Charlton—Cross*

Q. Sure of that?

A. Yes.

Q. What book do you use?

A. Well, there is different books, that is my knowledge of it.

Q. Well, is Gray's Anatomy a good book?

A. It is a good book.

Q. Would you take Gray's word for it? 10

A. Well, it is a new book, perhaps.

Q. Well, would you take DaCosta's Commentary on Gray's Anatomy?

A. I don't know anything about his.

Q. Would you say that DaCosta is an able man in the field of human anatomy?

A. Surgery —

Q. Yes.

A. —is where he stood out.

Q. Would you say he was an anatomist? 20

A. To be a good surgeon you have to know very much about it.

Q. And you say the cuneiforms—or what were you saying about Wrisberg's cartilages, which you were talking about?

A. I didn't say anything about cuneiforms.

Q. What is the name that Wrisberg's cartilages are known as?

A. Wrisberg's cartilages?

Q. Yes. 30

A. Wrisberg.

Q. No other name?

A. It might be called by other names.

Q. What other name?

A. I can't tell you just off-hand.

Q. Give me those that were discovered by Santorini.

A. That is the one that attaches to the arytenoids, the arytenoid cartilage has a little hook that you call Santorini's cartilage.

Q. That obtruncates, doesn't it? That the term you use? The arytenoid cartilages, don't they ob-  
10 truncate?

A. I don't know what you mean by the word.

Q. What is the name of that cartilage which you speak of now that you say Santorini discovered?

A. That is part of the arytenoid.

Q. What part?

A. The hook on the cartilages.

Q. Is it the apex or something else?

A. Turns back posteriorly from the cartilage.

Q. What is its name?

20 A. You just gave it.

Q. What is it?

A. Santorini.

Q. Santorini. No other name?

A. That is the only name I know it by.

Q. I am going to put that down. Santorini. You say they are where?

A. On the arytenoids.

Q. At what portion?

A. Posteriorly, above.

30 Q. Posteriorly, above. And at what portion posteriorly and above?

A. It is up near the angle like this—of course this is not the shape of the cartilage, but it would be something like that. Here is the posterior part, here is the upper part.

Q. Now, I am going to rub this cuneiform out, because I don't think you said anything about it.

A. You were the one that mentioned it.

Q. So we will put down Wrisberg's, which you say are attached to the epiglottis.

A. In the same position, location.

Q. Now, thyroid, cricoid, arytenoids, Wrisberg cartilages, and Santorini. How many thyroids are 10 there?

A. You have one thyroid gland.

Q. And how many cartilages?

A. You have got the two sides.

Q. What are they called?

A. Thyroids.

Q. Thyroid what?

A. Cartilages.

Q. Cartilages; or is it one cartilage?

A. There is two halves. 20

Q. Two parts?

A. On each side.

Q. What do you call each half?

A. You can call them right and left, if you want to.

Q. What is the name in anatomy, what do you give it?

A. That is enough, thyroid.

Q. Thyroid what?

A. Cartilages. 30

Q. Cartilages?

A. Right and left.

Q. Right and left cartilages, or cartilage, which is it?

A. Cartilage.

Q. Cartilage.

A. Singular, and plural.

Q. Divided into two wings; I will help you—*alae*.  
*Alae*; is that all right, Doctor.

A. That is all right.

Q. Now, we come to the *cricoid*. How many *cricoids* are there?

10 A. You have the one.

Q. One. How many *arytenoids*?

A. Two.

Q. Two. How many *Wrisbergs*?

A. One on each side.

Q. How many is that?

A. Two.

Q. How many *Santorinis*?

A. Two.

20 Q. Two. Start with the muscles. Start me with the *cricothyroid*; how many of those—well, the *cricothyreoideus*, how many of those?

A. Well, there is different names to them.

Q. I am asking you how many *cricothyreoideus* muscles there are?

A. Off-handed I should say there is perhaps six or more.

Q. Six or more *cricothyreoideus*. Now, give me the *cricoarytenoideus*; how many of those?

A. Well, there must be about three on each side.

30 Q. Three on each side?

A. About that.

Q. Now, give me the one that connects the two *arytenoid cartilages*.

A. *Arytenoideus*.

Q. The which?

A. Arytenoideus.

Q. Now, with reference to these cricoarytenoideus, subdivide those for me; give me the cricoarytenoideus lateralis, and give me the cricoarytenoideus posticus. How many of those?

A. Oh, perhaps—off-handed I wouldn't be able to tell you the exact number.

Q. All right; you can't tell me that? 10

A. About three on each side of those arytenoid cartilages.

Q. Three on each side?

A. That is what I have told you over there.

Q. You told me cricoarytenoideus?

A. Yes.

Q. That, I take it, you describe as a muscle. I am asking you for the cricoarytenoideus lateralis, and I am asking for the cricoarytenoideus posticus. I want you to tell me how many of each. Well, while you 20  
are thinking of that, we will take something else. The membranes. Start with the thyrocricoid membrane; going to put that down.

A. That is a membrane from the thyroid to the cricoid.

Q. Exactly so. Thyrocricoid membrane. That you say extends from the thyroid down to the cricoid. Now, give me the one that comes from the cricoid on down to the trachea. What do you call that one? 30

A. Trachea —

Q. May I ask this, before you answer that question. Tell me where the sinovial bursa is located in the thyrocricoid membrane.

A. The which?

Q. The sinovial bursa, with reference to the thyro-cricoid membrane.

A. In between.

Q. In between at what point?

A. The thyroid and cricoid.

Q. At what point in the thyro-cricoid membrane?

A. About in the center.

10 Q. In the center?

A. About that location.

Mr. Bolte: Is the Court satisfied with this doctor's ability as an expert of the throat?

The Court: I think sufficiently so.

Q. About the center of this membrane?

20 Mr. Bolte: Purely a matter if the Court feels he is qualified as an able specialist and knows his business in regards to it. We could keep at this all day.

Mr. Baratta: I want to cross-examine on the larynx. That is a question, your Honor, that is inextricably interwoven in this, and any testimony that this gentleman may offer in that behalf and in that direction is vital to my case, and I must be sure that the witness is on sound ground.

30 The Court: Quite true, but I think the examination has progressed sufficiently to disclose the doctor is qualified, has it not, to testify? Then, of course, you may cross-examine him as to his testimony in relation to the condition said to exist or not to exist in the throat of the plaintiff.

Mr. Baratta: My sole object in this examination now, your Honor, is to show that perhaps the doctor may not be as well—what I might say, as conversant, perhaps, or as clear in these particular entities that go to make up the larynx and the pharyngeal wall and the rest of the vocal organs there as might be required of him in a functional disturbance such as I am about to develop. I am going into the nervous system. I will be into the—excuse me—I don't want to become enthused. I am just trying my best, that is all. I don't know much about medicine. 10

The Court: Quite probable that you should pursue the doctor's qualifications.

Mr. Baratta: I want to go into the membranes and bursas and muscles and articulations. I want to know everything about the larynx, because I am going minutely into it; and then into the nerves, and into the—everything that has any question—if your Honor will permit me; always with that reservation. 20

Mr. Bolte: We will be here two weeks.

Mr. Baratta: That does not detract from the justice that your Honor is trying to do in the case.

Mr. Bolte: We don't feel — 30

The Court: I don't wish to unreasonably restrict you. Your present cross-examination is not cross-examination as to the doctor's testimony, but simply —

Mr. Baratta: To his qualifications.

The Court: To his qualifications to testify.

Mr. Baratta: That is all.

The Court: Which need not be, perhaps, as thorough as it might be to ascertain whether or not his opinion ultimately given was well founded or not.

Mr. Baratta: May I at this time permit the doctor to go on, with the understanding that I will be able to go into the anatomy, as needs be, in the premises, and to illustrate what is in my mind?

The Court: Yes.

Mr. Baratta: All right, then; let us proceed.

Direct examination. (Continued.)

By Mr. Bolte:

Q. Doctor, you made an examination, did you, of this man?

A. I did.

Q. When did you make it, Doctor?

A. On the 27th of last month.

Q. And where did you make it, Doctor?

A. My office.

Q. Who was present at the time the examination was made?

A. One of my nurses, and a lawyer.

*Dr. C. Coulter Charlton—Direct*

Q. Mr. Baratta?

A. Mr. Baratta.

Q. And, of course, Mr. Tieger?

A. Mr. Tieger.

Q. And what part of his body did you examine?

A. His nose, mouth and throat.

Q. And any other portion of his body besides his mouth? 10

A. His cheek.

Q. What did you find so far as the mouth was concerned?

A. On the inner surface of the mouth, a long scar from an injury I understood he had, and also on the cheek from the corner of the mouth to the angle of the jaw.

Q. Is that on the right side —

A. Right side.

Q. —or on the left? Find anything on the left 20 side, did you?

A. A small scar inside the mucous membrane, the left side, the mucous membrane.

Q. Did you notice the roof of the mouth?

A. I did.

Q. What condition was that in, so far as being normal or not normal is concerned?

A. I never noticed anything abnormal in the roof.

Q. Did you make an examination of the throat? 30

A. I did.

Q. Of what part—what of the throat did you examine?

A. The larynx, the pharynx, the nasal pharynx.

Q. Palate?

Mr. Baratta: Now, please.

Q. Did you examine the palate?

A. Oh, yes. The palate. You asked for the throat.

Q. And what other part; did you examine the nose?

10 A. The nose.

Q. What did you find at the nose?

A. I found a large growth, or what we call a spur on the septum of the nose.

Q. Is that—the septum, what do you mean by that?

A. The partition of the nose.

Q. And where was that growth, Doctor? Can you show it to the jury?

A. I have a record of it, if I may refer to my  
20 records —

Q. You may refer to your records.

A. —on which side it was on. (Consults papers.)  
On the left side.

Q. Now, so far as the throat is concerned and your examination of that, anatomically was there anything wrong with any of the different parts of the throat?

A. The upper part of the throat, there was a discharge draining in from the nose, which had a thick-  
30 ened mucous membrane. The palate was thickened and irritated, for this same secretion, that was dropping on down. His vocal cords seemed to be a little thickened and irritated, and the surrounding tissues thickened.

Q. From what?

A. From this secretion.

Q. That was coming from the ——

A. Nose.

Q. And from your observation of this growth or spur that you speak of that was on the septum, is that caused by any trauma or accident?

A. I don't think so, no.

Q. What is it, a natural condition? 10

A. Sometimes it is a natural condition. Most of the times it is caused by some injury.

Q. What—in this particular instance could you tell from it what was the cause of it?

A. I would say perhaps he had had it all his life; perhaps born with it.

Q. Now, did that affect the larynx or pharynx?

A. The pharynx, by the ventilation of the nose, and perhaps had something to do with the over-secretion that was dropping into the throat. 20

Q. Was there any condition of the throat that was—where it showed any damage to the throat or any of the different parts of the throat by reason of any trauma?

A. I couldn't see any.

Q. By a trauma, I mean an accident.

A. I couldn't see any.

Q. Or, as you say, for instance, a blow, or anything of that type, anything there you could see at all from it? 30

A. There was not.

Q. Do you know, Doctor, whether the palate is used in singing?

A. It is.

Q. What was the condition of his palate as far as it affected—affecting his voice?

A. It was thicker than a normal palate, and perhaps it would not act or functionate just as freely as a normal palate.

Q. And that thickening was from what?

A. This discharge, catarrhal condition.

10 Q. That was a catarrhal condition in his nose?

A. Nose and throat.

Mr. Bolte: That is all.

Cross-examination.

By Mr. Baratta:

20 Q. You say that you examined him. Who was there?

A. Well, my two girls in the office, you ——

Q. Yes.

A. —and the patient.

Q. That is right. And what instruments did you use?

A. Well, I used a nasal spectrum, used a tongue depressor, and use of the laryngeal mirror.

Q. What else?

A. Probes; lights; head mirrors.

30 Q. What lights? The Cameron lights?

A. The reflected light in my mirror. The head mirror.

Q. Didn't you use the Cameron light?

A. I think I did.

Q. Now, then, you say that is the only time that you ever saw the patient; is that true?

A. (Witness consults papers.)

Q. May I see what papers that you have in your hand from which you are testifying?

A. (Witness hands paper to counsel.)

Q. Now, then, if he had manifested—you say that this spur was there all his life, is that true?

A. Almost positive it was.

Q. I see. And you also say that this condition 10  
that you saw in the throat was also there all his life;  
is that right?

A. I don't recall saying that.

Q. Well, just what did you say, Doctor?

A. What—what are you referring to?

Q. You were talking of a thickening of the palate,  
and you attribute it to a certain condition you say  
was a discharge?

A. Yes.

Q. Of how long duration was the discharge? 20

A. Well, it was a chronic condition. I would say  
several years.

Q. Several years. And if the patient had not  
complained of this by way of impairment to his voice  
—you know he is a singer, don't you?

A. That is what I was told.

Q. If he had not complained of that two years be-  
fore and he had suffered no consequences of it, would  
you say that the accident no doubt aggravated the  
condition? 30

A. I don't think so.

Q. Well, what did the accident do with reference  
to this condition that you describe as chronic?

A. I doubt whether it had any effect on it.

Q. You don't think it had any effect at all. And

are you acquainted with the traumatized area in this particular injury?

A. I saw the scars.

Q. Yes. Did you know that subsequent to the accident the patient had difficulty in swallowing—deglutition, as you gentlemen call it?

A. I didn't know anything about his previous condition.

10 Q. Did you know there was a considerable aphonia?

A. I did not.

Q. Did you know that the patient had a swollen base of the tongue after the accident?

A. I did not.

Q. Did you or did you not think it important to ascertain those elements?

A. I couldn't see anything that would make me  
20 feel like I should ask that question.

Q. Did you or did you not think it important?

A. Not from what I could see in his throat.

Q. Well, can you see every throat impairment with a laryngeal mirror?

A. As far as is necessary for me to examine.

Q. Oh, as far as it is necessary for you to examine. How far is it necessary for you to examine?

A. The vocal cords?

Q. Yes. What else?

30 A. From there up.

Q. You can see. Can you see the ventricle?

A. You can.

Q. Can you see the muscles, can you see that?

A. You can't see any of the muscles.

Q. You cannot see any of the muscles. Can you see Merkel's filter?

A. They are all covered by mucous membrane.

Q. They are all covered by mucous membrane. What is the name of the part over here which emits the mucous and anoints the cords?

A. In the bursa.

Q. Tell us about that, the saccule. 10

Mr. Bolte: I don't know how that is cross-examination.

Mr. Baratta: Well, I will come to it.

Q. What is the name of that?

A. I couldn't tell you the exact name.

Q. Could you see that from above?

A. You can't see those things. 20

Q. You can see nothing?

A. The mucous membrane, that lines the throat, you see. These things are underneath.

Q. And you cannot see those?

A. You cannot see the muscles themselves. They are underneath the mucous membrane. They are just like seeing a wall if it is papered, you can see the paper but you don't see the wall.

Q. Now, we had gotten here where we had gotten to the thyrocrioid membrane. Let us go on with 30 the rest of it. What is the next membrane?

A. They are the membranes you can see when you look down the throat. You cannot see these others. They are below; they are underneath; they are covered.

Q. Can you see the membrana quadrangularis?

A. You can see the membrane that lines the throat.

Q. Can you see that?

A. That is the membrane you can see, that lines the throat.

Q. Where is it?

A. We are talking about the larynx.

10 Q. Can you see that?

A. You can see the membrane that lines the throat.

Q. Tell me where it is.

A. You only see the membrane that lines the throat.

Q. I am asking you for this one, the membrana quadrangularis.

A. Quadrangularis, of the thyroid.

Q. Where is that?

A. One of the thyroid cartilages.

20 Q. And it extends which way?

A. From cartilages to cartilages.

Mr. Bolte: I hesitate about objecting, but I see nothing of this cross-examination of the doctor in regards to what he has testified to.

The Court: Have you anything in mind?

Mr. Baratta: Yes.

30

Q. Now, let's finish up here with the—maybe we can agree that there is a thyroid cartilage; can we? We can agree that that is divided into two wings, can't we, known as the alae, is that right, the right wing and the left wing?

Mr. Bolte: He has gone over this in his qualifications.

Mr. Baratta: I am going to come right to it.

The Court: Well, Mr. Baratta, I don't think it is fair to the doctor, for me to permit him to be subjected to a general examination. If you have some fixed object in mind — 10

Mr. Baratta: I do, your Honor.

The Court: —which has its material relation to any injury that you claim the plaintiff in this case has sustained, very well.

Mr. Baratta: Yes, sir.

20

The Court: I don't want to restrict your doing so. On the other hand, I am not going to permit you to generally catechize the doctor.

Mr. Baratta: All right, then, your Honor, I am perfectly willing.

Q. Now, just you give me the dimensions of the larynx.

A. You mean this man's larynx? 30

Q. No, I mean the larynx, take it according to Sabbe.

A. I don't know —

Mr. Bolte: If the Court please.

Q. Give me some idea of the size of it.

Mr. Bolte: If he keeps it down to this particular man.

The Court: Do you object?

10 Mr. Bolte: I do, if the Court please.

The Court: It will be sustained.

Q. Now, where is the larynx, with relation to the base of the tongue?

A. It is below.

Q. And immediately contiguous, isn't it?

A. Near it.

20 Q. And doesn't the larynx itself form the anterior wall of the pharynx, doesn't the posterior wall of the larynx form part of the anterior wall of the pharynx, of the esophagus behind it?

A. The esophagus is a different tube, and the pharynx is higher up.

Q. Isn't the larynx attached to the pharyngeal wall?

A. The pharyngeal wall.

Q. To the pharyngeal?

A. Below.

30 Q. Immediately contiguous to the pharyngeal wall?

A. The pharynx stops where the larynx begins.

Q. That is right.

A. One is above the other.

Q. So that we have immediately contiguous, one

to the other, the base of the tongue, the larynx and the pharynx, is that it?

A. They are very closely situated.

Q. They are very closely situated?

A. Yes, sir.

Q. Now, then, you know that this patient was in an accident and received a blow to his face, the force and nature of which were so great as to sever and 10 render asunder the masseter muscle, the resulting scar of which you saw?

A. I saw the scar.

Q. It has also been testified to that several of the lower molars were loosened by virtue and force of the blow; it has also been testified to that there was swelling of the base of the tongue as a result; there has also been testified to that there was an attendant aphonia as a result of the force of this blow; and it has also been testified to that there was difficult 20 deglutition immediately following the accident, and the patient had to be fed with a tube. Now, I ask you to bear that in mind for a moment, and take you over to the field of physics. If you have put a force in motion, what happens to that force if it meets with no interference?

A. Does that have anything to bear on this?

Mr. Bolte: I can't—if Mr. Baratta is going to get to it, let's get to it. Let us cross-examine him on 30 what this man saw there and be done with it, so that we can make some progress in this case.

Mr. Baratta: Exactly so.

Mr. Bolte: This man is not taking his examination for the State Medical Society, to be admitted to practice medicine. This man has practiced medicine here for years, and has practiced in regard to the throat and ears and eyes, and so forth, and the conditions that actually existed there. I am perfectly willing he should be cross-examined on, but  
10 it is unfair to all of us to extend this cross-examination the way it is being done.

Mr. Baratta: I am just going to get right to the point.

Q. What happens to a force if you put it into space and it doesn't get any resistance?

Mr. Bolte: I object.  
20

The Court: Objection sustained. Let us get on.

Mr. Baratta: All right.

Q. You understand the query that I put to you in the last question about the force and severity of the blow?

A. You said there was a blow.

Q. Yes, the force and severity of which I described, that it was of such severity that it ripped  
30 asunder the masseter muscle and loosened a couple of molar teeth in the lower jaw, that it caused a swelling of the tongue, that it caused a difficulty in swallowing attending the accident, and that it caused an aphonia; now, I ask you, having all the conditions,

the base of the tongue, the larynx and the pharynx are immediately contiguous one to the other—I ask you where did force and resistance meet when that blow struck that man's face?

Mr. Bolte: I object to that again; what the effect may have been, it is different, but to put the question in that state I think is entirely ——— 10

The Court: What do you really want to know?

Mr. Baratta: I want to know ———

The Court: Whether it affected these particular parts?

Mr. Baratta: Exactly. The question I am putting to him, with the attendant results that I have given him that have been testified to, if in view of those symptoms and in the light of the injury and its nature and extent, if force and resistance didn't meet in the larynx and at the pharyngeal wall and at the base of the tongue. 20

A. It is impossible to say.

Q. It is impossible to say. What would have caused that swelling at the base of the tongue or difficulty in swallowing and the aphonia after the accident, if the trauma did not cause it? 30

A. That perhaps did.

Q. That perhaps did? That is all I want to know. Just one more question. Is the larynx a complicated and complex structure?

A. It is.

Q. Is it the human voice box?

A. So-called.

Q. And that is right at the head of the windpipe, isn't it?

A. Yes.

Q. Now, please tell me when does the recurrent  
10 laryngeal nerve come into play?

A. Comes in and supplies the lower portion of the larynx.

Q. How does the superior laryngeal nerve come in?

A. Up above.

Mr. Bolte: I object. I don't see where that is proper.

20 Mr. Baratta: I am going to get to a nerve injury right away.

Mr. Bolte: Let him ask about the nerve injury.

Q. Now, after we have this box set up, the larynx, which you describe as a complex masterpiece of nature, what supplies the muscles and cartilage with activity?

30 A. A recurrent laryngeal nerve.

Q. If there was an aphonia in there, was or was not there an injury to the larynx?

A. Not necessarily.

Q. What could have happened, what did happen?

A. Swelling.

Q. Swelling. What is swelling; edema or con-  
jection, which?

A. Well, edema.

Q. Suppose it is edema. What would cause an  
edema, an injury to the tissue or nerve, or either one?

A. Both might.

Q. Both might. Therefore, we have an edema  
down there, with an injury to the nerve, and injury 10  
to the tissues?

A. I didn't see any edema at the time.

Q. You didn't see any, but I am asking you, in  
the face of the symptoms; it was one or the other,  
wasn't it?

A. Yes.

Q. Isn't it?

A. Yes.

Q. An injury to the nerve could produce an edema,  
and the edema could produce the aphonia, is that so? 20

A. Perhaps it could.

Q. And in all probability it did, didn't it, in this  
accident, in view of the symptoms?

A. I don't know.

Q. In view of the symptoms, as I have given them  
to you?

A. I judge so, according to that.

Mr. Baratta: That is all I want.

Re-direct examination.

By Mr. Bolte:

Q. After all is said and done, Doctor, when you examined it, you found nothing wrong with the—  
with this throat and the parts that go to make it that  
10 were normal, with the exception of the discharge of  
the mucous?

A. That is right.

Q. And the discharge from the nose?

A. That is all.

Mr. Baratta: That concludes our medical.

(Recess until Tuesday, February 20th, 1934, at  
10 o'clock A. M.)

20

30

*Discussion*

Atlantic City, N. J.

Tuesday, February 20th, 1934. 10 A. M.

—  
TRIAL CONTINUED.

The Court: Juror No. 2 is not present this morning, although the Sheriff informs me he has no message from this juror. Yet I think it is to be assumed that the weather condition has made it impossible for the juror to appear. But I understand that counsel in this case are willing to proceed with the eleven jurors who are present. 10

Mr. Baratta: Yes, your Honor.

Mr. Bolte: Yes, your Honor. 20

The Court: Then by consent of counsel the trial in this case will proceed with the eleven jurors who are now present. Counsel may proceed.

Mr. Baratta: Your Honor, yesterday it was agreed to have all the medical testimony in at one time. I understood from Mr. Miller last night, who is associated with Mr. Bolte, that they had no intention of putting on any music teacher or anyone connected with the culture of voice at that time. I have Dr. Lippe here and I would like to be in a position to tell Dr. Lippe to go to Philadelphia or New York or wherever he has to go, if it is agreeable with the defense. 30

The Court: Well, you have to assume responsibility for that yourself.

Mr. Bolte: Although I am not going to put anyone on, I don't want—but I think Mr. Baratta would be perfectly safe. As far as our present intentions are, we don't expect to put anyone on.

10

Mr. Baratta: Well, that is good enough for me. Thank you very much.

Mr. Bolte: I don't want to take advantage of you.

The Court: I speak as I do on the subject, because I would not be inclined to hold up the trial of the case to afford you an opportunity to recall him if he were not present.

20

Mr. Baratta: No. I would hardly expect that, your Honor.

---

ALLEN TRASOFF, called as a witness on behalf of the plaintiff, being sworn, testified as follows:

Direct examination.

30 By Mr. Baratta:

Q. I am going to ask you to talk loud, please. Your full name, please?

A. Allen Trasoff.

Q. Mr. Trasoff, where do you live now?

*Allen Trasoff—Direct*

A. In Philadelphia.

Q. May we know the address, please?

A. 3513 Haverford Avenue.

Q. How long have you lived there?

A. Three years.

Q. Were you living there August 7, 1932?

A. Yes, sir.

Q. May I ask your present occupation, please? 10

A. I teach art at the Oak Lane Country Day School.

Q. And were you with Max Tieger when he met with the accident in Atlantic City, New Jersey?

A. Yes.

Q. It was a Sunday, I believe, wasn't it? Can you describe for us how the accident happened, beginning with the hour when you left the restaurant at New York Avenue and the Boardwalk?

A. When we left the restaurant there was a slight drizzle at the time, which we were on New York Avenue. We started to walk towards Pacific Avenue on New York. When we took a few steps, when we came out, and there was a cloudburst at that point, so we ran to a nearby garage on the same side of the street where we were, and we waited until the rain stopped and then we came out of the garage, and as soon as we came out Max wanted to take an alley across the street which he thought was a short cut. 20

30

Mr. Bolte: No; I object.

Q. Never mind that, please. Continue on.

A. We kept on walking up New York Avenue.

Q. How far did you walk?

A. We walked until about half-way up the block or so.

Q. I see. Then what did you do at half-way up the block? What happened? What did you observe?

A. Half-way up the block we found an empty space.

Q. How big was this empty space?

10 A. About two cars in length.

Q. And where was this empty space?

A. Between parked automobiles.

Q. And what happened at this space?

A. At this space we wanted to cross.

Q. Now, how did you proceed to cross at this space that you have described?

A. My friend, Martin Kanefield, who waded out into the water about as far as the automobile —

Q. As what part of the automobile?

20 A. As the part that was towards the middle—that was facing the street. He waded out as far as that car, and begin to look up and down New York Avenue.

Q. And then what?

A. Then —

Q. Did you look?

A. No; I stood on the curb.

Q. You stood on the curb?

A. Almost behind him.

30 Q. How far behind him were you?

A. About three or four feet.

Q. And he was out in the puddle?

A. Yes.

Q. Now, you say he looked up and down New York

Avenue. Was your attention attracted up New York Avenue?

A. Yes.

Q. And what did you see?

A. I saw an automobile approaching.

Q. And as this automobile approached what did you observe about the automobile?

A. It was a coupe. 10

Q. Yes, and was it raining hard at that time?

A. There was a slight drizzle.

Q. Slight drizzle. And as this car approached from up New York Avenue, what did you observe the car do?

A. It began to slow down when it came to about where we were.

Q. I see. Then, what did it do?

A. It came to a dead stop.

Q. About how far from the point where Mr. Martin Trasoff—is that his name? 20

A. No, his name is Martin Kanefield.

Q. Martin Kanefield was standing, that is the boy you have told us about, out in the puddle. About how far from him did the automobile stop?

A. About ten feet.

Q. Then, did you make any observations as to what the driver did at that point?

A. The driver gave us a crossing signal with his head. 30

Mr. Bolte: I ask it be stricken out.

The Court: Strike it out.

Mr. Bolte: You may repeat the question.

Mr. Baratta: May I?

Q. Did you? I think the answer is yes or no.

The Court: No, you ask him what he saw the defendant do.

10 Q. What did you see the defendant do?

A. The driver gave us a crossing signal.

Q. What did he do?

Mr. Bolte: I object.

The Court: Strike it out.

Q. Just explain to us his deportment. What did he do?

20 A. You mean as regards to his driving the car?

Q. No; as to what he did with any part of his body.

A. With his head.

Q. Well, what did he do with his head?

A. He made a motion.

Q. And the car at that time was stopped, or was it some other way?

A. It was stopped at that time.

Q. And then what happened?

A. And then Max Tieger jumped across.

30 Q. And then what happened?

A. And then the car shot up suddenly.

Q. And then what happened?

A. And then he was down on the street.

Q. I see. Then Max was taken somewhere, I suppose; to the hospital?

*Allen Trasoff—Cross*

A. Yes, to the hospital.

Q. In this automobile?

A. Yes.

Q. Did you follow to the hospital?

A. We ran to the hospital.

Mr. Baratta: You may cross-examine.

10

Cross-examination.

By Mr. Bolte:

Q. Kanefield went out first, did he?

A. Yes.

Q. You are positive of that?

A. Yes.

Q. Tieger didn't go out—jump first, and Kanefield then follow?

20

A. What is this?

Q. Tieger didn't jump first and then Kanefield jump after?

A. No.

Q. When you were—weren't you all three on the sidewalk and Tieger jumped and Kanefield was right in back of him and then you back of him?

A. No.

Q. How far did Kanefield go out?

A. He went almost the width of the car that was 30 parked.

Q. And there were cars parked all along there, were there?

A. Except where we were.

Q. Yes, and that space was how big?

A. Length of two automobiles.

Q. About how long was that?

A. Well, I wouldn't know in feet. How long is an automobile, about?

Q. Don't you know how long in feet it was?

A. Well, one automobile would be about ten feet in length; it would be about fifteen or twenty feet,  
10 about.

Q. So you say that Kanefield—which way was Kanefield facing when he stood out there?

A. He was facing down towards the Boardwalk.

Q. And you say that this car came to an absolute stop?

A. Yes.

Q. Where did it come to a stop?

A. About ten feet away from us.

Q. By ten feet away, what do you mean?

20 A. Just what I say.

Q. Well, I know. From—how far from where Kanefield was standing was it away?

A. Ten feet or so. Kanefield was right about where we were excepting —

Q. Kanefield was where you were and then the car was ten feet further down toward the Boardwalk from where you were, so that the car was about ten feet from Kanefield, is that correct?

A. Yes.

30 Q. And Kanefield was standing right next to the car that was toward the Boardwalk?

A. Yes.

Q. And that is where you people were?

A. Yes.

Q. Yes. That is where Tieger jumped?

A. Yes.

Q. Right where Kanefield was standing?

A. Yes.

Q. And that was right next to the car that was toward the Boardwalk?

A. No, no. Kanefield was standing towards the car that was nearest Pacific Avenue.

Q. Didn't you testify in your direct examination 10 that he was closer—standing next to the car that was toward the Boardwalk?

A. What is that —

The Court: This juror is now here. Very doubtful whether you ought to proceed, because he missed the testimony.

Mr. Bolte: Be guided entirely by the testimony.

20

The Court: This will all have to be done by consent.

Mr. Baratta: I am perfectly satisfied that we continue as we are trying it now.

The Court: Hasn't been much testimony.

Mr. Bolte: It could be read to him. Could do it all by consent.

30

Mr. Baratta: I think perhaps it would be advisable to continue as we are, since we have stipulated.

The Court: All right.

Q. How near to the car that was toward the Boardwalk was the Lundy car when it stopped, do you say?

A. I don't know.

Mr. Baratta: May I point out to the witness that the Lundy car is the defendant's car? Lundy is the  
10 name of the defendant.

The Witness: What was the question, please?

(The question and answer were read by the stenographer as follows: "Q. How near to the car that was toward the Boardwalk was the Lundy car when it stopped, do you say? A. I don't know.")

Q. Can you answer it now, knowing which is the  
20 Lundy car?

A. Well, I couldn't answer any exact distance. It was pretty near it.

Q. What do you mean by "pretty near it"?

A. Well, about, I would say, about four feet away or so.

Q. Four feet toward the Boardwalk from it?

A. Yes, about that.

Q. Is that correct? So that at the time it stopped, the front of this car was four feet back of the front  
30 of the car that was toward the Boardwalk?

A. Yes, sir.

Q. And when it had come to a stop, Tieger jumped, you say?

A. Yes.

Q. And where did he jump from?

- A. From the curb.
- Q. Yes; from where on the curb? Where was it?
- A. Right near the edge.
- Q. Near the other car or the car toward the Boardwalk, or the car toward Pacific Avenue?
- A. The car towards Pacific.
- Q. How wide a space was it that he jumped over?
- A. About three or four feet. 10
- Q. And you say that just at the time that he jumped, the other car started up?
- A. Yes.
- Q. Had he started to make his leap while the car was still standing still?
- A. Yes.
- Q. So that with him down near the car near the— Pacific Avenue, and the Lundy car four feet back of the car that was toward the Boardwalk, four feet in back of the front of it, while the other car was standing still, Tieger jumped across about—what would you say, three or four feet of water? 20
- A. Yes.
- Q. Did he take any steps after that?
- A. I don't remember that.
- Q. You were right there, weren't you?
- A. I can't remember that.
- Q. What?
- A. I don't remember that part. I just remember he jumped. 30
- Q. As he jumped did he land in the car?
- A. I couldn't tell you about that.
- Q. How far was the Lundy car from the side of the curb, your side of the curb?
- A. The Lundy car was in the middle of the street.

- Q. Coming down the middle of the street?  
A. I mean in the center of the street.  
Q. Yes.  
A. It was coming down the center of the street.  
Q. And with half of the car over on the left side and half on the right side; is that what you mean?  
A. No; I mean the car was coming right down the  
10 middle of the street; that is what I mean.  
Q. Just right down the middle of the street. And you were looking at everything that Tieger did?  
A. What did you say?  
Q. You were observing everything that Tieger was doing? You were watching him, weren't you?  
A. No, I wasn't.  
Q. Whom were you watching?  
A. I was watching Kanefield and the car.  
Q. You were watching Kanefield and the car? And  
20 you say you saw the man shake his head?  
A. Yes.  
Q. When did you see that?  
A. Right after the car stopped.  
Q. Right after the car stopped?  
A. Yes, sir.  
Q. And he stayed absolutely—it was absolutely stopped there?  
A. Yes, sir.  
Q. And that is the time that Tieger jumped?  
30 A. Yes.  
Q. Did you jump?  
A. No.  
Q. Kanefield jump?  
A. No.  
Q. Were you going to jump?

*Martin Kanefield—Direct*

A. Yes.

Q. But you did not jump?

A. No.

Mr. Bolte: That is all.

Mr. Baratta: I think that is all.

10

In introducing the next witness I have a statement to make, that it may develop that he is a bit obtuse and not only that, his English is anything but good, and it may be that I will have to resort to an interpreter as we go along.

---

MARTIN KANEFIELD, called as a witness on behalf of the plaintiff, being sworn, testified as follows: 20

Direct examination.

By Mr. Baratta:

Q. Mr. Kanefield, how long have you been in this country?

A. Four years.

Q. And you were with Mr.—the gentleman before—Mr. Trasoff and Mr. Tieger on the date of the accident, were you not? 30

A. Yes.

Q. You were the boy in the bathing suit?

A. Yes.

Q. Do you recollect how the accident happened, Mr. Kanefield?

A. Yes.

Q. Talk loud, please, Just tell us how it happened.

A. As soon as came to Atlantic City ——

Q. No. Tell me about when you left the Five-and-Ten Cent Store; that is all we are concerned with.

A. When we went out from the Five-and-Ten-Cent  
10 Store, it start to rain for a while. We went into a garage. We waited there about a half hour until the rain stopped to a drizzle. Then we went out and we went to cross. It was a little street on the other side and we wanted to make a short cut.

Q. Talk to me over here.

A. So we couldn't cross there because there is parked machines and the street was full of water. So we got —we kept on walking towards Pacific Avenue. We walked as far we saw empty space which  
20 we could cross.

Q. Yes.

A. And over there the puddle was not as wide as the place from the garage. Allen Trasoff had his pants on, and also shoes, and Mr. Max Tieger had his sneakers and *shoes*. I had my bathing suit on without any shoes. I went into the puddle as far as the end of the car which was parked towards Pacific Avenue. As I looked up there I saw a car is coming.

30 Q. From where?

A. From the Boardwalk.

Q. So?

A. The car was about twenty-five feet away, it slowed down. When the car came about ten feet it stopped.

*Martin Kanefield—Cross*

- Q. Yes. Then what?  
 A. And the driver gave us a signal.  
 Q. No; tell us what the driver did. Never mind  
 "signal." What did he do?  
 A. He shake his head.  
 Q. So?  
 A. And I said to the fellow it is all right. So  
 finally Max Tieger jumped into the car. 10  
 Q. And what did the car do?  
 A. The car stopped and the driver took Max  
 Tieger into the machine to the hospital.

Mr. Baratta: You may cross-examine.

Cross-examination.

By Mr. Bolte:

- Q. The car stopped, you say, Mr. Kanefield? 20  
 A. Yes.  
 Q. And Tieger jumped?  
 A. Yes, sir.  
 Q. And he landed in the car?  
 A. In the car.  
 Q. Do you know what part of the car he landed?  
 A. Not exactly.  
 Q. Was it on the side of the car?  
 A. He hit in the car. 30  
 Q. Right into the car?  
 A. Yes.  
 Q. Well, do you mean by that he went all the way  
 into the car?  
 A. As he jumped he hit the car.

Q. As he jumped he hit—you mean the side of it?

A. The side—I don't know.

Q. Do you know where, what part of the car he hit?

A. The body of the car.

Q. Body of the car. That is all.

10 Mr. Baratta: That is all.

The Court: Was the car stopped when Tieger jumped into it?

A. Yes, sir.

The Court: The car was standing still?

A. Yes.

20

The Court: Ten feet away?

A. Yes.

The Court: All right.

Mr. Bolte: That is all.

Mr. Baratta: That is all. We rest.

30

PLAINTIFF RESTS.

*Motion for Non-suit*

Mr. Bolte: We want to make a motion, if the Court please.

(In chambers.)

Mr. Miller: If your Honor please, I move for a non-suit at this time on the following grounds: 10

First, there is no testimony in the case at this time which would enable the jury to find any negligence on the part of the defendant. In that respect the only testimony of any act on the part of the defendant is the nod of his head. Now, it seems to me that that testimony is certainly not indicative of any fact which would bring the act of the defendant within the definition of negligence, and that is violation of a duty to use care, if he owed the duty to the plaintiff. I might be going down the street in my automobile and I might be nodding my head or shaking it or I might be acknowledging a greeting to some one on the sidewalk. Now, that is the only affirmative act in the testimony that the defendant is said to have performed. I don't think that it is sufficient to enable the jury to find any negligence. 20

I move for a non-suit on the further ground that the plaintiff himself from the testimony at this stage of the case was guilty of contributory negligence. In that connection the testimony, as I recall it, is that he jumped, and jumped into the side of the car at a time when he says and when his witnesses say that the car was stopped. Certainly his act in jumping at that time was the proximate cause of his injury, and I don't believe that there is any contradictory 30

facts in the case from which the jury might find otherwise. The testimony as a whole shows that the proximate cause of this injury to the plaintiff was his conduct. There can be no other basis of a finding by the jury at this time.

- The Court: The motion obviously must be denied.
- 10 It will be sufficient in disposing of this motion to make a very general reference to the testimony to the effect that at the time of the occurrence of this mishap, surface water was flowing down the gutter of New York Avenue, occasioned by a heavy shower, and that the plaintiff in endeavoring to cross the Avenue undertook to do so at a point where the parked automobiles were some fifteen or twenty feet apart, as is said. The testimony indicates that one of the associates of the plaintiff had waded from the
- 20 curb through the pool of water and taken the position at the rear of the—at the western rear corner of an automobile parked on the easterly side of New York Avenue facing Pacific Avenue, and that this associate, known as Kanefield, was there standing when the car said to have been operated by the defendant was approaching slowly from the Boardwalk. Additional testimony is to the effect that the defendant brought his car to a stop, that the plaintiff raised his hand in such a manner that the jury
- 30 might expect it indicated to the defendant a signal that the plaintiff was intending to cross the front of the car. Moreover, there is testimony to the effect that at this time the defendant nodded his head to the left in such a manner that from it the jury might infer that the defendant signalled to the

*Samuel Lundy—Direct*

plaintiff and his associates that they might proceed across New York Avenue in front of the automobile. Immediately following these signals the plaintiff, in order to escape the water in the gutter, jumped from the curb, and that as he did so the defendant started his car in motion, with the result that the car of the defendant and the plaintiff himself came into collision.

10

Accepting this testimony in its most favorable aspect to the plaintiff, and having in mind all inferences that may logically and legitimately be drawn from it, the conclusion is irresistible that the plaintiff has made out a prima facie case which prevents the granting of the present motion. I may add that whether the plaintiff himself in the existing circumstances was or was not guilty of contributory negligence is certainly a question for the jury.

The motion will accordingly be denied.

20

Mr. Miller: May we have an exception?

(In open court.)

SAMUEL LUNDY, the defendant, called as a witness in his own behalf, being sworn, testified as follows:

Direct examination.

30

By Mr. Bolte:

Q. Mr. Lundy, where do you live?

A. Philadelphia.

- Q. And are you in business there?  
A. Yes, sir.
- Q. What business are you in?  
A. Meat business.
- Q. And did you live in Philadelphia ——  
A. Yes, sir.
- Q. At the time that—on August 7, 1932?  
10 A. I had an apartment here.
- Q. Had an apartment in Atlantic City?  
A. Yes, sir.
- Q. Where?  
A. 3852 Boardwalk.
- Q. And were you on New York Avenue that day?  
A. Yes, sir.
- Q. Remember raining that day, do you?  
A. Yes, sir, very hard.
- Q. And where had you been on New York Avenue?  
20 A. I went out to the movie. I was in the moving pictures, Stanley movies.
- Q. Did you have your car parked on New York Avenue?  
A. On New York Avenue, yes, sir.
- Q. Coming from the movie, you got into your car, did you?  
A. Yes, sir.
- Q. And at the time that you got into your car, was it still raining?  
30 A. Drizzling a little bit; just drizzling.
- Q. How were the streets?  
A. The streets was full of water.
- Q. And you drove toward Pacific Avenue, did you?  
A. Yes, sir.

Q. How fast were you driving toward Pacific Avenue?

A. Very slow. I wouldn't say no more than ten miles an hour.

Q. As you drove along, which way did you look?

A. Looked forward.

Q. Were there other cars going back and forth on New York Avenue?

10

A. They did.

Q. And where was the water? Was it on the part you were driving to?

A. Yes, there was water on the part I was driving to, because there was a lot of water at the time.

Q. And did anything happen as you drove along there?

A. It did.

Q. What happened?

A. As I was going along I heard a knock on the side mine car, and I saw young man standing bleeding right aside of the car, and I stopped the car right on that spot.

Q. Where was the knock at your car?

A. In the door.

Q. On the side?

A. On the side of the car, yes, sir.

Q. Could you tell about what part of the door?

A. Hit the knob of the car.

Q. What kind of a car is it?

30

A. Buick coupe.

Q. How many doors does it have?

A. One door.

Q. And where is the handle of the car?

A. The rear end of the car.

- Q. Rear end of the door, you mean?  
 A. Rear end of the car.  
 Q. Where is the door?  
 A. The door is in the middle.  
 Q. Middle of the car?  
 A. It opens up towards the front.  
 Q. I see. And had you seen this young man be-  
 10 fore?  
 A. No, sir.  
 Q. You saw him standing there after you —  
 A. No, sir.  
 Q. —felt the bump on your car?  
 A. After the bump, I saw him stand there.  
 Q. Had you seen him before at all?  
 A. No, sir.  
 Q. Seen anything of him?  
 A. No, sir.  
 20 Q. Had you seen anything of either Kanefield, the  
 witness that last testified here, or Trasoff?  
 A. Haven't saw a soul; haven't saw anybody.  
 Q. Hadn't seen anybody at all?  
 A. No.  
 Q. Had you given any signal to anybody?  
 A. No, sir.  
 Q. That they should come across, jump across?  
 A. No, sir.  
 Q. Did you see Tieger standing on the side of the  
 30 car —  
 A. Yes, sir.  
 Q. Giving you any signal?  
 A. No, sir.  
 Q. I mean on the curb, giving you any signal?

*Samuel Lundy--Direct*

A. I haven't saw—I didn't look at the curb, because I kept on looking forward.

Q. Were there cars parked right straight along New York Avenue?

A. All the way right straight through, yes, sir.

Q. Just as soon as you saw him standing there bleeding, what did you do?

A. I told him to get in the car, and take him to the 10 hospital.

Q. Did you open the door of the car and let him in?

A. Yes, sir.

Q. Did the others come in, too?

A. No, sir.

Q. Did you see them there?

A. I saw two fellows coming over; after he was hit, I saw walking over towards him.

Q. Do you know where they came walking from? 20

A. From the curb.

Q. Both of them?

A. Yes, sir.

Q. Did you go to the hospital alone with him?

A. I stopped at the corner and took an officer with me to guide me, because I didn't know where the hospital was, so I took an officer to the hospital to guide me.

Q. From Pacific and New York Avenue you took an officer who took you then to the hospital? 30

A. Yes, sir.

Q. Did the young men get to the hospital?

A. They came about three-quarters of an hour later.

Q. Were they in bathing suits or not?

A. No, sir; all dressed up.

Q. You remember the taking of the testimony at our office in the Law Building of Mr. Tieger?

A. I was there, yes, sir.

Q. And did you after this testimony was taken tell Mr. Tieger that you had seen him there at the accident before it happened?

10 A. No, sir.

Mr. Bolte: Cross-examine.

Cross-examination.

By Mr. Baratta:

Q. You are in the butcher business, is that right?

A. Yes, sir.

20 Q. You say that you did not talk to Mr. Tieger when you came out?

Mr. Bolte: He did not say that, if the Court please.

A. I did not.

Mr. Bolte: The matter is entirely limited to the one statement that Mr. Tieger said he made to him, and he contradicts him—and that is all, the final of  
30 it.

Q. Was there or was there not an interview between yourself and Mr. Tieger?

A. No, sir; there was no interview at all.

*Samuel Lundy—Cross*

Q. Was there a meeting between yourself and Mr. Tieger outside of the office of Bolte and Tripician?

A. No, sir.

Mr. Bolte: I object. It has nothing to do with it. It is purely on the question of whether this statement was made.

10

The Court: That is true, but this witness can be examined on his denial of it. He denies it. Now, he may be examined on his denial.

Mr. Bolte: Your Honor overrules it?

The Court: Certainly.

Mr. Bolte: Allow me an exception.

20

Q. Was there or was there not a meeting between yourself and Mr. Tieger?

A. There was no meeting of the kind, no meeting at all.

Q. Did you see Mr. Tieger in the hall?

A. I did, with you.

Q. With me?

A. Yes, sir.

Q. And didn't you and Mr. Tieger exchange some words at that time?

30

A. No, sir. With you I did.

Q. Did you exchange them with me in the presence of Mr. Tieger?

A. Mr. Tieger was around there, yes, sir.

Q. So that there was a conversation at a meeting between yourself and Mr. Tieger?

A. There was no kind of a meeting of Mr. Tieger at all. I spoke to you and nobody else.

Q. Was Mr. Tieger there?

A. He was there.

Q. Were you there?

A. I was.

Q. Was I there?

10 A. Yes, sir.

Q. Does that make three of us meeting?

A. We met in the hallway, yes, sir.

Q. That is exactly right.

A. There was no meeting, what I call a meeting.

Q. There was an exchange of words with reference to the accident, wasn't there?

A. Between me and you.

Q. And you said nothing to Mr. Tieger?

20 A. Not a word; and you know it, too.

Mr. Bolte: Now, stop.

Q. I know a lot of things that you think I don't know.

A. Go ahead.

Mr. Bolte: I object.

Q. Now, when you came down New York Avenue,  
30 you say that you were proceeding very slowly?

A. I did.

Q. And you determined right then and there when you heard a knock, as you explained it, that the knob of your door had been hit, and the exact spot?

A. Because I saw blood on the knob where you—

I saw in the knob because there was some kind of flesh left when he hit the knob.

Q. That was—you determined that afterwards, didn't you? You didn't know ——

A. No, I didn't know. I heard the bump on the side of the car.

Q. But you didn't know at that time that that is the particular spot that was hit? 10

A. No, I did not.

Q. These are things that you pieced together since the accident?

A. Right in the hospital yard, because I had a man washing the car, there was a lot of blood in the car, and I had the man examined just the—when I got to the hospital, and the car was full of blood, and the man, a colored fellow there, went out to see where knocked, and the man says, he says, "There is some part of his jaw on the knob of the handle." 20

Q. Some part of his jaw on the knob?

A. Yes, some kind of flesh.

Q. Now, then, there were cars parked, then, all along New York Avenue?

A. Yes, sir.

Q. And they were parked very close together?

A. Yes, sir.

Q. And there were puddles in the street, weren't there?

A. Yes, sir. 30

Q. And there can be no doubt that there was an exceptional shower before this accident, can there?

A. I know it was.

Q. Exactly. So that we are agreed that far, aren't we?

A. Yes, sir.

Q. Are we agreed that it was drizzling slightly when you were coming down New York Avenue?

A. Yes, sir.

Q. Was your windshield wiper working?

A. Yes, sir.

Q. Were you looking to the sides as well as before  
10 you?

A. No, I kept on looking forward.

Q. Weren't you afraid that some parked automobile might come out?

A. I did not expect in the wet streets, puddles and streets, I didn't expect anybody to come out.

Q. You didn't expect anybody to come out?

A. No, sir.

Q. Was there a space at that place where the accident happened?

20 A. I couldn't tell you.

Q. Do you know whether there were cars parked there or not?

A. And I come across, driving right along.

Q. Do you know whether or not there was a space there where the accident —

A. I couldn't notice, because when I saw the man hurt I didn't pay attention to anything else, just to take him to the hospital.

Q. How far did you go before you hit him?

30 A. I stopped right at that spot.

Mr. Baratta: That is all. That is all; no questions.

Mr. Bolte: That is all.

*Motion for Direction of Verdict*

The Court: That your case?

Mr. Bolte: Yes. We renew our motion.

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Mr. Miller: We move for a direction on the same grounds urged at the motion for a non-suit at the close of the plaintiff's case.

10

The Court: Which will be denied.

Mr. Miller: Exception.

(Mr. Baratta opens the case to the jury on behalf of the plaintiff.)

20

(Mr. Bolte sums up the case to the jury on behalf of the defendant.)

(Mr. Baratta sums up the case to the jury on behalf of the plaintiff.)

30

## COURT'S CHARGE TO THE JURY.

JAYNE, J.:

Ladies and gentlemen of the jury: I think we may confidently assume from all of the testimony  
10 in this case that on the afternoon of August 7th, 1932, the defendant was driving his automobile in a northerly direction over and along New York Avenue and that at some point on New York Avenue, between the Boardwalk and Pacific Avenue, the plaintiff and the automobile of the defendant came into collision, resulting in bodily injury to the plaintiff.

Now, it is perhaps quite natural for us to experience a feeling and attitude of sympathy toward one  
20 who has sustained bodily injury, but I feel constrained to remind you that in a court of law the administration of justice is the matter of supreme importance and, therefore, you and I must perform our respective duties uninfluenced by sentiments of sympathy and equally by sentiments of prejudice. We must so discharge our respective duties, I think, that litigants may enter this court with the abiding trust and confidence that you as jurors and I as the presiding Judge will do that which we  
30 believe to be right and just on the merits of the case.

Now, the plaintiff, Max Tieger, seeks in this action to hold the defendant, Samuel Lundy, responsible in damages for his injuries and losses that he, the plaintiff, sustained in this accident. It is

*Court's Charge to the Jury*

not the fact or circumstance alone that the plaintiff has sustained a bodily injury with consequent losses that entitle him to recover damages from the defendant. These mishaps will occur. It is conceivable in some cases that collisions between automobiles or between a pedestrian and an automobile may occur notwithstanding the exercise of reasonable care on the part of all persons involved, and where an accident occurs in such circumstances we commonly speak of it as an unavoidable accident, and in such unavoidable accidents, where there is an absence of negligence, the defendant, of course, is not liable. 10

Now, the right of an injured person to recover damages for such injuries from another must necessarily arise from proof that such other person committed some wrong or was guilty of some failure or omission of duty that proximately caused the injury for which damages are sought. 20

And so, in this case, let me say to you at the outset that quite aside from the fact that the plaintiff was injured, quite aside from any tendency of sympathy that you may have for him, it becomes encumbent under the rules of law by which this action is governed for the plaintiff to satisfy you by a fair preponderance of the evidence that the injuries and losses for which he seeks damages were proximately caused by some negligence on the part of the defendant. Therefore, in the administration of justice in this case you must realize at the outset that if the defendant by his negligence proximately caused injury and loss to this plaintiff, then he, the defendant, ought in justice to respond 30

in damages for the natural and proximate consequences of his wrongdoing, unless the plaintiff was himself guilty of contributory negligence, to which I shall later refer. On the other hand, if the defendant was not negligent as alleged, and the injury to this plaintiff was not proximately caused by any negligence on the part of defendant, then  
10 the defendant cannot in fairness and justice be called upon to compensate the plaintiff for his injury or loss so sustained. Accordingly, the basic and fundamental question to be determined in this case is whether or not the defendant was negligent in the operation of his automobile on the occasion with which we are concerned in this case.

Now, negligence is the failure to exercise reasonable care, and reasonable care is said to be that degree of care that an ordinarily prudent person  
20 would exercise and employ in the same or like circumstances. You will, therefore, recognize that negligence is somewhat of an elastic term in that it represents a lack of care that would be reasonable in the existing circumstances. If we have witnessed the occurrence of an accident we perhaps have little difficulty in deciding who was wrong, who was at fault, who was negligent. Now, we have little difficulty, I think, in such a situation because, having witnessed the accident, we know the actual  
30 circumstances under which the accident occurred. The difficulty that you encounter as jurors in the trial of cases arises because of a conflict and variance in the testimony relating to the existing circumstances. We understand pretty well, I think, whether the driver of an automobile acted as an

*Court's Charge to the Jury*

ordinarily prudent person would have acted on a given occasion if we are aware of the actual circumstances amid which he was called upon to act. Therefore, the circumstances accompanying and surrounding the occurrence of the accident itself are exceedingly important in determining the existence or, on the other hand, the absence of negligence on the part of the person accused. To illustrate what I mean: that if this defendant, the driver of the automobile, was operating his car northerly along New York Avenue on his right-hand side of the street or on the center of the street, as one of the witnesses, I believe, testified, and at a moderate rate of speed, and if the plaintiff, Mr. Tieger, without any notice—to which some of the testimony has related—leaped from the curb between automobiles that were parked at the curb, and into and against the side of the defendant's then moving car, then I apprehend that you would conclude that this accident was not caused by any carelessness or negligence on the part of the defendant. On the other hand, if the defendant, in proceeding along New York Avenue, observed the plaintiff at the curb and brought his car to a stop, saw the plaintiff hold up his hand, and he, the defendant, by a nod of his head to the left, indicated to the plaintiff to proceed across the avenue in front of the car, then the plaintiff attempted to cross, jumping over the puddle of water that is said to have been in the gutter at the time, and the defendant at or about the same time, without any further warning, suddenly started up his car and drove it into and against the plaintiff, I assume that you

would, in such latter circumstances, perhaps conclude that the defendant had, in those circumstances, failed to exercise reasonable care. Now, I have made these references to an alternative set of circumstances only to illustrate the importance of determining what were the circumstances surrounding the occurrence of this accident.

- 10 Now, the testimony relating to the circumstances is in a state of conflict. The defendant testifies that he did not see the plaintiff or his associates at all; that he was driving slowly along New York Avenue and looking ahead, saw none of the party of which the plaintiff was one, and his only attention was attracted by a thud or, as he says, knock on the side of his automobile, and that he immediately stopped. And then there is additional testimony submitted to you to the general effect that plaintiff
- 20 struck the side of the defendant's car at or about the place where the handle of the door was located. Now, that testimony is decidedly in conflict, I assume you will feel, with the testimony given by the plaintiff himself and witnesses called in his behalf. Testimony introduced in behalf of the plaintiff is to quite a different effect, namely, that the defendant stopped his car, as you will recall, before the plaintiff attempted to cross, and gave a nod of his head indicating that the plaintiff might proceed to
- 30 go across the avenue at that point ahead of the automobile. I say the testimony has such evidential tendencies, and I speak of it only to illustrate the conflicting and contradictory features of the testimony in its relation to the facts and circumstances under which this collision occurred.

*Court's Charge to the Jury*

Now, in this situation the duty devolves upon you as jurors, ladies and gentlemen, to ascertain and determine from the conflicting testimony the facts and the true circumstances, and the duty of determining the facts from the evidence is exclusively yours. I have no right to in any wise abridge or limit or restrict your exclusive privilege to determine all questions of fact. I say it is not only your privilege but, indeed, your duty to weigh the testimony; and by weighing the testimony I do not mean that in the weighing of it you shall necessarily count the number of witnesses. By the weighing of testimony I mean that you shall put to the test of your judgment the credibility of the testimony of the several witnesses and that you in your analysis of the testimony will accept that which you conscientiously feel to be worthy of trust and confidence upon which you may find your decision in this case, and in that analysis, of course, you will have the right to reject and discard testimony which you feel is not worthy of your belief and not worthy of credit. And then, having analyzed the testimony, having weighed it, having tested its credibility, it becomes your duty to ultimately settle the actual facts and circumstances surrounding the occurrence of this accident.

Having determined the facts, you will then consider whether the defendant, Mr. Lundy, exercised or failed to exercise reasonable care in the circumstances which you find to have existed at the time, and then, of course, you will be called upon in this case to consider whether the plaintiff himself, Tieger, failed to exercise reasonable care for his

own safety in the circumstances which you find to have existed.

Now, both the plaintiff and the defendant were entitled to use, traverse this public street, but in doing so it was the duty of each of them to make reasonable observations to discover the conditions existing on the highway. It was the duty of each  
10 of them in using the highway to exercise reasonable care to prevent accidents. Of course, the motorist is not bound to anticipate that a person in the middle of the block and not at a crosswalk will suddenly jump out from between automobiles parked at the curb on his, the motorist's right, but the duty of the motorist in the existing circumstances is to exercise reasonable care in the operation of his vehicle.

Now, the plaintiff had a right to cross the avenue  
20 at the point indicated by the testimony, but it was the duty of the plaintiff in attempting to do so, knowing, as we must assume that he knew, that the lawful use of the street by the automobiles would put him in danger and peril unless he exercised due care and precaution—it thus became the duty of the plaintiff to exercise such care and precaution as an ordinarily prudent person would employ in the existing circumstances. And so I say, while the  
30 plaintiff had a right to cross this street anywhere, if he attempted to cross at a point other than the crosswalk, as would appear to be the fact in this case, he was under the duty to exercise that degree of care that would be commensurate with the danger and the risk and the conditions that would attend the crossing of the street at that point, and he was

*Court's Charge to the Jury*

obliged to exercise that degree of care that an ordinarily prudent person would have exercised in those existing circumstances and conditions.

I am requested to charge you, and I do so charge you, that the plaintiff was under a legal duty to use reasonable care to avoid colliding with vehicles on the public highway. In attempting to cross in the middle of the block, as appears to be the evidence in this case, he was under a duty to be reasonably alert to notice the conditions existing in the public street and to use his faculties as an ordinarily prudent person would under like circumstances, to the end that a collision, by the exercise of such care, might be avoided. Plaintiff was under a duty to look for approaching vehicles. And, on the other hand, as I have repeatedly said to you, it was the duty of the defendant to exercise reasonable care in the operation of his automobile over and along this public street.

So it seems to me it is important in this case for you to determine whether or not the plaintiff and the defendant saw each other before this mishap occurred; whether or not the defendant stopped his car; whether or not the plaintiff held up his hand; whether or not the defendant nodded his head to the left indicating to the plaintiff that he might proceed to cross the avenue in front of the car, and whether or not the defendant then having so nodded his head, whether the defendant then moved his car forward and collided with the plaintiff, or whether the plaintiff, without the signal to which I have referred, jumped out in front of the moving car of the defendant and, in so jumping out, ran into, so

to speak, the side of the defendant's moving car. Now, as I have said to you, you are the judges of the facts in this case, and these are all questions of fact, it seems to me, for you to solve, if you regard them as material and important to the ultimate decision of the issues of this case, namely: Was the defendant negligent? Was his negligence, the de-  
10 defendant's negligence, if he were negligent, the sole cause of this accident, or was plaintiff negligent? Was the negligence of the plaintiff a contributing cause of this accident?

I have spoken of contributory negligence. Contributory negligence is said to be present in a given case when the injured person by his own negligence has contributed in such a manner to the occurrence of the accident that in the absence of his own negligence he would have suffered no injury from the  
20 negligence of the other person. If the plaintiff was guilty of contributory negligence, as I have defined it, he cannot recover in this case, notwithstanding that you conclude that the defendant was also negligent. Contributory negligence, however, is a matter of defense, and the burden of proving in this case that the plaintiff, Tieger, was guilty of contributory negligence is upon the defendant. Plaintiff, in seeking to recover damages, has the burden to satisfy you by the greater weight of the legal  
30 and credible evidence that the defendant was negligent in the operation of his automobile and that his negligence was the proximate cause of the accident. If the plaintiff has failed to satisfy you by the fair preponderance of the evidence of these essential elements of his alleged cause of action, as

*Court's Charge to the Jury*

I have stated them, or if you should conclude that the plaintiff was guilty of contributory negligence, then in either such event the plaintiff is not entitled to a verdict in this case and your verdict should be one in favor of the defendant of no cause of action. If, on the other hand, the plaintiff has satisfied you by a fair preponderance of the evidence that the collision in this accident was proximately caused by the negligence of the defendant, and you conclude that the plaintiff was not guilty of any contributory negligence as I have defined it, then you will render a verdict in this case in favor of the plaintiff and award the plaintiff the damages to which, under the evidence and under the rules of law which I shall presently express, you believe him to be entitled. 10

Just as it is incumbent upon the plaintiff to establish the liability of the defendant, just so is it incumbent upon the plaintiff to prove the injuries and losses proximately caused by the negligence of the defendant. 20

The determination of the amount of damages to be awarded in any case, as well as in this case, is an exceedingly important and responsible function of the jury and requires serious consideration in the event that you undertake the consideration of damages in this case. The calculation of the amount of damages to be awarded in these cases requires the exercise of sound judgment and common sense on your part, because it is not always easy to translate bodily injuries such as those claimed to have been caused here into dollars and cents of damages. You have to exercise your best judgment and common sense in the making up of the amount of dam- 30

ages to be awarded. Now, if you conclude that the plaintiff is entitled to a favorable verdict in this case, you will take into consideration the bodily injury or injuries of the plaintiff, the nature, the degree of severity of his injury or injuries, the pain and suffering that he has undergone and the effect of his injury or injuries, that is to say,

10 whether temporary or permanent, consider what effect, if any, of his injury will in reasonable probability be permanent. It is said in this case that the scar on his right cheek is a permanent injury and that some impairment of the function of the muscles of his cheek is a permanent injury. Moreover, it is said that his injury on this occasion has injuriously affected his voice in singing. You will consider all the testimony touching upon these particulars to determine whether his injury has produced any such injurious effect upon his voice.

20 Considering these elements of damage which relate to his bodily injury and the effect of them, you will then in your verdict award him such sum for these elements of damage as in your sound judgment will fairly and justly compensate him. Additionally he asks for damages to compensate him for the expenses which he says were occasioned by his injuries. There is some testimony in support of this claim to the effect that the hospital expenses

30 amounted to some \$83.25. A bill appears to have been submitted by Dr. Subin for medical services, surgical services rendered to the plaintiff, which is in the sum of \$200. The plaintiff, if he is entitled to a favorable verdict in this case, would be entitled to recover such expenses, reasonable in amount, as

*Court's Charge to the Jury*

were made reasonably necessary by his injuries. Then, in conclusion, I will say to you that the plaintiff makes claim for damages for loss of earnings, both past and prospective, caused, as he alleges, by his injuries. Here again the burden is upon the plaintiff to prove what earnings he actually lost as a proximate consequence and result of the negligence of the defendant, if the defendant were negligent; and to recover for any future loss of earnings plaintiff must establish such a prospective loss of earnings by evidence that indicates such a future loss to a reasonable certainty. You cannot find or base an award to the plaintiff for the loss of future earnings upon mere conjecture and surmise or guesswork. You realize that. Was his voice injuriously affected by the injuries which he sustained in this accident? Will this injurious effect continue to impair the use of his voice as a singer in the future? It is not a question of whether it may possibly do so, but will the injury in reasonable probability do so, and if so, in reasonable probability for what period of time in the future? And then, again, will this impairment or injurious effect of his voice as a singer—will that under the evidence in this case result in a pecuniary loss of future earnings for the plaintiff? If you conclude in this case to award to the plaintiff damages for future loss of earnings, you will take into consideration, of course, the earning power of money. Future loss is one which the plaintiff would sustain at different periods in the future, and, therefore, you must take into consideration the earning power of the money which you are going to in the present award him

*Defendant's Requests to Charge*

for his damages for such a deprivation of future earnings, and award him only such sum as would be equivalent to the present value, that is to say, the present value of such a future loss of earnings.

Ladies and gentlemen, this case has been very thoroughly tried. It is an important case. Give it serious, careful and conscientious consideration, and  
10 render a verdict in this case, as I am sure you have done in others, which you believe to be right and just under the evidence and under the rules of law that I have expressed to you.

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Mr. Miller: Exception to the Court's refusal to charge defendant's requests number 2, number 4 and number 5.

20

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**DEFENDANT'S REQUESTS TO CHARGE.**

Defendant's requests to charge are as follows:

1. The defendant, Samuel Lundy, was not bound to anticipate that the plaintiff, Max Tieger, would suddenly jump out from between parked automobiles against the side of his car.

30

2. While the plaintiff had a right to cross the street anywhere, if he crossed at a point other than a crossing, as in this case, he must exercise greater care than when crossing the street at a designated crossing, because he had no greater preference than

*Defendant's Requests to Charge*

the defendant in the authorized use of the street. Greater care in this connection means that degree of care commensurate with the danger and conditions attendant which an ordinary prudent person under like circumstances would use.

3. Before the plaintiff can recover for his injuries from the defendant, he must prove to you by the greater weight of the believable evidence that the defendant did some act which he ought not to have done in the operation of his automobile or failed to do some act which he should have done in the operation of his automobile which proximately caused the injuries to the plaintiff. 10

4. If you find from all the testimony that the defendant at the time and place in question was operating his automobile as an ordinary prudent person under like circumstances would operate it and committed an act or failed to do something which did not proximately cause the plaintiff's injuries, then your verdict must be in favor of the defendant for no cause of action. 20

5. In determining the proximate cause of the injuries to the plaintiff you must consider all the believable evidence, and even if you find that the defendant committed some act or failed to do something so as to charge him with negligence, the plaintiff can not recover if you also find from the evidence that the plaintiff did some act of negligence which was the proximate cause of his injuries. 30

*Defendant's Requests to Charge*

6. If you find from the testimony that the plaintiff received his injuries as a result of an accident which was unavoidable, your verdict must be in favor of the defendant for no cause of action.

7. The plaintiff was under a legal duty to use reasonable care to avoid colliding with vehicles in  
10 the public highway. His duty was to be alert, to notice the conditions existing in the public street and to use his faculties as an ordinary prudent person would under like circumstances to avoid the collision.

8. The plaintiff was under a duty to look for approaching vehicles.

20

30

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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MAX TIEGER,  
*Plaintiff-Respondent,*

v.

SAMUEL LUNDY,  
*Defendant-Appellant.*

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ACTION AT LAW.

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ON APPEAL FROM ATLANTIC COUNTY CIRCUIT COURT.

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**BRIEF OF SAMUEL LUNDY, DEFENDANT-  
APPELLANT.**

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STATEMENT OF THE CASE.

This case was tried before the Honorable Wilfred H. Jayne, Judge of the Atlantic County Circuit Court, and a jury, on February 19th, 1934.

On August 7th, 1932, the plaintiff, Max Tieger, in company with two companions, one Allen Trasoff and one Martin Kanefield, came from Philadelphia to Atlantic City and proceeded to a house on Columbia Place for the purpose of changing from street clothing into bathing suits and going bathing (S. C. 26, ll. 12-35; S. C. 27, ll. 1-35). From Columbia Place the plaintiff and his two companions proceeded to

*Brief of Defendant-Appellant*

the Five and Ten Cent Store located at New York Avenue and the Boardwalk in Atlantic City, New Jersey. As the three of them left the entrance of the Five and Ten Cent Store a heavy storm broke out and the three proceeded to find shelter in a garage located on South New York Avenue and waited therein for about half an hour until the storm subsided into a drizzle (S. C. 30, ll. 10-35). The plaintiff and his companions then proceeded to return to the house on Columbia Place, which street was quite some distance west of New York Avenue in Atlantic City. They sought a short cut through a street having its entrance close to the Boardwalk on the westerly side of New York Avenue. They were unable to cross New York Avenue from the easterly side thereof to the westerly side due to the fact that there were automobiles parked along the easterly curb of New York Avenue between the Boardwalk and Pacific Avenue and further due to the fact that at the point opposite the street intersecting the westerly side of New York Avenue there were large puddles of water which they could not successfully traverse (S. C. 31, ll. 3-21). They then continued going north on the easterly side of New York Avenue between Pacific Avenue and the Boardwalk in an effort to locate an opening where they could cross to the westerly side of New York Avenue and finally at a point about the middle of the block succeeded in finding such an opening of about fifteen to twenty feet between two cars parked on the easterly side of New York Avenue (S. C. 31, ll. 23-35). Having gotten to this open space, one of the plaintiff's com-

*Brief of Defendant-Appellant*

panions, Martin Kanefield, went out a few feet into a puddle of water bordering the easterly curb of New York Avenue while the plaintiff and his remaining companion stood on the easterly curb of New York Avenue in said open space (S. C. 32, ll. 3-20). The plaintiff while on the easterly curb of New York Avenue looked toward the Boardwalk and saw the car of the defendant coming slowly until it arrived at a point about fifteen feet from where he was standing, at which point the defendant's automobile then came to a stop. The plaintiff put up his hand and he testified the defendant nodded his head to the left (S. C. 34, ll. 1-27). The plaintiff then jumped across the puddle and hit the automobile of the defendant and sustained his injuries (S. C. 35, ll. 1-4).

At the close of the plaintiff's case the defendant moved for a non-suit in his behalf which motion was denied by the learned trial Court (S. C. 181, 182 and 183).

At the close of the entire case the defendant moved for a directed verdict in his behalf, which motion the learned trial Court denied (S. C. 193).

The Court having permitted the case to go to the jury on the question of whether or not the defendant was guilty of negligence which caused the injuries to the plaintiff, the jury returned a verdict in favor of the plaintiff, Max Tieger, and against the defendant, Samuel Lundy, in the sum of \$5,300.00 and costs. Judgment having been entered in favor of the plaintiff and against the defendant, the defendant applied for and obtained a rule to show cause

*Brief of Defendant-Appellant*

why the verdict in favor of the plaintiff and against the defendant should not be set aside for the reason that the damages assessed by the jury were excessive; reserving for appeal in said rule to show cause all objections and exceptions granted to the defendant (S. C. 12 and 13). After the argument on the rule to show cause the learned trial Court ordered the verdict reduced from the sum of \$5,300 to the sum of \$4,300 (S. C. 14, 15 and 16).

From the verdict of the jury the defendant appeals to this Court assigning six reasons for reversal, of which only the following as numbered in the Grounds of Appeal will be argued.

1. Because the trial Court refused to grant the defendant-appellant's motion for a non-suit at the close of the plaintiff-respondent's case.

2. Because the trial Court refused to grant the defendant-appellant's motion for a directed verdict at the close of the entire case (S. C. 2 and 3).

3. Because the learned trial Court refused to charge the jury the second request of the defendant (S. C. 3, ll. 10-27).

The remaining grounds of appeal will not be argued by the defendant-appellant and are expressly abandoned.

ARGUMENT.

I.

THE COURT ERRED IN REFUSING TO GRANT  
THE DEFENDANT-APPELLANT'S MO-  
TION FOR A NON-SUIT.

It is elementary that negligence can never be presumed. It must be proved.

*Donus v. Public Service Railway Company,*  
102 N. J. L. 644.

A reading of the testimony of the plaintiff and his witnesses so far as negligence is concerned, will disclose that at the close of the plaintiff's case there was no direct evidence of any negligence on the part of the defendant which proximately caused the plaintiff's injuries. The evidence was entirely circumstantial. Those circumstances as testified to by the plaintiff and his two companions were that the defendant stopped his automobile, the plaintiff held up his hand, the defendant nodded his head and the plaintiff then jumped. The plaintiff on his direct examination testified in this respect as follows (S. C. 34, ll. 1-27) :

“Q. Which way did you look?

A. Toward the Boardwalk.

Q. And having looked towards the Boardwalk what, if anything, did you observe?

A. I have seen that car coming.

*Brief of Defendant-Appellant*

Q. You saw a car coming. What did the car coming do?

A. It came down slowly.

Q. At what point did it come slowly?

A. Well, I would say it came very slow till about ten or fifteen feet, then it slowed down very much.

Q. Yes, and then what?

A. It came almost to a stop.

Q. And then what?

A. And then I put up my hand to say I wanted to get across.

Q. Yes. You did what?

A. I put up myself—I was about to put up my hand to signal to stop.

Q. Then what happened?

A. He nodded with his head.

Q. Who nodded?

A. The man in the car.

Q. With his head which way?

A. This way, to the left.”

(S. C. 35, ll. 1-4):

“Q. What did you do then?

A. I jumped across the puddle.

Q. What happened?

A. That is all. I hit the car, I don't know how.”

And on cross-examination in this respect the plaintiff testified as follows (S. C. 90, ll. 30-35):

“Q. You say in your direct examination that you signalled him.

A. Yes.

Q. How did you signal him?

A. By standing this way, and I had my hand this way."

(S. C. 92, ll. 4-17):

"Q. And you say that you looked at him?

A. Yes.

Q. And what did you see him do?

A. Him? Nodded his head.

Q. You saw a shake of his head?

A. Yes.

Q. And seeing that shake of his head, you say you jumped at once?

A. Yes.

Q. And his car was stopped at the time?

A. Yes."

(S. C. 93, ll. 21-35):

"The Court: You say you were on the curb when you put up your hand?

A. Yes.

The Court: And the defendant's car had then stopped? Was it stopped then, at that time?

A. Yes; he keeps—kept coming slowly until he came to a short distance from me.

The Court: I know. Was the defendant's car in motion when you put up your hand or not?

A. Yes."

(S. C. 94, ll. 1-27):

“The Court: It was. And then stopped, did it?”

A. Yes.

The Court: How soon after it stopped did you jump?

A. Right as he stopped.

The Court: I understood you to say he was ten or fifteen feet away from you when he stopped?

A. About ten feet. I don't think it was more.

The Court: Did you hit the ground first and then go into the car?

A. No, I hit the car right there.

The Court: Jumped right into the car?

A. Yes.”

To the same effect is the testimony of the plaintiff's companion, Allen Trasoff (S. C. 170, ll. 18-33), (S. C. 172, ll. 14-18), (S. C. 174, ll. 33-34), (S. C. 176, ll. 26-31). Similarly did the plaintiff's remaining companion, Martin Kanefield, testify (S. C. 178, ll. 33-35), (S. C. 180, ll. 12-25).

It was the plaintiff's burden to prove negligence on the part of the defendant. While it is true that negligence may be inferred from facts, yet in those cases in which there is an absence of direct evidence of negligence, this Court has circumscribed the right to infer negligence from circumstantial evidence by the reasonable probability of negligence being present as distinguished from the possibility thereof.

*Brief of Defendant-Appellant*

We quote from this Honorable Court in the very recent case of *Jackson v. The Delaware, Lackawanna and Western Railroad Company*, 111 N. J. L. 487, where Mr. Justice Heher, speaking for this Court, at page 491, said:

“It is true that mere guess or conjecture cannot be substituted for legal proof, but it is difficult to mark with precision the line which separates the just and reasonable inference from mere conjecture or surmise. It is sufficient if the circumstantial evidence be such as to afford a fair and reasonable presumption of the facts inferred. ‘The claimed conclusion from the offered fact must be a *probable* (italics ours) or a more probable hypothesis, with reference to the *possibility* (italics ours) of other hypothesis. 1 Wigmore Evidence (2d ed.), paragraph 38.’ ”

In the case at bar with the testimony as it stood at the time of the making of a motion for a non-suit, it was nothing more than conjectural as to what the raising of the plaintiff's hand and the nodding of the defendant's head meant. At the close of the plaintiff's case the testimony disclosed the presence of facts necessary to enable the Court to distinguish between the possibility of negligence and the probability thereof and it is our contention that from the circumstantial facts present to determine that there was negligence on the part of the defendant from the testimony would be mere conjecture and surmise. At most, it can be said from the testimony that there was a mere possibility that the raising

of the hand and the nodding of the head to the left by the defendant meant for the plaintiff to jump across the puddle into the street. It was a mere possibility we say, as distinguished from a reasonable probability and in that respect the testimony did not meet the principle of law quoted by Mr. Justice Heher above from *1 Wigmore Evidence* (2d ed.), paragraph 38.

Mr. Justice Swayze in *Austin v. Pennsylvania Railroad Company*, 82 N. J. L. 416, said:

“The defendant appeals to the well-established rule that it is not enough for the plaintiff to prove that possible responsibility of the defendant, but he must show the existence of such circumstances as justify the inference of fault on the part of the defendant and exclude the inference that the damage was due to a cause for which the defendant was not responsible. *That is the rule and the plaintiff must prove circumstances which render it probable and not merely possible that the defendant is at fault.* (Italics ours.) But when it is said that the circumstances must exclude the inference that the damage was due to a cause for which the defendant is not responsible, it is not meant to change the rule that ordinarily governs in civil cases and to force the plaintiff to exclude such inference beyond doubt. All that is required is that the circumstances should be so strong that a jury might properly on grounds of *probability rather than of certainty* (italics ours), exclude the inference favorable to the defendant. The question arises only where the

*Brief of Defendant-Appellant*

evidence is circumstantial and where probability may be all that is attainable.”

It was the plaintiff's burden to prove something more than that the defendant was possibly responsible for the plaintiff's injuries. It was his burden to prove also such facts as would justify the inference that the injuries to the plaintiff were caused by the wrongful act of the defendant and to further prove such facts as would exclude the idea that the injuries to the plaintiff were due to a cause with which the defendant was unconnected. The evidence when the motion for a non-suit was made showed nothing more than a possibility of the defendant's responsibility for the plaintiff's injuries. The testimony did show that it was more probable that the plaintiff, Tieger, jumped in reliance upon the action of his companion, Martin Kanefield, who was in the street (S. C. 34, ll. 29-35; S. C. 35, ll. 1-2).

We are not unmindful of the principle of law which holds that upon a motion for a non-suit it is for the Court to determine whether or not negligence may be reasonably inferred from the testimony of the plaintiff and for the jury to say whether from the evidence negligence ought to be inferred.

*McCombe v. Public Service Railway Co.*, 95  
N. J. L. 187.

While it is true that in passing upon a motion to non-suit the Court can not weigh the testimony nor determine the credibility of the plaintiff's witnesses, yet it is our contention that in determining whether or not negligence may reasonably be in-

ferred from the proven facts the Court must determine the reasonable probability of the inference to be drawn from the proven facts. In determining the reasonable probability of the inference to be drawn from the proven facts the Court in analyzing the plaintiff's testimony must determine whether or not the conduct of the plaintiff is consistent with the common principles by which the conduct of mankind is naturally governed. If the conduct of the plaintiff in this case was such that it was inconsistent with the conduct of ordinary persons, then it was the Court's duty to determine that negligence might not reasonably be inferred from the facts of such conduct.

In the case at bar those facts in particular were: the plaintiff held up his hand and that the defendant nodded to his left. We fail to see how the mere holding up of a hand by the plaintiff in the position in which he was at the time he so conducted himself, with automobiles parked all along the easterly curb of New York Avenue, the roofs of which automobiles were at least as high as the plaintiff was tall, can be said to be an act consistent with the conduct by which mankind is naturally governed. Any number of persons walking along a street might raise their hands to a passing automobilist. Any number of automobilists might nod their heads to pedestrians. To our minds to say that such conduct on the part of the plaintiff gave to the plaintiff the right to assume that the defendant would permit him to cross the street and to say that the nod of the defendant gave to the plaintiff the right to assume that he might cross the street is far-fetched. If such

*Brief of Defendant-Appellant*

conduct gives rise to any duty on the part of the defendant then in our opinion it is unsafe for any automobilist to move his head in any direction while driving an automobile so long as there are pedestrians on the sidewalks. In addition to that it must be borne in mind that at the close of the plaintiff's case there was no direct testimony that the defendant had seen the plaintiff raise his hand. The improbability of the defendant having seen the plaintiff raise his hand is strengthened by the fact that the automobiles were parked almost solidly along the easterly curb of New York Avenue and further by the fact that when the plaintiff says he raised his hand the automobile of the defendant was quite some distance away from where he stood on the curb. Ordinary humans, in our opinion, do not conduct themselves in the way this plaintiff conducted himself in his effort to cross the street and because of that fact we say that the Court had no right to take into consideration the facts of such conduct on the part of the plaintiff as being the basis of any circumstances from which negligence might be reasonably and legitimately inferred. If the Court had eliminated such facts as it should have done from its consideration on the motion for a non-suit, then there was no further evidence in the case from which any negligence might reasonably and legitimately be inferred.

It is our further contention that the injuries sustained by the plaintiff were caused proximately as a result of his own negligent conduct. His testimony disclosed that he saw the defendant's automobile approaching slowly some distance away from

where he stood on the curb and that his companion in the street did some act upon which the plaintiff relied and that notwithstanding his seeing the defendant's automobile slowly approaching, he jumped into the side of the defendant's automobile. To our minds, the plaintiff's conduct was that of a man which contributed to his injuries in such a manner that if he had not been negligent he would not have been injured.

We respectfully submit that from the testimony at the time of the making of a motion for a non-suit there was no evidence in the case upon which negligence might reasonably and legitimately be inferred for the reason that that testimony did not meet the test of the reasonable probability of such negligence on the part of the defendant as distinguished from the mere possibility thereof and for the further reason that the plaintiff contributed to his injuries through his own negligent conduct. The Court should, therefore, have granted the defendant's motion for a non-suit.

## II.

### THE COURT ERRED IN REFUSING TO GRANT THE DEFENDANT-APPELLANT'S MO- TION FOR A DIRECTED VERDICT.

In support of this point the defendant-appellant urges the same reasons as urged under his first point.

At the close of the entire case the testimony dis-

*Brief of Defendant-Appellant*

closed definitely that the defendant was looking straight ahead while driving his automobile and that he did not see the plaintiff or his companions until after the plaintiff jumped into the side of his automobile. His testimony in this respect was as follows (S. C. 186, ll. 9-35; S. C. 187, ll. 1-2):

“Q. I see. And had you seen this young man before?

A. No, sir.

Q. You saw him standing there after you ——

A. No, sir.

Q. —felt the bump on your car?

A. After the bump, I saw him stand there.

Q. Had you seen him before at all?

A. No, sir.

Q. Seen anything of him?

A. No, sir.

Q. Had you seen anything of either Kanefield, the witness that last testified here, or Trasoff?

A. Haven't saw a soul; haven't saw anybody.

Q. Hadn't seen anybody at all?

A. No.

Q. Had you given any signal to anybody?

A. No, sir.

Q. That they should come across, jump across?

A. No, sir.

Q. Did you see Tieger standing on the side of the car ——

A. Yes, sir.

Q. Giving you any signal?

A. No, sir.

Q. I mean on the curb, giving you any signal?

A. I haven't saw—I didn't look at the curb, because I kept on looking forward."

This testimony was uncontradicted and definitely fixed as a fact that the defendant did not see the plaintiff on the curb.

There was nothing in the defendant's testimony which strengthened the facts of the case in favor of the plaintiff at the time of the making of a motion for a directed verdict.

It is a rule of law that in an action for negligence the trial Judge is not justified in leaving the case to the jury where the plaintiff's evidence is equally consistent with the absence, as with the existence of the negligence of the defendant. This Court so held in the case of *Hummer v. Lehigh Valley Railroad Company*, 75 N. J. L. 703.

There was no evidence in this case of any failure on the part of the plaintiff to perform any act which he could have reasonably done to prevent the accident, nor was there any evidence of any omission on the part of the defendant to do any act which would have prevented the accident.

Any conclusion or inference to be drawn from the testimony at the close of the entire case insofar as the negligence of the defendant is concerned would be mere conjecture. As distinguished from the testimony of the plaintiff as a basis for the defendant's negligence being conjectural, there is present in the testimony of the defendant the fact that he did not see the plaintiff raise his hand, nor did he see the plaintiff until after the accident happened and that

*Brief of Defendant-Appellant*

he did not give to the plaintiff any signal whatsoever.

It must be remembered that the defendant had no way of knowing what the plaintiff's intentions were. In the absence of his knowing that the plaintiff was going to cross the street the defendant owed no duty to the plaintiff for the rule is well settled

“that where the sole basis of liability is the omission to perform a certain duty suddenly and unexpectedly arising, there ought to be at least a consciousness of the facts which raise the duty on the part of the person who is charged with its performance, and a reasonable opportunity to discharge it.”

*H. M. & F. Pass. Ry. Co. v. Kelly*, 102 Pa. St. 115 (at p. 120), cited with approval in *Hummer v. Lehigh Valley R. R. Co.*, 75 N. J. L., at p. 712.

It can not be controverted that the defendant while driving his automobile along New York Avenue in the manner in which he was driving it was under no duty to anticipate that the plaintiff or any other person would jump from the curb into the street, and, therefore, this defendant could not have been called upon to perform any duty to the plaintiff until he was aware of or had knowledge of the plaintiff's intention to jump into the street. There is no testimony in the case disclosing any such intention on the part of the plaintiff.

The plaintiff's testimony discloses the physical impossibility of the accident happening as he contends it happened, because his testimony is that the

defendant's automobile came to a stop about ten to fifteen feet away from where he was standing and that he jumped just as the defendant's automobile stopped. If that be true, then there would have been no accident.

This fact was brought out by the examination the Court made of the plaintiff. That the accident did not happen that way is borne out by the fact that the plaintiff received his injuries by coming into contact with the side of the defendant's automobile.

We say that the Court erred in leaving the question of the defendant's negligence to the jury because there were no facts in the case from which such negligence might reasonably be inferred. As the testimony stood at the close of the entire case, a finding by the jury of negligence on the part of the defendant would be a finding of fact which the Court would have to set aside as being against the weight of the evidence, and if such a situation is present, the Court is under a duty to direct a verdict in accordance with the testimony.

It is respectfully submitted that the Court should have directed a verdict in favor of the defendant.

### III.

THE COURT ERRED IN REFUSING TO  
CHARGE THE JURY AS REQUESTED BY  
THE DEFENDANT-APPELLANT IN HIS  
SECOND REQUEST.

The defendant requested the Court to charge the jury as follows:

*Brief of Defendant-Appellant*

“While the plaintiff had a right to cross the street anywhere, if he crossed at a point other than a crossing, as in this case, he must exercise greater care than when crossing the street at a designated crossing, because he had no greater preference than the defendant in the authorized use of the street. Greater care in this connection means that degree of care commensurate with the danger and conditions attendant which an ordinary prudent person under like circumstances would use.”

The earliest case in this court which the defendant has been able to find defining the rights and duties of a pedestrian crossing a street at a point other than a crosswalk is *McAvoy v. Paterson Brewing and Malting Company, et al.*, 78 N. J. L. 633. In that case, which was one where a pedestrian received his injuries as a result of a collision with a **buggy** on the highway, the Court held that the pedestrian had the right to cross the street at any point, but must exercise reasonable care for his own safety.

The next case in this court in which the rights of a pedestrian crossing the street at a point other than a crosswalk and the duties of a pedestrian were defined, is the case of *Fox v. The Great Atlantic and Pacific Tea Company*, 84 N. J. L. 726, which concerned a collision between a pedestrian and a motor truck. In that case, which was decided in 1913, the Court held that the pedestrian had a right to cross the street at a point not a crosswalk and that in doing so was bound only to use reasonable care for his safety. We have been unable to find any later

decisions in this court respecting the rights and duties of a pedestrian crossing the street at a point other than a crosswalk.

In 1920, however, the Supreme Court in the case of *Lyons v. Volz*, 114 Atlantic Reporter, page 318 (not officially reported), for the first time enlarged upon the rule of law in this respect as defined by the Court of Errors and Appeals. In this case the Court held that while a pedestrian had a right to cross the street anywhere, that that pedestrian was under a duty to use greater care when not crossing at a crosswalk, having no greater preference there than any other authorized user of the street.

In 1927 in the case of *Dugan v. Public Service Transportation Company*, 5 New Jersey Miscellaneous Reports 245, the Supreme Court in passing upon a request to charge the jury submitted by the defendant as follows:

“A pedestrian attempting to cross a street at a place other than a crosswalk must exercise greater care for his own safety than one attempting to cross on a crosswalk, as a pedestrian crossing at a place other than a crosswalk has no greater preference than any other authorized user of the street.”

said that the request was too general and comprehensive, since the question in every case is whether or not the foot passenger used care commensurate with the danger of his environment, whether at a crossing or in the middle of the block.

It will be noted that the request submitted by the defendant in the case at bar was based upon the

*Brief of Defendant-Appellant*

request submitted in the case of *Dugan v. Public Service Transportation Company, supra*, and modified so as to meet the defect in the request in the cited case as pointed out by the Court therein. The request submitted by the defendant in the case at bar was further based upon the opinion of the Supreme Court in the case of *Lyons v. Volz, supra*.

The State of Pennsylvania in numerous cases has determined that a pedestrian crossing a street at a point other than a crosswalk is under a duty to use more care than while crossing at a crosswalk. This is the rule in Pennsylvania as defined by a long line of decisions beginning with the case of *Arnold v. McKelvey*, 253 Pennsylvania 324, 98 Atlantic Reporter 559.

The reasoning in back of such a legal pronouncement, to our minds, is logical. The use of the automobile since 1913 has greatly increased. The highways and streets between crossings have become what is known as the right of way for the automobiles to operate upon. The crosswalks have been particularly set aside for the use of pedestrians to cross the streets and highways. At these crosswalks pedestrians have the right of way. It is, therefore, logical to say that on the highways and streets other than at crosswalks automobiles and vehicles have the right of way. The duties of the automobilist and the pedestrian at crosswalks while crossing the street is not mutual because the pedestrian having the right of way, the automobilist at a crosswalk or intersection is under a duty to use greater care in traversing the streets and highways

at those points. Conversely in our opinion, at any point on the street or highway other than a cross-walk the automobilist traversing what may be called his own domain, the place on which he is authorized to proceed, has the right of way thereon and any pedestrian attempting to interfere with the authorized use of the automobilist's right of way is under a duty to use more care than the automobilist in so doing. The Courts of Pennsylvania have very aptly and logically stated as follows:

“The pedestrian must use such care and caution as an ordinarily careful and prudent person would exercise under the circumstances in the case, and more care and caution would be required of a pedestrian attempting to cross a street where automobiles and other vehicles are run between crossings than should be exercised at a crossing, because more care is required to be exercised by an automobile about to pass over a crossing than between crossings. Crossings are prepared especially for pedestrians; and automobilists must bear this in mind; therefore, more care is required of a driver of a car at crossings than between crossings. Nevertheless, ordinary care must be observed by drivers and pedestrians at all times, at and between crossings. Therefore, we say that more care is required of pedestrians between crossings than at crossings; but the rule of ordinary care applies.”

*Arnold v. McKelvey*, 98 Atlantic Reporter  
559.

*Brief of Defendant-Appellant*

The form of the request to charge the jury quoted above by the defendant was submitted in line with the decisions of the Supreme Court in the *Lyons v. Volz* case, *supra*, and the *Dugan v. Public Service Transportation Company* case, *supra*, and based upon the reasoning of the Pennsylvania Supreme Court in the case of *Arnold v. McKelvey*, *supra*.

It is to be noted that the request contains the underlying principle of care to be used by a pedestrian in all instances whether that degree of care be ordinary care or great care, to wit: care commensurate with the danger involved.

The failure of the Court to charge the request submitted by the defendant in the form submitted was prejudicial error to the defendant for the reason that in the absence of the Court charging the request in the form submitted, the jury was entitled to find that the plaintiff was under no greater duty to use care crossing the street where he did cross it than he would be if he had crossed at a crosswalk. If the Court had charged the request in the form submitted by the defendant the jury would have been almost impelled to find from the testimony that the conduct of the plaintiff did not constitute on his part the exercise of that greater degree of care required of him in crossing the street at the point in question.

SUMMARY.

It is respectfully submitted that the learned trial Court erred in refusing to grant defendant-appel-

*Brief of Defendant-Appellant*

lant's motion for a non-suit, in refusing to grant the defendant-appellant's motion for a directed verdict and in refusing to submit to the jury the defendant-appellant's second request to charge and for the reasons stated above, the judgment of the Court below should be reversed.

BOLTE & TRIPICIAN,  
*Attorneys for Defendant-*  
*Appellant.*

HARRY MILLER,  
*Of Counsel.*

NEW JERSEY COURT OF ERRORS  
AND APPEALS.

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MAX TIEGER,  
*Plaintiff-Respondent,*

v.

SAMUEL LUNDY,  
*Defendant-Appellant.*

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ON APPEAL.

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**BRIEF OF MAX TIEGER, PLAINTIFF-  
RESPONDENT.**

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STATEMENT OF THE CASE.

Pacific Avenue, in the City of Atlantic City, is parallel to the Boardwalk and one block therefrom. These two thoroughfares run east and west. New York Avenue, the scene of the accident, begins at the Boardwalk and runs north therefrom, intersecting Pacific Avenue.

On Sunday, August 7, 1932, Max Tieger, the plaintiff herein, came to Atlantic City with two of his boy friends, Allen Trasoff and Martin Kanefield, strangers all, to the resort. Their destination seems to have been a house near the Boardwalk, on Columbia Place, where plaintiff's sister was staying. Shortly after they arrived at the Columbia Place

address, the three changed to bathing suits and proceeded down to the beach at the foot of this street.

Having enjoyed beach and ocean for a while, the trio grew quite hungry. They made their way back to their staying place with the idea of putting on some clothes and getting lunch at some Five and Ten Cent Store. Plaintiff, Max Tieger, put on a pair of pants and a pair of sneaks. Trasoff put on a pair of pants and a pair of shoes, but Martin Kanefield remained barefooted and continued in his bathing suit only. Their attire proves important later.

And so, in quest of a Five and Ten Cent Store, they came to the Boardwalk, where, having gone a short distance, because of their improper garb, they were ordered off by a policeman. From him, however, they learned where a Five and Ten Cent Store was to be found. He suggested, nevertheless, they go to Pacific Avenue and walk along that street.

They then left the Boardwalk, and having reached Pacific Avenue, continued along thereon to New York Avenue, turned up the latter street to the Boardwalk, and entered the Five and Ten Cent Store there situate at the easterly foot of New York Avenue.

Luncheon had, the three emerged from the Five and Ten Cent Store and proceeded along the easterly side of New York Avenue back toward Pacific Avenue.

They had walked but a very short distance when an unusually heavy storm broke forth suddenly and they sought shelter in a nearby garage on the same side of the street. Here they waited for half-hour

*Brief of Plaintiff-Respondent*

or so until the rain subsided, whereupon they resumed their way. By this time the street was inundated and the gutters overflowed.

Giving into the westerly side of New York Avenue, about a quarter block from the Boardwalk, at a point some few feet opposite this garage but not intersecting New York Avenue, there is a little street known as Westminster Avenue. This street runs westerly and in the general direction of Columbia Place.

Thinking Westminster Avenue a shorter means to their Columbia Avenue destination, the three thought to cross over but found themselves impeded partly from the large puddles of water that flooded the gutters of the easterly side of New York Avenue in this vicinity, and partly from the automobiles ranked in close proximity along that curb. So they continued on north a bit until they came to an open space about 20 feet wide, separating these parked automobiles, and where the puddles were appreciably narrower. While the plaintiff, upon a signal from the defendant so to do, was in the act of crossing at the extreme northerly end of this 20-foot space, and in full view of the latter, the car of the defendant struck the plaintiff, and the accident occurred, resulting in serious injuries to the plaintiff.

## ARGUMENT.

DEFENDANT-APPELLANT ARGUES THAT THE COURT ERRED IN REFUSING TO GRANT DEFENDANT-APPELLANT'S MOTIONS FOR A NON-SUIT AND TO DIRECT A VERDICT.

## I.

From the evidence, the jury could find that the plaintiff and his companions desired to cross from the easterly to the westerly side of New York Avenue—that they were prevented from so doing at one point by the flooded condition of the gutter from a recent extraordinarily heavy shower—that they were further prevented from crossing at certain other points because of the automobiles ranked in close proximity along the easterly curb—that they eventually came to a place where the parked cars were 15 to 20 feet apart—that at this point one of plaintiff's companions, Martin Kanefield, who was barefooted and attired in bathing suit only, waded out from the curb through a pool of water and took a position at the western rear corner of an automobile parked on the easterly side of New York Avenue and facing Pacific Avenue—that Kanefield, having looked up and down New York Avenue for traffic, was there standing when the automobile of the defendant approached from the Boardwalk and toward Pacific Avenue—that plaintiff was then standing

*Brief of Plaintiff-Respondent*

on the easterly curb slightly to Kanefield's left and immediately behind him—that defendant observed the plaintiff and his companions—that he noted they wanted to cross the street—that he then slowed his car down—that he saw the plaintiff signal to him that the plaintiff was intending to cross in front of his, the defendant's car—that the defendant accordingly stopped his car within 10 feet of where plaintiff was standing and at the same time the defendant signalled to the plaintiff for the plaintiff to cross in front of the defendant's car—that, thereupon and immediately, plaintiff, then still on the curb, in order to escape a puddle in the gutter before him, proceeded to jump from the curb, and as plaintiff did so, the defendant's automobile darted forth suddenly and struck the plaintiff—that the plaintiff was all the while in open view to the defendant.

Max Tieger—Direct—page 30, line 11 to page 32, line 26.

“Q. You emerged from the Five and Ten Cent Store?

A. Yes.

Q. Then which way did you proceed?

A. We came down at the back entrance of the Five and Ten Cent Store.

Q. Yes.

A. And we started to go down to Pacific Avenue.

Q. Along what street?

A. On New York Avenue.

Q. What happened?

A. A storm broke out.

*Brief of Plaintiff-Respondent*

Q. Was it heavy, slight or moderate?

A. It was a very heavy—what I may say, which I have ever seen.

Q. A very heavy storm?

A. Heavy, yes.

Q. What did you do?

A. We ran down to the garage. There is a garage and we ran into the garage.

Q. On New York Avenue?

A. Yes.

Q. How long did you stay in the garage?

A. Probably half an hour or so, till the rain subsided.

Q. Did the rain subside entirely?

A. No; it kept on drizzling.

Q. Then what did you do?

A. We decided we should get back to the place to get dressed.

Q. Then what did you do?

A. We kept on going for about a few feet.

Q. Yes.

A. And then we seen a small street across.

Q. Yes.

A. And we thought it would be able to make a short cut.

Q. Then what?

A. But we couldn't go across right exactly where the street was.

Q. Why?

A. Because there were machines parked there.

Q. Anything else?

A. It was big water, puddles on the curb, on the curb.

Q. Then what did you do?

A. We kept on going down towards Pacific Avenue.

Q. And how far did you walk towards Pacific Avenue?

A. Well, about the middle of the block.

Q. Middle of the block. And when you got to the middle of the block what struck your observation?

A. We seen an opening.

Q. How big was the opening?

A. I would judge about fifteen to twenty feet.

Q. And this opening was between two what?

A. Between two cars.

Q. And the cars were parked on your side of the street?

A. Yes.

Q. When you got to this opening, as you say, for two cars, fifteen to twenty feet, what happened at that point?

A. There was a small puddle there.

Q. Yes.

A. Mr. Kanefield ——

Q. That is the boy in the bathing suit?

A. In the bathing suit, yes. We have decided to go across there, to get across.

Q. Yes.

A. Mr. Kanefield was standing—started to walk out into the puddle, because he had no shoes on.

Q. Yes.

*Brief of Plaintiff-Respondent*

A. And he stopped about almost at the end of the car to the right side of the ——

Q. To his right side?

A. Yes.

Q. That was the car towards Pacific Avenue?

A. Pacific Avenue.

Q. And having gotten there, what did he do?

A. He looked up for the traffic.”

Max Tieger—Direct—page 33, line 12 to page 34, line 27.

“Q. No; which way did he look?

A. First down to Pacific and then out to the Boardwalk.

Q. Fine. Now, having looked to Pacific and looked to the Boardwalk, what did you do then?

A. I looked up myself. I was standing on the curb, while I had sneaks on.

Q. You were standing on the curb?

A. Curb.

Q. And with relation to Mr. Kanefield who was out in the puddle, as you have described, where were you standing on the curb?

A. I was standing right behind him, about within hand reach, right on the curb.

Q. To what way?

A. To his left.

Q. And who was standing on the curb next to you?

A. Mr. Trasoff.

Q. Which side of you was Mr. Trasoff standing?

A. To my right side.

*Brief of Plaintiff-Respondent*

Q. Did you look at all while you were on the curb?

A. Yes.

Q. Which way did you look?

A. Toward the Boardwalk.

Q. And having looked towards the Boardwalk what, if anything, did you observe?

A. I have seen that car coming.

Q. You saw a car coming. What did the car coming do?

A. It came down slowly.

Q. At what point did it come slowly?

A. Well, I would say it came very slow till about ten or fifteen feet, then it slowed down very much.

Q. Yes, and then what?

A. It came almost to a stop.

Q. And then what?

A. And then I put up my hand to say I wanted to get across.

Q. Yes. You did what?

A. I put up myself—I was about to put up my hand to signal to stop.

Q. Then what happened?

A. He nodded with his head.

Q. Who nodded?

A. The man in the car.

Q. With his head which way?

A. This way, to the left.”

Max Tieger—Direct page 35, line 1 to page 36, line 4.

“Q. What did you do then?

*Brief of Plaintiff-Respondent*

A. I jumped across the puddle.

Q. What happened?

A. That is all. I hit the car, I don't know how.

Q. Then they took you where, Max?

A. Atlantic City Hospital.

Q. Who took you?

A. The man in the car.

Q. I see, Mr. Lundy?

A. Yes.

Q. What?

A. Yes, that is right.

Q. I now direct your attention to the day of May 13, 1933, more particularly the Real Estate and Law Building in the City of Atlantic City, State of New Jersey, to the office of Bolte and Tripician. Do you remember that day?

A. Yes.

Q. In the room where you were examined before trial, was Mr. Lundy present or wasn't he?

A. Yes, he was present.

Q. After you emerged from the room and came into the hall who confronted you?

A. Mr. Lundy.

Q. And is this Mr. Lundy sitting here now?

A. Yes.

Q. Did Mr. Lundy have a conversation with you relative to the accident?

A. Yes.

Q. What did you say to him?

A. He said he seen me. I said, 'If you seen me, why did you hit me?'

*Brief of Plaintiff-Respondent*

Q. What did he say?

A. Nothing. Just shrugged his shoulder. Nodded.”

Max Tieger—Cross—page 90, line 30 to page 91, line 19.

“Q. You say in your direct examination that you signalled him.

A. Yes.

Q. How did you signal him?

A. By standing this way, and I had my hand this way.

Q. And you were then on the sidewalk?

A. Yes.

Q. And there was a car towards the Boardwalk from you, wasn't there?

A. Toward the Boardwalk?

Q. Yes.

A. About a distance from fifteen to twenty feet.

Q. Was that the—what would you say, fifteen or twenty feet; which would you say?

A. About between fifteen and twenty feet, I cannot be exact.

Q. Were you all the way over toward the other car, the car toward Pacific Avenue, when you jumped?

A. A foot or two from the car.

Q. The car that was toward Pacific Avenue?

A. The car that was toward Pacific Avenue, yes.”

Max Tieger—Cross—page 92, line 4 to line 16.

“Q. And what did you see him do?

*Brief of Plaintiff-Respondent*

A. Him? Nodded his head.

Q. You saw a shake of his head?

A. Yes.

Q. And seeing that shake of his head, you say you jumped at once?

A. Yes.

Q. And his car was stopped at the time?

A. Yes.”

Max Tieger—Cross—page 93, line 21 to page 94, line 15.

“The Court: You say you were on the curb when you put up your hand?

A. Yes.

The Court: And the defendant's car had then stopped? Was it stopped then, at that time?

A. Yes; he keeps—kept coming slowly until he came to a short distance from me.

The Court: I know. Was the defendant's car in motion when you put up your hand or not?

A. Yes.

The Court: It was. And then stopped, did it?

A. Yes.

The Court: How soon after it stopped did you jump?

A. Right as he stopped.

The Court: I understood you to say he was ten or fifteen feet away from you when he stopped?

A. About ten feet. I don't think it was more.”

*Brief of Plaintiff-Respondent*

As to when he jumped, the plaintiff, Max Tieger, further testifies on page 87, line 16:

“A. I waited till he signalled me to go.”

Allen Trasoff—Direct—page 168, line 35 to page 169, line 26:

“Q. Now, you say he looked up and down New York Avenue. Was your attention attracted up New York Avenue?

A. Yes.

Q. And what did you see?

A. I saw an automobile approaching.

Q. And as this automobile approached what did you observe about the automobile?

A. It was a coupe.

Q. Yes, and was it raining hard at that time?

A. There was a slight drizzle.

Q. Slight drizzle. And as this car approached from up New York Avenue, what did you observe the car do?

A. It began to slow down when it came to about where we were.

Q. I see. Then, what did it do?

A. It came to a dead stop.

Q. About how far from the point where Mr. Martin Trasoff—is that his name?

A. No, his name is Martin Kanefield.

Q. Martin Kanefield was standing, that is the boy you have told us about, out in the puddle. About how far from him did the automobile stop?

A. About ten feet.”

Allen Trasoff—Direct—page 170, line 10 to line 31:

“Q. What did you see the defendant do?

A. The driver gave us a crossing signal.

Q. What did he do?

Mr. Bolte: I object.

The Court: Strike it out.

Q. Just explain to us his deportment. What did he do?

A. You mean as regards to his driving the car?

Q. No; as to what he did with any part of his body.

A. With his head.

Q. Well, what did he do with his head?

A. He made a motion.

Q. And the car at that time was stopped, or was it some other way?

A. It was stopped at that time.

Q. And then what happened?

A. And then Max Tieger jumped across.

Q. And then what happened?

A. And then the car shot up suddenly.”

In passing upon motions to non-suit and to direct a verdict upon the ground that there was no evidence of defendant's negligence, the Court is not concerned with the credibility of the witnesses nor with the weight of the evidence, but must take as true all evidence which supports the plaintiff's view and must give him the benefit of all legitimate inferences which may be drawn therefrom in his favor; and

*Brief of Plaintiff-Respondent*

where the evidence is such that reasonable minds may reasonably differ as to the fair conclusion to be drawn therefrom as to whether or not the defendant exercised reasonable care, a jury question is presented, and such motions must be denied.

*Andre v. Mertens*, 88 N. J. L. 626;

*Lozio v. Perrone*, 111 N. J. L. 549.

And if the evidence left the question of plaintiff's contributory negligence in doubt:

"This rule of substantive law has been the subject of frequent reiteration by this court to the effect that where the plaintiff has rested his case, and the evidence leaves the question of his contributory negligence in doubt, the determination of the question of the negligence of the defendant presents an issue of fact which must be submitted to the jury."

*Napodensky v. West Jersey, &c., R. R. Co.*,  
85 N. J. L. 336, 339.

The defendant's motions for non-suit and to direct a verdict were, accordingly, properly denied.

II.

WITH REFERENCE TO THE REFUSAL OF  
THE COURT TO CHARGE DEFENDANT-  
APPELLANT'S REQUEST NUMBER 2.

Defendant-appellant alleges that the Court erred in not charging the following request:

“While the plaintiff had a right to cross the street anywhere, if he crossed at a point other than a crossing, as in this case, he must exercise greater care than when crossing the street at a designated crossing, because he had no greater preference than the defendant in the authorized use of the street. Greater care in this connection means that degree of care commensurate with the danger and conditions attendant which an ordinary prudent person under like circumstances would use.”

The Court, in happy language, correctly, amply and fully sets forth the law governing plaintiff's conduct in the situation at hand, in its charge, and more particularly, in the following excerpts therefrom:

Court's charge—page 196, line 17 to line 24:

“Now, negligence is the failure to exercise reasonable care, and reasonable care is said to be that degree of care that an ordinarily prudent person would exercise and employ in the same or like circumstances. You will, therefore, recognize that negligence is somewhat of an elastic term in that it represents a lack of care that would be reasonable in the existing circumstances \* \* \*.”

Page 200, line 3 to line 11:

“Now, both the plaintiff and the defendant were entitled to use, traverse this public street, but in doing so it was the duty of each of them to make reasonable observations to discover the

*Brief of Plaintiff-Respondent*

conditions existing on the highway. It was the duty of each of them in using the highway to exercise reasonable care to prevent accidents

\* \* \* .”

Page 200, line 19 to page 201, line 3:

“Now, the plaintiff had a right to cross the avenue at the point indicated by the testimony, but it was the duty of the plaintiff in attempting to do so, knowing, as we must assume that he knew, that the lawful use of the street by the automobiles would put him in danger and peril unless he exercised due care and precaution—it thus became the duty of the plaintiff to exercise such care and precaution as an ordinarily prudent person would employ in the existing circumstances. And so I say, while the plaintiff had a right to cross this street anywhere, if he attempted to cross at a point other than the crosswalk, as would appear to be the fact in this case, he was under the duty to exercise that degree of care that would be commensurate with the danger and the risk and the conditions that would attend the crossing of the street at that point, and he was obliged to exercise that degree of care that an ordinarily prudent person would have exercised in those existing circumstances and conditions.”

The denied request concerned the plaintiff's negligence, and negligence is always a relative term. Reasonable care comprehends the entire legal concept of what is or is not negligence. The degree of care

to be employed under any given set of circumstances is always reasonable care.

“The expression reasonable care is an elastic one, running the entire gamut from those cases in which only the most trifling injury is to be anticipated in the event of negligence to those—such as the handling of death-dealing and dangerous agencies—in which the most frightful consequences are to be apprehended \* \* \*”

*Gellatty v. Central Railroad of New Jersey*,  
86 N. J. L. 416, 417, 418.

“Reasonable care is the standard exacted of all persons where the duty to exercise care for the safety of others arises. That care may be of lesser or greater degree according to the circumstances and conditions to which it applies, and a high degree of care denotes no more than the degree of care commensurate with the risk of danger, where the danger is great.”

*Goldberg v. New York Telephone Co.*, 2  
N. J. Misc. Rep. 449, 452.

Assuming but not conceding that the defendant's request contained a legal proposition accurately and properly cast and was appropriate in the circumstances, yet, nevertheless, it was embraced in the Court's charge and more particularly, in the foregoing excerpts therefrom, quoted hereinabove and accordingly properly refused.

The Court is not bound to instruct the jury in the identical language of a request or to

*Brief of Plaintiff-Respondent*

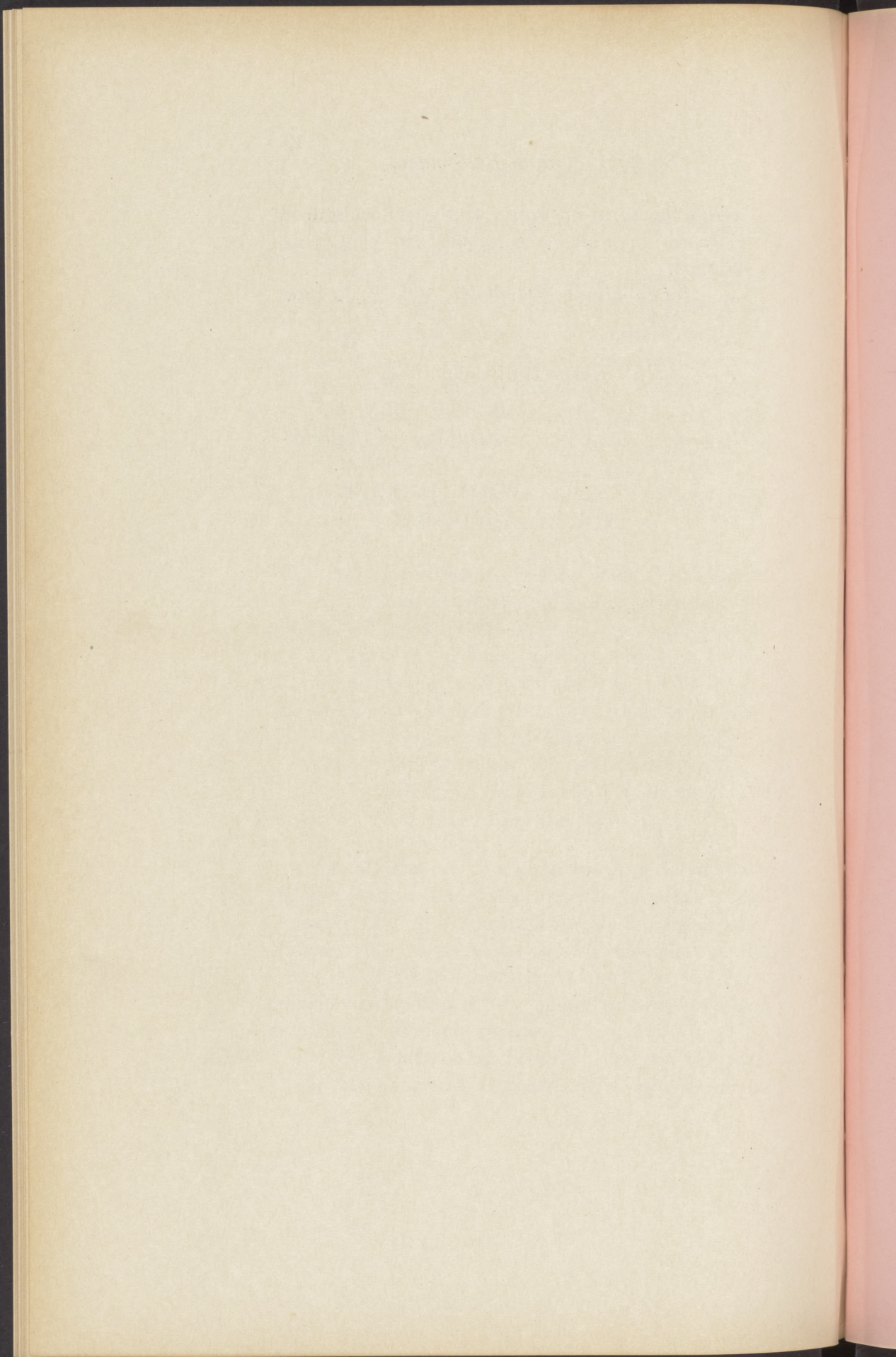
adopt the form or words or the collocation of phrases, in which the request to charge is framed.

*McLaughlin v. Damboldt*, 100 N. J. Law  
127.

Respectfully submitted,

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## Index.

	Page
Bill of Complaint .....	1
Affidavit of Joseph Friedlander .....	5
Affidavit of Sidney Berger .....	8
Affidavit of William Arnowitz .....	9
Affidavit of Sardi Arnowitz .....	10
Affidavit of Molly Kusnit .....	12
Reply Affidavit of Joseph Friedlander .....	13
Supplemental Affidavit of Sidney Berger .....	15
Supplemental Affidavit of William Lighter .....	16
Supplemental Affidavit of Albert Knapp .....	17
Supplemental Affidavit of J. Harmon Ford .....	18
Supplemental Affidavit of Joseph Fried- lander .....	19
Order to Show Cause .....	20
Answering Affidavit of Louis Grand .....	21
Answering Affidavit of Aaron Frankel .....	26
Answering Affidavit of Joseph Stone .....	29
Answering Affidavit of David M. Wein- traub .....	31
Supplemental Affidavit of Louis Grand .....	32
Answering Affidavit of Philip Shevins .....	35
Answering Affidavit of Benjamin Fishman .....	39
Answering Affidavit of Ida Kusnit .....	41
Opinion of V. C. Bigelow .....	43
Order Dissolving Restraint .....	44
Notice of Appeal .....	44a
Amended Notice of Appeal .....	45
Affidavit of Service .....	46
Petition of Appeal .....	47
Petition of Appeal .....	48a
Affidavit of Service .....	50
Petition to Secure Restraint .....	51
Affidavit of Complainant on Petition .....	52
Affidavit of Albert Knapp .....	55

