

INDEX

	PAGE
FRANK MALINOWSKI V. FREDERICK PHILLIPS.	
Summons	1
Complaint	2
Answer	5
Reply	6
Postea	7
Motion for Direction of a Verdict.....	124
Notice of Appeal	137
ADAM KOZLOKOWSKY V. FREDERICK PHILLIPS.	
Summons	8
Complaint	9
Answer	12
Reply	14
Postea	15
Motion for Non-suit	93
Motion for Direction of a Verdict	124
Notice of Appeal	138
Charge to Jury	126
Exceptions to Charge	133
Grounds of Appeal	139

TESTIMONY.

For Plaintiffs.

John Pluskota,	
direct examination.....	17
cross “	24
re-direct “	36
re-cross “	37
Frank Malinowski,	
direct examination.....	37
cross “	43
Howard C. Voorhees,	
direct examination.....	51
(recalled) direct “	65
cross “	65

	PAGE
Adam Kozlokowsky,	
direct examination.....	58
cross "	66
Joseph J. Bakaisa,	
direct examination.....	81
George H. Suydam,	
direct examination.....	84, 86
cross "	85, 86
re-direct "	86
Walter Malinowski,	
direct examination.....	87
Walter Guyette,	
direct examination.....	88
cross "	92

For Defendant.

George W. Ainscow,	
direct examination.....	93
cross "	99
re-direct "	106
Eaner A. Renning,	
direct examination.....	106
cross "	109
Benjamin W. Malseed,	
direct examination.....	112
cross "	114
re-direct "	120
George Ainscow, Jr.,	
direct examination.....	121
cross "	122

Plaintiffs' Rebuttal.

Frank Malinowski,	
direct examination.....	123
cross "	123
re-direct "	123

SUMMONS.

The State of New Jersey to Frederick Phillips:

(L. s.) You are summoned to answer the annexed complaint of Frank Malinowski, in an action at law in the New Jersey Supreme Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 10

WITNESS, WILLIAM S. GUMMERE, Esq., Judge of the said court at Trenton, this fifth day of February, one thousand nine hundred and twenty-six. 20

EDWARD J. KELLEHER,
Clerk.

JOHN E. TOOLAN,
Attorney.

Served February 17, 1926.

Malinowski v. Phillips—Complaint.

COMPLAINT

New Jersey Supreme Court

MIDDLESEX COUNTY.

10	FRANK MALINOWSKI, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> FREDERICK PHILLIPS, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law. Complaint.</i>
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20 Plaintiff herein, residing in the City of Perth Amboy, County of Middlesex and State of New Jersey, complaining of the defendant, says that:

1. Plaintiff herein on or about the 22nd day of September, 1925, was riding as a passenger in an automobile then and there being lawfully operated in a westerly direction on and over the Lincoln Highway, Raritan Township, Middlesex County, New Jersey.

30 2. On the date and at the time and place aforesaid defendant herein was the owner of a motor truck then and there being operated by his authorized servant and agent in a westerly direction along, upon and over the said Lincoln Highway.

40 3. It then and there became and was the duty of the defendant herein at the time and place aforesaid while operating and driving his automobile, through his servant and agent as aforesaid, to drive and operate said automobile in a lawful and careful manner, on the right-hand side of the highway, with due regard for the

Malinowski v. Phillips—Complaint.

rights of other persons lawfully using said highway, and particularly to give a signal or warning to other vehicles on said highway when defendant, through his agent or servant, made any radical change in the course of said automobile as same was traveling along the highway and particularly when the said automobile of the defendant was turning from the right-hand side of the highway to the left-hand side of the highway or in anywise crossing said highway, and in general to so guide, manage, operate and control said automobile so as to avoid running into and striking other vehicles lawfully using the highway.

10

4. Defendant herein, not regarding his duty as aforesaid, through his servant and agent, negligently and carelessly operated and drove his said automobile at a reckless rate of speed, on the wrong side of said highway, and without giving any proper signal or warning, by hand or other device, in crossing from the right side of said highway to the left side thereof, and generally neglected and failed to operate and drive his said automobile in a careful manner and without due and proper regard to the use of the highway by other persons or vehicles.

20

5. As a direct and proximate result of the negligence of the defendant as aforesaid, the defendant's automobile ran into and collided with the automobile in which the plaintiff herein was riding and as a result of said collision plaintiff was thrown violently from said automobile and suffered and sustained a severe fracture of the skull and severe wounds about the head, arms, body and face, of a character and nature which plaintiff is unable to explain.

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Malinowski v. Phillips—Complaint.

6. As a direct and proximate result of the injuries sustained as aforesaid, plaintiff ever since said accident has been sick, sore and disabled, and has suffered severe mental and physical pain and anguish and is now and in the future will be permanently disfigured and disabled and rendered incapable of doing or performing his usual work. As a further result of said injuries plaintiff lost large sums of money that he otherwise would have earned as wages and expended money for hospitals, doctors and medical care and attention.

Plaintiff demands damages in the sum of Fifteen Thousand (\$15,000.00) Dollars.

JOHN E. TOOLAN,
Attorney of the Plaintiff.

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Malinowski v. Phillips—Answer.

ANSWER.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

FRANK MALINOWSKI,	}	Action at Law. Answer.	10
<i>Plaintiff,</i>			
<i>vs.</i>			
FREDERICK PHILLIPS,			
<i>Defendant.</i>			

The defendant by way of answer to the complaint says:

1. Defendant denies the allegations in paragraph 1 of the complaint. 20
2. The defendant admits ownership of the motor truck but denies the other allegations in paragraph 2 of the complaint.
3. The defendant denies the allegations in paragraphs 3, 4, 5 and 6 of the complaint.

FIRST SEPARATE DEFENSE.

The carelessness and negligence of the plaintiff, Frank Malinowski, was the proximate cause of the alleged accident. 30

SECOND SEPARATE DEFENSE.

The carelessness and negligence of the plaintiff, Frank Malinowski, contributed to the happening of the alleged accident.

THIRD SEPARATE DEFENSE.

The carelessness and negligence of Adam Kozlokowsky, with whom the plaintiff, Frank Mali- 40

Malinowski v. Phillips—Postea.

POSTEA.

Filed September 28, 1926.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

FRANK MALINOWSKI,

Plaintiff,

vs.

FREDERICK PHILLIPS,

Defendant.

*Action
at Law.*

Postea.

10

This case was tried at the September term of court before the Honorable Peter F. Daly, Circuit Court Judge, with a jury, on September 23 and September 24, 1926. 20

The jury returned a general verdict in favor of the plaintiff and against the defendant for the sum of Three Thousand (\$3,000.00) Dollars.

PETER F. DALY,
Circuit Court Judge.

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Kozlokowsky v. Phillips—Summons.

SUMMONS.

State of New Jersey to Frederick Phillips:

(L. s.) YOU ARE SUMMONED to answer the annexed complaint of Adam Kozlokowsky, in an action at law in the New Jersey Supreme Court. AND TAKE NOTICE that unless you file your answer to said complaint with the Clerk of the New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you.

WITNESS, WILLIAM S. GUMMERE, Esq., Judge of our said court at Trenton, this fifth day of February, one thousand nine hundred and twenty-six.

EDWARD J. KELLEHER,
Clerk.

JOHN E. TOOLAN,
Attorney.

Served February 17, 1926.

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Kozlokowsky v. Phillips—Complaint.

COMPLAINT.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

ADAM KOZLOKOWSKY, <div style="text-align: center;"><i>vs.</i></div> FREDERICK PHILLIPS, 	}	<i>Plaintiff,</i> <i>Defendant.</i>	<i>Action at Law. Complaint.</i>	10
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Plaintiff herein, residing in the City of Perth Amboy, County of Middlesex and State of New Jersey, complaining of the defendant says that:

FIRST COUNT.

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1. Plaintiff herein, on or about the 22nd day of September, 1925, was the owner of an automobile which he was then and there lawfully operating in a westerly direction along, upon and over the Lincoln Highway, in the Township of Raritan, Middlesex County, New Jersey.

2. On the date and at the time and place aforesaid defendant herein was the owner of a motor truck then and there being operated by his authorized servant and agent in a westerly direction along, upon and over the said Lincoln Highway.

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3. It then and there became and was the duty of the defendant herein at the time and place aforesaid while operating and driving his automobile, through his servant and agent as aforesaid, to drive and operate said automobile in a lawful and careful manner, on the right-hand

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Kozlokowsky v. Phillips—Complaint.

side of the highway, with due regard for the rights of other persons lawfully using said highway, and particularly to give a signal or warning to other vehicles on said highway when defendant, through his agent or servant, made any radical change in the course of said automobile as same was traveling along the highway and particularly when the said automobile of the defendant was turning from the right-hand side of the highway to the left-hand side of the highway or in anywise crossing said highway, and in general to so guide, manage, operate and control said automobile so as to avoid running into and striking other vehicles lawfully using the highway.

4. Defendant herein, not regarding his duty as aforesaid, through his servant and agent, negligently and carelessly operated and drove his said automobile at a reckless rate of speed, on the wrong side of said highway, and without giving any proper signal or warning, by hand or other device, in crossing from the right side of said highway to the left side thereof, and generally neglected and failed to operate and drive his said automobile in a careful manner, or with due and proper regard to the use of the highway by other persons or vehicles.

5. As a direct and proximate result of the negligence of the defendant as aforesaid, defendant's automobile ran into and collided with the plaintiff's automobile, and as a result thereof plaintiff's automobile was broken and demolished and rendered entirely unfit for use.

Plaintiff demands as damages the sum of One Thousand (\$1,000.00) Dollars on the first count.

Kozlokowsky v. Phillips—Complaint.

SECOND COUNT.

1. Plaintiff repeats paragraphs 1, 2, 3 and 4 of the first count.

2. As a direct and proximate result of the negligence of the defendant's automobile as aforesaid, defendant's automobile ran into and struck plaintiff's automobile and plaintiff herein was cut and bruised about the head, arms, legs, body and face. 10

3. As a direct and proximate result of the injuries sustained by the plaintiff as aforesaid, plaintiff was unable to do or perform his usual work for a long period of time and suffered severe mental and physical pain and anguish, and expended large sums of money to be cured of his injuries as aforesaid. 20

Plaintiff demands as damages the sum of One Thousand (\$1,000.00) Dollars on the second count.

JOHN E. TOOLAN,
Attorney of the Plaintiff.

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Kozlokowsky v. Phillips—Answer.

ANSWER.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10	ADAM KOZLOKOWSKY, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> FREDERICK PHILLIPS, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law. Answer.</i>
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The defendant, Frederick Phillips, by way of answer says:

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ANSWER TO FIRST COUNT.

1. The defendant admits that the plaintiff was driving his automobile on September 22, 1925, along Lincoln Highway, but denies that the plaintiff was lawfully operating said automobile.

2. The defendant admits ownership of the motor truck but denies that it was being operated as alleged in paragraph 2 of the First Count.

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3. Defendant denies the allegations in paragraphs 3, 4 and 5 of the First Count.

ANSWER TO SECOND COUNT.

Paragraphs 1, 2 and 3 of the answer to the First Count are realleged as an answer to the first paragraph of the second.

2. Defendant denies the allegations in all the other paragraphs of the Second Count.

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Kozlokowsky v. Phillips—Answer.

FIRST SEPARATE DEFENSE TO FIRST
COUNT.

The carelessness and negligence of the plaintiff was the proximate cause of the alleged accident.

SECOND SEPARATE DEFENSE TO FIRST 10
COUNT.

The carelessness and negligence of the plaintiff contributed to the happening of the alleged accident.

FIRST SEPARATE DEFENSE TO SECOND
COUNT.

The carelessness and negligence of the plaintiff was the proximate cause of the alleged accident. 20

SECOND SEPARATE DEFENSE TO
SECOND COUNT.

The carelessness and negligence of the plaintiff contributed to the happening of the alleged accident.

JOHN A. MATTHEWS,
Attorney for Defendant. 30

Kozlokowsky v. Phillips—Reply.

REPLY.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

10	ADAM KOZLOKOWSKY, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> FREDERICK PHILLIPS, <div style="text-align: right;"><i>Defendant.</i></div>	}	<i>Action at Law. Reply.</i>
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Plaintiff denies each and every allegation in defendant's answer.

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JOHN E. TOOLAN,
Attorney of the Plaintiff.

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Kozlokowsky v. Phillips—Postea.

POSTEA.

Filed September 28, 1926.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY.

<p>ADAM KOZLOKOWSKY, <i>Plaintiff,</i></p> <p style="text-align: center;"><i>vs.</i></p> <p>FREDERICK PHILLIPS, <i>Defendant.</i></p>	}	<p><i>Action at Law. Postea.</i></p>	10
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This case was tried at the September term of court before the Honorable Peter F. Daly, Circuit Court Judge, with a jury, on September 23 and September 24, 1926. 20

The jury returned a general verdict in favor of the plaintiff and against the defendant for the sum of Five Hundred (\$500.00) Dollars.

PETER F. DALY,
Circuit Court Judge.

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Opening.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY CIRCUIT.

September Term, 1926.

10	FRANK MALINOWSKI	}
	<i>vs.</i>	
	FREDERICK PHILLIPS,	
	ADAM KOZLOKOWSKY	
	<i>vs.</i>	
	FREDERICK PHILLIPS.	

20 Transcript of stenographer's notes of evidence in the above-entitled causes, taken before Hon. Peter F. Daly, Circuit Court Judge, and a jury, at the Middlesex County Court House, in the City of New Brunswick, New Jersey, on the 23rd day of September, A. D. 1926, at 11:05 A. M.

Appearances:

John E. Toolan, Esq., attorney for the plaintiffs.

30 John A. Matthews, Esq., attorney for the defendant.

A jury being empaneled and found satisfactory, they were sworn.

Mr. Toolan opens the case for the plaintiffs.

Mr. Matthews: On the opening of counsel his statement is, and I ask the Court to correct me if I am wrong, that Kozlokowsky, the driver of the car, was coming along the highway and a

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John Pluskota, direct.

truck turned, and in attempting to go from behind the truck he ran into the truck and thereafter went 200 feet. That is the entire statement of the mechanics of the accident. On that statement of counsel in the opening as to Kozlokowsky I move a non-suit.

The Court: The motion is denied. 10

Mr. Matthews: Prays exception.

Mr. Matthews opens the case for the defendant.

JOHN PLUSKOTA, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath said:

Direct examination by Mr. Toolan.

Q Where do you live, Mr. Pluskota? A 212 Meade street. 20

Q Perth Amboy, New Jersey? A Yes, sir.

Q And you know Frank Malinowski? A Yes, sir.

Q And you also know Adam Kozlokowsky? A Yes, sir.

Q How long have you known these young men? A About ten years. 30

Q On the evening of September 22, 1925, were you in their company? A Yes, sir.

Q Were you in their company at the time of this alleged automobile accident? A Yes, sir.

Q Riding in the same car? A Yes, sir.

Q What sort of a car was it? A Ford sedan.

Q Driven by whom? A Adam Kozlokowsky.

Q Which one of these young men is Adam Kozlokowsky? A First man on the left.

Q This young man here? A Yes, sir. 40

John Pluskota, direct.

Mr. Toolan: Indicating the plaintiff Adam Kozlokowsy.

Q He was driving the Ford? A Yes, sir.

Q It was a Ford sedan? A Yes, sir.

10 Q On what roadway or highway did the accident happen? A Between Metuchen and New Brunswick.

Q On what road? A On the highway.

Q Lincoln Highway? A Yes, sir.

Q And where did the accident happen? A By the Lincoln Garage.

Q What time of the night did the accident happen? A Between 11:00 and 11:30.

Q How fast was that car being driven just before the accident? A About twenty, twenty-five miles an hour.

20 Q You were sitting in what seat? A In the front seat on the right-hand side.

Q And Kozlokowsky was driving? A Yes, sir.

Q Where was Malinowski sitting? A Sitting in the back on the right-hand side.

Q Anybody else in the car? A No, sir.

30 Q As you approached the Lincoln Garage what, if anything, did you see? A Well, about 200 feet before we got there we seen the truck standing parked on the right-hand side. As we got there, about ten or fifteen feet, the truck pulls out from the right to the left, so we turned to the left, he turned to the left, he couldn't pass, so he turned back to the right and hit the rear of the truck.

Q You say you first saw this truck when you were 200 feet away? A Yes, sir; parked.

40 Q As you approached that truck what, if anything, did Kozlokowsky, who was driving the car, do? A He was knocked unconscious.

John Pluskota, direct.

Q What? A He was knocked unconscious.

Q I know, but I say what did he do as you came up towards that truck? A He turned to the left.

Q For what purpose, do you know? A Well, he couldn't pass it—

10

Mr. Matthews: I object.

Mr. Toolan: I will withdraw it.

Q Was the truck standing still? A No, not at that time. The truck pulled out.

Q As you approached it was it standing still? A Yes, sir.

Q Did you intend to stop behind the truck, or go beyond it, or what? A No. At the same time the truck didn't give us no notice he pulls out.

20

Q What I want to know is this, were you going to go by that truck? A Yes, we was going to pass on the left.

Q And when you got ten or fifteen feet behind it—

Mr. Matthews: He did not say that. I object to that as leading.

Mr. Toolan: I understand he did say when they got ten or fifteen feet behind the truck pulled out.

30

Mr. Matthews: I object to the question.

Mr. Toolan: I will reframe it.

Q How close were you to that truck when the truck started to move? A About ten or fifteen feet.

Q Ten or fifteen feet from where? A From the truck.

40

John Pluskota, direct.

Q From which part of the truck? A The rear.

Q And what did the truck do then? A Truck pulls out from the right to the left.

Q And what is on the left-hand side of the highway there? A The garage, the gas station.

10 Q Did you see any warning or signal of any kind given? A No, sir.

Q No warning or signal of any kind? A No, sir.

Q What sort of a truck was this? A A big enclosed-in truck; I don't know the make of the truck.

Q Speak louder. A A big closed-in truck. I guess it was a five-ton truck.

20 Mr. Matthews: I object to the guess and move it be stricken out.

The Court: It is stricken out.

Q Was it a five-ton truck? A I won't be sure if it was a five-ton truck or not. It was a big truck.

Q What kind of a body did it have? A Big closed-in body.

Q Entirely closed? A Yes, sir.

30 Q One of these moving van bodies? A Yes, one of them big moving van bodies closed in.

Q What part of the truck did the Ford strike? A The rear of the truck.

Q What part of the rear? A I don't know what corner it was. I only know we hit the rear.

Q Well, was it a corner? A I don't know if it was the corner or not. I know we hit the rear of the truck.

40 Q Well, what happened to your Ford car after you hit the rear of the truck? A Car went up the street about 200 feet, or 250.

John Pluskota, direct.

Q Where was Kozlokowsky, the driver of the car? A He was knocked out, knocked unconscious, hanging out, and I was holding him by the hand and holding the wheel.

Q He was hanging out where? A Out the left side of the car.

Q How do you mean he was hanging? A 10
His head was hanging out this way here (indicating).

Q You say you had hold of him? A I was holding him by the hand and holding the wheel with the other hand.

Q Why didn't you stop the car? A I couldn't stop it as I was holding the wheel and holding him, and I hollered for someone to get up to stop the car.

Q How was the car finally stopped? A 20
Stopped on the right-hand side.

Q I mean what stopped it finally? A Someone jumped on it and stopped it.

Q Jumped on where? A On the left-hand side and stopped it.

Q What did they do when they jumped on the left-hand side to stop it? A I don't know what they did.

Q Where was Kozlokowsky then? A They 30
took him up on the porch.

Q Well, I mean what position was he in in the car when you stopped? A Hanging out.

Q Hanging out where? A Out the left side.

Q And what side of the street or highway did your car stop on? A On the right-hand side.

Q In travelling that 200 or 250 feet what side of the highway was it on? A On the right-hand side.

Q On the right-hand side all the time? A 40
Yes, sir.

John Pluskota, direct.

Q What side of the highway was your Ford sedan on when it struck this truck? A On the right-hand side.

Q After the car was stopped, what did you say you did to Kozlokowsky? A Took him to the hospital.

10 Q Well, before you took him to the hospital?
A He was on the porch; they took him on the porch.

Q On the porch of what? A Of a house.

Q Near there? A Yes, sir.

Q And what was done there? A There was some people around there, they was rubbing him with something.

Q And what were you doing? A Well, I run up after him.

20 Q Well, what did you do when you got there? A There was two men there with an automobile and we took him in the automobile and we went up and took the other fellow out of the car and we took them to the hospital.

Q When you say the other fellow you mean Malinowski? A Yes, sir.

Q Was Malinowski unconscious at that time? A No, sir.

30 Q How long was Malinowski unconscious? A Well, he wasn't all there after I left the hospital.

Q What is that? A He wasn't all there after I left the hospital; he couldn't lay or he couldn't sit; he couldn't do nothing.

Q Well, I mean was he conscious; did he know what he was doing? A No, sir; he didn't know what he was doing.

Q Where was he hurt or injured?

40 Mr. Matthews: I object as calling for a conclusion.

John Pluskota, direct.

A On the left side.

Q I will reframe it. What, if anything, did you see wrong with Kozlokowsky? A He was hurt on the left-hand side and his shirt was torn.

Q Whereabouts on the left-hand side? A Right above the heart.

Q Did you see anything else besides his shirt being torn? A And his sleeve, his arm was scratched, or bruised up. 10

Q Well, did you see anything wrong with the wound on the left side above the heart? A No, sir; I didn't look at it.

Q Was there any blood? A There was blood on his shirt all right.

Q What injuries did Malinowski have that you saw? A I seen a big cut over his head.

Q And he was conscious? A Yes, sir. After we took him to the hospital he was knocked unconscious. 20

Q After he was to the hospital? A He walked in himself to the hospital.

Q How about Kozlokowsky, did he walk in? A We held him under the arms.

Q Did your Ford or the Ford in which you were riding that night have a blow-out? A No, sir. 30

Q Just before you hit that truck? A No, sir.

Q Well, with reference to the tires on the rear, did you examine the car after the accident to see whether they were on or not? A No, sir; I didn't examine the car at all. I didn't look back.

Q What? A I didn't examine anything.

Q Well, what part of the car was struck? A Left side. 40

John Pluskota, cross.

Q Left side beginning where? A At the door.

Q How about the hood and the front? A The hood wasn't touched at all.

Cross examination by Mr. Matthews.

10 Q What is your business? A I am a laborer.

Q Whom were you working for on September 22 last year? A National Fire Proofing.

Q Had you worked that day? A Yes, sir.

Q Do Mr. Kozlokowsky or Malinowski work there? A No, sir.

Q Where did they work then, do you know? A Copper works. I don't work in the copper works; Kozlokowsky.

20 Q And the other boy worked where? A I don't know where he worked.

Q Where did you meet them that night? A Met them on Smith street.

Q Met them on Smith street in Perth Amboy? A Yes, sir.

Q Who was with you when you met them? A Why, there was quite a few boys.

30 Q Well, did you meet them in the car? Were they in the car and did they drive along? A We drove along, yes.

Q They picked you up at Smith street, Perth Amboy? A Yes, sir.

Q What time of night was that? A When we left Smith street—

Q No. What time did they pick you up at Smith street?

Mr. Toolan: Do you mean in the car, or personally?

40 A About 7:30 when they picked me up.

John Pluskota, cross.

Q They picked you up at 7:30 at Smith street and they both were in the car at that time? A Yes, sir.

Q Had you been home to your dinner that night? A Yes, sir.

Q What time did you quit work? A 5:30.

Q Where do you live? A 212 Meade street. 10

Q Perth Amboy? A Yes, sir.

Q And is your place of employment in Perth Amboy? A Keasbey, New Jersey.

Q How long does it take you to get from Keasbey to where you go—where you live? A About twenty-five minutes.

Q How do you go, by bus? A Trolley car.

Q You went home to dinner, didn't you? A Yes, sir.

Q And after dinner where did you go? A I went up on Smith street. 20

Q Are you married or were you married or single at this time? A I am single.

Q Did you have any date to meet Kozlokovsky or Malinowski? A No, sir.

Q They just happened on you. Well, when they picked you up where did they tell you they were going? A Well, we just went out for a joy ride. We went up towards South River.

Q Where did you go for that joy ride? A All around South River. 30

Q Well, now, which route did you take? A Over the bridge.

Q Where did you stop? A We didn't stop, we was riding around. We ride around and we come back to Smith street again.

Q You started at 7:30 from Smith street, Perth Amboy, and went to South River and then you stopped, turned around and came back to Smith street again? A Yes, sir. 40

John Pluskota, cross.

Q You are sure of it, aren't you? A Yes, sir.

Q What time did you get back to Smith street? A About 9:00 o'clock.

Q Did you get anybody on the way in your trip from Smith street across the bridge to South River and back again? A No, sir.

Q And when you came back to Smith street at 9:00 P. M. what did you do? A We stopped there.

Q Stopped where? A On Smith street.

Q At whose place? A At Frank Kovias'.

Q What is Frank Kovias'? A He has got a confectionery store.

Q He has got a confectionery store, is that right? A Yes, sir.

Q What did you have in the confectionery store? A We went in and we had ice cream.

Q Who had ice cream? A The three of us.

Q Are you sure of that? A Yes, sir.

Q Do you recall being any place else before you went into Frank Kovias' after you had come back from South River? A No, sir.

Q How long were you in Frank Kovias'? A About twenty minutes.

Q You say twenty-five minutes? A Twenty minutes.

Q What did you do after you came out from Frank Kovias', having had three ice creams, one one apiece? A One apiece. Why, we stood there for quite some time.

Q Well, how long? A We stood there for over two hours.

Q You did, on the corner? A Yes, sir.

Q With whom? A Me and Frank Malinowski and Adam Kozlokowsky, and there was a bunch of other boys there.

John Pluskota, cross.

Q You stood there two hours. Then what did you do? A Then we went up towards New Brunswick.

Q You went up towards Brunswick? A Yes, sir.

Q And for what? A Just for a ride.

Q For another ride this was, the same three of you? A Yes, sir. 10

Q How did you proceed? How did you go? Which route, and which way? A We went through Metuchen.

Q What roads did you go over, do you remember? A I don't know the name of the roads.

Q Where did you stop after you left Frank Kovias' on your second ride? A Last stop was when we had the accident. 20

Q Do you mean to tell me that you didn't stop at all from the time you left Frank Kovias' store at Smith street until this accident happened? A No, sir.

Q Are you sure of it? A Yes, sir.

Q Isn't it true that you stopped at a place to have refreshments? A Well, in Frank's; that is the only place we stopped was Frank Kovias'.

Q You think, then, that twenty minutes after nine you came out of Frank's, after having the three ice cream sodas, and then you think you stood around for two hours, is that right? What time do you think you started away from Smith street at Kovias' place on your second joy ride? A About quarter to eleven. 30

Q About quarter to eleven. How do you fix the time? A Oh, I judge just what time it was.

Q What makes you judge it? A There was a watch in Frank's in the store, too. 40

John Pluskota, cross.

Q Yes, all right. Did you go into Frank's store and look at the watch before you started away? A I looked in the window.

Q You looked in the window. You remember doing that, don't you? A Yes, sir.

Q And you looked at the clock. What did
10 the clock say? What time? A About quarter after eleven.

Q Did it say quarter after eleven? A Not exact. I couldn't tell you right on the minute.

Q I don't want to hold you to the minute, but you are sure it was in the vicinity of 11:15, and that is how you remember the time that night, isn't it? A Yes, sir.

Q So that you are sure, you are certain it may have been three minutes before 11:15, or
20 three minutes after 11:15, is that right? A Yes.

Q You don't know exactly. Then, you started from there and went up to Brunswick, you call it? A Yes, sir.

Q What routes did you take, what roads did you go over? A Went through Keasbey, Fords, Metuchen, all the way in.

Q Where were you going, did you say? A Brunswick.

Q To any particular place in Brunswick? A
30 No, sir.

Q You had no destination, are you sure of that? A Yes, sir.

Q What? A Yes, sir.

Q And it was while you were on your way to Brunswick coming from Metuchen that this accident happened? A Coming from Metuchen to New Brunswick.

Q This was a Ford sedan you were in, wasn't
40 it? A Yes, sir.

John Pluskota, cross.

Q The driver's place is on the left-hand side of the car? A Yes, sir.

Q And you were on the right-hand side? A Yes, sir.

Q Were the windows up or down? A I couldn't tell you exactly whether they was up or down. 10

Q Why is it you remember looking at the clock and seeing that it was immediately near 11:15 and you can't remember whether the windows were up or down or not? A I don't remember that.

Q Had you ever ridden with Kozlokowsky before in that Ford sedan? A Yes, sir; more than once.

Q What? A Yes, sir.

Q Was there a tire rack on the back of that Ford? A I don't know if there was or not. 20

Q Was there a spare on it, a spare tire? A I don't remember if there was or not.

Q Was it moonlight that night? A Well, it was bright; I don't know if it was moonlight or not.

Q You don't remember either whether the moon was out. Was it raining or fair? A It was fair. It wasn't raining.

Q As you came along this Lincoln Highway you were two hundred feet away? A Yes, sir. 30

Q When you first saw the truck? A Yes, sir.

Q Standing on the right-hand side of the road and parked, that is correct, isn't it? A Yes, sir.

Q How far do you estimate two hundred feet, using this room as a measure? Was it longer than this room away from you? A Oh, yes. 40

John Pluskota, cross.

Q What? A Yes, sir.

Q Was it three times as long as this room away from you? A Not more than three times I don't think.

Q Well, what is your estimation now of fifteen feet from where you sit? A About from here to the wall.

10

Q About from where you sit in the witness chair to the wall is fifteen feet in your estimation. And two hundred feet is less than three times the length of this room in your estimation, is that right? A Yes, sir.

Q Was there any other vehicle between you and this parked automobile, any other automobile or truck between you and this parked automobile, between the time you saw it two hundred feet away and the time, as you say, when you came in contact with it? A No, sir.

20

Q Did any other car pass you between the time that you saw this truck? A No, sir.

Q Two hundred feet away, at the time of the accident? A No, sir.

Q So that for two hundred feet down the road you saw this truck parked there, is that right? A Yes, sir.

30

Q Then you saw, when you got at about a distance between the wall and you, you noticed the truck start to turn, is that right? A Yes, sir.

Q And you told us it was a great big truck, you don't know whether it was five ton or not, it was covered over, that is right, isn't it? A Yes, sir.

Q How wide is that roadway at that point? A About thirty feet wide.

Q Does that include the shoulders of the road, or is it just macadam, or surface matter, whatever it may be? A Just the pavement.

40

John Pluskota, cross.

Q There are shoulders yonder of the pavement, are there not? A Yes, sir.

Q Beyond the pavement there is a shoulder on each side, is that right? A Yes, sir.

Q How wide do you think they are? A I don't know.

Q So that when the great big truck started to turn you were from the wall to yourself away from it? A Yes, sir. 10

Q You were seated in the front seat on the right-hand side, that is right? A Yes, sir.

Q Now, you say your man then pulled to the left, is that right? A Yes, sir.

Q Answer me this question please, sir: How near the shoulder of the road was this truck parked, this big truck that started to turn when you came near it, as you say? A About half ways on the road and half ways on the shoulder. 20

Q Half ways on the road and half ways on the shoulder, is that right? A Yes, sir.

Q In other words the truck was parked over as far as it could be, but, of course, some of it hung over on the road, that is correct, isn't it? A Yes, sir.

Q Now, when you turned sharply to the left there was still no vehicle between you and passage onward was there? A No, sir. 30

Q But you say despite that fact and despite the fact that you were going about twenty miles an hour, that you struck that truck that was going across the road, isn't that right? A Yes, sir.

Q Were there lights on the rear of the truck that was standing on the road? A I don't remember if there was or not.

Q Well, you saw the truck two hundred feet away? A I don't remember seeing lights. 40

John Pluskota, cross.

Q What attracted your attention to the truck two hundred feet away? A Just seen it parked there, that is all.

Q Now, you told Mr. Toolan that your man pulled to the left? A Yes, sir.

10 Q And then he pulled to the right, is that right? A Yes, sir.

Q Using these two pads on the witness box in front of the witness, and putting this about here, Mr. Witness, as the parked truck, and using this pad here that I put my hand on as your automobile, and for the sake of this illustration regarding this distance as fifteen feet, do you understand me? A Yes.

Q Your car pulled this way, indicating to the left, is that right? A Yes, sir.

20 Q And this first pad, indicating the truck, also turned across the road to the left? A Yes, sir.

Q Then you say your car turned to the right, is that right? A Yes, sir.

Q In order to go behind him, that is right, isn't it? A Yes.

Q And then you hit him, is that right? A Yes, sir.

30 Q On the right side of the road? A On the right side.

Q And you tell us that what part of that car hit the truck? A The left side.

Q What part of the left side? A Beginning from the door.

Q Beginning from the left door, is that right? A Yes, sir.

Q And you in that position were two hundred feet up the road? A Yes, sir.

40 Q You didn't go into the ditch or into the side of the road at all, did you? A No, sir.

John Pluskota, cross.

Q Now, Mr. Pluskota, you told Mr. Toolan that you don't know whether or not one of your rear tires blew or dislodged itself from the rim, is that right? A Before we got there the tire didn't blow out.

Q After you got there, did it? A After the collision.

Q After the collision the tire blew out. Well, you did know that then. You told Mr. Toolan, as I remember your testimony, that you didn't know anything about that. Let us see about that blown tire. Which tire blew? A No, I don't know when the tire blowed out. After we went up to the garage the tires was blowed out.

Q After you went up to the garage what tires were blown out? A Both rear tires.

Q Both rear tires were blown, is that right? A Yes, sir.

Q Were they on the rims? A No, sir.

Q No, they were not. Neither rear tire was on the rim, is that right? A No, sir.

Q This was a new Ford, wasn't it, about six months old? A Yes, sir.

Q After the accident when the man stopped the engine in the Ford you got out, helped Kozlokowsky to the porch, did you not? A No, sir.

Q What did you do? A Before I got out they had him on the porch.

Q Well, then you got out? A Yes, sir.

Q And when you got out did you get out the right-hand side or the left-hand side of the Ford? A On the right-hand side.

Q How did you walk, around the front or around the back of the Ford? A Around the back.

Q Didn't you notice then that the two tires were blown out? A I didn't look.

John Pluskota, cross.

Q Well, you were so excited then you didn't look, I take it. But you went over to the piazza where Kozlokowsky was being helped by somebody, is that right? A Yes, sir.

10 Q Then what did you do? A The two men with automobiles stopped and we took him in the automobile and they went up and took the other Malinowski out of the automobile and we took him to the hospital.

Q When you went to take Malinowski out of the automobile Malinowski was seated in the rear of the automobile, was he not? A Yes, sir.

Q Which side? A On the right-hand side he was seated.

Q So, you walked around the car again to get to Malinowski, is that right? A Yes, sir.

20 Q Did you notice then whether the rears were blown or not? A No, sir; I didn't pay notice.

Q You didn't notice that your machine was on its tin wheels, with all respect to the Ford, at that time? A No, sir.

Q Then you took Malinowski out and put him in a passing vehicle? A He walked out.

Q Then you put him in a passing auto and went to the hospital? A Yes.

30 Q And then you came back to the car, did you? A No, sir.

Q Well, do you know who took the car away from there? A I don't know today.

Q When did you see the tires blown off it? A Couple of weeks after when we went to the garage.

Q You didn't see it at all so you didn't know the tires were blown off until afterwards? A No, sir; I didn't know.

40 Q Now, don't you, as a matter of fact, know that you went from the time you hit that truck

John Pluskota, cross.

and operated on your rear wheels without any tires? A I didn't take notice. I didn't look the car over.

By the Court.

Q That is not answering the question. You were asked if you did not know that that car was running without tires before the contact? A I don't know if she was running without tires or not. 10

By Mr. Toolan.

Q Did you understand that question?

Mr. Matthews: Well, I will be finished in a moment.

20

By Mr. Matthews.

Q Did you have anything in Frank Kovias' store besides ice cream? A No, sir.

Q Did any of the other boys? A No, sir. I don't remember what they had. I don't know if they bought anything else.

Q You were in there for twenty minutes, weren't you? A Yes, sir.

30

Q Were you injured? A I just had a little scar here and my eye above was blackened.

Q Did you see Malinowski after the accident? Did you go to the hospital to see him? A Yes, sir.

Q He married since, did he not? A He has married after that, after the accident he got married.

Q How long ago, do you know? How long after the accident? A I don't know. 40

John Pluskota, re-direct.

Q How far do you estimate the distance you travelled from Kovias' store in Perth Amboy to the point of this accident? A How far is it?

Q Yes. A I don't know how far it is.

Q What was the greatest speed that you made from the time you left that store until you came to the point of the accident? A About thirty miles an hour.

Q And what was your speed when you saw the truck two hundred feet away? A About twenty, twenty-five miles an hour.

Q That was your speed when you started to turn out from behind the truck, was it not? A Yes, sir.

Q Is that right? A Yes, sir.

Mr. Matthews: That is all.

Re-direct examination by Mr. Toolan.

Q You were asked a few moments ago whether or not before you hit this truck, or at the time you hit the truck you had thrown a tire or tires from the rear wheel and were riding on the rims? A No, sir; not that time.

Q Were all your tires in good condition? A Yes, sir.

Q At the time of the collision? A Yes, sir.

Q You didn't hear any blowout? A No, sir.

Q Didn't feel any—

Mr. Matthews: I object to the leading questions.

Q Did you feel any change in the car? A No, sir.

Mr. Toolan: That is all, Mr. Pluskota.

Frank Malinowski, direct.

Re-cross examination by Mr. Matthews.

Q You say not at that time did you feel as though you were riding on a rim. When did you feel as if you were riding on a rim? A After the collision.

Q That is the first time you felt you were riding on a rim? A Yes, sir. 10

Q So that, Mr. Pluskota, this is true, isn't it? A Yes, sir.

Q That after the collision, wherever it may have been, you were riding on a rim and not on the tire, that is right, is it? A Yes, sir.

FRANK MALINOWSKI, one of the plaintiffs,
being duly sworn according to law, on his oath saith: 20

Direct examination by Mr. Toolan.

Q What is your name? A Frank Malinowski.

Q Where do you live Frank? A 175 Grant street, Perth Amboy.

Q How old are you, Frank? A Twenty-four. 30

Q When were you twenty-four? A Twenty-four July 13th.

Q You were one of the young men involved in this accident on this particular night? A Yes, sir.

Q Frank, can you tell us about the accident? A I cannot tell a thing.

Q Why can't you tell a thing? A I don't remember. 40

Frank Malinowski, direct.

Q Where were you riding in the car before the accident? A We took a ride to South River.

Q I mean what part of the car were you riding in before the accident? A On the right-hand side.

10 Q On the rear? A Sitting in the rear.

Q You say you have no recollection at all of how this accident happened? A No, sir.

Q Where were you injured, Frank? A Right in the head.

Q Step down before the jury, please.

(Witness exhibits injury to the jury.)

20 Q Frank, do you remember where you were earlier that evening? A No, sir. I do remember after we stopped there at Smith street I picked John up and took a ride to South River and on our way back we stopped at this Kovias, stopped there and had a little ice cream, and we hung around maybe for two hours and we decided we would take a ride to Brunswick, just for a little ride.

Q Frank, do you drink? A No, sir.

30 Q Did you ever drink in your life? A No, sir.

Q Did anybody do any drinking there that night? A No, sir.

Q Or anywhere else? A No, sir.

40 Q Do you remember starting for New Brunswick? A Yes, sir; we was down there at John Kovias' we stood there, we had a little ice cream, then we hung around for about two hours, and then we decided we would take a little ride to Brunswick so on our way the accident happened.

Frank Malinowski, direct.

Q Do you remember how it happened at all?

A No, sir.

Q Did you ever know how it happened? A No, sir.

Q Frank, were you knocked unconscious or not? A I believe I was off my mind.

Q What? A I don't remember a thing, I must have been out of my mind or something. 10

Q How did you get to St. Peter's Hospital? A I don't remember.

Q You don't remember? A I don't remember.

Q Do you know whether you walked in or not? A I don't remember.

Q You were taken to St. Peter's Hospital? A Yes, sir.

Q How long were you there, Frank? A Thirty-three days. 20

Q During the time you were there do you remember what you went through? A No, sir.

Q When do you first remember about being in the hospital? A Well, about a week after.

Q How did you feel then? A Well, I felt a little off in my head and with dizzy spells I was getting right along. I didn't remember a thing. My mother was up there talking to me and I never remembered. My brothers they was telling me they was up there to see me and I don't remember that. 30

Mr. Matthews: I object to this as hearsay.

Q What is the first thing you remember after being in the hospital? A First thing I remember when I was in the hospital I looked up and seen doctors. 40

Frank Malinowski, direct.

Q Well, I mean how long was that before you got out of the hospital? A I just don't know what you mean.

Q How many days was that before you got out of the hospital that you remember what was going on? A Oh, that was about after I
10 stayed in the hospital about a month then I started to remember little things.

Q Well, you were only there thirty-three days? A Thirty-three days.

Q Do you mean to say that you were there for thirty days before you remembered anything? A No. About a week then I started in to remember.

Q How did you feel, sick or not? A Oh, I was terrible. I was sick.

Q Well, tell us how you felt. A Well, I
20 felt dizzy spells and a little out of my mind, and headaches and all I was getting. Didn't seem to be in my right mind.

Q Well, after you got out of the hospital after being there thirty-three days where did you go then? A I had to stay home for two weeks, I laid in bed.

Q And after you got up out of bed, after being in bed for two weeks at home, what did
30 you do? A I got up and took a little walk outside to get a little fresh air.

Q How long did you do that before going back to work? A I did that maybe for two weeks.

Q When did you go back to work, Frank? A I believe it was October 1st.

Q The accident happened when, Frank? A September 22nd.

Q You didn't go back to work October 1st, did you? A I don't remember.
40

Frank Malinowski, direct.

Q Can I refresh your recollection by reminding you that it was around December 1st that you went back? A Around December 1st, that is when I believe it was.

Q Do you know how many days you were out of work, Frank? A Seventy-one days.

Q Where did you work? A Raritan Copper Works. 10

Q And you have been working in the Raritan Copper Works ever since you went back to work? A Yes, sir.

Q What wages do you receive at the Raritan Copper Works? A 52c an hour.

Q How many hours a day do you work? A Eight hours and two-thirds.

Q Since you went back to work, Frank, have you been able to work steady or not? A No, sir. 20

Q Why haven't you been able to work? A On account of dizzy spells and headaches.

Q How do these dizzy spells and headaches make you feel? A I couldn't seem to bow my head down; I had to keep my head straight, if I bow my head down I get them headaches and dizzy spells. I had to keep forwards looking.

Q What effect does that have on your work? A Well, I can't do it. It seems to go out of my mind, until I get up and shake it; if I keep shaking to get it off me. Then about five or ten minutes later I can keep right on working a little while. 30

Q Well, have you worked steadily ever since you went back to work? A No, sir.

Q How much time have you lost? A Well, I have been losing out of every two weeks' pay I have been losing between ten and fifteen hours.

Q Out of every two weeks' pay? A Yes, sir. 40

Frank Malinowski, direct.

Q How do you mean you lose it? A By coming home at 11 o'clock in the morning, sometimes at 2 and 3.

Q Do they let you do that? A Yes, sir.

Q Do you still have those spells? A Yes, sir.

10 Q How do you feel now, Frank? A Well, I feel a little all right, but I don't seem to be right in my right mind. Everything, when I look, just looks glossy, you know.

Q Do you still suffer from anything else? A I do, from headaches, that is all, just them headaches and dizzy spells.

Q How often do they happen, Frank? A Well, they happen once every two days.

20 Q Do you mean regularly once every two days? A Well, not regularly, no. I couldn't just say how often, but I have been getting them right along for every two days, every other day.

Q Then what do you have to do when you get one of those spells? A Well, I got to go at least to my foreman and tell him I have to go home, and when I go home I have to lay down, and sometimes I get them headaches I just stay to work and try to keep it off my mind, stay there and work.

30 Q How long have you been working at that plant? A I have been working there about a year and four months.

Q Did you work steady before the accident? A I worked steady before the accident.

Q Have you been married, Frank, since this accident? A Yes, sir; after the accident.

Q When did you get married? A I got married in May, May 17th.

40 Q Frank, did you see this car after the accident? A Yes, sir; I did.

Frank Malinowski, cross.

Q Where? A I seen it up here in this garage, I just couldn't tell you the name of the garage.

Q That is where it was taken after the accident? A Yes, sir.

Q And what part of the car was damaged? A The left rear, the left end of the car in the front door. 10

Q What is that? A The left end of the car, the front of the door was ripped right off. The door is entirely ripped off when I seen it.

Q Which doors? A The left door.

Q Was there one or two? A One.

Q Was the radiator, hood, and so forth, damaged? A Not a scratch on it.

Mr. Toolan: That is all I have. Cross 20
examine.

Cross examination by Mr. Matthews.

Q What do you do in the Raritan Copper Works? A I work in the foundry department.

By Mr. Toolan.

Q Who was your doctor that attended you? 30
A Dr. Voorhees.

Q Of New Brunswick? A Yes, sir. He is the doctor give me operation, but the house doctor was Dr. Greenbrook.

By Mr. Matthews.

Q I didn't hear your answer to my question.
A In the foundry department.

Q What do you do in the foundry department? A Labor work. 40

Frank Malinowski, cross.

Q What particular labor work do you do?

A Well, we make moulds and pour out casting, and all like that.

Q You are a moulder? A No, sir; just a laborer. There is moulders in there, but I am just a laborer.

10 Q Will you describe that work, please? Tell us what you did I mean. A Why, we get in there in the mornings; why, we just take a shovel and shovel sand off the casting, then we pull out a few boxes, then we get a crane, we put the sand in, hook all the stuff up and took them over to the door. Then we lay it down, and we have them big iron bars, what you call scrapers; we call them big scrapers; we take them and just scrape along, and I hold my head
20 down that way, take the sand off and make them clean. Of course, we fill them and take them out and put them on a cart.

Q That is your work continuously during the day, shoveling sand off the moulds and onto the moulds, isn't that right? A Shoveling sand off the moulds after they have been poured. We pour, and then in the mornings we come in we shovel the sand out. Pull them out and lay them on the side. Then we go along there
30 and clean all the sand off.

Q Then you have to put them on the crane?

A Put them on a crane and take them out.

Q How do you get them on the crane? A We push a car alongside of the plant.

Q How do you get them onto the car? A With the crane.

Q Then you operate the crane, or the operator operates the crane? A No. Just by sprockets itself. Got two sprockets and we pull them up and down.
40

Frank Malinowski, cross.

Q Who pushes the car off? A We all do.

Q Then it is unloaded outside? A Yes, sir.

Q Then you use these scrapers to take the residue off the moulds? A Scrape the sand off.

Q What is the company? A Raritan Copper Works foundry. It is right in the Raritan Copper Works, right inside of the plant.

10

Q It is a hot place to work, isn't it? A It is a little hot when we pour.

Q They pour all day, don't they? A No, not all day. Well, they start sometimes at 2:00 o'clock in the afternoon and pour right on to half-past four.

Q You told Mr. Toolan that you could not remember anything about the accident, but you remember having met Pluskota at Smith street that night, don't you? A Yes, sir.

Q Where were you living at that time? A 175 Grant street.

20

Q Had you worked that night? A Yes, sir.

Q What time did you quit work? A Half-past four.

Q And you live in Perth Amboy? A Perth Amboy.

Q After your dinner where did you meet Pluskota? A I didn't meet him right away. I just generally went down cellar and chopped a little wood. After that I went out to the corner.

30

Q You went out to the corner of your own street? A Yes, sir.

Q Did you happen on him or did he meet you by appointment? A He lives on the same street as I do, on Grant street, and I went up there on the corner of Grant and Market; he come out with his car and I got on the car.

Q Had you any appointment to go with him that evening? A No, I didn't. I just met him like that and took a ride.

40

Frank Malinowski, cross.

Q Your ride was simply to Smith street from your home? A To Smith street.

Q And where did you go while you were at Smith street? Into any place at all? A Well, the only place I remember we went down and met this here John, we stopped at the ice cream parlor and we had a little ice cream.

10 Q Yes, but when you got to Smith street was Pluskota there? A Yes, sir.

Q Did you leave with him right away or were you around there some time? A We were there a little while with John Pluskota and we decided we would take a ride over the river, over to South River. We rode around there.

Q Where particularly were you bound for, or were you going when you decided to take a ride over the river? A We wasn't going nowhere. No particular place. Just for a little ride.

20 Q You did take the ride, though? A Yes, sir.

Q And you crossed the bridge and went to South River? A Yes, sir.

Q When you got to South River where was it you turned around? A Up in Tanner's Corner.

30 Q Is that in the center of the community, the town? A No, that is not in the center. It is just a little below the town, up the road a little ways.

Q Did you stop anywhere in South River? A No, sir.

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

Q You remember distinctly, too, that you didn't stop anywhere? A Didn't stop nowhere.

40

Frank Malinowski, cross.

Q You remember distinctly that you didn't stop anywhere between the time that you left Smith street on your first trip and the time you got back there on your first trip, is that right?
A Right.

Q How long did that trip consume, how long a time? A Well, I couldn't just tell you how long that trip took us. 10

Q When you got back to Smith street was when you went into that— A Frank Kovias'.

Q What else does he sell there besides confectionery? A He has got ice cream, a little of everything he has got in there.

Q That would be a dangerous business, everything. I don't think you exactly mean it. Has he got a grocery store there? A No groceries.

Q Cigars there? A Cigars. 20

Q Candies? A Candy.

Q And ice cream? A And ice cream.

Q No fruit? A Well, he has got some other stuff in there like shoes, and all kinds of rugs, you know.

Q Shoe boxes? A Yes.

Q Where does he sell the ice cream, is it in the front of the store? A No, it is in the back.

Q What is in the front of the store, Mr. Malinowski? A All kinds of toys. 30

Q Is the shoe department in the front of the store? A No, it is in the back.

Q The ice cream is in the back? A Is in the back.

Q Has he an ice cream fountain for soda?
A Yes, sir.

Q Is it a real fountain? A Yes, sir. It isn't one of these great big ones. It is a small one. 40

Frank Malinowski, cross.

Q Is the place where the ice cream fountain, or small fountain is, is it cut off from the rest of the store, I mean of the store room? A No, sir.

10 Q What is there between the front? A The front has got cigars and cigarettes and chewing gum and candy, and then on the one side, on the same side he has got the ice cream parlor, and on the other side he has got all this other stuff.

Q In the front of the store the toys and things? A The toys that is in the window.

Q You remember having the ice cream sodas in there, don't you? A Yes, sir.

Q Were there any others besides yourself at the time? A No, sir.

20 Q You heard the first witness, Mr. Pluskota, say that you were around there for two hours before you left? A Yes, sir.

Q And you heard him testify, didn't you, that he looked at the clock of the storekeeper and that it was approximately 11:15 when you left there? A Yes, sir.

Q And you heard him say that you were bent then for New Brunswick, you were going to New Brunswick on a trip? A Yes, sir.

30 Q Did you have any point in view or was it just another ride? A Just another ride.

Q When you left the store at 9:00 o'clock, or at 11:15 o'clock, were you seated in the back of the car? A Yes, sir.

Q Where was the car while you and Pluskota and Kozlokowsky were in the store having soda? A Where was the car?

40 Q Yes. A Parked on the right-hand side, right alongside of the store, or in front of the store, rather.

Frank Malinowski, cross.

Q And it remained there for two hours? A Yes, sir.

Q Had you ridden in that car before? A No, sir.

Q This was your first ride? A First ride.

Q How long had you known Kozlokowsky? A Oh, I know him maybe for twenty years. 10

Q And you lived on the same street with him then? A Yes, sir.

Q This was your first ride in the car? A Yes, sir.

Q Did the car have a spare tire on the back of it? A I couldn't tell you that.

Q I mean a tire rack with a tire around it? A I know what you mean, but I don't remember. 20

Q Do you know what the condition of the tires were when you left? A No, sir.

Q Did you have any flats at all before the accident? A No, sir.

Q Do you remember seeing the big truck parked on the road before you started to turn out? A No, sir.

Q You don't remember that at all? A No, sir.

Q Do you remember passing the touring car on the road before you got along to the truck? A No, sir. 30

Q But you remember all the other details up to that? A Up to that.

Q When you left the store at 11:15 do you remember whether or not it was fair, or whether it was stormy? A It was a clear night.

Q What was your route from the store? What streets did you take to go to Brunswick? A Well, we went up around Keasbey out through Fords. 40

Frank Malinowski, cross.

Q Do you remember going through there? A Yes, sir, and then right out through Metuchen.

Q Pardon me. When you got to Keasbey how did you turn? A Well, we turned to our right.

Q To the right, and that brought you to—
10 A We went right over that small bridge there and brought us right out to Fords.

Q You had never ridden with the man before, but you really remember turning under that bridge, don't you? A Yes, sir.

Q When you got to Fords how did you proceed? A When we got to Fords, why, we rode straight right out, right out to Metuchen; there is a traffic sign out in Metuchen; instead of going that way he went straight right out.

Q You went straight right out in Metuchen?
20 A Yes, sir.

Q What road were you on when you went straight out Metuchen way? A I don't know the name of the road.

Q You remember going straight out, instead of going the other way by the traffic sign? A We went straight right from—there is a trolley car track; we went straight from that, and went down to the next traffic sign, and then we turned
30 to our left, and then we hit the Lincoln Highway.

Q The Lincoln Highway took you out of Metuchen, did it not, into New Brunswick? A Into New Brunswick.

Q When did you stop remembering, Mr. Malinowski? A I stopped remembering after the accident, after we got hit.

Q As a matter of fact, you have remembered everything up to the point of going along the Lincoln Highway, remember seeing this truck up ahead of you? A I don't remember.
40

Mr. Matthews: That is all.

Howard C. Voorhees, direct.

HOWARD C. VOORHEES, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath said:

Direct examination by Mr. Toolan.

Q Dr. Voorhees, you are a practicing physician in the City of New Brunswick? A Yes, sir. 10

Q And you were on the 22nd of September, 1925? A Yes, sir.

Q How long have you been practicing in the City of New Brunswick? A Twenty-one years.

Q You are a graduate of what medical institution? A Columbia, P. and S., New York.

Q Doctor, did you, on the 22nd of September, 1925, have occasion to attend Frank Malinowski, the young man who just got off the witness stand? A Yes, sir. 20

Q Where did you attend him, doctor? A St. Peter's Hospital.

Q What time of the night was it, about? A I forget the exact hour.

Q It was during the night? A Yes, around midnight.

Q When you arrived at the hospital did you proceed to examine Malinowski first? A Yes, sir. 30

Q What was his condition then? A He had a fracture of the skull, bleeding from the scalp, semi-conscious, suffering from shock.

Q Well, you say he was semi-conscious, doctor; was that a progressive condition at that stage? A Yes.

Q Getting progressively conscious or progressively unconscious? A Unconscious. 40

Howard C. Voorhees, direct.

Q From the history, doctor, did you learn whether or not this man had been conscious after the accident?

Mr. Matthews: I object to that.

The Court: Objection sustained.

10

Q Doctor, what was the reason for this progressive loss of consciousness? A Pressure on the brain, evidently.

Q Due to what, doctor? A Probably to a piece of bone pressing on the brain tissue.

Mr. Matthews: I object to "probably," unless it is the doctor's medical conclusion, and ask it be stricken out.

20 *By the Court.*

Q What is your opinion, doctor? A Due to pressure on the brain, judge.

By Mr. Toolan.

30 Q Doctor, what treatment, or what did you do for this young man? A Well, we put him to bed, treated the shock, and observed him for twenty-four hours. An X-ray picture was taken and we determined that the man had pressure on his brain, probably due to a fracture.

Q Did the X-ray reveal a fracture, doctor? A Yes, sir.

Q What character of a fracture? A Depressed fracture.

Q At the end of twenty-four hours was he conscious or unconscious? A Unconscious.

40 Q How long did he remain unconscious, doctor? A Oh, I think about a week.

Howard C. Voorhees, direct.

Q What did you do for him, doctor, at the end of the twenty-four-hour period of observation? A After consultation we decided to operate at once.

Q Was it necessary to operate, doctor? A Absolutely.

Q For what reason? A To remove this 10
piece of bone from pressing on the brain.

Q And in the absence of an operation, what would have been the result? A Death.

Q And what is the nature of that operation, doctor, which you performed? A The piece of bone was lifted by means of instruments, from the brain tissue, and removed.

Q What did you do, before you could get the instruments in to lift the piece of bone, doctor? 20
A The man was put under an anesthetic, his head was shaved, the scalp had to be incised further.

Q Well, when you say the scalp had to be incised further, will you go on, doctor? A It was already torn, but we had to enlarge the cut, as it were, and then by means of instruments bring this piece of bone up and remove it from the brain tissue.

Q Did you remove any bone, doctor? A Yes, 30
sir.

Q I show you in this bottle here two pieces of bone and ask you whether or not you removed two pieces of bone, of the general character of those shown in this bottle? A Yes, sir.

Q Do you know what you did with the two pieces of bone that you removed? A I gave them to a friend, who wanted them.

Q Do you know whether that is that young man there? A It looks like him. 40

Howard C. Voorhees, direct.

Q Doctor, what effect did the removal of those two bones have upon Malinowski? A Immediate effect.

Q What effect did it have upon his condition, the removal of those bones? A Increased the shock, caused greater hemorrhage.

10 Q Well, did it relieve the pressure, doctor?

A Oh, yes.

Q When did you operate, doctor, what day?

A That is September a year ago; I think it was around the 23rd.

Q I mean, a day or so after he was brought in the hospital? A Yes.

Q You say he remained unconscious for about a week's time? A Yes.

20 Q During that period, doctor, what course of treatment was accorded? A Well, symptomatic treatment, he was surrounded by heat, he was given heart stimulation when necessary, constantly observed by the sisters and nurses and the intern, and I saw him every day.

Q Was this man's condition during that period serious, doctor? A Yes, sir.

Q Is an injury of the description sustained by Malinowski likely to cause death? A It is.

30 Q Will you step down here and show the jury where the pieces of bone that you refer to were removed? A Right about here (indicating); right where that dark spot is.

Q Was that where the depression was found, doctor? A Yes.

Q Doctor, after an operation of this description, removing a piece of bone, does the skull grow over that opening, or not? A It may in time.

40 Q How long a period will it take, doctor? A Couldn't say.

Howard C. Voorhees, direct.

Q At the present time does this man have any bony protection under the flesh at all? A I think there is some there.

Q That has formed since then? A I think so, in a year's time.

Q You attended him in the hospital, doctor, how long? A About a month.

Q What was his condition upon discharge from the hospital? A Fairly good. 10

Q Well, was his condition such that it was reasonable that he would be incapacitated up until along about the first of December? A I think so.

Q Have you had occasion to see this young man since, doctor? A I have seen him once or twice.

Q At your office here in New Brunswick? A Yes. 20

Q What was his condition on those occasions, doctor? A Fair.

Q Has this wound entirely healed up, doctor? A No, sir.

Q What is its condition now? A There is a sinus there, a tract leading from the skin into the interior of the skull, probably.

Q When you say a sinus, or tract, what do you mean? A A small passageway. 30

Q Is there any discharge from that passageway now? A He says there is at times.

Mr. Matthews: I object to that.

The Court: That is stricken out.

Q From your observation of the wound at the present time, can you say that there is? A Probably is.

Q Malinowski has testified that he suffers from headaches, and dizziness, and so forth. 40

Howard C. Voorhees, direct.

Are those results a natural consequence or probable consequence of an injury of this description? A Yes, sir.

Q How long, doctor, in your opinion, will he suffer from headaches and dizziness? A I can't answer that, Mr. Toolan.

10 Q What effect, in your opinion, doctor, will the injury that you attended Malinowski for, and that you observed here today in the court room, what effect will that have upon Malinowski physically, in your opinion?

20 Mr. Matthews: I object to that question because it calls for a conclusion that the doctor cannot state, the premise being as it is. That calls for a hypothetical question. It would be very relevant to this issue to find that if this man lived this kind of a life, or that kind of a life, or the other kind of a life, what that effect would be.

30 Q Doctor, assuming that Malinowski must make his living in the future as a laborer, that he is now employed working about a foundry as a laborer, in your opinion will this injury have any effect upon him and his ability to earn a livelihood at that work in the future? A I think so.

Q To what extent, doctor? A He might have attacks of headache, dizziness, and possibly some remote developments like epilepsy. I can't tell.

Q Doctor, when you speak of epilepsy, what is the cause of epilepsy?

40 Mr. Matthews: I object to that as irrelevant and immaterial.

Howard C. Voorhees, direct.

The Court: I will allow that. You may take an exception.

Mr. Matthews: Prays exception.

Q It might result from the injury to the brain tissue, scars, adhesions that might form.

Q Where you have a wound of the description suffered by Malinowski, as the result of this injury and the subsequent operation and removing of part of the skull, is there a likelihood, or is it reasonably probable that adhesions may develop? A Yes, sir. 10

Q And if adhesions do develop they will result in what, doctor? A It is possible that he might—

Mr. Matthews: I object to "possible." 20

Q If adhesions do develop, what effect will that have, or what physical consequence may result, if adhesions develop?

Mr. Matthews: I object.

The Court: Objection sustained. The doctor has said, after being questioned, that there is a remote possibility. The jury cannot consider remote possibilities. 30

Q Doctor, I will frame it this way: Is it reasonable and probable that as a result of the injury sustained by Malinowski, and the subsequent operations, that he will develop adhesions, or brain lesions of any description? A It is.

Q And if brain lesions or adhesions develop, in what manner will that affect him, or what will be the physical effect upon him or those brain ad- 40

Adam Kozlokowsky, direct.

hesions or lesions? A Many results might ensue.

Mr. Matthews: I object to the "might," and ask it be stricken out, with respect to the doctor.

10 *By the Court.*

Q What is probable, doctor? A Mental deterioration, headaches, attacks of vertigo, inability to perform his work, physical degeneration, insanity, possibly.

Mr. Matthews: I object to "possibly."

The Court: Strike out that last.

20 *By Mr. Toolan.*

Q All the other results you have mentioned, doctor, are natural and probable results of the brain lesions? A Yes, sir.

Mr. Toolan: That is all I have. Cross examine.

Mr. Matthews: No questions.

30 ADAM KOZLOKOWSKY, one of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan.

Q Adam, where do you live? A 229 Grant street, Perth Amboy, New Jersey.

Q And on the 22nd of September, 1925, you were the owner of a Ford sedan car? A Yes, 40 sir.

Adam Kozlokowsky, direct.

Q Do you know Frank Malinowski? A Yes, sir.

Q And John Pluskota? A Yes, sir.

Q You met those boys on that evening? A Yes, sir.

Q You and Malinowski and Pluskota all live in the same general neighborhood in Perth Amboy? A Yes, sir. 10

Q Where did you meet Malinowski that night? A On Smith street by the confectionery store.

Q And Pluskota was there, too? A Yes, sir.

Q When you met there in front of the confectionery store was it the result of a definite date or engagement that you had with those men, or as a matter of accident? A No, sir.

Q What is that? A No dates at all. We didn't have any kind of a date at all.

Q How long did you remain there by the confectionery store? A For about a half hour, and then we decided to go out for a little ride. 20

Q And then where did you go? A South River.

Q When you went to South River and came back where did you stop? A Stopped there by the same place, confectionery store.

Q Did you stop anywhere in South River? A No, sir. 30

Q Or on the way? A No, sir.

Q Now, by inference at least it has been suggested that this confectionery store is a blind tiger, or a saloon of some description. Is there any liquor or anything sold there in that place? A No, sir; no liquor in there.

Q What sort of a store is it? A It is a soda fountain, and sells cigarettes, some dry goods in there, and other sort of stuff.

Q Sort of a general store? A Confectionery store. 40

Adam Kozlokowsky, direct.

Q Sell dry goods, do they, too? A I don't know sir. They sell gloves and probably stockings.

Q Shoes? A No, sir.

Q Well, anyway after being there for a while you did what? A Then we decided to go for another ride.

10 Q And where did you go? A New Brunswick.

Q What is that? A We was going to go out for a ride to Brunswick.

Q Going to ride to Brunswick? A Yes, sir.

Q What route did you take to go to New Brunswick? A Through Keasbey, Fords, to Metuchen.

Q Smith street in Perth Amboy to where the store is located leads out through where? A
20 Out through Keasbey.

Q Then you drove on the Lincoln Highway finally? A Yes, sir.

Q You had an accident that night, didn't you? A Yes, sir.

Q Where did that accident happen? A On the Lincoln Highway down by the Lincoln Garage and hotel and Lincoln Restaurant.

Q You were driving the car, were you not? A Yes, sir.

30 Q And you were the owner of the car? A Yes, sir.

Q As you approached the Lincoln Garage, what, if anything, did you see? A Why, I seen, when I was about two hundred, two hundred and twenty-five feet away, I saw a truck parked on the right side of the Lincoln Restaurant.

Q The Lincoln Restaurant is on one side of the road, is it? A Yes, sir.

Q And the Lincoln Garage is on the other? A
40 Opposite the Lincoln Garage.

Adam Kozlokowsky, direct.

Q All right. A As I got a distance about ten or fifteen feet, the truck pulled out from the right to the left; first I tried to pass it on the left; I couldn't; so I swung my wheel hard right and sideswiped the rear end of the truck.

Q What part of your car struck the truck? A It is the left side by the front door.

10

Q Do you know what part of the truck it struck? A I can't remember; it is the rear end, one of the corners, but I can't exactly say what corner it was.

Q Hit one of the corners? A One of the corners.

Q You don't know which one? A No, sir.

Q How fast were you going along the highway just prior to the accident? A About twenty, twenty-five.

Q What happened after the collision? A After the collision I was unconscious, knocked unconscious.

20

Q Did you stop the car yourself? A No, sir.

Q What is the first that you remember after the accident? A I don't remember a thing after the accident.

Q Well, when did you first remember anything? A Well, when I was on the way going to the hospital.

30

Q Going to the hospital? A Yes, sir.

Q How old was this Ford, or when did you buy it? A I bought it March 7th; I had it until September 22nd; that is about pretty near six months.

Q Bought it March 7th? A Yes, sir.

Q Where? A Dorsey.

Q Dorsey Motors, Perth Amboy? A Yes, sir.

Q That is the Ford dealer in Perth Amboy, is it not? A Yes, sir.

40

Adam Kozlokowsky, direct.

Q Was it a new car in March or second-hand?

A No, sir; brand new car.

Q What did you pay for the car in March?

A Seven hundred and ninety-five dollars.

Q At the time of the accident what was the condition of the tires on your automobile? A

10 Before the accident?

Q Yes. A Well, they were in the same condition, no blow-outs or anything like that.

Q Were they in good condition or not? A Yes, sir; I had brand new tires on there.

Q Brand new tires on where? A On both rear wheels.

Q On both rear wheels? A Yes, sir.

Q When had those tires been bought, the ones on the rear wheels? A Well, between two and three weeks' time, something like that.

20 Q Before the accident? A Yes, sir.

Q How about the tires on the front of the car? A Well, they were ever since I had the car.

Q But on the rear you say you had new tires only a few weeks old? A Yes, sir.

Q Prior to the accident, or when you got within forty or fifty feet of where these trucks were parked, did you have a blowout? A No, sir.

30 Q Did you lose control of the car in there?

A After the accident I did.

Q I mean before the accident? A No, sir; I had the car under control.

Q In other words, did a blowout on one of the rear tires cause you to lose control of that car and run into that truck? A No, sir.

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

40 Q Where was it? A Suydam Brothers Garage.

Adam Kozlokowsky, direct.

Q That is on the Lincoln Highway? A Yes, sir.

Q How long after the accident did you see the car there? A About two days after the accident.

Q And what was the condition of the car then? A Well, the whole body was ripped off and one of the tires were ripped off. 10

Q What is that? A One of the tires were completely off. The car were parked just on the rim.

Q Which tire was completely off? A I couldn't tell you. I don't remember. It is quite some time ago.

Q Was it front or rear? A Rear tire.

Q Were the front tires injured at all? A No, sir. 20

Q Just the rear tires? A Just the rear tires.

Q The fact is they were both off the car, weren't they? A I couldn't tell you.

Mr. Matthews: I object to that as leading.

The Court: Objection sustained. He said one tire was off. 30

Q Where was the car damaged, beginning where, or at what point? A Beginning by the front, on the left side.

Q Did you ever have that car fixed? A No, sir.

Q Why didn't you? A Why, the repair costs more than the car was worth.

Mr. Matthews: I object to that and ask it be stricken out as a conclusion. 40

Adam Kozlokowsky, direct.

The Court: It is stricken out.

Q Did you get estimates to have it repaired? A No, sir; I didn't.

Q Well, did you notify Dorsey Motors? A I did.

10 Q To take the car? A Yes, sir.

Q Did they ever take it? A No, sir.

Q What happened to the car? A Why, it is left in there.

Q It was left there at Suydam Brothers? A Left in the garage.

Q You never claimed it? A No, sir.

Q How far had you driven that car, do you know? A About five thousand miles.

Q Was it in good condition? A Yes, sir.

20 Mr. Matthews: I object to that. I may be late on that objection.

The Court: Oh, yes. It does not amount to much anyhow.

Q How or where were you injured in this accident? A Sir?

Q How were you injured in this accident? A How long?

30 Q How were you injured? Where were you hurt? A Left side above the heart, and the left arm had a bruise on it.

Q Now, when you were taken to the hospital how long were you there? How long did you stay there? A About twenty hours.

Q Then you were discharged? A Yes, sir.

Q What doctor took care of you? A Dr. Voorhees.

40 Q How long were you laid up? A I can't tell you the exact time. About seven days, seven or eight days.

Howard C. Voorhees, direct—cross.

Q Where were you working? A Raritan Copper Works.

Q What were you getting a day? A As high as seven dollars a day.

Q What doing? A Discharging crane operator.

10

Mr. Toolan: That is all I have. Cross
* examine.

Adjourned until 2:00 P. M.

AFTERNOON SESSION 2:00 P. M.

HOWARD C. VOORHEES, recalled.

20

Direct examination by Mr. Toolan.

Q Dr. Voorhees, what was your bill for services rendered to Frank Malinowski? A \$150.

Q Is that a reasonable charge for the services rendered, doctor? A I think so.

Q Doctor, did you also examine Kozlokowsky? A I think not.

Q Who attended him, do you know? A The internes. Slight injuries.

30

Cross examination by Mr. Matthews.

Q Doctor, of what is the bill for \$150 made up? Was he at St. Peter's Hospital? A Yes, sir.

Q Did he have a private room? A Semi-private ward. Several cases in there with him.

Q Was the charge for your services at St. Peter's Hospital? A In a private case, yes.

40

Adam Kozlokowsky, cross.

Q When did he become a private case, doctor? A As soon as he came under my care.

Q How did he get under your care? A I was on duty and I was called by the sister to come and see him.

Q Did you operate? A Yes, sir.

10

Mr. Matthews: That is all.

Mr. Toolan: It is agreed that the hospital bill for Frank Malinowski was \$173.

Mr. Matthews: That is in addition to the doctor's bill, is it?

Mr. Toolan: Yes.

ADAM KOZLOKOWSKY, resumed.

20

Cross examination by Mr. Matthews.

Q Mr. Kozlokowsky, you had that car six months at the time of this accident? A Yes, sir.

Q How long had you been driving the car? A Driving now about a year and a half.

Q No, then, at the time of the accident? A I got the license when I got the car.

Q You had driven 5,000 miles with the car?

30 A About that.

Q On the day of the accident had you worked that day? A Yes, sir.

Q Where? A Raritan Copper Works.

Q What time did you quit? A 5:00 o'clock.

Q From there you went to your home in Perth Amboy? A Yes, sir.

Q And after your dinner you started out in your Ford? A Sir?

40 Q And after your dinner you started out in your car? A Yes, sir.

Adam Kozlokowsky, cross.

Q Where were you going? A Went down by the confectionery store, met my friends over there, we decided to go out for a little ride.

Q Whom did you meet at the confectionery store? A Frank Malinowski and John Pluskota.

Q Were they both there? A Yes, sir. 10

Q Are you sure of that? A Yes, sir.

Q You met Pluskota and Malinowski at the confectionery store on Smith street? A Yes, sir.

Q Did you hear Pluskota testify that you met him on your own street?

Mr. Toolan: That was not Pluskota.

Q Or Malinowski? A No, sir. 20

Q And you didn't meet him on his own street?
A No, sir.

Q You met him at the confectionery store and you are sure of it? A Yes, sir.

Q Did you go down to meet them? A No, sir; I was parked, parked my car alongside of the confectionery store and I met them over there.

Q Is the confectionery store sort of a lounging place for you young men? A There is; yes, 30
sir.

Q What time of the night was it that you met Pluskota and Malinowski? A About half-past seven or 8:00 o'clock.

Q Did you invite him to go for a ride with you? A Yes, sir.

Q Did Malinowski say where he wanted to go? A Said all right, let's go.

Q Did he say where to go? A No, sir. We decided to go to South River for a little spin. 40

Adam Kozlokowsky, cross.

Q Who made the decision? A Well, all three of us.

Q All three of you agreed to go to South River, and you started away at what time? A About 8:00 o'clock, half-past eight.

Q Did you go directly to South River, Mr. Kozlokowsky? A Yes, sir.

Q Had you had anything to drink before you went to South River? A No, sir; I never drink.

Q What? A Never take a drink.

Q Do you remember a man getting on your car at the scene of the accident and asking you were you drinking, when he stopped the motor? A No, sir.

Q Do you remember a man getting on and stopping the motor? A No, sir.

Q Where did you go to in South River? A Down to the main section, we turned around and come back to Perth Amboy.

Q Didn't make any stop at all in South River? A No, sir.

Q Do you know a store in South River on the main street, that is a friend of the store-keeper in Perth Amboy where you lounge, where you hang out? A No, sir. I very seldom go there.

Q You didn't stop in any store there that night? A No, sir.

Q What time did you get back to Smith street? A About 9:00 o'clock, quarter-past nine.

Q What time did you start away, 8:30? A About 8:30.

Q When you got back to Perth Amboy what did you do? A Oh, we spent a little time over here with our friends.

Q With what friends? A Frank Malinowski and John Pluskota.

Adam Kozlokowsky, cross.

Q Where did you spend the time with them?

A In the confectionery store, and part of it outside.

Q When you went into the confectionery store, who was in there besides the proprietors?

A Well, there were several people in there.

Q In where? A In the store.

10

Q Whereabouts in the store? A Inside of the store, some drinking ice cream, some eating ice cream and some of them soda, as far as I know.

Q How long were you in there? A Well, I couldn't say; about twenty minutes or half hour.

Q Just for one soda all that time you were in there? A That is all I had.

Q Well, did the others have more? A Not that I remember. We all had one apiece.

20

Q And you were there twenty or twenty-five minutes? A Yes, sir.

Q How long have you known the proprietor of this store, owner of this store? A I know him for last four or five years.

Q Have you been in the store frequently? A Sir?

Q Have you been in the store often during during that time? A I don't understand.

Q Have you been in the store often during that four or five years? A Yes, sir; I am there pretty near every day.

30

Q What other business does he do besides ice cream? A Well, cigarettes and candy.

Q Dry goods? A Dry goods.

Q Shoes? A No, sir.

Q What else, toys? A Toys there.

Q Where is the soda place, or fountain, in that store? A On the left side as you enter the store.

40

Adam Kozlokowsky, cross.

Q Right in the front, then, is it? A On the side. No, sir.

Q It is at the rear, isn't it? A At the rear. He has the show case in the front.

Q After you were in there twenty or twenty-five minutes having you soda, you came outside and watched outside for awhile, did you? A
10 Yes, sir.

Q How long? A Well, until half-past ten or quarter to eleven.

Q Did you hear Mr. Malinowski testify that he looked at the clock and it was 11:15 when you left? A Well, I didn't see it, but it was about that time.

Q It was about that time? A No, sir; it was about half-past ten or quarter to.

Q So, it wasn't 11:15? A I couldn't say
20 it was.

Q You don't know what time it was, then, do you? A It was about half-past ten or quarter to eleven.

Q How do you fix it as half-past ten? A Well, I seen it a few minutes before I went out.

Q You see what? A Seen the time.

Q A few minutes before you went out of where? A Went outside. Well, I had been
30 going in the store and coming out.

Q You were going in and out of the store? A Well, probably been in five or six times.

Q Why did you go in five or six times? A Well, just a few friends in there. This is a lodging place in there for us.

Q Did you have a drink with the few friends that you met as you went in and out those five or six times? A Drink? No, sir; I don't drink.

Q Did you have a soda then with any of
40 them? A I did.

Adam Kozlokowsky, cross.

Q How many times? A The first time I went in there.

Q Did you have any the other times that you went in the five or six times? A No, sir.

Q On your sixth trip, or your last trip out, you looked at the clock, did you? A Yes, sir.

Q What time did the clock say? A About 10
quarter to eleven; then we decided to go out for another ride.

Q You remember it saying quarter of eleven, do you? A Yes, sir.

Q Then you went right out and went away on the ride, is that it? A Yes, sir.

Q You didn't wait any time after you saw that clock say quarter of eleven? A Well, we probably spent a couple of minutes.

Q You remember looking at the clock, don't you? A Yes, sir. 20

Q You remember that it was quarter of eleven, don't you? A Not exact.

Q Well, within five minutes of that? A Yes, sir.

Q Then you started. Now, who made up the trip to Brunswick? A Frank Malinowski, John Pluskota and I.

Q Those were the parties, but who suggested that you go to Brunswick? A Well, all three 30
of us.

Q And you started away at quarter of eleven and went from Amboy up through Fords? A Through Keasbey, Fords, Metuchen out to the Lincoln Highway.

Q And when you got on the Lincoln Highway you proceeded down to where the accident happened? A Yes, sir.

Q What was your greatest speed, mister, from the time you left Smith street until this 40

Adam Kozlokowsky, cross.

accident happened? A Twenty or twenty-five miles an hour.

Q Never over that? A Well, I couldn't say.

Q What makes you say twenty or twentyfive?

A Why, judging it, judging the speed.

Q Now, you say that when you got within
10 200 to 225 feet of a truck you saw the truck in front of the Lincoln Restaurant, is that right?

A Yes, sir.

Q And it was parked at that time, wasn't it? A Yes, sir.

Q And then when you got within ten or fifteen feet of it you say it started to turn, is that right? A Yes, sir.

Q What is that estimate of ten or fifteen feet; how do you judge it from where you are sitting?

20 A About from where I am sitting out to the all.

Q You were on the left side of your Ford, driving, isn't that right? A Yes, sir; on the left side.

Q And the truck at the time you were about from there to the wall away from it was stationary and then it started to turn; is that right?

A Yes, sir.

30 Q Turned to its left across the road? A Yes, sir.

Q To the garage? A I don't know where; I can't say where it was going it, but it started turning out.

Q Had you ever been over that road before?

A Yes, sir.

Q In your car? A Yes, sir.

Q Do you know where the Lincoln Inn is?

A Yes, sir.

40 Q You know that the filling station is right opposite it, don't you? A Yes, sir.

Adam Kozlokowsky, cross.

Q This car, this truck was parked in front of the Lincoln Inn, wasn't it? A Lincoln Inn; yes, sir.

Q And the filling station is right across the street? A Yes, sir.

Q There were plenty of lights there, weren't there? A Sir? 10

Q There were plenty of lights there, weren't there? A There was; yes, sir.

Q The Lincoln Inn is all lighted up, isn't it? A Yes, sir.

Q There are lights outside as well as in? A Yes, sir.

Q There are lights at that filling station, are there not? A Yes, sir.

Q And overhead at that point there is a street light, is there not? A Sir? 20

Q Overhead at that point where that truck was parked there is a street light, is there not? A I don't remember that.

Q Now, as the truck turned it turned to its left, did it not? A Yes, sir; from the right to the left.

Q To go across the street? A Yes, sir.

Q According to your story. And you also turned to the left, didn't you? A Yes, sir.

Q To pass in front of the truck? A Yes, sir. 30

Q You were going twenty to twenty-five miles an hour, you said, didn't you? A Yes, sir.

Q So that at a point fifteen feet behind this truck, when this truck started to turn left, you, too, started to turn left, is that right? A Yes, sir.

Q And then you started and turned right; is that right? A Yes, sir.

Q And you say the front left part of your car at the door struck the rear of the truck; is that correct? A Yes, sir. 40

Adam Kozlokowsky, cross.

Q What part of the rear of the truck? A Well, it is one of the corners; I can't say what corner it was; it is the rear end of the truck.

Q The rear corner of the truck? A Yes.

Q You have described that correctly for me, haven't you? Your testimony is that the truck
10 was standing still when you were from your seat to the wall away from it; you were going from twenty to twenty-five miles an hour; as the truck started to turn left you started to turn left, and then you turned right, and that the left front door of your car came into contact with a rear corner of the truck? A Yes, sir.

Q That is right, isn't it? A Yes, sir.

Q When did your tire come off? A Well, I don't know. After the accident I didn't know
20 nothing about it. I was unconscious.

Q How about before the accident? A The tires was all right, good condition.

Q Did you pass any vehicle at all between the time that you saw the parked truck and the time you tried to pass the moving truck? A I don't know. I didn't see any. I couldn't tell.

Q Well, you had 200 feet to travel, didn't you? A Yes, sir.

Q Do you remember a touring car passing
30 along in front of you? A No, sir.

Q Wasn't there any car, sir, in front of you for awhile before the Ainscow garage or where the truck was parked? A No, sir; I didn't see no cars.

Q Were you looking? A Well, I were looking where I was going.

Q So all you did with your car when you saw the truck was turn left, that is right, isn't it? A Yes, sir.

40 Q And then turn right? A Yes, sir.

Adam Kozlokowsky, cross.

Q When you saw your car you said it was two days after the accident? A Yes, sir.

Q But you had told Mr. Toolan that you were in the house for seven or eight days. How was that?

Mr. Toolan: No, he didn't testify to that. He said he was laid up seven or eight days. 10

Mr. Matthews: Well, laid up I suppose means up, and that is in the house, as a rule, or in the hospital.

Q You told Mr. Toolan you were laid up for six or seven days. You also told him that the second day after the accident you went and saw the car. How is that? A I wasn't able to go to work, sir.

Q It is just that you were not at work? You were not confined to your bed? You were not confined to your bed? A Yes, sir. 20

Q You were not in bed all day, were you, for six or seven days? A No, sir, I wasn't in bed but I wasn't able to work.

Q Where did you go two days after the accident to see the car? A Suydam Brothers garage; it is up on the Lincoln Highway here.

Q Suydam Brothers garage on the Lincoln Highway? A Yes, sir. 30

Q Who took you there? A I don't know nothing about who took it there. The car was there.

Q You don't understand me. Who brought you to Suydam's garage that day that you went to look at the tire? A I was down there with my brother as I was coming from the hospital.

Q You went with your brother? A Yes, sir.

Q Who else was there? A That is all there was, brother and I. 40

Adam Kozlokowsky, cross.

Q Was the glass on your car smashed? A Yes, sir.

Q On the left side? A On the left side.

Q And when you went to the garage two days after the accident you say that the rear left tire was off the car? A Yes, sir.

10 Q Where was that rear left tire? A I saw one of the tires laying alongside of the car.

Q And what was the matter with the other rear tire? A I don't know nothing about the other one.

Q Was it on the car? A I couldn't say it. All I seen is one was completely off the rim laying in the car.

Q That was the rear left, wasn't it? A I don't know what one it was.

20 Q You told me a moment ago that it was the rear left tire, didn't you? A I did one of the tires. I didn't say what one it was, sir.

Q You know it was, don't you? A It was off. One of the tires was off.

Q You know further, don't you, sir, that your left rear tire blew off that car before you came up to the parked truck? A No, sir; I didn't.

30 Q Didn't Malinowski tell you that he was going to sue you, that it was your fault? A I don't know a thing about it.

Q You didn't take the tire, did you? A No, sir.

Q You didn't take the car? A No, sir.

Q The front of the car wasn't damaged, was it? A No, sir; not even a scratch on it.

Q What? A Not even a scratch on the hood.

Q The engine wasn't damaged, was it? A No, sir.

40 Q There was nothing damaged except the top part of the car? A Yes, sir; except the body.

Adam Kozlokowsky, cross.

Q And yet you left the car there and never reclaimed it, did you? A No, sir.

Q And you didn't take the tire either? A No, sir; I didn't touch anything in it.

Q And it is there yet for all you know? A I guess it is.

Q Now, when you bought the car it was all new tired, wasn't it? A Yes, sir. 10

Q And you had worn out the two rears? A Sir?

Q You had worn out the two rears? A Yes, sir. I changed the rear ones off and put them on the front and put the good tires on what I bought.

Q You took the rear ones off, put the good ones on the front and put the front ones on the rear, is that it? 20

Mr. Toolan: He did not say that.

The Court: He can say whether that is so or not.

Mr. Toolan: The witness just told him just the opposite.

Mr. Matthews: I object to that statement of counsel because it is virtually a prompting of this witness. 30

Mr. Toolan: No, it is not. The witness testified that he took the tires off the rear—that he bought new tires and put them on the front, or on the rear.

Q Where did you put the good tires? A On the rear.

Q What did you put on the front? A Put the original tires on the front what I had on when I bought the car. 40

Adam Kozlokowsky, cross.

Q What did you need to tell me about putting anything, if you left the front ones alone?

A Why, I had to put ones on and I took them off and put the new ones on.

10 Q But you told me in the beginning, didn't you, that you took the two rears off and you put the fronts back on the rear, and put the new ones on the front, isn't that right? A The ones were in bad shape I wasted them and used the good ones on the front, see.

Q Where did you buy those two tires? A County Garage.

Q Where? A County Garage, Perth Amboy, New Jersey.

20 Q From whom? A I don't know. I didn't know the owner's name, just called the County Garage.

Q Where is the address of it? A I don't know the address.

Q Where is it? A It is in Perth Amboy.

Q Whereabouts in Perth Amboy? A On Market street.

Q Market street near where? A Down by the old bridge, near the old bridge.

30 Q And the name of the garage is the County Garage? A Yes, sir.

Q You don't know whom you bought them from? A It has been a man in there, it is a different man working, different mechanic working now. I can't remember who he is now.

Q You bought two new ones? A Two new ones; yes, sir.

Q What did you do with your old ones? A I wasted them. They were no good. All worn out.

40 Q Both rears? A Yes, sir.

Adam Kozlokowsky, cross.

Q What did you pay for your two rears that you bought? A I paid \$12.50 apiece.

Q Did you get any salvage on the old ones?

A No, sir.

Q So the two rear tires had gone five thousand miles and they were worn out, is that right?

A Yes, sir. 10

Q Now, isn't it true that you are just saying you had those tires put on in order to explain that the rear tire could not possibly have blown out? A No. They were put on.

Q Don't you know you didn't have any new tires on the rear of that car? A They were new rear tires on there, both of them new ones.

Q Is the garage man in whose place that car was here in court today, Mr. Suydam?

(Voice from the court room: Yes, sir.) 20

Q When you approached the truck and turned to your left nothing happened to your rear tire, did it? A No, sir.

Q Nothing at all, you are sure of that? A Yes, sir; I am sure of it.

Q And after you hit the truck are you sure that nothing happened to your tire then? A I don't know then. I was unconscious. I didn't know a thing about it. 30

Q Who put the tires on your car? A I did before the accident.

Q Yes. When? A About a week before or two weeks. The tires were only about three weeks old.

Q Were they demountable rims, or did you put the tire over the rim as it was? Did you have to pull the tire off the rim and put it on itself, or was the rim demountable? A Demountable rim. 40

Adam Kozlokowsky, cross.

Q You understand what I mean, don't you?

A Yes, sir.

Q You know what a demountable rim is? When you take a tire off your Ford what did you do? A Well, I used tools to take it off with.

10 Q How did you take it off? A With the tools.

Q When you took it off you just had the tire, didn't you, that is all? A Tire and the tube.

Q There was no rim attached to it when you took it off, was there? A No, sir.

Q You put it on yourself, when you put it on when you bought them? A Yes, sir.

20 Q Do you know how long that truck was that was standing in front of you, while you were two hundred feet away and started to move when you were fifteen feet away? A The truck, the length of the truck? Well, it is a heavy service truck, was about twenty-five feet long.

Q That is within two feet of it. How wide is the road at that point? A About thirty feet.

30 Q Now, as a matter of fact, Mr. Kozlokowsky, isn't it the truth that you lost control of your car in passing a touring car, that you lost your rear tire, and that the rim of your rear wheel diverted you over to the Ainscow Garage and you crashed into a truck that was taking gas there? A No, sir.

Q Didn't you two days afterward see in the roadway the rut marks that were made by the iron or steel, whatever it is of your tire rim, for a distance of seventy-five to one hundred feet? A No, sir; I didn't investigate then.

Mr. Matthews: That is all.

40

Mr. Toolan: That is all.

Joseph J. Bakaisa, direct.

JOSEPH J. BAKAISA, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan.

Q Mr. Bakaisa, you are employed by Dorsey Motors? A Yes, sir. 10

Q Are you familiar with the type of Ford car that was being sold by Dorsey Motors in the month of March, 1925? A Yes, sir.

Q Did that particular type of car have demountable rims or not? A Yes, sir.

Q In what capacity are you employed by Dorsey Motors? A I am working in the tractor and truck sales.

Q Are you familiar with the prices of the Ford cars that are being sold? A I am familiar with all Ford trucks. 20

Q You have been in that business how long? A I have been connected with Dorsey three years, and three years previous to Dorsey's, a total of six years.

Q In the course of your experience during that six years in handling Ford trucks you were familiar with the values of new and second-hand Fords? A To a certain extent; yes, sir. 30

Q Well, what do you mean when you say to a certain extent? A Well, valuations on automobiles differ as the age of the car goes along.

Q Now, with reference to this particular car that was owned by Kozlokowsky on the 22nd of September, 1926, what would the normal depreciation be on an automobile that was purchased in March, 1925, and between March, 1925, and September 22, 1925, had travelled approximately five thousand miles? 40

Joseph J. Bakaisa, direct.

10 Mr. Matthews: I object as incompetent, and not a measure of damage, nor can it be used as evidence to produce the normal damage, which is the difference between the value of the car at the time of the accident and the time it was sold, by observations of the vehicle itself. They can testify what the car was worth before the accident, and what it was worth on September 22nd, if he saw it.

By the Court.

Q Did you know this car? A I did know the car previous to the accident.

Q How long before the accident had you seen that car? A About a month before the accident.

20 Q You got a good look at it? A Yes, sir.

Q What was it worth?

Mr. Matthews: Your Honor, allows my objection to that, and an exception to your Honor's ruling.

The Court: Do you deny his qualification?

Mr. Matthews: It is not that. I deny, with respect to the Court, that that is the competent way of ascertaining it.

30

Q What was it worth? A I have an appraisalment here that is based—

Q Never mind. You say you know the value of the car? A Yes, sir.

Q That you were engaged in the sale of these particular kind of cars for six years? A Yes, sir.

40 Q That you saw this car about a month before the accident, that you had a good look at it. What was the value of that car?

Joseph J. Bakaisa, direct.

Mr. Matthews: I object.

The Court: It is objected.

A That car at that time was worth about \$650, \$625, something like that, in that figure.

Q Did you see it after the accident? A No, sir.

10

By Mr. Toolan.

Q The figure that you give us now is the figure a month prior to the accident? A Yes, sir.

Mr. Matthews: I object to that question.

The Court: Yes, certainly.

Mr. Matthews: Prays exception.

20

The Court: Yes.

Q You didn't see the car at the time of the accident or subsequent? A I didn't see it at the time of the accident; no, sir.

Q Nor after the accident? A Nor after the accident.

Mr. Toolan: That is all I have. Cross examine. 30

Mr. Matthews: No questions.

Mr. Matthews: I move to strike out his testimony concerning the value of the car.

The Court: Motion denied. You may take an exception.

George H. Suydam, direct.

GEORGE H. SUYDAM, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan.

10 Q Mr. Suydam, you are one of the members of the firm or partnership of Suydam Brothers?

A Yes, sir.

Q You operate a garage on the Lincoln Highway? A Yes, sir.

Q How far from the Lincoln Garage? A About a mile, I should judge.

Q Did you personally tow in this Ford wreck on the night of September 22, 1925? A Yes, sir.

Q Brought it to your garage? A Yes, sir.

20 Q Where was that car damaged, Mr. Suydam? A On the left-hand side of the car, the whole body all the way from the windshield back. And the rear housing was out of line, and the back end of the chassis.

Q Did you observe the condition of the tires when you got the car that night to tow it in? A Yes, sir.

30 Q With reference to the rear tires particularly, what was their condition? A Why, there was only one tire we found that day in the back of the car, I guess Officer Guyette put in there.

Mr. Matthews: I object.

The Court: Strike that out.

Q There was only one tire? A Only one tire was found that day, a rear tire, it was a new tire, I think it was a Federal cord.

40 Q Did you ever find the other tire? A No, sir.

George H. Suydam, special cross.

Q Were both tires off the rear wheels? A Yes, sir.

Q How about the front wheels? A It had the ordinary Ford tires on the front.

Q Were either of them blown out? A No, sir.

Q In good condition? A Yes, sir. 10

Q Mr. Suydam, do you buy and sell cars? A Not until just lately.

Q What is that? A We have just taken over an agency lately.

Q Were you familiar with the value of second-hand Ford cars? A Yes, sir.

Q On the 22nd of September, 1925? A Yes, sir.

Q What would you say the value of that was?

Mr. Matthews: I object. I want to examine on his qualifications. 20

The Court: All right. You want to take time. This is something which should be agreed upon before hand. The difference between the value of the car before and after. You should not take up the time of juries on it. Counsel should get together and agree on those things. However, go on.

Special cross examination by Mr. Matthews. 30

Q Have you bought and sold Ford cars before you took over this agency? A We sold used cars, second-hand cars.

Q Ford cars? A Yes, sir.

Q How often? How many have you sold? A Oh, I don't know. Quite a few, maybe.

Q Do you sell them? A No. We sell them for other dealers. We are simply selling them for other dealers. 40

George H. Suydam, cross—re-direct.

Q Did you sell them yourself? A Why, we put the sale through through the other dealers, like W. E. Mount of New Brunswick.

Direct examination (continued) by Mr. Toolan.

10 Q What was the value of that car that you towed in there that night? A After the accident?

Q Yes. A I would not want to pay much for it.

Q Well, what? A About sixty-five dollars for what is left of it.

Mr. Toolan: That is all I have. Cross examine.

20 *Cross examination by Mr. Matthews.*

Q What is the engine that is uninjured of a Ford car worth? A I don't remember. About \$115, I guess.

Mr. Matthews: That is all.

Re-direct examination by Mr. Toolan.

30 Q Was the engine intact? A No. Only one arm was bent a little, the motor arm, where the chassis sprung it out of shape.

By Mr. Matthews.

Q Outside of that the engine was all right, wasn't it? A Yes. It run.

Q Front wheels and front tires were all right, weren't they? A Yes.

Q Rear wheels were all right, weren't they?
40 A No.

Walter Malinowski, direct.

Q No tires on them? A No tires. The rear wheel was bent.

Q Which wheel was bent? A The left rear.

Mr. Matthews: That is all.

Mr. Toolan: That is all.

10

WALTER MALINOWSKI, a witness produced on behalf of the plaintiffs, being duly sworn, according to law, on his oath saith:

Direct examination by Mr. Toolan.

Q You are a brother of Frank Malinowski?

A Yes, sir.

Q I call your attention to the jar in front of you and ask you whether or not—or, where you obtained possession of the bony content in that jar? Who gave it to you? A Why, the doctor. 20

Q Dr. Voorhees? A Yes, sir.

Q After you got it what did you do with it?

A I took it home.

Q After that what did you do with it? Who did you give it to? A I got these bones and I bought alcohol and I put them in the bottle.

Q You have had possession of them ever since? A Yes, sir. I had them for about three or four days in my own hands. 30

Q Then what did you do with them? A Then I returned them to my mother.

Q You returned them to your mother? A Yes, sir. I was married then.

Q Do you know where they have been ever since?

Mr. Matthews: I object as hearsay. 40

Walter Guyette, direct.

Q Who put them in the jar? A I did.

Q Did you put them in there yourself? A Yes, sir.

Q Is that the jar you put them in? A No, sir.

10 Q It is not? A No, sir.

Mr. Toolan: That is all I have.

Mr. Matthews: No questions.

Mr. Toolan: That is all.

Mr. Toolan: I would like to offer that jar and contents.

Mr. Matthews: I object.

The Court: Objection sustained.

20

WALTER GUYETTE, a witness produced on behalf of the plaintiffs, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Toolan.

Q You are a police officer in Raritan Township? A Yes, sir.

30 Q You were on September 22, 1925? A Yes, sir.

Q Did you witness the accident in front of the Lincoln Garage on the night of the 22nd of September? A Did I what?

Q Did you witness the accident? A No, I did not.

Q Did you come upon the scene of the accident afterwards? A Yes, sir.

40 Q What time did you get there, officer? A 11:30.

Walter Guyette, direct.

Q And when you got there where was Malinowski, the man who had his head injured? Was he still there? A No. Nobody there.

Q They were not there? A No, sir.

Q Did you examine the roadway in the vicinity of the Lincoln Garage? A I did.

Q Did you find anything on the highway? A 10
I found a mark of a rim of the car.

Q Did you find anything else? A I found glass.

Q How much glass? A Well, about twenty-five or thirty feet from the accident there was quite some glass.

Q When you say twenty-five or thirty feet from the accident you mean what? A In the rear, towards Metuchen.

20

Mr. Matthews: I object to that as a conclusion and hearsay.

The Court: He does not know where the accident occurred, because he was not there.

Mr. Matthews: I ask that be stricken out.

The Court: It is stricken out.

Q Where did you find glass, officer; will you tell us what part of the highway? A I found 30
glass right at the rear of the truck.

Q At the rear of the truck? A Yes.

Q Where it was standing when you got there?

A Where it was standing.

Q Did you find glass anywhere else? A Twenty-five or thirty feet behind the truck.

Q Twenty-five or thirty feet behind the truck?

A Yes.

Q In which direction? A Towards Metuchen.

40

Walter Guyette, direct.

Q On which side of the highway? A On the right-hand side going towards Metuchen; almost in the middle.

Q On the right-hand side going towards Metuchen or towards New Brunswick? A Going towards Metuchen; almost in the middle, on the center line.

10 Q On the line? A Yes.

Q Is there a line in that highway?

The Court: He said almost the center line.

Mr. Matthews: Right-hand side, almost the center.

Q Is there a center line there? A Yes, sir.

Q What kind of center line? A Concrete.

20 Q This glass was how far from that center line? A Well, I should judge a foot. Right off the line.

Q How much glass did you find there? A Well, there was quite some.

Q Did you find this mark on the highway that you mentioned—where did that mark on the highway begin? A From where the truck was stopped, where the truck was parked.

30 Mr. Matthews: I ask it be stricken out, unless it is the truck after the accident.

The Court: That is what he means. The truck that he found there.

Q I mean with reference to this glass in the center of the highway, or near the center of the highway, where was the rim mark, where did it begin? A From where the truck was parked.

40 Q What is that? A Where the truck was parked.

Walter Guyette, direct.

Q From where the truck was parked when?

A Where the glass was when I got there, where the truck was parked; the marks started across the highway from where the truck was parked.

Q There wasn't any tire mark or rim mark beyond that? A No, sir.

By the Court.

10

Q Beyond what? A Beyond where the accident was.

Q But you don't know where the accident was. To what did the mark extend, from where to where? A From where the truck was to where the sedan was.

Q And where was the sedan? A On the right-hand side, about 200 feet up the road.

Q Which right-hand side? A Towards New Brunswick, on the right-hand side of the road towards New Brunswick.

20

By Mr. Toolan.

Q As I understand it, you found glass in two places? A Yes, sir.

Q When you got there the truck was parked where? A In front of the Lincoln Garage.

Q Facing in which direction? A New Brunswick.

30

Q Now was the truck located with reference to the highway? A Parallel with the highway.

Q Parallel with the highway? A With the rear end off in this direction.

Q What is that? A The rear end sticking out like this in the highway.

Q How far out on the highway did the rear end stick? A Around seven or eight feet.

Q Was there more glass there near the rear end of the truck, or was there more glass down

40

Walter Guyette, cross.

the highway from there at this other point, twenty-five or thirty feet? A There was more glass down the highway.

Q There was more glass down the highway?

A Yes, sir.

Q Did you see any other marks down there where that glass was? A No.

10

Mr. Toolan: That is all I have. Cross examine.

Cross examination by Mr. Matthews.

Q There was glass at the rear of the truck that was parked at the gas station? A Yes, sir.

Q Who was there when you came there? A Who was what?

Q Who was at the scene of the accident when you came there? A Mr. Ainscow for one.

20

Q That gentleman? A That is him.

Q Who else, Mr. Guyette? A I don't know. There were three or four drivers around there, truck drivers.

Q Were those two men there? A I don't recognize them.

Q What other officers were there? A Officer Merley come there about twenty minutes after I was there.

30

Q What other officer? A No other officer.

Q How long did you remain? A Three-quarters of an hour.

Q During that time the only officer there was Officer Merley, is that right? A Yes.

Q Were the people that were injured, had they been taken away when you got there? A They were gone when I arrived.

Mr. Matthews: That is all.

40

Mr. Toolan: That is all. We rest.

George W. Ainscow, direct.

MOTION FOR NON-SUIT.

Mr. Matthews: I respectfully move a non-suit in the Kozlokowsky case on the ground that the evidence of the plaintiff shows that Kozlokowsky was guilty of contributory negligence, in that in a position which he testified was such that within fifteen feet of a twenty-five foot long vehicle, turning across a street thirty-five feet wide, he turned left and then turned right and struck the car. 10

The Court: That motion is denied.

Mr. Matthews: Prays exception.

The Court: Note an exception.

DEFENDANT'S CASE. 20

GEORGE W. AINSCOW, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Matthews.

Q Mr. Ainscow, you are the proprietor of a garage on the Lincoln Highway between Metuchen and New Brunswick? A Yes, sir. 30

Q What is the name of your garage? A Lincoln Garage.

Q Is the Lincoln Inn immediately opposite your garage? A Yes, sir.

Q How wide is the Lincoln Highway between the Lincoln Inn and your garage? A The warranite bed is thirty-two feet.

Q Are there shoulders? A Shoulders about four feet. 40

George W. Ainscow, direct.

Q How is your filling station and garage situated? Does it run flush up to the shoulder of the road? A There is what is called an apron that is put into all driveways.

Q Your driveway only? A Nine feet apron, what they call an apron.

10 Q What is it made of? A Concrete.

Q There are pumps in front of your garage, are there not? A Yes, sir.

Q How far from the highway shoulder are the pumps situated? A Just nine feet; about four inches less than nine feet the pumps are from the outside of the warranite.

Q So that there is five feet of apron and four feet of shoulder between the warranite? A No, there is no shoulder there. That concrete extends right up to the curb.

20 Q To the warranite. On the night of September 22nd did you witness an accident at your garage? A Yes, sir.

Q Where were you when the accident happened? A Right there ready to pump gas into the truck.

Q And what truck was at the garage pumping? A One of Frederick Phillips', number 19.

Q How close to the pump was the truck? A
30 About as close as it could get.

Q Did any of the truck hang over on the warranite of the road? A No, sir.

Q At which pump was the truck that was taking gas? A The second pump from Metuchen, the middle pump as we call it.

Q Was there anybody at the first pump from Metuchen? A No, sir.

Q Was there another truck, if you know, and if you saw, at or near your garage? A Not on
40 that side of the road.

George W. Ainscow, direct.

Q Well, was there on the other side of the road? A Yes, sir. In the rear of this truck, ahead of this truck.

Q In other words, on the other side of the road, to its rear, and ahead of it, there were trucks parked on the right side of the road? A Yes, sir.

10

Q Facing where, New Brunswick or New York? A New Brunswick.

Q Did you see this touring car that had the accident, before the accident? A No, sir.

Q What did you see of the accident? Describe it. A Well, I was there ready to pump gas, and I heard a crash and glass and splinters of wood flew up over the front of the truck.

Q Which truck did the glass and splinters of wood fly up over? A The truck that was at the pump, number 19.

20

Q Where was the driver of the truck at that time? A In the cab.

Q What doing? A Ready to take the gas.

Q Did he or did he not have anything in his hand? A He might have had—

Q Not what he might. If you know. Well, when you said ready to take gas, I thought perhaps you might. Never mind it. What next, if anything, did you see, after you saw the glass and wood fly up over the truck? A Saw the wrecked car proceeding on up the highway.

30

Q How far did you see it go? A Well, it went up, I suppose, 200 feet or more.

Q After the car went up 200 feet, what, if anything, did you see anybody do? A Well, before it got that far another one of Mr. Phillips' drivers ran alongside of the car, ran up with it.

40

George W. Ainscow, direct.

Q Yes. A And I don't know; I have been told they—

Q Don't tell what you were told. A He run alongside of the car.

Q What next, if anything, did you see or do?

A Well, we got—then I ordered him to pull the car across the road, the driver of this truck.

Q When you ordered the driver of the truck to pull the car across the road, by the car do you mean the touring car? A No. I ordered the truck driver to pull the truck. We gassed him immediately and ordered him to pull out, so that we could clean up the glass and wood and broken-up material that was there.

Q Did you go up to the touring car? A Not until sometime after.

Q Who was there when you went up there? A I don't just remember who was there at the time; Officer Guyette appeared on the scene sometime while the car was there.

Q Was there any other officer there? A Yes, sir. Officer Merley was there a half hour before Officer Guyette got there.

Q When you went up to the sedan car did you notice anything about it? A I noticed that the body was pretty well wrecked; I noticed that it had the tire off of one hind wheel, the left hind wheel, that is the left hind wheel standing from front, or the left wheel standing from behind. We would call it the left hind rear wheel.

Q Did you in company with anybody inspect the highway? A Yes, sir.

Q Who was the person who inspected it with you? A The drivers and one of my boys and Officer Merley and quite a number of us.

Q What? A Quite a number.

George W. Ainscow, direct.

Q Your boy's name is what? A George.

Q Is he here in court? A Yes, sir.

Q What did you find when you inspected the highway? A We found where the car had run with the tire off across on an angle of about forty-five degrees, right across the road.

Q Across what road? A The Lincoln Highway. 10

Q Was this in front of or behind the car that you say was hit? A Behind the truck.

Q And how far behind the truck did those marks begin? A Why, I should judge seventy-five or one hundred feet, somewhere in that neighborhood.

Q And what kind of marks were they? A Just marks that a regular Ford car makes when it has no tire on. An imprint in the warranite.

Q Where did that imprint start and where did it finish? A It started, as I say, across the road at an angle of probably forty-five degrees back towards Metuchen. 20

Q Yes. A On the right-hand side of the road, on the right-hand side of the center of the road, which is a concrete center; also it started and ran right across into the truck.

Q Did the marks continue after or ahead of the truck that was parked at the gas station? A I don't think we made any examination. We simply made the examination back to see what caused the accident. 30

Q How long had the truck been standing at the filling station before this car hit it? A It hadn't been there I don't think more than a minute or two.

Q Did you see any other car pass before this Ford car came along? A Any what?

Q Any other car pass before the Ford car hit the touring car? A No, sir; I did not. 40

George W. Ainscow, direct.

Q When the Phillips Specialty truck came in to gas, did or did you not put any lights anywhere at or about your place? A We have a red light out on the right-hand side of the truck; it sets on the warranite.

10 Q When you put that light on the highway did you or did you not see whether the rear lights were lit on the Phillips truck? A No, sir; I didn't go behind the truck.*

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

Q Did you see where the Ford car had hit it? A I did not notice any mark on the truck, no.

Q Did you notice, when you saw the truck after the accident, whether any lights were lit on the rear of it or not? A I can't say that I noticed that.

20 Q You say that Officer Merley was with you when you inspected the highway? A Yes, sir.

Q And your son and what others? A And the drivers that are here today, and several others.

Q What is the lighting condition at your filling station, or what was the lighting condition at the time of this accident? A Very light.

30 Q What makes it very light? A The Lincoln Inn is lit up with, I suppose, fifty lights on the front of it.

Q Was it lit that night? A Lit, yes, sir. There is a street light right about twenty feet from the Lincoln Inn on the same side of the road or street, and the Lincoln Garage is lit up.

Q Was there any truck moving across the highway at the time of this accident? A I didn't see any.

40 Q And at the time of the accident was the truck that was being filled the only truck that was in the filling station? A Yes, sir.

George W. Ainscow, cross.

Q Did you see any of the plaintiffs, either Malinowski or Kozlokowsky, after this accident?

A Yes, sir.

Q Which one? A The one that had the—that was in the hospital from the wound in his head.

Q How long after the accident do you think it was you saw him? A Oh, I suppose, six weeks or two months, somewhere in that neighborhood. 10

Q Did you have a conversation with him? A Yes, sir.

Q What did he say and what did you say?

A He said that he was going to sue the Phillips. I says, "Why, you can't sue them, you have got no suit against him." "Well," he said, "can't I sue somebody?" I said, "Yes, you can sue the man who had you out, that you were riding with." I said, "You have got no suit against Phillips"; I said, "He is the man that you want to sue," I said; "he is the man that is responsible for your injury." "Well," he says, "I will sue him." 20

Q Was there anybody with him at the time?

A No, sir. Nobody with him.

Mr. Matthews: Cross examine. 30

Cross examination by Mr. Toolan.

Q How long was this truck getting gas at your station? A How long was it? It hadn't got any then, Mr. Toolan.

Q What is that? A It hadn't got gas yet.

Q I said how long was the truck? A Oh, how long is the truck? About, I should judge, twenty-five or twenty-six feet. 40

George W. Ainscow, cross.

Q That truck was proceeding from New York in the direction of Philadelphia, was it not? A Not when it was hit.

Q That was the direction in which the trucks were proceeding, isn't that so? A Before the accident, yes.

10 Q And at the time of the accident the trucks were facing in the direction of Philadelphia? A Yes, sir.

Q What sort of a body was on that truck? A Panel body, what we call a panel-body truck.

Q What type truck was it? A Pierce-Arrow.

Q Five-ton? A Yes, sir.

Q With an enclosed body? A Yes, sir.

Q How wide is that truck? A Why, the wheel base?

20 Q The body. A I should judge about six foot six, possibly seven foot.

Q That truck was the center truck, as I understand it, in that truck train; there were trucks in front of it and a truck behind it, is that right? A I can't tell you about it being the center truck. It was one of the middle trucks.

Q One of the middle trucks? A Yes, sir.

30 Q That pulled over into your garage at an angle, didn't it? A No, sir.

Q Isn't it a fact that the rear end of the truck was projecting out into the highway eight or ten feet? A No, sir. They have got strict orders.

Q Never mind what they have got; answer the question. A No, sir.

Q Why, then, did you take a red lantern and put it out in the highway? A We always put it out.

40 Q Never mind. Why did you do it that night if the truck was not projecting out into the highway? A We always put it out.

George W. Ainscow, cross.

Q Is that the reason you did it that night?

A Yes, sir.

Q No part of the truck, you say, was on the highway? A No, sir.

Q As I understand it, the apron, and the apron, as I understand it, is the concrete that extends from the edge of the highway up to your gas tank? A Right. 10

Q That is nine feet long? A Wide.

Q And extending the length of the gas tanks?

A Yes, sir.

Q So that this truck at the time it was taking on gas was standing entirely off the highway?

A Yes, sir.

Q On that apron? A Yes, sir.

Q And it was facing due west? A Towards New Brunswick, southwest. 20

Q Well, it was facing practically parallel with the road, was it? A Right.

Q So that the rear of that truck was square facing east, isn't that so? A Northeast; yes, sir.

Q It was at an angle approaching it? A No, sir.

Q You said the first thing that you heard was the crash? A Yes, sir.

Q You didn't hear anything else before that? 30

A No.

Q Which corner of the truck was hit? A I said I didn't examine the truck.

Q Why didn't you examine the truck, Mr. Ainscow? A Well, I don't just know; I had a lot of other work to do and wanted to get the truck gassed and get it out of there and get the rubbish cleaned up so that we could get others in. We couldn't pull over the amount of rubbish that was there. 40

George W. Ainscow, cross.

Q Where was the rubbish lying with reference to the rear end of the truck after the accident? A Mostly in front of it.

Q Mostly in front? A Yes, sir. Come up all over the hood, all inside, on the inside of the truck, over the hood, lots of it. Glass and pieces of broken—

10 Q I mean with reference to the rear end of the truck was there any debris around there? A Very little, if any.

Q What part of the truck did this car strike, do you know, the rear end? A I don't know.

Q You say the debris was up around the hood of the truck? A Yes, sir.

Q When you say the hood do you mean the hood or the cabin of the truck? A Cabin and hood both.

20 Q Cabin and hood? A Yes, sir.

Q You were on the left-hand side of that truck as you were facing, is that correct, or that is as the truck was facing? A Exactly.

Q Had the gas pump about ready to pump gas? A Yes.

Q The driver was in the cab? A In the cab.

Q If the debris was there, Mr. Ainscow, right there up by the cab and the hood didn't you see this other truck struck up there somewhere? A
30 No, sir.

Q You didn't see the Ford strike at all, did you? A No, sir.

Q You heard the crash? A Heard the crash.

Q This mark that you traced on the highway extended, you saw it and observed it extending seventy-five or one hundred feet in the direction of Metuchen? A Yes, on an angle right across the street on a forty-five-degree angle.

40 Q Where did the mark start, on what part of the highway? A Started, as I said, on the

George W. Ainscow, cross.

other side, on the right-hand side of the center curb.

Q On the right-hand side coming towards New Brunswick? A Coming towards New Brunswick; yes, sir.

Q And how far was the beginning of that mark from the center line of the road? A Well, 10 I don't just know. We didn't measure that. I would say twenty feet, maybe, fifteen or twenty feet.

Q I don't think you understand me. There is a center concrete strip along that highway?

A Yes, sir.

Q I say how far from that center line of the highway was the beginning of this mark? A I say I think about fifteen feet, in that neighborhood. 20

Q The road is thirty-two feet wide, isn't it?

A Yes.

Q And half of it, then, is about sixteen feet?

A Going straight across, yes. But this was on an angle.

Q But I mean the extreme top where that began, how far was that from the center line? A Oh, I should say maybe four feet.

Q And you traced that from seventy-five or one hundred feet down the road up to the truck? 30

A We traced it back the other way.

Q Well, from the truck? A Back.

Q And you didn't trace it any other way, did you? A No.

Q You stopped when it got to the truck, that is true? A We stopped.

Q Or, you started when it got to the truck and traced it back? A That is it exactly.

Q And you didn't trace it any further? A No. We called Officer Merley's attention to it. 40

George W. Ainscow, cross.

Q How long have you been doing business with the Phillips people who operate that fleet of trucks? A Ever since they started in business.

10 Q You sell them practically all their gasoline going through here, don't you? A I sell them quite a good bit. They gas up in Philadelphia and New York and at my place.

Q They are pretty good customers of yours, aren't they? A All my customers are pretty good.

Q As I understand it, the truck that was struck had only been in there a very short time? A We get them in and out just as fast as I can.

20 Q I mean it had only been there a minute or so, you say, when it was struck? A I will explain to you about how long; as the trucks come in I go right inside and mark down the number of gas they get, and just as soon as they pull out, I ordered them to pull out as soon as they get the gas, I ordered the other trucks in, go right in and write down the number of gallons they get. I was in and run out and started to gas this man up when he was hit.

30 Q Did you examine the Ford afterwards? A Nothing more than I say I didn't make any microscopical examination.

Q No, people generally don't. Where was the Ford car smashed? A The body.

Q Beginning where? A Front.

Q Where in the front? A The whole front.

Q Well, when you say the whole front what do you mean by that? A I mean just what I say, the whole front, the whole car.

40 Q Beginning with the radiator? A Not the radiator. The radiator wasn't touched. The body.

George W. Ainscow, cross.

Q The radiator wasn't touched. The left front mudguard wasn't touched, was it? A I don't think so.

Q It began by the left front door where the body comes up by the windshield, isn't that true?

A Right in front of the body, the whole front of the body.

Q Beginning right at the windshield, isn't that so? A Yes, right at the windshield.

Q At the door where it joins in there, isn't that so? A Yes.

Q And it was crashed in on that left side, isn't that so? A Right.

Q Did you take any of this debris or glass or anything and move it down the highway twenty or thirty feet? A No, sir. I don't know where Officer Merley found it down there.

Q You didn't see it, did you? A No, sir.

Q Did you look for it? A I didn't look for glass. I was all over that ground below that car.

Q You didn't find any glass further down? A No, sir; no glass.

Q As this car was proceeding up the road, as you testified, and this man was running along after it, did you see a young man hanging out of the side of the car? A No, sir.

Q Did you look close enough to see that? A I just watched the car going up the road and wondered how it was going to stop or where they were going to stop it.

Q Did you see where they took these boys after the accident? A No, sir.

Q You didn't see that? A No.

Q You didn't go up to look at the boys? A No, sir. I did go up, but—

Mr. Toolan: That is all I have.

Eaner A. Renning, direct.

Re-direct examination by Mr. Matthews.

10 Q What were you going to say about you did go up? A I did go up to tow the car into my garage and found Officer Guyette there, and because of the one tire being off of the rear hind wheel he wouldn't allow me to tow it across the road, but he went to Suydam Brothers and they towed it a mile up without any tire on.

By Mr. Toolan.

Q Isn't it a fact that Suydam Brothers hoisted it up on the rear and towed it on the front tires? A No, sir. They towed it just as it was.

20 Mr. Toolan: That is all.

EANER A. RENNING, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Matthews.

30 Q Mr. Renning, you are employed by the Phillips Specialty Company as a truck driver? A Yes, sir.

Q And you were so employed on the 22nd of September of last year? A Yes, sir.

Q Do you remember an accident that happened on that night in question? A I do.

Q Where was your truck at the time this accident happened? A At the middle pump.

40 Q Of what garage? A Of the Lincoln Garage.

Eaner A. Renning, direct.

Q Were you standing still or moving when this accident occurred? A Standing still.

Q Did you or did you not see the accident? A No, sir, I didn't see it.

Q Which of your sense told you anything of the accident? Did you feel it? A Yes, I felt the crash.

10

Q Where were you standing when the accident happened? A In the cab with the hose in the tank.

Q With your hose in the tank? A Ready to pump gas.

Q What was the first indication you had of any accident? A There was a bump and I turned around and looked at the windshield and seen a car going down the road zigzagging, about 200 feet.

20

Q Did you or did you not see any glass or debris or wood or splinters or anything around there? A Yes, I seen plenty of glass and plenty of wood on the side of the truck and back of the truck.

Q On the side and in back of the truck? A Yes, sir.

Q What, if anything, did you do with reference to that glass and wood? Did you help clear it away? A Yes, I helped clean it off, yes.

30

Q Did you go with Mr. Ainscow to look at the roadway, were you one of the men who went? A Officer Merley had me then.

Q Who? A Officer Merley.

Q Did you go with him? A Yes, I went with him, yes.

Q What did you see? A Well, he takes me to the Lincoln Inn, across the way, you know, and writes out everything, you know, name and everything.

40

Eaner A. Renning, direct.

Q I mean, did you go with him to inspect the road? A Yes, I was there; yes, sir.

Q What did you see? A Do you mean—

The Court: Marks.

10 Q Did you see any marks? A Yes, I seen the mark.

Q Where were they, Mr. Renning? A Well, leading from across on an agle, you know, on the road.

Q Was that in front of or in back of your truck? A Back of my truck, about fifteen feet back, I guess.

Q How much? A About fifteen feet, some- wheres around there.

20 Q How far did they go? A Sir?

Q How far did the marks go? A Went across the angle in front of Mr. Ainscow's garage, pretty near, I think, when I seen them.

Q What? A In front of Mr. Ainscow's garage. In front of Mr. Ainscow's garage it stopped.

Q Did you after the accident then go up to where the car was that had been in the accident? A No, sir.

30 Q You pulled your car out afterward? A I got my gas and pulled out on the other side, off the highway.

Q At the time that your car was parked did you observe whether or not there were any lights on the rear of your truck? A I had two lights on the rear, sir.

Q Did you notice any other light at or in the highway? A No, I didn't; no.

40 Q Did you notice any other light at Ainscow's garage? A Yes, sir.

Eaner A. Renning, cross.

Q Put out for trucks? A Yes, sir; on the highway, a red lantern on the highway.

Q You are still working for the Phillips Specialty Company? A Yes, sir.

Q You had come from New York that night, had you not? A Yes, sir.

Q And were en route to Philadelphia? A To Philadelphia. 10

Q You were one of a fleet of trucks? A Yes, sir.

Q How many trucks were in the fleet? A I believe there were six or seven. I think seven.

Q Was your car, at any time that night, in the vicinity of Ainscow's garage, hit while it was moving? A No, sir.

Mr. Matthews: Cross examine.

20

Cross examination by Mr. Toolan.

Q Where was this red light in the highway that Mr. Ainscow put out? A In back of me.

Q How far out in the highway? A On the edge of the highway.

Q On the edge of the highway? A Yes, what they call the apron, or edge of the road, anyhow.

Q Well, was it on the warranite pavement or not? A Edge of the concrete alongside of the truck in the rear. 30

Q You testified a moment ago on direct examination that immediately after the crash you pulled your car off the highway. Did you mean that? A I got my gas, yes.

Mr. Matthews: I submit that is not the testimony.

Mr. Toolan: That is my recollection. 40

Eaner A. Renning, cross.

A After I gassed up I pulled across the highway in the clear off the road.

Q Well, you were off the road, according to your testimony, before the accident happened, weren't you? A Off the road?

Q Yes. A Explain that, please.

10 Q Was any part of your truck on the highway when the accident happened? A No, sir; no, sir. I was off the highway.

Q Where did your truck stop in this truck train with reference to the Lincoln Inn? A At the middle pump.

Q No. I mean before you pulled over to the pump was your truck stopped in front of the Lincoln Inn? A No, sir; away back.

Q How far? A On the right-hand side about seventy-five feet back.

20 Q Twenty-five feet? A Seventy-five feet from the garage.

Q And you pulled across the highway, did you not? A Pulled across the highway.

Q Up into Ainscow's garage? A Yes, sir.

Q This mark that you testified to on the highway, you say that you traced that fifteen feet in back of the truck? A In back of the truck, yes.

30 Q Fifteen feet? A Well, fifteen or twenty feet, anyhow, somewheres around there.

Q You are sure about that? A Yes, I seen the mark, anyhow, from the right over the angle, see?

Q Did that mark go beyond the center line of the road? A Yes, sir.

Q How far? A Went on the left-hand side.

40 Q You traced it on the left-hand side of the highway? A On the right-hand side, of course, I traced it; across the white mark over on the left-hand side, see?

Eaner A. Renning, cross.

Q And what is your idea of fifteen feet, how far is it? From where you are to where? A Maybe across there.

Q What? A Across here, I guess.

Q From where you are to the wall? A From here over to the wall, yes.

Q From where you are to the wall? A Yes. 10

Q Did you see any glass in the roadway back there about twenty-five or thirty feet beyond your truck? A No.

Q Did you look for any? A The glass was in back of the truck.

Q What is that? A The glass was in back of the truck.

Q The glass was in back of the truck? A Back of the truck, yes.

Q How far in back of the truck? A Well, all around the back, around the side of the truck. 20

Q Well, you mean in back of the truck as it was parked at the gas pump? A Gas station, yes.

Q Well, how far beyond or past the back of the truck did the glass start? A It started at the rear of the truck.

Q It started at the rear of the truck? A At the rear, yes, up along the side, too. 30

Q Did you examine this truck or this Ford car after the accident? A No. Officer Merley had me. I couldn't.

Q Did you see either of the boys after the accident? A No, sir.

Mr. Toolan: That is all I have.

Mr. Matthews: That is all.

Benjamin W. Malseed, direct.

BENJAMIN W. MALSEED, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Matthews:

10 Q Mr. Malseed, you are a driver for the Phillips Specialty Company? A Yes, sir.

Q And were you on September 22, 1925? A Coming from New York.

Q Were you a driver on that night? A Yes, sir.

Q Did you on that night see an accident happen? A Yes, sir.

20 Q Where was your truck at the time this accident happened? A On the right-hand side of the Lincoln Highway about seventy-five foot the other side of Lincoln Inn, I guess it is called.

Q About seventy-five feet the other side of the Lincoln Inn, and by the other side you mean the New York side or the Philadelphia side? A The New York side.

Q Where were you at the time this accident happened? A I was standing alongside of the cab. I got out of the cab.

30 Q Were you standing on the roadway? A On the roadway.

Q Did you see the accident? A I did.

Q Please tell the Court and jury just what you saw. A Well, number 19 truck was at the gas station, see?

40 Q Speak louder. A Number 19 truck was at the gas station getting gas; he was entirely off the road. Of course, I had to wait there until he pulled out; so after you sit awhile in the truck you get stiff, so I stood on the highway, see, beside my truck; and a touring car came along

Benjamin W. Malseed, direct.

about twenty miles an hour, and in back of this touring car a Ford sedan came, and it appeared to me as if he didn't—

Mr. Toolan: I object.

Q Don't tell us what appeared. Tell us what you actually saw and the jury will draw the inferences. A He didn't notice this touring car. 10

Mr. Matthews: You don't know that. I consent it be stricken out.

The Court: It is stricken out.

Q What did you see? A Well, when he got close to this touring car he pulled to the left and he came around with a pretty good speed, and as he swung to the left, the left-hand rear tire slid off the rear wheel, see, and he run along on the rim. 20

Q He went along on the rim? A Yes, he went along on the rim and he made a sharp turn, and he gets right next to 19 truck, and his rear end slid right into the truck, right to the center door, and it ripped the whole side from the center door out off the Ford.

Q You saw his car, then, come in contact with the other truck? A Yes, sir. 30

Q After it came in contact with the truck what became of the sedan? A Why, it wiggled down the road about twelve miles an hour; it stopped its speed when it hit the truck, pretty near stalled the motor, and I seen somebody hanging out of the side, but I couldn't recognize what it was, but I didn't go near it. After 19 truck pulled out I helped sweep up the glass and wood and stuff that laid there. 40

Benjamin W. Malseed, cross.

Q Where was the glass and wood and stuff?

A The sedan hit number 19 truck on the right rear, see, and the glass was scattered all around the rear, about four or five foot from the rear end, see, along the side, and some went in the cab and some went over the hood.

10 Q How far away from your truck was the Ford car when you saw it start to pass the touring car? A About twenty-five foot.

Q And you say that you were seventy-five feet down on the right-hand side of the highway from the Lincoln Inn? A Yes, sir. We always stop that far so you can swing across the roadway.

20 Q Was there any one of your trucks in the middle of the road when this Ford car had the accident? A No, sir.

Q Did the touring car stop? A He kept on going.

Q Did you observe whether or not the lights on the rear of 19 truck, the truck that was gas-ing, were lit? A Two lights, a lantern and electric light.

30 Q What was the condition as to the lighting of the highway at the point where this accident took place? Were there lights there? A There is five gas pumps there, and there is a light on each one of them. The Lincoln Inn has got about sixty lights on it; they all were lit, and there is a street light there; it is very well illuminated.

Cross examination by Mr. Toolan.

Q As I understand, you were about seventy-five feet down the road from truck number 19?

40 A Yes, sir.

Benjamin W. Malseed, cross.

By the Court.

Q That is not what you said before. You said you were seventy-five feet down the road from Lincoln Inn? A With my truck.

By Mr. Toolan.

Q Nineteen was parked right across the street from Lincoln Inn, wasn't it? A That was parked at the gas station. 10

Q Well, that is right across the street? A Yes.

Q So that there would not be any great difference measuring it from the Lincoln Inn and measuring it from 19, would there, the distance? A It would be across the road, wouldn't it?

Q What? A It would be across the highway. 20

Q It would be across the road? A Yes.

Q About the same distance down? A Yes.

Q What sort of a car was this that was coming along the road, this touring car? A It appeared to me like a Cadillac. I couldn't swear what it was.

Q Open or closed? A Touring car, open.

Q Had the Ford started to pass that Cadillac before he got to you, or afterwards? A Before he got to me? 30

Q What? A I didn't get you that time.

Q I say, had the Ford car started to pass that Cadillac touring car before either the Cadillac or the Ford reached you, or after they had passed you? A I noticed the Cadillac first, see; I was standing close to my truck and as he approached within fifteen feet, see, I noticed him about twenty-five foot, and when he got about fifteen foot I seen the Ford swing around, and it appeared that the Cadillac put on a little 40

Benjamin W. Malseed, cross.

more speed, see, and then he kind of slowed down and the Ford made a hard swing to get out of the road of the truck, and he threw this tire off.

Q Made a hard swing to get out of the road of what truck? A Out of the road of the Cadillac, see, and he swung into the truck.

Q Well, then— A His tire slid, his tire come off, understand?

Q Now, just a minute. As I understand it, the Ford was in the act of passing the Cadillac at about the point where truck number 19 was standing? A Do you want to know how far it was?

Q No. I say the Ford car was about in the act of passing the Cadillac at about the place where truck number 19 was standing? A I didn't get you.

Q Well, you know the section of the highway opposite where truck number 19 was standing? A Yes.

Q Did I understand you to say that the Ford car in making a hard swing to get around the Cadillac car struck the truck? A The Cadillac car didn't strike no truck.

Q What is that? A The Cadillac car didn't strike the truck.

Q I know. I don't know whether I understood you correctly or not, but I thought I understood you to say that the Ford car in making a hard swing— A Yes.

Q To get around the Cadillac struck the truck, is that right? A When the Ford—

Q Is that correct? A Yes.

Q So that the Ford car wasn't actually passing the Cadillac until it got up about where truck number 19 was standing? A No, not that close.

Benjamin W. Malseed, cross.

He started to pass him before he got to the truck.

Q I know he started to pass him, but when they got up about by truck number 19 was the Ford and the Cadillac about opposite each other then? A No. The Cadillac was behind the Ford a little.

10

Q How far behind it? A About fifteen foot.

Q About fifteen feet? A Yes.

Q Had the Ford at that time gotten entirely in front of the Cadillac? A Yes, he was entirely in front of him but he was on an angle, see, this way. His tire slid off with the force that he turned it, see—

Q Never mind what it slid off. A I want to explain it to you.

Q Did you see the tire come off? A I saw the tire come off.

20

Q Where did the tire go? A The tire stayed on the housing, see; it went on the inside of the wheel, and when he swung it pushed the tire off.

Q Let me understand you: This Ford started to pass the Cadillac about fifteen or twenty feet beyond where you were parked, is that right? A That is it.

Q And you say you saw the Cadillac put on speed? A Yes.

30

Q How far did the Cadillac go towards truck number 19 before the Ford got up abreast of it? A About fifteen foot.

Q In other words, notwithstanding the fact that the Cadillac put on speed, the Ford overtook him within fifteen feet? A He didn't put on that much speed that the Ford couldn't overtake him.

Q Well, where was the Ford and the Cadillac when they went by you? A The Cadillac went by me first, understand.

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Benjamin W. Malseed, cross.

Q The Cadillac went by you first. How far behind the Cadillac was the Ford at that time?

A At that time about fifteen foot.

Q In other words, you were seventy-five feet away from truck number 19? A Yes.

10 Q And when the Cadillac went by you the Ford was fifteen feet behind it? A That is it.

Q How fast was the Cadillac going then? A About twenty miles an hour.

Q Did the Ford start to pass the Cadillac after the Cadillac got by you? A Just as it passed me the Ford turned around.

Q The Ford started to turn out? A Yes, sir.

20 Q Did this wheel go off the Ford when he turned out the first time, or was it when he started to get in in front of the Cadillac? A When he turned out the first time she went then.

Q When he turned out the first time? A And then when he give it the hard swing to get really in front of the Cadillac she slid—you can see the mark on the highway yet—about fifteen feet it slid, and that is what bound his rear wheel.

30 Q You say that after he got by he turned then to get in front of the Cadillac? A Yes.

Q To the right? A To the left.

Q What? A He passed the driver on the left side.

Q He turned to the left first to get by? A Yes.

Q Then did he attempt to turn to the right again to get in front of the Cadillac? A Yes, but when he got closer to the truck he did that.

40 Q When he got up close to the truck he tried to pull to the right, is that correct? A That is it.

Benjamin W. Malseed, cross.

Q And as I understand it, the wheel went off when he made the first turn towards the left? A When he made the first swing, yes.

Q You said as he tried to pull hard to the right to get in front of the Cadillac, up near the truck 19, that the rear end of the Ford car struck the truck? A It skidded into the truck. 10

Q That is the rear end skidded into the truck? A The rear end about the the center of the Ford, see, where the two doors meet; it is a two-door sedan, the both handles; it struck there.

Q I didn't hear you. A It is a two-door sedan.

Q Yes. A Right where the doors meet, they both open the same way; well, that is where it hit. It skidded into it.

Q What part of the truck did he hit? A The right rear. 20

Q The corner? A Right on the corner, yes.

Q Or the side? A The corner.

Q The corner? A Right on the corner.

Q Did you examine the Ford car afterwards? A I didn't go near them. I seen the truck. He pulled one of the eyes that the chain goes through off the tail gate.

Q You didn't examine the Ford car at all after the accident? A No, sir. 30

Q You didn't see where it was damaged? A I didn't see where it was damaged.

Q And you didn't see either of the men after the accident? A No, sir. They was taken away in a short time. I helped to clean up the glass and stuff.

Q Did you see any glass in the highway about twenty-five or thirty feet from the rear end of the truck? A Five foot is the most I saw where it had flied. 40

Benjamin W. Malseed, re-direct.

Re-direct examination by Mr. Matthews:

Q Did you see marks in the highway from the rim of the Ford? A When he first threw the shoe off it left marks there.

10 *By Mr. Toolan.*

Q As I understand it, he started to pass this Cadillac about alongside of your truck, is that so? A Yes, sir.

Q Your truck was standing on the highway, wasn't it? A On the right side of the highway.

Q On the hard paved part of the road? A Yes, sir.

Q And the Cadillac was outside of you towards the center, isn't that so? A That is it.

20 Q When this Ford car went by the Cadillac did he get over the center line of the road? A Positively.

Q In other words, both wheels of the Ford were then on the left-hand side of the road, is that right? A Positively.

Q As he was traveling, that is correct? A Yes, sir.

Mr. Toolan: That is all.

30 Mr. Matthews: That is all.

George Ainscow, Jr., direct.

GEORGE AINSCOW, JR., a witness produced on behalf of the defendant, being duly sworn according to law, on his oath saith:

Direct examination by Mr. Matthews.

Q You are a son of Mr. Ainscow, the proprietor of the Lincoln Garage on the Lincoln Highway opposite the Lincoln Inn? A Yes, sir. 10

Q On the night of September, 22, 1925, were you present at your father's garage at or about the time of an accident between a Phillips Specialty truck and a Ford touring car or sedan? A I just arrived there.

Q You arrived before or after the accident? A Just after.

Q What did you see when you got there? A Well, I saw the truck standing there. 20

Q Did you see the Ford car? A I saw the Ford car, yes.

Q Did you notice anything about the rear left wheel? A The tire was off.

Q Did you, in company with anybody else, inspect the road from the rear of the Phillips Specialty truck towards Metuchen? A Yes, sir.

Q With whom were you? A My father and Officer Merley, and there might have been two or three others. There were some more there. 30

Q What did you notice, if anything, from the rear of that truck along the highway towards Metuchen? A The marks, the two rim marks of the rim of the wheel.

Q What was the course of those marks? A Well, it was cater-cornered across the road from the edge of the road cater-cornered over up to the right-hand side side of the road, that is, from Metuchen. 40

George Ainscow, Jr., cross.

Q At your father's garage and in the vicinity of the truck did you observe any debris, wooden matter or glass? A Alongside of the truck.

Q Did you or did you not assist in the removing of that, or did you see it removed? A Yes, after the truck pulled out, after this one truck pulled out.

10 Q Did you see any of the young men who were in the car? A No, I didn't see them.

Q Had they been taken away before you got there? A They were up the road, they must have been taken out of the car. We didn't go up to the car until a while after.

Cross examination by Mr. Toolan.

Q You are sure this tire or rim mark that
20 you saw on the highway ran from the side of the road, that is the edge close to your garage? A Yes, sir.

Q Back to the right-hand side of the road traveling towards Metuchen or towards New Brunswick? A Traveling towards New Brunswick it runs back to the right-hand side.

Q And how many feet? A Well, it was about seventy-five or one hundred feet back.

30 Mr. Toolan: That is all.

Mr. Matthews: That is all.

WE REST.

Frank Malinowski, direct—cross—re-direct.

PLAINTIFFS' REBUTTAL TESTIMONY.

FRANK MALINOWSKI, recalled.

Direct examination by Mr. Toolan.

Q Mr. Malinowski, did you some time after this accident have a conversation with Mr. George Ainscow? A Yes, sir. 10

Q And did you at that time speak to him about suing Phillips? A No, sir.

Q And did he say to you or did you say to him that if you could not sue Phillips that you would sue Kozlokowsky? A No, sir.

Cross examination by Mr. Matthews.

Q What did you talk to him about? A I got off the Brunswick bus going to Perth Amboy, I stopped off the bus, all I asked the man was if I could take a look at the car. He said the car wasn't here, it is up in the other garage, so that is all I said to him. Then he said, can't you see, look across the street, he said, youse was coming down the road, he said, youse got a blow out and the chauffeur got excited and steered for the truck and hit the truck. That is all I understood him to say. 20 30

Re-direct examination by Mr. Toolan.

Q How did Mr. Ainscow treat you on that occasion? A Oh, he treat me terrible, he wouldn't give me a chance to say a word. He jumped up wild at me. I thought he was going to eat me up. The only way he believed me after I took my hat off and showed him the wound. He asked me who I was and I told him who I was. 40

Motion for Direction of a Verdict.

Mr. Matthews: I ask that be stricken out.

The Court: It is stricken out.

Mr. Toolan: That is all I have.

10 MOTION FOR DIRECTION OF A VERDICT.

Mr. Matthews: I renew my motion, or make a motion to direct a verdict, first in the Kozlokowsky case on the ground that the evidence both of the plaintiff and defendant shows that he was guilty of contributory negligence.

And in the Malinowski case on the ground that they have failed to prove that our truck was negligent.

20 The Court: Motion denied and you may take an exception.

Adjourned until tomorrow, Friday, September 24, 1926, at 10:00 A. M.

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NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY CIRCUIT.

September Term, 1926.

 FRANK MALINOWSKI,
vs.

FREDERICK PHILLIPS.

10

 ADAM KOZLOKOWSKY,
vs.

FREDERICK PHILLIPS.

Transcript of stenographer's notes of evidence
in the above-entitled causes, taken before HON.
PETER F. DALY, Circuit Court Judge, and a jury, 20
at the Middlesex County Court House, in the City
of New Brunswick, New Jersey, on the 23d day
of September, A. D. 1926, at 11:05 A. M.

Appearances:

John E. Toolan, Esq., attorney for the plain-
tiffs.

John A. Matthews, Esq., attorney for the de- 30
fendant.

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Charge to Jury.

NEW JERSEY SUPREME COURT.

MIDDLESEX COUNTY CIRCUIT.

September Term, 1926.

10

FRANK MALINOWSKI,

vs.

FREDERICK PHILLIPS.

ADAM KOZLOKOWSKY,

vs.

FREDERICK PHILLIPS.

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Court's charge to the jury by HON. PETER F. DALY, Circuit Court Judge, as follows:

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Members of the Jury: On the night of September 22 last year there was a collision between the Ford sedan of Kozlokowsky, one of the plaintiffs, and a truck of the defendant, and this collision resulted in substantial damages to the car which Kozlokowsky was driving, and of which he was the owner, and very serious physical injuries to Malinowski, who was in the car with Kozlokowsky at the time of the collision, together with another young man who was a witness in this case, and who is not a party to any suit for damages, so far as we know. If this collision was the result of the negligence of the defendant then Kozlokowsky, the owner of the car, is entitled to a verdict at your hands that will compensate him for the injuries done to his car; and the legal test as to what that amount is, is whatever you, from all of the evidence in the case, determine was the value of the car before

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Charge to Jury.

the accident, and what was the value of the car after the accident, as a result of the accident. You have heard testimony given by witnesses as to the alleged value of this car; it was a car about six months old; it had gone five thousand miles and, therefore, it was what is known as a second-hand car. A man who is familiar with the values of cars says that he saw it about a month before the accident, and that in his opinion it was worth about six hundred and fifty dollars at that time. What usage it got between that six months and the time of the accident is not specifically in evidence. I am referring to this more to emphasize that while you are to consider all evidence which has been admitted as to the value of the car, yet in the final conclusion you are from the evidence, and from the evidence alone, to determine in your own minds, as a matter of your impartial judgment, what was the value of the car before the accident, and what was the value of the car after the accident, as a result of the accident.

Kozlokowsky, if he is entitled to a verdict, is also entitled to a verdict that, in addition to a verdict for the injuries to his car, will compensate him for whatever loss of time he necessarily lost as a result of any physical disability resulting to him from this accident, if the accident was the result of the negligence of the defendant; and he is also entitled to be compensated for any pain and suffering that he went through as a result of this accident, if he is entitled to a verdict at all. He is also entitled to be compensated for any actual financial loss that he suffered through a loss of time, if that loss of time was necessarily caused as a result of the negligence of the defendant. And, if the defendant is responsi-

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Charge to Jury.

ble, Malinowski, who was in the car with Koz-
lokowsky at the time, is entitled to a verdict that
will compensate him for the doctors' bills that he
reasonably and necessarily incurred in the proper
treatment of his injuries; also for the hospital
bill which was rendered necessary because of his
10 injuries; also for the loss of time which was
caused because of his injuries; and he is entitled
to be compensated for the very serious injury
that was done to him, if the defendant is legally
responsible. He was very badly injured; as to
the extent, as to the character of that injury, you
are to determine what they actually were, the ex-
tent and the character. You have heard Dr.
Voorhees testify. As to the injuries to this young
man which you determine are certain, that you
must determine as certain from the preponderance
20 of the evidence in the case, but as to the alleged
injuries which will flow in the future, you are not
entitled to compensate upon anything that is mere
possibility, in your judgment, on anything that is
merely the result of mental speculation or guess-
work. The law says that so far as permanent or
continuing injuries, injuries that will continue in
the future, are concerned, that no jury has a
right to compensate for that, as a matter of hon-
esty or law, unless they are satisfied from the
30 preponderance of the evidence to a point of rea-
sonable certainty as to the fact, as to the extent
and as to the character of the permanent or con-
tinuing injury. If this defendant is responsible,
as I have stated, both of these plaintiffs are en-
titled to verdicts, and in the case particularly of
Malinowski, the injury is undisputably severe.
Here is a young man with probably many, many
years of life before him, and yet he has been in-
jured in the head, there has been the fractured

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Charge to Jury.

skull, there have been bones taken away as a result of the fracture, and it is the kind of a case that naturally appeals to every wholesome man and woman, as a matter of sympathy, and there is a danger in a case like this, for people who are wholesome to lose their mental poise and to lose their appreciation of their bounden duty in the matter, which is to determine, not from the standpoint of sympathy, not from the standpoint of pity, but from the standpoint of facts, and the law which governs the facts, whether or not a certain person is responsible for that bad condition which exists, so far as the physical being of a fellow human being is concerned.

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You will not be concerned at all on this question of damages, unless you have first determined that it was the negligence of the defendant which caused the injuries and caused the damages, that it was the negligence of the defendant that was the proximate cause of the injuries and the cause of the damages; the mere fact that there was a collision with the defendant's truck does not in itself entitle the plaintiffs to a judgment at your hands against the owner of that truck; you are to determine whether in the handling, in the location, in the management of that truck at the time of the collision, there was negligence upon the part of the owner of the truck, or his servants or agents.

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In this class of cases we often find that because of the suddenness of the happening, it is humanly to be expected, as a matter of common experience, that when it comes to the details of just how the happening occurred, that even the most impartial of witnesses will differ as to those details, but I put to you this proposition for your passing upon this case: When it comes to the

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Charge to Jury.

heart or the body of the case, then is there that difference? As to appearance and circumstances and minor unessential details, there is the difference. You might, for example, walk out, the twelve of you, on Bayard street now and see a fist fight, and you would come in here and you would be astounded yourselves when it came to a recital of just the details you saw; but as to the heart or thing itself, as to the essential life of the transaction, with honest witnesses, don't they, as a matter of fact, generally agree on it? And the reason why I am saying this is this: How could there, on such a vitally essential matter as the location of the truck, be any difference in the testimony as to where the truck was? And am I not justified in saying to you that this is not a question of mere mistake as to the detail of a happening, that someone is deliberately falsifying when they testify as to where the location of that truck was. How could they, on such a matter that goes right to the heart of the happening, honestly differ in the way that they do? Where was the truck? Who is telling the truth to you, ladies and gentlemen, as to the location of that truck? And is not that the first question of fact that will naturally present itself to you? Because, if that truck was where the driver of the truck said it was, where Ainscow said it was, then there is no evidence in this case that there was any negligence upon the part of the owner of that truck; that truck, according to their story, was clean off the thirty-two feet of the regular highway of the Lincoln Highway at this point or locality, on an apron that is built from that highway and is five feet wide, running into Ainscow's garage. Was it there? These young men were driving the car on the opposite side

Charge to Jury.

of the road; that was their right, as they were going towards New Brunswick, and it was towards New Brunswick that they admit they were going at the time, and, according to the driver of the truck, his truck was over at the filling station on the opposite side of the road, and I am charging you, as a matter of fact, from all of the evidence in this case, and as a matter of law also, that if that truck was over on that so-called apron, off the thirty-two feet of highway, then there is no basis for a jury to return a verdict against these defendants. Now, who is lying about that? And I am using that word advisedly—as to where that truck was. If you come to the conclusion that that truck was not there, but that the truck was where Kozlokowsky says it was, then the question is, was there negligence upon the part of the defendant which caused this accident? I am not going into any detailing of the testimony along that line. You have listened with admirable intensity of attention to all of the evidence as it has been unrolled from the witness chair, and you have heard the argument of counsel, who, in their honest zeal, have given you their versions of the testimony and their conclusions as to what lessons are to be drawn from the testimony. Was there negligence, if you find that the truck was where Kozlokowsky and the other witnesses of the plaintiffs say it was?

What is negligence? A great many elaborate legal definitions of negligence might be given to you jurors. Every human being owes to a fellow human being, in his conduct towards that fellow human being, the degree of care, caution and prudence which the circumstances justly demand; and the degree of care, caution and pru-

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Charge to Jury.

dence is that degree of care which is exercised by the ordinarily prudent person. So, if in your relationship or conduct towards another person you fail to do that which an ordinarily prudent person would do under the time, place and circumstances, and from such failure injury results to another, that is negligence. Or, if you do
 10 that which a reasonably prudent person would not have done under the time, place and circumstances, and from such doing injury results to another, that is negligence. So, that is the test of negligence. If you find that the car was on the right-hand side of the road, as the plaintiffs claim, the right-hand side of the road as they were going, then you are to determine whether or not the collision was the result of the negligence of the defendant.

20 Contributory negligence has been alleged. In order for a defendant to relieve himself from liability, if there was negligence upon his part that was the proximate cause of an injury, because of his claim that there was contributory negligence upon the part of the plaintiffs, the burden of proving that is upon him. Contributory negligence is such negligence that without which there would have been no injury to a plaintiff, even though there was negligence upon the
 30 part of the defendant.

Was this accident the result of the negligence of the defendant? No one can come into a court, under our law, and be righteously and rightfully entitled to a verdict for a claim for damages because of the negligence of another, until they have first satisfied a jury, through a preponderance of the evidence, that is, through a greater weight of the evidence, that their claim is true. If this accident was the result of the
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Exceptions to Charge.

negligence of the defendant, then these plaintiffs are entitled to a verdict. If this accident was the result of the negligence of the defendant, but you find also that there was contributory negligence upon the part of the driver of the Ford sedan, Kozlokowsky, who is one of the plaintiffs in this case, then if Kozlokowsky was guilty of contributory negligence he would not be entitled to a verdict, even though there was negligence which was the proximate cause of the accident and such negligence was upon the part of the defendant. But if there was negligence upon the part of both Kozlokowsky and the defendant, and it was that combined negligence that caused this accident, then Malinowski, if he were free from contributory negligence, would nevertheless be entitled to a verdict.

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You may take the case.

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Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge at the very beginning where your Honor said: "If this collision was the result of the negligence of the defendant Kozlokowsky is entitled to a verdict at your hands for the damage to his car"; because that precludes his contributory negligence, and even though in the very last sentence of your charge you briefly, and as I hope to point out, not according to my knowledge of the law, stated it, nevertheless it did not cure the defect.

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Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge in which your Honor said: "The legal test is whatever you determine the value of the car, from all of the evidence, to have been," because your Honor also stated the evidence of a man testi-

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Exceptions to Charge.

fied as to the worth of the car a month before, and there is an objection on the record to that.

10 Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge where your Honor said: "If Malinowski is entitled to a verdict he is also entitled to damages for loss of time," and so forth, and particularly these words where your Honor said, "If the accident was the result of the negligence of the defendant," again your Honor precluding contributory negligence.

20 Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge where your Honor said: "If the defendant is responsible, Malinowski is entitled to what will compensate him for doctors' bills, also hospital bills, also loss of time; now, as to these injuries, you determine from the preponderance of the certain evidence in the case, you cannot compensate him as to speculation." My thought being in that case that your measure of damage was too wide, and that again contributory negligence was not precluded, nor the proposition in the pleadings of joint enterprise, which your Honor did not charge at all, and which the testimony showed some evidence of, where they said they
30 all agreed to go on both joy rides.

Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge in which your Honor said: "If this defendant is responsible both are entitled to verdicts, and in the case of Malinowski the injuries are undisputably severe"; my thought there being that again your Honor precluded, by failure to mention it, contributory negligence.

40 Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge in

Exceptions to Charge.

which your Honor said: "You will not be concerned at all on this damage unless the negligence of the defendant caused the injury. The mere fact that there was a collision does not entitle the plaintiffs to recover. You have to determine whether in handling the truck there was negligence on the part of the owner."

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Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge in which your Honor said: "If you find that the truck was where Kozlokowsky said it was, was there negligence on the part of the owner? If you find there was negligence, there will be a verdict for the plaintiff."

Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge in which your Honor said: "If this accident was the result of the negligence of the defendant, the plaintiffs are entitled to recover"; my thought being that again contributory negligence was precluded.

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Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge in which your Honor said: "If this accident was the result of the action of the defendant, or Kozlokowsky was negligent, Kozlokowsky is not entitled to a verdict."

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Mr. Matthews: I want to respectfully take objection to that part of your Honor's charge in which your Honor said: "But if the negligence was on the part of both, and that combined negligence caused the accident, they cannot recover, but Malinowski can."

The Court: Provided he is free of contributory negligence.

Mr. Matthews: Provided he is free of contributory negligence. My thought being your

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Exceptions to Charge.

Honor left out entirely the proposition of joint enterprise, evidence of which was in the case.

The Court: I do not agree at all with the correctness of the quotations of what I said.

Mr. Matthews: I wrote them down literally.

10 The Court: I dispute the fact you have them literally, and I dispute the fact you have everything that I said in connection with the points of your particular objections, as I understand your objections.

Mr. Matthews: With respect to the Court, I want to insist that your Honor did not charge contributory negligence until the last sentence of the charge, and then I think charged it unscientifically, from a legal standpoint.

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Notice of Appeal.

NOTICE OF APPEAL.

NEW JERSEY SUPREME COURT.

MIDDLESEX CIRCUIT.

10	ADAM KOZLOKOWSKY, <div style="text-align: right;"><i>Plaintiff,</i></div>	}	<i>Action at Law.</i>
	<i>vs.</i>		<i>Notice of Appeal.</i>
	FREDERICK PHILLIPS, <div style="text-align: right;"><i>Defendant.</i></div>		

To John E. Toolan, attorney of the above-named plaintiff:

20 TAKE NOTICE, That the above-named defendant, Frederick Phillips, appeals to the Court of Errors and Appeals in the last resort in all causes in New Jersey, from the whole of the judgment entered in the above-entitled cause in the New Jersey Supreme Court, Middlesex County.

JNO. A. MATTHEWS,
 Attorney of Defendant-Appellant.

Dated, October 18, 1926.

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*Grounds of Appeal.***GROUNDS OF APPEAL.****New Jersey Court of Errors and Appeals**

FRANK MALINOWSKI, <i>Plaintiff-Appellee,</i>	}	<i>Action at Law.</i>	10
<i>vs.</i>			
FREDERICK PHILLIPS, <i>Defendant-Appellant.</i>	}	<i>Grounds of Appeal.</i>	20
<i>vs.</i>			
ADAM KOZLOKOWSKY, <i>Plaintiff-Appellee,</i>	}	<i>Action at Law.</i>	10
<i>vs.</i>			
FREDERICK PHILLIPS, <i>Defendant-Appellant.</i>	}	<i>Grounds of Appeal.</i>	20
<i>vs.</i>			

The above-entitled causes were tried together in the New Jersey Supreme Court, Middlesex County, before Honorable Peter F. Daly, Judge of the said court, and a jury.

The defendant hereby writes down his grounds of appeal upon which he rests his appeal to set aside the verdicts rendered in favor of the plaintiffs and against the defendant and to grant a new trial of said causes. 30

1. Because the Court refused to non-suit the plaintiffs upon being requested so to do by the defendant.

2. Because the Court refused to direct a verdict to be rendered in favor of the defendant and against the plaintiffs when requested so to do by the defendant. 40

Grounds of Appeal.

3. Because the said verdict is against the weight of the evidence.

4. Because the Court improperly permitted Dr. Howard C. Voorhees, witness for plaintiffs, to answer on direct examination the following question:

10 “Q Doctor, when you speak of epilepsy, what is the cause of epilepsy?”

5. Because the Court erroneously and improperly charged the jury as follows:

20 “and the legal test as to what that amount is, is whatever you, from all of the evidence in the case, determine was the value of the car before the accident, and what was the value of the car after the accident, as a result of the accident. You have heard testimony given by witnesses as to the alleged value of this car; it was a car about six months old; it had gone five thousand miles and, therefore, it was what is known as a second-hand car.”

6. Because the Court erroneously and improperly charged the jury as follows:

30 “Kozlokowsky, if he is entitled to a verdict, is also entitled to a verdict that, in addition to a verdict for the injuries to his car, will compensate him for whatever loss of time he necessarily lost as a result of any physical disability resulting to him from this accident, if the accident was the result of the negligence of the defendant; and he is also entitled to be compensated for any pain and suffering that he went through as a result of this accident, if he is entitled to a verdict at all. He is also entitled to be compensated for any actual financial loss that he suffered through a loss of time, if that loss of time was necessarily caused as a result of the negligence of the defendant.”

Grounds of Appeal.

7. Because the Court erroneously and improperly charged the jury as follows:

“if the defendant is responsible, Malinowski, who was in the car with Kozlokowsky at the time, is entitled to a verdict that will compensate him for the doctors’ bills that he reasonably and necessarily incurred in the proper treatment of his injuries; also for the hospital bill which was rendered necessary because of his injuries; also for the loss of time which was caused because of his injuries; and he is entitled to be compensated for the very serious injury that was done to him, if the defendant is legally responsible. He was very badly injured; as to the extent, as to the character of that injury, you are to determine what they actually were, the extent and the character. You have heard Dr. Voorhees testify. As to the injuries to this young man which you determine are certain, that you must determine as certain from the preponderance of the evidence in the case, but as to the alleged injuries which will flow in the future, you are not entitled to compensate upon anything that is mere possibility, in your judgment, on anything that is merely the result of mental speculation or guesswork. The law says that so far as permanent or continuing injuries, injuries that will continue in the future, are concerned, that no jury has a right to compensate for that, as a matter of honesty or law, unless they are satisfied from the preponderance of the evidence to a point of reasonable certainty as to the fact, as to the extent and as to the character of the permanent or continuing injury.”

8. Because the Court erroneously and improperly charged the jury as follows:

“If this defendant is responsible, as I have stated, both of these plaintiffs are entitled to verdicts, and in the case particu-

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Grounds of Appeal.

10 larly of Malinowski, the injury is indisputably severe. Here is a young man with probably many, many years of life before him, and yet he has been injured in the head, there has been the fractured skull, there have been bones taken away as a result of the fracture, and it is the kind of a case that naturally appeals to every wholesome man and woman, as a matter of sympathy, and there is a danger in a case like this, for people who are wholesome to lose their mental poise and to lose their appreciation of their bounden duty in the matter, which is to determine, not from the standpoint of sympathy, not from the standpoint of pity, but from the standpoint of facts, and the law which governs the facts, whether or not a certain person is responsible for that bad condition which exists, so far as the physical being of a fellow human being is concerned."

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9. Because the Court erroneously and improperly charged the jury as follows:

"If you come to the conclusion that that truck was not there, but that the truck was where Kozlokowsky says it was, then the question is was there negligence upon the part of the defendant which caused this accident?"

30 10. Because the Court erroneously and improperly charged the jury as follows:

"If this accident was the result of the negligence of the defendant, then these plaintiffs are entitled to a verdict."

11. Because the Court erroneously and improperly charged the jury as follows:

40 "If this accident was the result of the negligence of the defendant, but you find also that there was contributory negligence upon the part of the driver of the Ford sedan, Kozlokowsky, who is one of the plaintiffs in this case, then if Kozlokowsky was guilty of

Grounds of Appeal.

contributory negligence he would not be entitled to a verdict, even though there was negligence which was the proximate cause of the accident and such negligence was upon the part of the defendant."

12. Because the Court erroneously and improperly charged the jury as follows:

"But if there was negligence upon the part of both Kozlokowsky and the defendant, and it was that combined negligence that caused this accident, then Malinowski, if he were free from contributory negligence, would nevertheless be entitled to a verdict." 10

JNO. A. MATTHEWS,
Attorney for Defendant-Appellant.

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Arthur W. Cross, Law Printer, 55-57 Lafayette Street, Newark, N. J.

New Jersey Court of Errors and Appeals

FRANK MALINOWSKI,
Plaintiff-Appellee,

vs.

FREDERICK PHILLIPS,
Defendant-Appellant.

*Action at
Law.*

ADAM KOZLOKOWSKY,
Plaintiff-Appellee,

vs.

FREDERICK PHILLIPS,
Defendant-Appellant.

*On Appeal
from
Supreme
Court,
Middlesex
County.*

BRIEF OF DEFENDANT-APPELLANT.

Informative Preliminary Statement.

The above cases were tried together by consent of counsel in the New Jersey Supreme Court, Middlesex County Circuit, and resulted in verdicts in favor of the plaintiff-appellee, Frank Malinowski, for \$3,000.00, and for the plaintiff-appellee, Adam Kozlokowsky, for \$500.00.

The cause of action arose out of a collision which occurred on the night of September 22, 1925, when a Ford automobile owned and driven by the plaintiff Kozlokowsky collided with an automobile truck belonging to the defendant. The plaintiff, Frank Malinowski, was in the car with Kozlokowsky when the collision occurred. The testimony of the plaintiffs and their witness, John Pluskota, showed that they met at Smith street, Perth Amboy, at about 7:30 P. M. the night of the accident. The plaintiff, Adam

Kozlokowsky, was driving a Ford sedan. They drove first to South River and returned to Smith street again at about 9:30 P. M. (S. C. pp. 26, 38 and 68). They stopped at a store for about twenty minutes and remained at a nearby corner until about 10:45 or 11:15 when they decided to take a ride to New Brunswick. It was on this second trip that the accident occurred. (S. C. p. 38, ll. 19-27).

The plaintiffs and their witness testified that they were proceeding from Metuchen to New Brunswick along the Lincoln Highway, traveling about 20 to 25 miles an hour, when at a point 200 to 225 feet from Lincoln Inn they saw a truck parked in front of the Inn on the right-hand side of the road. They further testified that when plaintiff's automobile was about 10 or 15 feet to the rear of this truck, the truck started to turn to the left across the highway to the gas filling station across the way; and that the plaintiff, Kozlokowsky, swung to the left in order to pass in front of the truck, but could not make it, then turned to the right, and the front left part of his car at the door collided with the rear of the truck (S. C. pp. 18-20, 72-73).

The defendant's witnesses testified that the truck was parked at the pump in the gas station on the left side of the Lincoln Highway going towards New Brunswick, entirely off the roadway and up on an apron in front of the garage (S. C. pp. 95, 112); that marks on the road indicated that the Ford had ridden without a tire on the rear wheel at a 45° angle across the highway from its right to its left before it collided with the defendant's truck (S. C. pp. 97, 108); it being the contention that in passing another car on the road, proceeding in the same

direction as plaintiff's car, the left rear tire of the plaintiff's automobile came off the rim and caused the car to travel at an angle across to the left side of the road and to run into the defendant's truck (S. C. pp. 112-117).

ARGUMENT.

The grounds of appeal relied upon by the defendant-appellant are Numbers 4, 5, 6, 7 and 8. Number 4 will be argued under Point I, and Numbers 5, 6, 7 and 8 under Point II.

POINT I.

Because the Court improperly permitted Dr. Howard C. Voorhees, witness for the plaintiffs, to answer on direct examination the following question:

“Doctor, when you speak of epilepsy, what is the cause of epilepsy?”

It is our contention that the Court's permitting the witness to answer this question in his testimony as to the nature of the injuries sustained by the plaintiff, Malinowski, was erroneous. The testimony on this subject is as follows (S. C. p. 56, ll. 25-40; p. 57, ll. 1-9):

Q Doctor, assuming that Malinowski must make his living in the future as a laborer, that he is now employed working about a foundry as a laborer, in your opinion will this injury have any effect upon him and his ability to earn a livelihood at that work in the future? A I think so.

Q To what extent, doctor? A He might have attacks of headaches, dizziness, and possibly some remote developments like epilepsy. I can't tell.

Q Doctor, when you speak of epilepsy, what is the cause of epilepsy?

Mr. Matthews: I object to that as irrelevant and immaterial.

The Court: I will allow that. You may take an exception.

Mr. Matthews prays exception.

Q It might result from the injury to the brain tissue, scars, adhesions that might form.

That a jury is not concerned with remote possibilities is a well settled principle of law, and in the part of the testimony just preceding the question complained of, the doctor had spoken of it as "possibly some remote development like epilepsy. I can't tell." (S. C., p. 56, ll. 33-35.) With this characterization of it by the plaintiff's doctor in mind, it is hard to imagine a clearer example of an objectionable question. It was irrelevant and immaterial, and the ruling of the Court permitting it to be answered was prejudicial and harmful error. This term epilepsy is one familiar to the average individual and he knows it as a condition of a very serious nature, far more serious than the "attacks of headache and dizziness" of which the plaintiff's doctor spoke when he gave his opinion as to the effect upon Malinowski of the injuries sustained by him. (S. C., p. 56, l. 33.) Is it not reasonable to believe that this jury had the same familiarity with the term epilepsy and that it carried to their minds the same impression of seriousness as it would to the mind of the average person? Undoubtedly this stress laid upon the term epilepsy, coupled with the reasonable probability that the jury considered it a serious condition, overshadowed in their minds the previous statement of the doctor that it would be only a possible remote development of the injuries sustained by this man; and would have the effect of emphasizing it and convincing them

that it was a probable consequence and one to be considered by them in arriving at their verdict for the plaintiff, Malinowski.

It is a rule of law in this State that a "judgment will not be reversed for an error, however manifest, which has done no injustice. But it should be *clear* that the party complaining has not been injured by the error, and *if there is reasonable doubt on that point it is the duty of the court to give him the benefit of it.*" *Ruckman v. Bergholz*, 37 N. J. L. 437. With this in mind, we respectfully submit that for the reasons argued above the rulings of the trial court allowing this testimony as to epilepsy to be given was harmful and prejudicial error and did a grave injustice to the defendant, and that, therefore, the judgment below should be reversed.

POINT II.

Because the Court erroneously and improperly charged the jury as follows:

"If this collision was the result of the negligence of the defendant then Kozlokowsky, the owner of the car, is entitled to a verdict at your hands that will compensate him for the injuries done to his car; and the legal test as to what that amount is, is whatever you, from all of the evidence in the case, determine was the value of the car before the accident, and what was the value of the car after the accident, as a result of the accident. You have heard testimony given by witnesses as to the alleged value of this car; it was a car about six months old; it had gone five thousand miles, and therefore, it was what is known as a second-hand car." (S. C., p. 126, ll. 37-40; p. 127, ll. 1-10.)

“Kozlokowsky, if he is entitled to a verdict, is also entitled to a verdict that, in addition to a verdict for the injuries to his car, will compensate him for whatever loss of time he necessarily lost as a result of any physical disability resulting to him from this accident, if the accident was the result of the negligence of the defendant; and he is also entitled to be compensated for any pain and suffering that he went through as a result of this accident, if he is entitled to a verdict at all. He is also entitled to be compensated for any actual financial loss that he suffered through a loss of time, if that loss of time was necessarily caused as a result of the negligence of the defendant.” (S. C. p. 127, ll. 25-39).

“And, if the defendant is responsible, Malinowski, who was in the car with Kozlokowsky at the time, is entitled to a verdict that will compensate him for the doctor’s bills that he reasonably and necessarily incurred in the proper treatment of his injuries; also for the hospital bill which was rendered necessary because of his injuries; also for the loss of time which was caused because of his injuries; and he is entitled to be compensated for the very serious injury that was done to him, if the defendant is legally responsible. He was very badly injured; as to the extent, as to the character of that injury, you are to determine what they actually were, the extent and the character. You have heard Dr. Voorhees testify. As to the injuries to this young man which you determine are certain, that you must determine as certain from the preponderance of the evidence in the case, but as to the alleged injuries which will flow in the future, you are not entitled to compensate upon anything that is mere possibility, in your judgment, or anything that is merely the result of mental speculation or guesswork. The law says that so far as permanent or continuing injuries, injuries that will continue in the future, are

concerned, that no jury has a right to compensate for that, as a matter of honesty or law, unless they are satisfied from the preponderance of the evidence to a point of reasonable certainty as to the fact, as to the extent and as to the character of the permanent or continuing injury." (S. C., p. 127, l. 40; p. 128, ll. 1-34.)

"If this defendant is responsible, as I have stated, both of these plaintiffs are entitled to verdicts, and in the case particularly of Malinowski, the injury is indisputably severe. Here is a young man with probably many many years of life before him, and yet he has been injured in the head, there has been the fractured skull, there have been bones taken away as a result of the fracture, and it is the kind of a case that naturally appeals to every wholesome man and woman, as a matter of sympathy, and there is a danger in a case like this, for people who are wholesome to lose their mental poise and to lose their appreciation of their bounden duty in the matter, which is to determine, not from the standpoint of sympathy, not from the standpoint of pity, but from the standpoint of facts, and the law which governs the facts, whether or not a certain person is responsible for that bad condition which exists, so far as the physical being of a fellow human being is concerned." (S. C., p. 128, ll. 34-40; p. 129, ll. 1-17.)

It is the contention of the defendant that these portions of the charge of the Court are erroneous for the reason that they fail to instruct the jury on the question of the contributory negligence of the plaintiff, Kozlokowsky, and thereby justify the jury in returning verdicts for the plaintiffs if they find the defendant guilty of any negligence at all, even though the plaintiff, Kozlokowsky, was contributorily negligent; and further because the Court failed

to bring to the attention of the jury the fact that the contributory negligence of the defendant, Kozlokowsky, could have been imputed to the plaintiff, Malinowski, so as to bar a recovery by him. There is ample evidence in the case that these plaintiffs were engaged in a joint enterprise. Plaintiff's witness, John Pluskota, testified (S. C. p. 25, ll. 24-30):

Q Did you have any date to meet Kozlokowsky or Malinowski? A No, sir.

Q They just happened on you. Well, when they picked you up where did they tell you they were going? A Well, we just went out for a joy ride. We went up towards South River.

And as to the second trip on which the accident occurred, he said (S. C. p. 27, ll. 1-11):

Q You stood there two hours. Then what did you do? A Then we went up towards New Brunswick.

Q You went up towards New Brunswick? A Yes, sir.

Q And for what? A Just for a ride.

Q For another ride this was, the same three of you? A Yes, sir.

Frank Malinowski says practically the same thing (S. C. p. 45, ll. 35-40; p. 48, ll. 30-32), and the plaintiff Kozlokowsky states (S. C. p. 67, ll. 37-40; p. 68, ll. 1-5):

Q Did Malinowski say where he wanted to go? A Said all right, let's go.

Q Did he say where to go? A No, sir. We decided to go to South River for a little spin.

Q Who made the decision? A Well, all three of us.

Q All three of you agreed to go to South River and you started away at what time?

A About 8:00 o'clock, half-past eight.

And at S. C. p. 71, ll. 10-12:

Q What time did the clock say? A About quarter to eleven; then we decided to go out for another ride.

And on the same page, ll. 26-31:

Q Then you started. Now, who made up the trip to New Brunswick? A Frank Malinowski, John Pluskota and I.

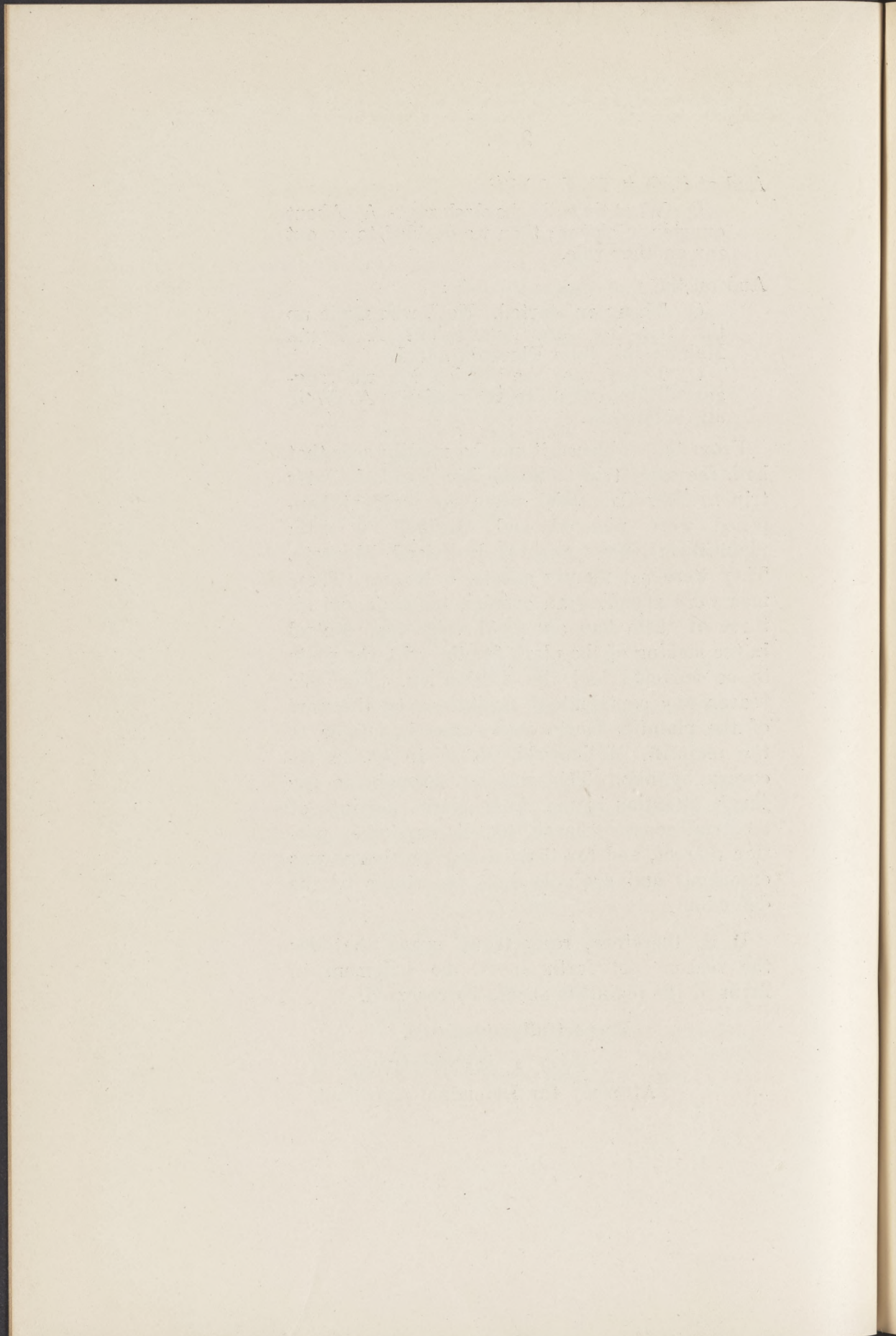
Q Those were the parties, but who suggested that you go to Brunswick? A Well, all three of us.

From this evidence it can be readily seen that both the early trip to South River and the later trip to New Brunswick when the accident happened were planned and executed by both plaintiffs together with their friend Pluskota. They were not merely guests in the car. These men were spending an evening together and all three of them had an equal voice and control in the making of the plans for the trip, the route to be traveled and the destination. For this reason any contributory negligence on the part of the plaintiff Kozłokowsky was imputable to the plaintiff, Malinowski, so as to bar a recovery by him. This was not brought to the jury's attention in the above-quoted portions of the trial court's charge, nor in any other portion thereof, and for that reason the charge was erroneous and prejudicial to the rights of the defendant.

It is, therefore, respectfully urged that for the reasons set forth above the judgment in favor of the plaintiffs should be reversed.

Respectfully submitted,

JNO. A. MATTHEWS,
Attorney for Defendant-Appellant.



New Jersey Court of Errors and Appeals.

FRANK MALINOWSKI, Plaintiff-Appellee,	}	Action at Law On Appeal from the Supreme Court.	10
vs.			
FREDERICK PHILLIPS, Defendant-Appellant.			
ADAM KOZLOKOWSKY, Plaintiff-Appellee,			
vs.			
FREDERICK PHILLIPS, Defendant-Appellant.			20

BRIEF OF JOHN E. TOOLAN,
Attorney for Plaintiff-Appellees.

STATEMENT OF FACTS.

On September 22, 1925, plaintiff, Frank Malinowski, was riding in a Ford sedan driven by the plaintiff, Adam Kozlokowsky, together with one John Pluskota. The testimony produced by the plaintiffs showed that they were proceeding along the Lincoln Highway between Metuchen and New Brunswick at a speed of twenty to twenty-five miles per hour. When they reached a point about two hundred feet from the Lincoln Inn, they saw the defendant's truck parked on the right-hand side of the highway and when they were about ten or fifteen feet from the truck, it pulled out

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without any notice whatsoever and started to cross to the left-hand side of the said highway. The testimony of the plaintiffs further showed that the plaintiff, Adam Kozlokowsky, turned his car to the left, in order to avoid the collision but could not make it, so he then swung his car to the right and the left side of his car collided with the rear end of the truck.

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By consent of counsel both cases were tried together at the Middlesex Circuit and resulted in a verdict in favor of the plaintiff-appellee, Frank Malinowski, in the amount of three thousand (\$3,000.00) dollars, and a verdict in favor of the plaintiff-appellee, Adam Kozlokowsky, in the amount of five hundred (\$500.00) dollars.

ARGUMENT

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Counsel for the defendant-appellant relies upon numbers 4, 5, 6, 7 and 8 of his grounds of appeal, all other grounds being abandoned.

POINT I.

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NO ERROR, PREJUDICIAL OR OTHERWISE, WAS COMMITTED BY THE TRIAL COURT, ASSIGNED AS THE REASON NUMBER 4, ARGUED AS POINT I IN BRIEF OF DEFENDANT-APPELLANT, AS CAUSE FOR A REVERSAL OF THE JUDGMENT.

The question which counsel for the defendant finds objectionable (S. C. p. 56, L. 36-40; p. 57, L. 1-9) is as follows:

Q. Doctor, when you speak of epilepsy, what is the cause of epilepsy?

Mr. Matthews: I object to that as irrelevant and immaterial.

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The Court: I will allow that. You may take an exception.

Mr. Matthews: Prays exception.

A. It might result from the injury to the brain tissue, scars, adhesions that might form.

Previous to this question the doctor's testimony (S. C. p. 56, L. 23-35) was as follows:

Q. Doctor, assuming that Malinowski must make his living in the future as a laborer, that he is now employed working about a foundry as a laborer, in your opinion will this injury have any effect upon him and his ability to earn a livelihood at that work in the future? 10

A. I think so.

Q. To what extent, Doctor?

A. He might have attacks of headaches, dizziness and possibly some remote developments like epilepsy. I can't tell.

Counsel for the defendant did not ask to have answer stricken out and consequently it remained a part of the record. Nor did he, in any way attempt to have the witness explain exactly what he meant by "remote developments like epilepsy." Certainly counsel cannot now complain, as he does in his brief, that because of the use of the word "epilepsy" in the question "What is the cause of epilepsy, Doctor?" which was asked after the above stated questions, it tended to prejudice the minds of the jurors and do a grave injustice to the defendant. As a matter of fact, they were not at all prejudiced by it because the extent of the plaintiff's injuries and the testimony concerning epilepsy had already been stated by the witness prior to this question and without any objection from defendant's counsel. 20 30

On reading the record, this court will find that Dr. Voorhees was being examined by counsel for the plaintiff, and giving his medical opinions, as an expert in his profession, his qualifications having been duly proven. The question and answer is as a matter of fact proper because it gives the 40

witness's opinion, the very subject that he was being questioned on—although the “remote developments like epilepsy” may not be, under the strictest construction, a basis for the allowance of damages on that point. But if counsel wished to limit the effect of such evidence, he might have made the request for the appropriate charge to that end, which he did not do.

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Counsel for the defendant in cross-examination made no effort to have Dr. Voorhees further explain his testimony to indicate that epilepsy in the instant case was only a remote possibility and thus lay the foundation for striking the doctor's testimony in this respect from the record. Counsel elected to let the testimony stand and now seeks to take advantage of his own neglect.

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The Court in its charge called the court's attention specifically to the testimony of Dr. Voorhees and then correctly stated the law with respect to damages in the following language (S. C. p. 128):

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“You have heard Dr. Voorhees testify. As to the injuries to this young man which you determine are certain, that you must determine as certain from the preponderance of the evidence in the case, but as to the alleged injuries which will follow in the future, you are not entitled to compensate upon anything that is mere possibility, in your judgment, on anything that is merely the result of mental speculation or guesswork. The law says that so far as permanent or continuing injuries, injuries that will continue in the future, are concerned, that no jury has a right to compensate for that, as a matter of honesty or law, unless they are satisfied from the preponderance of the evidence to a point of reasonable certainty as to the fact, as to the extent and as to the character of the permanent or continuing injury.”

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On this point, therefore, we respectfully con-

tend that assuming the action complained of to have been erroneous, it is not shown to have prejudiced the defendant. For this reason the point made by counsel for the defendant, in support of his reason assigned is without merit in law.

POINT II.

NO ERROR, PREJUDICIAL OR OTHERWISE, WAS COMMITTED BY THE TRIAL COURT, ASSIGNED AS REASONS 5, 6, 7, 8, ARGUED AS POINT II IN BRIEF OF DEFENDANT-APPELLANT, AS CAUSE FOR A REVERSAL OF THE JUDGMENT.

Counsel for the defendant objects to the Court charging the jury as follows:

"If this collision was the result of the negligence of the defendant then Kozlokowsky, the owner of the car, is entitled to a verdict at your hands that will compensate him for the injuries done to his car; and the legal test as to what that amount is, is whatever you, from all the evidence in the case, determine was the value of the car before the accident, and what was the value of the car after the accident, as a result of the accident. You have heard testimony given by witnesses as to the alleged value of this car; it was a car about six months old; it had gone five thousand miles, and therefore, it was what is known as a second-hand car." (S. C. p. 126, ll. 37-40; p. 127, ll. 1-10).

"Kozlokowsky, if he is entitled to a verdict, is also entitled to a verdict that, in addition to a verdict for the injuries to his car, will compensate him for whatever loss of time he necessarily lost as a result of any physical disability resulting to him from this accident, if the accident was the result of the negligence of the defendant; and he is also entitled to be compensated for any pain and suffering that he went through as a result of this accident, if he is entitled to a verdict at all. He is also entitled to be compensated

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for any financial loss that he suffered through a loss of time, if that loss of time was necessarily caused as a result of the negligence of the defendant." (S. C. p. 127, ll. 25-39).

10 "And, if the defendant is responsible, Malinowski, who was in the car with Kozlowsky at the time, is entitled to a verdict that will compensate him for the doctor's bills that he reasonably and necessarily incurred in the proper treatment of his injuries; also for the hospital bill which was rendered necessary because of his injuries; also for the loss of time which was caused because of his injuries; and he is entitled to be compensated for the very serious injury that was done to him, if the defendant is legally responsible. He was very badly injured; as to the extent, as to the character of that injury, you are to determine what they actually were, the extent and the character. You have heard Dr. Voorhees testify. As to the injuries to this
20 young man which you determine are certain, that you must determine as certain from the preponderance of the evidence in the case, but as to the alleged injuries which will flow in the future, you are not entitled to compensate upon anything that is mere possibility, in your judgment, or anything that is merely the result of mental speculation or guess work. The law says that so far as permanent or continuing injuries, injuries that will continue in the future, are concerned, that no jury has a right to compensate for that, as a matter of honesty or law, unless
30 they are satisfied from the preponderance of the evidence to a point of reasonable certainty as to the fact, as to the extent and as to the character of the permanent or continuing injury." (S. C. p. 127, l. 40; p. 128, ll. 1-34).

40 "If this defendant is responsible, as I have stated, both of these plaintiffs are entitled to verdicts, and in the case particularly of Malinowski, the injury is indisputably severe. Here is a young man with probably many, many years of life before him, and yet he has been injured in the head, there has been the fractured skull, there have been bones taken

away as a result of the fracture, and it is the kind of a case that naturally appeals to every wholesome man and woman, as a matter of sympathy, and there is a danger in a case like this, for people who are wholesome to lose their mental poise and to lose their appreciation of their bounden duty in the matter, which is to determine, not from the standpoint of pity, but from the standpoint of facts, and the law which governs the facts, whether or not a certain person is responsible for that bad condition which exists, so far as the physical being of a fellow human being is concerned." (S. C. p. 128, ll. 33-40; p. 129, ll. 1-17).

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Defendant's counsel contends that these portions of the charge are erroneous for the reason that they fail to instruct the jury on the question of the contributory negligence of the plaintiff, Kozlokowsky, and thereby justify the jury in returning verdicts for the plaintiffs if they find the defendant guilty of any negligence at all, even though the plaintiff, Kozlokowsky was contributorily negligent.

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On this point we need only refer this court to the following excerpt of the charge of the trial court:

"Contributory negligence has been alleged. In order for the defendant to relieve himself from liability, if there was negligence upon his part that was the proximate cause of an injury, because of his claim that there was contributory negligence upon the part of the plaintiffs, the burden of proving that is upon him. Contributory negligence is such negligence that without which there would have been no injury to a plaintiff, even though there was negligence upon the part of the defendant.

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"Was this accident the result of the negligence of the defendant? No one can come into a court, under our law, and be righteously and rightfully entitled to a verdict for

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a claim for damage because of the negligence of another, until they have just satisfied a jury, through a preponderance of the evidence, that is, through a greater weight of the evidence, that their claim is true. If this accident was the result of the negligence of the defendant, then these plaintiffs are entitled to a verdict. If this accident was the result of the negligence of the defendant, but you find also that there was contributory negligence upon the part of the driver of the Ford sedan, Kozlokowsky, who is one of the plaintiffs in this case, then if Kozlokowsky was guilty of contributory negligence he would not be entitled to a verdict, even though there was negligence which was the proximate cause of the accident and such negligence was upon the part of the defendant. But if there was negligence upon the part of both Kozlokowsky and the defendant and it was that combined negligence that caused this accident, then Malinowski, if he were free from contributory negligence, would nevertheless be entitled to a verdict." (S. C. p. 132, ll. 20-40; p. 133 ll. 1-20.

It is urged that the Court erred in omitting to charge on the subject of contributory negligence. Certainly counsel for the defendant cannot say that the trial court failed to instruct the jury on the question of contributory negligence after reading the above portion of the charge. That the charge is not to be taken piecemeal, as counsel for the defendant would like to do, but as a whole, has been repeatedly held by this court.

See *Sullivan v. North Hudson Co.*, 51 N. J. L. 518; *France v. Lehigh Valley R. R.*, 96 N. J. L. 25.

Counsel did not request the court to charge on the subject of contributory negligence. It is true that he took an exception. But this was not legally sufficient to make it a basis of appeal. This court has held time and again that an exception cannot properly be taken to a failure on part of a court to charge a legal proposition unless re-

quested so to do.

See *Osburn v. De Young*, 99 N. J. L. 204, 210.

Defendant further contends that the Court failed to bring to the attention of the jury the fact that the contributory negligence of the plaintiff, Kozlokowsky, could have been imputed to the plaintiff, Malinowski, so as to bar a recovery by him on the grounds that they were engaged in a joint enterprise.

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We feel there is no need of our reiterating the rule of law set forth above which also disposes of counsel's contention on this point. We might add that we think that the true rule which applies to this point was stated by Chief Justice Green in the case of *Cole v. Taylor*, 22 N. J. L. 59, and which is as follows:

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"The omission to state any legal principle which may be pertinent or applicable to the case, or the omission to give any charge whatever, when no charge is requested, affords in itself no ground for a new trial, much less for reversal upon a writ of error or appeal."

It is therefore respectfully submitted that the judgment entered in the Supreme Court be affirmed and this appeal be dismissed with costs.

JOHN E. TOOLAN,

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Attorney for and of counsel with
the Plaintiff-Appellees.

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