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NOTICE OF APPEAL.

Filed February 23, 1928.

Essex County Circuit Court

<hr/> IDA BERGMAN, <i>Plaintiff,</i> <i>vs.</i> ABRAHAM S. GINSBURG, <i>Defendant.</i> <hr/>	}	<i>Notice of Appeal.</i>
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To Nathan Erlich, attorney of plaintiff.

SIR: 20
PLEASE TAKE NOTICE that the defendant appeals from the entire judgment of the Essex County Circuit Court to the New Jersey Court of Errors and Appeals.

KALISCH & KALISCH,
Attorneys of Defendant.

Service of a copy of the within notice of appeal is hereby acknowledged this 17th day of February, 1928. 30

NATHAN ERLICH,
Atty. of Plaintiff.

SUMMONS.

The State of New Jersey to Abraham S. Ginsburg:

10 (L. s.) You are summoned to answer the annexed complaint of Ida Bergman, in an action at law in the Essex County Circuit Court. And take notice that unless you file your answer to said complaint with the Clerk of the Essex County Circuit Court, at Newark, 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.

20 WITNESS, NELSON Y. DUNGAN, Judge of the Essex County Circuit Court, at Newark, this 14th day of April, 1925.

JOHN H. SCOTT,
Clerk.

NATHAN ERLICH,
Attorney.

30

40

COMPLAINT.

ESSEX COUNTY CIRCUIT COURT.

IDA BERGMAN, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>	10
<div style="text-align: center;"><i>vs.</i></div> ABRAHAM S. GINSBURG, <div style="text-align: right;"><i>Defendant.</i></div>			
		<i>Complaint.</i>	

Ida Bergman, residing in the City of Newark, County of Essex and State of New Jersey, complains:

1. The defendant herein is a resident of the Town of Nutley, County of Essex and State of New Jersey. 20

2. On September 17, 1924, the plaintiff was riding in an automobile truck which was being driven southerly along Lexington avenue, in the City of Clifton, County of Passaic and State aforesaid.

3. That when said automobile truck aforesaid reached a point which was about opposite No. 599 Lexington avenue, in the City of Clifton aforesaid, an automobile owned and driven by the said defendant, Abraham S. Ginsburg, ran into the said automobile truck on which the said plaintiff was riding and threw the said plaintiff off of the said automobile truck to the street. 30

4. That the collision aforesaid resulted from the carelessness and negligence of the defendant, Abraham S. Ginsburg, his agent, servant or employee, in that the automobile of the said defend- 40

Complaint.

ant was operated at an excessive and unlawful rate of speed, and failure to give signal of approach, failure of the defendant to observe the presence of other automobiles on the highways aforesaid at the time and place aforementioned and his failure to properly control his said automobile and divers other negligent acts of the defendant aforementioned.

5. Wherefore and by means of the premises, the plaintiff sustained severe and permanent internal and external bodily injuries, and did become sick, sore, lame and disordered, and so remained and will continue to remain, and underwent and in the future will undergo great pain and suffering, and was prevented for a long time and will be prevented from attending to her necessary and lawful affairs, and did and in the future will lose great gains, profits and advantages, and did and in the future will be obliged to expend large sums of money endeavoring to cure herself of the said wounds and injuries.

Plaintiff claims as damages the sum of \$20,000.

NATHAN ERLICH,
Attorney for Plaintiff.

Served within summons and complaint, April 17th, 1925 personally upon Abraham S. Ginsburg, within-named defendant, by delivering to him a true copy thereof, at his usual place of abode, 169 Highfield Lane, Nutley, New Jersey.

HARRY B. O'CONNELL,
Sheriff.

By James Muhahy,
Special Deputy.

Complaint.

I hereby appoint and depute James Muhahy to serve the within writ.

Witness my hand and seal this 14 day of April, 1925.

HARRY B. O'CONNELL,
Sheriff. 10

By Conrad Deuchler,
Under Sheriff.

Sheriff Fees \$4.10.

(Seal)

ANSWER.

Filed May 13, 1925.

ESSEX COUNTY CIRCUIT COURT.

10	IDA BERGMAN,	<i>Plaintiff,</i>	}	<i>Action</i>
				<i>at Law.</i>
	<i>vs.</i>			
	ABRAHAM S. GINSBURG,	<i>Defendant.</i>		<i>Answer.</i>

Defendant, residing in the Town of Nutley, County of Essex and State of New Jersey, answering the complaint filed in the above-entitled cause, says that:

1. He admits paragraphs 1 and 2 of the complaint.
2. He admits the collision set forth in paragraph 3 of the complaint, but denies the point of collision as set forth in paragraph 3 of the complaint.
3. He denies paragraphs 4 and 5 of the complaint.

SEPARATE DEFENSE.

Defendant alleges that plaintiff was guilty of contributory negligence in that she suffered and permitted the driver of the automobile in which she was riding to carelessly, negligently and improperly operate the same so that it collided with the automobile of the defendant.

40 KALISCH & KALISCH,
Attorneys.

REPLY.

Filed February 1, 1928.

ESSEX COUNTY CIRCUIT COURT.

10	IDA BERGMAN,	<i>Plaintiff,</i>	}	<i>Action</i>
				<i>at Law.</i>
	<i>vs.</i>			
	ABRAHAM S. GINSBURG,	<i>Defendant.</i>		<i>Reply.</i>

The plaintiff replies to the separate defense filed by the defendant herein, and says that she denies each and every allegation therein contained.

NATHAN ERLICH,
Attorney for Plaintiff.

Consent is hereby given to the filing of the within reply as of within time.

Dated February 1, 1928.

KALISCH & KALISCH,
Attorneys for Defendant. 30

APPEAL BOND.

Filed March 13, 1928.

COLUMBIA CASUALTY COMPANY.

10 Know All Men by These Presents, That we, Abraham S. Ginsberg, as Principal, and Columbia Casualty Company, a corporation organized and existing under the laws of the State of New York and authorized to transact business in the State of New Jersey as surety are held and firmly bound unto Ida Bergman, in the sum of Ten Thousand and 00/100 (\$10,000.00) Dollars lawful money of the United States of America, for payment of which sum, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

20 Sealed with our seals and dated this Sixth day of March, A. D. One Thousand Nine Hundred and Twenty Eight.

Whereas, a judgment was rendered in the Essex County Circuit Court on the third day of February, A. D. 1928, in a suit therein pending, wherein Ida Bergman is the Plaintiff and Abraham S. Ginsberg, is the defendant, for the sum of Five Thousand and 00/100 (\$5,000.00) Dollars, and the defendant, Abraham S. Ginsberg, is about to appeal from said Judgment of the said Essex County Circuit Court to the New Jersey Court of Errors and Appeals.

Now, the condition of this obligation is such, that if the said Abraham S. Ginsberg, shall pay the costs of the said appeal, whatever be the result thereof, and shall pay to the said Ida Bergman the judgment of the Essex County Circuit

40

Appeal Bond.

Court, so as aforesaid, rendered against the said Abraham S. Ginsberg, if the said appeal be not prosecuted by the said Abraham S. Ginsberg or dismissed, then this obligation to be void, otherwise to remain in full force and virtue.

ABRAHAM S. GINSBURG. 10
 COLUMBIA CASUALTY COMPANY,
 By Paul F. Ryan Corp. Seal.
 Attorney in Fact.

Signed, sealed and delivered
 in the presence of
 JAMES M. SANTORO.

Columbia Casualty Company, 20
 1 Park Avenue, New York, N. Y.

FINANCIAL STATEMENT.
 As of December 31, 1927.

Assets.		
Real Estate	\$ 37,137.90	
Bonds (Market Value)	5,786,370.67	
Cash in Bank	334,944.07	
Interest due and accrued	76,098.97	30
Premiums in course of collection (not overdue)	1,173,123.19	
Other Assets	44,852.20	\$7,452,527.00

40

Appeal Bond.

Liabilities.

Reserves:

Unearned Premiums . . .	\$2,265,219.94	
Claims in process of adjustment	2,442,263.43	
10 Commission on premi- ums in course of col- lection	254,031.64	
Taxes and Sundries . . .	232,848.33	
Capital, paid up ..\$1,000,000.00		
Surplus over all liabilities. 1,258,163.66		
<hr/>		
20 Surplus to Policy- holders	2,258,163.66	\$7,452,527.00

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

30 Paul F. Ryan, being duly sworn, says that he is Attorney in Fact of the Columbia Casualty Company, and that to the best of his knowledge and belief, the foregoing is a true and correct statement of the financial condition of said Company as of December 31, 1927.

PAUL F. RYAN,
Attorney in Fact.

Subscribed and sworn to before me
this 6th day of March, 1928.

L. TRACY (nee Fallon),
Notary Public of N. J.

My commission expires 9-22-30.
Form 9571 P-2-28.

Appeal Bond.

COLUMBIA CASUALTY COMPANY

114 Fifth Avenue, New York City.

Bonding Department

STATE OF NEW JERSEY, }
CITY OF NEWARK, } ss.
COUNTY OF ESSEX. }

On this 6th day of March, 1928, before me, the subscribed, a Notary Public of the State of New Jersey, duly commissioned and sworn, personally came Paul F. Ryan, who being by me duly sworn on his oath saith: that he is Attorney in Fact of the Columbia Casualty Company, that he resides in Newark, N. J., that he knows the corporate seal of said Company: that the seal affixed to the foregoing instrument is such corporate seal: that it was so affixed by order of the Board of Directors of said Company: and that deponent signed the foregoing instrument by order of the Board of Directors of said Company as the voluntary act and deed for said Company: that said Company has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the year 1902, and the amendments thereof and supplements thereto: that the good available assets of the Company exceed its liability, as such liabilities are ascertained in the manner provided in said Chapter: that the Columbia Casualty Company is duly incorporated under the laws of the State of New York, and is authorized by the laws of that State and under its charter to become surety on bonds and obligations such as are mentioned in said Chapter: that it has on deposit with the Superintendent of Insurance of the State of New York, good securities worth at par and at market value

Appeal Bond.

at least Two Hundred and Fifty Thousand Dollars (\$250,000.00) held as security for all holders of its obligations and has a fully paid up, safely invested and unimpaired capital of One Million Dollars (\$1,000,000.00) and that the following is a true copy of the bylaws duly adopted by Directors of the said Columbia Casualty Company on the fourth day of February, 1920 at a regular meeting, to wit:

Article III. Officers.

Section 1. The president or a vice president shall have power and authority to appoint assistant secretaries, resident vice presidents, resident secretaries, resident assistant secretaries, and attorneys in fact and to give such appointees full power and authority to sign and to seal with the company's seal where required, all policies, bonds, recognizances, stipulations and all underwriting undertakings and may at any time remove any such appointees and revoke the authority given them.

Article V. Signing of Policies, etc.

Section 1. All policies, bonds, recognizances, stipulations and all underwriting-undertakings shall be valid (a) when signed by the president or a vice president, or a resident vice president or a departmental manager as one representative of the company and the secretary or assistant secretary, or a resident assistant secretary or other duly authorized official or agent of the company as the other representative of the company and when sealed with the seal of the company when required by law, or (b) when executed by an attorney in fact.

PAUL F. RYAN (SEAL)

Judgment.

Sworn and subscribed before me at the day and year first above written.

IRENE MAISENBACHER,
(SEAL) Notary Public of N. J.
My Commission Expires Nov. 1, 1931.

JUDGMENT.

ESSEX COUNTY CIRCUIT COURT.

Book 104.
114-37970.

IDA BERGMAN, <div style="text-align: center;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> ABRAM S. GINSBURG, <div style="text-align: center;"><i>Defendant.</i></div>	}	<i>Action at Law.</i> <i>On Verdict by Jury.</i>	20
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Judgment entered February 1, 1928.		
Damage	\$5,000.00	
Costs	106.44	
		30
Total	\$5,106.44	

Nathan Erlich, attorney of plaintiff.

This action was tried before Judge Nelson Y. Dungan with a jury at the Essex County Circuit Court on February 1, 1928.

The cause having been heard and submitted to the jury, they return their verdict as follows:

They find in favor of the plaintiff, Ida Bergman, and against the defendant, Abram S. Gins-

Judgment.

burg, for the sum of five thousand dollars (\$5,000.00) damage.

10 Whereupon it is adjudged that the plaintiff recover of the defendant the sum of five thousand dollars (\$5,000.00) damage and costs, which are taxed at one hundred six dollars and forty-four cents, making in the whole the sum of five thousand one hundred six dollars and forty-four cents.

Judgment entered and signed February 1, 1928.

WILLIAM S. GUMMERE,
Chief Justice.

JOHN H. SCOTT,
Clerk.

20 Book C. C. 104, page 114.
April 9, 1928.

30

40

Certificate of Clerk.

ESSEX COUNTY CLERK'S OFFICE.

STATE OF NEW JERSEY, }
COUNTY OF ESSEX. } ss.

I, JOHN H. SCOTT, Clerk of the County of Essex in the State of New Jersey,

10 Do HEREBY CERTIFY That the foregoing is a true and correct copy of all the records in the case of Ida Bergman, plaintiff, v. Abraham S. Ginsburg, defendant, together with a copy of the judgment record entered in Book 104, Circuit Court Judgments, page 114, and the same is taken from and compared with original copies of all records together with copy of Judgment Record Book 104, page 114, and as the same now remains on the files of said office.

20 IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the official seal of said county at Newark, N. J., this 9th day of April, A. D. 1928.

JOHN H. SCOTT,
Clerk.

(SEAL)

10

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40

Boris Pashenko, direct.

TESTIMONY.

ESSEX COUNTY CIRCUIT COURT.

January 31, 1928.

10	IDA BERGMAN, <div style="text-align: right; padding-right: 20px;"><i>Plaintiff,</i></div> <div style="text-align: center; padding: 0 10px;"><i>vs.</i></div> ABRAHAM S. GINSBURG, <div style="text-align: right; padding-right: 20px;"><i>Defendant.</i></div>	}	<i>Action at Law.</i>
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Before Hon. Worrall F. Mountain *J.*, and a jury.

20 For the plaintiff appears Nathan S. Erlich (by Benjamin M. Weinberg), of counsel.

For the defendant appears Kalisch & Kalisch (by Isidor Kalisch).

(A jury is called and sworn.)

Mr. Weinberg opens for the plaintiff.

Mr. Kalisch opens for the defendant.

30 Mr. Kalisch: We withdraw the defense of contributory negligence, as far as this plaintiff is concerned.

BORIS PASHENKO, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q Please pronounce your name. A Pashenko, P-a-s-h-e-n-k-o.

40 Q You do not mind if we call you Boris? A No.

Boris Pashenko, direct.

Q What is your occupation? A At that time I was engineer on a steam-shovel.

Q At that time, what time? A 1924.

Q At the time the accident occurred? A Yes, sir.

Q You were operating a steam-shovel that was used by what company? A John P White Company, Passaic. 10

Q On September 17, 1924, what were you doing? A Laying the pipes up there a distance of about 100, 120 feet.

Q You were laying pipes on Lexington avenue which is the main highway that runs on the westerly side of the Passaic River? A Yes, sir.

Q Somewhere near Clifton, New Jersey? A In Clifton. 20

Q That is between Passaic and Paterson? A Yes, sir.

Q How soon before September 17th did this work of laying pipes in the street start? A About six weeks we had started and finished it.

Q You had started six weeks before the accident? A No, six weeks it took to finish the job.

Q Were you finished on the day of the accident? A No.

Q State briefly the condition of Lexington avenue on the day of the accident? A The same as the other streets, but I think ten or twelve feet was open on the easterly side of Lexington avenue. 30

Q Part of the street had been opened with this trench dug out, excavated, this trench? A Yes, sir.

Q How much of a trench was there on the day of the accident? A About twenty-five feet, one length. 40

Boris Pashenko, direct.

Q One length of twenty-five feet? A Yes, sir.

Q When you go from Passaic to Paterson on what side of the road was that? A On the right-hand side from Passaic to Paterson.

10 Q From Passaic to Paterson it was on the right-hand side or easterly side? A Yes.

Q Was there anything around the excavation? A Well, shafting to keep the road in shape.

Q What was that like? A Twenty-one feet long and three by ten's to draw them down to keep the quicksand from filling up the trenches and killing the men.

Q Where were they driven down, in the trench? A In the trench.

20 Q Did they stick up above the ground? A About three or four feet at that time, so a man could stand on the street and look over into the excavation.

Q They were sticking up about three or four feet at that time so that a man could stand on the street and look into the excavation? A Yes, sir.

Q You think they were three or four feet high? A About that.

30 Q Where were these beams put, on one side of the trench? A All the way around on all four sides.

Q So that the hole was completely protected and covered on the sides by these beams, is that right? A Yes, sir.

Q Your business was operating a steam-shovel? A Yes, sir.

Q What was that used for? A What?

Q What was that used for? A To pull the muck out of the hole.

40

Boris Pashenko, direct.

Q After the dirt was taken out of the hole where was it dropped? A In a truck. We usually did that every other day, or every two days.

Q What is Lexington avenue like; is it a dirt or a macadam road? A A macadam road, very good road.

10

Q Are there any sidewalks on Lexington avenue? A At that time, no sidewalks up to Kip avenue; there were sidewalks, but no concrete on them; dirt.

Q But it was a regular walk? A Yes, dirt walk.

Q How was your steam-shovel placed at the time the accident occurred? How was it standing, which way? A Beyond the trench.

Q Are you pretty good with a piece of chalk on a blackboard? A All right.

20

Q Will you answer the question before you stand up? Can you do it? A Yes. This side of Lexington avenue the trench was open (indicating) with shafting all the way around and sidewalk in here (indicating) and a house on the corner, a butcher shop there, and my shovel was standing there (indicating).

Q According to that little sketch on the blackboard where would Paterson be? A Here (indicating).

30

Q Put "P" there. A (Witness does as requested.)

Q Passaic is on the left and on the right that is supposed to show Paterson? A Yes, sir.

Q According to the way you made that little sketch. I will put it this way, did the steam-shovel stand about on a line with the fence you have drawn, or did it stick out? A No, right in line.

40

Boris Pashenko, direct.

Q How long was that steam-shovel? A I judge about a fifteen or twelve body and a thirty-six foot beam.

Q How long is the whole contraption? A With the boom?

Q That is the big timber? A Yes, this is
10 the boom.

Q How big is the shovel itself? A Between twelve and fifteen feet long.

Q How wide is it? A About nine feet wide.

Q Were you working at the time the accident happened? A Yes, I was on the shovel, but not operating it.

Q How were you sitting? You had a seat in that machine? A No, I stand up alongside the boiler.

Q Which way were you facing? A On the
20 front of the trench.

Q In what direction would that be? A It runs this way towards Paterson (indicating).

Q What was the first you knew, Boris, that an accident happened? A I had just about wanted to start operating, the men were ready to work on it, and I heard a crash and I turned my face the other way and I saw two cars together. Then I shut off everything and ran to the cars and picked a woman up off the car.

Q I understand the first thing that attracted
30 your attention was the crash? A Yes, sir.

Q Then you looked over your left shoulder and what did you see? A Two cars clinched together.

Q Where were the two cars? A The little Ford was close to the sidewalk and the big car rushed right in the middle of the Ford and they clinched together with their wheels and springs.

Q You say the Ford was close to the side-
40 walk. Turn around and look at the blackboard

Boris Pashenko, direct.

and tell the jury what sidewalk you mean? A This side (indicating).

Q You are pointing to the sidewalk on the westerly side of Lexington avenue. Where was it with respect to your steam-shovel? A Just about—

Q I do not mean that. Was it facing your
10 steam-shovel towards Paterson way or had it reached it? A It was past a few feet, past about in here (indicating); when I turned over and looked over my shoulder I could see the car.

Q Whereabouts, put an X there? A By the steam-shovel.

Q Do not do that, if you are going to mark it mark it where the sidewalk is. You say the
20 little Ford was on the sidewalk. Where is the sidewalk? A Here (indicating).

Q Put a mark there if that is where the collision occurred. Put a mark where the collision was. Which car did you say was on the sidewalk? A The little Ford.

Q Is that the one Mrs. Bergman was in? A Yes, sir.

Q What kind of a little Ford car was it? A I guess a four-ton truck.

Q A small truck? A A small truck. 30

Q While you said they were locked together you did not tell us just exactly what their positions were. What was the position of Mr. Ginsburg's car, was it straight out, was it on an angle, or how? A Together. Nothing left of them, they were more to the sidewalk, and the little Ford was on the sidewalk, because I helped pull them apart.

Q This sidewalk you refer to is a dirt side-
40 walk? A Yes, sir.

Boris Pashenko, direct.

Q How was it standing when you saw it, the Ford? A The radiator was smashed and the wheels were underneath the engine.

Q How was it pointing? A Pointing to Passaic.

10 Q How was Mr. Ginsburg's car? A Pointing to Paterson.

Q How much room was there, do you think, between your steam-shovel and the place where the two cars were locked? A After the accident?

Q Yes. A It took a truck, a five ton truck to come up and pull Mr. Ginsburg's car to the garage, and the truck passed between us.

Q Between the smashed cars and your trench? Q Yes, sir.

20 Q There was room for two cars to pass each other between? A Yes.

Q Did you notice what sort of a car was locked with the Ford car? A What is that?

Q Did you notice what kind of a car it was that was locked with the Ford car? Do you know anything about automobiles? A Yes.

Q Do you know what kind of a car this was? A Stearns-Knight.

Q Was it an open or closed car? A Open, touring.

30 Q About what time was it? A I judge about half-past nine in the morning.

Q What kind of weather was it? A Very good weather.

Q Was the ground slippery, or was it dry? A I couldn't tell you about that.

Q Do you know whether it was raining that day? A No, it was not raining.

Q Was it a dry day? A Yes, sir.

40 Q You said that after the accident you picked up Mrs. Bergman? A Yes.

Boris Pashenko, cross.

Q Where was she? A She was in the car, half through the windshield and some teeth lay on the running board. I picked everything up and took her over to someone else's Ford.

Q You say there was some teeth on the running board? A Yes. 10

Q Just what did you do with her, where was she put? A I just helped to put her in someone's Ford sedan; I never saw her since up until yesterday.

Q Did you hear any signals given by either of these cars? A I can't remember.

Q Was your steam-shovel making any noise at that time? A At that time the steam-shovel was not working; it was waiting for a truck to load it up; just about ready to start at the time it happened. 20

Q You did not know either of these people before the accident? A No, I never met them before.

Q Where do you live now? A Clifton.

Q For whom do you work? A John P. White Company, Freeport, Long Island.

Q That is where you are working now? A Yes, sir.

Cross examination by Mr. Kalisch. 30

Q Did you make a report of this accident to your employer? A No.

Q You did not tell your superintendent about the accident? A No, sir.

Q You say your steam-shovel was not working at the time? A No.

Q How long does it take for the steam to be strong enough to operate the steam-shovel? A Well, according to how you start the fire, and 40

Boris Pashenko, cross.

when you start it sometimes two to three hours, sometimes one hour.

Q What time was this? A What do you mean?

Q When the accident happened? A Half-past nine or quarter to ten.

10 Q What time did you start working? A Seven o'clock.

Q You started the fire at seven o'clock? A No, the fire goes on all night, there is a man taking care of it, the watchman.

Q Has your steam-shovel got a safety valve on it? A Oh, yes, every steam-shovel should have.

Q That one did? A Yes.

20 Q At what pressure does it blow off? A Seventy-five.

Q How long has your steam-shovel been idle—I do not want to confuse you—how long had the shovel been working? A How long?

Q Yes. A On that job, or what?

Q You said a few minutes ago that when the accident happened you were just standing there, you were not working? A It had not started yet.

30 Q How many times had it blown off steam while you were there and waiting to start the work? A It's according to the engineer. If he closes the fire-box and gets a fire draft it will blow off every five or ten minutes.

Q How many times do you remember it blew off steam that morning? A I don't know, I never counted it; maybe once or twice, or half a dozen times.

40 Q I do not want you to tell me exactly, but about as often as you remember. A About two or three times.

Boris Pashenko, cross.

Q In other words, every time it got up to seventy-five pounds? A Yes, sir.

Q Where is the pipe where the steam comes out? A In the chimney, smoke-stack.

Q Your machine is about how long? A About fifteen feet.

10 Q Where is it, in the middle, or on the left-hand or right? A On the back.

Q How high is your steam-shovel from the ground? A About fourteen to fifteen feet, about.

Q Do you think it was that high? A About to the smoke-stack?

Q To the smoke-stack? A Yes.

20 Q So that steam would come out, it would come out of a place fourteen feet from the ground? A Yes, sir.

Q How long would it blow? A A minute.

Q How wide is the smooth road where the automobiles usually drive? A I don't know how wide Lexington avenue is, but where I live it is about between eight and ten feet. At the trench I don't know how wide the road is, I couldn't figure it, but I know that two trucks can pass each other on some part of the road.

30 Q Two trucks can pass each other on the road? A Yes, sir.

Q Is that what you meant when you answered Mr. Weinberg's question about the two trucks passing? A Yes, sir.

Q The road was wide enough for two trucks to pass by? A Yes, sir.

Q That is what you figure, two good size trucks could pass each other? A Yes, five ton trucks passing each other.

40 Q Now, on the right and left side of the smooth road there is dirt, isn't there, what

Boris Pashenko, cross.

they call a dirt shoulder? A It is a dirt sidewalk.

Q People walk there? A Yes, sir.

Q On this dirt? A Yes, sir.

10 Q How wide would you say the dirt is on the right of the smooth road and on the left of the smooth road? A I don't understand.

Q Perhaps I can make it plainer to you. You put this diagram on here to explain yourself before, and the smooth road is the middle of the road, isn't it? A Yes.

Q Let us assume you are going from Passaic to Paterson, on the left-hand side there is dirt, to the left of the smooth road? A Yes.

Q Then, on the right side of the smooth road there is dirt, isn't there? A No.

20 Q There is no dirt on the right side? A No.

Q How wide is that dirt strip of road where the people walk? A From the house up to the road?

Q How far do you think that is; not exactly? A Not more than a foot.

Q You do not believe it is more than that? A I don't believe so.

30 Q Where did this trench you had begun, that is, how near the house? A It is about fifteen to twenty feet away from the big garage.

Q Did your trench begin in the dirt? A Half on the dirt and half on the pavement.

Q How wide was the trench? A Between eight and ten feet.

Q So you cut into the pavement about four or five feet? A Yes.

40 Q How much did you leave then between the place where you cut into the pavement and the other side of the smooth road? A How much did I leave?

Boris Pashenko, cross.

Q About how many feet? Do you understand me? A Yes. The whole length of the road.

Q I know that, but I am trying to get some number of feet to help us. A Tell me how wide Lexington avenue is and I will tell you exactly how many feet was open.

10 Q Can you point to something from the front of this witness box out straight in front of you that you think would show the distance to where you cut into the road or the trench and the other side of the smooth road? A About twenty to twenty-five feet.

Q You think you would leave twenty-five feet of smooth road open? A Yes, sir.

Q So you think then the road itself, the smooth road was about thirty feet wide? A I think so. 20

Q You think it is that wide? A I think so.

Q I do not mean the whole street, I mean the asphalt. You think that is about twenty to twenty-five feet? A Yes, sir.

Q If you cut four feet into the smooth part and it was only twenty feet wide, it would only leave sixteen feet, wouldn't it? A Yes, sir.

Q Which is it? It is rather important. If you cannot remember, say so. A I know one thing, that two trucks could pass, so how wide do you figure a truck is? 30

Q Do you mean two trucks with the bodies coming out beyond the wheels? A Yes, sir.

Q Or bodies even with the wheels? A Five-ton dump trucks.

Q Those bodies are even with the wheels? A No, about six inches on each side. They passed each other without touching the dirt.

Q They are pretty close to each other on the road? A Maybe a foot or a foot and a half. 40

Boris Pashenko, cross.

Q Now, how long had you people been working on that trench; how many days or weeks?

A Six weeks altogether.

Q You had already worked six weeks? A Yes, sir.

10 Q I thought you said a few moments ago that in six weeks the job was finished? A From start to finish; six weeks.

Q How long had you been working on it then? A Six weeks.

Q Was the job finished? A In six weeks' time the job was finished and I took the shovel away.

Q How long had you been working there when the accident happened? A I couldn't tell you now.

20 Q How long after the accident did you have to work to finish the job? A I don't remember that.

Q The work was not finished, was it? A No, but close to it, to finish up.

Q The teeth you picked up were false teeth, they were not teeth that were knocked out from the mouth? A I don't know.

Q There was no blood on the teeth? A There was blood all over the car.

30 Q On the teeth? A I don't know; I couldn't say that.

Q After the accident was the Stearns-Knight car opposite where the steam-shovel was? A Just about.

Robert Johnstone, direct

ROBERT JOHNSTONE, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q With what municipality were you connected in September, 1924? A Clifton, New Jersey. 10

Q Are you still there? A Yes, sir.

Q On the police force? A Yes, sir.

Q Were you on the police force on September 17, 1924? A Yes, sir.

Q You did not see the accident between the Ginsburg and the Bergman car? A No, sir.

Q When was the first you knew that an accident had happened? A I was doing traffic duty at Clifton and Lexington avenues, some eight blocks from the accident. 20

Q You received word that something happened? A This Ford coupe came up to me.

Q Do not tell us what they said. Someone reported in a Ford car that an accident had happened? A Yes.

Q You were some eight blocks away at that time on post? A Yes, sir.

Q What did you do after receiving that information? A Placed the Ford there at the traffic booth to let the women into it, and while they were explaining the ambulance came down. 30

Q Did you go up to the scene of the accident? A After we conveyed the woman from the Ford to the ambulance.

Q She was brought down to where you were? A Yes, sir.

Q She was brought down to where you were by some sort of vehicle? A Yes, sir.

Q She was then transferred to the ambulance? A Yes, sir. 40

Robert Johnstone, direct

Q What ambulance? A Clifton ambulance, or patrol wagon.

Q Then, after you saw the injured woman and knew an accident had happened, what did you do? A Went to the scene of the accident.

10 Q How did you get there? A I jumped on an automobile and went down to the accident.

Q How far did you go before you saw signs of the accident? Where was this accident? A On what we called at that time Kip avenue and Lexington avenue.

Q Do you recall at that time an excavation going on in Lexington avenue? A Yes, sir.

20 Q Where was that excavation with respect to Kip avenue? A On the extreme right of Lexington avenue from Kip avenue. Kip avenue runs into Lexington avenue; it is a dead-end street and ends at Lexington avenue.

Q At the extreme right going in what direction? A To Paterson.

Q What did you use to get up there?

30 Mr. Kalisch: If this has to do with the position of the cars I shall object, because my information is that the cars were moved after the accident and before the officer got there. I object unless they prove that the condition of the cars or position of the cars was the same after the accident as when the officer got there and saw them.

The Court: You may proceed. He can tell what he saw.

Q What did you see when you got up there?

40 A I seen the Stearns-Knight touring car and the Ford truck with the two left front wheels locked.

Robert Johnstone, direct

Q (By the Court.) Were they together? A Yes, sir.

Q (By Mr. Weinberg.) They were locked in? A Yes, sir.

Q Were the wheels of one locked into the other one? A Two left front ones.

Q So that the two cars were practically facing each other? A Yes, sir. 10

Q Where were they with respect to the side of the road? A On the west side of Lexington avenue, which is the left-hand side of the road going from Paterson to Passaic.

Q How far over on the left-hand side of the road going to Paterson were these two cars? A On the average man's right, keeping on the right of his road.

Q (By the Court.) Where is that, the middle of the road? A Yes, sir. 20

Q Both of them? A No; the Stearns-Knight was in the center, but not straight; it was on an angle.

Q (By Mr. Weinberg.) Pointing which way? A Northwest.

Q How far over or past the center of the street was the front of the Stearns-Knight car?

A Well, I couldn't say that exactly; a Stearns-Knight is a long car. 30

Q Now, the Ford truck. What side of Lexington avenue, or what portion of Lexington avenue, in what portion of Lexington avenue was the little Ford truck when you saw it? A It was on his right, that is, his own right.

Q Do you know whether there is a sidewalk on Lexington avenue? A There is not, no. There is a sidewalk, but an ash sidewalk.

Q It is not macadam or stone, but there is an ash or dirt walk there? A Yes, sir. 40

Robert Johnstone, direct

Q With respect to that dirt walk on the west side of Lexington avenue, where is the Ford truck? A It would be about where the curb should be if the street was graded.

Q That would be on the edge of the sidewalk? A Yes, sir.

10 Q You say the Stearns car was sort of cross-wise on the street pointing toward the westerly side; you say it was near where the grade would be on the westerly side. I suppose you mean the right-hand side of the Ford truck would have been there? A Yes.

Q Can you gauge it further over to the west side than the truck then was, without running over onto the sidewalk? A No, sir.

20 Q When you got there, officer, whom did you see? A Why, there were a number of people around there at the time. I found out who the drivers were.

Q Were they still there? A Yes; Mr. Bergman, who came down with the Ford with his mother to the traffic booth, then went back with me.

Q What did Bergman come down in? A A Ford coupe.

30 Q Not the one in the accident? A No; a car he had his mother in.

Q Bergman was not there, then, at the scene of the accident when you got there? A He went back with me.

Q He was there, then? A Yes.

Q Was he in his car? A No, sir.

Q Did you see anybody move the cars while you were there? A No, sir.

Q Did you stay there until the cars were separated? A No, sir.

40 Q You left before that? A Yes, sir.

Robert Johnstone, direct

Q Did you notice the damage to any or either one of these cars? A Yes.

Q Where was the damage on them? A The Stearns-Knight, his front left wheel and front left fender was damaged.

Q I do not mean what caused it, but what were the nature of the damages? A I couldn't say. 10

Q You remember the left front wheel and the left front fender on the Stearns-Knight was damaged? A Yes, sir.

Q Where was the damage to the little Ford truck? A The whole front was demolished.

Q You did not see how that car was moved? A No, sir. 20

Q After obtaining the particulars that you were required to take you left there? A No, sir; I took the two men with me to the police station, and on the way down we stopped at the garage and Mr. Ginsburg got a man with a wrecker, which was about five blocks from the accident, to tow his car into the garage.

Q That is the Stearns-Knight? A Yes, sir.

Q Do you know what happened to the little Ford truck? A No, sir. 30

Q That ended your duties? A Yes; I took both into headquarters and there made a report.

Q You did not know either of these parties before the accident? A No.

Q In taking the both of them in it was in the discharge of your duty? A Yes.

Q They were obliged to report to the captain or lieutenant and he settled that end of it? A Yes, sir. 40

Robert Johnstone, cross.

Cross examination by Mr. Kalisch.

Q How wide would you say is the traveled portion of Lexington avenue at the point where the accident took place? A To be exact, I couldn't say; but Lexington avenue is not a very
10 wide road; they just have what they call amesite.

Q Well, about? A Two cars can pass, but a third car cannot go without either of the cars turning into the dirt.

Q Do you think it would be as much as twenty feet wide? A Twenty feet is quite a distance.

Q You do not think it would be that much? A No, not twenty feet.

Q Somewhere between fifteen and twenty feet? A Between fifteen and twenty feet, yes.
20

Q The sidewalk or the walking place on the westerly side of Lexington avenue is how wide, that dirt walk? A Around three feet.

Q Is there a gutter there? A No, sir.

Q In other words, the amesite is a smooth, even, level road; is that right? A No; there is a crown to the road.

Q A slight crown on the top of the amesite? A Yes.

30 Q Then, that runs pretty straight across the end of the amesite and three feet on the dirt shoulder? A Yes, on the westerly side.

Q And on the easterly side the same thing? A No; the easterly side was kind of a funny place.

Q No; I mean ordinarily. A No, it would not be, because there was no place made out for a sidewalk on the easterly side.

40 Q Isn't there a dirt shoulder there? A It was just like mud.

Robert Johnstone, cross.

Q It is mud only when it is wet? A The other side is ashes, but no one walks on that side.

Q There is a dirt shoulder there? A Yes.

Q How wide is the dirt shoulder? A On the same level with the end of the amesite.

Q So as far as you can estimate, the whole width of the road is somewhere between twenty-
10 one and twenty-six feet? A Yes, sir.

Q That includes both shoulders? A Yes, sir.

Q Did you notice how much of the amesite was cut into by the excavation? A No, sir.

Q Do you know whether any part of it was cut into? A No, sir.

Q You pass there quite frequently, do you not? A No, sir.

Q Your work does not occasion you to be there at all? A No, sir.
20

Q Well, you saw this Stearns-Knight car, at any rate? That is correct? A Yes, sir.

Q If an imaginary line were drawn along there, north to south, along the center of Lexington avenue, would you mind telling us exactly where the two wheels on the westerly side of this Stearns-Knight car rested on the ground with reference to that imaginary line? A The front wheels would be on the other man's right and the left rear wheel was on the right of the center
30 of the road.

Q The left rear wheel would be to Mr. Ginsburg's right of the center of the road? A Not the way he was coming; no, sir.

Q If there were a line drawn down here (indicating), with reference to that center line, I understood you to say that the left front, the wheels on his right side, the left front would be somewhat on the Ford's side of the street? A
40 Yes, sir.

Robert Johnstone, cross.

Q But that the rear, you said, was about the center of the road? A Yes, sir.

Q When you say the center of the road, do you mean the rear left wheel of Mr. Ginsburg's car was to the right of the center somewhat, his right? A I would say yes.

10 Q And that the left would be somewhat to the Ford's right? A Yes, sir.

Q In other words, the left of Mr. Ginsburg's car and the rear was on his own side, but the left rear was to his right of the road and his left front was somewhat to the left of the road? A No; his both wheels were on the center of the road.

20 Q With reference to the left front wheel, what have you to say whether that left front wheel of Mr. Ginsburg's car was to the right or the left or the center of the road? A To the left, his left front wheel was to the left of the center of the road going to Paterson.

Q In other words, it was slightly over on the other man's side? A Yes, sir.

Q Would it be inches or feet? A It was quite noticeable; I would say it was feet, not inches.

30 Q Can you show us? A No, sir.

Q But the rear wheel you say was all right; it was on its proper side of the street? A No; his left could not be on the center that way.

Q If it were on an angle pointing in a somewhat westerly direction, why couldn't the left be on the right side of the street and the front of it somewhat to the left? A It would be almost across the road, but his right was on the right. When a man is in the center of the road he is not on his right.

40

Robert Johnstone, cross.

Q How far away from the dirt shoulder was the left front? A Halfway over the engine.

Q The front of his car was between the center line of the dirt shoulder and the right on the westerly side of the street? A No; the man in the Ford was on the shoulder of the road.

10 Q I understand that. I say the Stearns-Knight car was on a diagonal direction or towards the left-hand side of the street, and you state it was about halfway over? A Yes.

Q Is it halfway over towards the dirt part of the shoulder or halfway over towards the whole road including the dirt shoulder? A The center of the road we are talking of, the center. This is where the excavation was (indicating), and the center is here (indicating) and the man is here, and is not near the dirt of the shoulder.

20

Q I am merely trying to get the position of Mr. Ginsburg's car in the road as you saw it. How far across on the right was it when you found the left of his car in that position? A That was the front left?

Q Yes; of the Ford car. A If Mr. Ginsburg was coming down?

30 Q Towards Paterson? A Yes, and was riding almost the center of the road and then he took on an angle, if that helps you out any.

Q Can I put it in a different way? Can you tell us how much he was over on the wrong side of the street when you found his car, having in mind that center line of the amesite pavement? A I will say that his left front wheels and half the engine was on his left.

Q Was the angle of his car a sharp angle or a small angle? A A small angle.

40 Q It was less than the right angle, wasn't it? A Yes.

40

Robert Johnstone, re-direct.

Q Can you give us an approximate degree of the angle? A I would say about fifty degrees.

Q You would say a very mild angle? A Yes, sir.

10 Q Do you know how far the easterly side of his car in the direction it was going was from the nearest part of the excavation or nearest part of the machine, the mixer, the shovel? A No, sir.

Q Was there any considerable distance between the shovel and the nearest part of Mr. Ginsburg's machine? A I didn't notice that.

Q You went down to fix the blame one way or another for the collision? A No, sir.

20 Q Wasn't that part of your duty? A No, sir.

Re-direct examination by Mr. Weinberg.

Q Can you indicate on that board your idea of an angle of fifteen degrees? A This (indicating).

Q That is practically a forty-five-degree angle, or aren't you familiar with the degrees of an arc? A I am.

30 Q Now complete the triangle on the board there and see how many degrees there are there. At any rate, whatever the degree might be that represents about the slant of the defendant's automobile? A It could be a little less.

Q What do you mean it could be a little less, less of the fifteen degrees or the actual angle? A You are getting down to degrees. I cannot understand exactly about that.

40 Q This mark you put on the map. Does or does not that represent the angle in which the

Robert Johnstone, re-direct.

Stearns car was at? A That would be close to it.

Q Of course, you did not make any such observations to get the exact angle, but approximately that represents about the position in which the Stearns-Knight car was? A Yes, sir. 10

Q Maybe a little more or it might be a little less.

Mr. Kalisch: I object. The witness said it was a little less. I object to the form of the question.

The Court: I will admit it.

Q I say it might be a little more or it might be a little less, or could it be either more or less? A It could be less; it wouldn't be more. 20

Q How much less would you think? A That is something I couldn't say.

Q How near right or how near wrong is that mark you made?

The Court: If you cannot approximate it, say so.

A It is neither right nor wrong. 30

The Court: It is your best judgment?

A Yes, sir.

Q (By Mr. Weinberg.) Were there any houses on that street at that time? A Yes, sir.

Q Where? On what side of the street? A On the westerly side.

Q With respect to this excavation, where were those houses? A Almost opposite. 40

Robert Johnstone, re-cross.

Q How many? A The excavation went down the road quite some distance.

Q How many of them, a few houses or sparsely settled? A Close to the excavation there are a number of houses and garages until about a block from the scene of the accident and
10 then there is four or five two-family houses.

Q On the side of the excavation? A Yes, sir.

Q What about the other side? A The other side has one store from the corner of Kip avenue, and then there is a building on the corner of Kip and Lexington avenues.

Q Can you tell us with respect to that excavation about where Kip avenue comes in, with respect to the excavation, is it north or south of it? A It crosses Kip avenue; it came all the way
20 down; it was for the trunk sewer.

Q You mean that excavation crossed Kip avenue? A Yes, Kip avenue down across Lexington avenue.

Q How? A From the east side.

Re-cross examination by Mr. Kalisch.

Q Are the houses on an average in that locality more than 100 feet apart? A No, sir.

Q Isn't it a very sparsely settled neighborhood? A Right where the accident happened?
30

Q I mean the general locality. That road along there. Aren't the houses on an average of more than 100 feet apart? A Yes, sir.

James P. Morrill, direct.

JAMES P. MORRILL, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q You are a practicing physician and surgeon of this State? A I practice medicine. 10

Q How long have you been practicing? A Since 1901.

Q Your office is in Paterson, New Jersey? A Yes, sir.

Q Were you connected with any institution in September, 1924? A Orthopedic surgeon at St. Joseph's Hospital.

Q Were you connected with any other institutions other than St. Joseph's?

Mr. Kalisch: I will admit the doctor's qualifications. 20

Q You say you were an orthopedic surgeon at the hospital in September, 1924? A Yes, sir.

Q Was Mrs. Ida Bergman admitted to that hospital around that time? A Yes, on the 17th of September, 1924.

Q When did you first see her? A I couldn't tell you the time of day. 30

Q Was it that day? A Yes.

Q Where was she when you saw her? A In the ward of the hospital.

Q Can you tell us whether before you examined her, whether any physician or anyone else had examined her? A I can't remember that.

Q Do you remember if you made an examination of her? A Certainly.

Q Tell us what your examination consisted of and what was disclosed by that examination. A 40

James P. Morrill, direct.

Well, as the result of the examination I found that she had a laceration of the left side of the upper ribs, that is a deep cut, and a break or fracture of the right upper arm, the bone of the right upper arm, the humerus, on the right side below the shoulder.

10 Q How far from the shoulder joint? A About three inches below the shoulder joint.

Q Proceed. A That's all.

Q Do you remember whether she had any bruises? A She had a slight abrasion on the side of her neck; left side of her neck.

Q Do you have any record of anything else? A That's all.

20 Q Are you reading your notes or someone else's? A I am reading the hospital notes which were taken under my supervision.

Q Do you know whether the notes are correct? A Yes.

Q Did you supervise the making of them? A Yes, sir.

Mr. Kalisch: I do not object to them.

30 Q Tell us a little more about that fracture, the nature of it. A Well, the bone in this region, about three inches below the shoulder joint, was broken obliquely across and a piece two and a half to three inches was broken out; that is what we call a comminuted fracture where the bone is broken in more than one piece, which is quite a severe fracture.

Q What you call comminuted? A Yes, comminuted, not compound.

40 Q A compound fracture is where the bone protrudes through the flesh? A Yes, that is where the skin is broken and the bone is exposed to the air.

James P. Morrill, direct.

Q One or two breaks? A It was in the same location, but it was two breaks.

Q You say a piece was broken out; you do not mean that that piece came out? A No, just broken away from the shaft of the bone.

10 Q What was done for the patient? A We applied plaster to the arm with a block to pull the bone in position and put in an aeroplane splint; that is a splint that pulls the arm in this position on the side of the body (indicating).

Q You have your arm in a horizontal position, about the height of your shoulder? A A little bit down from that; the idea is to support the arm and the forearm, I mean by the pull; it is to keep the bones from overlapping.

20 Q What is this block you refer to? A You put plaster on the arm and put a block in to keep or fasten it tight and then you put a rubber band on to keep a constant pull on the bone.

Q Keep the parts of the bone separated from each other? A No, keep them in line; otherwise they would ride over each other and be deformed. That will keep them straight. If you did not have this extension they would overlap.

Q It pulls it in alignment? A Yes.

30 Q How long was that apparatus kept on the lady? A That I don't know. I treated her in the hospital until the 26th of September, about nine days.

Q That is how long she was under your care? A Yes; she then left the hospital and was under someone else's care.

40 Q Did you have complete charge of her in the hospital? A Yes. I have an assistant, of course, but she was practically entirely under my care.

James P. Morrill, direct.

Q When she left the hospital did she have anything on her arm at all? A She still had a broken arm, yes.

Q I mean any protective apparatus, or any splint, or anything of that sort? A Yes.

10 Q What? A She had this same splint on; she left the hospital with the same apparatus on that I described.

Q Did you see her after that or not? A Never; no, sir.

Q You never saw her after that time? A No, sir.

Q Did you have any X-rays made? A Yes.

Q Did you bring them with you? A I have them with me, yes.

20 Q Was this made under your supervision? A Yes; they are all made under my supervision. Of course, that is, we have an X-ray—

Mr. Kalisch: If this doctor says he knows the X-ray and knows it to be hers I will have no objection.

30 Q Do you know that the film or negative that you have there is a picture of Mrs. Bermgan's arm? A Yes.

Q Are you able to interpret those X-rays? A Well, yes, as a surgeon. Of course, we do depend on the X-ray specialists, but we read a great many X-ray plates.

Q There is such a thing as an X-ray interpretation of plates? A Yes.

Q Not being an expert, tell the jury whether you can read and if you understand what is shown on this film? A I think I do.

40 Q Do you? A Yes.

James P. Morrill, cross.

Q Look at it and tell us what the picture shows in respect to that injury. A It shows a fracture which is an oblique fracture across and down. This piece here (indicating) seems to be broken away from the main shaft, however, as an expert orthopedic surgeon I think the bone is in very good position as far as this picture shows, with healing. This bone is not healed, it is only one week after the setting. 10

Q Does that picture you have show everything in respect to this injury, or have you another one that shows anything else or more? A No, I have not.

Q So, when you last saw her the fracture had not healed? A This picture was taken, by the way, on the day when she left the hospital, the 26th of September, so that was the position it was in when she left my care. 20

Q You do not, of course, know what resulted from that injury, do you? A I do not.

Q You never examined the plaintiff since then? A I have never seen her since.

Q There was no charge for your services at that hospital, was there? A No.

Q That went in the hospital charge; it was furnished by the hospital? A I don't know anything about that; I treat all patients in the ward for nothing. 30

Q You got nothing out of it yourself? A Nothing whatever except glory.

Cross examination by Mr. Kalisch.

Q And experience? A And experience.

Q Is there any charge made by the hospital for your services? A None whatever.

Q There was none? A Not as far as I know, no, sir. 40

James P. Morrill, cross.

Q You had a report made to you for the purposes of seeing whether your conclusions as to her condition were confirmed by the X-ray expert, isn't that so? A Yes.

10 Q Please turn to your file there and refer to the X-ray man's report to you?

Mr. Weinberg: I object.

The Court: Sustain the objection.

Mr. Kalisch: I refer the doctor to the part of the record connected with the paper from which he was reading in answer to Mr. Weinberg's question, on the ground Mr. Weinberg has opened the door for a complete examination of that record by use of it himself.

20 The Court: I have already ruled on that.

Q I ask you now to refer to the record, and I ask you whether that record that you read from was complete in your hands at the time you answered Mr. Weinberg's question as to the condition of this woman at the time she was brought into the hospital.

30 Mr. Weinberg: I object. I do not see that there is anything on the record to show that you read from that.

Mr. Kalisch: Withdraw the question.

Q In answer to Mr. Weinberg's question, did you or not read from a record furnished you by the hospital, in connection with this woman? A I did, yes.

40 Q Now, I ask you whether any part of that hospital record there which you read from in

James P. Morrill, cross.

answer to Mr. Weinberg's question has to do with the reading of the X-ray picture to which he also referred in connection with Mrs. Bergman's broken arm? A I made the picture myself.

Q I asked you whether any other part of the record— A I did not use it to read the picture, if that's what you mean. I might have— I think I have a record here of it. 10

Q Were the bones in position as shown by the X-ray? A Yes.

Q That was your conclusion? A Yes.

Q Was Dr. Golding the expert roentgenologist for the hospital at that time? A Yes.

Q So his conclusion and yours are the same?

Mr. Weinberg: I object as immaterial and irrelevant. 20

The Court: Sustain the objection.

Q Was there anything which developed as shown by the X-ray which caused you to change your opinion as to the healing of the fracture in complete apposition? A I do not understand your question.

Q I will change the question. Was there anything which caused you to change your opinion that the fragments healed in perfect position or alignment? A They were not healed at this time; it was only a week after the accident. 30

Q Was there anything that changed your position as to their being in perfect alignment and apposition as shown in the X-ray? A No, sir.

Q They were in perfect alignment? A As far as I can see.

Q Was there anything about their position which would indicate they would heal out of alignment? A Not at that time, no, sir. 40

James P. Morrill, re-direct.

Q Whatever the patient complained of, of course, either you yourself or you through some employee of the hospital entered it on the hospital records in the way of pain in place of pain? A Those things are noted, yes.

10 Q I mean to say, if she complained of anything, you did not just pass it off, you examined her for it, didn't you? A Yes.

Q So that you have testified to what you found and gave a full list of what she complained of to you and what you found on examining her? A I think so, yes.

Re-direct examination by Mr. Weinberg.

Q Will you tell us what her complaints were?

20 A Laceration of the left side of the ribs, which is a deep cut in the rib; fracture of the right arm, and an abraisson knocking off the skin on the left side of the neck.

Q Did you see evidences of those injuries yourself? A I did.

Q Did she make any other complaint to you in respect to pain or sleeplessness? A That I don't remember.

30 Q Was this injury one such as you would expect pain to result therefrom? A Considerable pain, yes.

Q Were the injuries such as to cause her sleeplessness? A I think they probably would, yes.

Q I understood that you gave your testimony that any data from which you refreshed your recollection was only with respect to your own treatment and not to someone else's? A Yes.

40

James P. Morrill, re-cross.

Re-cross examination by Mr. Kalisch.

Q After the fracture was reduced and the arm placed as you describe you had it placed, that reduced the pain a great deal, didn't it? A Yes.

10 Q So that from that time on there should not have been much pain in regard to the fractured arm? A I wouldn't say that by any means.

Q It would be reduced a great deal? A Yes, it would be reduced a large amount.

Q After the callus had formed it would be still further reduced, wouldn't it? A That is a thing you cannot say.

20 Q Well, from your experience in these cases after there is healing and the callus thrown about the site of the fracture, the pain is greatly reduced, isn't it, when it once heals? A Ordinarily, you expect it to heal, but there are very many things that may enter into that so that you cannot say positively.

Q This woman has never come to you before the trial of this case to be examined again, has she? A No.

30 Q You were not asked to make a further examination today before she testified to see what her present condition is, were you? A No.

Mr. Weinberger: I offer the X-ray film in evidence.

Mr. Kalisch: I object unless the whole record goes in.

Mr. Weinberg: I am only offering the X-ray.

40

Isaac Baltar, direct.

Mr. Kalisch: I object to the X-ray going in, it being part of the hospital record, unless the whole record goes in.

The Court: It is not part of the hospital record, exactly.

10 Mr. Weinberg: I will not press it.
(Argument.)

Mr. Kalisch: I withdraw the objection and consent to the X-ray going in.

(X-ray film is marked Ex. P. 1.)

ISAAC BALTAR, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

20 Q Where do you live? A Paterson.

Q Where did you live in September, 1924?
A Paterson.

Q What is your business? A Poultry line.

Q Was that your line on September 17, 1924?
A Yes, sir.

Q Were you in business for yourself? A Yes, sir.

30 Q Did you own and drive a truck? A Yes, sir.

Q Were you driving a truck along Lexington avenue at the time the accident occurred? A I was going to Hoboken with chickens.

Q You were coming from Paterson? A Yes, sir.

Q Going where? A To Passaic.

Q Do you know the name of the roadway that skirts the westerly side of the Passaic River; what is that road called? A I don't know exactly, the road what they call it, but River Road.

40

Isaac Baltar, direct.

Q That is, this road here (indicating)? A Yes, sir.

Q Were you in the neighborhood of a certain excavation on September 17, 1924? A I don't understand.

10 Q Did you see an accident on September 17, 1924? A Yes, sir.

Q Where were you at the time? A Right behind the truck, behind the Ford truck.

Q You were going in the same direction?
A As the truck was, yes.

Q For how long a distance could you keep behind that truck? A I was about fifteen feet away from the truck.

Q You were fifteen feet which way, behind it? A Yes, sir.

20 Q For how long a distance had you been following that truck, if you had been following it?
A I will tell you; he had a lighter truck than mine. My truck was heavier, and he beat me out, away behind, before they ever stopped.

Q Where was it when you first noticed it? A It was coming just right where they were putting sewers in.

Q Is that where he was when you first saw him? A Yes.

30 Q What were you driving? A A big Commerce truck.

Q Did he pass you at some point on that road? A He passed me before we got there, but I was following him up.

Q How fast were you going? A We were going about fifteen to eighteen miles an hour; we couldn't go very fast.

Q How fast were you going? A Not so fast, because he was only fifteen feet away from me.

40 Q What side of the road were you driving on? A The right-hand side.

Isaac Baltar, direct.

Q What side of the road was he driving on?

A The same side.

Q When you say the right-hand side of the road, how far over on that road do you mean?

A The State road.

10 Q How far over on the right-hand side was he? A He was driving on the right alongside of that soft ground; there is no sidewalks there.

Q What is your idea of the width of that road at that point? A Well, the road is a very wide road, and the only thing I seen—

Q I am not asking you what you saw. What is your idea of the width of the roadway—the roadway itself? A The road is wide enough to go through with two trucks, but they took away some room by digging it, but when they are not
20 digging it there is enough room for two trucks.

Q Did you notice this excavation that was on your left-hand side? A Yes, sir.

Q As you were going towards Passaic? A Yes, sir.

Q Did you see the accident itself? A Yes, sir.

30 Q Where was the Bergman truck at the time of the collision? A It was passing. I couldn't tell you exactly, passing that steam engine there, and all of a sudden I seen a car shoot out from behind that steam engine right into the front of his cab and it locked the two together; it locked right into him and locked him together. Of course, I was close to him and I stopped, and when I stopped I jumped off the truck and ran over to the cab and the only thing I heard was, "My mother is dead, save her." I said, "Don't get excited." She wasn't screaming at all, and there was nothing but blood on her face and that
40 front windshield had crashed right into her; it

Isaac Baltar, direct.

kept away from him. That corner of the windshield was crashed into her. We took her out of the cab and he was hollering and didn't know what to do, and there was a lot of people helped us, and some man came over with a Ford coupe and rushed him right back and they grabbed
10 ahold of her and rushed her to the hospital, and he went right back, turned around and went back towards Passaic and I was left there trying to get the cars apart and I couldn't get them apart and the man who ran into that flivver disappeared for a moment, and he came back again and he was trying to get some witnesses there.

Q Did you see this car before the collision?

A Yes, I could see it from in front, but it came in crosswise like; I didn't know what to figure, either the man lost control of the car.
20

Mr. Kalisch: I object to that and ask that it be stricken out.

The Court: Strike it out.

Q Did you see the defendant's automobile before he hit? A Yes, sir.

Q When you first saw him what was he doing? A He was driving on the road but he came out so fast from that right-hand side.
30

Q Then, I will put it this way. How far away from Bergman's car was Mr. Ginsburg's car when you first saw it? A It was on the right-hand side.

Q How far away? A I couldn't tell you exactly.

Q Was it far enough away for you to form any estimate as to how fast he was going? A I couldn't give you an estimate of how fast he was going, because if I was to follow him up I could see how fast he went.
40

Isaac Baltar, cross.

Q Can you say whether he was going faster than the Bergman car? A He was going faster enough; he hit an awful big shot on the Ford.

Q I will press this question. Was he going faster or slower than the Bergman car? A Faster, because I followed up the Ford and it wasn't going so fast. 10

Q What sort of a crash was it, did it make a noise? A He ran into the front, the front wheels were locked in the front; I couldn't tell you which wheels, whether the right or left, but the car was locked in and we couldn't break them apart.

Q Who tried to break them apart? A It took a few men to get them apart. I was supposed to go through, but it was a long time before we got them apart. 20

Q Who did get them apart? A There was about fifteen or twenty men altogether there.

Q Did the wrecking machine come there before you left? A I didn't see the wrecker. We had to get a truck to pull them apart.

Q Where were these cars up to the time when you left there? A We took them apart and put the big touring car on the side and I drove ahead.

Q Did you notice what kind of a car it was? A It was a big touring car with dealer's license on it. 30

Q You went on then on your business to Passaic? A Yes, sir.

Cross examination by Mr. Kalisch.

Q You say two men tried to separate the cars and could not? A Yes.

Q You were supposed to go through there? A Yes. 40

Isaac Baltar, cross.

Q Wasn't there room enough for you to go through on that road? A No.

Q There was not? A No.

Q Did you hear the first witness on the stand this morning, Boris? A Yes.

Q You still say there was not enough room for you to go through? A Yes. 10

Q How long did it take you to get up to the point of the accident after it happened? A What point of the accident?

Q You say you saw the accident? A It did not take me three minutes; I was right behind him.

Q About two or three minutes? A Yes.

Q Are you sure of that? A Yes.

Q When you say a minute or two minutes you mean sixty seconds for each minute? A It took me about three minutes to get there. 20

Q It was more than sixty seconds? A More or less.

Q What? A I couldn't tell you.

Q You said three minutes, what do you mean by that? A When a man is away from a car about fifteen feet it takes more than three minutes.

Q What? A I say when a man is away from a car about fifteen feet it takes more than three minutes to go over. 30

Q When you say two or three minutes how much time do you mean? Can you show us by clapping your hands and then clapping them a second time to show how long it took you? A To get over to that car?

Q Yes. A I am telling you.

Q How long? A About three minutes to jump off the truck and go over to the cab.

Q Do you mean sixty seconds to each minute? A I don't know the seconds. 40

Isaac Baltar, cross.

Q Do you know how many seconds there are in a minute? A How many seconds?

Q Yes. A No.

Q Do you know how many minutes there are in an hour? A No.

10 Q Assuming there are sixty seconds in a minute, how many minutes would it take you to go from where you were when you saw the accident up to the place where the accident was? Do you still say two or three minutes? A I didn't look at a clock, how many minutes. The minute I see the collision I went right off the truck and helped.

Q You say it took two or three minutes? A Well—

20 Q Now, I ask you if there are sixty seconds in a minute, can you tell us how many minutes it took you to go from where you were when you saw the accident up to the accident? A I was getting off the truck and went over to that other place.

Q Weren't you moving when the accident happened? A Moving where?

30 Q Was your automobile stopped or moving when the accident happened? A After the accident happened. After the accident happened I come close to that car there.

Q I say, was your automobile stopped or moving after the accident happened? A Yes, sir.

Q How long did it continue to move before you got to the accident? A I couldn't tell you exactly how many minutes or how many hours. I just told you it happened. I couldn't tell you any different.

40 Q Can you show us by going this way (indicating) when the accident happened, and going like this again (indicating) when you got up to the

Isaac Baltar, cross.

place where the accident happened? I mean by slapping your hands. A I couldn't tell you exactly how many hours it took me to get over there. I am just telling you when you asked me a question I was right behind that place when it happened, and it took me three or four minutes to get off the truck and I couldn't tell you any more. 10

Q Please, if you can remember actually how long it took, strike your hands together when you saw the accident and then strike your hands again to show how long a time it took you to get up to where the accident happened? A It just took me a few minutes to jump off the truck and run over.

Q Won't you do that with your hands as I asked you? 20

Mr. Weinberg: This witness has no idea of the time. He says he jumped off the truck and ran over to the Ford; he says he does not know what a minute is.

Q You do not want to show us by clapping your hands how long it took you? A It took me—

30 Q I am asking you do you want to show us by clapping your hands how long it took you from the time you saw the accident up to the time when you got to the accident. Do you want to do it or don't you? A I am telling the truth. There is no use clapping my hands.

Q You want it to stand as three or four minutes? A I came right over.

Q Now, sixty seconds long each minute—

The Court: We have had that. I am cutting in with the thought that if you asked me 40

Isaac Baltar, cross.

the same question so many times it would get a little monotonous.

Mr. Kalisch: I except to your Honor's remarks.

Exception noted as ground of appeal.

10 Q Do you know what fifteen feet is? A Yes, sir.

Q Show me. A From here to that fence there; further than that.

Q Further than the fence? A Yes, that is fifteen feet to that fence there.

Q Did you put your brakes on right away? A Yes, sir.

Q As soon as you saw the accident? A Yes, sir.

20 Q That is right? A Yes, sir.

Q Did it take you the fifteen feet to stop your car? A I drove right over there and stopped it.

Q It took you fifteen feet to stop your car?

Mr. Weinburg: I object.

The Court: I will admit it.

Q (Question read.) A No, I just pulled right over close to it.

30 Q As a matter of fact you were way down the road in back of them when the accident happened and it took you three or four minutes to get up to where the accident happened, isn't that so? A Maybe it took three or four minutes, I don't know exactly, but the way I figured it it didn't take me more than three minutes to jump right off the truck.

Q Had you been catching up to the Ford yet or had the Ford car been getting away from you? A The Ford car is driving ahead of me

40

Isaac Baltar, cross.

and I was driving behind him, not very fast, just neutral, about fifteen to eighteen miles an hour.

Q How many miles had you been doing that?

A Not far.

Q How far? A A few miles; before I come over to that building there.

10

Q So you were driving a couple of miles right in back of the Ford, fifteen feet in back of him?

A Yes.

Q You were in no hurry to get to Hoboken with your chickens, were you? A No.

Q You were driving further over to the right-hand side of the road than the Ford, or was the Ford further over to the right-hand side of the road than you? A You cannot drive any further, because if you get off on the road it is all soft road.

20

Q Please answer the question. Were you closer to the right side of the road than the Ford or was the Ford closer to the right side than you? A We both were about the same, driving.

Q How far down the street was the Stearns-Knight automobile when you first saw it? How far on the other side of the steam-shovel? A It wasn't far from the steam-shovel.

Q It was not far? A No.

30

Q How far was the Ford car from the steam-shovel when you first saw the Stearns-Knight car? A The steam-shovel was on that side (indicating) and we drove on the right-hand side and then finished by the steam-shovel when they come together; by the steam-shovel the accident happened.

Q How far was the Ford car from the Stearns-Knight car when you first saw the Stearns-Knight automobile? A It was not far, just across that road; as wide as that road was.

40

Isaac Baltar, cross.

Q Can you point to anything in the court room which you think will show the distance between the Stearns-Knight car and the Ford car when you first saw the Stearns-Knight car? A I couldn't tell you in feet.

10 Q Point to something from where you are sitting ahead of you that shows that distance? A Here is the road where the steam-shovel is standing (indicating) and he came right out from behind the steam-shovel, right into that Ford across the road.

Q Then both cars were very close to the steam-shovel when you first saw the Stearns-Knight car? A Yes, but this guy was behind the steam shovel.

20 Q The steam-shovel stuck out into the street, did it? A No, it stood ahead in the lot where they were putting the sewer in.

Q So, at first you did not see him because as you looked down the road the steam-shovel blocked your view? A No, the road was open.

Q What was there in front of you that stopped you from seeing him before he came there by the steam-shovel? A I didn't watch the man coming over, but when I was right behind him I saw him coming out and cross into me.

30 Q Coming out what way? A From the right-hand side to the left-hand side of the road from behind the steam-shovel.

Q From behind the steam-shovel? A He was away from the steam-shovel.

Q Isn't there a curve in that road? A No.

40 Q There isn't a curve just beyond that steam-shovel, on the southerly side of the steam-shovel from where you were driving, a little curve towards the left? A There is no curve there as far as I can see.

Morris S. Joelson, direct.

MORRIS S. JOELSON, sworn in behalf of the plaintiff.

Direct examination by Mr. Weinberg.

Q How long have you been practicing medicine? A Twenty-one years. 10

Q Where do you keep your office? A Paterson, New Jersey.

Q Do you specialize in any particular branch? A Obstetrics, but a general practice as well.

Q Are you connected with any institutions? A The Paterson Hospital.

Q Paterson? A Yes, sir.

Q You were practicing medicine in September, 1924, in Paterson? A Yes. 20

Q Can you tell us whether Mrs. Ida Bergman ever became a patient of yours as the result of some injuries she sustained? A Yes.

Q Tell us when you first attended her? A The day after she came back from the hospital, which was on September 26th; I saw her on September 27, 1924.

Q Did you know her before that time? A I did, yes.

Q Did you ever attend the family? A Yes, a number of years. 30

Q You knew them for some time and knew whom she was? A Yes.

Q When she came back from the hospital she called you to attend her? A Yes.

Q Do you recall whether you made an examination of Mrs. Bergman when you first saw her and what you discovered? A Yes, when I first came over there her right arm was in an extension splint and she had a cut on the upper lip 40

Morris S. Joelson, direct.

and a bruise on the neck and the legs were swollen.

Q Where was she at that time? A At her home in bed.

Q In bed? A Yes, sir.

10 Q Did you prescribe anything for her at that time? A Well, I dressed her wounds and prescribed something for her nerves and pain; she had excruciating pain in the arm and I believe the hip.

Q What was the matter with her nerves?

Mr. Kalisch: I object on the ground the bill of particulars or the complaint does not set forth a claim for nerve disorders and I am surprised if they attempt to prove it.

20 The Court: I will admit the question.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q What was the matter with her nerves? A Well, as the result of this accident—

Mr. Kalisch: May I at this time have an objection noted on the record in connection with any further questions in regard to nervous conditions?

30 The Court: No; you had better object to each question as it is asked.

Mr. Kalisch: Then I will object to this question on the same grounds.

The Court: I have ruled that it may be answered.

Defendant's counsel prays an exception to this ruling of the Court.

40 Exception noted as ground of appeal.

Morris S. Joelson, direct.

Q (Question read.) A As the result of her excruciating pain she was unable to sleep and very excited as the result of that.

Q While on that subject can you tell us anything with respect to the condition of her nerves before the accident when you saw her?

10

Mr. Kalisch: I object on the same grounds.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A Before that she was perfectly all right, as far as I knew.

Q How well did you know the plaintiff before the accident? A I knew her very well; I have been treating those people for a number of years, and children; some of her children.

20

Q That was some time back? A Yes.

Q Now, we will go on with the general examination. You say you treated her for nerves and what else? A Fractured arm and lacerations, and she developed septic abscesses over her body as the result of either the wounds or the fracture she had.

30

Q Where were they? A They were scattered over the body. I do not recall exactly where they were.

Q What was that due to? A Absorption of some of the toxic due to the lacerations she had.

Q Did you find any evidence of any toxemia in the arm? A That arm was swollen and painful to touch and she has quite a laceration on the back of the shoulder blade which had to be dressed every day.

40

Morris S. Joelson, direct.

Q (By the Court.) What was that? A She had a laceration of the shoulder blade or back of the arm.

Q (By Mr. Weinberg.) Can you tell us whether there was any festering of those wounds?

A That is what I mean.

10 Q Of these particular wounds in the arm? A In the arm?

Q Yes. A That was the one right on the shoulder blade, back of the arm; she held her arm up like that and there was quite a laceration on the back of her there, right over the shoulder blade.

Q When after the first time you examined her did you again see her? A I saw her every day for about two months.

20 Q What did you do for her during that period? A Dressed her wounds and her legs had to be massaged due to the swelling, and she had phlebitis of both legs; that is the tying up of the veins due to an injury.

Q Did she suffer any pain at the time? A Yes, excruciating pain; I had to go there during the night sometimes.

Q Did I understand you to say that you had to prescribe for sleeplessness? A Yes.

30 Q Did she complain of that? A Yes.

Q During the two months you treated her where was she? A What do you mean?

Q I mean was she at home or did you treat her at your office? A That was after she went about I treated her in the office; she comes occasionally now.

Q How long did you treat her at home? A About two months at home.

40 Q Then, after she left her home did you continue to treat her? A After she left her home I

Morris S. Joelson, direct.

thought her daughter took her over to Newark and then occasionally she came down to the office.

Q Now? A I don't know.

Q How often did she come to your office after you stopped treating her at her home? A About once a week and then every two, three or four weeks.

10 Q When did you last see her? A About a couple of months ago.

Q Did you make an examination of her? A Yes.

Q Tell us what you found from that examination. A She is still unable to function with that arm.

Q What? A She is still unable to use that arm properly.

Q What is the trouble with it? A She has a little ankylosis of the right shoulder; that is a stiffening of that shoulder.

Q Can you tell us what causes that ankylosis? A That is due to the fracture; the fracture extended almost up to the joint.

Q Will you tell us just what occurred to that arm to cause this ankylosis? A It is a very long, irregular fracture which extends away up near the end of the bone, and in this case a good deal of inflammation exists which inflames the capsule of the joint and as a result they get ankylosis.

30 Q Did that actually occur here? A Yes.

Q To what extent is motion in that arm restricted? A How is that?

Q To what extent would you say the motion in her arm is restricted? Not percentage; just show us. A Why, just about that much (indicating). In other words, she tells me she has pain when she moves her arm.

Morris S. Joelson, direct.

Q Do you find any reason for the existence of any pain? A Yes, the ankylosis causes her pain.

Q Is that what you expect to find as the result of that condition, pain? Can you say anything with respect to the future of that arm considering the length of time that has elapsed since the accident? A I do not think she will ever have any perfect function in that arm.

Q What amount of restriction is there now? A About twenty-five per cent.

Q You do not think she will ever recover back that lost motion A No.

Q What is there that causes this ankylosis? A Probably a fibrous condition or the hardening of that capsule.

Q Have you ever seen this arm under an X-ray? A Not since the last one.

Q Can you read and interpret X-ray films? A Well, pretty well.

Q Have you done that often? A Well, in my own cases.

Q In this particular case? Look at that and tell the Court and jury whether you can see that?

A Oh, yes, sure. This is an irregular fracture, longitudinal and transverse, of the upper third of the humerus, which runs away up nearly to the joint.

Q Is that the fracture which in your opinion has caused the ankylosis? A Yes, sir.

Q This nerve condition, when did you treat her for that?

Mr. Kalisch: I object to that on the ground that neither the complaint nor the answer to the bill of particulars indicates any claim of a condition arising as the re-

40

Morris S. Joelson, direct.

sult of an accident for nervousness by an aggravation of a previous condition of nerves and I plead surprise.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

10

Q Have you? A Since the accident?

Q Yes. A Yes.

Mr. Kalisch: I object on the same ground.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

20

A Since the accident.

Q That means up to when?

Mr. Kalisch: I make the same objection.

The Court: The question will be admitted.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

30

A Up until a little while ago she was down at my office.

Q Tell us about the injury to the mouth a little more. A She had a little laceration of her upper lip on the left side.

Q Can you tell us anything about whether she had teeth or false teeth in her mouth when you saw her first? A Whether she had false teeth at that time?

40

Morris S. Joelson, direct.

Q Yes. A I believe she did.

Q Did you notice whether they were broken or not? A That I don't recall.

Q Have you received payment for any of the services rendered by you? A No, sir.

10 Q Can you tell us what is the reasonable value of the services performed by you since the 17th of September, 1924, and which concerned simply these injuries and the result thereof? A I don't recall exactly.

Mr. Kalisch: If he has a record let him produce it.

Q Have you the record? A I didn't bring it with me.

20 Mr. Kalisch: I object then.

Q Aside from your record, can you tell us what the reasonable value was for the services rendered by you? I am not asking you in regard to any bill you rendered; I want you to tell the Court and jury what in your opinion is the reasonable value of the services you rendered to Mrs. Bergman.

30 Mr. Kalisch: I object.

The Court: I will admit it.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

A \$200.

40

Morris S. Joelson, cross.

Cross examination by Mr. Kalisch.

Q Haven't you any records? A I haven't them here. She used to receive the bills as we went along, but she told me to wait until this case is over, so I haven't sent any bill after that.

Q Did she owe you a bill previous to the accident? A No, not previous. 10

Q Have you treated her for anything else other than the conditions that you claim arose from the accident? A You mean since the accident?

Q Yes. A No.

Q You knew you were going to testify today, didn't you? A I knew.

Q Weren't you told to bring your records with you in this case? A My office is apart from my records, and I forgot to take them. 20

Q Your records would show exactly what treatments you rendered, wouldn't them? A Apparently; not office work or anything like that; just charging.

Q Each day would indicate whether there was a charge made against her for treatment? A Yes.

Q It would also show the length of time between each treatment, wouldn't it? A Yes. 30

Q Those records are clear and more accurate as to the exact time between each visit? A Yes.

Q Than your recollection of it is today, aren't they? A Of course, to the charges, yes.

Q More accurate, isn't it? A I don't know how accurate it would be, but I have—

Q You do not know how accurate your records would be? A My records are accurate.

Q You have a lot of patients, haven't you? A Yes. 40

Morris S. Joelson, cross.

Q So your records in the office would show the number of visits and the length of time between each visit better than your recollection?

A Yes.

Q As a matter of fact, you cannot tell us the number of visits without referring to your records? A I am telling you how many visits she made.

Q You cannot tell us how many visits you made to her without referring to the records? A I testified before, over two months.

Q As far as that is concerned, you cannot tell us accurately? A No.

Q Your record would also show exactly how long ago was the last time you treated her? A Yes.

Q Who was the one who told you to come down here today to testify? A This gentleman there (indicating).

Q When did he tell you? A This gentleman was in to see me yesterday.

Q Where did he see you? A Saw me at my office, at which time I took the record out, but I did not bring it.

Q Didn't he tell you for the purpose of testifying in this case you should bring your records with you? A No.

Q Were you given a subpoena to come? A He put a subpoena there, but I did not take it.

Q You did not take the subpoena? A No.

Q Wasn't there on the subpoena, at the end of it, an instruction that you bring with you all your records in connection with your treatment of this woman? A I did not see it.

Q Or didn't you take it because you were a friend of hers for a long period of time? A I did not take it so that I could not be obligated

Morris S. Joelson, cross.

by law if I was busy. I am due back at 12:30 to operate.

Q You are here without any payment for your services today? A I expect to be paid.

Q Paid your bill that is owing or paid also for your appearance today? A If I get paid for my appearance, well and good.

Q If you do not, well and good? A That is a chance I take; very seldom I do get paid for testifying.

Q When was the last time you rendered a bill for services to this woman? A It is quite a long time.

Q You recall you did render one, don't you? A Oh, yes, the bills go out through the office by the girl.

Q Monthly, or at the end of the treatment? A No; probably every three, or four, or five, or six months.

Q You treated her for two months every day and finished with her? A I was not finished.

Q Your record will show when the bill was rendered? A My record will show, yes.

Q Then, your record will also show how many times that bill was rendered and whether you gave further treatments, wouldn't it? A Yes.

Q Do you recall how much the bill was you rendered to them? A The rendered bill I think was \$92 I have this gentleman.

Mr. Kalisch: Do you mind producing the bill, Mr. Weinberg?

Mr. Weinberg: Yes, here it is.

Q Is that the bill with the amount of \$92 you testified to? A This is January 27, 1926, two years later.

Morris S. Joelson, re-direct.

Q So, that is the end of your treatment, isn't it? A That is the bill that went out at that time.

Q You testified a moment ago that you did not render a bill until you finished with the treatment of the woman. A I didn't say that.

10 Q I say that you said when you finished with the treatment of the patient you rendered your bill. Didn't you say that? A No.

Q Why did you render the bill? A It was requested that I render a bill.

Q Who? A The attorney.

Q Did you consult your records when you rendered that bill? A Yes.

Q After you rendered the bill January 27, 1926, you said you never rendered another bill after that? A Because I was told to wait because the woman was unable to pay the bill.

20 Q The bill was not paid, was it? A No, but that was given to the attorneys for their information.

Q Or was it given for the purpose of introduction into this record without your records? A No.

Mr. Kalisch: I have no objection to the bill.

30 *Re-direct examination* by Mr. Weinberg.

Q This bill of January 27, 1926, was made up as the result of what appeared on your records? A Yes, up to that time.

Q The amount she incurred up to that time? A Yes.

Mr. Weinberg: I offer this bill in evidence.

40

James P. Morrill, direct.

Mr. Kalisch: No objection.
(Same is marked Exhibit P. 2.)

Q Can you tell us what the reasonable value of the services were that you rendered this woman since January 27, 1926?

10

Mr. Kalisch: I object.

A I cannot tell.

Q Can you approximate it? A I can.

Q Can you tell us what if any services you rendered since January 26th? A Just coming down and prescribing something for her nervous condition.

Q Is there anything you can do for this arm? A Just massage it. We could operate, but I wouldn't say that she would get any good results.

20

Q That is the only thing you recommend, massage? A Yes.

Re-cross examination by Mr. Kalisch.

Q You said that you were a general practitioner and obstetrician? A Yes, sir.

30

JAMES P. MORRILL, recalled in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q Did you examine the plaintiff, Mrs. Bergman, here this morning, a little while ago? A I did, yes.

Q After you left the stand on your first examination here? A Yes.

40

James P. Morrill, direct.

Q Tell us what examination you made and what you found, if anything?

Mr. Kalisch: I object to the form of the question unless the question includes the objective symptoms and not from any complaint the woman made. 10

The Court: Sustain the objection.

Q What did your examination disclose? A She removed her dress enough to see her shoulder and back. It shows beneath the armpit here (indicating) a little scar about three inches long, which apparently is the result of a laceration or infection, or at least some wound of the skin. The function of the arm, to my mind, is good. 20

Q Are there any restrictions? A I do not think there is.

Q Did you try it? A I did.

Q What did you do? A I raised her shoulder and moved it in abduction, forward and back, upward and backward.

Q How far did you raise it? A I raised it above the right angle of the body.

Q Did you try to get her hand back to her head? A I did, yes. 30

Q Were you able to do that? A She would not do that.

Q Why? A I don't know.

Q Did she exhibit any pain? A She said it hurt her.

Q Do you know whether that is so or not? A That depends on the patient, that is a thing I couldn't say.

Q At any rate you did not get the arm back above the head? A Not above the head. 40

James P. Morrill, cross.

Q How far did you raise the arm? A I raised it at least ten degrees above right angles, taking a right angle from the body as about as far as it would normally go.

Q You raised it about at the angle you just described? A About ten degrees above a right angle from the body, that is as far as it will go. 10

Cross examination by Mr. Kalisch.

Q Did you find any ankylosis? A I don't think I did.

Q Do you find any condition present objectively which would indicate to your expert mind that you saw any reason why this woman could not use that arm normally? A Objectively, no, I do not think you can tell. 20

Q Was Dr. Joelson there? A No, sir.

Q Did you disclose to him your finding? A No, sir.

Q Was there anything at all in your examination of this woman which indicated to you with your expert knowledge that there was anything wrong with the arm? A I think any arm as badly injured as hers is never as good as it was before.

Q You found no ankylosis? A No. 30

Q You said you thought the arm was very good? A Very good.

Q Did you find as much as twenty-five per cent. loss of use of that arm objectively from your examination? A That is a very hard figure to give. I think anyone who has had as bad an injury as this has a certain percentage of disability, whether it is ten or twenty-five per cent. is a matter of expert opinion. I wouldn't say so.

Q You say also that your manipulation of the arm was about ten degrees above at right angles 40

James P. Morrill, re-direct.

to the body which is as high as a person normally can raise it? A I think it is, yes. I mean that the arm held in this position (indicating) when you hold your arm this way you find you can go no further. If you do the rest you will rotate the shoulder.

10 Q Did she rotate her shoulder? A No.

Q Did you try that motion that is usually adopted in the examination of an arm for the purpose of determining the condition of that arm? A I may have done that, but I didn't try that examination. I asked her to do it for me, and she refused to do it.

Q She did not try to do it? A I don't know about that.

20 Q You know whether she put her hand up?
A She said she could not do it.

Q In your presence she made no attempt to show her inability to do it? A She said she could not do it.

Re-direct examination by Mr. Weinberg.

Q That is what you mean by she refused?
A Yes.

30 Q You do not know whether it could be done or not? A This portion (indicating), I did not try to rotate the shoulder.

Q That much you could determine yourself, but when you asked her to put her hand up over her head she said she could not do it? A Yes.

40 Q You haven't determined whether she can or cannot. A No, I could not determine that, that is a functional affair, the patient has to do that more or less herself. I asked her if she could remove her hat and she said "No." You see that you would have to rotate the shoulder

Harry Bergman, direct.

to get the hand up there to remove her hat and she said she could not do it.

Q Have you any reason to think she was untruthful about that?

Mr. Kalisch: I object.

The Court: Sustain the objection. 10

At one o'clock P. M. the Court takes a recess of one hour.

—————
AFTER RECESS.

HARRY BERGMAN, sworn in behalf of plaintiff. 20

Direct examination by Mr. Weinberg.

Q On September 17, 1924, I understand you lived in Paterson and that you now live in Newark? A Yes, sir.

Q Your present address is what? A 45 Harding Terrace.

Q What was your business or occupation when you lived in Paterson? A I had a fruit and vegetable store. 30

Q It was in connection with that business that you used this little truck? A Yes, sir.

Q At the time in question, namely, September 17, 1924, where were you going? A I was going to Passaic and then to New York.

Q You had in your car, your mother, the plaintiff? A Yes, sir.

Q She was sitting on the right and you were driving on the left-hand side of the car? A Yes, sir. 40

Harry Bergman, direct.

Q In coming along the main road in Paterson, after leaving the city, it is called Lexington avenue. How were you driving? A I was driving on the right-hand side of the road.

10 Q Do you know what we have been referring to here as the excavation for sewer pipes on Lexington avenue? A I don't know what they were doing there, but I know there was an opening there surrounded by parts.

Q You know there was something going on in the street? A Yes, sir.

Q On what side of the road was that? A The left-hand side from Paterson going to Passaic.

20 Q As you approached the immediate neighborhood where this excavation was on what side of the road were you? A To the extreme right-hand side.

Q What was then to the right-hand side of you, if anything? A Well, there was supposed to be a sidewalk, but there wasn't any sidewalk, just dirt there.

30 Q As you were approaching this locality where this excavation was, what would you say your rate of speed was? A Well, I was going about eighteen miles an hour and when I reached this, when I saw I was about—

Q Wait a minute. What sort of a day was it? A It was a nice summer day.

Q Did you notice this apparatus called the steam-shovel? A I didn't notice it, I seen something sticking above on the other side, but what it was I don't know.

40 Q It was on the far side when you were approaching? A Yes.

Harry Bergman, direct.

Q Did you notice this excavation was surrounded by boards or planking? A Yes, sir, I did.

Q Your car came into collision with another car, did it? A Yes.

10 Q Where was your car at the time of the collision? A It was on the right-hand side of the road.

Q With respect to that steam-shovel where was it? A Well, it was a little bit, it was to my right by the steam-shovel, the exact spot I don't recall.

Q It was about where the steam-shovel was? A Yes, sir.

Q Only the steam-shovel was on the other side of the road? A Yes, sir.

20 Q Where did this car come from that collided with your car? A It was coming down on the right-hand side of the road, that is on my right-hand, that would be the other driver's left-hand side.

Q When was it on the left-hand side, when did it get there? A Well, I seen him for quite a distance.

30 Q What side of the road was it on when you first saw him? A When I first saw him it was on the right-hand side.

Q His right or yours? A My right.

Q Then, what happened from then on? A I was driving along and I knew there was enough room to pass there for two cars and as I was going through there all of a sudden I was hit, never expecting him to run into me, and I was on the extreme right and he had plenty of room to pass.

40 Q What part of your car was hit? A The front.

Harry Bergman, direct.

Q What part of the front? A It was smashed right into the radiator, the fender, and windshield was broken and it came right in.

Q How about the car that hit you? A I don't know anything about that car.

10 Q Did you notice what damage was done to that car or not? A I did not.

Q You were— A I was all excited and my mother was half in the car and half out of the car.

Q You gave your attention to your mother? A Yes, practically all my attention to my mother. I didn't think anything about the car after that.

Q What was your mother's position at that time? A More dead than anything.

20 Q Describe her appearance. How did she look? A To tell you the truth I know there was blood coming from her face and that she was in a fainting condition and about the arm or anything I couldn't say what it was, I don't know.

Q Then, your mother was removed from the place of the accident in whose car, what car?

A Why, I don't know whose car it was.

30 Q Well, some car? A It was a Ford, I remember, I think it was a coupe and then came along the emergency wagon from the Clifton police station, and we switched her over into that car because there was more room and she could lie down and then they took us to St. Joseph's Hospital.

Q Were you living home with your mother at that time? A I was.

40 Q How long after your mother went to the hospital was it she was brought back to the house? A How long?

Harry Bergman, direct.

Q Yes. A About nine or ten days and she went home on her own consent, that is, because she wanted to see the children.

Mr. Kalisch: I object to that and ask that it be stricken out.

The Court: Strike it out.

10

Q She got home nine or ten days after the accident? A Yes, sir.

Q After the accident where was she? A She was home in bed.

Q How long do you think she remained home in bed? A She remained home in bed about two or three months; I couldn't exactly remember how long; it is a pretty long time since it happened.

20

Q During that time by whom was she treated? A Dr. Joelson.

Q How often did Dr. Joelson come? A I know he used to come once a day, but whether more than that I don't know, because I was busy in the store.

Q Where was the store? A It was located at 7 something; I don't know exactly, but between Park avenue and Fifteenth avenue in Paterson on East Twenty-fourth street.

30

Q After your mother was able to leave the house how did she get around? A After she left the house?

Q Yes. A She could not walk so well, and couldn't work the way she used to. Before she used to help me in the business every day and ever since then she couldn't do anything; she simply could not do hardly anything.

Q When did you leave Paterson? A About four months after the accident.

40

Harry Bergman, direct.

Q Did she break up house? A Yes.

Q She is now living with whom? A One of my married sisters.

Q In Newark? A Yes, sir.

Q Do you live with your mother now? A Yes, sir.

10 Q Do you sleep in the same house she sleeps in? A Yes, sir.

Q Can you tell us anything about her condition in that respect, whether she sleeps all night, if you know?

Mr. Kalisch: I object.

Mr. Kalisch: Withdraw the objection.

20 Q (Question read.) A You mean at the present time?

Q Following the accident. A There are many nights she is up on account of being very nervous.

Mr. Kalisch: I move that that be stricken out.

Mr. Weinberg: Strike out "On account of being very nervous."

30 Q She is up many a night? A Yes, sir.

Q How do you know that? A There are many nights I hear her walking around and I come down to see what is the trouble with her and she tells me—

Q No, just what you saw. Before the accident did she ever have anything like that? A No, sir, she used to put in a hard day's work and slept all night long.

Q That is to say, you never saw her walking around at night? A No.

Harry Bergman, cross.

Q You do not know whether she slept or not? A No.

Q Did she at any time go back to work in the business? A She used to come there and stay there, but never did any work, just stayed for a few hours and then went home.

Q How old are you? A Twenty-five.

10

Cross examination by Mr. Kalisch.

Q Where was this Ford automobile when you first saw it? A It was some distance on the opposite side of the excavation from where I was coming from.

Q How far, do you know? A Quite a distance.

Q Don't you know anything more, other than that? A No, sir.

20

Q Was it ten feet, 100 feet, or 200 feet? A I said it was quite a distance; ten feet isn't quite a distance.

Q What do you consider quite a distance? A Well, I consider—I can't tell you the exact amount or about, I know it was quite a distance.

Q What do you mean by that? Haven't you any idea what you mean when you told us quite a distance? A Quite a distance can mean two blocks, and it can mean one hundred blocks.

30

Q Quite a distance is smaller than the distance of two blocks? A Why, no.

Q What would be a smaller distance when you say quite a distance? A What do I mean what?

Q (Question read.) A When I say quite a distance, when I say from where I saw him it was about say, about one hundred feet from the excavation more or less; I don't know exactly.

40

Harry Bergman, cross.

Q It wouldn't be much more or less, would it? A I don't know.

Q You haven't a very clear idea how far away it was, have you? A If you are driving a car—

10 Mr. Kalisch: I ask that that be stricken out.

The Court: Strike it out.

Q You haven't a very clear idea how far it was from that intersection, have you? A I was?

Q He, not you? A The exact amount I couldn't tell you.

20 Q Can you tell me how far away you were from this shovel when you saw him quite a distance on the other side of it? A I was about forty to fifty feet from the excavation.

Q Was it as far away from it on the other side as you were? A It was a little further, if I remember right.

Q You were going pretty slowly, weren't you? A Eighteen miles an hour.

Q You kept on the same course as you had started, on the right-hand side of the street? A I didn't quite get that.

30 Q You still kept on the right-hand side of the street after you saw him? A Yes.

Q When he got opposite the steam-shovel the other car suddenly locked itself with its front left into your front left? A I wouldn't say whether they were locked or not, I know I was hit, and after that I didn't give a darn any more because my mother was in a critical condition.

40 Q You do not know what part struck you then, do you? A The front part struck me.

Harry Bergman, cross.

Q You do not know what part of your car struck? A The front part.

Q His front part struck? A I don't know; my front part struck the car.

Q You do not know what part of his car struck you at all? A His front hit me.

10 Q You do not know how far his car was away from the steam-shovel, do you, when you were struck? A How far his car was from the steam-shovel?

Q Yes. A You mean after the accident occurred?

Q I said when the two cars struck. A It was about where the steam-shovel was.

20 Q Do you know how far to the west of the steam-shovel his right-hand side was, or don't you know? A There was enough room for another car to pass.

Q Between his right side and the steam-shovel? A I don't know; I didn't measure that.

Q Why did you say it if you did not measure it? A If you want to know how much room there was, there was enough room for two cars to pass.

30 Q You mean his car and your car? A Yes, sir.

Q Are you the oldest of the children? A No, sir, my married sister is older.

Q How old is she? A I didn't ask her, I forget.

Q You do not know? A I don't know her exact age.

Q Do you know her approximate age? A About twenty-eight.

40 Q Are you still running this business in Paterson? A No, sir.

Harry Bergman, cross.

Q You sold it? A We sold it.

Q What are you doing now? A Working in Newark.

Q Did you notice the speed of the other car?
A No, sir, I couldn't determine his speed.

10 Q Did you notice how far out from the right side of the road he was traveling when you noticed him? A When I seen him coming he was on my right-hand side.

Q On your right-hand side? A He was on the right-hand side of the road.

Q That would be your left-hand side? A No, he was on the left-hand side there where he was going.

20 Q Wasn't he on your left-hand side as you were driving? A He was on his left side driving, instead of being on the right he was on the left.

Q So he was coming down the road all the time on the wrong side of the street? A From where I saw him.

Q Yet, you continued to go right on towards him? A I continued to go through because there was enough room for two cars to pass.

30 Q In other words, when you saw him coming down on your side or straight towards you you kept right on going at the same rate of speed, didn't you? A Yes, sir.

Q You saw he was not turning out? A Yes.

Q You gambled, of course, that he would turn out? A Why shouldn't I; I was on the right-hand side.

Q Didn't you see this obstruction in the road? A What obstruction?

40 Q The steam-shovel? A He had plenty of room to pass.

Harry Bergman, cross.

Q You took a chance that he was going to change his course? A Any driver would.

Q Do you think so? A Absolutely. If not, he was not fit to drive the car.

Q You did not reduce any at all? A I had to.

10 Q Didn't you say a few moments ago that you continued at the same rate of speed? A Yes, all the way through, but when I got to the excavation I slowed up.

Q Why did you slow up for the excavation?
A Any man would.

Q Why did you, here on the opposite side of the road (indicating), stop for the excavation which was on your left-hand side of the road?
A I didn't stop.

20 Q Why did you slow up? A Because the simple reason the extreme right was not so very good, so I slowed a little to get through better.

Q Wasn't there plenty of space for two cars to go through? A Absolutely so.

Q If there was plenty of space for two cars to go through as you came along at eighteen miles an hour going towards Passaic, what was there in front of you which made you slow up as you passed the steam-shovel? A There was a dirt crown right off the road. 30

Q That is to your right, wasn't it? A That is why I pulled over to the right.

Q The dirt crown was on the right-hand side alongside of you for several miles, wasn't it? A No, sir.

Q Where did it start? A Near the excavation.

40 Q The dirt to your right started near the excavation? A What I mean by the dirt, they let down dirt from taking out the crown.

Harry Bergman, cross.

Q Where was the dirt deposited? A Right opposite the excavation.

Q How far across the road was it deposited?
A Right about there (indicating).

10 Q Was it resting on the dirt of the road? A Some of it.

Q How about the rest of it? A The rest was like the sidewalk.

Q So, the dirt they took out of the excavation to your right, or was some up on the amesite pavement there and was that the reason you slowed up? A I slowed up because the road was not right there.

20 Q Wasn't it smooth amesite all the way along or was there something on the amesite? A There was dirt on the amesite.

Q There was? A Sure, not much.

Q What do you mean, hardly any? A Some.

Q What were you afraid of if you had to slow up for a little dirt on the amesite pavement? A I wasn't afraid of anything.

Q Then why did you slow up? A Can't a man slow up if he wants to?

Q Why? A For no reason at all, I felt like slowing up.

30 Q Is that the way you drive a car? A No, I drive a car the way you should drive an automobile.

Q What was done in connection with the steam-shovel and dirt which suddenly prompted you, as you approached the steam-shovel to slow up your car? A Nothing.

40 Q Wasn't it because the road, by reason of the dirt, and the road by reason of the steam-shovel, reduced the place of passage for automobiles? A No, sir, it was not.

Harry Bergman, cross.

Q You do that driving along and every once in a while you get the idea that you are going to slow up? A If a man wants to slow up he has a right to slow up.

Q When you see a steam-shovel on the street you slow up? A Not all the time, not unless it is necessary. 10

Q What was there about it that made it necessary? A There wasn't anything there.

Q You said you do not slow up when you see a steam-shovel on the road, that it was not necessary. What did you see about it that made it necessary? A I saw another car coming. What do you think I saw?

Q Now, you say you saw another car coming?
A Yes, from a distance. 20

Q There was plenty of room for two cars to pass? A Yes, but why did he slash into me then?

Mr. Kalisch: I move that that be stricken out.

The Court: Strike it out.

Q You said a moment ago that you did not slow up. Do you remember seeing him continue up the same street? A Yes. 30

Q Do you remember saying afterwards as you approached the steam-shovel that you did not slow up? A A little.

Q Do you remember seeing him slow up? A A little.

Q Which did you do, slow up or not? A I slowed up a little as I was passing through there.

Q Had you seen any one around that steam-shovel as you came along that you thought 40

Philip G. Hood, direct.

might step into the street? A There was none there at all; there were people working there, but no one on the road.

Q Was the reason you didn't slow up the fact that you saw people working in and about the steam-shovel who might step out to the road?

10 A I saw people standing on top or the side where the road is.

Q So, it was not because you were afraid someone would cross? A I slowed up on my own account.

Re-direct examination by Mr. Weinberg.

Q At the time when you slowed up where was the defendant's car? A It was coming
20 closer all the time.

Mr. Kalisch: May I put Dr. Hood on for the defendant out of order?

Mr. Weinberg: I have no objection.

The Court: You may.

PHILIP G, HOOD, sworn in behalf of defendant.

30 *Direct examination by Mr. Kalisch.*

Q Dr. Hood, your work is that of a roentgenologist? A Yes, sir.

Q For how many years have you been in this work.

The Court: Gentlemen of the jury, this is a witness for the defendant.

Philip G. Hood, direct.

Q How many years have you been engaged in this work? A Eighteen years.

Q The X-ray machine at your office is what kind? A It is a Waite & Bartlett transformer.

Q Is it a modern X-ray machine? A Yes, sir.

Q Standard make? A Yes, sir, standard
10 make.

Q Before you took up this as a specialty you were a general practitioner, weren't you?

A Yes, sir.

Q When did you become a general practitioner? A 1904.

Q Did you take a picture of Mrs. Bergman's arm? A Yes, sir.

Q I show you an X-ray picture and I ask you whether at Dr. Theodore Teimer's request
20 you made that? A Yes, this is the one (indicating).

Q Do you recall when you took the picture? A I can only tell you that by referring to the envelope.

Q Do you mind doing that? A December 29, 1925.

Q Please tell us whether you took that picture yourself? A Yes.

Q Do you know that to be a picture of Mrs.
30 Bergman's arm? A Yes.

Q Please look at the picture and kindly tell us what it discloses. A Just a picture of the right shoulder taken from before backwards, and it shows an old fracture of the upper third of the humerus or upper arm and it also shows a fracture comminution. The fragments are in good position with firm callus formation which is repair tissue thrown out when a bone has been broken and is healing.
40

Philip G. Hood, cross.

Q It is nature's cement, is it? A Yes, sir.

Q Does the callus remain? A It is smoothed off and partly absorbed so that the bone is smooth again.

Q Now, does that picture disclose any breaking into the shoulder at all?

10 Q Can you tell us how far below the shoulder joint the fragment appears to be according to that picture, approximately? A The fragment is about three inches below the point that you can feel with your finger on the outside of the upper arm.

By the Court.

Q What did you say about the callus? You said the bones were in good position. A There was a callus formation.

By Mr. Kalisch.

Q When you say the parts are in good position what do you mean by that? A I mean the alignment of the fragments is good and that there is no marked, not much, if any, separation of these fragments.

30 Q Between the two fragments, is that the place where you say that is? A The repair tissue has been thrown out.

Mr. Kalisch: I offer this X-ray film in evidence.

Mr. Weinberg: No objection.

(Same is marked Exhibit D. 1.)

Cross examination by Mr. Weinberg.

40 Q When was the picture taken? A December 29, 1925.

Philip G. Hood, cross.

Q Do you see on this picture evidence of a fracture? A Do I see evidence of a fracture?

Q Yes. A Yes, this line here (indicating), is the upper fragment. Then, this is the position of the break, making it a comminuted fracture.

Q Have you any information concerning the condition of this lady other than given you by this picture? A No.

Q You confine it solely to what the picture shows you? A Yes.

Q Is that the exact size of the bone, or is that smaller? A That is approximately the size.

Q I show you Exhibit P. 1 and I ask you if you can recognize that picture as being representative of the condition of the plaintiff's arm? A It is a smaller fracture to the one there.

Q So does the machine sometimes increase the size on the same photograph, or is it always the same? A It depends on the distance of the X-ray tube from the plate.

Q Is there anything here on Exhibit D. 1 to show any separation of the fragment? A No, there is no separation.

Q What is this light line which seems to be running vertically inside the bone (indicating)? A That I find is the continuation of the lower part of the arm, the arm bone structure in distinction from the medullary canal.

Q Where on that picture can you show me the joining of the fracture with the bone? A The fragments are the parts of the bone which has been fractured or broken.

Q Does that bone grow back on to the main bone or is it as Mr. Kalisch suggested cemented by nature on to the main bone. A All frag-

Philip G. Hood, cross.

ments, if they us them are joined into one bony piece.

Q Does it become bone or part callus? A After a time it is all bone. It is calcium while the bone is in callus and then it is bony.

10 Q Would this picture not show if there is any separation? A There is no separation of the fragments.

Q You used the expression "There is not much, if any". Do you mean by that that you cannot tell if there is any separation? A By that I mean the small fragments on the outside of the bone which have been torn off from the main fragments and filled in between it and the main fragments by callus.

20 Q Now, should the line of the humerus on what is the left side as we are looking at it have the protrusion that you find there about an inch below the head of the bone? A No, that should not be.

Q What is that? A That is a fragment that has been broken and has united in that position.

Q Then, it has not united as nature had it originally to the bone? A No, it seldom is that fractures unite that way.

30 Q Strike out that part. I want to know about this in this particular case, the bone not uniting is the sort of an overend that shows an overriding there. A It is not overriding.

Q Is there anything between the upper part of that bone and the upper part of the bone? A Callus.

40 Q It did not then heal so as to leave a perfect line of the arm bone, like this (indicating), but it has healed so that the upper fragment is sticking over the side of that bone? A In this examination.

Philip G. Hood, re-direct.

Q That is what this picture shows, doesn't it? A Yes.

Q That means also, doesn't it, that the upper part of that bone, including the head is not as straight as it was before the break? A That is true.

10 Q And not being straight and being out of line from the rest of the humerus—you need not answer that unless you want to—does that cause any disorder?

Mr. Kalisch: I object.

Mr. Weinberg: If you press it I withdraw it.

20 Q So we will close this by saying that your testimony has been intended to be limited solely to what the picture shows? A Yes.

Q Does it show actually the size of the fragments? A In this examination you cannot measure them, because they have united and turned to three separate fragments as it was in the picture you showed me.

Q How much of the humerus is shown on this picture? A A little less than the upper half.

30 Q Would you say relatively the size of the bone in the human body? A About that size.

Q No smaller? A No.

Q Isn't the head of the bone larger than what it appears to be? A Not in the female.

Q These other marks are the ribs? A Yes. This is the collar bone and the other is the shoulder.

Re-direct examination by Mr. Kalisch.

40 Q Is that displacement great or small? A Very small.

Anna B. Fox, direct.

Re-cross examination by Mr. Weinberg.

Q It is large enough to be seen as it is shown on the picture? We can see it, can't we?

A Yes, we can see it on that one.

10 Mr. Kalisch: Mr. Weinberg is referring to another exhibit.

Q It is very plainly seen on the exhibit produced by you, is it not? A Yes, it is noticeable.

Q That is the same thing that is shown on Exhibit P. 1 about an inch and a half below the bar of the humerus?

Mr. Kalisch: I object.

20 The Court: Sustain the objection.

ANNA B. FOX, sworn in behalf of plaintiff.

Direct examination by Mr. Weinberg.

Q You are Mrs. Bergman's daughter; you are married? A Yes, sir.

30 Q Where do you live? A Now?

Q Yes. A 45 Harding Terrace.

Q How long have you been married? A Four years.

Q Before you were married you lived at home with your mother? A Yes, sir.

Q Do you remember the time when she was hurt? A Yes, sir.

40 Q How long before her accident did you marry and leave home? A It was about, I believe, a year.

Anna B. Fox, direct.

Q Did you see your mother steadily up to the time you left home? A I used to see her three or four times a week for about eight months until I went to business and then I only saw her week-ends.

Q From the time you were married how often did you see her? A Every day. 10

Q You lived at home? A Yes, I thought you meant after.

Q No, up to the time you were married you saw her every day and you lived at home? A Yes, sir.

Q What was the condition of her health as you could see it and observe it up to the time when you married and left home? A She was very healthy; she ran a business that would take a very strong man to run. 20

Q She was active? A Very active.

Q Had she any complaints of pain? A No, sir.

Q How did she sleep, to your knowledge? A Well, she slept very sound. She worked hard all the time and slept sound.

Q Did you and she sleep on the same floor? A Yes, sir.

Q Did you occupy the same room? A No, not at the time. 30

Q Between the time when you left home and the time of the accident when would you visit your mother? A I averaged three or four days every week.

Q Did you ever stay over night? A Yes, week-ends, Saturday, and stayed over Sunday.

Q During that time did you observe your mother's condition with respect to whether she was restless or slept soundly? A She always slept soundly, she was very well. 40

Anna B. Fox, direct.

Q After she came from the hospital she went back to her own home, after the accident?

A Yes, sir.

Q How long after she left her bed did she come to live with you; I understand she lives with you? A I believe it was around January, if not later; I don't remember; I know it was quite a few months after that.

Q After she came to live with you in Newark?

A Yes, sir.

Q She gave up housekeeping in Paterson?

A Yes, sir.

Q Has she been living with you since that time? A Yes, sir.

Q Tell us, please, what you have observed as to her condition as regards to restlessness? A Well, she did not want to be alone in the house. Now, I have help home and she does not want to be left alone.

Mr Kalisch: I move that that be stricken out because it is not an observation but a statement of the mother to her.

The Court: I will not strike it out.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q You say she does not want to be left alone. Did she tell you that? A No, sir.

Q How do you know? A She don't have to tell me things I observe.

Q What did you observe to make you say that she does not want to be left alone? A I am in business, and many times she comes down to the store and says the baby and the girl is out, she says, and I don't want to be home alone.

Anna B. Fox, direct.

Mr. Kalisch: I object and ask that that be stricken out.

Mr. Weinberg: I consent.

Q Have you left her home alone? A I have to; I cannot take her to business with me.

Q Do you know that she cannot be left alone because of what she told you? A She is very restless and I can tell by her face; every daughter knows their mother's—

Mr. Kalisch: I move that the answer be stricken out.

The Court: Strike it out.

Q How has she been sleeping since the accident and while at home?

Mr. Kalisch: I object to the form of the question unless it is from an observation.

The Court: Overruled. That is for you on cross examination.

Q Tell me if you know of your own knowledge as to seeing her, that being the guide; tell us whether or not your mother is restless or restless at night. A My bedroom is on the second floor and many nights I come down and I find her walking the floor and up with the light on and naturally I question and find out why.

Q Did you observe her doing that before? A Prior to the accident?

Q Yes. A No, sir.

Q How often did she go through that? A Quite often. I would say on an average of once a week, sometimes twice a week.

Anna B. Fox, direct.

Q Now, do you know of any disability of your mother's arm, not from what she told you, but what you observed? A I can say that since the accident, when she lived with me, I have had to do her hair up, because she has never done it since the accident.

10

Mr. Kalisch: I object to that and ask that it be stricken out. "I have to do her hair up."

The Court: Strike it out.

Q The fact is you have been doing it since the accident? A I have been doing it right along.

Q Is there anything else you do for her? A
20 Such as it is hard to get into a dress where she has to raise both arms.

Mr. Kalisch: I object and ask that that be stricken out.

Mr. Weinberg: All right.

The Court: I will strike it out.

Q That part is stricken out. Tell us what you did about it yourself. A Well, I comb her
30 hair and do other things for her that it is hard for her to do.

Mr. Kalisch: I move that that part be stricken out wherein she stated, "We do those things for her that are hard for her to do."

The Court: Strike it out.

Q What are the things you do for her, and
40 have been doing since the accident? A As I

Anna B. Fox, direct.

said I comb her hair, help her dress and am with her when she cannot sleep.

Q Does she do any housework? A Yes.

Q What kind? A Such as helping with the cooking.

Q Does she do any washing? A No, sir.

10

Q No hard work? A No, sir.

Q Did she do that work before the accident? A Not only that, but she ran a business, that is hard for a man to run; scrubbing and cleaning fish; she used to have a fish and vegetable store.

Q Is that the store your brother spoke of? A Yes, my father died and left her with seven children.

Q When did he die? A Five years in April and she was left a widow to support the family.

20

Q How many stores did you have at that time? A The one on River street at the time, and she thought she would take one and put my brother in another.

Mr. Kalisch: I object to what she thought she was going to do and ask that it be stricken out.

The Court: Strike it out.

30

Q At the time of the accident there was this one store running? A Yes, sir.

Q That is the store your brother is in now? A No, sir.

Q Were they both in it or just your mother? A They were both in it at the time.

Q Are you the only daughter? A No, there is more, I am the oldest.

Q How old is the youngest? A Twelve.

40

Anna B. Fox, cross.

Cross examination by Mr. Kalisch.

Q When you said a little while ago that five years ago when your father died your mother was supporting the entire family you did not mean that, did you? A I did. All the children
10 were going to school at the time.

Q Were you going to school? A No.

Q Who is the youngest child in line now?

A Myself and two brothers working.

Q She was not supporting them, was she? A
No.

Q She was not supporting you? A No.

Q How many more children are there? That
is three. A Four.

Q Four more? A Yes, there are seven.

Q What is the youngest, a brother? A They
20 are twins, two girls.

Q How old are they? A Eighteen.

Q They were about sixteen and a half at
the time of the accident? A Yes, sir.

Q What were they doing? A Going to high
school.

Q Did they graduate from high school? A
Yes.

Q So they continued on just the same even
30 though your mother was hurt, at high school?
A Yes, sir.

Q Your brothers, of course, and you, turn in
some money in the family, to help support the
family, don't you? A We do.

Q Did you hear your brother testify this
morning that he was running the store at the
time of the accident? A He was running it
after my mother got hurt.

40 Mr. Kalisch: I object and ask that it
be stricken out as not responsive.

Anna B. Fox, cross.

The Court. Strike it out.

Q I said did you hear your brother testify
this morning that he was running the store at
the time of the accident? A I heard him say
it, but it is not true.

Q It is not true? A No, sir. 10

Q Was there a lease on the store? A Yes.

Q In whose name was the lease? A That
I don't remember.

Q You said you visited your mother at Pater-
son? A I don't know that I did.

Q Whether you did or not, how frequently
before the accident did you visit her? A I
didn't state that.

Q How frequently? A About three or four
times a week. 20

Q After the accident how frequently did you
visit her up there? A I could only go once
a week.

Q Previous to the accident did you go in the
daytime or in the evening? A Both.

Q Did you stay for meals? A Yes.

Q Your mother was not in the store when
you were eating meals with her, was she? A
We had the kitchen in the back of the store.

Q The kitchen was in the back of the store? 30

A Yes, we did not live there, we just had a
kitchen back there.

Q Dinner, too? A All three meals.

Q Breakfast? A No, except that. Those
who wanted to help themselves just helped them-
selves.

Q You had noticed her walking about occa-
sionally in your house since the 14th day of
April, 1925, isn't that so? A What do you
mean? 40

Ida Bergman, direct.

Q I mean you have noticed her walking about your house after she started suit for the injuries against Mr. Ginsburg? A I don't know when she started suit, but she was with me after the accident.

10 Q Did you ever talk to her about if the suit was started and coming up soon to be tried? A Speak about it?

Q Yes, with her. A In what respect?

Q Just the subject of the suit coming up to be tried? A You would pass that remark.

Q You are sure that claim was to be made of disability and restlessness? A No.

20 Q You are sure there was no discussion regarding claims of restlessness and disability between you and your mother? A No, sir.

Q You did not know even what she was going to claim? A I know she was going to claim for a broken arm, which is a fact.

Q That is all you knew she was going to claim? A Yes.

30 IDA BERGMAN, sworn in behalf of plaintiff (through the interpreter).

Direct examination by Mr. Weinberg.

Q Where do you live? A Harding Terrace, Newark.

Q With whom do you live? A With my daughter.

Q What is your daughter's name? A Mrs. Fox.

40 Q How old are you? A Forty-six.

Ida Bergman, direct.

Q Where did you live before you came to live with your daughter in Newark? A Matlick street, Paterson.

Q Did you keep house in Paterson? A Yes, sir.

Q You were going to Newark on a day in September with your son, were you not? A I don't remember the day. 10

Q It appears that on September 17, 1924, you were riding in an automobile or an auto truck of the Ford type which was going from Paterson to Passaic with your son, that is so, isn't it? A Yes.

Q Now, did something happen while you were on your way to Passaic? A Yes, sir.

Q Your automobile, the automobile in which you were riding came into collision with another automobile, didn't it? A Yes, sir. 20

Q Do you know on what side of the road your automobile was being driven just before the accident? A Right.

Q Do you remember that you had a collision? A Yes, sir.

Q Do you remember where the collision happened? A Clifton.

Q Do you know anything about digging that was going on on Lexington avenue at that place? A They were digging; around there was some parts. 30

Q How near to that place did the accident happen? A Not far from where I was riding.

Q Did you see the automobile that came into collision with your automobile before the accident happened? A Yes.

Q How far away from your machine was it at the time you first saw it, approximately? A 40

Ida Bergman, direct.

About as far as from here to that first bench (indicating).

Q That is where the other machine was when you first saw it? A Yes, sir.

10 (The distance is measured and found to be 19 feet 6 inches.)

Q What are you referring to? What was this distance away from you? A I saw the machine about that distance.

Q Where was it when you first saw it? A I saw it on the other side and we were on the right side.

20 Q When you saw it on the other side, the other side of what? A I saw it on my left side and he was coming from Passaic.

Q How far was he, meaning the defendant, away from your car when you saw him on the left side, on your left side. A The first time I saw him when I looked up he was the same distance I said before.

Q He was on the left side? A Yes, sir.

30 Q How did the automobiles come together, if you know? A He just turned in front of my car, but it happened so quick I don't know what happened.

Q On what side of the roadway was your car at the time the accident happened? A We were on the right side and he just went in front of us.

Q The question is, what side of the street did the accident happen on? A He came from the left side to the right side; the accident occurred on the right side.

Q That is on your right side? A Yes, sir.

40 Q Did you notice what we have been calling a steam-shovel? A I didn't see a thing, I just

Ida Bergman, direct.

saw a man walking, and I didn't see any shovel or anything.

Q After these cars came together the one in which you were riding and the other one, did you get hurt? A When the automobiles came together I just made a sound like, "Oh," and I don't remember anything after that. 10

Q How long after the accident do you remember? A I don't know how long later.

Q You became conscious some time, I assume, and after you did become conscious, you found yourself in the hospital? A Yes, sir.

Q What had the doctors done for you so far as you could see after your first week in the hospital? A When I woke up there was a doctor standing over me washing the blood off my mouth; there was blood running out of my mouth and there was some stitches on my mouth; I felt very sick. 20

Q Where was your mouth stitched up? Was the inside of your mouth cut? A The inside and the outside; the stitches were outside.

Q Did you at the time of the accident wear any false teeth? A Yes, sir.

Q In which jaw, upper or lower? A Both.

Q Did anything happen to those teeth? A Yes, they broke; just broke and smashed. 30

Q Was your mouth cut where the teeth were? A My mouth was cut and it hurt me all over my face and jaw and neck.

Q Did you have any other injuries? Was anything else the matter with you? A My arm was broke.

Q Anything else? A My foot; I was more dead than alive.

Q Do you mean your foot or your legs? A My whole foot. 40

Ida Bergman, direct.

Q What does that mean? A (Pointing to her legs.)

Q That covers both? A Below the legs and my whole foot.

Q You were in the hospital about ten days and after that you went home and after you
10 went home how long did you stay there before you first went out again? A Three months before the doctor told me to go around.

Q During that time what doctor took care of you? A Dr. Joelson.

Q How many times or how often did Dr. Joelson see you when you were at home? A He used to come twice a day and then he came every night.

Q For how long did he continue those visits?
20 A About two months, I don't know.

Q When you were able to leave the house did you go to see Dr. Joelson at his office? A Yes, sir.

Q How often? A Four months.

Q What did he do for you? A He gave me electrical treatments.

Q Where? A My foot and my shoulders.

Q How long did you take those treatments?
A Once a week.

30 Q When was the last time you had such treatments? A More than a month ago; about a month or more.

Q During the time you were in the hospital did you have any pain from your injuries? A It pained me so much I didn't want to stay there, I wanted to get out, because I didn't know what was happening to me.

Q After you got out and went home did you have pains? A I wouldn't wish it on anybody.

40 Q Does that mean yes or no?

Ida Bergman, direct.

Mr. Kalisch: I will substitute the word "yes" for that answer.

Q Is your arm all right? A No.

Q What is the matter with it? A It hurts me over here (indicating).

Q Pointing to your right shoulder? A Yes,
sir. 10

Q Can you use that arm the same as you did before the accident? A No.

Q Can you use it the same as before the accident? What difference is there now? A No.

Q What is the use you can make of that arm now compared with the way you could use it before the accident? A I cannot raise my arm, it hurts me in the shoulder. 20

Q Do you try to raise it? A Yes, the doctor tried to raise my hand the other day, but I couldn't.

Q Are you able to use the arm the same as you did before and if not in what respects are you not able to use it? A I cannot raise my hand. If I try to raise it my arm hurts.

Q I ask you now with regard to the use of it. Do you use it the same as you did before the accident? A Before I was able to do a lot of
work, now I can't. 30

Q What did you do before the accident that you cannot now do? A I had a paralyzed husband for eight years and I had to take care of him and small children.

Q I asked you what you did. A When my right hand is in this condition what can I do?

Q Did you work around the store before the accident? A Yes, I did more than three men.

Q What did you do? A I used to go to the 40

Ida Bergman, direct.

fish market, buy the fish and in the store I used to chop it.

Q Have you tried doing anything like that since the accident? A I have not My left arm is the only decent arm.

10 Q How about dressing yourself; can you do that? A No.

Q Why not? A Because I cannot raise my arm; they have to dress me and comb my hair.

Q Do you rest as well now as you did before the accident? If not, tell us about it. A No, I make the children nervous, I cry at night.

Q Before your accident were you able to sleep at night? A Yes, before I was able to work.

20 Q Did you take any medicine for that, for your sleeplessness? A The doctor gives me pills.

Q These broken teeth; did you have new plates made?

Mr. Kalisch: That is an element of damage I shall object to on the ground there is no claim for any property damage in this case.

30 The Court: Sustain the objection.

Mr. Weinberg: I ask to amend the complaint in that respect and in respect to any expenditures for doctors' bills, medicines, dentist bill. The defendant can hardly plead surprise as I see it. It has had the bill of particulars in which they have been apprised of these matters. I did not draw the complaint.

40 The Court: Is there any objection?

Ida Bergman, direct.

Mr. Kalisch: Yes.

The Court: Then, I will not admit it.

Q Tell us about this business with which you were connected. Did you have anything to do with it? A I have nothing to do with it.

10 Q Did you have before the accident? A It was my store, I paid the bills and paid the rent, and did the work.

Q Did you get paid anything, or were you drawing any profits out of it, or how was it run? A Yes, I used to support the family and I got about sixty to seventy dollars a week.

Q Did your son get a profit out of that, too, or was he paid, or you paid? How was it worked? A He used to take what he needed.

20 Q And you took the rest? A Yes, I took the rest.

Q Did you ever go back to that business after the accident? A I could not stay.

Q Did you ever go back to it? A No.

Q Can you tell us approximately how much you have laid out for medicines?

Mr. Kalisch: I object to the question on the ground— 30

The Court: I will admit it and you may bring out on cross examination if there is anything included in that which should not be.

Q Tell me what you have spent for medicines and leave out of consideration any money you paid or spent for your teeth? A I don't remember. About \$100. The children used to buy the medicines. 40

Ida Bergman, cross.

Mr. Weinberg: That is all on direct examination. If later on these particulars are put in with bills for those items I reserve the right of claiming the privilege of amending. In other words, if your Honor should change your mind about this matter.

10 The Court: You, of course, have the right to make the motion at any time.

(Argument.)

The Court: I will let you reserve your right to make any motion.

Cross examination by Mr. Kalisch.

Q Did you have a bank account when you were in business? A No.

20 Q Where did you keep your money? A I held it by me.

Q How much did you take in in a week? A Sometimes \$300, sometimes \$400.

Q How many people did you employ? A Three.

Q The business was in your name? A Yes, sir.

Q For how many years had you been making that amount of money? A It was only during
30 the holidays I made as high as \$400.

Q How much did you average? A Between two and three and four hundred.

Q How much profit would you have if you took in \$200 a week? A I made \$75 on \$200.

Q When you were making \$75 a week profit, how much of that went to your son for working there? A He took as much as he needed.

Q About how much did he usually take? A It is hard to say, whatever he needed; some-
40 times \$5 a day, sometimes \$10.

Ida Bergman, cross.

Q Did you have \$75 left after paying the two extra men you had there? A Yes.

Q Where would you take the money at the end of the week when you were making as much as \$400, what would you do with that money? A I did business with that money.

Q Did you own any building and loan shares? 10
A Yes, sir.

Q How many? A \$10 a month.

Q Did you own any real estate? A I had my house.

Q Did you buy any real estate yourself? A No.

Q Did you have any other stocks or bonds except \$10 a month which you paid into the building and loan? A No, such things I didn't
20 have.

Q Before March 20th of every year did you give the United States Government an income tax report of your business? A Yes, sir.

Q Have you any copies of those here? A I had them, but I don't know where they are.

Q Did you keep account of your business; what you sold and what you bought? A No, I had a cash business.

Q Then, how did you keep account for the United States Government at the end of the year? A They used to send in a report, I should say \$6,000, I don't remember. 30

Mr. Kalisch: I move that the answer be stricken out.

The Court: I will not strike it out.

Q (Question read.)

Ida Bergman, cross.

Mr. Weinberg: I object to it on the ground it is purely collateral matter.

(Argument.)

Mr. Kalisch: I asked it for the purpose of attempting to contradict her testimony that she was earning \$75 a week.

10

(Question read.)

The Court: I think that question is objectionable.

Q How do you know at the end of the year that you had made money or lost money if you did not keep any records of your sales? A I know from the money I had and spent whether I made or lost any money.

20 Q You knew from the money you had that? A I had money and it was all spent on the accident.

Q How much did you have before the accident? A I had about \$200.

Q You had been in business how long? A Eight years.

30 Q How much did it cost you a week for your own expenses? How much did you spend of your money to run your house? A I don't know, I couldn't count.

Q How much of the money that you spent for your house did your children give you from what they earned? A Will you repeat that?

Q (Question read.) A My children did not give me anything.

Q Did you hear Mrs. Fox, your daughter, on the stand just before you? A Yes, sir.

Q You understand some English, don't you? A A little.

40

Ida Bergman, cross.

Q Didn't you hear your daughter say that those who were working helped you and gave you some of the money you earned?

Mr. Weinberg: I object. I did not hear it and it is immaterial.

The Court: Sustain the objection.

10

Q You say now that none of your children gave you anything, is that right? A When I had money they didn't give me any, but when I needed, they gave me.

Adjourned to February 2, 1928, at ten o'clock, A. M.

20

SECOND DAY.

February 2, 1928.

Continued pursuant to adjournment.

Present, counsel as before stated.

IDA BERGMAN, plaintiff, recalled.

30

Cross examination (continued) by Mr. Kalisch.

Mr. Kalisch: Mr Erlich says that he will interpret and I have no objection.

The Court: Very well.

Q (Through the interpreter.) How much did you pay each man who worked in your store?

A In my store mostly my children worked.

40

Ida Bergman, cross.

Q You said yesterday that you had two other men beside your son, isn't that true? A We put two extra men in on Thursdays.

Q How much did you pay your children for working for you? A I didn't pay them anything.

10 Q When you were hurt why didn't you get someone else to take your place and do your work? A In that kind of business you must tend to it yourself.

Q Do you mean to say you could not find anybody to do the work as you did in a fish store? A No.

Q Did you try? A We tried, but couldn't find anybody.

20 Q In the City of Paterson you were unable to find anybody you could get to work in a fish store to do the work that you had been doing, is that correct? A In the fish store to do the work, yes, but not to do the buying.

Q Didn't your son, the one who was here yesterday and testified, ever do any buying? A He was no judge of goods and merchandise.

Q How long had you been in the business? A Eight years.

30 Q How long was he in it? A He helped me out the whole time.

Q You said yesterday that "when I need money the children give me the money." Which children? A Only those two, the daughter and son.

Q I thought you said a few moments ago that your children worked in the fish store and that you did not pay them anything, is that correct? A Those that were in high school came and helped me.

40

Ida Bergman, cross.

Q How many? A Three went to high school and one to public school

Q They could not help you during the day, could they, when they were in school? A After they came from school.

Q If you were making the money you said you were making how was it you needed money and help from your children? 10

Mr. Weinberg: I object as argumentative.

The Court: Sustain the objection.

Mr. Kalisch: Strike out the question.

Q Why did you require help from your children when you were getting the profits out of your business at the rate of sixty to seventy dollars a week? 20

Mr. Weinberg: I object as argumentative.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Q Please explain how frequently you asked help of your children? A Money help, or help in the store? 30

Q Money. A I didn't need it very often, but when I did need it they used to give it to me.

Q What was the necessity in your business that caused you to ask for money help from your children?

Mr. Weinberg: I object. There is no proof that there was money help necessary in the business. 40

Ida Bergman, cross.

The Court: Sustain the objection.

Q When you said yesterday that you would get money from your children when you needed it, did you mean you needed it for your home or your business? A When my husband was sick, that is when I needed it.

Q After your husband died how frequently did you receive or ask for money from your children? A I didn't need it, but they used to ask, "Mother, do you need money?"

Q Did you take it? A If I needed it I took it from them.

Q For the business or for the house? A Sometimes to dress the children and sometimes for other things.

Q What were the other things? A Dresses, shoes, things of that kind.

Q Not for the business at all? A No.

Q If you were making sixty to seventy dollars a week profit in your business regularly was that enough or not to pay your household expenses?

Mr. Weinberg: I object to the question as it is self evident.

The Court: Sustain the objection.

Q Were the profits you got out of the business enough to carry on your household?

Mr. Weinberg: I object.

The Court: Sustain the objection.

Defendant's counsel prays an exception to this ruling of the Court.

Exception noted as ground of appeal.

Abraham S. Ginsburg, direct.

Q Did you keep a separate account for the house and one for the business? A I didn't have any bookkeeper and I didn't keep any books.

Q You had no bank account? A No, they didn't have any.

PLAINTIFF RESTS.

ABRAHAM S. GINSBURG, defendant, sworn in his own behalf.

Direct examination by Mr. Kalisch.

Q You are the defendant in this case? A Yes, sir.

Q It was your automobile that was involved in the collision with Mrs. Bergman? A Yes.

Q Do not shake your head yes or no when you answer the question because the stenographer has to get it on the record just what you say. A All right.

Q Where were you coming from and where were you going to at the time the accident happened? A I was going from Passaic to Paterson.

Q Will you tell us as you approached the point of the accident just what occurred? A I was going on the way from Passaic to Paterson, driving on the amesite road. When I got within fifteen feet of the steam-shovel, the steam discharged, the safety valve blew off and I was blinded. I couldn't see a thing, and I applied my brakes, and the next thing I knew I was in an accident.

Abraham S. Ginsburg, direct.

Q Please tell the Court and jury whether this road is straight within twenty-five to thirty feet of the point where the steam-shovel was. A Right past the steam-shovel there is a slight curve in the road.

10 Q The curve is on the Paterson side of the steam-shovel or the Passaic side of the steam-shovel? A The Paterson side.

Q You were traveling from Passaic to Paterson? A Yes, sir.

Q What kind of a curve is it? A Not very sharp, but there is a curve that obstructed my view passing the steam-shovel.

Q Did you know that an automobile was coming, or did you see an automobile before the accident? A I did not.

20 Q How far out in the road, the amesite road, did the construction work or the steam-shovel extend? A Just a few feet, about three or four feet.

Q In order to pass either the construction work or the steam-shovel were you able to go straight along the right side of that road? A Yes, sir.

30 Q You did not have to pull out at all? A I did not.

Q How far from the extreme right side of the amesite road were you traveling before you got to the point where the steam-shovel or the first part of the construction work appeared in the street? A I was traveling about four or five feet from the edge.

Q So that you could pass by without turning out? A Yes, sir.

40 Q Had the safety valve blown off within your view at any time before this one occasion when

Abraham S. Ginsburg, direct.

it blinded you? A No, this is the first time it happened.

Q Was there anything to indicate, as you approached the steam-shovel, that it was going to blow? A No.

10 Q What, if anything, did you do before starting to pass the construction work and the steam-shovel? A I didn't get your question.

Q You kept on going at about what speed? A Twenty to twenty-five miles an hour.

Q Did you hear any horn blown by the other automobile coming towards you? A I did not.

Q Did you blow a horn? A I don't remember exactly. I might have as I approached the steam-shovel, but I don't remember whether I did or not.

20 Q How high from the ground were you as you sat in your machine driving the car? A Between four and five feet.

Q Will you please describe to the jury in what manner this steam blurred your view? A When the safety valve blew up that whole road was just full of steam.

30 Q Did you stop or keep on going when that happened? A I put my searchlight on as soon as the steam blew off and struck my face and I applied the brakes.

Q What did you do? A I was hit about the same time.

Q Did you keep on going or stop? A I stopped alongside the steam-shovel.

40 Q After you stopped and when the steam disappeared describe the condition of your car and the position of the other car and how they were together, if they were together? A Front left wheel and the front left fender struck the front left wheel and front part of their car com-

Abraham S. Ginsburg, direct.

ing towards me and I was slightly over the center of the road.

Q Now, do you know when you got off the center of the road? A I do not.

Q Were you over the center of the road before the steam blinded you? A Well, I was slightly over when I was four to five feet away. In order to pass the steam-shovel I had to be slightly over the center of the road. It is only a road there of sixteen to twenty feet, and I had to pass over the center of the road to pass the steam shovel.

Q You mean all of your car was partly over the center? A Yes, sir.

Q (By the Court.) As you approached the steam-shovel before the steam interfered with your vision how far could you see down the road? A I couldn't see very far past the steam-shovel, maybe twenty to twenty-five feet.

Q Why not? A There was a curve in the road.

Q (By Mr. Kalisch.) Was the curve in the road as you proceeded a right-hand curve or a left-hand curve? A A right-hand curve.

Q To your right? A Yes, sir.

Q Do you know whether at the time the steam blew off you were still proceeding partly to the left of the road. (Strike that out.) Had you started to make your turn back to the right? A After the steam blew off?

Q No, before. A In order to turn to the right I had to pass the steam-shovel.

Q And you had not passed it yet? A No.

Abraham S. Ginsburg, cross.

Cross examination by Mr. Weinberg.

Q You had been going along this same roadway some time previous to the accident, had you not? A Yes, sir.

Q Going through there every morning? A Not every morning, but two or three times a week.

Q For how long a period? A I know that road for years.

Q You knew the steam-shovel and excavation were there, did you not? A Yes, sir.

Q You knew the lay-out of the roadway? A Yes, sir.

Q So, you were not surprised when you came to the steam-shovel to find the road curved? You knew that right along? A Yes, sir.

Q You knew that necessarily you could not go right straight ahead and take a chance on anything that was coming around that curve? A Yes, sir.

Q You know how wide the road is at that point? A Say about eighteen or twenty feet.

Q That is the amesite itself? A Yes, sir.

Q How much road is there on each side of the amesite? A About four or five feet on one side, and on the other side there was an excavation.

Q Before the excavation was made you had a large roadway there, didn't you? A We had a dirt part alongside the amesite.

Q So that before you reached the excavation you had a roadway about thirty feet wide? A Yes, sir.

Q Eighteen to twenty feet of amesite and eight to ten feet dirt, thirty feet wide? A Yes, sir.

Abraham S. Ginsburg, cross.

Q You say the steam-shovel and the excavation took up about thirty feet of the roadway?

A Yes, sir.

Q On the roadway, the amesite or the dirt?

A The amesite.

Q It was over the dirt? A The trench was dug into the dirt part of the road.

Q Then it had not touched the amesite part at all? A The trench did not.

Q What is that? A I do not think the trench cut in any on the amesite road, but the steam-shovel was a little on the amesite road.

Q You are pretty good at making mental measurements, I assume, how wide would you say the amesite was up there at that time? A From the steam-shovel?

Q No, how wide that amesite road is? A At what point?

Q Right there? A About sixteen to eighteen feet.

Q That amesite road was entirely clear at that time, wasn't it? A Yes, sir.

Q The steam-shovel was using up no part of the amesite? A The steam-shovel was about two to three feet on the amesite.

Q We won't quarrel over two or three feet. You had at least sixteen feet of amesite on your left as you came along and about four feet of dirt road? A The dirt road was on my left.

Q On the east? A On the east.

Q So that between the excavation and anything else on that road that might have been to the west there was at least twenty feet, wasn't there? A Yes, sir.

Q What were you doing away over on the westerly side of the road, then, at the time of the collision? A I wasn't away over.

Abraham S. Ginsburg, cross.

Q Well, where were the cars when they were locked? A When the cars were locked they were a little off the center of the road.

Q What do you call a little off the center of the road? A About two feet.

Q You did not measure it, did you? A I am pretty good at measuring.

Q You did not measure it? A No.

Q You are good if you measure, but if you do not measure you are no better than we are. It is true that when your car locked the little Ford truck was away over on the westerly side as far as it could get? A No, the little Ford truck has two of its wheels on the edge of the amesite on the dirt road and the two other wheels were on the amesite and I was on the amesite entirely.

Q So, part of the little Ford truck was off the amesite on the dirt road? A Yes, sir.

Q Leaving approximately some fifteen feet between the side of the Ford and the excavation for you to go through? A No, there wasn't that much.

Q How much less would there be? A I would say about ten or twelve feet.

Q Couldn't your car get through ten or twelve feet? A Yes, the steam blinded me.

Mr. Weinberg: I ask that the answer be stricken out.

Q I am not asking as to the physical ability of the car to get through, but I am now asking as to the distance whether his car could not get through an opening of ten or twelve feet?

(Argument.)

Abraham S. Ginsburg, cross.

Q Aside from the question that you say you did not go through because the steam blinded you there was plenty of room to go through? A Yes, sir.

Q Just where were you when you say this engine discharged all that steam? A I was about fifteen feet from the steam-shovel.

Q You were fifteen feet from the steam-shovel? A Yes, sir.

Q On your own side of the road? A Yes, I was on the road fifteen feet before I reached the steam-shovel.

Q That is what I understood you to say. You were fifteen feet to the south left-hand according to that map, of the steam-shovel when it blew off steam? A Yes, sir.

Q Now, will you tell us about where this collision occurred? A Opposite the steam-shovel.

Q On the other side of the street? A Yes, sir.

Q How does it come that your car went all that distance when you realized that the steam had blown off? A I applied my brakes and it took fifteen to twenty feet to bring the car to a stop.

Q You must have been going very fast?

Mr. Kalisch: I object as argumentative.

The Court: Sustain the objection.

Q You were going fast? A I was going twenty to twenty-five miles an hour.

Q Then how does it come you went that far?

Mr. Kalisch: I object as argumentative.

The Court: I will admit it.

Abraham S. Ginsburg, cross.

A In going twenty to twenty-five miles an hour in applying your brakes it takes fifteen feet to stop the car; the car was eighteen feet long and it takes the length of the car to bring it to a stop.

Q You knew that, didn't you? A Yes, sir.

Q You knew you could not stop with a heavy car under twenty feet or more? A Twenty or less.

Q You went fifteen feet until you came to the shovel, didn't you, and then you went a distance it took you to go from the right-hand side of the street over to the point where the accident happened? A I didn't go across the street.

Q You said when you collided with the other car it was just off or part of it was off the dirt road on the westerly side of it, didn't you? A No. I was on the center of the road when I collided with the car. I was going some distance, but I didn't turn off.

Q When you say you were going in the center of the road, what do you mean. If there was an imaginary line drawn along that road, you were straddling that line? A Yes, about two feet off the center.

Q Ordinarily you would have had plenty of room to get to the right of the center? A With the steam-shovel out three or four feet I had to go over the center line past the steam-shovel.

Q Did you swerve because of the steam? A No, we usually travel, that road is about sixteen to eighteen feet, and we usually travel about the center of the road unless there is a lot of traffic coming the other way.

Q If no steam was blown what part of the roadway would have been in when you were

Abraham S. Ginsburg, cross.

passing that steam-shovel? A The same place that I was.

Q Then, you were over the center of that roadway irrespective of the steam? A Yes, sir.

Q So, the steam had nothing to do with putting you where you say you were at the time of the collision? A Yes, sir.

Q That is right, isn't it? A Yes, sir.

Q Now, the steam however, kept you from seeing this car fifteen feet away, is that right? A Yes, sir.

Q Was there anything to prevent your seeing it 150 feet away? A The curve in the road.

Q I thought you said the curve in that road was very slight? A It curved to the right and you couldn't see it. The steam-shovel blocked its view.

Q Where did that curve commence? A Right passing the steam-shovel, about twenty to twenty-five feet past the steam-shovel, the road curved.

Q You had a stretch of almost one hundred feet of excavation past the steam-shovel? A The excavation was along the curve.

Q So, the curve did not commence at the excavation? A The excavation was curved, it was not a straight excavation, it followed the river road.

Q How much was it curved? A There is a curve here (indicating) almost as much as this curve (indicating).

Q If it made a sharpe curve like that you had no trouble seeing beyond the excavation? A I couldn't on account of the steam-shovel, but when the steam-shovel was not there and there are no trees we can always see the road. The steam-shovel shut off the view.

Abraham S. Ginsburg, cross.

Q Assume that you are using that road there. Do you have any trouble to see from a point there approximately which might represent a point before you get to the steam-shovel to over there (indicating) which would represent the point of the excavation? A If the steam-shovel was there you could not see; if it wasn't you could.

Q Isn't the steam-shovel a low affair? A No, it is twenty-five feet high.

Q You heard the steam-shovel man testify yesterday, didn't you?

Mr. Kalisch: I object.

The Court: Sustain the objection.

Q Did you see a pipe on this steam-shovel? A What kind of a pipe?

Q A pipe sticking out from it? A Smoke-stack, yes.

Q In your opinion how high was that smoke-stack? A Fifteen to twenty feet, the smoke-stack, but only two or three feet above the cabin.

Q So the smoke-stack would be at least sixteen to eighteen feet above the ground? A Yes.

Q The steam went up, didn't it? A It would spread all over the place.

Q By the length of time it took you to go fifteen feet do you mean to tell me the steam went up and down and spread all over? A No, it discharged from the side, under seventy-five pounds pressure the steam will go in all directions.

Q Did it go in all directions up in the air? A It didn't discharge up in the air, it came out from the side.

Abraham S. Ginsburg, cross.

Q Where did the steam come out of? A From the safety valve alongside the boiler.

Q The amount of steam that came out of that safety valve you want to tell the jury was such an amount as to blind the view of an automobile in that roadway? A Yes, there is with one hundred pounds pressure behind it.

Q You did not look at the pressure, did you? A I know it blows up on the safety valve at seventy-five.

Q Did you see what the pressure was on the engine at the time the steam blew? A No.

Q Then, why do you talk about it?

Mr. Kalisch: I object to counsel characterizing the witness' testimony.

The Court: Proceed.

Q You saw a quantity of steam coming out of the safety valve. What is that, by the way, a big opening? A The safety valve?

Q Yes. A That was just a valve and anytime the pressure goes above seventy-five pounds the valve opens and the steam discharges something like a boiler in a house.

Q A small stream of steam comes out? A No.

Q A big, blinding stream? A Yes, sir.

Q When that first came out you were fifteen feet away? A Yes, sir.

Q In that space, the length of time it took you to cover fifteen feet, the roadway was blinded with steam so that you could not see what was going on? A Yes, sir.

Q You could not stop your car within the distance you were away from the plaintiff's automobile? A No, sir.

Abraham S. Ginsburg, cross.

Q You did hit it when your car was over the center of the roadway? A I wouldn't say I hit him or he hit me, I know we came together.

Q You do not even know that? A I couldn't say.

Q You do not know under those conditions whether you sounded a horn or not? A I don't know whether I did or not.

Q How many times do you suppose you passed that shovel in that neighborhood before the accident? A Probably about a half a dozen times.

Q Did you ever see it blow steam before? A I have seen it blow steam, but never was near it when it blew steam.

Q You saw it blow steam before? A Yes, sir.

Q Did it spread all over the roadway? A Yes, sir.

Q Then you knew as you approached this steam engine that it was likely to blow without notice and obscure your view, that is so, isn't it? A I didn't know at that time whether the steam was on in the steam-shovel.

Q You did not know as a matter of fact any other time whether the steam was on until you saw it blow? A When the steam-shovel is in use it does not blow steam. They use the extra steam, but when it is standing idle with the fire on two or three hours it blows off.

Q You did not know as you approached that steam-shovel whether or not it was ready to blow steam or not? A No.

Q You had seen it blow steam before? A Once or twice.

Q You recall up to that day a quantity of steam blown off, say as much as to blur your view of it, of the street, didn't you? A Yes.

Abraham S. Ginsburg, re-direct.

Q Yet you kept right on knowing it might happen that morning? A May I explain why? At other times when they were blowing off steam they had a man out in the road stopping traffic.

Q You remember that, that on other occasions when they blew the steam off they had a man out in the road to stop the traffic? A Yes, sir. When they blow off steam they also hold up traffic.

Q Is that an intentional blow or what? A Sometimes it is intentional and sometimes automatic.

Q How would a man on the roadway know if it is automatic? A It usually should be intentional. It is up to the engineer to blow off steam once in awhile.

20 *Re-direct examination by Mr. Kalisch.*

Q If this machine gets up enough pressure it automatically blows off itself? A Yes, sir.

DEFENDANT RESTS.

PLAINTIFF RESTS.

Mr. Kalisch sums up for the defendant.

30 Mr. Weinberg sums up for the plaintiff.

40

CHARGE.

The Court charges the jury as follows:

MOUNTAIN, J.

The plaintiff in this case has brought the action which you have tried, against the defendant and seeks to recover compensatory damages because of the alleged negligence of the defendant. She claims by her testimony that on the 17th day of December, 1924, she was riding in an auto truck with her son, in a southerly direction on Lexington avenue, in Clifton, New Jersey. Clifton is located between Passaic and Paterson. She was going in the general direction of Passaic from Paterson.

The plaintiff testified, or witnesses testified in her behalf, that it was a clear day about nine o'clock in the morning and that at or near the situs of the accident there was a steam-shovel and there was an open trench. Both of these were located on the easterly side of the road. I think there was testimony to the effect that the trench was about twenty-five feet long and some of the sheathing protruded three to four feet above the ground. The road was paved in the middle with amesite.

The plaintiff alleges that she was driving, as I say, with her son, and going at a speed which was estimated by the son to be about eighteen miles an hour on the right-hand side of the road. Her son, who was driving this car, testified that he saw the car of the defendant in the distance and that when he first saw it, it was on his side of the road; that as he approached the steam-shovel he estimated that he was nearer to the opening between the steam-shovel and the other side of the road than the other car was, but he

Charge to Jury.

testified that in spite of that there was enough room for both cars to have passed the steam-shovel at the same time. He said as he approached he slowed up a little before going on.

There was testimony given on the plaintiff's behalf by the engineer of the steam-shovel.
 10 Among other things he told us that there was even room for two cars to have passed between the steam-shovel and the cars which had been in collision, as I understood him, after the accident. I think there was another witness called who denied that was the fact.

We were told there was a commerce truck following the truck driven by the son of the plaintiff, and this was driven by one Isaac Baltar. The latter said he was about fifteen feet behind
 20 Bergman's truck, and that Bergman and he were both going fifteen to eighteen miles an hour, and that young Bergman was driving on the right-hand side of the road. When they approached or got near to this steam-shovel a car shot out from the side of the steam-shovel and went right into the front of the little truck, he testified. In describing the manner in which this car came out and its speed, among other things he said, describing the course of the defendant's car, it came "cross-ways." Now, the
 30 defendant in this case told us that he had driven on this road before, and he testified that as he approached the steam-shovel he saw it and he did not see any other car on the road, as I understand his testimony and he explained that there was a curve north of this steam-shovel and that that accounted for the fact, or perhaps you may find that accounted for the fact, that he did not see any other car coming. He said that
 40 when he was fifteen feet from the steam-shovel

Charge to Jury.

the steam blew off and he was blinded; that he applied his brakes and the next thing he knew there was an accident. As I understood him he never saw this other car until the time of the accident. He said he was going twenty to twenty-five miles an hour before he applied his brakes
 10 and that he was slightly over the center of the road at the time. As to his position in the road he said that the steam had nothing to do with putting him where he was, as he expressed it, but he told us the steam came from alongside the engine. He thought the amesite road at that point was sixteen to eighteen feet wide, and that the steam-shovel occupied two to three feet of that.

The burden of proof in this case is upon the plaintiff to prove by the greater weight of the
 20 evidence that the defendant was negligent. The mere proof of an accident raises no presumption of negligence; it must be proved.

The parties in this case have joined issue on the question of negligence and that is a question of fact for you to determine, that is, as to its existence or non-existence. The plaintiff cannot be held guilty of contributory negligence because that has been withdrawn by the defendant, nor
 30 can the negligence of her son in driving the car, if he was negligent, be imputed to her. What degree of care did the defendant have to exercise in driving this automobile that he was operating on the morning in question? He had to exercise such care as a reasonably careful and prudent man would have exercised under similar conditions. Those conditions and the circumstances that existed you may find commenced with the knowledge he had of this steam-shovel before he approached it that day, what he saw,
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Charge to Jury.

the character of his observation, how he used his senses. In the operation of a car you may find that the sense of sight is very important and the sense of hearing is sometimes helpful. In the operation of the feet on the brake and clutch you may find that the sense of feeling has something to do with the way a car is operated, at least by an expert. What observation did the defendant make, and what was the result of his observation, and as the result of the observation what did he do? Of course, the question of whether he was negligent or not depends on what part of the testimony you are going to believe and whether the plaintiff proved by a preponderance of the evidence that he was negligent, because that burden is upon her.

20 There is, as you doubtless know, without any advice from the Court, a provision of the Traffic Act which provides that the operator of a motor vehicle or of a vehicle shall drive on the right-hand side of the improved portion of the highway. You may find from the testimony that young Mr. Bergman was doing that. The mere fact that a provision of the Traffic Act is violated is not of itself negligence. For instance, if a man is driving on the right-hand side of the improved portion of the highway and a child suddenly runs out and he quickly turns his car to the left and avoids the child but goes on the left-hand side of the highway, you would not call it negligence, and so, whether a man is negligent or not depends on all the facts and circumstances of the case, but the provision of the Traffic Act which I have related is a factor to be considered by you. If the plaintiff in this case is entitled to recover she can recover for the bodily injury which she has sustained and the effect of that injury up-

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Charge to Jury.

on her health as to degree and probable duration. She can recover for any pain or suffering she has had or will have as a result of the injury she has sustained. She was taken to the hospital and we were told she had a laceration of the left side of her upper lip. That her upper right arm was fractured about three inches from the shoulder and that there was an abrasion of her neck. The fracture was described as a comminuted fracture and a severe fracture. We were told that she had excruciating pain. We were told that there was a stiffening of the joint above the fracture after the mending of it which the doctor, I think, termed ankylosis. Another doctor told us that he found no symptoms or could not ascertain that there was ankylosis and that the function of the arm now was good and that there was no restriction. Another physician said that he thought there was some restriction or limitation of motion.

Another element of her damages is any reasonable amount that she has spent to cure or alleviate her injuries. She testified, I think, or someone did, that she has spent \$100 for medicines, and there was testimony by Dr. Joelson that his reasonable fee was \$200. Shortly after that testimony was given that there was a bill introduced in evidence indicating that his fee, I suppose, up to that time was \$92; whether he attended the plaintiff after that time or not is a question of fact that I will have to leave with you, because frankly I do not remember.

This lady at the time of the accident said that she was conducting a fish business in Paterson and in that position, as I understand her she was aided by one or two others. I think she employed three people, she told us. Now, she

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Charge to Jury.

can recover any pecuniary losses which she has sustained by reason of her inability to attend to her business or the pecuniary loss sustained if she gave the business up and if her abandonment of it was naturally and proximately caused by the negligence of the defendant. As a guide
 10 to what pecuniary losses she sustained among other things she told us that she made sixty to seventy dollars a week out of the business, and I understood that that was based on a gross profit of \$200 to \$400 a week, that is the net profit, as I understood her, was sixty to seventy dollars a week, and the gross profit was \$200 to \$400 a week. There was testimony given as to the manner in which she conducted her business and her profits; I am only reciting part of it.
 20 She testified that she never went back to her vocation after the accident. If you find that she is entitled to recover, those are the elements of her damages. If you find the defendant is entitled to recover then, your verdict should be for the defendant.

I have been asked to charge several requests by counsel for the defendant. The first and second I have charged you. The third I will deny,
 30 because I believe there are certain conditions which naturally and proximately follow a physical injury, and those conditions which naturally follow a physical injury are all elements of damage.

Mr. Kalisch, if you will read 60 New Jersey Law, page 457, you will see specifically why I refuse that request.

If I have narrated any testimony and it is not in accordance with your recollection of what the
 40 witnesses have said you must take your recollection

Exceptions to Charge.

tion of what they have said and not what I related that I thought they had said, because you are the sole arbiters of all questions of facts.

(The jury retires.)

Mr. Kalisch: I respectfully pray an exception
 10 to that part of your Honor's charge where you stated to the jury, "In determining the facts of the case you have a right to consider as one of the elements that when an expert is driving his sense of feeling may be one of the senses which should guide." My point being that the driver himself must only be expected to have a reasonable capacity and not the capacity of an expert.

Exception noted as grounds of appeal.

Mr. Kalisch: I respectfully pray an exception
 20 to that part of the Traffic Act which your Honor read which provided that a driver must drive on the right-hand side of the road. I understand it to be only when the improved portion of the road is of sufficient width to permit him so to do.

Exception noted as ground of appeal.

Mr. Kalisch: I respectfully pray an exception
 30 to that part of your Honor's charge where your Honor stated that the jury might bring in damages for loss of business if caused by the defendant, on the ground that your Honor failed to state to them that she must also make a reasonable attempt to operate the business so as to reduce her damages. That your Honor did not charge.

Exception noted as ground for appeal.

Mr. Kalisch: I respectfully pray an exception
 40 to your Honor's refusal to charge in the

Defendant's Requests to Charge.

language of request No. 1, request No. 2 and your Honor's refusal to charge at all request No. 3.

Exception noted as ground of appeal.

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DEFENDANT'S REQUESTS TO CHARGE

1. If you find that this woman was injured as the result of a pure accident, then the defendant is not responsible.

2. The mere happening of the accident does not make this defendant responsible.

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3. All evidence concerning the alleged nervous condition of the plaintiff must be disregarded by you, since no claim is made regarding same in the complaint.

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REASONS ON APPEAL.

Filed March 29, 1928

NEW JERSEY COURT OF ERRORS AND APPEALS.

IDA BERGMAN,

Plaintiff-Respondent,

vs.

ABRAHAM S. GINSBURG,

Defendant-Appellant.

On Appeal from the Essex County Circuit Court. Reasons.

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The appellant assigns the following reasons on appeal:

1. The trial court erroneously and improperly refused to permit the completion of appellant's question about to be asked on cross examination of respondent's witness Baltar: "Now, sixty seconds long each minte * * * ."

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2. Because the trial court erroneously and improperly refused to grant appellant's motion to strike out the answer to question propounded by respondent's attorney to respondent's witness, Fox: "Well, she did not want to be alone in the house. Now, I have help home, and she does not want to be left alone."

30

3. Because the trial court erroneously and improperly upon respondent's motion, overruled appellant's question on cross examination of plaintiff: "Why did you require help from your children when you were getting the profits out of your business at the rate of \$60.00 to \$70.00 a week?"

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Reasons on Appeal.

4. Because the trial court erroneously and improperly, upon the motion of respondent, overruled the appellant's question on cross examination of the plaintiff: "Were the profits you got out of the business enough to carry on your household?"

10 5. Because the trial court in his charge to the jury erroneously and improperly charged, as follows:

"In the operation of the feet on the brake and clutch, you may find that the sense of feeling has something to do with the way a car is operated, at least by an expert."

6. Because the trial court in his charge to the jury erroneously and improperly charged as follows:

20 "There is, as you doubtless know, without any advice from the court, a provision of the traffic act which provides that the operator of a motor vehicle, or of a vehicle, shall drive on the right-hand side of the improved portion of the highway."

7. Because the trial court in his charge to the jury erroneously and improperly charged as follows:

30 "Now she can recover any pecuniary losses which she has sustained by reason of her inability to attend to her business or the pecuniary loss sustained if she gave the business up, and if her abandonment of it was naturally and proximately caused by the negligence of the defendant. There was testimony given as to the manner in which she conducted her business and her profits; I am only reciting part of it. She testified that she never went back to her vocation after the accident. If you find that, she is entitled to recover; those are the elements of her damage."

40

Reasons on Appeal.

8. Because the trial court erroneously and improperly refused to charge appellant's request:

"If you find that this woman was injured as the result of a pure accident, then the defendant is not responsible."

KALISCH & KALISCH,
Attorneys for Defendant-Appellant.

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BENJAMIN M. WEINBERG
Counselor-at-Law
738 Broad Street
Newark, N. J.

Mar. 20, 1928

Isidor Kalisch, Esq.,
790 Broad Street,
Newark, N. J.

Dear Sir:

The papers in re Bergman vs. Ginsburg, have been turned over to me for attention. There is no objection to granting you an extension of time for serving your reasons on appeal, the only condition being attached to such extension is that the cause shall be brought on for argument at the next term of the Court of Errors and Appeals.

Kindly send me all further papers and stipulations in the case.

Truly yours,

Benjamin M. Weinberg

B.M.W.

99 MAY 18 1928
Brief is hereby filed
the 17th day of May

Arthur W. Cross, Law Printer, 55-57 Lafayette

New Jersey Court of Errors

IDA BERGMAN,
Plaintiff-Respondent,

vs.

ABRAHAM S. GINSBURG,
Defendant-Appellant.

BRIEF ON BEHALF OF PL RESPONDENT.

This is defendant's appeal from a judgment rendered in favor of the plaintiff in the County Circuit Court.

On the morning of September 1, 1927, there was a clear, dry day, the plaintiff who was engaged in business in Newark was riding in a small automobile truck in a southerly direction along Broadway, in Clifton, in the County of Hudson, New Jersey.

When the said truck, which was traveling on the extreme right-hand side of the road at a point opposite to where a street crossing was standing, it was run into by an automobile and driven by the defendant, which was traveling from the opposite direction, running on the wrong side of the road, causing the two vehicles to come together in head-on collision.

The testimony clearly shows that the accident was entirely the fault of the defendant who operated his car at the time and in a most careless and reckless manner.

Some of the witnesses testified that the plaintiff was riding, was

BENJAMIN M. WEINBERG
Counsellor-at-Law
738 Broad Street
Newark, N. J.

Mar. 20, 1928.

Isidor Kalisch, Esq.,
790 Broad Street,
Newark, N. J.

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The papers in re Bergman vs. Ginsburg, have been turned over to me for attention. There is no objection to granting you an extension of time for serving your reasons on appeal, the only condition being attached to such extension is that the cause shall be brought on for argument at the next term of the Court of Errors and Appeals.

Kindly send me all further papers and stipulations in the case.

Truly yours,

Benjamin M. Weinberg

BMW.MSK

99 MAY 11 1928
Brief is hereby acknowledged
this 17th day of May, 1928.
Kalisch + Kalisch
Attys of Def.

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

IDA BERGMAN, <i>Plaintiff-Respondent,</i>	} <i>Action at Law.</i>
<i>vs.</i>	
ABRAHAM S. GINSBURG, <i>Defendant-Appellant.</i>	} <i>On Appeal from Essex Circuit Court.</i>

BRIEF ON BEHALF OF PLAINTIFF-RESPONDENT.

This is defendant's appeal from a judgment rendered in favor of the plaintiff in the Essex County Circuit Court.

On the morning of September 17th, 1924, which was a clear, dry day, the plaintiff, Ida Bergman, who was engaged in business in Paterson, was riding in a small automobile truck, driven by her son in a southerly direction along Lexington avenue, in Clifton, in the County of Passaic, in this State.

When the said truck, which was traveling on the extreme right-hand side of the road, reached a point opposite to where a steam shovel was standing, it was run into by an automobile owned and driven by the defendant, which approached from the opposite direction, running on the left or wrong side of the road, causing the two machines to come together in head-on fashion.

The testimony clearly shows that the accident was entirely the fault of the defendant, who operated his car at the time and place aforesaid, in a most careless and reckless manner.

Some of the witnesses testified that the car in which plaintiff was riding, was running as far

over to the right-hand side of the street as it could go, and that defendant's automobile was, therefore, at the time of the collision, on his own extreme left-hand side; that he was coming rapidly and gave no signal or warning of his intention to travel upon the wrong side of the highway (see testimony of Boris Pashenko, pp. 21, 22, 25, 26 and 27; Robert Johnstone, pp. 31, 35 and 37; Isaac Baltar, bottom p. 52, p. 53, and top p. 54; Harry Bergman, pp. 78, 79, 84, etc.; Ida Bergman, pp. 105 and 106).

As a result of the accident in question, the plaintiff was severely and permanently injured, and was obliged to give up and abandon a business theretofore conducted by her.

ARGUMENT OF THE LAW.

The defendant has assigned a number of reasons for a reversal of the judgment, all of which go to alleged errors of the Trial Court in its instructions to the jury, but in defendant's brief, counsel states that all of the assigned reasons are waived, with the exception of reasons 5, 6 and 7.

POINT 1.

Reason 5, is that the Trial Court erred in charging the jury as follows:

"In the operation of the feet on the brake and clutch, you may find that the sense of feeling has something to do with the way a car is operated, at least by an expert."

The above exception deals with a very simple, indifferent and wholly innocuous extract from a statement of the Court with reference to the operation of an automobile, and in nowise calls for the elaborate statement of facts and discus-

sion of the law as set forth by appellant in his brief.

The learned Court, in telling the jury the part played by the *senses* in the operation of defendant's car, said:

"In the operation of a car, you may find that *the sense of sight* is very important, and the *sense of hearing* is sometimes helpful. *In the operation of the feet on the brake and clutch, you may find that the sense of feeling has something to do with the way a car is operated, at least by an expert.*"

It is to the part italicized that counsel has excepted.

Appellant's counsel argues that this observation of the Court placed upon the defendant, a duty of handling his automobile as an expert would, but it is respectfully suggested that no such interpretation can be placed upon the statement in question. Such a statement would be, at best, meaningless, because it nowhere appears in the case just how an expert should handle a car. However, it may properly be said that everyone who is licensed to drive an automobile, is in a sense an expert driver, since the law does not permit a driver to become licensed who has not demonstrated his knowledge of the operation of an automobile.

Reference by appellant's counsel to a table of distances in which a car should be stopped, which was not put in evidence, and which is now mentioned for the first time, is inappropriate, and irrelevant, and obviously demands no reply.

POINT 2. SIXTH ASSIGNMENT.

This assignment deals with the alleged error of the Trial Court in charging the following extract from the Traffic Act, to wit:

“There is, as you doubtless know, without any advice from the court, a provision of the Traffic Act which provides that the operator of a motor vehicle, or of a vehicle, shall drive on the right-hand side of the improved portion of the highway.”

Appellant's counsel argues that the above instruction was an indication, if not an instruction by the Court to the jury, that a violation of the regulation in question, was evidence of negligence. Respondent respectfully seeks to correct this erroneous assertion by referring to the language of the learned Court, which almost immediately follows the citation from the Traffic Act, viz:

“The mere fact that a provision of the Traffic Act is violated, is not of itself negligence” (l. 27, etc., p. 136).

Defendant's exception to that part of the Court's statement, apprises the Court that defendant is excepting

“To that part of the Traffic Act, which your Honor read, which provided that a driver must drive on the right-hand side of the road” (l. 20, p. 139).

Whether counsel meant to take an exception to the Court's reading that part of the Traffic Act, or whether the thought to be conveyed was that the Court erroneously read or quoted from the Traffic Act, is in doubt. In either event, no valid criticism of the Court's charge is perceived. The language is almost identical. Counsel, however, points out that the act contains the further provision that a driver shall, when the improved portion of the road is of sufficient width, keep to

the “right of the center” of such road, except when passing a vehicle ahead, and from this argues that injury has been done him because it does not appear that the improved portion of the road, at the point of the accident, was wide enough for a driver to keep to the center of the road.

The first answer to that is that the evidence fairly shows that there was room for the defendant to keep to the right of the center of the road, and the second answer is that if counsel desired a further citation from the Traffic Act, as to the keeping to the right of the center of the road (upon which subject the Court did not touch) he should have made a request to so charge.

Suffice it to say, however, that the matter is of the slightest importance for the reason that it appeared from the testimony, that the defendant drove upon the wrong side of the road, and that his so driving was not caused by the alleged blowing off of the steam from the steam shovel. The defendant himself so testified (top p. 128). Witnesses testified that there was plenty room for two trucks to pass the excavation and shovel without touching each other, and therefore, the only pertinent part of the act in question, was that which related to the duty of a driver of a vehicle to keep to the right of a road. This provision is independent of that portion of the act which provides when a vehicle must keep to the “right of the center.”

As the instruction from the Court is identical to the language of the Traffic Act, it is respectfully submitted that criticism of the Court's charge is groundless.

POINT 3. SEVENTH ASSIGNMENT.

The last assignment is to the following instruction of the Court, to wit:

"Now she can recover any pecuniary losses which she has sustained by reason of her inability to attend to her business or the pecuniary loss sustained if she gave the business up, and if her abandonment of it was naturally and proximately caused by the negligence of the defendant. There was testimony given as to the manner in which she conducted her business and her profits; I am only reciting part of it. She testified that she never went back to her vocation after the accident. If you find that, she is entitled to recover; those are elements of her damage."

The portion of the charge hereinabove recited is not continuous, as will be discerned upon reading the Court's charge on page 138, but is made up of two separate extracts. Said extracts, however, deal simply with the right of the plaintiff to recover any pecuniary losses which she sustained by reason of the loss of her business, if the same was "naturally and proximately caused by the negligence of the defendant."

Counsel for appellant, in taking his exception to the Court's charge in the respect mentioned, based it upon the fact that the Court,

"failed to state to them (the jury) that she must also make a reasonable attempt to operate the business so as to reduce her damages" (l. 34, etc., p. 139).

The objection here is not that the Court erred in its statement of the law to the jury, but that it failed to make a further statement of the law. It has been settled that when a particular charge as to any principle of law, is desired, a request to the Court to charge such proposition of law, is necessary.

This is another familiar case of an exception based upon an alleged error of omission rather than commission. However, if as stated by the Court, it was the province of the jury to determine if her abandonment of the business was caused by the negligence of the defendant, then it was unnecessary to say to the jury that it was the duty of the plaintiff

"to make a reasonable attempt to operate the business so as to reduce her damages."

Simplified, the situation disclosed was, that the Court recited from the testimony of the plaintiff as to her losses, to none of which testimony in that respect, the defendant objected, and then proceeded to say that if those losses were the natural and proximate cause of defendant's negligence, she would be entitled to recover. That she could recover for such losses is beyond question. See *Healey v. Ballantine*, 66 N. J. L. 339, at pp. 350 and 351, and *Rabinowitz vs. Hawthorne*, 89 N. J. L. 308.

Inasmuch, therefore, as appellant's counsel did not take an exception to what the Court said, but rather to what it did *not* say, he is not entitled to raise any question in this court, and it nowhere appearing that any such instruction was requested, it is respectfully submitted that the assignment in question is groundless and without merit.

It is, therefore, respectfully insisted that no error having appeared in the charge of the Court in any of the respects pointed out, the judgment of the Essex County Circuit Court should be affirmed with costs.

Respectfully submitted,

BENJAMIN M. WEINBERG,
Of Counsel with Plaintiff-Respondent.

9999 MAY. 1. 1928

Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

IDA BERGMAN, <i>Plaintiff-Respondent,</i> <i>vs.</i> ABRAHAM S. GINSBURG, <i>Defendant-Appellant.</i>

BRIEF OF APPELLANT.

Facts.

On September 17, 1924, while the respondent was a passenger in another automobile on Lexington avenue, at or near Clifton, New Jersey, which is between Passaic and Paterson, and while said automobile was being driven by the appellant in the opposite direction viz.: from Passaic to Paterson. Lexington avenue was opened to the extent of ten or twelve feet on the easterly side by reason of a trench, which trench was about twenty-five feet long (p. 17, ll. 30 to 40). The trench was to the appellant's right in the direction he was going (p. 18, ll. 6 to 10).

The traveled portion of the road was amesite (p. 120, ll. 30 to 37), and there was a steam shovel on the same side of the road on which the trench was dug (p. 19, ll. 17 to 19). At the time the appellant and the car in which the respondent was riding were about opposite the steam shovel the accident occurred, and the testimony of the appellant was that when he reached a point about fifteen feet away from the steam shovel the safety valve blew and he could not see a thing and he applied his brakes and then the accident happened (p. 119, ll. 30 to 40). In this accident the respondent was injured.

Respondent's testimony as to the seriousness of her injuries was contradicted and particularly by Dr. James P. Morrill, her main medical witness, who was the surgeon of St. Joseph's Hospital, where the respondent was taken after the accident. His testimony was that she had a laceration of the upper ribs, a deep cut and a break or fracture of the right upper arm about three inches below the shoulder, she had a slight abrasion on the right side of her neck, and all this appeared from the hospital notes which were taken under this doctor's supervision (p. 42 top to l. 25). The X-ray picture, according to this doctor, was taken about one week after the accident (p. 45, ll. 11 and 12), and there was no charge at the hospital for services (p. 45, ll. 25 and 27). The fracture was in perfect alignment (p. 47, ll. 36 and 37). At the time of the trial this doctor made a further examination in which he said there was a slight scar left and the function of the arm was good; no restriction, although a test was made for it; no ankylosis (pp. 74 and 75).

Respondent further testified that she was in the fish business (p. 109 bottom, top of p. 110). That she never returned to her business after the accident (p. 111, ll. 23 and 24). On page 113 she testified about her average weekly earnings in the business. She also testified that she had some of her family helping her; that she could not find anybody to do the buying of the fish after the accident and that is the reason why she gave up the business (p. 116).

Dr. Joelson's testimony differed very largely with the other doctor produced by the respondent. Of course, he is a general practitioner, whereas Dr. Morrill was the surgeon in charge of the case. Dr. Joelson's testimony appears on pages

61 to 73. On page 69 he states that he did not have any records with him at the trial, although he knew he was going to be called. *Plaintiff's judgment was \$5000. (p. 73).*

The reasons on appeal appear on pages 141, 142 and 143.

BRIEF OF ARGUMENT.

Appellant waives reasons 1, 2, 3, 4 and 8 and will stand on reasons 5, 6 and 7.

REASON 5.

The Trial Court erred in charging the jury, "In the operation of the feet on the brake and clutch, you may find that the sense of feeling has something to do with the way a car is operated, at least by an expert."

It will be observed that the appellant stated that while on his way from Passaic to Paterson driving on the amesite portion of the road and when about fifteen feet from the steam shovel on his right, the steam discharged and he was blinded and he could not see a thing and he applied his brakes and then the accident happened (p. 119, ll. 32 to bottom). That about twenty-five to thirty feet beyond the steam shovel, in the direction he was going, there was a slight curve to the right, that he saw no automobile coming and that the construction work or the steam shovel was about three or four feet over on the amesite (p. 120, ll. 34 and 35). There was no indication that the steam shovel was going to blow (p. 121, ll. 6 to 8). That he was going twenty to twenty-five miles an hour (p. 121, ll. 12 to 13). That he heard no horn blown (p. 121, ll. 14 to 15).

It will be recalled that this was open country and, therefore, a speed of thirty miles an hour was the maximum rate of speed under our motor vehicle laws.

When the steam shovel blew, the whole road was full of steam and struck the appellant's face and the accident happened, and he immediately stopped alongside of the steam shovel (p. 121, ll. 22 to 32). That his front left wheel and fender struck the left front wheel and front tire of the other car and appellant was slightly over the center of the road. That he had to be slightly over the center of the road, in order to pass the steam shovel, the amesite road being from 16 to 20 feet wide (p. 121 bottom to 122, l. 15). That he could see about twenty to twenty-five feet to the other side of the steam shovel as he approached it, the curve then being to the right and he had not passed the steam shovel when the steam blew (p. 122, l. 18 to bottom).

On cross examination this witness indicated there was dirt on both sides of the amesite road and at the time the accident happened he was about two feet to the left of the center of the road (p. 125 top). That there was only about ten or twelve feet between the left-hand side of the Ford car in which the respondent was riding and the excavation (p. 125, ll. 22 to 25), and the reason that he could not get his car through was because the steam blinded him (p. 125, ll. 29 to 30). On further cross examination he stated that he was about fifteen feet away from the steam shovel, when it blew and the accident happened opposite the steam shovel (p. 126, ll. 16 to 20). That he could stop his car in twenty feet or less (p. 127, ll. 10 and 11), but that he did not go across the street, he being about the center of the road when it happened (p. 127, ll. 18 to 24)

about two feet to the left of the center (p. 127, ll. 28 and 29). *That he had to go to the left of the center to pass the steam shovel* (p. 127, ll. 30 to 33). That if no steam had been blown the appellant would have been about the same place on the road (bottom of p. 127, top of p. 128), *but it was the steam which made it impossible for appellant to see the other automobile* (p. 128, ll. 12 and 13). That the steam shovel and the curve in the road obstructed his view (p. 128, ll. 12 to 20). The steam came out from the side of the steam shovel (p. 129 bottom to p. 130, l. 10). That he could not stop his car within the fifteen feet to avoid striking the other automobile (bottom of p. 130). That the steam spread over the roadway (p. 130, ll. 35-36); that he did not know when the steam shovel was going to blow off steam (p. 131, ll. 23, to p. 132, l. 22).

It will be observed, from the above excerpts of testimony, that the curve in the road and the steam shovel, obstructed appellant's vision and his inability to see, was increased just before the accident by the blowing off of steam at a time when the appellant was about fifteen feet from the steam shovel. Therefore, it became necessary for the Court to charge the jury with regard to the law governing the appellant's measure of duty, in connection with his observation and control of his automobile, at about the time of this accident. Manifestly, the only duty resting upon the appellant was to exercise reasonable care in the operation of his automobile and reasonable care in an attempt to observe a situation which might endanger other persons.

The charge of the Court as given, the statement of which appears at the beginning of this point, cast a greater duty upon the appellant than was imposed by law, *because the jury was*

told that the criterion of duty resting upon the appellant was comparable with the ability of an expert in the use of the brake and clutch of an automobile.

It would seem highly improper to cast upon a driver of an automobile the duty of having expert capacity in the use of the brake and clutch of his automobile. The charge of the Court is not susceptible of any other interpretation, especially to the mind of a layman and under it, the jury, in determining whether the appellant stopped his automobile as quickly as he should have, *would apply the test of whether an expert could have stopped and not whether an ordinary driver could stop by the use of his clutch and brake, at the time of the occurrence.*

Manifestly the duty upon ordinary members of the public, driving automobiles, should not be different than the duty imposed upon general practitioners of medicine as laid down by our courts.

The rule as laid down in *Ely v. Wilbur*, 49 Law p. 685; *Lollie v. Gray*, 128 Atl. Rep. 256, and *Smith v. Corrigan*, 100 N. J. L. 267, is that the law requires of the physician that degree of knowledge and skill which is used in the grade of the profession which he occupies and in which he was employed in the particular case. If there were a reason for a higher degree of care under any circumstances, the higher degree of care should be demanded of a physician.

Appended to the official pamphlet issued May 15, 1926, by Motor Vehicle Commissioner Dill of New Jersey, is a table of speeds and the number of feet which a car equipped with proper brakes, should stop. At the several rates of speed mentioned, the number of feet within which a car

should stop, going at the rate of twenty-five miles an hour, by the application of the brakes which are right, is fifty-eight feet if the car is equipped with two-wheel brakes and if equipped with four-wheel brakes it should stop in thirty-eight feet six inches.

The appellant here came to a stop in about fifteen feet, yet the jury was told by the Court, in so many words, that the appellant was to be charged with the duty of bringing his car to a stop as an expert could. We all realize that experts have different little tricks by reason of which they are able to do certain things with automobiles that a driver with ordinary capacity could not do, and it is safe to say that the jury had this in mind, when the Court gave it the charge of which we are now complaining.

We maintain it was highly prejudicial to the appellant and charged him with a greater duty than was his by law.

REASON 6.

The Court erred in charging the jury, "There is, as you doubtless know without any advice from the Court, a provision of the Traffic Act which provides that the operator of a motor vehicle, or of a vehicle, shall drive on the right-hand side of the improved portion of the highway."

Paragraph 2, Subdivision 2, Part II, of the State Traffic Act, Chapter 156, P. S. 1915, as amended, provides:

"A vehicle shall keep to the right and when the improved portion of a road is of sufficient width the vehicle shall keep to the right of the center of such road, except when passing a vehicle ahead."

The Court did not charge the language of this statute, but gave his version of the act and then indicated to the jury that violation of it was evidence of negligence (p. 136, ll. 20 to 37). Manifestly the reference to the Traffic Act, by the Court, was an incorrect statement of the law and the example given by the Court of an emergency, which would excuse the driver of an automobile from a violation of the act, did not cure this error.

The testimony of the appellant was to the effect that it was not the steam which caused him to go to the left of the center of the road, in the first instance, but it was the projection of the trench and the steam shovel which was responsible. This was not a sudden emergency, but a physical situation, which made it impossible for the driver of the automobile to pass the steam shovel without going two or three feet to the left of the center of the road. The mere fact that there was testimony pro and con as to the necessity of the appellant, to cross to the left of the center of the road to pass the steam shovel, would not correct the error of the trial court as made in his charge.

The physical facts in this case as disclosed in the evidence, were, that there was an amesite pavement, approximately twenty feet wide, with a dirt shoulder on both sides; the amesite pavement was the improved portion of the road and the Court unconditionally charged the jury, that if the driver did not drive on the right-hand side of the improved portion of the road he violated the Traffic Law of this State. This statement of law by the Court is contrary to the citation of the

act as hereinbefore stated, because the Traffic Act provides in substance that:

“The driver of a motor vehicle shall only be obliged to drive to the right of the center of the road when the improved portion of the same shall permit.”

In this instance the improved portion of the road did not permit of his so doing, and yet the Court at the same time stated to the jury that a violation of the law as he charged the jury, was evidence of negligence.

It is true that the Judge charged the jury

“You may find from the testimony that young Mr. Bergman was doing that,”

yet the other alternative was given the jury, that if the appellant's car was not to the right of the improved portion of the road, it was evidence of negligence. The example, of what might excuse the driver, namely, if he were suddenly confronted with a child who ran out, on the right side of the road and the driver turned to the left of the road to avoid it, is not one which tends to clear up the erroneous conception of the law as laid down by the Court.

The error complained of was such as to clearly prejudice the appellant's legal rights in the trial of this issue.

REASON 7.

The Court erred in charging the jury, "Now she can recover any pecuniary losses which she has sustained by reason of her inability to attend to her business or the pecuniary loss sustained if she gave the business up, and if her abandonment of it was naturally and proximately caused by the negligence of the defendant. There was testimony given as to the manner in which she conducted her business and her profits; I am only reciting part of it. She testified that she never went back to her vocation after the accident. If you find that, she is entitled to recover; those are elements of her damage."

The Court's attention was clearly called to this erroneous portion of the charge in connection with damages at the end of the trial; the exception taken was as follows:

"I respectfully pray an exception to that part of your Honor's charge where your Honor stated that the jury might bring in damages for loss of business if caused by the defendant on the ground that your Honor failed to state to them that she must also make a reasonable attempt to operate the business so as to reduce her damages" (p. 139, ll. 29 to 37).

We have no fault to find with the charge as to damages as far as it contains the ordinary elements in a tort action of this kind, but as far as it relates to the respondent's right to recover for the business which was given up by her as a distinct item, in addition to the loss of profits during the period of her inability to work, we maintain the Court erred.

We believe there can be no argument against the proposition that in a case such as this, it is the injured's duty to reduce her damages (*Coll v.*

Lehigh Valley R. R. Co., 138 Atl. Rep., p. 225 at 226).

Regardless of whose duty it was to go into the question of the injured's attempt to reduce her damages, it still remained the Court's duty to charge the jury properly on the legal question viz.: the injured's duty to reduce her damages.

We have already given excerpts of the testimony of the respondent showing the great contradiction of her testimony by her surgeon, Dr. Morrill showing that her arm indicated very little, if any, disability, and, of course, the thought immediately arises as to why she could not exercise her mental capacity in buying fish, even though she had an injured arm.

The jury was only called upon to determine whether the abandonment of her business was naturally and proximately caused by the negligence of the appellant (p. 138 top to l. 9). This is not the exclusive test. She might have owned a building with a business in it and when the accident occurred, not being able to operate the business any longer, she could sit back, allow the mortgage to be foreclosed and the property to be taken away from her. Certainly the person responsible for her injuries could not have been held for that loss.

It was nowhere stated to the jury, that regardless of what the evidence disclosed, the law cast upon the respondent a certain duty, which duty was to reduce her damages, even though her inability to perform labor had been caused by the negligence of the driver of the automobile.

Suppose the jury were of the opinion that she could have sold her business and if it was a paying one, as respondent testified, the good-will

with it and the income to be derived from the sale of the business would be more than or equal to the income derived from the operation of the business, the Court's charge took away from the jury's consideration that element. It cannot be said that the jury gave no heed to this element of damages. It is impossible to divide up the verdict, so as to allocate to the several items of damages, upon which a recovery might be had under the Court's charge, the several sums allowed by the jury for each item.

On page 872 C. J., Vol 17, appears the following:

"On the question of reducing damages no award may be made for elements of damages as are susceptible of proof with reasonable accuracy when such proof is not introduced."

This injured failed to show what she paid for the business and failed to show what she was obliged to sell the business for, if anything, and the jury was left to speculate as to the value of the business which was lost to the respondent as a result of this accident. The injured should have been in a position to offer and actually offer in evidence the cost of the business and the amount obtained for the sale of it.

If the rule that a person may recover for the reasonable value of such services as might be used in the curing of the person's disability is a correct rule of law, then it should follow that the same rule applies with regard to a business which is alleged to have been given up as a result of an accident.

We maintain this charge was prejudicial to the appellant.

We, therefore, submit that for the errors complained of, the judgment in the above matter should be set aside and a new trial granted.

Respectfully submitted,

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ISIDOR KALISCH,
On the Brief.

