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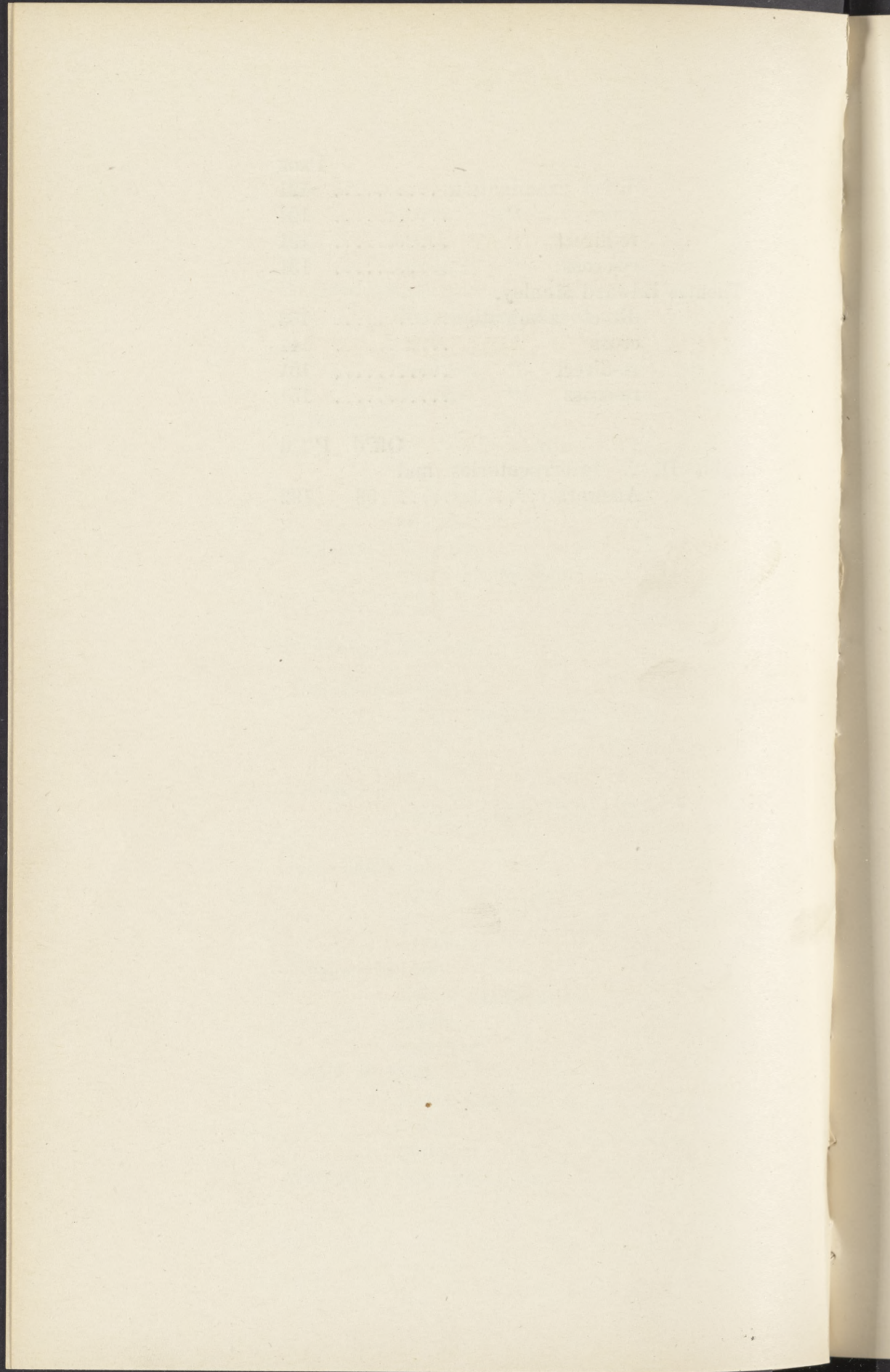
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NOTICE OF APPEAL.

Filed December 15, 1929.

New Jersey Supreme Court

KATHERINE SEINNER,
Plaintiff-Appellee,

vs.

PUBLIC SERVICE COORDINATED
TRANSPORT and CLINTON
HARLEY,
Defendant-Appellant.

*Action
at Law.*

10

*To Irving Fischer, Esq., Attorney of Plaintiff-
Appellee, 80 Lexington avenue, Passaic, N. J.:*

20

SIR:

TAKE NOTICE that the defendant, Public Service Coordinated Transport, appeals to the New Jersey Court of Errors and Appeals from the whole of the judgment entered in this cause.

Dated, December 9, 1929.

Yours truly,

HENRY H. FRYLING,
Attorney of Defendant-Appellant,
Public Service Coordinated Transport.

30

(Endorsed) "Service of a copy of within notice of appeal acknowledged this 12th day of December, 1929.

IRVING FISCHER,
Attorney of Plaintiff."

40

Complaint.

Summons and Complaint.

Filed August 27, 1929.

NEW JERSEY SUPREME COURT.

10 KATHERINE SEINNER,

Plaintiff,

vs.

PUBLIC SERVICE COORDINATED
TRANSPORT, a corporation of
New Jersey,

Defendant.

*Judgment
Record.*

*Action
at Law.*

On Postea.

*Irving
Fischer,
Attorney.*

20 Public Service Coordinated Transport, a corporation of New Jersey the defendant in this cause was summoned to answer unto Katherine Seinner, the plaintiff therein, in an action at law upon the following complaint:

(Summons issued February 19, 1929.)

Plaintiff, residing in the City of Garfield, County of Bergen and State of New Jersey, says that:

30 1. On or about the 27th day of September, nineteen hundred and twenty-eight, defendant company was the owner and caused to be operated by its agent or servant, Clinton Harley, a certain jitney bus which was being operated at the intersection of Outwater Lane and Prospect street, Garfield, New Jersey.

40 2. On the aforementioned date, plaintiff was a fare-paying passenger and invitee in the bus owned and operated by the agents or servants of the defendant corporation.

Complaint.

3. On aforementioned date, plaintiff, due to the negligence of the defendant, was suddenly thrown out of her seat and hurled to the ground with great force, causing said plaintiff to be severely injured.

4. The negligence of the defendant consisted in that: 10

a. Said jitney bus was mechanically improper, because of faulty brakes; defective mechanism, etc.

b. He caused said car to be operated on the wrong side of the highway.

c. The defendant failed to have automobile properly lighted.

d. He failed to give any warning or signal of approach. 20

e. Said bus was being operated at a high and excessive rate of speed.

f. He failed to have his said bus under proper control.

g. Said bus was otherwise negligently and carelessly operated.

5. Because of the aforementioned negligence, plaintiff sustained a broken rib on the right side. Injuries to her head, legs, arms and entire body. She suffered from headaches, dizziness and loss of sleep. She was and will be confined to her home and bed for a long period of time. She was and will be prevented from performing her lawful tasks and duties. Plaintiff was and will be obliged to expend divers sums of moneys for medicinals, doctors, aids and devices in an effort to heal and cure herself. Plaintiff will suffer loss of moneys by reason of the impairment of her earning capacity due to her state of her inability. Plaintiff was and will be obliged to 40

Order Amending Name of Defendant.

expend moneys to engage someone to perform her usual duties. Plaintiff's clothes were damaged, demolished and deteriorated.

Wherefore, plaintiff demands as damages the sum of Fifteen Thousand Dollars damages.

10

IRVING FISCHER,
Attorney of Plaintiff.

Filed April 27, 1929.

Order Amending Name of Defendant.

Filed November 20, 1929.

20 It appearing on the hearing of the motion of Irving Fischer, attorney for the plaintiff in the above-entitled cause of action, and good cause having been shown therefor,

It is on this 19th day of November, 1929, ORDERED that the style of the above-named defendant and that paragraph five of the complaint of the above-entitled cause of action be and the same are hereby amended, as follows:

30

“Public Service Coordinated Transport, a corporation of New Jersey and Clinton Harley.”

40

“Plaintiff sustained a broken rib on the right side; traumatic pleurisy, resulting in a chronic cough and chronic bronchitis; a permanent injury to the pleura, causing a general weakness of the pleura and a susceptibility to recurrent attacks; injury to the lung at the position of the fracture; injuries to the spine nerve and muscles in the region of the back, preventing her from carrying on her usual duties, necessitating her engaging

Order Amending Name of Defendant.

another to attend to these duties; concussion of the brain; injuries to the head, causing headaches, dizziness, nervousness and loss of sleep; traumatic neuresthenia, and general injuries to her legs, arms and entire body.”

It is further ORDERED that a copy of this order be served upon Henry H. Fryling, Esq., attorney for the defendant, Public Service Co-ordinated Transport, a corporation of New Jersey, within four days from the date hereof, which service may be made by mailing the same by registered letter to said attorney, at his office at 80 Park Place, Newark, New Jersey. 10

And it is further ORDERED that a copy of this order may be certified as true by Irving Fischer, attorney for the plaintiff.

NEWTON H. PORTER, 20
Judge.

Entered November 20, 1929, on motion of

IRVING FISCHER,
Attorney for Plaintiff.

30

40

Answer of Public Service Coordinated Transport.

**Answer of Public Service Coordinated
Transport.**

Filed March 9, 1929.

10 The defendant, a corporation of New Jersey,
having its principal office at the City of Newark,
County of Essex and State of New Jersey, in
answer to the plaintiff's complaint, says that:

1. In answer to paragraph one, it admits own-
ership, and operation by servant or agent, but it
has no knowledge or information thereof suf-
ficient to form a belief and it therefore denies
the balance of same.

20 2. It has no knowledge or information thereof
sufficient to form a belief and it therefore denies
the allegations contained in paragraph two.

3. It denies the allegations contained in para-
graphs three, four and five.

FIRST OBJECTION.

It avers that the complaint does not set up
specifically wherein the defendant was negligent.

SECOND OBJECTION.

30 It avers that the complaint does not set forth
facts sufficient to constitute a cause of action in
the plaintiff herein, and it reserves the right to
move to strike out the same at the trial of this
suit.

FIRST DEFENSE.

40 It avers that the negligence of the plaintiff
contributed to the happening of the said alleged
accident in that she, negligently and carelessly,
exposed herself to the risk of such an accident

Reply to Answer of P. S. Coordinated Transport.

and neglected to take precautions to guard and protect herself against such an accident; moreover, at the time and place mentioned in the complaint, she was conducting herself in a careless, reckless and negligent manner and was not exercising care or taking proper precautions and that she negligently, carelessly and recklessly placed herself in a position of danger at the time and place mentioned in the complaint. 10

HENRY H. FRYLING,
Attorney of Defendant,
Public Service Coordinated Transport.

Filed March 9, 1929.

**Reply to Answer of Public Service
Coordinated Transport.** 20

Filed June 11, 1929.

Plaintiff denies each and every allegation of the first defense of the defendant, Public Service Coordinated Transport.

Plaintiff denies she was guilty of any contributory negligence.

IRVING FISCHER, 30
Attorney of Plaintiff.

Filed June 11, 1929.

Amended Answer of P. S. Coordinated Transport.

**Amended Answer of Public Service
Coordinated Transport.**

Filed November 15, 1929.

10 The defendant, Public Service Coordinated
Transport, answering paragraph five of the com-
plaint as amended says:

1. It denies the allegations contained in said
amended paragraph five.

HENRY H. FRYLING,
Attorney for Defendant,
Public Service Coordinated Transport.

Filed November 15, 1929.

20

30

40

Judgment.

Judgment.

Entered December 5, 1929.

The above-entitled cause was tried before Judge Newton H. Porter and a mixed jury in the above-entitled court on December 2, 1929, and December 3, 1929, resulting in the following verdict: 10

For the plaintiff, Katherine Seinner, against the defendant, Public Service Coordinated Transport, a corporation of New Jersey, the sum of Three Thousand Six Hundred Sixteen (\$3,616.00) Dollars.

Whereupon it is adjudged that the plaintiff Katherine Seinner do recover of the said defendant Public Service Coordinated Transport, a corporation of New Jersey, the sum of 20

	Three thousand six hundred
	and sixteen dollars damages
	together with her costs which
	have been taxed at the sum
	of
Damages \$3,616.00	making in the whole the sum
Costs	of

Judgment signed and entered December 5, 1929. 30

WM. S. GUMMERE,
C. J.

*Certificate of Clerk.***Certificate of Clerk.**

I, Fred L. Bloodgood, Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of the judgment entered in the above-stated cause as the same remains of record in my office.

In testimony whereof I have set my hand and the seal of said Court at
(SEAL) Trenton, this twenty-third day of December, A. D. Nineteen hundred and twenty-nine.

FRED L. BLOODGOOD,
Clerk.

20

30

40

Substitution of Attorney.

Substitution of Attorney.

Filed December 20, 1929.

NEW JERSEY SUPREME COURT,

PASSAIC COUNTY.

10

KATHERINE SEINNER,
Plaintiff,

vs.

PUBLIC SERVICE COORDINATED
TRANSPORT, a corporation of
New Jersey, and CLINTON
HARLEY,

Defendants.

*Action
at Law.*

20

It is hereby stipulated and agreed that Aaron

30

L. Simon be and he is substituted as attorney of
record for the plaintiff in the above-entitled cause
of action instead and in place of Irving Fischer.

IRVING FISCHER.
AARON L. SIMON.

Dated December 19, 1929.

40

Ethel Seinner, direct.

TESTIMONY.

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

10	KATHERINE SEINNER, <div style="text-align: right;"><i>Plaintiff,</i></div> <div style="text-align: center;"><i>vs.</i></div> PUBLIC SERVICE COORDINATED TRANSPORT and CLINTON HANLEY, <div style="text-align: right;"><i>Defendants.</i></div>
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Paterson, N. J., December 2, 1929.

20 Before Hon. Newton H. Porter, Judge, and a jury.

Appearances:

Aaron L. Simon, Esq., attorney for the plaintiff.

Harold Dorgeval, Esq., attorney for the defendants.

(A jury was duly impaneled and sworn.)

30 (Plaintiff's counsel opened to the jury.)
(Defendants' counsel opened to the jury.)

ETHEL SEINNER, was called as a witness on behalf of the plaintiff, and being first duly sworn, testified as follows:

Direct examination by Mr. Simon.

40 Q Who lives at your home with your mother at Garfield? A My mother, my sister, my brother and I.

Ethel Seinner, direct.

Q And who did the house work at your home altogether before the time of this accident? A My mother did.

Q Did anyone assist her at all? A No, sir.

Q What was the condition of her health as you observed before the accident? A Nothing at all. She never was under a doctor's care. 10

By the Court.

Q You mean by that she was in good health? A Yes, sir.

Q Do you know what your mother weighed before this accident? A About 160 pounds.

Q Do you know what mother weighs today? A 128.

Q When did you first know that your mother was in an accident? A I was out at that time, she went to church and when I came home I found her in bed. 20

Q What doctor took care of her? A Dr. Bleasby.

Q Where does he live? A On Passaic avenue.

Q Garfield? A Yes.

Q For about how long was your mother in and out of bed? A She was in one month and at times she had to get up, on account of her pains and she could not stand it and could not lay down. 30

Q And after a month what did she do? A Off and on she was in bed.

Q How long was she around the house before she was able to get out? A Three months.

Q After the doctor had taken care of her, what other doctor did she have? A Dr. Cohen.

Q Was she X-rayed at all? A Yes. 40

Ethel Seinner, direct.

Q What doctors took the X-rays? A Terhune and Roth.

Q Dr. Terhune took the X-rays for the chest and Dr. Roth for the head? A Yes.

Q What did Dr. Terhune get paid for the X-rays and the charts?

10

Mr. Dorgeval: I object to that.

The Court: How do you know he was paid?

The Witness: Mother paid it.

The Court: Were you there?

The Witness: No.

By Mr. Simon.

20

Q Were you there when the X-rays were taken? A No, sir, my sister was there.

Q Who took care of mother the first month while she was at home? A Mrs. Vores.

Q A friend of the family? A Yes, we are acquainted from church.

Q That is the first month? A Yes.

Q Who took care of mother after the first month? A My sister.

Q What is her name? A Grace.

30

Q Where was Grace working at that time? A Mrs. Ackerman.

Q Where does she live? A I do not know. I am not sure.

Q And how long was Grace home with mother? A One month.

Q Do you know from your own knowledge what Grace earned a month at Mrs. Ackerman's? A \$70.

40

Mr. Dorgeval: I ask that that be stricken out.

Ethel Seinner, direct.

The Court: Yes.

Mr. Dorgeval: I do not understand that this is a measure of damages.

Mr. Simon: That is what we allege in our complaint.

The Court: If the daughter stayed home and had to stay home to take care of the mother I think that is a proper measure of damages, the loss of wages that she had. 10

Mr. Simon: That is what we are contending for one month.

The Court: But does this girl know what her sister's wages are?

Mr. Simon: The mother is a foreigner and I thought I could get it out of this girl. 20

The Court: Her sister is here.

Mr. Simon: She is working.

By Mr. Simon.

Q How long was your sister Grace with mother? A One month.

The Court: It would be hearsay except from the mother.

Mr. Simon: She turned her earnings over to her mother. 30

The Court: And this girl may know that.

By Mr. Simon.

Q Do you know what your sister Grace turned over to your mother? A \$70.

By the Court.

Q The question is yes or no? A Yes. 40

Ethel Seinner, direct.

By Mr. Simon.

Q How much did she turn over to your mother? A \$70.

Mr. Dorgeval: I object to that.

10 The Court: I will allow it. She said she saw it.

Mr. Dorgeval: May I have an exception noted?

The Court: You may.

By the Court.

Q What is your sister's name? A Grace.

Q Did your sister turn this over at one time?

A Yes, sir.

20 Q She was paid by the month? A Yes.

By Mr. Simon.

Q After the second month who took care of the home for the mother? A I did.

By the Court.

Q Did not Grace? A That was the second month.

30

By Mr. Simon.

Q Who took care of mother for the next few months? A Mrs. Vores took sick and then Grace took sick and then I did. Then Mrs. Vores came back.

Q How long did Mrs. Vores take care of mother? A About six months.

Q And after that who took care of the home?

40 A I did.

Ethel Seinner, direct.

Q You worked in one of the factories there?

A Yes.

Q But you did this work at night? A Yes.

Q For how long was it that your mother was not able to do any work? A She does not do it today. She does shopping.

Q She does some housework today? A Very 10
little.

Q What does she do? A She cleans off the table and takes the dishes and she don't do anything.

Q For how long has she been doing this light amount of work? A Only lately.

Q Then for how long a period was it before your mother did any work around the house? A I do not exactly know. She went out shopping about eight months or ten months, but I do not recall. 20

Q What have you observed about your mother today, about her general health and condition?

A She holds her chest and she is gasping for breath and she sways and complains about her back, and she always holds her side.

Q Does she look as well now as she did before? A No, sir.

Q Do you know how old your mother is? A Fifty-three now. 30

Q Do you know what mother paid Dr. Bleasby?

Mr. Dorgeval: That is objected to.

The Court: If she knows.

A About \$48.

By the Court.

Q He did not ask you how much. Did you know? A Yes. 40

Ethel Seinner, direct.

Q How do you know? A Because I paid some. I cannot pay him at once and I paid him two or three times.

Q Did you pay him the entire amount at different times? A Yes.

10 *By Mr. Simon.*

Q How often did the doctor come to your home? A Three times a week for a month.

Q And after that? A We went by him.

Q How much was his bill?

Mr. Dorgeval: May I have an objection now?

The Court: Yes. She said she paid it herself.

20 Mr. Dorgeval: Which is on the ground that it is not the best evidence.

The Court: You may have an exception.

By the Court.

Q How much was it altogether? A About \$48.

By Mr. Simon.

30 Q Was that all for mother's ailment? A Just for the visits.

Q You did not have Dr. Bleasby for yourself? A My sister had him before.

Q Before the accident? A Yes.

Q Is that \$48 only for mother's illness? A Yes.

Q Who does the washing and ironing around the house today? A I do.

40 Q You do that evenings? A Yes, when I get home from work.

Ethel Seinner, direct.

Mr. Simon: That is all.

By the Court.

Q How long did you stop work if at all because of your mother? A I did not stop at all. I stayed home off and on, and I do it at night, when I get home. 10

Q Your sister stayed home a month? A Yes, and she stays home now off and on. Two weeks ago she was home two days.

By Mr. Simon.

Q Did I understand you to say that you stayed home sometimes? A Off and on.

Q How long did you stay home? A About three weeks off and on. 20

Q Where do you work? A Samuel Hurd's Mills.

Q Why did you stay off? A If my sister did not feel good or could not get off I stayed home.

Q What do you earn a week? A \$20.

Mr. Dorgeval: I object to this again as a measure of damage.

The Court: Allowed.

Mr. Dorgeval: May I have an exception? 30

The Court: Yes.

By Mr. Simon.

Q For three weeks altogether you were out of work? A Off and on, yes.

Q During the time that you were out of work did you get paid? A No.

Q Then you were out about \$60 altogether?
A Yes. 40

Ethel Seinner, cross.

Q What did you do with the money you got?
A We give it to mother. We have no father and we support her and keep up the house.

Cross examination by Mr. Dorgeval.

10 Q How old are you? A Twenty-six.
Q And your sister? A Twenty-four.
Q And she was employed in a private home?
A Yes, sir.

Q Is she employed now? A She is out from work now at the present time. She cannot hold her job because she has to stay home off and on.

Q I only asked you if she is working now? A No, sir.

20 Q How long had she not been working? A About four days.

Q Does she frequently have intervals like that when she does not work, that is, she works for a while and then she does not work for a while? A Yes, sir.

Q That happens regularly? A Not before the accident.

Q It does happen regularly? A Since the accident.

30 Q Your sister was not in the accident? A No.

Q Do you mean to say that before the accident your sister worked continuously? A Yes, sir.

Q Never lost a day? A I did not say that. She did not have to stay home on account of mother's health.

Q But before the accident your sister was doing the same kind of work? A Yes, sir.

40 Q She did not work every day before that, either? A Not when she was sick.

Ethel Seinner, cross.

Q Wasn't she sometime out of work? A
But not like now.

Q Wasn't she sometime before the accident
sometimes out of work? A Yes.

Q And, of course, she would get another job
and she would work there for a while and then
she would be out of work again? A She would 10
work steady then.

Q But she did miss some time from her work
before the accident? A Yes, when she was sick.

Q When she was sick and did not have a job,
were there not times when she was not sick and
did not have a job before the accident? A Very
seldom.

Q But there were times? A She was work-
ing steady at the time.

Q But there were times? 20

Mr. Simon: Counsel might state the time.
Does he mean twenty years ago?

Mr. Dorgeval: She is only twenty-four
years. I thought that might be self-evident.

By Mr. Dorgeval.

Q You say that for eight or ten months your
mother has been doing the shopping? A I did
not say that. 30

Q I understood you to say— A I said eight
months of the accident, since then she does some
shopping.

Q You mean eight months after the accident?
A Yes.

Q Where does she go to do the shopping? A
She goes to the A. & P. and to the butcher.

Q She walks? A Yes, sir.

Q How far away are they from your house?
A About four blocks. 40

Ethel Seinner, cross.

Q And she walks both ways? A Yes.

Q She does that every day? A Not exactly every day. I have to do it after work.

Q She does it most every day? A Not every day.

10 *By the Court.*

Q He said most every day? A I do it mostly all the time.

By Mr. Dorgeval.

Q You said that your mother did the shopping? A She does now but not always.

Q Since eight months after the accident she has been doing the shopping, is not that so? A Eight months after the accident she started to do the shopping.

Q Is it not so that she has been doing the shopping since then or most of it? A Yes, she does it.

Q Around the house, she can walk around the house? A Yes, she walks but gets dizzy spells.

Mr. Dorgeval: I ask that that be stricken out.

The Court: Strike out the dizzy spells.

30 Q She walks around the house? A Yes.

Q Does she not carry things around the house sometimes? A No, sir.

Q Does she not do some cooking? A No, sir.

Q None whatever? A No, sir.

Q You are positive that she has not done any cooking at all since the accident? A No, sir.

Q When she does the shopping she carries the bundles home? A Very little. From the A. & P. they send it.

40

Ethel Seinner, cross.

Q When she does the shopping she carries the bundles home? A Small bundles.

Q There is no charge at all for Dr. Cohen's services? A For accident and for the treatment he will charge.

Q Is it not a fact that he is a doctor for a certain society that your mother is a member of? 10
A Yes, sir.

Q And he has been attending your mother since Dr. Bleasby stopped attending? A Yes.

Q And is it not a fact that as the doctor for that society there is no charge for his services?
A For the visit he did not charge.

Q Is it not a fact that your mother's membership in that society entitles her to free medical treatment from Dr. Cohen? A Only for sickness, and not for an accident. 20

Q Do you not remember talking to Mr. Feeney of the Public Service the last time this case came up, and your own attorney was present? A I do not know whether he was present at that moment or not, but he introduced Mr. Feeney to you at that time. Do you remember talking to Mr. Feeney at that time? A Yes, sir.

Q Did you not tell us that Dr. Cohen's services were free in this case? A For the visits, and not for an accident. For sickness he is. 30

Q Do you have a contract with that society?
A No, sir.

Q Do you have anything at all to show what the agreement with the society was? A No, sir.

Q You mean to say that the society distinguishes between whether you are ill because you have had an accident or whether you are ill because of sickness? A He is not supposed to take care of it so long. She is getting electric treatment. 40

Ethel Seinner, cross.

Q Is it not a fact that the society provides this doctor free of charge?

Mr. Simon: First of all it is improper cross examination, and second of all—

10 The Court: What difference does it make? There is no claim for his services.

Mr. Dorgeval: I do not know whether there will be or not.

Mr. Simon: The doctor will charge for that. He will testify as to that.

Mr. Dorgeval: I am laying a foundation for something she told Mr. Feeney in my presence.

20 Mr. Simon: Suppose she did say that.

The Court: She said he did not charge except for accident cases.

Mr. Simon: The doctor will tell us about that.

The Court: Let us pass along to the next subject.

Mr. Simon: Then how would it be binding on the mother?

30 The Court: It might be.

By Mr. Dorgeval.

Q If the illness is not caused by an accident his services are entirely free? A Yes, sir.

Q For no matter how long the person is sick?

A Just for the visit.

By the Court.

40 Q For the visits he makes at the house? A The examination.

Katherine Seinner, direct.

Q What do you mean by that? Suppose I was a member of the society and I had the grippe, he would take care of me? A Yes, sir.

Q Every time he had to come he would come?
A Not for an accident.

Q I am talking about the grippe? A Yes.

Q Or pneumonia. He would take care of me? 10
A Yes.

Q You say that he would take care of your mother, too, but the only thing is that he would not take care of her in this case because she was hurt in an accident? A Yes, sir.

The Court: That is all.

(Witness excused.)

KATHERINE SEINNER, plaintiff, was called 20
as a witness on her own behalf and being first
duly sworn, testified as follows:

Direct examination by Mr. Simon.

Q You understand when you put your hand on that book, that that is a Bible? A Yes.

Q And you understand that you have to tell the truth? A I know.

Q Did you understand what the gentleman 30
said to you? A Yes.

Q Where were you sitting on this bus? A
Left side front.

Q What street did you get on this bus? A
Prospect street and Outwater Lane.

Q You got on the bus there? A Yes, I sit there.

Q Where did you get on the bus, where were you coming from, from the church? A From church.

Katherine Seinner, direct.

Q Where is the church? A Midland avenue and Passaic street.

Q Garfield? A Yes.

Q That is the Holy Name Church? A Yes.

Q Who was with you at the time? A Eight o'clock, twenty minutes.

10 Q Was Mrs. Vores with you? A Yes.

Q Who was sitting with you on the outside by the window? A Mrs. Vores.

Q What street did this accident happen on? A Prospect street.

Q What street was the automobile on? A I do not know.

Q Outwater Lane?

20 Mr. Dorgeval: Do you mean the Public Service bus? We admit it was Outwater Lane.

Q Before the accident how did you feel? A Very sick.

Q Before the accident, before you got hurt, how did you feel? A The first time all right and the accident very sick.

Q How much did you weigh then, do you know? A (No answer.)

By the Court.

30 Q How heavy were you? A 160.

Q What do you weigh now? A 128.

By Mr. Simon.

Q Who did the housework before the accident? A Me.

Q Did you do all the work yourself? A Yes.

40 Q After the accident for how long was it that you did not do any work at all? A No work nothing.

Katherine Seinner, direct.

Q For how long? A Accident no work nothing now.

Q Now you do not do anything? A No.

Q Why? A My head, chest, back, inside very sick, cough little bit and spit blood in the morning.

Q When did you spit blood last time? A 10
Today morning. It is how much I cough.

Q When? A Today morning. Every morning there is so much cough.

Q What causes the blood? A Blood light.

Q You say you cough? A Yes.

Q When? A Any time, sometime any morning so much cough.

Q Did you cough before this accident at all?
A No.

Q Where did you get hurt, what side? A 20
Left side here.

By the Court.

Q Left side? A Right side.

By Mr. Simon.

Q How long was it before you went out of the house and do some working? A Three months.

Q And after three months what did you do 30
outside? A I go to butcher store.

Q And you do all the buying? A Yes.

Q Why don't you do some housework? A I cannot do nothing.

Q How long did Mrs. Vores work for you? A
One month, first month.

Q Then did she work for you again? A Yes,
in six months again.

Q How much did you pay Mrs. Vores? A
Me no pay nothing because I had no money. 40

Katherine Seinner, direct.

Q Has she charged you anything? A Maybe \$12 a week.

Mr. Dorgeval: I object to that.

The Court: She will be on the stand.

Mr. Dorgeval: Is that stricken out?

10 Mr. Simon: I will consent to it.

The Court: She has not paid her anything.

By Mr. Simon.

Q When did you see Dr. Cohen the last time? A Friday.

Q Friday of last week? A Yes.

20 Q What did he do for you? A X-ray electric.

Q When did you see him before last Friday, how many times did you see Dr. Cohen? A I do not know how many times. So much times. Every week sometimes two times, sometimes three times, sometimes one time a week.

Q What does the doctor do for you every time? A Electric.

By the Court.

30 Q Do you go to his office? A Yes.

By Mr. Simon.

Q Where is his office? A Lexington avenue.

Q Do you know the number? A I don't know. I go every time with my daughter.

Q That is your daughter Grace; how much money does she make a month? A \$70.

40 Mr. Dorgeval: I object to that.

Katherine Seinner, direct.

By the Court.

Q How much does she give you a month? A All the money.

By Mr. Simon.

Q How much was that? A My daughter 10 give me.

By the Court.

Q How many dollars? A \$70.

Q That is Grace? A Yes.

By Mr. Simon.

Q And how long was she out of work on account of you?

20

The Court: Do not lead her.

Q Did she help you at all, your daughter? A Yes.

Q How long was she out of work? A A month.

Q During that month did she give you the \$70 then? A No. She worked home, of Mrs. Ackerman come in to visit me.

30

Mr. Dorgeval: There was no question pending.

Q When you first came home where were you brought, upstairs or downstairs? A First go upstairs.

Q Then what did they do for you? A Go to bed.

Q And after the next day where did you go? A Next door bring me a bed downstairs where

40

Katherine Seinner, direct.

it hurts and can't stay in bed and they bring me other bed next door.

Q What did the doctor do for you here? A Plaster.

Q When did you have pain the last time over here? A Any time pain.

10 Q Can you bend your knee and stoop? A No, cannot bend, that hurts.

Q How often do you get dizzy spells?

Mr. Dorgeval: I object to that. She did not say anything about dizzy spells.

Q How is your head today? A No good feel.

20 *By the Court.*

Q How is your head? A Very sick.

Q How do you mean sick? A Go around all the time.

By Mr. Simon.

Q You had pictures taken of your head by Dr. Roth in the Passaic? A Yes, sir.

30 Mr. Simon: These X-rays were negative.

Q How much did you pay Dr. Roth for the pictures? A I do not know. My daughter pay.

Mr. Simon: May I ask the daughter?

The Court: Yes.

Mr. Dorgeval: May I have an exception?

The Court: Yes.

Mr. Simon: How much did you pay?

40 Ethel Seinner: \$25.

Katherine Seinner, direct.

By Mr. Simon.

Q How much did you pay Dr. Terhune for the chest? A \$15.

Mr. Dorgeval: May I have an exception on that?

The Court: Yes.

10

By Mr. Simon.

Q What time did you say this accident happened? A Night.

Q About what time? A Eight and one quarter.

Q What kind of weather was it outside? A No weather.

By the Court.

20

Q Was it stormy or clear? A No weather.

Q Was it raining? A No rain.

Q Snowing? A No, nothing, nice day.

Q What day was it? A Tuesday.

Q What date, what month? A September 27th.

Q What year? A Last year.

The Court: We will take a recess until two o'clock.

30

Joseph Leslik, direct.

AFTER RECESS.

Mr. Simon: I have some police officers here and the Chief of Police asked me to put them on and get rid of them. May I do that now?

10 The Court: Yes.
(Witness excused.)

JOSEPH LESLIK, was called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:

Direct examination by Mr. Simon.

Q You are a peace officer in the City of Garfield? A Yes, sir.

20 Q How long have you been such? A Seven years.

Q As such were you on the jitney bus on September 27, 1928? A Yes, sir.

Q Do you remember about what time it was? A About 8:30.

Q I understand that this bus was traveling on Outwater Lane before this accident? A Yes, sir.

30 Q How does that run? A Going West.

Q How wide would you say that road is at the scene of the accident? A 75 feet wide.

Q Is it level? A It comes to a slope.

Q And looking East in the direction the bus was traveling, is that an incline of any kind? A It is.

Q Downhill or uphill? A Downhill.

40 Q So that the direction the bus was traveling in was down the hill? A Yes, sir.

Joseph Leslik, direct.

Q Where was the bus, towards the center of the road or towards either side? A It was traveling towards the center of the road.

Q What was the condition of the pavement at this time? A It was raining before that and the pavement was wet.

Q Do you know where Prospect street is in the City of Garfield? A Yes. 10

Q And that runs— A North and south.

Q And it is a dead-end street? A Yes, at Outwater Lane.

Q As you are out on Outwater Lane, and before you reach Prospect street, did you observe any vehicles coming out of Prospect street? A There was a bus coming out.

Q How far was your car from the corner where Prospect street was? A About 200 feet. 20

Q And was that bus on Prospect street on the left or right of your bus? A He was on the right.

Q At that time when this bus was coming out what did you observe the driver of the Public Service bus do? A He did not do anything until he came 50 feet away and then he noticed a bus and jammed his emergency brake on.

Q Then what happened? A And then the bus went out into the gutter and the rear wheel hit the gutter. 30

Q In what direction was the bus coming out of? A West on Outwater Lane.

Q After it hit the gutter was it in the same direction that it was traveling before that? A His front was sticking out towards the center of the road.

Q Where was that when that occurred? A About 10 feet of Prospect street going towards Prospect street. Ten feet from Prospect street sidewalk. 40

Joseph Leslik, direct.

By the Court.

Q Does Prospect street cross Outwater Lane?

A It is a dead-end street.

Q It goes to Outwater Lane but does not cross? A That is right. She comes through but not all the way across.

10 Q It comes through but does not go through?

A It does not go across.

By Mr. Simon.

Q So that from the time he applied his brakes to the time that the bus stopped, how many feet had he travelled? A About 10 feet.

Q Do you know what I mean? A His rear swung over that way and his front went that way.

20

By the Court.

Q He asked you how far he travelled from the time he first put on his brake until he stopped? A About 10 feet.

By Mr. Simon.

Q Which part of the bus struck the curb? A The right rear wheel.

30 Q And then turned half way around, is that right?

Mr. Dorgeval: I object to that. Counsel is putting in "half-way."

The Court: He did not say half-way.

By Mr. Simon.

Q How far did the bus turn? A His rear was over to the gutter and his front was sticking half-way over the road.

40

Joseph Leslik, direct.

Q Then what did the bus driver do? A After some passengers got off he kept on going and this woman was sitting in the alley-way of the bus. There are seats on both sides of the bus.

Q When did the bus driver stop? A I told him to stop at Palisade avenue and Outwater Lane, a block further down. 10

Q You told him to stop? A I said there was a woman looks kind of pale and she must have got hurt.

Q Did anybody yell? A A woman yelled.

Q Who helped to pick this woman up? A I went over and picked her up with some other woman.

Q Then how far did you go? A Then I told the bus driver that there was a box on the corner and I would call for an ambulance and I asked her did she want to go to the hospital. 20

Q Where did the bus go? A I went down as far as Fennick's at the railroad tracks and she told me she lives at Columbus avenue and I told her to stop there and I can take her home.

Q Did you take her home? A Yes, with some woman.

Q Was this woman able to walk alone without your assistance? A I do not think she was. 30

Q Who helped her upstairs to her home? A I did.

Q Do you know whether she was able to walk alone? A No, sir.

Q Did she complain about anything? A About pains in her side.

Q What did she look like? A She was white as a sheet.

Q Where was she when you saw her? A Down this way in the alley of the bus. 40

Joseph Leslik, direct.

Q Who helped pick her up? A I did and some other woman.

Q Was she in that position when you first saw her? A That is when I first saw her.

Q What was her general complexion? A She was as white as a sheet.

10 Q Did she do anything, hold your hand anywhere?

Mr. Dorgeval: I think we are going pretty far.

The Court: Do not lead.

A She sat there making faces.

By Mr. Simon.

20 Q When did you see her next again? A The next day.

Q What did you do?

By the Court.

Q What conversation did you have? A I took her over to the doctor's to have an X-ray taken of her.

By Mr. Simon.

30 Q Where was this doctor? A Right across from the City Hall, I think.

Q Was it raining at that time or had it rained before? A It rained before that.

Q And was the road very wet or not? A Just about drying up.

Q Is there much of a decline there where this accident happened? A There is a decline.

40 Q How fast would you say this bus was traveling just before this accident? A About fifteen or twenty miles.

Joseph Leslik, direct.

Q When this bus struck the curb and turned—

Mr. Dorgeval: That is objected to, I do not believe that has been testified to.

The Court: He said so.

Mr. Dorgeval: All right. 10

By Mr. Simon.

Q What happened with the occupants in the bus there?

Mr. Dorgeval: If anything.

A We were all shaken up. I asked a few of them if they were hurt and they said no. They just got scared. 20

Q And this was the only woman—

Mr. Dorgeval: Please do not lead.

Q Did you see any people off the seats? A They were all shook up off their seats but this woman was knocked out.

Mr. Simon: That is all.

By the Court. 30

Q What was the date of it? A September 27, 1928.

Q What time of day? A 8:30.

Q What day of the week? A I do not remember now.

Q Sunday? A I think it was. It was some holiday.

Joseph Leslik, cross.

Cross examination by Mr. Dorgeval.

Q Sunday night? A I think so.

Q And it was dark? A Yes.

Q And the lights in the bus were on? A Yes.

10 Q And the headlights of the bus were on?
A They were all on.

Q And the Public Service bus was traveling towards the center? A He was driving towards the center.

Q Do you mean the left wheels of the bus were in about the center of the street? A The right wheel of the bus. It was more to his right.

20 Q How close to the center of the road would you say the left side of the bus was? A About 35 feet.

Q I will withdraw that. Was the bus on the right side of the center or the left side of the center? A Right side of the center.

Q I am only asking about how far the left side of the bus was from the center of the road? A He was more to the right of the center of the road than to his left.

30 Q How close to the curb then was he driving? A I judge about 20 or 25 feet.

Q You said the bus was going fifteen or twenty miles an hour before the accident? A Yes, sir.

Q And were the roads still wet? A It was raining before that.

Q And the roads were still wet? A They were wet but they were drying up.

40 Q Were you acquainted with Mrs. Seinner or any member of the family before this accident? A No, sir, I did not know her.

Joseph Leslik, cross.

Q Of course, as you say, she was the only one thrown from her seat? A Thrown out of her seat, yes.

Q To the floor? A Yes, she was the only one thrown to the floor.

Q You noticed her? A I did not notice her until someone screamed. 10

Q But you noticed her then? A Yes, I noticed her sit down.

Q And the bus driver had no way of knowing what had happened back there?

Mr. Simon: I object to that.

The Court: Sustained.

By Mr. Dorgeval.

Q You said that the bus driver went on until you called his attention? A I said "Why don't you look around?" 20

The Court: Strike it out. He did not ask you what was said.

By Mr. Dorgeval.

Q I said, the bus driver went on until you called his attention to the situation? A Yes. 30

Q There was nothing more than you have described to attract his attention to the situation than what attracted yours, was there? A I do not know whether he heard the other woman scream or not. I do not know. He did not know until I told him about it.

Q So that when you told him he did not know that anything had happened? A He said he did not know.

Q The other bus, you said you saw that coming out of Prospect street? A Yes, sir. 40

Joseph Leslik, cross.

Q Turning to its left? A To his right, turning west into Outwater Lane.

Q Which side of the road was it on? A On its right, he was on the bus driver's left, but the bus was on the left.

10 Q This Public Service bus was on the bus' right? A Yes.

Q But the bus coming out was on the left side of the bus? A It was on the right side of the road. Coming out of Prospect street and he was on the right side of the road.

Q What was left? A H was to the bus driver's left. He was to the left of the bus driver. He was coming out this way and if he looked out it would be on the right side of the road, but on the driver's left of the bus.

20 Q This bus that came out of Prospect street was on the right side of Prospect street? A Right side.

Q And the bus you were on was on the right side of the street? A Yes.

Q What was on the left side? A If the bus driver looked out of his car the Public Service bus would be on his left.

Q This other bus kept going out and made the turn? A Yes.

30 Q He continued coming right out? A Yes.

Q And the Public Service driver applied his brakes about 50 feet from the bus? A Yes.

Q Was that bus then directly in front of the Public Service bus? A Oh, no.

Q If the Public Service bus had continued ahead there would have been a collision? A No.

40 Mr. Simon: I object to that. I will withdraw it if he can answer it.

Joseph Leslik, cross.

The Witness: There never could be a collision. The other bus was already out when he applied his brakes.

By the Court.

Q Where did he come from? A Prospect street. 10

Q And did he turn to the right? A To the right.

Q And the other bus was on Outwater Lane going in the same direction? A Yes, sir.

By Mr. Dorgeval.

Q This other bus pulled out in front of the Public Service bus? A He was 50 feet away from him. 20

Q I understand that. But he was directly in the path of the Public Service bus? A If he kept on going at the same speed there would be no collision.

The Court: He did not ask you that. Listen to the question.

By Mr. Dorgeval.

Q I am not trying to mix you up, but this other bus when it turned into Outwater Lane was directly in the path of the Public Service bus, it was directly ahead of it? A Yes. 30

Q Although it was 50 feet ahead? A Yes.

Q If that other bus had stopped right there and the Public Service bus had continued there would have been a collision?

Mr. Simon: I object to that.

The Court: Sustained. 40

Joseph Leslik, cross.

Mr. Dorgeval: I am trying to bring out the geographical situation.

The Court: That is the situation. He was directly in the path of the other bus but 50 feet in advance. That is true, is it not?

The Witness: Yes.

10

By Mr. Dorgeval.

Q And it was then that the Public Service driver applied his brakes? A He applied them before he noticed the bus because I can recall that someone had buzzed and he was supposed to stop at that corner.

Q Before he saw the bus he applied his brakes? A No.

20

Q I understood you to say in answer to this attorney's question that your bus driver applied the brakes when the other car was 50 feet ahead of him? A That is right.

Q So that it was then that he applied the brakes when the other car came out 50 feet ahead? A Yes.

Q That is a fairly good grade there? A It is an incline.

30 Q It is a good grade? A It is not quite a grade. It is a slope.

Q The Public Service bus was going down grade? A Yes.

Q And it is a pretty good grade? A It is a grade.

Q Pretty good grade down hill? A There are some better hills than that.

Q But is not this a good one? A Yes, this is a good one.

40 Q And he stopped in 10 feet? A After he applied his brakes he skidded about 10 feet.

Joseph Leslik, re-direct.

Q He stopped within ten feet? A Yes, he stopped.

Q This lady was not unconscious? A No.

Q And she walked with your assistance and the assistance of the other lady? A I carried her most of the way.

Q Was she not walking between the two of you? A No. I sort of dragged her more than a walk. 10

Q You did not have her in your arms? A No, I had my hand under her arm.

Q And you took her home? A Yes.

Q She did not want to go to a hospital? A No, I asked her.

Q And nobody else was hurt? A Nobody in that bus that I know of. 20

Q And nobody else was thrown to the floor? A No.

Mr. Dorgeval: That is all.

Re-direct examination by Mr. Simon.

Q How near the bus driver were you seated? A I seen him about 100 feet.

By the Court. 30

Q You were in the bus? A Yes.

Q How near were you to the driver of your bus when you were seated? A I was to his right.

Q How far away? A Across the aisle.

By Mr. Simon.

Q And the first that attracted your attention was when some woman screamed? A Yes. 40

Joseph Leslik, re-cross.

Q Did the bus driver then turn around at all?
A No, he just proceeded down toward Outwater Lane.

Q What brakes did you observe the driver apply? A Both emergency and footbrakes.

10 Mr. Simon: That is all.

Re-cross examination by Mr. Dorgeval.

Q Of course, he stopped some distance from the corner? A Yes.

Q He did not stop at a regular stopping place? A No, he passed that.

Q He stopped at a place he ordinarily would not stop at? A That is right.

20 Q He stopped to avoid this other car? Whether you think there would have been a collision or not the bus driver stopped to avoid another car?

Mr. Simon: I object to that.

The Court: He has already said that he saw the bus driver put on his brakes and then he saw the other car coming down around the corner. That is about all he can say.

30

By Mr. Dorgeval.

Q Do you mean that Outwater Lane is 75 feet wide? A It is a wide road.

Q The average street is about 35 feet? A Average road is fifty.

Q That is in your opinion? A Yes.

Q You have not measured it? A No.

Mr. Dorgeval: That is all.

40

(Witness excused.)

Katherine Seinner, cross.

Mr. Simon: May I call the doctor now out of turn?

The Court: Yes.

Mr. Dorgeval: I do not want to hold up any doctors or professional men, but I have so often had trouble with this situation, the doctor testifies and after he has finished the plaintiff goes on and says— 10

Mr. Simon: Very well; I will recall the plaintiff.

KATHERINE SEINNER was recalled as a witness and testified further as follows:

By Mr. Simon.

Q Did you pay your fare? 20

Mr. Dorgeval: That is admitted.

Cross examination by Mr. Dorgeval.

Q How long have you been in this country?

A Twenty-three.

Q Twenty-three years? A Yes.

Q Three months after the accident you started to do the shopping, didn't you? A Yes. 30

Q And you have done the shopping ever since, haven't you? Do you understand me? If you do not say so. You have been doing the shopping ever since three months after the accident? A Just three months after accident I go butcher store.

Q And to go to the store you have to walk a few blocks, do you not? A A couple of blocks to the butcher store. 40

Katherine Seinner, cross.

Q Where does your doctor live? A Dr. Bleasby?

Q Did you go to Dr. Bleasby's office? A Yes.

Q Where was Dr. Bleasby's office? A After a month me come Dr. Bleasby's house a month.

10 Q How long did you go to Dr. Bleasby's office? A One month coming in my house Dr. Bleasby.

Q For one month Dr. Bleasby came to your house? A Yes.

Q And after that? A After maybe two a week.

Q After the one month, did you go to his office? A Yes, one man takes me automobile.

20 Q Did you go to Dr. Bleasby's office after the first month? A After.

Q After the month? A Yes.

Q After the month you went to Dr. Bleasby's office, is that right? A Yes, a guy bring me automobile to the doctor's office.

Q You went in an automobile to the doctor's office? A Yes.

Q How long did you go to the doctor's office in the automobile? A I don't know.

Q About? A Maybe ten minutes.

30 Q How many weeks did you go to Dr. Bleasby's office in an automobile? A Two weeks. Maybe two weeks or one time two times I go to his office.

Q And after that did you walk to Dr. Bleasby's office? A No.

Q How did you go to Dr. Bleasby's office after that? A I no walk.

40 Q How long did you keep on going to Dr. Bleasby's altogether? A Five weeks. One month and one week going again and I stay

Katherine Seinner, cross.

home accident, one week stay home and next week going and going five weeks for blood.

Mr. Dorgeval: I ask to strike it out.

Mr. Simon: I object to that.

The Court: I cannot make head or tail of it. Strike it out. I do not know what it means. It is something about five weeks but just what it means I do not know. 10

By Mr. Dorgeval.

Q How long did you go to Dr. Bleasby after the first month? A Two weeks.

Q And after that, did you go to any doctor after that? A Yes.

Q Who did you go to? A Dr. Cohen. 20

Q And you have been going to Dr. Cohen since? A Yes, Dr. Cohen came my house second day accident, he is my society doctor.

Q When did he first come to your house? A Yes.

Q When did he first come to your house? A Night.

By the Court.

Q Two days after? A Yes. 30

By Mr. Dorgeval.

Q Then did you go to Dr. Cohen's office after that? A Dr. Cohen was little bit better I go to Dr. Cohen's office give me electric.

Q You have been taking treatments from Dr. Cohen? A Yes.

Q And how long have you been going to Dr. Cohen? A I don't know. I go last Friday. 40

Katherine Seinner, cross.

Q How did you go to Dr. Cohen's office, did you walk or ride? A My son bring me automobile.

Q You say you have a cough? A Yes.

Q And do you cough at any time, day or night? A Morning so much cough.

10 Q Do you cough through the day? A Yes.

Q Do you cough during the day? A Sometimes. Every morning so much cough, sometimes come a little blood.

Q But you cough during the day, too? A Yes, I cough.

Q And you cough in the morning and you cough in the afternoon and cough in the evening? A Yes, morning so much cough every morning.

20 Q Do you cough during the day, too? A Yes, sometimes.

Q In the afternoon? A Sure.

Q You have not coughed here at all, have you? While you have been here in court you have not coughed at all? A No.

Q You have been in court a few days, have you not? You have been around the court a few days waiting for this case. Do you understand me? A Yes.

Q A few days? A You no hear me cough.

30 Q You have been waiting around here a few days? A Yes.

Q Have you not been doing anything around the house at all? Have you not been doing any work around the house at all? A Not yet.

Q Do you dress yourself? A I dress myself.

Q You do dress yourself? A A little bit.

Q You do dress yourself? A Sure.

Q You dress yourself, do you not? A Yes, my shoe help me my daughter.

40 Q Your daughters always turn all their money over to you? A Yes.

Katherine Seinner, cross.

Q Everything? A Yes.

Q One daughter turns over \$70? A Yes.

Q And the other turns over \$20 a week? A Yes.

Q And do you give them money to spend? A No.

Q Then they have to buy their clothes? A 10
Not so much clothes.

Q Your daughters have to buy clothes; do you not give them money back to buy clothes?
A Yes.

Q You do not give them? A Not so much clothes.

By the Court.

Q How much? A I do not know. One year 20
two dresses.

Q How about carfare? A Yes, carfare.

Q How about lunch money? A No lunch money.

Q How about money to go to the movies? A No movies no more.

Q How about powder for their noses? A (No response.)

By Mr. Dorgeval. 30

Q All you give your daughters is enough to buy two dresses a year? A Yes, that is enough.

Q And that is all they get? A Somebody buy my daughter a dress—

Q Please—

The Court: Let her answer.

The Witness: My daughter, her friend Mrs. Sobel buy her dress.

Katherine Seinner, cross.

By Mr. Dorgeval.

Q That is all you give them, is enough for two dresses a year? A Yes.

Q The lights were on in the bus? A Yes.

10 Mr. Simon: This is improper cross examination. I have said nothing at all about that.

Mr. Dorgeval: This is the party and I have the right to go into that.

The Court: Do not waste much time about that. There is no dispute about the lights. The officer said there were lights.

By Mr. Dorgeval.

20 Q Your bus was on the right side of the road? A Yes.

Q Do you remember that the road was wet? A No wet.

Q You do not remember or they were not wet? A I do not know that.

Q You were seated next to the aisle or next to the window? A Mrs. Vores sits window and I sit right.

30 Q You were sitting to the right of the lady with you? A Yes.

Q Did you have any bundle in your arm? A No.

Q An umbrella? A Nothing.

Q You did not have an umbrella? A Nothing.

Q Nothing in your hands? A Nothing.

Q You saw the other bus come out? A Yes.

40 Q The other bus you saw that come out? A Yes, I see go out.

Katherine Seinner, cross.

Q And if your bus had not stopped there would have been an accident?

Mr. Simon: I object to that. How can she say what would happen?

The Court: I will allow it. She can give her opinion. 10

By the Court.

Q If your bus had not stopped there would have been an accident? A No stopping.

Q Your bus stopped? A No stop was coming an accident the bus go over there and no stop.

By Mr. Dorgeval.

Q Do you remember Mr. Barnes, do you remember that man? A Yes. 20

Q He came to see you from the Public Service? A Yes, sir.

Q And you told him, did you not, there would have been a bad accident if both buses had not stopped? A Bus no stop.

Q Your bus stopped? A No.

Q Your bus did not stop? A No, bus not stop. One lady get out and Public Service bus no stop. 30

Q The Public Service bus no stop? A No stop. Go away again.

Q Did the other bus stop? A Yes.

Q Did you not tell that man, Mr. Barnes, that there would have been a bad accident if both buses had not stopped. Do you understand me? A The other bus stop.

Q And your bus stopped too? A My bus no stop. Going too fast and no stop. 40

Katherine Seinner, cross.

Q That was not the question. Mr. Hafer, will you stand up? Do you remember that man?

A Yes.

Q He was from the Public Service too? A Yes.

10 Q Do you remember he came to see you on October 10th, the accident was September 27th and he came to see you October 10th? A Yes.

Q You were then up with a bathrobe on? A Yes.

Q That is right, is it not? A Yes.

Q And then he came to see you on October 18th? A I do not know what time.

Q About October 18th. And you were up and fully clothed, up and all your regular clothes on? A Yes.

20 Q That is right? A Yes.

Q And he also was to see you on the 20th and you had all your clothes on? A I got all dressed.

Q And then do you remember that he was there on November 5th and you were getting dinner ready for the family? A No, sir, my daughter. There is a man, I do not know his name—

30 Q Just answer the question, please. Was not Mr. Hafer in your house on the evening, toward night, November 5, were you not then getting dinner for your family? A No.

Q This is your signature, is it not? That is your name? A That is my name.

Q You wrote that name? A No.

Q Did you not go to your lawyer's office or did not somebody from your lawyer's office come to your house and ask you to sign that? A I no sign nothing.

40 Q Just look at it carefully? A That is no my sign.

Katherine Seinner, cross.

Q That is not your signature? A No sign.

Q You did not sign that? A I no sign no paper, nothing.

Q Will you, please sign your name on there?

(Witness writes on a piece of paper.)

Q Is this part of your name? A This. 10

Mr. Dorgeval: I ask that this be marked for identification.

(The paper was thereupon marked Defendant's Exhibit D. 1 for identification.)

Mr. Dorgeval: May I ask to have this paper also marked for identification?

(The said paper was thereupon marked Defendant's Exhibit D. 2 for identification.) 20

By Mr. Dorgeval.

Q This which I am showing you, and which I ask you if you did not sign, this was not for the Public Service? A Not Public Service?

Q No. You did not sign this for your lawyer? A Yes, my lawyer sign. No Public Service sign. I no sign Public Service nothing.

Q Nothing for Public Service? A Nothing. 30

Q But did you not sign this for your lawyer? A Yes, my lawyer.

Q Is that your signature? A I cannot see good. I have home eye-glasses.

Q Have you your glasses here? A No.

Q Has your daughter got your glasses? A No.

Q Is this your signature? I am now referring to Defendant's Exhibit D. 2 for identification. A Yes. 40

Katherine Seinner, cross.

Q That is your signature? A Yes.

Q Written by you? A Yes.

Q You wrote this? A Looks like.

Q Are you not sure whether you signed that?

A Looks like my sign.

10 Q Do you know Irwin H. Simon, that is not Dr. Simon, but Irwin H. Simon? A Yes.

Q Was he not present when you signed this? Was he not there? When you wrote this was not Irwin Simon there at the same time? A I don't know.

Q Did you not swear to this, did you not put up your right hand and swear that these things were correct? (No response.)

20 Q Did you not sign your name and swear that the questions and answers in here were correct, do you understand me? A No.

Q You do not understand me now? A No.

Q Did not your lawyer ask you some questions? A Yes.

Q And did you not answer them? A Yes.

Q Didn't you ask your lawyer to read the questions and answers to you? Did he not read them to you? Your lawyer, not Public Service? A Yes, my lawyer.

30 Q He read the answers to you, yes or no? A Yes.

Q And you said they were right, they were correct? A Yes.

Q And you swore to them? A Yes.

Q You did not say anything about spitting blood in these answers? A Yes.

Q You did? A Yes.

Q Can you read this? A No.

Mr. Dorgeval: That is all.

40 (Witness excused.)

Mary Vores, direct.

MARY VORES, called as a witness on behalf of the plaintiff and being first duly sworn, testified as follows:

Mr. Simon: May I be permitted to put on Dr. McGinnies, and if I do not connect him with the other doctor I will strike it out. 10

Mr. Dorgeval: I object.

The Court: Sustained.

Direct examination by Mr. Simon.

Q Where do you live? A 145 Dewey street, Garfield.

Q Were you on the bus with Mrs. Seinner this night? A Yes, sir. 20

Q Where were you seated, near the window? Or near the center? A Near the window.

Q What did the bus do before this accident?

Mr. Dorgeval: May I ask that "if anything" be added?

The Court: Yes, if anything.

A I sit in the bus like the auto in the line and Prospect street a bus out in the Outwater Lane and I see Outwater Lane bus coming, Public Service jitney, and I know right away must accident. 30

Mr. Dorgeval: I ask that that be stricken out.

Mr. Simon: I consent.

The Court: Strike it out.

Mary Vores, direct.

By the Court.

Q Tell just what you saw? A I closed my eye and I afraid right away big accident come and the driver turn around and the other way and my jitney bus hit my head in the window and I don't know where I am and I look Mrs. Seinner and I do not see and I see Mrs. Seinner sit in the floor and I want talk.

By Mr. Simon.

Q After Mrs. Seinner came home, were you with her at all in her house? A Yes, I stay.

Q What did you do for a living before this accident, what kind of work did you do before this accident? A Cleaning, washing.

Q For who? A For Mrs. Seinner.

Q Before the accident? A Before the accident no do nothing.

Q Did you work for yourself? A I work myself, yes.

Q Where? A House.

Q Your own house or for other people? A And Mrs. Brigand's house and Mrs. Aaronfeld's house.

Q What kind of work? A Housework.

Q How much do you charge for your work?

Mr. Dorgeval: I object to that.

Q How much did you charge Mrs. Seinner for the work that you had? A She is good friend for me and she wants to pay and I said you want to give me something, \$12, that is enough.

Q \$12 a week? A Yes.

Q How many weeks were you with Mrs. Seinner? A About six or seven months.

Mary Vores, cross.

Q Altogether? A Yes.

Q During these six or seven months did Mrs. Seinner do any work in the house? A No work Mrs. Seinner can do. She can't.

Mr. Dorgeval: I ask that "she can't" be stricken out. 10

The Court: Strike it out.

By Mr. Simon.

Q You say she did not do any work for six months? A No work.

Q How do you know? A I was there all the time. At that time I live one minute walk and all the time I was there Mrs. Seinner's house.

Q How many people in this bus? A About eight or nine, one lady, two children, and men, another fellow, and two policemen, and maybe two or three men more. 20

Mr. Simon: That is all.

Cross examination by Mr. Dorgeval.

Q You live about a minute from Mrs. Seinner? A Yes. 30

Q You are good friends? A Good friends, you know.

Q You have been friends for many years? A About 21 years.

Q Do you have a family of your own? A Yes.

Q Husband living? A Yes, husband.

Q And how many children have you? A One children.

Q How old is the child? A Thirteen. 40

Mary Vores, cross.

Q And you have your own housework to do?

A Yes, and I go outside work.

Q You do not go out all the time? A Four or five days.

Q Four or five days a week? A Yes.

10 Q Work all day or half day? A Sometime work half day, sometime work a whole day, more work whole day than half day.

Q Before this accident you would go to see Mrs. Seinner sometimes? A Yes.

Q You would drop in and spend some time with her before the accident, you were friends? A Yes.

Q How much time did you spend at the Seinner house? A Six or seven months.

20 Q How much time each day? A Half past eleven we go home my house and one o'clock go back again.

Q What time did you go there in the morning? A Eight o'clock

Q And from eight o'clock you would stay until when? A Half past eleven. My children come home from school and I give eat.

Q And then you would come back again? A Yes.

Q When? A One o'clock I go back.

30 Q And how long would you stay in the afternoon? A Five o'clock.

Q And then you would come home? A Yes.

Q And you would come back again in the evening? A Sometimes night.

Q How late did you stay at night? A No work. I only speak to her.

Q At night you would go back just to be with Mrs. Seinner? A Yes.

40 Q You would come back at night to be with your friend? A Yes.

Mary Vores, cross.

Q How big a place did the Seiners have, a big house or an apartment, a flat? A What you mean?

Q Mrs. Seinner? A Mrs. Seinner no big house live in.

Q How big? A One-family house, bungalow house, five rooms. 10

Q Five rooms altogether? A Yes.

Q How many bedrooms? A Three bedrooms upstairs three and downstairs three.

Q Three bedrooms upstairs? A Yes.

Q And dining room and kitchen and front room? A Yes, downstairs.

Q And there were four in Mrs. Seinner's family? A Four.

Q And one daughter was out? A One daughter worked. 20

Q She was not living home? A She live home. She come every night home.

Q She slept home? A Yes, sometimes.

Q One daughter ate her meals out? A Yes.

Q So that there were only three in the family eating home? A She eat night home all the time.

Q The son ate out at lunchtime, at noontime. The only one to eat home at noon was Mrs. Seinner? A Yes, sometimes son eat home. 30

Q Lunch? A Dinner.

Q Do you mean dinner at noon or night? A Twelve o'clock.

Q They got their own breakfast, the daughters and the boy had their breakfast before you got there in the morning? A Yes.

Q So that they were gone before you got there? A Yes, I do not see mornings.

Q At lunch there would be Mrs. Seinner and maybe one other? A Mrs. Seinner and one daughter she is all the time come home dinner. 40

Mary Vores, cross.

Q Two for lunch? A Yes, night another one come home.

Q Nights three? A Nights three.

Q What did you do all morning from eight to eleven-thirty, how did you spend your time for six or seven months? A Sweep and wash-
10 ing and talk little bit, working.

Q Every day? A Most every day.

Q For six or seven months? A Sometimes I go cook in my house and bring dinner for Mrs. Seinner.

Q How often did you clean the house? A I clean it.

Q How often, how many times? A Every day.

20 Q The whole house? A Must sweep, and must dust.

Q Did you sweep the whole house upstairs and downstairs? A Yes.

Q Every day? A Most every day, sweep and wash the floor.

Q Wash the floor. How many floors did you wash every day? A I wash my floor every day.

30 Q How many floors did you wash in Mrs. Seinner's house? A I take a mop every day and a little bit wash.

Q Every day? A Yes.

Q How much did you dust every day? A Every morning must dust.

Q Did you dust in the morning? A Yes.

Q Did you sweep in the morning? A Yes.

Q Did you wash the floor in the morning?
A All day.

40 Q What did you do in the afternoon, from one o'clock until five? A Cooking.

Mary Vores, cross.

Q For four hours? A No. Right away no can cook. You want eat good supper you must take your time.

Q Every afternoon you do that? A Every day you must cook soup and the soup takes three or four hour, good soup.

Q You can put the soup on and let it stand there? A You must watch it. 10

Q Do you have to sit there the whole time? A Not everything must cook. You must cook other things from soup.

Q Did you sit and watch everything? A Do something else.

Q Did both buses stop? A What means both?

Q Did your bus stop? A No. Public Service bus no stop. 20

Q Other bus stop? A Other bus stop. Prospect street other bus stop.

Q Public Service bus slow down? A Public Service run fast.

Mr. Dorgeval: I ask that that be stricken out.

Mr. Simon: I object to that.

The Court: That is responsive. 30

Mr. Dorgeval: That could have been answered yes or no.

The Court: But I think it is responsive.

By Mr. Dorgeval.

Q Did the Public Service bus brakes go on?
A Public Service goes fast.

Mr. Dorgeval: I ask that that be stricken out. 40

Mary Vores, cross.

The Court: Strike it out. He asked you whether the brakes were put on.

The Witness: What is brakes?

Mr. Dorgeval: I will withdraw it.

By Mr. Dorgeval.

10 Q You said you expected a big accident? A That is very big.

Q You saw a big accident was going to happen? A Yes.

Q When you saw this other bus come out— A Other bus stay.

Q Let me finish my question, please. When you saw the other bus come out you thought there would be a big accident? A Yes.

20 Q And that was just before your bus jerked? A That bus stay over there Prospect street.

Q When you thought there was going to be a big accident— A It stay up there.

Q When you thought there was going to be a big accident then your bus jerked? A What is jerked?

By the Court.

30 Q It was just before Mrs. Seinner fell on the floor that you thought there would be a big accident? A Yes.

Q Just before you banged your head? A I saw jitney pass Prospect street but stay and my bus run fast.

Q And you bunched your head? A Yes.

Q And she fell on the floor? A Yes.

40 Q And that is when you thought there would be a big accident? A I don't know.

Elinore Schmidtroth, direct.

Re-direct examination by Mr. Simon.

Q Before the accident how did Mrs. Seinner look? A Very nice lady. Fat and red face.

10

ELINORE SCHMIDTROTTH, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

Direct examination by Mr. Simon.

Q You were a passenger on this bus on the night of the accident? A Yes.

Q And you were seated with whom? A With the boy friend. 20

Q And what is his name? A Joe Hastick.

Q Where were you going, home? You are sure it was your boy friend? A Yes.

Q You were on this bus just before the accident? A Yes.

Q And where did you get on this bus? A Corner of Passaic street and I was at the church.

Q What church is that? A Most Holy Name of Garfield. 30

Q And you all got on the bus at the same time and place? A Yes.

Q Your bus was proceeding on Outwater Lane? A Yes.

Q What did the bus in which you were riding do, or what did the bus driver of the bus on which you were riding do?

Mr. Dorgeval: I object to that.

40

Elinore Schmidtroth, direct.

By the Court.

Q What bus were you in, the same one that Mrs. Seinner was in? A Yes, sir.

Q Did you see what the bus driver did? A I was not sitting there.

10 Q You were observing your boy friend? A Yes.

By Mr. Simon.

Q Tell us what you saw the bus do? A I was looking out of the window and as we were getting to the street, Prospect street, there was a bus coming up from there and before it came out, it did not come out of the side street, but was just about to turn.

20 *By the Court.*

Q Is that Prospect? A Yes. Our bus was coming down the hill but it was not going fast and all of a sudden the bus came to a sort of a stop.

By Mr. Simon.

Q Which bus? A Our bus.

30 Q And what happened to the bus then? A It gave a jerk.

Q Were you jolted at all then, were you moved at all? A I felt the jerk.

Q Did you see Mrs. Seinner then? A I was looking out of the window, I did not see her fall.

By the Court.

40 Q Did the bus change its course? A In what way?

Elinore Schmidtroth, direct.

Q Any way. When it jerked did it stay in the same place? A It moved.

Q Where did it move? A Toward the right.

Q Sideways? A Yes, sir.

Q How far? A I cannot judge.

10

Q Did it come in contact with the curb? A Not that I know of.

Q Did it skid? A To the right.

Q How much? A I do not know.

Q You were looking outside of the window, were you on the right side or on the left? A I was on the right.

Q And that was the side that skidded? A Yes.

Q How near the front were you of the bus? A The second side seat from the rear.

20

Q Was it the rear that skidded? A Yes, sir.

Q How far did it skid? A I do not know.

Q Was it a matter of just a few feet or a long distance? A It was not a long distance to my judgment.

Q And it stopped? A He did not make a complete stop there. He went real slow but then he started up again.

30

Q As soon as the skid was over, he went ahead? A Yes. He did not make a complete stop.

Q He came to almost a stop and then went ahead? A Yes.

By Mr. Simon.

Q Did you hear anybody scream? A No, I do not recall that.

40

Elinore Schmidtroth, cross.

By the Court.

Q Where was it that this happened with reference to Prospect street, had you crossed Prospect street? A We were just about crossing Prospect street.

10 Q Where was the other bus when that happened? A It was coming up from Prospect street.

Q Had it gotten into Outwater Lane? A It did not reach Outwater Lane but it was about near the turn.

Q Which went first on Outwater Lane, your bus or the other bus after the skidding? A Our bus went.

20 Q And the other bus came behind? A Our bus went first and the other bus did not come out.

Q You went on Prospect street? A I did not look back but we came ahead first.

Q It was not ahead of you when you crossed Prospect street? A No.

Mr. Simon: That is all.

Cross examination by Mr. Dorgeval.

30 Q But you saw the other bus come into view on Prospect street, did you not? A Yes, sir.

Q You saw it coming into view and then it came to a stop? A Yes, sir.

Q Where did it stop, at the curb line? A It did not come out Outwater Lane.

Q Did it come up to the curb line on Outwater Lane, about? A Just before the turn and it stopped there.

40 Q Did you see it come out and come to a stop? A Yes.

Elinore Schmidtroth, re-direct.

Q You saw it come up and stop? A Yes.

Q And your bus was not going fast? A No, it was not.

Q And you felt this jerk? A Yes, sir.

Q And did you feel the jerk just about the time you saw the other bus come to a stop, or come out the way it did come out, is that about the time you felt the jerk? A Yes. 10

Q You say you heard no one scream? A I do not recall that.

Q Your bus did not come to a complete stop, but it slowed down and then continued? A Yes.

Q Continued real slowly? A Yes.

Q The buses did not come together? A No. 20

Q And you said that your bus did not come in contact with the curb so far as you know? A As far as I know.

Q And you were sitting on the extreme right? A Yes.

Q Next to the window? A Yes.

Q And you had been looking out that way? A Yes.

Re-direct examination by Mr. Simon. 30

Q How far were you from the corner when you saw this other bus? A I do not know.

Q About? A It could not have been very far because I seen the other bus.

Q How far from Prospect street?

Mr. Dorgeval: May I ask that counsel state whether he means the front of the bus.

Elinore Schmidtroth, re-cross.

By the Court.

Q How far were you seated from the bus when you first saw it?

By Mr. Simon.

10 Q How far was the front of your bus from the corner of Prospect street when you first saw the other bus? A It must have been about even with that corner. The least bit ahead of it.

Q And the other bus was stopped? A Yes.

Mr. Simon: That is all.

Re-cross examination by Mr. Dorgeval.

20 Q When you saw the other bus it just came to a stop? A Yes.

Q Nobody else was thrown to the floor that you saw? A No, sir.

Q And you were sitting in the next to the last seat? A Second side seat from the rear.

Q You were not thrown out? A No.

Q And you were not nearly thrown out? A All that I knew the bus gave a real jerk. I was sitting with my boy friend and I felt his arm tighten around me.

30

(Witness excused.)

Mr. Simon: Plaintiff rests except with the right to call the doctors.

Mr. Dorgeval: I object to that.

The Court: Then we will have to take a recess. The doctor was here and had to go away and the doctor cannot help it. He had a quarter past three appointment to give an anesthetic. You would not consent to his being put on.

40

Motion for a Non-suit.

Mr. Dorgeval: I do not want to be put in a false position.

The Court: No, but I will adjourn now because I cannot help it.

Mr. Dorgeval: I will consent to go on.

The Court: All right. I do not see what harm it will do. If you are embarrassed I will take a recess until tomorrow morning. 10

Mr. Dorgeval: If your Honor wants to go ahead I will go ahead, of course. I move for a non-suit. I suppose a motion is in order now.

The Court: Yes.

Mr. Dorgeval: On the ground that there has been no proof of negligence on the part of the defendant. There is no proof at all to show negligent operation. The proof is that there was danger of an accident and an accident was imminent and in that situation the driver of the Public Service bus applied his brakes and there was a jerk and there is no testimony as to the nature of the jerk, whether it was anything unusual or remarkable or anything that would bring it within the line of cases, the jerk and jolt cases, and furthermore from the testimony of the plaintiff's witnesses it comes directly under the case of Corkill, and I can get the citation in a moment, in which a trolley car motorman crossing a railroad track or railroad tracks to avoid an accident with a train, accelerated his speed suddenly and as a result one or several of the passengers or all of them were thrown from their seats. 20 30

As it happened the train stopped before it reached the crossing so that as a matter of 40

Catherine Reddy, direct.

10 fact nothing would have happened if he had not done this, but the situation presented according to the plaintiff's own case was a situation of imminent peril, and in that situation he accelerated his speed and got across the crossing to avoid the accident and our own Supreme Court in that situation says that that was the exercise of a high degree of care. Had he done anything else in the situation it would have been negligence.

The Court: What is the citation? I will reserve decision and you can give it to me afterwards. I will look it up before the morning. Have you anything to add?

20 Mr. Simon: I do not think there was anything to be said about that.

The Court: My own notion is that there is something in it. You may proceed. I shall not need another jury today. You may retire until tomorrow morning.

30 CATHERINE REDDY, was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct examination by Mr. Dorgeval.

Q Mrs. Reddy, where do you live? A 43 Linden street, Passaic.

Q Are you related in any way to Clinton Harley? A Only by marriage.

40 Q Just what relation to him are you by virtue of marriage? A He was married to my niece.

Catherine Reddy, cross.

Q Did he have any immediate relatives here on his own side? A No.

Q Any mother or father? A No.

Q Do you know where he came from? A South Carolina.

Q Is there anyone up here that you know of who is more closely related to him than you are? 10
A No.

Q As far as you know, where is he at the present time, to the best of your knowledge? A In Mexico.

Q And what do you base that on? A I received a postal the latter part of October from him, from San Juan. I would not be positive, but I am almost sure it was, I know it had the biggest barroom in the world. I recollect that. 20

Q And from what country? A Mexico.

Mr. Dorgeval: That is all.

Cross examination by Mr. Simon.

Q Do you know how the Public Service happened to get your name?

Mr. Dorgeval: That is objected to.

The Court: Sustained. 30

By Mr. Simon.

Q When was the first that you knew that you would be called in this case? A Somebody called to see me on the case.

Q And when was that? A I really cannot tell, but I reckon it was on a Sunday morning.

Q And how long ago? A I really cannot tell you. 40

Catherine Reddy, cross.

By the Court.

Q A week ago, two weeks, or three weeks?
A It might be about three weeks ago.

By Mr. Simon.

10 Q So that about three weeks ago for the first time someone called you on the phone? A They did not call me on the phone at all.

Q Came over to see you at your home? A Yes.

Q And asked you what you knew about Clinton Harley? A Yes.

Q And you told him at that time that you had gotten a postal card from him and he was somewhere in Mexico? A Yes.

20 Q Do you know when you got this card? A The latter part of October, but what date I do not know.

Q You mean this last month? A Yes.

Q Was that the first you heard from him? A In four years.

Q Have you got that card here? A No, I have not. I kept it for a few days and I disposed of it because I was not interested in it at all.

Q You were not interested? A No.

30 Q He was your nephew by marriage? A But the card did not interest me. I kept it for a few days and I disposed of it.

Q Were you very friendly with him?

Mr. Dorgeval: That is objected to.

The Court: We are not interested in whether she is friendly.

40 Mr. Simon: She says that for four years she had known him or had been in the family and this is the first she heard of him.

Catherine Reddy, re-direct.

The Court: What difference does it make. The only question is where is he. She says he is in Mexico. We are not interested in what she thinks of him or whether the wife is with him, or whether the bar is the biggest or smallest in Mexico.

10

By Mr. Simon.

Q Do you remember whether there was an address on that card or not? A There was, but I cannot remember it.

By the Court.

Q You have not the postal with you? A No, I disposed of it.

By Mr. Simon.

20

Q Did you tell it to the Public Service that he wrote to you and gave you an address? A He was not talking to me at first. He was talking to my husband at first. He asked me a few questions about his wife and I thought it was personal and I did not answer.

Q That is all you know about it? A That is all.

Q You do not know whether he is here in the states or not? A No.

30

Q Do you know when he went to Mexico? A No, I do not.

Q That is all you know about him, he may have been here for the last six months or a year? A I do not know.

Re-direct examination by Mr. Dorgeval.

Q Do you believe he is around here anywhere? A I believe he is in Mexico yet.

40

Josephine De Lotto, direct.

JOSEPHINE DELOTTO, was called as a witness on behalf of the defendants, and being first duly sworn, testified as follows:

Direct examination by Mr. Dorgeval.

10 Q You were on this Public Service bus, were you not? A Yes.

Q And where were you sitting? A Third seat from the rear on the left side.

Q And across the seat facing the front of the bus? A Yes.

Q And you were sitting next to the aisle or next to the window? A Next to the aisle.

Q And your friend Miss Pallatina— A She was sitting towards my left.

20 Q In the same seat with you? A Yes.

Q Do you remember this bus riding along Outwater Lane? A Yes, sir.

Q Do you remember the jerk or whatever it was? A Yes, there was a jerk.

Q Were you thrown from your seat? A No.

Q Were you nearly thrown from your seat? A I do not remember.

Q You were not thrown from your seat? A No, sir.

30 Q And you were sitting next to the aisle? A Yes.

Q Do you remember whether it was raining at that time? A The streets were wet.

Q What first attracted your attention to the plaintiff in this case? A I heard a commotion.

Q Where was that commotion with reference to you, was it alongside of you or ahead of you or behind you? A Behind me.

40 Q Did you look around? A Yes, I did.

Josephine De Lotto, cross.

Q And what did you see? A She was being helped up and she was seated in the back seat of the bus.

Q That was the first thing that attracted your attention? A Yes, sir.

Q Are you connected with the Public Service in any way? A No, sir. 10

Q Any member of your family so connected? A No, sir.

Cross examination by Mr. Simon.

Q Were you looking out of the window at the time? A Yes, I was sitting with my friend and looking out at the window at times.

Q And this bus gave you a jerk? A Yes, but I received more than one of those jerks. 20

Q Do you know whether the rear of the bus struck the curb? A I do not remember that.

Q What was the position of the bus after it gave a jerk, did the bus make any turn at all? A I really could not remember.

Q Do you remember seeing another bus on Prospect street? A I heard it mention that there was a bus coming there.

By the Court. 30

Q Did you see a bus on Prospect street? A No, I did not. I heard it mentioned.

The Court: We only care for what you saw.

By Mr. Simon.

Q You were looking out of the window? A On the left hand side. 40

Lena Pallatina, direct.

Q Did you at any time see a bus at all?

The Court: At that point?

A No.

Q All you know is that your car gave a jerk?

10 A Yes, sir.

Mr. Simon: That is all.

(Witness excused.)

LENA PALLATINA, was called as a witness in behalf of the defendants and being first duly sworn, testified as follows:

20 *Direct examination by Mr. Dorgeval.*

Q You were sitting with your friend Mrs. DeLotto? A Yes, sir.

Q And you were sitting next to the window or next to the aisle? A Next to the window.

Q Were you thrown from your seat? A No, sir.

Q Do you remember that there is a down-grade there? A It is a little down grade.

30 Q Do you remember whether it was raining or not? A Not at that moment. I know it had been raining.

Q What, if anything, attracted your attention to Mrs. Feinner? A I heard someone say that a woman fell off the seat.

Q What did you do when you heard someone say that? A I turned around, a man was helping the lady up in the back.

40 Q This lady that was being helped up, how far behind you was she, the next seat or the

Lena Pallatina, direct.

second seat or the third seat? A I do not know.

Q What seat were you sitting in? A On the third from the rear.

Q On the left side? A Yes.

By the Court.

10

Q And she was behind you? A Yes.

Q She was either in the last seat or the next to the last seat? A Yes.

Q These were all cross seats? A Yes.

Q What made her fall, do you know? A I do not know.

Q Did you experience anything just before you were told that a woman had fallen? A The bus gave a jerk.

Q How soon before this that you heard someone had fallen on the floor? A Just a little before. 20

Q What kind of a jerk was it?

Mr. Dorgeval: If your Honor please—

The Court: Withdrawn. Go ahead. I want to save time and that is all.

Mr. Dorgeval: That is all.

By the Court.

30

Q What kind of a jerk was—

Mr. Dorgeval: That is the kind of a question that I would object to if counsel asked it for the reason that it is not within the scope of the direct examination.

The Court: You should object to anything that is asked that is improper whether asked by the Court or counsel, and I have no objection to your objecting. 40

Lena Pallatina, cross.

Mr. Dorgeval: In practice I do not object usually and in fact I objected at no time before.

The Court: I will withdraw it.

Cross examination by Mr. Simon.

10

Q What kind of a jerk was it?

Mr. Dorgeval: I object to that on the ground that it is outside of the scope of the direct examination.

Mr. Simon: She said there was a jerk.

The Court: In answer to my question. Counsel should have objected then, I suppose.

20

Mr. Simon: It went into evidence.

The Court: You can make her your witness.

Mr. Dorgeval: Counsel can do that if he wishes to. I am satisfied if he makes her his witness.

30

The Court: I will allow you to make her your witness. I will sustain the objection. I think it is a close question and perhaps you are right. In view of the fact that I brought out, and he did not, I think it is only fair that you may make her your witness. I will let you open your case as to this witness.

By Mr. Simon.

Q Did you see this woman on the floor? A No.

Q Do you know whether or not she was on the floor? A No, sir. When I turned around
40 the man was helping her up.

Lena Pallatina, cross.

Q A man? A Yes, I think it was a man.

Q Do you not remember whether it was a man or woman?

Mr. Dorgeval: Either counsel did not get the full answer—

The Court: He is asking her whether she is not sure it was a man. 10

By Mr. Simon.

Q Do you not remember whether it was a man or woman that helped her up? A I think it was a man.

Q Did you know that she was seated with someone else, a woman alongside of her? A No, sir, I glanced and I saw something, it must have been a man that helped her. 20

Q So that you do not know? A No, sir.

Q You sat in front of her? A Yes, sir.

Q Did you hear someone scream? A No, sir.

Q What happened about just before you looked around and saw this woman being picked up? A I do not remember.

Q Did it not recall to your mind the fact that a woman was being picked up that something had happened? A I knew something happened and I felt a skid or jerk. 30

Q How did you feel it? Tell us what happened to you when you felt the skid or jerk. A It happened so quick that I do not know. I did not feel anything. I mean it did not throw me off my feet. Maybe I went forward a little bit.

Q You were seated on the outside or by the window? A Window.

Q Then you would have to fall over the other girl front? 40

Lena Pallatina, re-direct.

Mr. Dorgeval: Objected to.

The Court: Sustained.

Q There was a young lady between you in the aisle? A Yes.

10 Q This jerk, where was it in relation to the corner of Prospect street when you felt that jerk, how far from the corner? A I do not remember. At the time it happened I was looking out of the window, opposite from Prospect street. Prospect street is on the right.

Q Did you see any other bus there at all? A No, sir.

Q Did the car after the jerk skid, did it make a half turn around? A I do not remember.

20 *By the Court.*

Q Did it stop? A It did not exactly stop.

By Mr. Simon.

Q Did you hear a police officer call the attention of the driver that a woman fell? A I do not remember.

Mr. Simon: That is all.

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

Q Are you connected with the Public Service in any way? A No, sir.

(Witness excused.)

Joseph Hastick, direct.

JOSEPH HASTICK, was called as a witness for the defendants, and having been first duly sworn, testified as follows:

Direct examination by Mr. Dorgeval.

Q You were sitting in the bus at the time this occurred? A Yes. 10

Q You were with the young lady who testified here? A Yes, sir.

Q Do you drive an automobile? A Yes, sir.

Q How long have you driven an automobile? A Yes, sir.

Q How long have you driven an automobile? A Four years.

Q What would you say about the speed of the bus you were in, the Public Service bus immediately before the accident? A Between 10 and 15 miles. 20

Q Was your bus on the right side of the road or left or center or where was it? A It was right on the right side of the road.

Q Did you see the other bus? A When our bus jerked, I just happened to see forward and I saw the other bus make a dead stop.

Q The other bus when you saw it was coming to a stop or had it stopped, is that correct? A Yes. 30

Q And what did your bus do, did it stop or did it go on? A After the bus skidded to one side—

Q Just tell me what your bus did; did it go on or did it stop? A It almost made a dead stop, but it did not stop completely and went on.

Q Are you connected with the Public Service in any way? A No, sir. 40

Joseph Hastick, cross—re-direct.

Q Any member of your family so connected?
A No, sir.

Mr. Dorgeval: That is all.

Cross examination by Mr. Simon.

10

Q You say the bus jerked and skidded to one side? A Yes.

Q What side did it skid to, right or left? A To the right.

Q What kind of a skid was it, did it make almost a half a turn around? A No, I would not say that it made a half turn.

Q What kind of a turn would you say it made, if any?

20

Mr. Dorgeval: There is no testimony of any turn at all.

The Court: I think I will take judicial notice of the fact that a skid is a partial turn. This is cross examination. My idea of a skid is a side motion, going ahead is a slide. A skid is where the rear of the car goes out of alignment.

Mr. Dorgeval: May I re-open my direct for one moment?

30

The Court: Yes.

Re-direct examination by Mr. Dorgeval.

Q You heard what the judge said about a skid and a slide? A Yes.

Q Did this bus skid to the side at all? A Yes.

Q How much would you say it went to the side? A About three feet.

40

Q Three feet side movement? A Yes.

Joseph Hastick, cross—re-direct.

Q Did it slide forward at all? A Yes, it did slide forward.

Q How many feet? A About ten or twelve.

Mr. Dorgeval: That is all.

By the Court.

10

Q So that the motion of the bus was ten or twelve feet forward slide and the rear of it went three feet to the right? A At the same time it was going forward it was skidding sideways.

Mr. Dorgeval: That is all.

Mr. Simon: That is all.

(Witness excused.)

Mr. Dorgeval: That is our case, with the exception of Mr. Bush who will add to Mrs. Reddy's efforts to locate the driver. 20

Mr. Simon: We will consent to that.

Mr. Dorgeval: I think we can put him on tomorrow. Then we have my doctor.

The Court: Any rebuttal as to the accident?

Mr. Simon: I would like to think that over.

(Discussion off the record.) 30

The Court: We will recess until tomorrow morning.

Whereupon an adjournment was taken until Wednesday, December 3, 1929, at 10 A. M.

Louis W. Bush, direct.

Paterson, New Jersey, December 3, 1929.

TRIAL OF THE CAUSE RESUMED AT 10 O'CLOCK A. M.

The Court: Now, then, in this case are you all ready?

10 Mr. Dorgeval: I neglected to put a witness on. Do you want me to go on with the motion?

The Court: As I understand it the case is closed except as to medical testimony, and a motion is made for non-suit.

Mr. Simon: Mr. Dorgeval said he would like to have Mr. Bush on.

Mr. Dorgeval: All I said was Bush was going to tell what he did.

The Court: If you want to put him on—

20 Mr. Dorgeval: May I have the permission to put him on if the motion goes unfavorably?

The Court: No.

Mr. Dorgeval: All he is going to testify to is what he did to get the operator here.

The Court: Then put him on or not. It is up to you.

LOUIS W. BUSH sworn.

30 *Direct examination by Mr. Dorgeval.*

Q Mr. Bush, you are employed by the Public Service as investigator? A Yes, sir.

Q And have been for how long? A Four years.

Q Were you assigned to investigate this case? A Yes, sir.

40 Q And that is, to bring witnesses to court? A Yes, sir.

Louis W. Bush, direct.

Q And did you, in the course of your investigation try to get the operator, Mr. Harley, the operator in this case? A Yes, sir.

Q Tell us what you did. A Why, Mr. Harley after this accident, about two months after the accident, he left our employ to go with the Standard Oil Company to open a gasoline station. He left them and he disappeared, and we were unable to get any trace of him at all. We kept a very accurate record as to his former employees—employers—and references that he had given. 10

We made a complete canvass of all these references, which included his mother-in-law and his aunt, who was here yesterday, and nobody had heard from him other than that he had been on the West Coast some place. Do you wish me to enumerate the different references? 20

Q Well, no. What do you mean by "references"? A Why, such references are required, when he gave any, such as to close relatives, nearest relatives.

Q When a man is employed he gives these references? A Business references and former employers.

Q Did you do that yourself personally? A I did it all personally, yes, sir.

Q What did you find out? A I found that he was not in this part of the country, and nobody knew exactly where he was employed, that the record was that he was on the West Coast some place. 30

Q And you talked with his aunt, the lady who testified? A I talked with his aunt, his mother-in-law, and I talked with everybody.

Louis W. Bush, cross.

Cross examination by Mr. Simon.

Q Do you know, Mr. Bush, how long he had worked for this gasoline company? A No, I do not, doctor.

10 Q Well, now, you went there to find out, I assume? A Not how long he worked there, no.

Q And didn't you ask him how long was it he was away from their employ? A No, sir.

Q Did you think it important enough to find out where this man was; how long he was in their employ? A Why, no, sir. Mr. Harley has gone about one year, approximately, from this part of the country.

20 Q All right. Now, let us see. You found when he left this gasoline employ and then immediately he left to parts unknown? A I do not know whether it was immediate or not, doctor.

Q What effort did you make to find out when he left for these parts unknown? A I don't understand you.

Q You did see this woman who was on the stand yesterday, the aunt, Mrs. Reddy, you did see her? A Yes, sir.

30 Q And it was testified she had only seen him about two months ago, to her best recollection, is that right, Mr. Bush? A I did not hear what she testified, doctor.

Q You were not here in court? A No.

The Court: He was not here in court.

40 Q It was testified to that the first anyone had consulted her about the whereabouts of her nephew was about six or eight weeks ago, I suppose that is so?

Louis W. Bush, cross.

Mr. Dorgeval: That is objected to as argumentative.

The Court: Objection sustained, characterising the other witness.

Q When did you see Mrs. Reddy?

10

The Court: I think she also said someone had seen her husband about it.

Mr. Simon: Yes, six or eight weeks ago, your Honor, the first time.

The Court: That may be. I do not recall that.

Q Do you recall when you had first seen Mrs. Reddy? A Surely.

Q How long ago would you say it was? A 20
About a month ago; about a month to six weeks ago; I am not very definite.

Q That is all right, but you knew, of course, a long time ago, did you not, that she was an aunt of this Mr. Harley's, did you not? A
A month to six weeks ago.

Q. Was that the first you knew that she was an aunt of this young man? A The first I knew personally.

Q How did you get that information? A 30
From Mr. Harley's application.

Q All right. That application blank was on your file when he first entered your employ? A
When he was appointed to service, yes.

Q And at the time this accident of September, 1928, that application was still on your file, wasn't it, at the time of this accident? A I presume it was; not to my knowledge.

Q Then, despite the fact that that application was on your file September of last year and her 40

Motion for Direction of a Verdict.

name was mentioned there, despite that fact, the first time you saw this woman and went to see her was about a month ago, that is right, Mr. Bush? A I do not understand you, doctor.

Q Despite the fact that this Mrs. Reddy's name was mentioned in the application blank, and
10 despite the fact that this accident happened over a year ago, fourteen months ago, the first effort that you made to see this woman was only about a month ago, and that is true, isn't it? A Yes.

Mr. Simon: That is all.

The Court: That is all.

Re-direct examination by Mr. Dorgeval.

Q And in the course of your experience,
20 have you ever failed to have an operator present—

Mr. Simon: I object to that. I do not think it is at all material what his experience is.

The Court: Objection sustained.

Mr. Dorgeval: All right, that is all. That is our case, your Honor. We rest.

The Court: Now, doctor, there is a motion made for a non-suit on the ground that there is no question of fact for the jury, under the case of *Corkhill vs. Camden*. Have you looked at that case?
30

Mr. Simon: Yes, your Honor.

The Court: I would like to hear you, if you care to be heard.

Mr. Dorgeval: May I now make that motion for a direction since we have put in our entire case?
40

Motion for Direction of a Verdict.

The Court: Yes.

Mr. Simon: I did not think, your Honor, that I would ever be called upon in this sort of a motion. and I do not know whether your Honor has read the case or not.

The Court: Yes, I have it before me. 10

Mr. Simon: If your Honor please, this is altogether a different, one hundred per cent. different, than this case is.

The Court: All right.

Mr. Simon: A motorman is driving a trolley car, presumably across the tracks of a railroad company. The motorman in this particular accident, as I read the case, as he came to the tracks, stopped his bus, or stopped his car. 20

The Court: Yes, the facts are entirely different.

Mr. Simon: Look how careful that man was. The Supreme Court said that he walked on the tracks, looked down and saw no train. Look how careful he was. After that the gateman of the railroad company told him to go ahead and he went ahead, and when he got on the tracks he saw that there was imminent danger, and then shot past. 30

The Supreme Court said, what more could a man have done? The Supreme Court said he did more than a reasonable man would have done.

Now, let us see—and then bear in mind, the Supreme Court does not say a non-suit should have been granted at all. It said it was not evidence presented. It being a question for defense in this case, what is 40

Motion for Direction of a Verdict.

10 the defense? None at all. They do not bring a witness here in Court who testifies as to having seen that bus before. What did the girl say? We saw no bus at all. All we knew, there was a jerk. The other man said he saw nothing. All he knew, there was a jerk. The bus went three or four feet to the side, and then twelve feet ahead, right off the track.

20 To pin their case on our evidence—what are they trying to do on our evidence? What is our evidence? They tried to win this case on this one sole question when they said for instance, Lesnick, the officer, if the driver of the Public Service bus had proceeded, wouldn't he have collided with the other bus? Why, no, said the officer, the bus was far away. That in itself answers this question. The officer says, why, certainly not, a collision would not have occurred, because they got around. The one girl testified the bus had completely stopped on Prospect street, and this driver of the bus applied his brakes. Here is a man—

30 we will assume for a minute that the driver of the Public Service bus took the stand, we will assume he was here and he has said, as they got to the corner he suddenly started up and I applied my brakes. Assuming that is the best evidence, I say a non-suit could not be granted, because that man who was on the right had the right of way, under ordinary circumstances.

40 Look what they did, they do not do that, and the only evidence is when the bus was two hundred feet away from this Prospect street, they saw a bus parked two hundred

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feet away. He says that the driver did not see it, but when the driver got fifty feet from the corner and had proceeded along, he applies his brakes. If the driver proceeded to apply his brakes fifty feet before he got to that corner, and the ordinary street is twenty-five feet wide, which makes it seventy-five feet, and the car had been some distance, fifteen feet, making it ninety feet away, and the road that is seventy-five feet wide, we have all the road where six cars could go, and ninety feet away he applied his brakes. If that is not negligence, all right, we will assume it is not. 10

Who said the brakes were in good condition? Who proved that? I cannot get over the excitement of this thing. Who says that it was necessary for him to apply two brakes, the emergency and the foot brakes? Who said they were in good condition? Who said, under ordinary circumstances, it was negligent for a man to drive fifteen or twenty-five miles an hour with a road that is wet and on a hill, with a road that is not level? It seems to me, all I would have to prove the case is to put the plaintiff on the stand to state she paid her fare, and knows a jerk happened, and for them to explain it. That is fundamental. 20 30

The Court: It may be fundamental, but it is not according to my notion of the law. I will deny the motion because there is some little dispute as to the facts. There is little, infinitesimal almost, perhaps. There is a dispute with respect to where the bus was when the brakes were applied. Some witnesses say she was at the intersection. 40

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Mr. Simon: I don't think so.

10 The Court: I think there was, that it was at the intersection, and there was some testimony that the other bus had preceded the Public Service bus around the corner into Outwater Lane. There is other testimony that the Plauderville bus did not turn around the corner and stop in Plauderville Lane. There is some dispute as to the facts that raises, perhaps, a question of negligence, and there being a question of fact, I will deny the motion, but will tell you now that I will charge the jury the law to be well settled as laid down by the Supreme Court in *Corkhill vs. Camden and Suburban Railway*. You may have an exception.

20 Mr. Dorgeval: May I answer counsel?

The Court: No.

Mr. Dorgeval: May I state my motion for direction more completely?

The Court: You can, if you like, if you want the record.

Mr. Dorgeval: So I can state all the reasons.

The Court: Yes.

30 Mr. Dorgeval: I move for a direction of verdict on the ground, first, no proof of negligence against the defendant; on the ground, second, that there is no proof of an abnormal or unusual jerk or jar, which is also an essential of this type of case. Further, that the evidenece of all the witnesses in the case, and of course, I have the right to discuss the testimony of all

40

Motion for Direction of a Verdict.

witnesses, whether they were for the plaintiff or the defendant—

The Court: No doubt about that.

Mr. Dorgeval: —is that the driver of the Public Service bus was confronted with an emergency, and under these circumstances, applied his brakes, and there was a jerk, the exact nature of the jerk has not been described, but acting in the emergency, using the best judgment he was capable of, I respectfully submit, there was nothing about his conduct, nothing in the testimony in the case to introduce any negligence and I move for a direction on those grounds, and I understand, the motion is denied, and I may have an exception.

10

The Court: You may have an exception. Now, the medical testimony.

20

Mr. Simon: I was to the hospital this morning, and I went into the operating room, the doctor was closing up an abdomen in this case, and he said they had another operation that would take about fifteen minutes, and would be here by ten-thirty.

The Court: It is ten-thirty now.

Mr. Simon: I would like to put on Dr. Mageniss.

30

The Court: Any objection?

Mr. Dorgeval: Yes.

The Court: Then, we will take a recess until Dr. Cohen comes here.

(A recess was here taken.)

40

Isidore Cohen, direct.

ISIDORE COHEN, sworn.

Direct examination by Mr. Simon.

Q You are a practicing physician and surgeon of the State of New Jersey? A Yes, sir.

10 Q For how long have you been practicing?
A Eighteen years.

Q I understand you are the official anaesthetist of the hospitals in Passaic? A St. Mary's, and the General Hospital.

Mr. Dorgeval: I will admit the doctor's qualifications.

Q I understand you are the family physician of the Seinner family? A Yes, sir.

20 Q You treated the Seinner family before? A Yes, sir.

Q And do you remember the first visit to Mr. Seinner's home after the accident? A I haven't got my data, but a week after she was injured I was notified by the organization which I take care of—

Q Where was she? A At home.

Q What did your examination reveal? A I noticed she was strapped by adhesive plaster on the chest, and had an ice bag on the head.

Q What did your examination show, doctor? A Of course, the examination—from the history of the patient she—I noticed she had a fractured rib.

Q What else? A Contusions around the head.

Q And did you examine the chest, doctor? A No, not that day, because she had another physician, and I told her, I just wrote on a

40

Isidore Cohen, direct.

piece of paper what her injuries were, that was all.

Q You were not her physician at that time?

A No.

Q Do you say she showed you some X-rays?

A Yes, sir.

Q Can you identify these X-rays as the X-rays 10
she showed you (handing)?

Mr. Dorgeval: I object to that.

The Court: Have these been proven?

Mr. Simon: No, your Honor.

The Court: I will let him answer yes or
no.

The Witness: Yes, sir; they were handed
to me by the patient.

The Court: You understand, I am letting 20
him answer whether these were the ones
handed to him by the patient.

The Witness: Yes, sir.

Q And do you know from your own knowledge
that these are the X-ray films taken of Mrs. Seiner?
A I cannot tell.

Q Do you know Dr. Terhune, doctor? A
Yes.

Q What position does he hold? A X-ray 30
man of the Passaic General.

Q Did you have occasion to speak to him
about this case?

Mr. Dorgeval: That is objected to.

The Court: Sustained. It would be hear-
say.

Mr. Simon: I will withdraw that, then.

Q Doctor, before you examined her the second
time, I presume— A Well, I came there the 40

Isidore Cohen, direct.

next week and looked at her, but I did not examine her then. I just looked at her.

Q Now, doctor, when did she come under your care and treatment? A About the middle of November she asked me whether I would be kind enough to take care of her and treat her, so I said, "If you want me to, if you will discharge Dr. Bleasly I will be glad to, but I cannot do anything until you talk to Dr. Bleasly," because I did not want to have any trouble with another doctor.

The Court: What year was that?

The Witness: Last year, November, 1928.

Q Then, she was your patient from that time on, doctor? A I think she was.

Q You do not know of her having any other doctor besides you? A That I don't know.

Q When did you last see her, doctor? A I saw her in my office, I think, the latter part of November, around the 20th or 22nd.

The Court: Of this year?

The Witness: Of this year.

Q Doctor, when you treated her, did you treat her at her home? A I saw her about five or six times at the house.

Q What did you treat her for, and what did you find? A I strapped her chest again, she complained of severe pain over that fractured rib.

Q How many weeks after the accident? A That must have been about six or seven weeks.

Q Then what did you do? A I strapped her up. She said she felt a little bit pain, but when the weather starts in she feels pain again. The only thing I can advise is to give you some sort

Isidore Cohen, direct.

of heat treatment that may help you with the pain; too much medicine will not do the trick. The damage is done, and we have got to wait until we see what happens.

Q What medication did you give, doctor? A Some medicine that will relieve pain in her chest.

Q Did you give her any medicine for her chest? A For a cough. 10

Q She coughed? A At the beginning she coughed up blood, but I never saw that.

Mr. Dorgeval: Just a minute, doctor.

Q How do you know? A Well, from the history.

Mr. Dorgeval. Just a minute.

20

Q So, doctor, you were her family doctor, were you not?

Mr. Dorgeval: My objection was this—

The Court: He did not answer it.

The Witness: I answered partially.

Mr. Dorgeval: I was going to move to strike this part of the doctor's reply—he said she had been spitting blood and he did not see it. 30

Mr. Simon: I object. He is the treating doctor.

The Court: He may say that is what she told him.

Mr. Dorgeval: He did not say that. He said he did not know.

Q How did you know that she expectorated blood? A She told me so, and then with the 40

Isidore Cohen, direct.

fractured rib, I suppose, one and one would coincide.

Mr. Dorgeval: I ask that the doctor omit suppositions.

The Witness: Well, I cannot tell.

10 The Court: Wait a moment, doctor. I will let it stand that this is part of the history, and then strike out the rest.

Q That is the history you got from her, doctor. Now, did she tell you how often she spit blood?

Mr. Dorgeval: That is objected to.

The Court: No, I will allow that.

20 A When she coughed she would bring up phlegm with streaky blood.

Mr. Dorgeval: May I have an exception?

The Court: You may.

Q For how long did that continue? A That only continued for a short while, that is, blood, but kept on coughing.

30 Q Well, now, what medication did you give her for that? A I gave her something to alleviate the cough.

Q What did that indicate in your own mind, the fact that she was continually coughing and had expectorated blood and had a fractured rib, as to what was wrong with her?

Mr. Dorgeval: I object to the form of the question.

The Court: The question is directed as to that time.

40

Isidore Cohen, direct.

Q What conclusion did you come to? A The conclusion with the fractured rib, she must have a punctured lung, a puncture to the pleura, to the lining of the lung.

Mr. Dorgeval: I object to that answer and ask it be stricken out. 10

The Court: That is his conclusion.

Mr. Dorgeval: That must be a reasonable and probable result.

The Court: I understand that. That is his answer.

The Witness: Absolutely, with a punctured rib. I was not there to see how far it punctured the lung. I cannot see, but from the X-ray— 20

Q Well, now, doctor, do you say she had a rupture of the lung or injury of the lung or pleura?

Mr. Dorgeval: There has not been any mention made of a rupture.

Mr. Simon: I said fractured rib must have ruptured the lung or the pleura.

The Court: But it is not the lung. 30

The Witness: It is the lining, the pleura is the lining of the lung. It could go right through the pleura and into the lung, which has happened often.

The Court: I understand. My question is whether the pleura and the lung are the same.

The Witness: They are two different things.

The Court: That is what I thought. 40

Isidore Cohen, direct.

Q What made her cough, in your opinion? A Irritation of the pleura, lung.

Q What, in your opinion, causes expectoration of blood? A The punctured rib must have pierced her, injured her, abraded the pleura and the lung, and while it irritated it, made her cough.

10 Q Doctor, you say you have treated her recently, too? A From time to time.

Q What did you do for her? A I just gave her a little medicine for her nervousness, and give her lamp treatments.

Q This nervousness, doctor, is she a nervous woman? A To a certain extent, yes.

Q You knew her before this accident? A I have treated her twice for grippe.

20 Q Doctor, what sort of a woman was she? Do you remember what she weighed, or is there any difference in her general health from that time to the present date? A I don't know what she weighed, but I know she was much stouter and heavier than what she is now.

Q Do you know about her color? A It was good.

Q Before? A Yes.

30 Q How is it now? A Sallow, her cheeks are sunken. It shows there is a sign of loss of weight by looking at her entire body. It shows she has lost some weight. How much I do not know.

Q What was her health before this accident? A As far as I know was good, except I treated her twice for grippe, for colds.

Q Did that pass off and cure after this grippe? Was she discharged as cured? A Yes.

40 Q And do you know how many times in all you have seen her up to date? A I have seen her about forty times and my charge is \$3 a

Isidore Cohen, direct.

visit, and my bill is \$5 for strapping her chest, and I made forty other calls. The entire bill is \$125.

Q The \$3, is that a reasonable charge call for you? A \$3 is reasonable, and \$5 for the strapping.

Q Are you familiar with X-ray charges? A 10
If I am not mistaken an X-ray of the chest—

Q Are you familiar? A I think so. There are various charges by various doctors, but I think Dr. Terhune charged \$20.

Mr. Dorgeval: I ask that be stricken out.

Q Tell us what was charged for an X-ray of the chest. A \$20. 20

Mr. Dorgeval: I object to that and ask it be stricken out. There is no proof X-rays were taken.

The Court: Yes, somebody told us about it.

Mr. Dorgeval: That was subject to being connected up.

The Court: Yes.

Mr. Dorgeval: If it was identified. 30

Mr. Simon: She said she was taken to Dr. Terhune's office to be X-rayed.

The Court: Yes, somebody said that Dr. Roth charged \$25 and Dr. Terhune \$15 or \$20.

Q Is \$15 a reasonable charge for an X-ray of the chest? A Very reasonable.

Q Is \$25 a reasonable charge for X-rays of the head? A For four views, yes. 40

Isidore Cohen, direct.

Q Doctor, what would you say as to her condition today, doctor? A Well, she has suffered pain over that fractured rib and along the spine which connects that rib to the spine. Now, in all probability, I am not positive, she must have injured that nerve as it emerges from the
10 spinal canal, and those pains come on and off, and I think with the change of weather these pains come on.

Q What about the nerve injury, doctor? Does the nerve regenerate very readily or not?

A If it is going to regenerate, I think it is going to regenerate within six months. After six months I think it will never regenerate.

Q Is it a permanent injury, in your opinion, or not?

20 Mr. Dorgeval: I think we ought to have the injuries proven more definitely before the doctor gives an opinion.

The Court: He says there was a nerve injury where it emerges from the back.

The Witness: It emerges from the spinal column and goes along the ribs.

The Court: That is her trouble?

The Witness: Well, her main injury.

30 The Court: Is it permanent?

The Witness: From the time of the accident I think now I would say yes. If it was six or seven months ago I would hesitate to say whether it was permanent, because it is hard to tell so soon after an accident, but as a rule six months is sufficient.

40 Q This being fourteen months, is it your opinion it is a permanent injury? A Yes.

Isidore Cohen, direct.

Q This cough she complains of, in your opinion, is it a permanent thing or not?

Mr. Dorgeval: I object to that.

The Court: She said she coughed.

Mr. Dorgeval: At the beginning.

The Court: Now. 10

The Witness: Coughs on and off, your Honor.

Mr. Dorgeval: I missed that.

The Court: He said that, but he did not say she spits blood now. He is now asking about the cough.

Q In your opinion what is the cause of this cough, doctor? A From the history at the beginning and the fractured rib, I presume that the pleura, which is the lining of the lung, has a light fracture so to speak. 20

Q Is that a permanent thing, doctor, or not?

A I think this is permanent now.

Q Doctor, you said your charge would be about \$125? A Yes, sir.

Q Doctor, from the examination you made and the treatments you gave, is she able to bend, stoop and so forth, as she did before this accident, and move about? A I cannot tell you how much she can bend. Of course she bends, but how much I don't know. 30

Q Is there any limited motion in the chest, doctor? A Limited motion?

Q Yes. A Why, no, I do not think there is much limited motion. I think she breathes, but has pain. How much I cannot tell.

Q And do you think, doctor, she can exert herself today in all directions as she could formerly? A I would say partially limited, but I 40

Isidore Cohen, cross.

cannot say how much, but it is hard for me to say just which.

Q Is she still under your care? A She comes in once in a while complaining of pains, if the weather will be damp and rainy, I suppose she will have a little pain, but if it is nice and dry I do not think she will have any pain, that is, from previous experience with other people.

Mr. Simon: That is all, doctor.

The Court: Cross examination.

Cross examination by Mr. Dorgeval.

Q Your previous experience, doctor, is that a fractured rib usually heals up and makes a complete recovery? A Lots of times, yes.

Q Doesn't a fracture of this kind, usually make a complete recovery? A I would not say all fractures.

Q I only said usual. A Yes.

Q There is really no limitation of movement? A No, I would not say, not say, not entirely, because she breathes fairly good, because I was listening to her chest, and I get good breathe signs.

Q Good breathe signs? A Yes.

Q No rales? A No rales, no.

Q Rales, pardon me. There is no rubbing? A Not at the present, a friction rub.

Q What? A That is when the pleura rubs against the other.

Q Nothing like that now? A Not now.

Q She has a normal excursion on both sides of the chest? A As far as I can see, yes.

Isidore Cohen, cross.

Q There is no evidence of any chronic bronchitis, is there? A Not throughout the lungs, no.

Q That is what I mean. A I would not say chronic, no.

The Court: About the time in the middle of November when you started to treat her she had recovered from the broken rib, had she, or was she still strapped at that time? 10

The Witness: Oh, no. The strapping was taken off.

The Court: Was it healed and had it grown together again?

The Witness: I do not know whether it did or did not.

The Court: Did you examine her? 20

The Witness: Oh, yes, sure.

The Court: Did she complain of any broken rib at that time?

The Witness: No, I could not find a broken rib, but being she complained of pain I strapped her again.

Q You never saw a broken rib, yourself? A Oh, no. I did not examine the woman while under Dr. Bleasby's care. 30

Q You examined her when, and went for the Society? A Yes, superficially. I came in and talked to her to find out what the trouble was, and if there was another physician I did not treat her.

Q She was all strapped and you could not see what was underneath? A No.

Q And then when you treated her you strapped her again? A Yes, and she com- 40

Isidore Cohen, cross.

plained about pain, and I figured by the limitation of that part she would feel better.

Q But the rib was healed already? A In all probability, yes. I could not say, after six weeks a rib like that should be healed.

10 Q Could you tell by the palpitation whether it was in good alignment? A That is hard for me to say. You feel a little lump, and you put your finger across at the rib.

The Court: Did you feel it?

The Witness: I did, sure.

Q That is normal, of course? A That is the normal procedure in opening regeneration.

20 Q That is the cement that nature throws out to heal? A That is right.

Q As far as your examination of the rib was concerned— A It looked good.

Q In good alignment? A Yes.

Q In good position? A Yes.

30 Q So outside of that, doctor, when you first examined her in the middle of November, 1928, or when you first started treating her in the middle of November, 1928, there were no objective signs of injury, were there? A Well, the objective was that I saw that little lump there.

Q Outside of that? A Outside of that, no, I didn't see anything.

Q No objective signs? A No.

Q All of her injuries then were entirely subjective? A Yes.

40 Q Will you please tell the jury the difference between subjective and objective? A Objective is what the doctor sees, and subjective is what the patient tells you.

Isidore Cohen, re-direct.

The Court: What he cannot see, like a pain in the stomach?

The Witness: That is right.

Q The doctor is entirely dependent on what the patient tells him? A The doctor is dependent on what the patient tells him. 10

Q And all her symptoms were subjective with the exception of this little enlargement on the wrist? A That is right.

Q Is that society that you are connected with giving free medical treatment? A Yes, for diseases, that is, colds or something like that. When it comes to accidents or operations I get paid for it.

Q You get paid for it? A Absolutely.

The Court: By the patient and not the society? 20

The Witness: By the patient.

Q Your fee does not cover that? A Absolutely not.

Re-direct examination by Mr. Simon.

Q This injury to the pleura, doctor, what happens as to the result of traumatic pleurisy? 30

Mr. Dorgeval: I object, no testimony as to traumatic pleurisy.

Mr. Simon: Anyhow, there is. He said injury to the pleura.

The Court: No, I think not. What happened to this injury? You might ask him, but do not call it something that he has not called it. He has not called it traumatic pleurisy. 40

Isidore Cohen, re-direct.

Q What is the injury to the pleura result of blood, what is the diagnosis, what do you call it?

Mr. Dorgeval: I object to that.

The Court: What was this woman suffering from?

10 The Witness: Traumatic pleurisy. This was not where she got a cold or dry pleurisy due to disease.

Q There is no question that she suffered from traumatic pleurisy? A None at all.

Q What happened to the pleura in this case?
A As a rule, the pleura—

20 The Court: No, what happened in this case, not as a rule. What did you find, doctor?

The Witness: I cannot tell you what I found but only from symptoms, what I listened to.

Q When you listened, doctor, what did you hear in that neighborhood of traumatic pleurisy?

30 A As a rule you do not hear anything when it is normal, but when abnormal you get a friction rub.

Mr. Dorgeval: The doctor is answering as a rule again.

The Court: We do not want the rule. This must be an exception.

Q Did you get friction rub in this case? A No, sir, I would not say exactly.

40 Q What kind of rub? A A big breathing sign that did not suit me.

Isidore Cohen, re-cross.

Q Was that normal or abnormal? A Abnormal.

Q No doubt in your mind? A Absolutely.

Q In your opinion, would that be permanent or, at least, recur again? A It is hard for me to say.

Q Doctor, these traumatic pleurisies, when the pleura is affected that way, what may happen to that pleura again, in all probability, is there weakness there or not? 10

Mr. Dorgeval: I object, unless confined to this case.

Q (Continued.) Yes. A She can catch cold faster than others would. For instance, if the patient has pneumonia— 20

Q You say she can catch cold faster. Why, doctor? A The resistance of that part that was injured is never as good as it was before and the liability of other trouble setting in may be possible.

Q What about her general resistance, doctor, is it as good as it was before? A I don't think so.

Mr. Simon: That is all. 30

The Court; Cross examine.

Re-cross examination by Mr. Dorgeval.

Q Doctor, you only saw her twice before for grippe? A Twice before.

Q When were those two times? A It is hard for me to tell you. I have been the doctor for this organization for the last seven or eight years. 40

Isidore Cohen, re-cross.

Q I thought it would be difficult, but you have been testifying a great deal about what her previous condition was. A I speak to lots of people every day.

Q I know you are very busy. You are busy today? A I am busy every day and busy this
10 afternoon again.

Q You only treated her twice before this accident? A That is all, for grippe.

Q That was the only time? A Absolutely.

Q When you treated her for grippe you did not have occasion to make a thorough examination? A No.

The Court: Is that all?

Q Now, doctor, of course when you first saw
20 this lady the bone was healed, that is correct? A The first time I started to treat her?

Q Yes. A In all probability, what I found from the examination.

Q The first time you saw her she was strapped so you could not see? A I could not see nothing, absolutely nothing.

The Court: He said he did not see her
30 those two times. There was another doctor there and he would not treat her. He just saw her, and at that time looked at the X-rays that she showed him and made it clear that he could not treat her. Later on, in the middle of November when he found that the doctor that was treating her was no longer treating her then, for the first, he treated her.

Q Then, the first time you examined her the
40 rib was healed? A Yes, sir.

Isidore Cohen, re-direct.

Q And isn't it a fact, doctor, that the pleura would heal a great deal more quickly than the bone? A That is hard for me to tell you.

Q Doesn't it usually heal much quicker than the bone? A I cannot tell you. It depends how much injury. If there was a piece of bone sticking into the pleura it would not heal.

10

Q In this case you did not see any bone sticking into the pleura? A I only examined her superficially, along the outside of the skin.

Q If you thought it was necessary you could have X-rays taken? A I did not think it would show much after six weeks.

Q You never found any puncture of the lung? A No, sir.

Q You did not find it? A No, sir, not after six weeks.

20

Q You did not find any bone protruding into the lung? A From the history of spitting up blood, I assume that is what happened.

Q What you testified to about traumatic pleurisy is a presumption, is that right? A Yes, presuming from the history taken, one, altogether, you think of that.

Q It is the history and a presumption? A Yes. I am not positive.

Q This is something that you did not actually find there yourself? A No.

30

The Court: Anything more?

Mr. Dorgeval: That is all.

Re-direct examination by Mr. Simon.

Q Doctor, have you any reason to believe that this patient had this cough and had this expectoration of blood, from the history of the case and from the examination you made?

40

Bryant C. Mageniss, direct.

Mr. Dorgeval: That is objected to.

The Court: I will allow that. Is there any reason why you think she is lying and malingering?

The Witness: I do not think after I—

10 The Court: Yes or no?

The Witness: No, she is not lying.

The Court: That is your opinion?

The Witness: No, she is not lying.

The Court: The next question.

By Mr. Dorgeval.

Q You do not find any objective symptoms there at all? A Nothing objective.

20 Q Nothing that you can find from your examination to go on? A Do I know that for the moment?

Q Yes. A No.

The Court: That is all.

BRYANT C. MAGENISS sworn.

Direct examination by Mr. Simon.

30 Q Doctor, you are an old practicing physician and surgeon in this State? A Do not say old. I am a practitioner of the State.

Q Well, we will say you are a young practitioner.

Mr. Dorgeval: I will admit the doctor's qualifications.

40 Q Now, doctor, you are the chief surgeon of what hospitals in Paterson? A I am consulting

Bryant C. Mageniss, direct.

surgeon of the Paterson General, and the Miriam Barnett Memorial.

Q You have been surgeon at Paterson for how many years? A Oh, forty years at least.

Q Forty years at least? A Yes.

Q You did examine Mrs. Seinner at my request several weeks ago? A I did. 10

Q And made a thorough examination, doctor, did you? A Yes.

Q Now, doctor, tell us what examination you made?

The Court: And when, doctor.

The Witness: I cannot remember the date. It was a few weeks ago when the case was to come up, and I got the history of the case then. 20

Q Yes? A And examined her, looked at her, and saw she was a spare woman in build, and nervous condition, and depressed expression of face, and from the history of the case—

Mr. Dorgeval: Now, just a minute. I object to that.

The Court: Only from your examination, doctor. You are not the attending physician and, therefore, you cannot give us the history? 30

The Witness: No.

Q What examination did you make, doctor?
A Well, I examined her and found that there was some tenderness over the right side of the chest, posteriorly, and that the breathing was not just as clear as it was on the other side, but not to any marked extent. Those are the only things that I discovered. 40

Bryant C. Mageniss, direct.

Q And tenderness, doctor, in your opinion, if that had lasted for fourteen months, would you say that would be a permanent condition or not?

Mr. Dorgeval: Objected to.

10 The Court: I will allow that. That is not from his examination.

Mr. Dorgeval: This question is given without any basis at all. The doctor finds tenderness.

Mr. Simon: I will withdraw it, if your Honor pleases.

The Court: All right, withdrawn.

20 Q Doctor, do you remember what particular part was tender? A I think it was about the sixth and seventh rib, underneath the shoulder blade.

Q Doctor, was she able to exert herself and bend herself in all directions like a normal individual? A She complained of pain when she did so.

30 Q Did your examination show that she was suffering pain? A I could not tell that. She complained in her history, and from questions, it always pained her when she stooped over. I could not tell that.

Q The breathing sounds on that side, you say, doctor, was abnormal?

Mr. Dorgeval: I object to that.

Q (Continuing.) Was it normal, doctor?

The Court: Do not testify.

40 A There was a slight change around the area that had been injured.

Bryant C. Mageniss, direct.

Q Doctor, in your opinion, if that change persists today, fourteen months after the accident, would you say in your opinion that would be permanent?

Mr. Dorgeval: There is nothing to show what that is.

10

The Court: Objection sustained.

Q Doctor, assuming in September, 1928, a patient of yours met with an accident—

The Court: The trouble is there is no testimony here as to whether this breathing condition was present before the accident or not. That is the ground.

Mr. Simon: I think, if your Honor please, she said she was perfectly well and never had any trouble there.

20

The Court: She would not know that.

Mr. Simon: Oh, yes. Who else can better testify than the plaintiff herself?

The Court: Do not let us waste any more time. I have wasted an hour waiting for these doctors.

Mr. Simon: We were here yesterday.

30

The Court: I know you were. You may ask it, and I will allow it.

Q Doctor, assuming a woman of fifty-three sustained a broken rib and had expectorated blood thereafter some time, and had a cough that lasted to the present date, what would you say, in your opinion, doctor, she had suffered from?

40

Bryant C. Mageniss, direct.

Mr. Dorgeval: I object to that on the ground that it does not give sufficient facts, and does not give the facts accurately.

Mr. Simon: Maybe counsel can reframe it.

10 The Court: What is the inquiry?

Mr. Dorgeval: Spitting of blood was for a short time.

The Court: She says right up to now.

Mr. Dorgeval: That is right, but the doctor says for a short time.

20 The Court: Well, I know, but some testimony is that it is right up to now. It is for the jury to say whether she does spit blood now or not, but she—is there anything else wrong with it? You may answer it, doctor.

Mr. Dorgeval: I think there are insufficient facts.

The Court: I thought she said she was in good health before and weighed 160 pounds and now weighs 128.

30 Q Would you say, doctor, in all probability was the injury she suffered in this case—

Mr. Dorgeval: We will object on the ground of insufficient facts, nothing to show what the condition is.

The Court: What did you find? He has already testified to what he found.

The Witness: From the history of the case—

40 The Court: No, you cannot testify with respect to the history, doctor, I am sorry,

Bryant C. Mageniss, direct.

because you were not the attending physician and that is limited only to the attending physician. Eliminate the history of the case and just answer from the hypothetical question, plus the result of the examination that you made the other day, and you need not give the history of the case to determine the kind of breathing that you indicated. 10

Mr. Dorgeval: May I have an exception noted, please?

The Court: Read the question. Yes, you may have an exception.

(Question read by the reporter.)

The Witness: From the contusion of the fracture of the ribs, a probable injury to the pleura. 20

Q Anything else? A Most always in fractured ribs injury to the pleura, because the pleura is almost attached to the ribs, or the ribs attached to the pleura.

Q Would you say in this particular case that she had suffered, from your experience as a physician and the examination that you made, that she suffered from injury to the pleura? A Yes, from a continuation of this particular cough. 30

Q Is there any doubt in your mind about that, doctor? A No, the cough of pleurisy is a very peculiar cough.

Q Would the condition like that affect an individual worse, a woman of fifty-three, than a young person? A Oh, naturally.

Mr. Dorgeval: That is objected to.

Q Would her healing powers today be the same as a person of fifty-three? 40

Bryant C. Mageniss, direct.

The Court: The question is whether she is fifty-three.

Mr. Dorgeval: I do not think it makes any difference as to that. I mean to say, we are dealing with this lady.

10 The Court: If she is fifty-three, the question is what is the extent of her injury.

Mr. Dorgeval: My point is we do not in this case compare the recuperative powers of one person with another. If we are to compare recuperative powers of fifty-three to twenty-five, you might as well compare the recuperative powers of one particular man with counsel, and there is no limit of comparison if we are going into that.

20 The Court: That might be so, but if you injure a person whose power of resistance is so low that they cannot recover quickly—if you hit a good, tough, old bird like me, it probably would not hurt me any. I would be on the job tomorrow.

Mr. Dorgeval: The point is what her disability would be. That is what he is asking, a person of her age. He is asking for a comparison. He is not limiting it to her age.

30 The Court: That is what I understand the question what would her limits be, considering her age. That is the question.

Mr. Dorgeval: I have no objection to that.

Q What happens to the pleura when it is injured in that way? A It becomes congested and inflamed, adhesion grows fast.

40

Bryant C. Mageniss, cross.

Q Do you think that is what happened in this case, doctor?

Mr. Dorgeval: That is objected to.

The Court: He has already said she had traumatic pleurisy, in his opinion.

10

Q And in your opinion, doctor—withdraw that—where is that traumatic pleurisy; do you remember the neighborhood of it, just where it is seated? A Underneath the side of the injury.

Q And that, in your opinion, doctor, is due to the accident? A I think so. I have indicated it about that way.

The Court: Cross examine.

20

Cross examination by Mr. Dorgeval.

Q Which side, doctor? A Right side.

Q I understand that your examination disclosed simply a little difference in sound? A Yes.

Q I think you used the words “difference in sound”? A I mean it is not absolutely normal compared to the other side, or compared to the surrounding lung.

30

Q Now, doctor, eliminate from your mind the history of this case, and just take your examination as you made it, that difference in sound could have been due to a great number of things? A Some things, an old pleurisy might have it.

Q An old pleurisy? A Yes.

Q Any other things it could be due to? A Some inflammatory conditions; she might have had pneumonia with adhesions there.

40

Bryant C. Mageniss, cross.

Q That might have been there for years? A Yes.

Q So that the condition that you found on your examination was one that might have been there for some time? A It might have been.

10 Q Now, what you have testified to here, doctor, then, all that you have testified to here about pleurisy has been based upon the facts that counsel gave you, isn't that right? A No, based on the history of the case and X-rays.

Q You see, doctor, you were asked to exclude the history of the case from your mind. A She told me about the accident. I have it in my mind. I cannot discard it. I have to hear it, but according to the objective symptoms and subjective symptoms she complained of.

20 Q That was the only objective symptom you found, doctor? A That was the only one.

Q She did bend for you, didn't she? A Yes.

Q Now, of course, doctor, where there is a fractured rib, the pleura will heal more quickly than the bone will, will it not? A Oh, yes, the bone has to go through the process that takes four or five weeks.

30 Q And the pleura will heal more quickly? A Yes, all it needs is rest and care.

Q There was nothing in your examination, doctor, if you will eliminate the history of the case, nothing in your examination to show traumatic pleurisy? A No, only the history of the case.

40 Q But eliminating the history, just taking your examination that you made, as you say, two weeks ago, there was nothing there to indicate traumatic pleurisy, of course? A No, she has pleurisy, an old pleurisy there.

Gerard J. Van Schott, Jr., direct.

Q What? A She has an old pleurisy there.

Q Doctor, did you make this examination only for the purpose of testifying in Court? A Only; that is all.

Q And you frequently testify in Dr. Simon's cases, do you not? A Yes, or any other man that employs me. 10

Mr. Dorgeval: That is all.

Mr. Simon: That is all, doctor.

The Court: That is all.

Mr. Simon: Plaintiff rests. Dr. Bleasby.

(No response.)

Mr. Dorgeval: I would like very much to have Dr. Bleasby. 20

The Court: You may subpoena him. I will adjourn so you can get him. Do you wish it?

Mr. Dorgeval: No.

The Court: All right, the next witness. I take it you did not subpoena him?

Mr. Simon: He was here at the last trial, if your Honor please.

30

GERARD J. VANSCHOTT, JR., SWORN.

Direct examination by Mr. Dorgeval.

Q You are a practicing physician of the State of New Jersey? A Yes, sir.

Mr. Simon: I will admit the doctor's qualifications, if you want. 40

Gerard J. Van Schott, Jr., direct.

Q And have been for how long? A Over 23 years.

Q Where is your office? A Passaic.

Q Have you been there the entire time? A Yes, sir.

10 Q Now, did you examine Mrs. Seinner, the plaintiff in this case on behalf of the Public Service? A I did.

Q You make examinations for the Public Service from time to time, do you not? A Yes, sir.

Q When did you examine her, doctor? A October 2, 1928.

20 Q Just tell us, please, what you found? A I examined her at her home while she was sitting up in a chair, and her right chest, in fact, three-quarters of her entire chest was encased in adhesive plaster. The lower portion of it, and on palpation she seemed tender about the lower angle of the scapula of the shoulder blade. There were no marks that I could see or find.

Q No marks that you could see and find? A No, her chest was encased in adhesive plaster. I could not see any marks on her chest or elsewhere.

Q And where did you say she was, in bed? A No, she was sitting in a chair.

30 Q Did you ask her about her weight at that time? A Yes.

Q What did she tell you she weighed at that time? A About 125 pounds.

Q This was on October 2, 1928? A Yes, sir.

Q Did you communicate with the attending physician to find out what her condition was?

Mr. Simon: I object to that.

40

The Court: What is the purpose of this?

Gerard J. Van Schott, Jr., direct.

Mr. Dorgeval: To show, if your Honor please, what the attending physician, Dr. Bleasby, who has not been produced—

The Court: That is hearsay.

Mr. Dorgeval: But so many things were introduced in this case.

The Court: I know, but that does not take it out of the hearsay rule. That is why I say if you want Dr. Bleasly I will give you an opportunity to get him here. We cannot, certainly, have this man tell us what Dr. Bleasby told him.

10

Mr. Dorgeval: Only as showing what we knew about this case.

The Court: No, not to even show that; that would be hearsay. Your man cannot testify with respect to the history, either. I will let him testify about the weight, because I do not suppose that is a history, exactly. I think it is rather probable at any rate. I understand the rule to be the only one, with the exception to the hearsay rule, is with respect to the attending physician. He may tell what he has been told by any physician who examines for the purpose of testifying, if precluded from telling the history. Hearsay comes in there. Now, you are asked to have this man tell what the attending physician told him. That, clearly, is inadmissible.

20

30

Q What was your prognosis, doctor? A Why, from her appearance and condition at the time, I felt that she had recovered.

Q Made a complete recovery or not? A I thought so. I saw no reason at that time why not.

40

Gerard J. Van Schott, Jr., cross.

Q Within what time did you think she had to recover, approximately, in your opinion? A Well, as a rule from a fracture of the ribs, four to six weeks, if there is no complication.

10 The Court: What was the date of this accident?

Mr. Dorgeval: September 27, 1928. This examination was on October 2nd, five days after.

The Court: Is that all?

Q Did you find any evidence of pleurisy? A No.

Q Punctured lung? A No, sir.

20 The Court: Spitting of blood?

The Witness: No, sir.

Q Was that complained of to you, about the spitting of blood? A No, sir.

Mr. Dorgeval: That is all.

The Court: Cross examine.

Cross examination by Mr. Simon.

30 Q Of course, you did not remove the plaster? A No, sir.

Q So you do not know whether there were marks there or not? A I do not.

Q Of course, therefore, you would not say there were no marks there? A No, sir, I would not.

Q Who was present when you made this examination? A I do not think anyone was present.

40 Q Just she alone? A Yes, sir.

Gerard J. Van Schott, Jr., cross.

Q And you recall quite vividly, do you not, that you asked her how much she weighed? A Yes.

Q Sure about that, doctor? A I have her weight down on my note.

Q Have you the note here? A I have a copy of it. 10

Q The copy of the note that you made at the time? A Yes.

Q Where is the original, doctor? A It is in my book.

Q Haven't you got the book here? A No.

Q What kind of a book is it? A Just a little memorandum book.

Q And you haven't that book with you today? A No, I have not.

Q You knew you were going to testify today, doctor, did you not? A Yes, sir. 20

Q And she spoke English very well, doctor? A Fairly good.

Q Able and easy to understand her? A Yes.

Q No difficulty at all, doctor? A I did not seem to have any.

Q Well, now, you asked her at that time whether she expectorated any blood, did you? A Naturally I asked her what she complained of. 30

Q Well, doctor, did you say to her, "Are you expectorating any blood"? A No.

Q Did you say, "Are you suffering from any pleurisy"? A No.

Mr. Dorgeval: That is objected to.

The Court: He has answered it.

Q All you asked her was what she complained of? A That is right. 40

Gerard J. Van Schott, Jr., cross.

Q And, doctor, her family physician was not there, was he? A No.

Q Nor was her lawyer or anyone else there at the time? A No.

Q Did you ever make another examination, doctor? A No, sir.

10 Q You say, if she had no complication, in your opinion, she ought to get well in four to six weeks, is that right? A Yes.

Q If she had complications such as pleurisy, how long in your opinion would it take before she got well? A I don't know.

Mr. Dorgeval: That is objected to.

The Court: He says he does not know.

20 Q No one can tell? A No.

Q That may last for months and years and years? A It might clear up in a few days.

Mr. Dorgeval: I object. That is outside of the scope of the examination.

The Court: He has answered it, she might get well the next day, and she might not the next day, is his testimony, pretty much.

30 The Witness: Yes, sir.

Q You listened to the chest? A Yes.

Q At that time you found no friction sound at any time? A I found no advantitious sounds.

40 Q Doctor, do those advantitious sounds that you talk about take place immediately after the accident or sometimes may not develop until weeks later? A Well, if there is an injury to the pleura the effect of it would be pretty soon, pretty quick.

Gerard J. Van Schott, Jr., cross.

Q How soon would you say, doctor? A A few days; it might be within a few hours.

Q You were there within a few hours? A I was there on the 2nd day of October.

Q You never came back any more? A No, sir.

Q What was your diagnosis then, doctor? 10

A Why, I knew what the X-ray showed, but my diagnosis was a probable fracture of the rib.

Q And did you see the X-rays at the time, doctor? A No, sir, I never saw them.

Q How did you know what the X-rays showed? A Because both the attending physician and the roentgenologist had told me.

Q You had talked about this case? A Yes.

Q And they told you what the X-rays showed? A Yes, sir. 20

Q But you never saw them? A Yes.

Q Would you say \$15 is a reasonable charge for two films of this kind (handing)? A I think so, yes.

Mr. Dorgeval: I object to that.

The Court: I will allow it.

Q Doctor, of course, you and I as physicians often vary, and often are wrong, are we not? 30

Mr. Dorgeval: That is objected to.

The Court: Objection sustained.

Q Doctor, you may be mistaken as to whether or not at that time there was a pleuretic sound, were you not?

Mr. Dorgeval: That is objected to.

The Court: I will allow it. 40

Gerard J. Van Schott, Jr., cross.

A Well, if there was I could not hear it.

The Court: Then you are not mistaken?

The Witness: I do not think so, your Honor.

10 The Court: That is what he is asking you, whether you think you were mistaken.

The Witness: I do not believe I was.

The Court: You could not be mistaken about that, could you?

The Witness: No; my ears did not tell it to me.

The Court: I mean, you either heard it or did not hear it; there can be no mistake about that?

20 The Witness: I did not hear it.

Q A friction rub in pleurisy does not occur immediately after, but only after congestion has taken place? A It is in an inflamed state.

Q The friction rub you do not hear sometimes for weeks later? A You might hear it in twenty-four hours.

Q And might not hear it for a few weeks later, that is true, isn't it? A Yes.

30 Q And although—withdraw that. There was no member of the family present, I think you said? A No, sir.

Q Doctor, isn't it true, in conditions of this kind where one has a fractured rib, one gets a good deal more comfort by sitting up than by lying down? A I think so.

Mr. Dorgeval: That is objected to.

40 Mr. Simon: He said she was sitting up at the time.

Gerard J. Van Schott, Jr., cross.

Q Is that true, doctor?

Mr. Dorgeval: It seems to me we are wasting time.

The Court: Yes, I think we are. This is not the first case we have wasted time in.

Mr. Simon: I do not think we are wasting time. This is important. It is coming from the Public Service to show here she was sitting up and not lying down, and I want to show you the proper treatment is to sit up and not to lie down.

10

The Court: But the witness said she was in bed for a month.

Mr. Simon: On and off, that is her statement.

20

The Court: That may be so. She said some one was there attending her. Now this man finds nobody there. Next question.

Q What time did you get there, doctor? A I think it was ten o'clock in the morning.

Q You think. Have you any idea? Does your recollection show you what time you got there?

A Yes, sir; ten o'clock in the morning.

Q Did you ask her whether she had anybody there helping her? A No, sir.

30

Mr. Dorgeval: Objected to.

The Court: Sustained.

Q During that time you saw her she was able to move about and do her housework?

Mr. Dorgeval: That is objected to.

The Court: Objection sustained.

40

Gerard J. Van Schott, Jr., cross.

Mr. Simon: He is called as an expert, and he may answer it.

Q From the examination you made at the time was she able to move about and do her house work? A Well, I do not know; she might have
10 been able to do it.

Q You think so, doctor, with this fractured rib and her whole chest strapped up, she ought to be able to do her work?

The Court: Was she dressed, doctor?

The Witness: I think she had a bathrobe on, your Honor.

The Court: All right, you may answer the question.

20 Q You think, doctor, she was able to do her regular house work with her chest strapped up that way? A Sometimes people even work.

The Court: You have had women in confinement doing family washing the next day?

The Witness: My father broke a rib two years ago and never stayed still a minute.

30 Q Do you know whether your father had traumatic pleurisy, doctor? A No, he did not.

Q Of course, your father had examinations for the Public Service for a good many years?

The Court: Objection sustained.

Q You have been examining for the Public Service for a number of years? A Several years, yes, sir.

40 The Court: Next question.

Gerard J. Van Schott, Jr., re-direct—re-cross.

Q And, doctor, that is the purpose for which you came in court to testify for the Public Service? A Yes.

Mr. Dorgeval: We will admit that.

Q And you have made thousands of dollars in the many years you have testified for them? 10

The Court: Objection sustained.

Re-direct examination by Mr. Dorgeval.

Q You say an injury to the pleura follows how soon after the injury, if there is a fracture of the rib, how long does the puncture of the lung follow? A It is just the same as you get a laceration of the skin from a cut. Of course, inside it would have to be through a piece of bone that would punch a hole through there, something sharp. 20

Q Then, the injury to the pleura comes when with reference to the injury to the rib, at the same time or later? A It is most apt to occur right then and there at the time the fracture occurs.

Q At the time that the fracture occurs, that is when it usually happens? A Unless there is a loose fragment in there which later on gets twisted around and punctures through. 30

Q That would usually follow how soon after?

A I don't know; it might never happen.

Q In the normal case it comes immediately?

A I say yes.

Re-cross examination by Mr. Simon.

Q You do not mean that you get dry friction sound for traumatic pleurisy, or doesn't it take several days and weeks? A Probably hours. 40

Gerard J. Van Schott, Jr., re-direct—re-cross.

Q Not weeks, doctor? A Twenty-four hours or so.

Q Not weeks, doctor? A I do not know. You might get pleurisy lasting weeks, occurring weeks after, due to the inflammation.

10 Q That is nothing unusual, is it? A No, of course; it sometimes occurs just as it comes, without any apparent cause.

Q As I understand it, the pleura is the coat of lining with some grease fluid inside as a lubricant inside? A Yes.

Q Then that becomes inflamed and absorbed and dry? A Yes, sir.

Q It takes several weeks? A Yes, when it gets to that stage, when you get adhesion forms.

20 *By Mr. Dorgeval.*

Q Do you know about traumatic pleurisy; does that occur after the injury? A I would say it occurs at the time the fracture occurs.

Q That is, traumatic pleurisy? A Yes, sir.

By Mr. Simon.

Q But, doctor, you cannot make your diagnosis at that time always, can you? A No.

30 Q You have got to wait until you have signs of it? A Not unless you have the puncture clear through the lung.

Q Bu if you haven't got that you have to wait until you get signs before you can make your diagnosis? A Yes.

Thomas Edward Manley, direct.

THOMAS EDWARD MANLEY, sworn.

Direct examination by Mr. Dorgeval.

Q You are a practicing physician of the State of New Jersey? A Yes, sir.

Q And have been for how long? A Since 1921. 10

Q Where is your office? A 390 Park avenue, Paterson.

Q How long have you been in Paterson? A Since 1921.

Q Did you examine the plaintiff, Mrs. Seinner, in this case, on behalf of the Public Service? A Yes, sir.

Q And you make examinations on behalf of the Public Service from time to time, do you not? A Yes, sir. 20

Q Now, let us see, you made three examinations in all, in this case, did you not? A Yes, sir.

Q What was the date of the first one? A January 28, 1929.

Q Tell us what you found then, please? A I examined Mrs. Seinner at her house in 77 Columbus avenue, her daughter was present, and Mrs. Seinner was in bed. She was dressed. I asked her what her trouble was, and she told me she had an injury to her right chest. 30

Q You say she was dressed? A Yes, sir.

Q In bed? A I imagine she had been up and went to lay down again. She also said that she had an X-ray picture there with an X-ray report. I examined her chest and found she had a normally placed heart.

Q And what? A Her heart was normally placed, and there were no sounds that were on her, her excursion of breathing was the same on 40

Thomas Edward Manley, direct.

both sides of her chest. On the right side of her chest at that time she did complain of a little tenderness when I pressed it. That was the only tender area she had any place in her body. There was nothing to be seen on her head due to any injury, except the fact that I
 10 did notice her teeth were in very poor condition, or her gums, and the rest of her head was negative. She made no complaint at that time about her back. I asked her to sit up in bed, and she did it to facilitate the examination. Her breathing, at that time, showed no rales, no signs of any pleurisy, no signs of any punctured lungs, and no displacement of this rib at all.

The Court: Was she strapped at that
 20 time?

The Witness: No, sir, she was not.

Q Did she complain of coughing? A She did not cough, and she said nothing about coughing.

By the Court.

Q Did you have her out of bed? A Yes, sir.

30 Q Did she bend? A In getting up out of bed.

Q She did not have to do any calisthenics for you? A No.

The Court: All right.

By Mr. Dorgeval.

40 Q When did you next examine her? A September 15, 1929, at Dr. Simon's office.

Thomas Edward Manley, direct.

The Court: Did she complain on January 28th of anything else?

The Witness: No, sir; just injury to her right side.

By the Court.

Q Did she say anything about being dizzy? 10

A Not at that time.

Q On the next time? A She said she hurt her back, her head and right chest.

Q When was that? A September 15, 1929, in Dr. Simon's office, in Passaic, her daughter and Mr. Katz were present.

By Mr. Dorgeval.

Q Now, she complained of her head, back and chest at this time? A Yes. 20

Q What had she complained of the first time?

A Only her chest.

Q What did you find in your second examination at Dr. Simon's office? A Similar to the first examination.

By the Court.

Q Anything different? A No, sir.

Q No abnormal breathing? A No, sir. 30

By Mr. Dorgeval.

Q Did you find any limitation of breathing in her chest? A No, sir, excursion on both sides was equal.

Q How about the fracture; what about it? A Everything free, solid and no tenderness present at that time.

Q What about its alignment and position? A Evidently good. 40

Thomas Edward Manley, direct.

Q Any abnormal signs? A No, sir.

Q Any scars of any kind? A No, sir.

Q Did you examine—then, she complained of her head, you said, what did you find with reference to her head? A Nothing, outside of the fact that she had very poor teeth and gums.

10 Q And how about the back? A Nothing to be seen there, no rigidity of the muscles, no spasm. She said she could not bend very well, and I could not see any evidence of any reason why she could not. There is no curvature of the spine.

Q When did you next examine her, doctor? A November 24, 1929, also at Dr. Simon's office; her daughter was present that day, and Dr. Aaron Simon was present.

20 Q The doctor himself was present? A He was.

Q Where was she then, was she up and around? A Oh, yes.

Q What did you find then? A Similar to the other two examinations.

By the Court.

30 Q What was her appearance with respect to weight on the first visit, and with respect to the last? A She looks just the same now as she did then.

Q You would not say she lost anything? A Not since I have seen her.

Q From January 29th to now, is that right? A Yes, sir.

By Mr. Dorgeval.

Q And did you examine her for rales, her chest? A Yes, sir.

40 Q And did you find any? A No.

Thomas Edward Manley, direct.

Q What about breath sounds, were they normal or not? A Normal breath sounds, normal excursion of the chest.

Q Did you find any evidence of chronic bronchitis? A No chronic bronchities.

Q Any tenderness elicited? A Only at the first examination. 10

Q Now, doctor, she has testified that she suffers from dizziness; was there anything that you found on your examination that might account for that? A I think if she had her gums and teeth fixed she probably would lose that trouble.

Q You think that might account for it? A They are very pusy.

Q What was their condition, were they a little bad, or very bad, or what? A Very bad.

Q And now, in your opinion, doctor, was there on the occasion of any of your three examinations any evidence of traumatic pleurisy? A No, sir. 20

Q Did you find any adhesions of the pleura of any kind? A None at all.

Q Any rub? A No friction rub.

Q And you said no rales? A That is right.

Q What are the evidences of traumatic pleurisy, what would you find there, if she had traumatic pleurisy? A Well, you will have to be more explicit. There are several kinds of pleurisy. You will have to tell me which kind. 30

Q I am talking about traumatic now. A There are different kinds of traumatic pleurisy.

Mr. Dorgeval: I will withdraw that.

Q Are rales evidence of the existence of a pleuratic condition? A You will have rales in moist pleurisy.

Q Did you find any in this case? A None. 40

Thomas Edward Manley, direct.

Q Are adhesions evidence? A If there is a pleurisy?

Q Yes? A You get adhesions.

Q Did you find any in this case? A No, sir.

10 Q And pleura rub, is that any evidence of adhesions, did you find any in this case? A A pleura rub, that is evidence of a pleurisy. I found none.

Q Is there anything that you found to interfere with her ability to bend? A No, sir.

Q That would interfere with any of her movements, sitting or walking? A No, she sits and walks and moves around all right.

Q Or functions in any way? A She moves around all right.

20 Q What institution are you connected with? A Paterson General Hospital.

Q How long have you been connected with that? A Six years.

Q And do you at times go on service for that hospital? A Yes, I am associate surgeon there four months a year.

30 Q What do you mean when you say you go on service? A My chief and myself are on service for four months, and all ward patients admitted to the hospital on surgical service are taken care of by us.

Q Are you at present so connected with the hospital? A Yes, sir.

Q Who are you associated with now? A Dr. Deyo.

Q And before that were you associated with anyone else? A Dr. Mageniss.

Q The doctor who testified here today? A Yes.

40 Q How long have you been on service of that kind at the general hospital? A Six years.

Thomas Edward Manley, direct.

Q About how many cases of traumatic pleurisy would you say come under your attention while you were on service as you have described?

A Traumatic pleurisy that we see on service would number about two in the four months, and they are fatal within the day. They are very extreme accidents, just as the one we had this summer of a man who was caught in a dyeing vat, and had some big apparatus come down on him which crushed his chest. He has a traumatic pleurisy, and people who went to the hospital on our service who have injured ribs, we have an X-ray taken and find they have a fractured rib, we do not find one in fifty who would have a pleurisy from it. 10

Q And when you do find that pleurisy results from the fractured rib, what degree of fracture is it, is it a severe one or a medium one, or a light one? A Severe fracture with displacement of the bones. 20

Q When pleurisy follows any injury as a result of the injury or trauma, how soon does it come after the injury? A As soon as the injury happens.

Q As soon as the injury happens? A At that time if you have an injury and you break the rib, why, the rib sticks through the pleura. It does it right then. It does not wait. It does it at the time the blow was struck, similar to if you break your leg you break it then. It don't just get hit now and break two weeks later. 30

Q You break your leg and break the tissue or bone? A You break it at the time of the accident.

Q The injury to the pleura would be instant with the breaking of the bone? A At the same time, yes, sir. 40

Thomas Edward Manley, direct.

By the Court.

Q But not necessarily discovered at the time, that is right? A It can be.

Q Well, it might not be, too? A Oh, yes, it might not be.

10 Q You would not get abnormal breathing immediately, would you? A You get the abnormal breathing within the first day.

Q Would you? A Yes, sir.

By the Court.

Q All right.

By Mr. Dorgeval.

20 Q Well, doctor, if pleurisy of this kind is—I withdraw that—you say you would discover it within what time, within one day? A Oh, yes,

By the Court.

Q Pleurisy is the inflammation of the pleura? A Yes.

Q An inflammation of the pleura would not develop immediately there was an injury to the pleura? A It surely would.

30 Q Would it? A Surely.

Q Nature acts fast? A It does.

By Mr. Dorgeval.

Q What happens? A If you should get pleurisy the rib punctures the pleura that causes an inflammation developing very immediately.

40 Q You say the rib is broken and punctures the lung, and there was a confusion, what do you mean? A There will be bleeding from the pleura, from the underlying tissues which have

Thomas Edward Manley, cross.

also been injured due to this, and all those things all mass together, and in the ordinary fractured rib, if you had a condition such as that you would have an area almost as big as your fist involved. If you could not hear that within a day, then there is something wrong with your ear.

10

Q Within a day at the most that should be discovered by the physician? A Oh, yes, absolutely, when you are bleeding after you have punctured this area, nature does not wait about four or five days before it starts bleeding. It does it at the time it is punctured.

Q Now, doctor, assuming that it has been discovered, is it a practice of good physicians to allow someone with pleurisy to walk about? A No, a person with pleurisy would be kept quiet. Rest is the treatment for pleurisy.

20

Mr. Dorgeval: That is all.

The Court: Cross examine.

Cross examination by Mr. Simon.

Q Did you know, doctor, that the patient develops traumatic pleurisy, they do not live?

A I said that the patients we have treated in the hospital who have had traumatic pleurisy have been cases who have been in very violent accidents, and that they do not live. I did not say in general that a patient who gets traumatic pleurisy would not live, but I say that the ones we see they usually do not live; usually they die within an hour or two, if not before.

30

Q If you have not had any cases in your experience as a doctor where patients that they developed traumatic pleurisy have lived, is that

40

Thomas Edward Manley, cross.

right, doctor? A I have not had any experience.

By the Court.

10 Q He asks whether you have had any patients who have had traumatic pleurisy who lived? A Not on our ward service at the hospital for the last six years.

Q He did not ask that. A I thought that was what he was leading in to.

Q He did not ask that. Have you had any patients? A Oh, yes, we have had patients live.

By Mr. Simon.

20 Q If the rib was fractured, broken, was that part of it, would injure the pleura, that would be traumatic pleurisy? A If it injured the pleura?

Q Yes. A Yes, sir.

Q Is there anything unusual about such a thing? A Anything unusual?

Q Yes. A No.

Q Because the pleura lies up against the ribs, doesn't it? A Oh, it does not lie right up against it.

30 Q How far? A It is at least a speck about a quarter of an inch away from the nearest part of the rib, and that would be your outer layer of the pleura, and not near the layer. That is another quarter inch away.

Q So the outer pleura is a quarter of an inch away from the rib? A That is the nearest place it can come to the rib.

Q If the rib were injured it would get to the inside of the pleura? A Very often.

40 Q And nothing unusual for a rib to open a quarter of an inch? A No.

Thomas Edward Manley, cross.

Q It is nothing unusual for a woman to sit on a seat of a bus and fall down in the aisle to get that kind of a blow, for the rib to get in one-quarter of an inch? A I have never seen a woman fall from a bus seat, so I could not testify to that.

10

The Court: That is what I thought the answer would be. If a woman fell off a seat on to the floor she would not break her ribs?

The Witness: I do not believe so.

Q Now, doctor, you examined her the first time four months after, about? A January 28th from September.

Q And even at that time she was tender over that seat of the fracture? A She said she was tender.

20

Q Well, didn't you find her tender there, doctor? A I pressed her there, and she said it hurt. That is what is known as tenderness. I do not know whether it hurt.

Q Did you have any reason to disbelieve her that she was tender when you examined her? A I did not even know the lady had a fractured rib there.

Q Didn't you say the first time you examined her she was tender, and the second time she was not? A Correct.

30

Q Was she tender four months after? A I pressed her and she said it hurt.

Q What did you think, in your opinion, as the examining physician, do you think she was telling the truth or not? A I could not say.

Q You could not say? A No, sir, I do not know the lady well enough to say whether she is telling the truth or not.

40

Thomas Edward Manley, cross.

Q Doctor, you must have come to some conclusion.

Mr. Dorgeval: The doctor's answer is obvious. I do not see how he can tell whether anyone is telling the truth.

10 The Court: I do not either.

Q Doctor, did she complain of tenderness anywhere else over the chest, about that place? A No, sir.

Q Well, now, four months after when you came there she was in bed? A She was in bed that day.

Q Did you ask her why she was in bed four months after? A No, sir, of course not.

20 Q And did you make any effort to find out when you were there why she should be in bed four months after? A She might be in bed all the time for all I know. That isn't anything unusual for someone to lay down in the afternoon. She probably does that quite often.

Q You know that there was a suit pending, did you not, with the Public Service? A At that time?

Q Yes. A No, sir.

30 Q Did the Public Service tell you what this woman was complaining of? A They asked me to go and examine her and told me Dr. Bleasby was her doctor, and where she lived, that is all the information I got, and I know nothing about lawsuits.

Q Did you get in touch with Dr. Bleasby? A I did.

Q Did he tell you about the blood business? A He told me I could go there and see her all I wanted, and I could see an X-ray that Dr. Terhune had taken, and also an X-ray report.

40

Thomas Edward Manley, cross.

Q You knew when you went there she had a fractured rib? A I don't know yet whether she has that.

Q You saw Dr. Bleasby? A I spoke with him.

Q And you saw the X-ray? A Yes, I saw the X-ray she had at her house, and the one at your office. I do not know whether this lady has a fractured rib now. 10

Q And you spoke to her doctor? A I did.

Q And did her doctor tell you what was wrong? A The doctor told me I could see the X-ray when I got there. He said she had an injury to her right chest, and the X-ray and the X-ray report.

Q And you saw the X-ray and X-ray report? A I did. 20

Q And after speaking to the doctor you still do not think she has a fractured rib? A I say I do not know whether the woman has or not.

Q You examined her? A Yes.

Q Did you find—what condition did you find? A I found a good solid rib.

Q Was there any evidence at all that she had a fractured rib? A I haven't the least idea whether the lady had a fractured rib.

Q Did she show you X-rays? A She did. 30

Q Did you see them? A Yes.

Q Did you see that on the X-ray? A On the X-ray I saw a fractured rib.

Q You mean she may have shown you someone else's? A I am sure I don't know. There is no way I can tell.

Q When she showed you this X-ray, and were not so sure about that, did you check up with the doctor that took it to find out whether it was the truth or not? A I did not. 40

Thomas Edward Manley, cross.

Q You say she did not complain of being dizzy at that time? A No, not at that time.

Q Have you any record of the first examination you made? A No, I have not.

Q Where is that record? A I do not even know where that is. I can remember it all, though.

Q You were in court yesterday? A Yes, sir.

Q And you are in court today on this case? A Yes, sir, twice.

Q And you knew you were going to testify on it? A Yes, sir.

Q And still you did not bring your record? A I don't need it.

Q Are you telling us what happened almost a year ago from your own memory? A No, I looked the records up.

Q When? A Within the last two weeks.

Q And are you sure now the first time she never complained of dizziness? A No, sir.

Q Do you know that she went to a doctor to examine her head for headaches? A November 24, 1929, you told me that.

Q And although you found nothing the matter with her the first time on January 20, 1929, you went to examine her about nine months later? A September 15, 1929.

Q Almost eight months later you went back to examine her again. Did she complain of dizziness at that time? A She did.

Q And she complained of her chest and back? A And her head. She said her head hurt.

Q Have you got that record here, doctor? A No, I haven't any records with me.

Q Did you examine her chest and back? A Yes, sir.

Q Did you have her bend and exercise herself in all directions? A I did.

Thomas Edward Manley, cross.

Q Was she able normally to do it? A I think she was able to.

Q And no restriction of any movement there at all? A She said she had restriction. I think she can move.

Q You do not think, in other words, you do not think she is telling you the truth when she says she can not? 10

Mr. Dorgeval: That is objected to. I do not think you should ask the witness to characterize anybody.

The Court: I will allow it.

A Oh, yes, the lady can move.

Q When you first saw her four months later, and seeing her today, would you say there is any difference in her general appearance? A The general appearance is the same. 20

Q You think so? A Yes, sir.

Q She has made no such vivid impression on your mind when you first examined her in the few minutes you were there? A I remember the lady.

Q You remember her well? A Yes.

Q And you think there is no difference in her appearance? A I see no difference. 30

Q Who was there? A Her daughter at the first examination with Mr. Katz, and her daughter at the second, and her daughter and you at the third.

Q Just the first time? A Her daughter.

Q How long were you there? A About 25 minutes.

Q In your opinion you do not think there is a bit of difference in appearance than nine months ago? A No. 40

Thomas Edward Manley, cross.

Q And did you make a note of her appearance at that time? A Yes.

Q What did you say then as to the appearance? A The only note I make of appearance is the color of hair, complexion, that is about all on appearance. I do not say whether beautiful or anything like that.

10 Q How about the general physique? A No.

The Court: Her apparent weight?

The Witness: No, sir.

Q You did not ask her about her weight? A No.

Q After examining her September 15, 1929, she was perfectly normal, and nothing the matter with her, you went back two months again and examined her? A About November 24.

20 Q So although those two examinations showed nothing the matter you went back two months later and examined her again? A Yes, sir.

Q And at that time there was nothing either the matter with her? A No.

Q Doctor, will you tell this Court and jury why it was necessary for you to go back the second and third time when you found nothing the matter with her the first time? A You will have to ask somebody else that question. Somebody called me up from the Public Service and asked me to examine such and such a person.

30 Q When you made this examination the first, second and third time and reported nothing the matter, they sent you back again? A I think they should be convinced about it.

40 Q And it took them three or four times to be convinced? A Yes, sir.

Thomas Edward Manley, cross.

Mr. Dorgeval: Three times he said.

Q Now, doctor, talking about pleurisy, would you say now that I am not suffering from chronic pleurisy from an examination that you could make of me? A That you are not suffering from chronic pleurisy? 10

Q Yes. A From an examination I can make of you?

Q Yes. A I can examine you and find out whether you had chronic pleurisy.

Q You mean to say if I suffer from chronic pleurisy I show symptoms of it now? A You surely would, you have have it, if you have it.

Q Would it surprise you that I get three or four times a year attacks of pleurisy and still show no signs of it. A How do you know that you have pleurisy? 20

Q Assuming that I have difficulty with coughing, breathing, laughing, sneezing, assuming every time I took a deep breath I have pain in the side? A You could have a sore foot, and breathe like that. If you hurt your leg and catch your breath like that you would have pain.

Mr. Dorgeval: I would like to know whether we are trying Mrs. Seinner's suit of Dr. Simon's? 30

The Witness: (Interposing) If you breathe like that that don't tell me you have a pleurisy.

Q May have difficulty in breathing, coughing, sneezing, laughing and have pain every time—

A Now, you are doing a lot of other things.

Q Isn't that what I said? A Oh, no. You said if you get this pain in your back—you said 40

Thomas Edward Manley, cross.

nothing about coughing and sneezing and all those other things.

Q Are you sure I did not say that? A I am sure you did not.

10 Mr. Simon: We will have the stenographer read the question.

(Question read by the reporter as requested.)

Q Now, doctor, assuming that I had pains when I took a deep breath, and assuming those pains were there when I coughed, sneezed or laughed, assuming, then, doctor, I had a friction sound there, would you say I was suffering from pleurisy? A This pain in your back—

20 Q You have been applying to a particular region. A The only time when you get a pain is when you cough and sneeze and do all that?

Q And there is a friction sound? A And there is a friction sound, would I say you had pleurisy?

Q Yes. A Not on that.

Q What would you say I had? A I would not make any diagnosis, because you sneeze, I would not say you had signs.

30 Q What else would you have? A I would desire to have an X-ray picture of your chest to see whether you had pleurisy. That would be the quickest way to determine whether you had any pleurisy there.

Q Would all X-rays show pleura inflammation? A Absolutely, and anybody who is treating a patient who thinks they have pleurisy have an X-ray taken for that reason.

Q How many X-rays did you ever take? A I have never taken an X-ray.

40 Mr. Simon: That is all.

Thomas Edward Manley, re-direct—re-cross.

Re-direct examination by Mr. Dorgeval.

Q Doctor, the X-rays that you saw, do they show any evidence of pleurisy? A No, sir.

Re-cross examination by Mr. Simon.

Q Now, you have opened the door, now I can go into that. The X-ray that you saw, did they have any marks of identification on them? A Not in the least. I could not tell you who took the pictures, and nobody else could identify those pictures, either.

10

Q Of course, doctor, you make examinations as requested? A No, sir, only as requested.

Q When you go back a second and third time— A I was requested to do so.

20

Q You did not do that of your own initiative? A Oh, no.

Q Now, doctor, look at these X-rays, and see if these are not the ones that Mrs. Seinner showed you at her home (handing)?

Mr. Dorgeval: That is objected to.

The Court: I will allow it.

Mr. Simon: You opened the door.

Mr. Dorgeval: As absolutely immaterial. 30

The Witness: I have no idea. There is no mark of identification on either plate.

Q Now, look again and see if there is any mark there, an arrow to show where the fracture is? A I don't know who put the arrow. There is no number on that X-ray plate.

Q Was there an arrow on there when you saw it at the time? A When I looked at the 4)

Thomas Edward Manley, re-cross.

X-ray plate, if I am going to identify it, I want to have some distinguishing mark put on that, a number which corresponds to the doctor's records who took the pictures, possibly the date, and the doctor's name. I see nothing on that plate at all to identify it.

10

The Court: The question now is did you see an arrow on the one that you saw.

The Witness: I see an arrow on the one he showed me.

Q Isn't that the same one that you saw at that time? A I have no way of identifying the plate. There is an arrow on lots of pictures.

20

Q My only point is do you recognize that as the same film that you saw at the home of Mrs. Seinner? A It may be or may not be.

Q Was there an arrow there at the time? A There was an arrow on the picture that I saw.

Q Did you say, in looking at this plate, you said there was no pleurisy? A No pleurisy.

Q Can you read pleurisy in a plate? Are you able to read pleurisy on a plate? A Yes, sir.

Q Sure about that? A Oh, absolutely sure.

30

Q Well, doctor, look from where this arrow is located in a downward direction—

Mr. Dorgeval: That is objected to.

The Court: Objection sustained.

Q Well, let me ask you this: Is there any part of the lung here shown on this X-ray that points underneath this arrow?

Mr. Dorgeval: Objected to.

40

The Court: Objection sustained.

Thomas Edward Manley, re-cross.

Mr. Simon: It refers to the X-ray film, that is the only reason.

The Court: But we do not know that is the one.

Mr. Dorgeval: I object to this plate as the X-ray.

10

The Court: I have sustained you.

Mr. Dorgeval: When counsel knows the proper way to prove it.

The Court: I sustained you.

Mr. Dorgeval: Yes, I know, but it is leading with an implication.

The Court: We are not—bring the doctor in that took the plate, otherwise they cannot get in.

20

Mr. Dorgeval: Or under whose supervision they were taken. Bring Dr. Bleasly here. He is competent to testify.

Mr. Simon: He is not competent to testify about this film, as I understand the law.

The Court: Next question.

Q Doctor, do you remember having testified, I think, before this very court—

30

The Court: If the doctor said it was taken under his supervision, and he can identify it, I would let it in.

Mr. Simon: But how can this doctor in Garfield testify about it?

The Court: Bring him here and ask him.

Mr. Simon: I know he did not. I spoke to him. The only reason Dr. Terhune is not here, he wanted \$25 to come here and we could not afford it.

40

Thomas Edward Manley, re-cross.

Q Doctor, do you remember testifying in a case for the Public Service of Gallo Carrucus, a Greek fellow that was hurt, the man with a fractured rib? A Carrucus?

Q Yes, before this very court?

10 Mr. Dorgeval: I object to this.

The Court: He may answer.

Q (Continued.) Struck by a Public Service bus? A Bodo?

Q No, his name is John Gallo Carrucus; do you remember that? A I do not remember him by name.

20 Q Do you remember having testified in the case before this very same court of a Greek fellow that was hurt with an automobile? A I do not remember he was a Greek, but I remember we had such a similar case.

Q In that case there was a ruptured lung involved? A I did not know the man had any ruptured lung.

Q Well, a ruptured pleura? A The man had a fractured rib.

30 Q I mean the contention involved pleura in that case? A Did you make that contention? A Then, it did.

Mr. Dorgeval: I object to that.

The Court: No harm has been done yet.

Q Do you remember in that case that traumatic pleurisy may not show up for weeks after? A No, sir, I said immediately.

40 Q Are you sure about that? A I am positive.

Thomas Edward Manley, re-cross.

Q And you didn't say three days after? A I said immediately. Judge Porter was there that day.

Q However, the jury did not agree with you.

The Court: Strike that out.

10

Q When one has pleurisy—

Mr. Dorgeval: I think, counsel should be instructed—

The Court: That was very unfair, and very unwise, and you know it. The next question.

Q Doctor, traumatic pleurisy, there is an involvement of fluid which is ordinarily between the pleura? A Yes.

20

Q And when the injury is there the fluid becomes congested? A Yes.

Q And sometime later the fluid is absorbed, nature takes care of it? A Yes, sometimes you have to draw the fluid out with a needle.

Q And then adhesion forms? A Right.

Q And the walls become tight one to another? A Correct.

Q And you say that that happens within a few hours? A Oh, no, I did not say all that happened within a few hours.

30

Q How long would all that happen? A How long would all that procedure you have spoken of take?

Q Yes? A That would take all of six weeks for it to happen.

Q That is what? A All the procedure to the reproductive part, when they are done, which would be within six weeks.

40

Thomas Edward Manley, re-cross.

Q That would be ready at the same time the rib is healed, if that happened? You do not get a friction rub while the fluid is there? A You do get a friction rub with the fluid there, too.

10 Q How can you get a friction rub if fluid is between the two walls? A Because the pleura is so formed which involves on to your chest walls.

Q Isn't it friction because it gets a friction rub on the pleura? A You are not hearing the sound from there. You are hearing it from your left hand where that is attached to your chest wall to your pleura involvement.

Q While the fluid is between the two walls you would not get friction rub on account of pleura? A Not from pleura, but you get it from the left-hand pleura attaching to your chest wall.

20 Q As long as the fluid is here between the two walls you do not get any rub between the two gates of the pleura? A Now, for the third time, the rub that you get which you do get at that time is from what you are discussing as the pleura on your left hand where it is attached on to the chest wall. Now, the water is not giving you any rub, but this part out here (indicating) that you are also showing, that will give it to you.

30 Q See if you do not understand me better—
A I understand you very clearly.

Q Doctor, as long as there is fluid between the two pleura will you get a rub between the two pleura or not? A You do not get a rub between the two pleura.

Q All right, that answers it. A Not between the two pleura.

40 Q After that fluid is absorbed, nature takes care of it, then you get a rub, don't you? A Where?

Katherine Seinner, recalled, direct.

Q Between the two pleura? A From the two pleura joining together?

Q Yes. A You do.

Q How long will that take, may that take?
A Anywhere up to six weeks. It can last for a whole month of time from the first day to the end of the six weeks.

10

By Mr. Dorgeval.

Q That is the whole course of the pleurisy?
A Yes, sir, that is in a bad case which takes a long time to get better.

Q Did you find any rub in this case? A None at all.

Q On any of your examinations? A None at all.

20

Mr. Dorgeval: We rest.

KATHERINE SEINNER, recalled.

Direct examination by Mr. Simon.

Q Do you remember when Dr. Van Schott, the other doctor, came to your home? A Yes.

30

Q Who was there when he came to your home? A Mrs. Vores and Mrs. Newhouse.

Q Who talked to the doctor? A Mrs. Newhouse's boy.

Q Mrs. Newhouse's son? A Yes.

Q Was he there at the time, or did you have to get him? A Mrs. Vores stayed home and the boy came to my house.

Q And that boy talked to Dr. Van Schott?
A Yes.

40

Katherine Seinner, recalled, cross.

Q Did you talk to Dr. Van Schott? A No, I can't.

Q Did Dr. Van Schott ask you how much you weighed? A Yes.

Q He asked you how much you weighed? A I do, doctor told me how much on me first month
10 to 160 pound, this time how much pound, I don't know this explain.

Q He asked you and you told him 165? A Yes.

Q Did the doctor ask you how much you weighed? A Yes.

Q How much did you tell him? A I don't know now.

Q You don't know now at that time?

20 The Court: That is what she told him, I don't know what I weigh, but I did weigh 165 before the accident, that is what she is trying to tell, so she told him.

Q You told that to the doctor? A Yes.

The Court: That is the way I understood it, at any rate. Anything more?

Cross examination by Mr. Dorgeval.

30 Q You did tell him what you weighed? A (No answer.)

Q You did tell the doctor what you weighed? A I don't know.

Q Do you understand me? You did tell the doctor how much you weighed, didn't you? A Yes, 165, and the accident—

Q How soon did you lose that weight; how soon did you lose that weight? A About 30
40 pounds.

Discussion.

Q How many days did it take you to lose it?

A I don't know.

Q What? A I don't know how many days.

Q You remember the doctor we are talking about, he examined you five days after the accident? A (No answer.)

10

Mr. Simon: Plaintiff rests.

Mr. Dorgeval: Defendant rests.

The Court: Both sides rest, is that right?

Mr. Dorgeval: Yes, sir.

The Court: We will take a recess until 2 o'clock.

20

AFTER RECESS.

Mr. Dorgeval: May I read in these interrogatories?

Mr. Simon: I think it is improper.

The Court: Why?

Mr. Simon: Because they are not admitted in evidence.

The Court: I will admit them in evidence; any objection?

30

Mr. Simon: I think so, because she answered that, according to that.

The Court: She was asked whether she signed?

Mr. Simon: Yes.

The Court: She said she did, whether these questions had been put to her and answered, and she said there had been some questions put to her and answered.

40

Discussion.

Mr. Simon: I think the signature was not identified. However, I would like to offer my objection and say it is improper at this time to admit them in evidence after the case has rested.

10 The Court: Counsel has asked me all the way through the case, and I told him no until the doctors came, because the jury has gone and we had taken a recess. At that time he asked me if he might, and I said no.

Mr. Simon: I say, at this time, after the case is all rested, it is improper for him to come now—

The Court: He did not rest, subject to this.

Mr. Simon: I never heard such a motion.
20 May I have it on the record, and may I have an exception?

The Court: You may have it on the record, and you may have the exception.

Mr. Dorgeval: I am now reading on the record from the interrogatories of the plaintiff: "Interrogatory No. 4: State particularly in what bones, joints, muscles, arms, or parts of your body you were injured, and the extent and nature of your injury? A Fracture of ribs;
30 chest.

"Interrogatory No. 3: State explicitly the physical injuries suffered by you in the accident for which you seek to recover damages in this suit? A Fracture of ribs; pains over right side, chest; nervousness.

"Interrogatory No. 5: Were you confined to your bed by reason of the injuries complained of, and if so, for how long? A Yes, one month and since intermittently assisting in taking
40 ing care."

Discussion.

Mr. Simon: My only point is, if they are in evidence, they all go in, and you can not get a few isolated questions.

The Court: Certainly. The entire interrogatories.

Mr. Dorgeval: As I understand it, the attorney for the side propounding the interrogatories may use whichever ones he wishes. 10

The Court: He must put it all in, and you reserve only that part of it as you please. If you are reading it, all of it must go into the record.

Mr. Dorgeval: All of it?

The Court: Certainly. You need not read any part of it, but if you mark it in evidence you can refer, in summation, to whatever part you please. I supposed you were reading it all into the record. 20

Mr. Dorgeval: No, sir. I am reading in the ones I have use for, which I understand is right.

The Court: No, I think not. You may offer it all and call attention only to those parts that you think are pertinent, but it all goes in.

Mr. Dorgeval: If your Honor please, that means that interrogatories are practically valueless; that means the other side can put in all sorts of self-serving declarations. 30

The Court: Well, it is part of the record in the case.

Mr. Dorgeval: I do not understand that the interrogatories—

The Court: That is the ruling.

Mr. Simon: That is the chance they take. 40

Discussion.

The Court: You may withdraw it if you wish, and not put any of it in. If you want any of it in it must all go in.

Mr. Dorgeval: I want to refer to certain ones.

10 The Court: You may do that, and counsel on the other side may refer to the rest but not put part in and not all.

Mr. Dorgeval: But these are all separate questions.

The Court: They are all part of one paper. This is all part of the interrogatories. It is one paper, just as one pleading is. You cannot put one part of the pleading in and leave out some other part. The pleading is all in. Now, 20 this is part of the papers in the case. It is part of the record, and it ordinarily would no go before the jury unless it is offered in evidence. You offer it in evidence, and it is admissible, but you cannot offer just part of it.

Mr. Dorgeval: I understood I could offer whatever interrogatories I wished.

The Court: No, I think not. You may be right, but I do not think that is proper.

Mr. Dorgeval: I am quite sure, if your Honor please, that is the rule.

30 The Court: Have you a case?

Mr. Dorgeval: I can get one, but not in a second. I am quite sure the interrogatories may be used by the party propounding them.

The Court: That is a new point to me, and I am frank to say I do not know the answer, and I will allow it all to go in or none.

Mr. Dorgeval: You mean, I cannot refer to them unless I put them all in evidence?

40

Discussion.

The Court: I mean you can refer to only those parts that you please, but do not read any part, just a part, because then the record would not be correct. You may offer it in evidence. Let it be marked in evidence, and then you use such part of it as you please in summing up to the jury, or in reading it to the jury, if you wish, either now or when you sum up, as you please, but the point is that gives the other party the opportunity to use that part of it as he may wish to. 10

Mr. Dorgeval: The point is those answers are self-serving, as far as she is concerned.

The Court: I know it. I can not help that.

Mr. Dorgeval: Well, I offer it in evidence.

The Court: You may have it marked.

Mr. Simon: I object, of course, your Honor, and take an exception. 20

The Court: An objection is noted.

(Defendants' Exhibit D. 2 for identification was then received and marked in evidence.)

Mr. Dorgeval: (Reading) "No. 9: Are you entirely cured of the injuries for which you are seeking damages?"

The Court: Do not read to the stenographer part of it. I have no objection if you want the record to contain it to read it all to the stenographer, but I do not think any purpose is gained by reading any part of it to the stenographer, because it is all a part of the record, now that it is in record, in the case I mean. This is all a part of the record, every answer and every question. 30

Mr. Dorgeval: All right.

The Court: And in summation you may sum up and refer only to that part that you wish. 40

Discussion.

Mr. Dorgeval: May I have an exception noted, if your Honor please, to your Honor's requirement that I introduce all of the answers?

The Court: Yes, sir, you may.

10 Mr. Dorgeval: My ground being, counsel for the parties propounding the interrogatories has a right to use whichever ones he wishes.

The Court: Yes, sir.

Mr. Dorgeval: Thank you, sir.

The Court: Now, how long do you need to sum up?

Mr. Dorgeval: Ten minutes.

The Court: Maybe fifteen; ten or fifteen. I do not think you need a great deal of time for the summation.

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(Mr. Dorgeval sums up to the jury on behalf of the defendants.)

(Mr. Simon sums up to the jury on behalf of the plaintiff.)

30

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THE COURT'S CHARGE.

PORTER, J. Ladies and gentlemen of the jury: The case that you have been called upon to try is one brought by Katherine Seinner against the Public Service Coordinated Transport and Clinton Harley. Is Clinton Harley in court? 10

Mr. Dorgeval: No, sir; never was served.

The Court: Then, just Katherine Seinner against the Public Service Coordinated Transport. The suit was brought against the driver of the bus, Clinton Harley, but was not served.

Mr. Simon: Service was sent to the sheriff, and he was unable to be located.

The Court: Yes, there was an attempt to serve him but he could not be found and the suit is based upon an occurrence of September 27, 1928, while Mrs. Seinner was a passenger in a bus, jitney bus, of the defendant. 20

She says that there was a sudden swerving or jerking of the bus which caused her to be precipitated out of her seat onto the floor, and which caused her certain hurts from which she has been suffering at times. She says she was hurt about the head and about the chest and back, I think. That as a result of the hurts that she received she has been spitting blood. She had a broken rib. That she has dizzy spells, that she was confined to her bed either entirely or intermittently for a month, that she has been unable since to do any household work whatsoever, that she is able to go out to do the shopping, that she has to hire someone to do her housework, that she is dizzy, and that she has pains in the region where she claims to have been hurt. And so she says she is in a bad condition of health, that she was well and strong before the acci- 30 40

Charge to Jury.

dent, weighing about 160 pounds, and now weighs but 128 pounds, that the loss of weight is due to this injury, or these injuries that she has received, and she asks that she be compensated for the amount of money that it cost her in the way of expenses, doctor's bills and for the hiring of
10 someone to do her work, and such further sum as you think it proper to compensate her for the loss of her health, for the disability, the physical disability, that she has had and may have in the future, and the pain and suffering that she has endured and may endure in the future, and the expense that she has been put to as I have noted it, is a \$125 bill which she owes Dr. Cohen, or which he charged—I do not know whether it is paid or not, I have forgotten—but she paid Dr.
20 Roth \$25, and Dr. Terhune \$15 and Dr. Bleasby, her attending physician, until Dr. Cohen treated her, about \$48; and in addition to that she says that one of her daughter's, Grace, who was employed at a wage of \$70 a month, was obliged to stay home for a month with her, that she gave her all of her money, and that she therefore lost the daughter's services for that month, and she is entitled to receive the reasonable value of someone's services to take care of her during that month, that she had her daughter Grace stay
30 home, and her daughter Ethel says she was obliged to stay home more or less to take care of her mother when Grace could not, and she lost in wages about \$50, and she says that during the times that she stayed home she was not paid, and she says that she also gave all of her wages to her mother.

You remember that the mother only gave them a dress or two a year, and never anything for the movies. The mother got it all pretty much, apparently, although I think in answer to my ques-
40

Charge to Jury.

tion, she said she did give them carfare, but I am not sure of that; but the question is how much would it have cost the mother to have hired someone to have taken care of her during these times that the daughters stayed home. That is the measure of damages. In addition to those items there is another item. There is a Mrs. Vores who was a friend and a neighbor who was with her at the time she was hurt, and came in. Mrs. Vores is a householder, has at least one child, because I remember her talking about getting home for lunch to get her child's or children's lunch. She took care of her, and she says that she was going to charge her a small amount because of their friendship, and the amount that she was charging for her services, which extended for seven or eight months, as I remember it, is \$12 a week.

10

20

Now, those are the actual expenses, the actual outlays as I have recorded them, as they were testified to, and I think you will find them correct. Then, in addition to these items, I say, if there should be a verdict in this case you must add such sum as you think is fair to compensate this plaintiff for the suffering, for the physical disability that she has had or may have in the future. She says she is permanently disabled. She says so through her counsel. She says this is a permanent disability. Now, on that question doctors do not agree. The defendant says the testimony does not sustain the contention of the plaintiff as to the extent of her injuries. She says that she spits blood. The doctors that examined her say she did not tell them anything about that. The doctor who treated her from the middle of November up to now, for a year, does not say so, either. He says she did

30

40

Charge to Jury.

spit blood. That was the history in the early part of the case. The doctors say she did not complain of all of the things that she now speaks of.

10 Dr. Manley, who examined her three times, says she did not complain about being dizzy. He says the first time he examined her he found tender spots on palpation, on pressing, and he found she did not even complain about that the second and third time he examined her, and at no time did she say anything about dizziness, and if it is that she is dizzy, it is because of pusy condition of her teeth and gums, and her teeth and gums are in very bad condition, and were so from the first time he saw her, and he says it is not true; and Dr. Van Schott says it is
20 not true that she lost a great deal of weight. Dr. Van Schott, who examined her a few days after the accident said that he noted that she weighed 125 pounds, the weight that she now gives as her weight, I think. No, she now says 128; but at any rate, Dr. Van Schott says she then gave her weight as 125, as I recall it.

30 Dr. Manley says that she was the same then as now in appearance, that she has not lost the weight that she says she has. She says she has lost from 160 to 128, and there may be other discrepancies, but those are just a few that there are between the plaintiff's testimony and the defendants' with respect to her condition. The plaintiff says that she has a broken rib which punctured the pleura which caused this traumatic pleurisy, that is, pleurisy caused by a blow which caused the spitting of blood, which causes pain now, which causes this imperfect breathing, that the imperfect breathing is a symptom, and the
40 others could not find it, some of them, anyway,

Charge to Jury.

say that she had no injury to the pleura or lung, that she had no traumatic pleurisy, at least, they could not find any, and that the condition that they did find, a broken rib, should have cleared up in a relatively short time.

Now, that I say, is the difference between, or some of the difference—I do not say they are 10
all—between the testimony on behalf of the plaintiff and on behalf of the defendant. Counsel have very completely, both of them, covered them in their summation.

Counsel have also attempted to explain the law to you in their summation. I will have to ask you to forget anything they told you about the law, because that is my job, and they were wasting your time and mine when they told you about it, and what I tell you to be the law I ask 20
you to believe to be the law, whether it is correct or not.

Now, this case is founded upon negligence. Negligence is the basis of this suit, and the burden is placed upon the plaintiff to establish negligence by the clear weight of the testimony before there can be any recovery, because negligence is never presumed, but must always be proven, and the person who claims there was negligence must prove it, must prove it by the 30
clear weight of the testimony. As you weigh it, on what side is the scale borne down? On what side of the question does the testimony weigh more heavily? It must weigh more heavily in favor of negligence than against negligence in order that there be a recovery. Weigh it as you consider it entitled to weight. You are the sole judges of the facts. That is your function. This is a fact question as to the question of negligence, as I will presently define negligence, 40

Charge to Jury.

and you are the sole judges of the weight that the evidence is to receive. Not necessarily is the weight of the evidence on the side of the most witnesses. One person may testify to the truth and nine others to the opposite, and you may say that the one who testified against the

10 nine was telling the truth, and the others were not, because it appealed to your common sense, and because it was unequivocal and straightforward. You looked him in the eye and discerned an honest person. The others all got mixed up, and you detected little discrepancies from their stories, from which you concluded they were lying; therefore, the truth would be on the side of one and against nine. Therefore, the weight of the testimony would be on the side of one

20 against nine in spite of the difference in number, as you decide where the truth lies. Of course, I do not mean to say there has been anybody deliberately testifying here falsely. You may be able to reconcile discrepancies in the testimony. You take into consideration the human weaknesses and mental infirmities and lack of recollection, and what one may observe and see another may not. One may have a car going so fast, and another faster or slower. It is a matter of judgment. When you come to distances it is a matter of judgment. These things

30 happen rather quickly and, of course, witnesses do not all agree, and honestly disagree. They give you the best they can after a lapse of a year or more as to what did happen, but if you should believe that any witness has come here and testified falsely with respect to a material fact in this case for the purpose of deceiving you, you have a right to disregard everything that such a witness may have testified to. In

Charge to Jury.

other words, it is your job to find the truth; to separate the truth from the untruth and disregard the untruth and rely on the real truth. Negligence is the omission to do something which a reasonable person, guided by those considerations which ordinarily regulate the conduct of human affairs, would do, or the doing of something which a reasonable, prudent person would not do. 10

You will observe from that that the test is not that of the most skillful person, the most expert driver, but rather that of a reasonable, prudent person. Keep that in mind with reference to what I shall presently say with respect to the degree of care that is required of a person engaged in driving a jitney bus.

Again, negligence has been defined to be the failure to observe for the protection of the interests of another person that degree of care, protection and vigilance which the circumstances justly demand whereby such other person suffers injury. Again, the absence of care according to circumstances. Such an omission by a reasonable person, to use that degree of care, diligence and skill which it was his legal duty to use for the protection of another person from injury as, a natural and continuous sequence, causes injury to the latter. 20 30

Now, in the case of a person engaged or a corporation engaged as a common carrier, that is, carrying passengers for hire, the duty is placed by law upon such common carrier to use a high degree of care for the safety of the passengers. They are bound to exercise a high degree of care to carry their passengers safely, as distinguished from the degree of care that is owed by one individual to another. Here 40

Charge to Jury.

the charge is that the Public Service Coordinated Transport's agent or employe did not use that high degree of care that its agent was required to use in order to carry its passengers safely. Now, the law recognized the fact that trolley cars, steam cars and jitney buses in the
10 ordinary and usual operation of them do start and stop with more or less jerks. So the question is whether the jerk or jar that was present in this case was an ordinary jerk or jar that would ordinarily be occasioned by ordinary and proper driving of the vehicle, or whether it was occasioned by an improper operation, by a negligent operation, by an operation that a person ought not to have permitted who was under a duty such as I have indicated, to use a high
20 degree of care in operating it.

Of course, there is no testimony here of any contributory negligence. The only question I repeat for you to determine is whether or not there is wrong done by the Public Service to the plaintiff, whether there was a violation of the law that it owed her. There is no question but what she was not in the operation of the bus herself. She was not driving it, and she did not jump off while it was going and she did
30 not stand on the step. There is no testimony here that she did anything that would cause her to be charged with contributory negligence. So that the only question here is as to whether or not there was a lack of the care that was necessary to be exercised by the driver of this jitney bus to carry her safely. Now, the high degree of care that I have been talking about denotes no more than a degree of care commensurate with the risk or danger. That is what is meant by that. The care commensurate with
40 the risk or danger. In considering whether or

Charge to Jury.

not the bus driver was negligent you must take into consideration, of course, all of the surrounding facts and circumstances. If you find that he was confronted with a sudden emergency, you must test his conduct by what you think a reasonable, prudent person would have done if confronted with a similar emergency.

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He is not required to exercise the best possible judgment. He is only required to exercise that degree of skill and care which a reasonable, prudent man would be expected to exercise under similar circumstances.

If you find, for instance, that this occurrence was an unavoidable accident and not due to any lack of care or negligence on his part then, of course, your verdict must be no cause for action. If you find that the driver of the bus was negligent, but that such negligence was not the proximate cause of the accident, then again your verdict must be no cause for action.

20

By proximate cause is meant the directly producing cause without which the accident would not have happened.

The term "proximate" indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the injury.

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If, therefore, you find that the proximate cause of the accident was a third party, the other bus in this case, then your verdict must be no cause for action.

The plaintiff here says there was an act of negligence on the part of the bus driver, and that is why she brings this suit. She says he did not have his bus under proper control. She says there was a high degree of care necessary, and under the law he was bound to use a high

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Charge to Jury.

10 degree of care to safeguard his passengers. That he did not do it, that he was traveling on wet pavement, that he was either going too fast or he had not his car under proper control, or was not looking, or he put his brakes on too suddenly, that he did something that he ought not to have done, that a reasonable, prudent person would not have done, who was obliged to use a high degree of care, and it was because of his negligence in that regard that caused this sudden, unusual jerk which precipitated this woman on the floor and caused her injury, and the fact was a proximate cause of the accident. That is the plaintiff's case in a nutshell.

20 The defendant says that is not so. The defendant says that he was not going fast. His bus was not out of control. He was only going according to plaintiff's own witnesses ten to fifteen miles an hour—I have forgotten just what they said—but no one said the car was going very fast, as I recall it, and that he was on the right-hand side of the road, and that he had his bus under control, and that he stopped within ten feet when he put his brakes on, and that there was no terrific lurching or jerking, that the only person who left his or her seat was this plaintiff.

30 No one else did, and the defendant claims, therefore, that the bus driver was not guilty of any negligence, that he was not violating any duty that the defendant owed to this woman, that they were under duty to use a high degree of care, and it was used, that the driver was confronted suddenly with danger, and that danger was a bus approaching from his right, I think, on the intersecting street, and seeing that danger, and to safeguard and save his passengers from injury, he used a high degree of care. He applied his

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Charge to Jury.

brakes and stopped, or came to nearly a stop, and then the danger being over, or he apprehending no further danger, went on and, therefore, under these circumstances there was no negligence, and there was no violation of the high degree of care that he owed to this passenger or any other passengers, and if that be so there should be a verdict of no cause for action. If, on the other hand, you find that is not so, and that he acted as a reasonable, prudent person who owed this high degree of care should not have acted under the circumstances, which was the proximate cause of the accident, then there should be a verdict.

The defendant says that the fact that he stopped or came practically to a stop within ten or twelve feet, or whatever the testimony is, is evidence that he had his bus under control. The fact that it only swerved a little on a wet pavement is further evidence that he had it under control. There is a dispute in the testimony as to how much of a skid there was. One witness had the car backed to the curb, sticking at an angle in the street; another witness had the rear of the car swerving three feet, which is not very much of a skid, perhaps. Some said it was a big jerk, and some said it was a little jerk, I think, or words to that effect. How much was it? Was this an unusual jerk, or was it not? The defendants say that under these facts the driver had his presence of mind, and that he evidenced complete control and exercised a high degree of care, and if that is so that is all there is to the case. The plaintiff says he did not, and the defendants say he did. Did he lose his presence of mind? Was he negligent? Did he operate this bus as he should have op-

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Charge to Jury.

erated it, as a reasonable, prudent driver of a common carrier bus should have driven it, or didn't he? That is the question for you to decide first before you approach any other question, and if you decide that he did, that he was not guilty of any act of negligence, that he did
 10 not do anything that a driver of a bus under a duty to use a high degree of care should not have done, or ought not to have done, then your verdict is no cause for action, and that ends the case.

If you should find as a fact that he was negligent, that he exercised no high degree of care, but was negligent, and that was the proximate cause of the accident, then there should be a verdict, and in that case and only in that case,
 20 need you take up the question of the amount of the verdict, and I have already covered the question of the verdict in the early part of my charge. I mean as to the measure of damage, if you get to that situation.

You decide this case from your recollection of what the testimony was, not from mine, because I may have misstated it, and if I have in any particular, you will disregard any misstatements that I have made. There is no significance in
 30 the fact that I have not covered all of the testimony. You must decide it from all the testimony, and you must decide it from all the testimony, as you remember it, and if I have stated it incorrectly, or if counsel has in any particular, of course, you will disregard such misstatement, but depend rather on your own recollection of what the testimony is.

This accident either occurred because of the negligence of the driver, or it did not, that it was in violation of the duty that was owed by
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Charge to Jury.

the defendant common carrier to her, and if you find that there should be a verdict. If you find that there was a violation of her rights, as I have described it to you, then there should be a verdict; otherwise not, and if there should be a verdict it must be based upon the facts in this case as you find them to be.

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Either she is hurt as badly as her witnesses say she is, or she is not hurt as badly as she says she is. You will decide whether she is hurt as badly as she says she is or not. That you must decide when you come to the question of damages, if you come to it. The case must be decided by you according to the testimony, and according to the facts, not as you might like to decide it, not as your sympathies may swerve you either one way or the other.

20

It is an important case. Important both to the Public Service, who claim they have been imposed upon in this case, and important to the plaintiff, who is hurt. There is no question but what she was hurt to some extent, at any rate, whether she is hurt to the extent she says she is or not is for you to say, but it is important from both their standpoints, and you must give it the consideration that it warrants. You must give it careful consideration, as counsel has said. This is her last day in court, and, of course, we try these cases but once, and this is her day. Now, decide the case according to the testimony as you find the facts to be from the testimony, and decide it without fear or favor, irrespective of what your sympathies may be one way or the other. You may retire.

30

Mr. Simon: May I ask your Honor—invariably charges about the speed.

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Charge to Jury.

The Court: I did. Counsel was not listening to me. I said there may have been negligence with respect to the speed, lack of control not lacking. I covered that thoroughly. I do not think it is necessary for me to go over it.

10 Mr. Simon: My only point as to what speed your Honor invariably says, that speed is not a deciding element they must take into consideration, and so on.

The Court (to the Jury): I tried to cover that as well as I could, that all the circumstances surrounding this case must be taken into consideration. What counsel has in mind is that I sometimes say a car may go fifty miles or else much faster than the law says they can go, and yet not be guilty of negligence, if it is a
20 perfect road, no crossroads in the middle of it, and a splendid car and a splendid driver, they might go without being negligent. On the other hand, a man might be driving four miles an hour or three miles an hour, if he has his eyes shut and mooning with a girl and both arms around the girl, and no arms around the car, it would be negligence. The question is not necessarily the speed. It is all of the circumstances and the facts. I do not believe I could
30 make it any plainer if I recharged you on that whole thing. I think counsel was not listening, perhaps. I said that counsel's point was that there was an act of negligence, either speed, improper brakes, or something that he did that a reasonable, prudent person would not do who had the charge of passengers, and the duty of using a high degree of care, anything that you might find in the facts that was lacking in a high degree of care rather, and was negligent is all that you need to find for the plaintiff. The
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Plaintiff's Exceptions to Charge.

defendant says there is not a blessed thing in this case that the driver did that he should not have done, and there was no lack of care, that he was not going fast, that he was not out of control, that he had his mind on his job, that he saw a sudden danger and did what a skillful man would do, and a man charged with the high degree of care would do and brought his car immediately to a stop, or practically to a stop and avoided this on-coming bus. Did he or didn't he? You may retire. 10

Mr. Dorgeval: Will your Honor state this is our only day in court?

The Court: Of course, I am not going to try this case but once for either of them, if I can help it.

(The jury retired.) 20

PLAINTIFF'S EXCEPTIONS.

Mr. Simon: The plaintiff takes exception to that portion of the Judge's charge, "That if you find the proximate cause of the accident was due to negligence of a third party then your verdict must be no cause of action," on the grounds that same was not raised by the issue, not having been pleaded, especially on the grounds that the evidence does not warrant same; on the further grounds that it is exclusive of what concurring negligence may have been on the part of the defendant. 30

Plaintiff also takes exception to the fact that the defendant denies that he failed to use the degree of care that was necessary under the circumstances, on the ground that the defendant was not present in court, nor was there any evi- 40

Defendants' Exceptions to Charge.

dence that the defendant did everything possible to avert the collision, that he used that degree which was necessary for him under the circumstances.

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DEFENDANTS' EXCEPTIONS.

Mr. Dorgeval: I desire to except to your Honor's leaving to the jury as an element of damage the \$70 claimed to have been lost by plaintiff's daughter to attend her mother. I am now referring to the daughter Grace who did housework, and who it was claimed turned all of her wages over to her mother.

20

I except for the reason that this is not a proper measure of damage for this plaintiff, for the reason that this daughter was an adult child and entitled to her own wages, and the mere fact that it was her custom to turn her wages over to her mother did not make this an element of damage for the mother.

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I desire to except to your Honor's leaving to the jury as an element of damage the fact that Mrs. Vores had attended the plaintiff for seven or eight months at \$12 a week, for the reason, first, that the time stated by your Honor was incorrect, such time being, according to Mrs. Vores' testimony, six or seven months, instead of seven or eight.

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Second, this was not a proper element of damage, because it was never shown that said charge was reasonable; and further it was not shown that Mrs. Vores was actually going to make such a charge, or that she had made such a charge. She merely mentioned \$12 a week incidentally with a qualifying remark which left it open to

Defendants' Exceptions to Charge.

question as to whether she was actually going to charge anything for her services.

The other proofs being that they were intimate friends. My point is this item should not have been left to the jury at all as an element of damage.

I desire to except to your Honor's omission to charge that if they find for the plaintiff, that they ascertain the present value of her losses which they find may accrue in the future. I desire to except to your Honor's remark that the doctors, or the plaintiff's doctors, say that she is permanently disabled. My point is that the most that her doctors said was that she had a permanent condition, but none of them said she was permanently disabled.

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Next, I desire also to except to your Honor's omission to charge the jury that the jerk must be unusual or abnormal. There was no proof of this, and, therefore, nothing to go to the jury on this question.

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I further desire to except to your Honor's leaving it to the jury for their consideration, and I desire to except to your Honor's saying in two places in the charge, that for the plaintiff to recover the jury must find that the driver of the bus was not looking, or that his brakes did not work, or that his bus was out of control, and words to that effect.

30

My point is that there was no proof whatever in the case that the brakes were out of order. On the contrary, all of the evidence indicated that they were in excellent order, for the bus, without dispute made a very quick stop. There was no proof whatever that the bus driver was not looking, or that the bus was out of control. On the contrary, the evidence indicates that the

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Defendants' Exceptions to Charge.

bus was proceedings upon a very moderate rate of speed, and was stopped quickly.

This, again, is undisputed and demonstrates conclusively that the bus was not out of control. I respectfully submit that your Honor's leaving these questions to the jury as you did, points upon which there is no evidence whatever, could not help, but be prejudicial to the defendant, and was without legal justification.

As a matter of fact these suggestions of possible negligence were first introduced into the case in your Honor's charge.

I desire to except to another portion of your Honor's charge in which your Honor said substantially that the question was whether there was a big jerk or a little jerk. My point here is that there was no testimony that there was a big jerk, whereas the only direct testimony on the point was directly contra, that is, that the jerk was slight. Therefore, your leaving to the jury to decide whether there was a big jerk was without foundation of the evidence, and without legal justification.

Next, I desire to except to your Honor's stating to the jury that this is an important case. From our point of view it was not an important case, and your Honor's statement to that effect, I respectfully submit, added undue gravity to the situation.

I desire also to except to that part of your Honor's charge in which your Honor, after saying all you have defined as lack of control on the part of the bus driver, or that he was not looking, or had bad brakes, stated that all the jury had to do was to find one of these things to bring in a verdict for the plaintiff. This statement was made without qualification. I

Plaintiff's Requests to Charge.

submit, first, that it was without foundation in the evidence, and even if there had been such evidence it should have been qualified by the further statement that it must have been proved by the preponderance of evidence, and must be shown to have been the proximate cause of the accident. There was no such qualification. I 10
 desire to except to your Honor's charge that the proper measure of damage to which the plaintiff is entitled for the hire of someone to care for her was the reasonable cost, of what it would cost to hire such a person. My point is that she is not, of course, entitled to anything she did not spend but is only entitled to what she actually did spend, after proof that she required someone to care for her and proof of the period for which she required such attendance. The language of your Honor's charge 20
 leaves the jury the right to award the reasonable cost to hire someone to care for her, irrespective of what she actually spent and, of course, the latter is all that she has a right to recover for.

PLAINTIFF'S REQUESTS TO CHARGE.

Plaintiff respectfully requests the Court to instruct the Court to charge the jury that: 30

1. The Public Service Coordinated Transport is a common carrier of passengers and as such it and its employes owe to the plaintiff a high degree of care for the safety of the passengers and they are bound to exercise a high degree of care to get them safely to the journey's end.

2. A common carrier is negligent if it fails to take a high degree of care to protect its pas- 40

Defendants' Requests to Charge.

sengers from every danger that the exercise of reasonable foresight would anticipate.

10 3. There is no evidence of contributory negligence on the part of the plaintiff and the only question left for your determination is whether or not the defendant was guilty of negligence.

4. The jury is to disregard the evidence respecting the loss of earnings on the part of the daughters and in lieu thereof the plaintiff is to be compensated for what it would reasonably cost to hire someone to perform the services that was performed by the daughters.

DEFENDANTS' REQUESTS TO CHARGE.

20 1. By concensus of opinion of text writers on the law of negligence and by judicial decisions, "high degree of care" denotes no more than a degree of care commensurate with the risk of danger.

New Jersey Fidelity v. Lehigh Valley R. Co., 105 Atl. 206.

30 2. In considering whether or not the bus driver was negligent you must take into account all of the surrounding facts and circumstances. If you find that said bus driver was confronted with a sudden emergency you must test his conduct by what you think a reasonably prudent man would have done if confronted with a sudden emergency.

40 He is not required to exercise the best possible judgment. He is only required to exercise that degree of skill and care which a reasonably prudent man might be expected to exercise under similar circumstances.

Defendants' Requests to Charge.

3. If you find that this occurrence was simply an unavoidable accident then your verdict must be for the defendant.

4. If you find that the driver of the defendant's bus was negligent but that such negligence was not the proximate cause of the accident then your verdict must be for the defendant.

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5. By proximate cause I mean the directly producing cause without which the accident would not have happened.

6. The term proximate indicates that there must be no other culpable and efficient agency intervening between the defendant's dereliction and the injury.

7. If, therefore, you find that the proximate cause of this accident was a third party, the other bus in the case, then your verdict must be for the defendant.

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8. If you find that any witness in the case has testified falsely as to a material matter for the purpose of deceiving you, you have the right to disbelieve the whole of the testimony of such a witness.

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GROUND OF APPEAL.

Filed December 31, 1929.

NEW JERSEY COURT OF ERRORS
AND APPEALS.

10

KATHERINE SEINNER,
Plaintiff-Appellee,

vs.

PUBLIC SERVICE COORDINATED
TRANSPORT,
Defendant-Appellant.

*Action
at Law.*

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*To Aaron L. Simon, Esq., attorney for plaintiff-
Appellee:*

SIR:

TAKE NOTICE, that the following are the grounds of appeal which the defendant-appellant, Public Service Coordinated Transport, will urge why the judgment heretofore rendered against it in the above-entitled cause should be reversed, set aside and for nothing holden:

30

1. Because the Court, at the close of the plaintiff's case, although moved so to do by the attorney for the defendant on the ground that no negligence on the part of the defendant had been shown, refused to non-suit the plaintiff.

2. Because the Court, at the close of the whole case, although moved so to do by the attorney for the defendant on the ground that no negligence had been shown on the part of the defendant, refused to direct a verdict in favor of the defendant.

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Grounds of Appeal.

3. Because the Court, despite the objection of the attorney for the defendant, permitted Dr. Bryant C. Mageniss, a witness produced by the plaintiff, to testify in answer to the following questions, as follows:

“Q Doctor, assuming a woman of 53 sustained a broken rib and had expectorated blood thereafter some time, and had a cough that lasted to the present date, what would you say, in your opinion, doctor, she had suffered from? 10

The Witness: From the contusion of the fracture of the ribs, a probable injury to the pleura.

Q Anything else? A Most always in fractured ribs injury to the pleura, because the pleura is almost attached to the ribs, or the ribs attached to the pleura.” 20

4. Because the Court permitted Ethel Seiner, a witness produced by the plaintiff, to testify over objection by the attorney for the defendant as follows:

“Q How much did she turn over to your mother? A \$70.”

5. Because the Court, despite the objection of the attorney of the defendant, instructed the jury as follows:

“* * * and she asks that she be compensated for the amount of money that it cost her in the way of expenses * * * for the hiring of someone to do her work * * * the expense she has been put to as I have noted it, is * * * that one of her daughters, Grace, who was employed at a wage of \$70 a month, was obliged to stay home for a month with her, that she gave her all of her money, and that she therefore lost the daughter’s services for that month, and she is entitled to receive the reasonable value of someone’s services to 30 40

Grounds of Appeal.

10 take care of her during that month, that she had her daughter Grace stay home, and her daughter Ethel says she was obliged to stay home more or less to take care of her mother when Grace could not, and she lost in wages about \$50, and she says that during the times that she stayed home she was not paid, and she says that she also gave all her wages to her mother. * * * but the question is how much would it have cost the mother to have hired someone to have taken care of her during these times that the daughters stayed home. That is the measure of damages."

6. Because the Court, despite the objection of the attorney for the defendant, instructed the jury as follows:

20 "In addition to those items here is another item. There is a Mrs. Vores who was a friend and a neighbor who was with her at the time she was hurt, and came in. Mrs. Vores is a householder, has at least one child, because I remember her talking about getting home for lunch to get her child's or children's lunch. She took care of her, and she says that she was going to charge her a small amount because of their friendship, and the amount that she was charging for her services, which extended for seven or eight months, as I remember it, is \$12
30 a week. Now those are the actual expenses, the actual outlays as I have recorded them, as they were testified to, and I think you will find them correct."

7. Because the Court, despite the objection of the attorney of the defendant, instructed the jury as follows:

40 "She says she is permanently disabled. She says so through her counsel. She says this is a permanent disability. Now, on that question doctors do not agree."

Grounds of Appeal.

8. Because the Court, despite the objection of the attorney of the defendant, instructed the jury as follows:

“So the question is whether the jerk or jar that was present in this case was an ordinary jerk or jar that would ordinarily be occasioned by ordinary and proper driving of the vehicle, or whether it was occasioned by an improper operation, by a negligent operation, by an operation that a person ought not to have permitted who was under a duty such as I have indicated, to use a high degree of care in operating it.”

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9. Because the Court, despite the objection of the attorney for the defendant, instructed the jury, as follows:

“The plaintiff here says there was an act of negligence on the part of the bus driver, and that is why she brings this suit. She says he did not have his bus under proper control. She says there was a high degree of care necessary, and under the law he was bound to use a high degree of care to safeguard his passengers. That he did not do it, that he was traveling on wet pavement, that he was either going too fast or he had not his car under proper control, or was not looking, or he put his brakes on too suddenly, that he did something that he ought not to have done, that a reasonable, prudent person would not have done, who was obliged to use a high degree of care, and it was because of his negligence in that regard that caused this sudden, unusual jerk which precipitated this woman on the floor and caused her injury, and the fact was a proximate cause of the accident. That is the plaintiff's case in a nutshell.”

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Grounds of Appeal.

10. Because the Court, despite the objection of the attorney for the defendant, instructed the jury as follows:

“The defendant says that he was not going fast. His bus was not out of control. * * * and that there was no terrific lurching or jerking * * *.”

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11. Because the Court, despite the objection of the attorney for the defendant, instructed the jury as follows:

“Some said it was a big jerk, and some said it was a little jerk, I think, or words to that effect. How much was it? Was this an unusual jerk, or was it not?”

12. Because the Court, despite the objection of the attorney for the defendant, instructed the jury as follows:

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“I said that counsel’s point was that there was an act of negligence, either speed, improper brakes, or something that he did that a reasonable, prudent person would not do who had the charge of passengers, and the duty of using a high degree of care, anything that you might find in the facts that was lacking in a high degree of care rather, and was negligent is all that you need to find for the plaintiff.”

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13. Because the Court, despite the objection of the attorney for the defendant, refused to permit the attorney for the defendant to introduce into evidence certain of the interrogatories, and the answers thereto, that had been propounded by the defendant, but compelled said attorney for the defendant to introduce all of the interrogatories and the answers thereto if

Grounds of Appeal.

said attorney wished to introduce any of said interrogatories and their answers.

Dated December 30, 1929.

Yours truly,

HENRY H. FRYLING,
Attorney of Defendant-Appellant. 10

(Endorsed) "Service of a copy of within grounds of appeal acknowledged this 30th day of December, 1929.

AARON L. SIMON,
Attorney of Plaintiff."

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*Exhibit D. 2.***EXHIBIT D. 2.**

NEW JERSEY SUPREME COURT.

PASSAIC COUNTY.

10 KATHERINE SEINNER,

*Plaintiff,**vs.*PUBLIC SERVICE COORDINATED
TRANSPORT COMPANY and
CLINTON HARLEY,*Defendants.**Action
at Law.**Interroga-
tories.*20 *To Irving Fisher, 80 Lexington avenue, Passaic,
New Jersey, attorney for plaintiff:*

SIR:

TAKE NOTICE, that the defendant in the above-stated cause, the Public Service Coordinated Transport Company, requires answers under oath from Katherine Seinner, plaintiff therein, to the following interrogatories proposed in the above cause, within ten days after the service thereof upon you.

30 FIRST.—How did the alleged accident happen?

ANSWER.—While passenger in bus, was thrown due to carelessness of driver.

SECOND.—Describe in detail the manner in which you were injured.

ANSWER.—Was thrown against the seat and the aisle and then to the floor.

THIRD.—State explicitly the physical injuries suffered by you in the accident, for which you seek to recover damages in this suit.

40

Exhibit D. 2.

Answer.—Fracture of ribs; pains over right side, chest; nervousness.

FOURTH.—State particularly in what bones, joints, muscles, organs or parts of your body you were injured, and the extent and nature of your injury.

Answer.—Fracture of ribs; chest.

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FIFTH.—Were you confined to your bed by reason of the injury complained of, and, if so, for how long?

Answer.—Yes; one month and since, intermittently assisting in taking care.

SIXTH.—Were you confined to your room by reason of the injury complained of, and if so, for how long?

Answer.—Same. See answer to 5.

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SEVENTH.—Were you confined to your house by reason of the injury complained of, and if so, for how long?

Answer.—Same. About the house for two months.

EIGHTH.—For what number of days, if any, were you prevented from attending to your usual household duties as a consequence of the accident and on what day did you resume your household duties after the accident.

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Answer.—Still unable to do own housework.

NINTH.—Are you entirely cured of the injuries for which you are seeking to recover damages in this suit? If your answer to this question is "No," then state fully and particularly in what respect you still suffer from such injuries.

Answer.—No. Still pains in chest; nervous.

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Exhibit D. 2.

TENTH.—Give an itemized statement of the disbursements and losses for which you claim reimbursement in this suit.

Answer.—Dr. Bleasby about \$30.00. Still under doctor's care. Household, 3 times a week, at \$4.00 per day. Medicines about \$50.00.

10

Very truly yours,

HENRY H. FRYLING,
Attorney of Defendant.

4/17/29—OS

PB-9655

File 20557

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STATE OF NEW JERSEY, }
COUNTY OF PASSAIC. } ss.:

KATHERINE SEINNER, of full age, being duly sworn on her oath according to law says that she is the plaintiff in the suit in which the foregoing interrogatories and the answers thereunto, are made, and that she is familiar with the case, and that the facts set out in the said answers and the statements therein are true to the best of her knowledge as she verily believes.

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KEDI SEINER.

Sworn and subscribed before me
this 21st day of October, 1929.

IRWIN H. SIMON.
(SEAL)

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New Jersey Court of Errors and Appeals

KATHERINE SEINNER,
Plaintiff-Appellee,

vs.

PUBLIC SERVICE COORDINATED
TRANSPORT,
Defendant-Appellant.

*Action
at Law.*

*On Appeal
from
New Jersey
Supreme
Court.*

BRIEF OF DEFENDANT-APPELLANT.

The plaintiff brought suit to recover damages for alleged personal injuries sustained by her while a passenger on one of defendant's buses on September 27, 1928. Suit was originally instituted against both the present defendant-appellant, hereinafter referred to as the defendant, and one Clinton Harley, who was operating defendant's bus at the time. Harley was never served (p. 165, ll. 1-23). He left defendant's employ two months after this accident and defendant was unable to locate him for the trial (p. 84, l. 30, to p. 85, l. 40). The best and only evidence of his whereabouts that defendant was able to obtain was from an aunt by marriage, his nearest relative in this vicinity, his home being in South Carolina. She testified to the above as well as to the further fact that the last word she had from him, a little over a month before the trial, was a postal card from Mexico (p. 70, l. 30, to p. 71, l. 22).

The evidence discloses that defendant's bus was proceeding west on Outwater Lane, Garfield, New Jersey, down hill on wet pavement, on its right side of the road, at a very moderate rate of speed estimated at from 10 to 20 miles an

hour at the most. As it came to or neared Prospect street, an intersecting street that entered Outwater Lane from the north and came to what is ordinarily called a "dead end" at that point, another bus (not owned or operated by this defendant but by another company, which for convenience will hereafter be referred to as the "other bus"), proceeding south on Prospect street, or toward Outwater Lane, and about to turn into it, suddenly appeared. An emergency situation was presented. The passengers, including the plaintiff, who happened to see the other bus at this moment thought that an accident was about to happen. There can be no doubt from the evidence that if both buses had continued an accident would have occurred. Both drivers apparently saw one another and applied their brakes at about the same time. Defendant's bus slowed down nearly to a stop and then, the other bus having stopped, proceeded on. There was no contact whatever between the respective vehicles.

In the course of this operation the defendant's bus jerked. No one described what kind of a jerk it was. Several of the witnesses described their reaction to it. The evidence on this point will be completely summarized hereinafter. Suffice it to say for the present that the testimony indicates that it was a slight jerk, one witness saying, "I received more than one of those jerks," and another, "Maybe I went forward a little bit." There were several adult passengers, other than the plaintiff, and some children in the bus. None of these were unseated. None of these saw plaintiff thrown to the floor, nor did she testify that she was so thrown. She was observed on the floor after the jerk, but neither she nor anyone else testified as to just how she came to be there.

Motions for non-suit (p. 69, l. 13, to p. 70, l. 25), and for direction of verdict (p. 88, l. 30, to p. 93, l. 20) in favor of the defendant were denied. The jury returned a general verdict in favor of the plaintiff in the sum of \$3,616.00 (p. 9), from which the defendant appeals (p. 1) and assigns several grounds in support thereof (p. 186 to p. 191).

The grounds of appeal will be discussed herein under the following headings:

I.

It was error to refuse the motion for non-suit and/or for direction of verdict in favor of the defendant. (Grounds of Appeal Nos. 1 and 2.)

II.

The Trial Judge submitted the case to the jury upon erroneous principles of law and, in his charge, erroneously injected several entirely imaginative theories of ways in which the defendant may have been negligent for which there was no foundation whatever in the evidence, and erroneously instructed the jury that, "all" that they "need to find for the plaintiff" is that the defendant was guilty of any one of them. (Grounds of Appeal Nos. 8, 9, 10, 11 and 12.)

III.

The Trial Judge erroneously admitted in evidence certain testimony relating to alleged money losses on the part of the plaintiff, and erroneously charged the jury as to the measure of damage they should use in assessing the amount to which the plaintiff was entitled for the hire of someone to care for her. (Grounds of Appeal Nos. 4 and 5.)

IV.

The Trial Judge erroneously submitted to the jury as an element of damage an alleged item of expense for the hire of someone to care for the plaintiff of which there was no competent proof. (Ground of Appeal No. 6.)

V.

The Trial Judge erroneously charged the jury that there was evidence that the plaintiff was permanently disabled. (Ground of Appeal No. 7.)

VI.

The Trial Judge erroneously permitted a medical expert called by the plaintiff to testify in answer to a hypothetical question that did not either accurately or sufficiently state the facts. (Ground of Appeal No. 3.)

VII.

The Trial Judge, upon the application of the attorney for the defendant to introduce into evidence certain of the interrogatories, and their answers, that had been propounded by the defendant, erroneously ruled that all of the defendant's interrogatories, and their answers, must be introduced if any were to be admitted into evidence. (Ground of Appeal No. 13.)

POINT I.

It was error to refuse the motion for non-suit and/or for direction of verdict in favor of the defendant.

Under this heading we will argue Grounds of Appeal Nos. One and Two.

Motions for non-suit (p. 69, l. 13 to p. 70, l. 25) and for direction of verdict (p. 88, l. 30 to p. 93, l. 20) were made on the grounds that there was no proof of negligence on the part of the defendant. The trial judge reserved decision on the motion to non-suit (p. 70, ll. 15-17), and denied the motion for direction (p. 91, l. 35), and the defendant duly excepted thereto (p. 93, ll. 16-20). While the record does not disclose that the motion to non-suit was specifically denied and exception taken, the clear inference from a reading of both motions and the Court's rulings is that, the trial judge having reserved decision on the motion to non-suit, it became merged in the motion for direction, which was denied, and to which ruling the defendant excepted. We respectfully submit, therefore, that the Court's refusal to non-suit, as well as to direct a verdict, is raised by the record. Whether this be so is immaterial from a practical point of view, however, as the testimony of the defendant's witnesses did not cure any of the defects in the plaintiff's case, but, on the contrary, strengthened the reasons urged by the defendant on its motion to non-suit. The whole question, therefore, is clearly raised, in any event, by the motion for direction.

Discussion of this point involves an examination of the testimony as to the circumstances of the accident.

The plaintiff, who did not speak English well, testified that she was seated on the left side of the bus with another lady, the latter being next to the window, and the plaintiff next to the aisle (p. 25, ll. 32-33; p. 50, ll. 26-30); that she saw the other bus come out of Prospect street and that an accident was about to occur, or, as she put it "was coming an accident" (p. 50, l. 37; p. 51, l.

18). The other bus stopped but defendant's did not (p. 51, ll. 24-33).

It should be noted that nowhere in her testimony does she describe the manner in which she was injured, how she came to fall from her seat, or, in fact, that she did fall from her seat, and that no mention is made of a jerk or anything akin thereto. The defendant's bus did not stop (p. 51, ll. 13-18).

Mary Vores (for the plaintiff) testified on direct examination that she was seated next to the window in the same seat as the plaintiff; that she saw the other bus come out of Prospect street and closed her eyes as she immediately feared that a "big accident" was about to happen (p. 55, l. 19; p. 56, l. 10). On cross examination she said that she could see a "big accident" was going to happen when she saw the other bus come out of Prospect street, and that this was just before she struck her head against something and the plaintiff fell to the floor, *i. e.*, immediately before the alleged jerk. It is worthy of note, however, that nowhere in her testimony does this witness mention a jerk or anything synonymous therewith; neither did she see the plaintiff fall to the floor, but only observed her sitting there (p. 56, ll. 9-11). The other bus stopped, but the defendant's did not, (p. 61, ll. 17-22).

Elinore Schmidtroth (for the plaintiff) testified on direct examination that she was sitting next to the window on the second side seat from the rear of the defendant's bus (p. 65, ll. 15-21); that she was looking out of the window and, as the defendant's bus came to Prospect street "not going fast," observed the other bus coming up said street and about to turn from it into Out-

water Lane; thereupon defendant's bus, which was proceeding down hill on said Outwater Lane, "came to a sort of a stop" and there was a jerk (p. 64, ll. 13-32). The Court then took a hand in the examination and elicited the following: that when the bus jerked the rear of it, in which she was seated, skidded sideways, a distance that "was not a long distance" in her judgment, and did not come in contact with the curb to the best of her knowledge, and she was seated on the right side, next to and looking out of the window, in the second seat from the rear; the defendant's bus did not come to a complete stop but came almost to one and then proceeded on (p. 65, ll. 4-37); further, that when the foregoing occurred defendant's bus was "just about crossing Prospect street," and the other bus was coming up Prospect street near the turn into Outwater Lane (p. 66, ll. 4-15).

On cross examination she testified that she saw the other bus come into view on Prospect street, approaching Outwater Lane, and stop just before the turn; that it was at this time that she felt the jerk; that defendant's bus was not going fast and the buses did not come together. She reiterated that defendant's bus did not come in contact with the curb so far as she knew, and she was sitting next to and looking out of the window on the right side (p. 66, l. 30 to p. 67, l. 30). Neither she nor anyone else to her knowledge was thrown to the floor of the bus (p. 68, ll. 21-25), so that, although she apparently saw plaintiff on the floor, she, too, like the others, did not *know* how she came to be there.

On re-direct examination counsel for the plaintiff brought out the very important information that the front of the defendant's bus was about even, or "the least bit ahead," of the corner of

Prospect street when this witness first saw the other bus (p. 68, ll. 10-13).

Joseph Leslik (for the plaintiff) testified on direct examination that he was a peace officer in the City of Garfield (p. 32, ll. 18-20), and was seated across the aisle from the driver in defendant's bus (p. 43, ll. 30-36) which was traveling downhill on wet pavement (p. 32, l. 33 to p. 33, l. 9). Saw other bus on Prospect street when defendant's bus was 200 feet from it; when defendant's bus was 50 feet from it driver applied emergency brakes and rear wheel of defendant's bus struck gutter, stopping with its rear in the gutter and front at an angle across the road at a point about 10 feet from the sidewalk of Prospect street. Questioned by both the Court and counsel for the plaintiff he twice replied that defendant's bus stopped within ten feet from the time the brakes were applied (p. 33, l. 15 to p. 34, l. 40). Interrogated as to what happened to the other occupants of the bus he said, "We were all shaken up. I asked a few of them if they were hurt and they said no. *They just got scared*" (p. 37, ll. 12-20). Plaintiff was on the floor of the bus when he first saw her (p. 35, l. 39 to p. 36, l. 7). Defendant's bus was traveling 15 to 20 miles per hour (p. 36, ll. 38-40).

On cross examination he testified that the lights inside the bus, as well as the headlights, were lighted; that left side of bus was 35 feet from center of road and right side 20 to 25 feet from curb (which, may we point out here, would make width of one-half the street 35 feet + 20 feet + width of bus, which we will estimate at 6 feet, or 61 feet, and the width of whole street twice that, or 122 feet). Reiterated that defendant's bus was proceeding at only 15 to 20 miles per hour (p. 38, ll. 4 to 33). Plaintiff was the

only person thrown either out of her seat or to the floor (p. 39, ll. 4-8). It should be noted that he could not, of course, *know* that for, as set out above, she was on the floor when he first saw her (p. 35, l. 39 to p. 36, l. 7). Saw other bus coming out of Prospect street (p. 39, ll. 39-40); it continued coming out of Prospect street and defendant's driver applied his brakes when 50 feet from it (p. 40, ll. 28-32); other bus, when it turned into Outwater Lane from Prospect street, was directly in the path of defendant's bus and 50 feet ahead of it (p. 41, ll. 30-40). This last was then summarized for him by the Court and he said that it was true (p. 42, ll. 6-9). In answer to the very next question on cross examination, however, he said that defendant's driver applied the brakes before latter saw the other bus, but then when asked specifically in the very next question if that was what happened he reversed himself again, forthwith, and said "No", and in answer to the two next questions admitted that it was the fact, and that he had so testified, that defendant's driver applied his brakes when the other bus came out 50 feet ahead of him (p. 42, ll. 11-26). The Court without objection, summed up his testimony on this point as follows (p. 44, ll. 25-30):

"The Court: He has already said that he saw the bus driver put on his brakes and then he saw the other car coming down around the corner. That is about all he can say."

Defendant's bus was going down a "good" grade, but, nevertheless stopped within ten feet (p. 42, l. 27 to p. 43, l. 5). No one else in the bus was hurt that he knows of, and no one else was thrown to the floor (p. 43, ll. 19-22). Defendant's bus stopped some distance from the corner, not at a regular stopping place, and at a

point he ordinarily would not stop at (p. 44, ll. 13-18). The average street in his opinion is 50 feet wide (p. 44, ll. 30-40.)

On re-direct examination the important information was brought out that defendant's driver applied both emergency and foot brakes (p. 44, ll. 7-8) indicating as conclusively as any minute fact possibly could that said driver was confronted with a real emergency.

While it does not illuminate nor assist us on this point a further illustration of his muddled thinking, or at least muddled testimony, if any is needed, is to be found on page 40, lines 4 to 27.

Josephine De Lotto (for the defendant) testified on direct examination that she was seated in the third seat from the rear, next to the aisle, facing toward the front of the defendant's bus, her friend, Miss Pallatina, the next witness, being on the same seat to her left. There was a jerk but she was not thrown from her seat although she was sitting next to the aisle (p. 74, ll. 10-31), or in a position exactly similar to that occupied by the plaintiff. The streets were wet. The first thing that attracted her attention to the plaintiff was a commotion behind her, she looked around and saw the plaintiff being helped up and seated in the back seat. Neither she nor any member of her family is connected with the defendant in any way (p. 74, l. 32, to p. 75, l. 12).

On cross examination the following question and answer hold particular interest (p. 75, ll. 19-20):

“Q And this bus gave you a jerk? A Yes, but I received more than one of those jerks.”

Was looking out of the window to her left (p. 75, ll. 16-18) and did not see a bus on Prospect street (p. 75, ll. 27-33), which was to her right.

Lena Pallatina (for the defendant) testified that she was seated in the same seat with Miss DeLotto, the previous witness, occupying the seat next to the window (or seated in third seat from rear next to window). It had been raining. Her attention was first attracted to the plaintiff when she heard someone say that a woman "fell" off a seat. She turned around and saw a man helping plaintiff in the back of the bus.

In response to the direct questions by the Court, "What made her fall, do you know?" she replied, "I do not know." The bus gave a jerk "Just a little before" she heard that someone had fallen on the floor (p. 76, l. 20, to p. 77, l. 22).

On cross examination she said that she did not see plaintiff on the floor and did not know whether she was on the floor (p. 78, ll. 36-40). She "felt a skid or jerk." Asked to explain how she felt it and what happened to her she said: "It happened so quick that I do not know. I did not feel anything. I mean it did not throw me off my feet. Maybe I went forward a little bit" (p. 79, ll. 27-37). Bus did not exactly stop (p. 80, l. 21). Did not see any other bus at scene as she was looking out of the window to her left. Prospect street is to the right (p. 80, ll. 9-16).

Joseph Hastick (for the defendant) testified on direct examination that he was an occupant of defendant's bus; that he has been driving automobiles for four years, and that said bus, in his opinion, was traveling only 10 to 15 miles per hour immediately before this occurrence, and

was on its right side of the road. Asked as to the other bus he said, "When our bus jerked, I just happened to see forward and I saw the other bus make a dead stop." Defendant's bus almost stopped completely and then went on (p. 81, ll. 10-38). The jerk involved, concurrently, a lateral movement of about 3 feet and a forward slide of about 10 or 12 feet (p. 82, l. 20, to p. 83, l. 16). Neither he nor any member of his family connected with the defendant in any way (p. 81, l. 39, to p. 82, l. 5).

The foregoing comprises a complete summary of all the evidence in the case bearing upon how the alleged accident occurred. Seven witnesses testified upon this subject and, it will be noted, that there is an almost complete agreement in the testimony of all of them, whether for the plaintiff or the defendant. We say "all" for this is literally true with a single possible partial exception. We refer here to Joseph Leslik and we say "partial" because the main and credible portions of his testimony are in agreement with the testimony of the other witnesses, as above stated. He contradicted himself, however, so frequently, gave such palpably bad estimates of distances, and gave testimony on so many points that was in direct conflict with that of *all* of the other witnesses, as to seriously call into question the authenticity of all of his testimony, and, at the very least, to stamp it as of a character that must be considered with discriminating care.

For example, he is the only one who said that defendant's bus came to a complete stop. The plaintiff, Mrs. Vores, and Miss Schmidtroth (for the plaintiff), and Miss Pallatina and Mr. Hastick (for the defendant) said that it did not, the last three adding that it slowed down and then continued. Not only did Leslik say that it stopped,

but he gave details. On three separate occasions in answer to questions by the Court, counsel for the plaintiff and the defendant, respectively, he said that it stopped within ten feet. He described the position in which it stopped; said that it was not at the regular stopping place at that point but "passed" it (p. 44, ll. 13-18).

He said that some passengers alighted and the bus continued on (p. 35, ll. 4-7). Although seated opposite the driver, and, therefore, in a position in which he could not possibly see, he stated that the right rear wheel struck the gutter. No one else, either for the plaintiff or the defendant, even suggested any of these things, and Miss Schmidtroth, who was sitting in the right rear, next to and looking out of the window to her right, and who was, therefore, in the very best position possible to observe this last, stated, on cross examination, that defendant's bus did not come in contact with the gutter. Again, Leslik is the only one who says that the other bus did not stop. The plaintiff, Mrs. Vores, and Miss Schmidtroth (for the plaintiff), and Mr. Hastick (for the defendant), all say that it did. He volunteered the information that "There never could" have been a collision when no question whatever was pending (p. 41, ll. 4-6). While this is not competent evidence for the reason mentioned, as well as because it is a conclusion, we refer to it because despite this statement he has the bus stopping within ten feet, not at its regular stopping place but past it, *i. e.*, nearer to Prospect street, and therefore to the other bus than the bus stop before said street, and also because it is in direct conflict with the testimony of every other witness who saw the other bus, and these include the plaintiff, Mrs. Vores, Miss

Schmidtroth and Mr. Hastick. Further, he testified in one place that he saw the other bus coming out of Prospect street 200 feet away, in another he fixed this distance at only 100 feet (p. 43, ll. 25-30), and in another he says the defendant's driver "applied the brakes when the other car came out 50 feet ahead."

In this matter of when the brakes were applied his testimony is in hopeless confusion. In one place he says that defendant's driver applied the brakes before he noticed the other bus, someone having "buzzed" for the bus to stop. But in the very next question when asked "Before he saw the bus he applied his brakes?" he flatly denied this statement and answered, "No." In *four* other places, however, he testified that defendant's driver applied his brakes when 50 feet from the other bus. It would seem that this last, therefore, must be taken as his most authentic statement on this subject. It must be considered, however, in connection with his patent inability to judge distances, or, more accurately, his penchant for greatly overestimating them. This is best demonstrated by his testimony, referred to above, that Outwater Lane, the street on which defendant's bus was traveling, was 75 feet wide, and his other testimony as to the position of defendant's bus on the road which, when checked up, make said lane 122 feet wide. Measured by this gauge the fifty feet referred to above necessarily becomes something very much less; only a fractional part thereof in fact.

We respectfully submit that testimony that is so studded with flat contradictions and patent inaccuracies and which is, on so many points, directly contradicted by every other witness, whether for plaintiff or defendant who testified

on the particular subject, does not meet the high standards for veracity which our courts require, and indicates, at the very least, a penchant for loose and inaccurate observation and testimony that renders the whole of the testimony of this witness unworthy to be classified under the heading of credible evidence. Certainly, at the very least, a line must be drawn somewhere between what is credible and what is incredible. If, however, any consideration is to be given to his testimony it must be remembered that on all essential points it is wholly favorable to the defendant for, taking it literally, he testified that defendant's bus was travelling on its right side of the road at a speed of from 15 to 20 miles an hour and, despite the fact that it was going down hill on a wet road, stopped within 10 feet, the brakes being applied when the other bus came out of Prospect street 50 feet from defendant's bus. If his said estimate of 50 feet is viewed in the light of his demonstrated habit of overstating distances, and his other testimony that this bus stopped *past* its regular stopping place, this distance is greatly reduced and his testimony on all essential points is, as above stated, in complete harmony with that of all the other witnesses for he, too, said that plaintiff was the only person thrown either out of her seat or to the floor, and it should be noted that he, admittedly, did not see this as she was on the floor when he first noticed her.

As stated above, therefore, the testimony of all of the witnesses is in singular agreement. Considered compositely there can be no question as to what happened. Defendant's bus was proceeding west on Outwater Lane, down hill on a wet road, at a moderate speed (Leslik says 15 to 20 miles an hour; Hastick 10 to 15 miles an hour; Miss Schmidtroth "not fast"). As it

came to or neared Prospect street, another bus, proceeding south on said street and about to turn into Outwater Lane, suddenly appeared. An emergency was presented; the recorded actions of both drivers, as well as the other testimony, leaves no doubt but that if both buses had continued a collision would have ensued. Both drivers apparently saw one another, and applied their brakes, at about the same time for, as Mr. Hastick described it, he felt a jerk and looked up and saw the other bus coming to a stop. Defendant's bus slowed down to almost a stop and then, its driver seeing that the other bus had stopped, proceeded on its way. Could anything be more natural or more casual? What driver of an automobile has not had numerous such experiences at intersections? Is this not just the sort of thing that happens on the highways hundreds of times each day?

There was a jerk. No one describes what kind of a jerk it was. A careful examination of all of the testimony of all of the witnesses discloses the following as the only evidence upon this subject.

The plaintiff is entirely silent upon this point. Mrs. Vores says that, expecting a "big accident," she closed her eyes and then bumped her head against the window, indicating, incidentally, that whatever happened caused her to move to her left. She did not even mention a jerk, much less describe one. Miss Schmidtroth merely says that there was a real jerk and the bus moved sideways but "not a long distance." Of course, if there was any jerk at all it must have been a real one. Leslik says only that the passengers were shaken up. He, too, does not even mention a jerk. Miss De Lotto says there was a jerk "*but I received more than one of those*

jerks." Miss Pallatina felt a jerk and adds, by way of description, "*Maybe I went forward a little bit.*" Mr. Hastick says there was a jerk and defendant's bus slid to its right about three feet while it was at the same time sliding forward about 10 or 12 feet. *No one saw anyone thrown from his or her seat to the floor. No one, including the plaintiff, says that he or she was so thrown. On the contrary, everyone who was asked says that he was not thrown and did not see anyone else so thrown.* And this is the sum total of all of the evidence upon this subject.

Finally, the evidence is conclusive that the driver of defendant's bus, as well as the other driver, was confronted with a sudden emergency. The evidence is so overwhelming on this point as to permit of no other inference. The plaintiff herself saw the other bus come out of Prospect street and that an accident was coming. Her friend and companion at the time, Mrs. Vores, graphically described how she could see that a "*big accident*" was about to happen when she saw the other bus coming out of Prospect street, and closed her eyes in anticipation of it. Miss Schmidtroth, another of plaintiff's witnesses, gave facts which are equally conclusive. As defendant's bus came to Prospect street she observed the other bus coming up said street and about to turn into Outwater Lane. The other bus stopped and at the same time she felt a jerk, defendant's bus slowed down and then proceeded on. In other words, both drivers saw one another at about the same time, applied their brakes, and, the other bus having stopped, defendant's bus, which was going down hill on wet pavement, proceeded. We have discussed Leslik's testimony at length above, and will not here repeat it. Suffice it to say that, despite the

fact that he described an accident entirely different from that testified to by all of the other witnesses, the facts testified to by him are equally conclusive that an emergency situation was presented. The Misses De Lotto and Palatina were seated on the left side, looking out of the left windows and did not see the other bus which, of course, approached from their right. When Hastick felt the jerk he looked forward and saw the other bus come to a stop.

In other words, every witness who was in a position to see the other bus testified to facts that leave no doubt that defendant's driver was confronted with a sudden emergency. If there should be any doubt as to what the driver himself thought of the situation, we have the testimony of Leslik, the only one to observe any of his movements, that he applied both the emergency and foot brakes (p. 44, ll. 7-8).

So then, to recapitulate we have a bus carrying passengers, being driven on its right side of the road, down hill on a wet pavement at a moderate rate of speed. As it nears or comes to an intersecting street another bus suddenly appears on said street, moving toward a point directly ahead of it. If both buses continue it is obvious that an accident will inevitably result; in short, a genuine, if not very unusual, emergency is presented; something must be done. The driver of the first bus applies his brakes, there is a jerk as above described, and slows his bus down nearly to a stop and then, seeing that the other bus has stopped, drives on. Query: Was he guilty of negligence in the operation of his bus, under the circumstances, or is there anything from which negligence on the part of his employer might be inferred?

Certainly the facts do not disclose any thing such. His speed was very moderate and he was on his proper side of the road. When confronted with an emergency he acted promptly and effectively. His bus generally, and brakes in particular, were, obviously, in good order for when he applied the latter the bus immediately slowed to nearly a stop (or stopped within 10 feet according to Leslik) despite the fact that it was proceeding down hill on wet pavement. This, too, is corroborative of the moderate speed of the bus and of the further fact that its driver had it under complete control. There is, therefore, nothing in the facts from which negligence in the operation of the bus, or in its construction, such as defective brakes, could be inferred.

We have left, then, only one item in the facts with which to deal, to wit, the fact that there was a jerk, and the query set out above naturally narrows itself to: is the fact that there was a jerk, under the facts in this case, and having in mind that the driver was confronted in an emergency, sufficient to permit of an inference of negligence on the part of the defendant?

The law is well settled that it is not. To this effect is the case of *Corkhill v. Camden & Suburban Railway Co.*, 69 N. J. Law 97. This was an action brought by Mrs. Corkhill and her husband against the named defendant and Pennsylvania Railroad Co. to recover damages for personal injuries alleged to have been sustained by Mrs. Corkhill while a passenger upon a street car of the Camden and Suburban Railway Company at the crossing of that railroad over the tracks of the Pennsylvania Railroad. Upon the trial a non-suit was ordered as to the latter company, which was not complained of, and the

plaintiffs recovered verdicts against the present defendant.

The facts are recited in the opinion as follows:

“Taking the evidence most strongly in favor of the plaintiffs, it shows that while Mrs. Corkhill was seated in an electric street railway car, operated by the employes of the present defendant, the car came to the crossing of the steam railroad (which consisted of three tracks) at Twelfth and Federal streets in the city of Camden; that it stopped before entering upon the crossing; that the gates were at this time down; the conductor of the electric car went forward to the centre of the crossing and looked for trains upon the steam railway; he saw no train save a freight train, which was standing on one of the tracks nearby; the railroad flagman told the conductor to cross, as the train was going to stand there; then the gates were raised, the conductor beckoned to the motorman to come ahead, and he did so; thereupon the electric car started over the crossing at a moderate speed; while it was passing over, a train unexpectedly approached on the railroad, rounding a curve, and, so far as the evidence shows, giving no signal by bell or whistle. The evidence shows that a collision appeared imminent; the flagman upon the railroad waved a red flag in front of the locomotive, in order to avert a collision, and the train was finally stopped within fifty feet of the electric car. The situation was so critical that every passenger in the car was alarmed, and stood up and looked out of the windows; and the motorman, seeing the danger, instantly applied all power, in order to carry his car across as quickly as possible. Mrs. Corkhill’s story is that, by the sudden lurch caused by the increased speed of the electric car, she was thrown to the floor, and the inference sought to be drawn from this is that the fall caused the paralysis from which she has since suffered.”

The Court held (*italics ours*):

“The case is devoid of evidence to show any want of care in either conductor or motorman in attempting the crossing; on the contrary, there is affirmative evidence to show that the conductor took every reasonable precaution, and that neither he nor the motorman had any warning that a train was coming.

“As to the conduct of the motorman in turning on full power when confronted with the imminent danger of a collision, his act evidenced complete presence of mind and the exercise of the highest degree of care. If, on being confronted with such a danger, he had failed to make extraordinary efforts to increase his speed, there would perhaps have been ground to charge him with negligence, and the only excuse would have been that, in the sudden peril, he lost his presence of mind. If he had presence of mind (as he manifestly had), it was his plain duty to instantly apply the utmost power possible, in order to carry his passengers across without loss of life. Even though that might necessarily result in some danger of bruising, or even of more serious personal injury to the passengers, such injury was far preferable to the loss of life of one or more of the passengers, which would undoubtedly have resulted from a collision with the locomotive.”

The Court distinguished this type of case from the cases, of which it cited several, in which railway companies have been held liable for injuries caused by a lurch as follows:

“The cases that have held street railway companies liable for injuries to passengers caused by the lurch of a car have gone upon the ground that there was a sudden increase of speed *under circumstances that evinced a disregard of the safety of the passengers*. Consolidated Traction Co. *v.* Thalheimer, 30 Vroom, 474; Scott *v.* Bergen

County Traction Co., 34 *Id.* 407. See, also, *May v. North Hudson County Railway Co.*, 20 *Id.* 445; *Haile v. Clayton & Hoff Co.*, 32 *Id.* 197; *Burr v. Pennsylvania Railroad Co.*, 35 *Id.* 30; *Paynter v. Bridgeton Traction Co.*, 38 *Id.* 619."

The Court approved the limited issues upon which the case was submitted to the jury by the trial judge in the following language:

"In the present case the trial judge properly charged the jury, in effect, that, unless there was negligence on the part of the conductor in allowing the car to cross without exercising proper vigilance, or negligence on the part of the motorman in managing the car as it crossed the railroad, the plaintiff could not recover."

The defendant's rule to show cause was made absolute. The fact that this case was on rule is immaterial for the Court found the case to be "devoid of evidence" of negligence and, on the contrary, found that the action of the motorman in turning on full power "evidenced complete presence of mind and the exercise of the highest degree of care," so that the result must have been the same had the case been on appeal.

It will be noted that in the above case the degree of the jerk is not considered at all. On the contrary, the presence of mind exhibited by the motorman is highly commended "Even though that might necessarily result in some danger of bruising, or even of more serious personal injury to the passengers, * * * ." It will also be noted that said case is similar to the instant one in that the action of the motorman in that case, and the bus driver in this, turned out to be unnecessary for the reason that in the *Corkhill* case the locomotive was finally stopped within 50 feet of the trolley car, while in the present case the other bus came to a complete stop. This did not

alter the opinion of the Court in the Corkhill case, however, for, of course, it is the situation that is originally presented that must be considered in testing the conduct of those confronted with an emergency.

The cases are also similar in that in both every reasonable precaution was taken to avoid an accident under the existing circumstances, and that in both the men in charge of the respective vehicles exercised a high presence of mind. They are different only in that in the Corkhill case the motorman applied "all power" of acceleration in order to avoid an accident, whereas in the case *sub judice* the bus driver applied the stopping power to avert the threatened consequences of the emergency presented.

The evidence relating to the jerk in the instant case has been completely set out above. As we said there, no one described what kind of jerk it was. The attitude of our courts on the subject of lurches, jolts and jars in the operation of vehicles by common carriers is well established by a long line of cases. We will refer to a few of them.

The general principle is well stated in the case of *Chester v. Public Service Railway Co.*, (not officially reported) 94 Atl. Rep. 953. (Italics ours):

"The ordinary progress of a trolley car from rail to rail is, in a sense, a succession of jolts or lurches, and the same is true to a greater extent upon the passing of the car onto a bridge; but these are not evidence of negligence. The ordinary incidents of operation may unbalance a passenger standing up, as the plaintiff was, without any adequate support.

"This, however, is not actionable, unless accompanied by proof of a lurching so un-

usual and violent as to suggest, if not to demonstrate, negligence.”

In *Faul v. North Jersey Street Railway Co.*, 70 N. J. Law, 795, decided in this Court, the plaintiff claimed that he was thrown from defendant's street car as a result of a sudden jolt. The opinion is in so many respects pertinent to the case at bar, that we are taking the liberty of quoting from it freely in setting out both the facts and findings as follows. (Italics ours):

“The refusal of the trial court, at the close of the evidence, upon the defendant's motion, to direct a verdict in its favor on the ground that no negligence imputable to it had been shown, brings, under exception, the whole record of the case here in review. *Unless from the established facts such negligence might reasonably and legitimately be inferred by the jury, such a direction was the right of the defendant.* It is certainly clear law that the mere fact of a passenger's fall while standing on the platform of a street car raises, in itself, no inference of negligence in its operation by the car company. We are not at liberty, under well-settled authority approved by this court, to deduce negligence on the carrier's part from the occurrence alone of such an accident. *Paynter v. Bridgeton, &c., Traction Co.*, 38 Vroom 619, and cases there cited. In the case in hand the incident from which this controversy grew happened February 5th, 1901, on a very cold, stormy and exceedingly windy night, accompanied at times by hail and snow. The plaintiff, in his testimony, thus briefly relates the affair: The car he boarded was very crowded with passengers inside, and the rear platform, on which he stood, ‘was crowded, too; * * * I had a little dinner pail in my hand—in one hand; * * * I held the railing with my right hand; * * * I fell off the car; * * * they drove on slow, and drove a little ways, then the car took a jolt, * * * and that jolt

*threw me * * * from the platform;*
 * * * car had gone, maybe, a hundred feet.

“Reasoning from effect to cause, it was insisted on behalf of the plaintiff that the alleged ‘jolt’ was a fact from which the jury could legitimately infer that the motorman had started his car forward with such extraordinary violence as to constitute actionable negligence on the part of the company. No claim was made that the tracks, or switch, or roadbed were in any way defective or could have caused any such jolt. The track was straight and the grade level. The controversy was therefore narrowed to the alleged negligent conduct of the motorman in releasing his brake or in turning on the power, or both, after leaving the switch where the car had stopped. I think it will be found, from an examination of the evidence of the only witness for the plaintiff who observed the action of the motorman, that his car was managed with due care, both before and co-incidentally with the accident.”

The witness here referred to was standing on the front platform alongside of the motorman. He testified, that as they proceeded along, the motorman “slowed up” his car to avoid hitting a wagon parked along the curb. It was questionable whether the rear step of the car would clear it. He peered out and thus described what followed (*italics ours*):

“I wanted to see whether this hub of the wheel would touch the rear end of the car—that is, the steps of the car—so I leaned over and looked—kind of judged up the distance between the hub of the front wheel and the rear end of the car—and I said it was ‘all right.’

“Q You said to whom that it was all right?

“A To the motorman.

“Q And what was done then?

“A The motorman went right ahead then; and just as he did—why, I saw a man fall off the back platform, while I was watching there.

“Q Now, what had the motorman done before he approached that wagon as to the speed of the car?

“A Well, he saw the wagon there, and he was just as much in doubt as I was, and kind of slowed up.

“Q Now, when the car went ahead, what did he do in order to give the car speed?

“A I could not see what he done, because I was looking out the other way.

“Q What did you feel, if anything?

“A I felt the car go ahead.

“Q Well how?

“A You can't feel very much in the front as you can at the back, because I was holding myself, and naturally I swung a little bit to the side, but it wasn't very severe in the front.

“Q It did swing you to the side, did it?

“A Yes, sir; a little bit.”

Upon cross examination he said (*italics ours*):

“Q Then there was nothing unusual about the starting of the car that night, was there?

“A Well, not just at that moment. * * *

“Q It started just as cars ordinarily do?

“A Well, just according to the motorman.

“(Question repeated.)

“Q *There was nothing unusual about the starting of the car that night, was there?*

“A *Certainly there was; I told you so in the last trial* * * *

“Q Did you, anywhere in your testimony at the last trial, swear that the car started with any unusual motion?

“A Well, there are two ways for me to answer that.

“Q Well, answer it both ways, then?

“A I said it all depends upon how the motorman starts the car; * * * *well, I fell a little to one side.*”

“From these facts, stated by the witness—not from his opinion nor conclusions thereon—could the jury reasonably and legitimately infer the negligent management of the car by the motorman? No passenger inside of the car, whether standing or sitting, testified that he noticed any jolt of the car. That expression was only used by the plaintiff. *Admitting, for the sake of the discussion, that the slowing up of the car to avoid the wagon and the increase of speed after clearing that obstruction may not have been done skillfully, it by no means follows that it was done negligently. There is a wide distance between want of skill and negligence. The motorman certainly acted discreetly in avoiding collision with the wagon. Obligated as he was, to stand on the front platform, exposed for hours to the hail and blasts of a stormy winter’s night, it would not have been at all surprising if his eye had miscalculated the distance from the track of the obstructing wagon, or his cold hand had slipped for a moment from the metal handle of his brake. If from such misadventure or unskillfulness the ‘jolt’ in question resulted, can it be reasonably affirmed that he acted negligently? His method of starting or increasing the speed of his car was not testified to have been even unskillful, much less negligent. In order to resume his progress, after ‘slowing up’ and avoiding the wagon, he was, of course, compelled to turn on his power and release his brake, the effect of which was to cause the plaintiff’s witness, who was standing, to swing to the side ‘a little bit,’ or ‘fall a little to the side.’ No court, certainly, of this state, has yet declared that such an effect justified an inference of negligence in car operation against the carrier.”*

After referring to the Corkhill case, *supra*, and noting that in it “The court regarded the actual management of the car as the only correct test

of negligence" the opinion continues (*italics ours*):

"The sudden jerk in starting a street car by a driver whipping up his horses, which threw down a passenger standing on the car platform, was the subject of decision of this court in *May v. North Hudson Railway Co.*, 20 *Id.* 445. The principle there settled was, I think, identical with that involved in the case at bar. In that case the car (drawn by horses) was full of passengers and the plaintiff was standing on the platform. The track was straight and the grade about level. The driver stopped, or almost stopped, the car for a lady to alight, and after she had alighted he whipped up his horses and, according to the testimony, the car gave a sudden jerk, which threw the standing passenger off the platform and he was injured. The close correspondence between the facts of this case and the present is too apparent to need comment. The driver there 'whipped up' his horses in order either to start his heavy and crowded car quickly, or to keep it in motion, and the motorman here 'whipped up' his electrical current for the same purpose. The result in each case was the same—a passenger, standing on the platform, was claimed to have been thrown from each car. In each case it was necessary to apply sufficient force to start a heavily-loaded car, and the nice adjustment of the exact amount of power necessary was therefore difficult of calculation. This court held that the jerk of the car, resulting from the sudden whipping up of the horses, did not afford evidence of negligence in the driver. Nor can the evidence in the present case, consistently with that ruling, it seems to me, establish negligence in the motorman. The change from horse-power to electric propulsion brings into use a still more difficult agent to control, but the basic principle of the law of negligence has not changed."

Other cases that might, mistakenly, be confused with one of this type are distinguished as follows (*italics ours*):

“There are a large number of cases decided by the courts of this state, and of various other jurisdictions, upon the general subject of the negligence of car companies in cases where passengers have been thrown from the platform of cars under a variety of circumstances, but reference to them would not materially assist us here. The only decision of this court which it may be well to distinguish from the case in hand is that of *Consolidated Traction Co. v. Thalheimer*, 30 Vroom 474. In that case the passenger, who was thrown off the street car in the act of alighting by a lurch or jerk of the car, had notified the conductor of her desire to get off at a certain street, designated by her, and after the conductor had called out the name of that street had arisen and gone to the rear door in preparation of alighting. This court held that, under those circumstances, the jerk of the car justified an inference of some breach of duty owed to her by the carrier. Manifestly the conduct of the company’s agent was an invitation to alight and was calculated to put the passenger off her guard at the very time she had the right to expect the car would become stationary. No such fact appears in the case at bar. That case is readily distinguishable from the present by the above circumstantial statement. The two cases rest upon different principles of classification.”

After discussing the defendant’s evidence, the opinion concludes:

“But whether or not the nature of the start or increased motion of the car was of such a character as to have been alone instrumental in causing the plaintiff’s fall, the motorman’s management of the car seems, under all the evidence, to have been duly careful and without negligence. The ac-

cepted rule in actions founded upon negligence is that when the plaintiff shows that he was injured through some act of the carrier's servant, which might have been prevented by due care, that if the carrier proves that such care was in fact exercised, negligence cannot be inferred by the jury. *Whalen v. Consolidated Traction Co.*, 32 Vroom 606, and cases there cited."

This Court unanimously reversed the judgment below.

In view of the fact that the *Whalen* case is cited at the conclusion of the opinion in the above case it is, perhaps, not unappropriate to point out at this time that it, and with it another line of cases, are also clearly to be distinguished from the case at bar. In it the plaintiff testified that while a passenger standing upon the running board of a crowded trolley car, he was thrown off said car when the conductor stumbled, from a cause unknown to the plaintiff, lost his footing, tried to catch an upright and, instead, caught plaintiff by the shoulder and threw him off the car.

Upon this state of facts a non-suit was granted at the trial. This Court, of course, very properly held this error for the reason that a jury question was presented as to whether the conductor exercised due care as he passed along the board. This case is particularly important to us here, however, as it cites and briefly states the facts and discusses a number of cases which, while they involve injuries to passengers which resulted from jerks of one kind or another, are in all other respects different from the instant case and clearly to be distinguished therefrom. We refer to those cases in which the accident is of such a nature, and the facts as to its cause so peculiarly within the defendant's knowledge, that

the defendant is called upon to explain, as, for example, to borrow from some of those referred to above in the Whalen case, the derailment of a railroad train, the upsetting of a stage coach or the breaking of an axle.

In *Raeuber v. Public Service Railway Co.*, 89 N. J. Law, 366, 98 Atl. Rep. 192, on appeal to this Court from a judgment of the Supreme Court reversing a judgment for the plaintiff, the facts are set out in the opinion as follows:

“Plaintiff’s case was that, being a passenger on the defendant’s car, and desiring to leave the car at Eighth street, he advised the conductor of his wish; that, upon arriving at Seventh street, he again told the conductor to let him off at Eighth, and the conductor gave the necessary signal to the motorman; that after the signal was given he (the plaintiff) went out on the platform; that the car slacked up; that he stepped onto the step; and that just at that moment the car gave a jerk which threw him into the street.”

The Court said:

“We think this judgment cannot be sustained. There is no proof that the jerk of which plaintiff complains was abnormal, or anything more than was merely incidental to the proper operation of the car. Consequently, no negligence was shown which rendered the defendant company responsible for plaintiff’s injury. * * *

“It is true that the motorman testified that there was no observable jerk after he began to slow down the car. But, conceding that the jury had a right to disbelieve this statement, the nullifying of his testimony will not supply the evidence which the plaintiff was bound to produce, namely, evidence showing abnormality in the operation of the car.

“The judgment under review will be reversed.”

The language quoted is from the opinion of the Supreme Court which this Court, however, in affirming the judgment of said Court, adopted as its own.

Burr v. Pennsylvania Co., 64 N. J. Law 30, is authority for the following (italics ours):

“—that it was not until *extraordinary lurching and violence* was shown that negligence could be presumed. * * *”

In *Haile v. Clayton & Hoff Co.*, 61 N. J. Law 197, the plaintiff, a passenger on a horse-drawn stage, “raised up and reached over to the other side to get hold” of a child, “when the driver,” who had been waiting for a procession to pass, “started his horses, and, to use her own language, she ‘rebounded back’, and was thrown out the back door of the stage. A scream was heard by the driver, and the horses were stopped within three feet. There is some difficulty in determining whether she was thrown out of the stage by reason of the starting of the horses, or the rebound when they were again stopped.” One of the witnesses said that the driver pulled the reins and the horses started “suddenly.”

“The driver did not whip or strike the horses, did not call to them, nor do anything to excite them, and it does not appear that they were excited or frightened. The evidence is that the driver had them under complete control, and stopped them within three feet of starting.”

Motion to non-suit was refused, no evidence was introduced by the defendant, and the motion to direct a verdict was also refused.

It was held that, as a matter of law, there was no evidence of negligence, and the jury should have been so instructed.

It is significant that although there was evidence that the horses started "suddenly" and were stopped very quickly when the driver heard the scream, which, of course, was an emergency measure on his part and was so regarded by the Court, and that the plaintiff, in consequence of either the sudden start or stop, "rebounded back" and was thrown out of the back door of the stage, these facts were not sufficient to raise the inference that there had been a jerk of sufficient violence to constitute negligence.

Nirk v. Jersey City, &c. St. Ry. Co., 75 N. J. Law, 646, is also authority for the principle (italics ours). "That it is not until *extraordinary lurching or violence* is shown that negligence is to be presumed."

In the case of *Budner v. Public Service Corporation*, 74 N. J. Law 298, the Supreme Court held that the facts in that particular case warranted its submission to the jury, but took care to particularly point out that (italics ours):

"Had the only evidence been that the motorman put on the *full force* of the car 'and kind of jarred the car like,' or that the car gave a *sudden jerk* when they put on the force, the negligence of the defendant would not have been established. *Faul v. North Jersey Street Railway Co.*, 41 Vroom 795."

This is another of the cases to be distinguished from the one at bar, for in it the plaintiff was thrown from the car while walking along the running board pursuant to the motorman's directions when the latter applied full force. In other words it is another of those cases in which the action of the operator evinced a total disregard of the safety of the plaintiff and is, therefore, directly opposite from the one at bar where the operator's action was taken in the exercise

of a high degree of care for the safety of his passengers.

In *Agry v. Pennsylvania R. Co.*, (not yet officially reported) 146 Atl. Rep. 587, the plaintiff, a passenger on one of the defendant's trains, stepped out onto the vestibule as the train approached a station stop and, the door being open, put his hand in the door jamb. The train gave a lurch, the door closed, cutting his fingers.

The Supreme Court said:

"Coming to the merits, no negligence of the railroad company was proved, and there was no proof that the door, the hinges, or the jamb were out of order. Lurches of trains are to be expected. Persons who put their hands in door jambs do so at their own peril.

"The judgment should be reversed."

Finally, we wish to call attention to another principle of law which may be applicable to the situation presented by the facts in this case. It was self stated by this Court in the case of *Hummer v. Lehigh Valley R. Co.*, 75 N. J. Law 703, as follows (italics ours):

"Where the evidence is equally consistent with either view, with the existence or non-existence of negligence, *it is not competent to the judge to leave the matter to the jury.* The party who affirms negligence had altogether failed to establish it. That is a rule which ought never to be lost sight of."

It will be seen from the above that it is well settled that a jerk, to be actionable, must be abnormal or extraordinary, and must be described as such; that the mere statement that there was a jerk is not sufficient; that neither is it sufficient merely to show that a passenger was thrown from a street car, or swayed or fell a little to one side, or rebounded back; that jerks or lurches are to be expected in the ordinary progress of

vehicles; that a case of this kind is clearly to be distinguished from one in which the doctrine of *res ipsa loquitur* is invoked and also from those in which the action of the operator of the vehicle evinces a disregard for the safety of a passenger, as when the latter is moving about the vehicle pursuant to the operator's direction, or is about to alight therefrom; that, in fact, this type of case is the direct antithesis of the last mentioned group in that the action taken by the operator evinces, not a disregard for the safety of his passengers, but the exercise of a high degree of care for their safety; that where the evidence is equally consistent with the existence or non-existence of negligence, having in mind, of course, the degree of care owed by the defendant to the plaintiff, which in this case was a high degree, "it is not competent to the judge to leave the matter to the jury. The party who affirms negligence had altogether failed to establish it. That is a rule which ought never to be lost sight of."

Applying the law to the facts in this case, and disregarding for the moment the fact that there was an emergency and confining ourselves only to the jerk as such, we respectfully submit that there was no proof of an actionable jerk. There was a jerk, but no one described it. Neither the words "violent," "abnormal" or "extraordinary," nor any words synonymous therewith, were used by any witness in this case. There were several other adults and some children in this bus, yet the undisputed evidence is that no one else was unseated. No one saw the plaintiff fall as a result of the jerk, in fact no one saw her fall at all, and the plaintiff herself is absolutely silent as to how she came to be on the floor; she does not even mention a jerk. Mrs. Vores bumped

her head against the window next to her; Leslik says the passengers were shaken up; Miss Schmidtroth felt a jerk; Miss De Lotto says there was a jerk but that she had experienced many others like it. She was not unseated although she occupied a seat next to the aisle, exactly similar to that occupied by the plaintiff. Miss Pallatina's head may have been moved forward a little.

Certainly there is nothing in the testimony of any of the above witnesses, and we have covered them all, to permit the inference that said jerk was violent, abnormal or extraordinary, and none of them said that it was. On the contrary what they did say about it indicates that it could not properly be described by any of the above adjectives. Probably the most descriptive thing said of it is Miss De Lotto's remark that "I received more than one of those jerks."

There is nothing to indicate that anyone seated with ordinary security would or should have been unseated. In fact the evidence is directly the reverse, as no one else was. Is it not reasonably inferable that the plaintiff, for some reason such as because she had assumed an awkward posture to look at some object difficult to see outside of the bus, or to the rear of it, or because she was tying a shoe lace, or for a thousand and one other possible reasons, was not seated with ordinary security? Is this not especially so when it is remembered that no one saw plaintiff fall, no one knows precisely what caused her to fall, and she herself does not mention a jerk, does not say that she fell to the floor, and is utterly silent as to how she came to be on the floor? In short, there is nothing in the evidence to show any causal connection between the jerk and her being on the floor. The evidence merely indicates a

coincidence between these two events. Certainly the defendant is entitled to better proof than this, especially when the plaintiff is available. We submit, therefore, that confining ourselves to the jerk alone, without regard to what caused it, the plaintiff failed to make out a case.

When we pass from this to consider the case as a whole, the total failure of the plaintiff to establish a cause of action becomes more manifest. For the jerk, regardless of what species it belongs to, resulted from the action taken by the bus driver, in an emergency, to avert a possible accident and consequent injury to his passengers. As pointed out above, the evidence is conclusive on this point, and, perhaps fortunately for the defendant, comes most strongly from the plaintiff and her witnesses. Under these circumstances we are brought squarely within the reasoning of the Corkhill case, *supra*.

The language of the Court in that case at page 99 is so peculiarly applicable to the facts in this case that we take the liberty of referring to it again.

“As to the conduct of the motorman in turning on full power when confronted with the imminent danger of a collision, his act evidenced complete presence of mind and the exercise of the highest degree of care. If, on being confronted with such a danger, he had failed to make extraordinary efforts to increase his speed, there would perhaps have been ground to charge him with negligence, and the only excuse would have been that, in the sudden peril, he lost his presence of mind. If he had presence of mind (as he manifestly had), it was his plain duty to instantly apply the utmost power possible, in order to carry his passengers across without loss of life. Even though that might necessarily result in some danger

of bruising, or even of more serious personal injury to the passengers, such injury was far preferable to the loss of life of one or more of the passengers, which would undoubtedly have resulted from a collision with the locomotive."

May we not paraphrase the language of the Supreme Court in the above case and say that the conduct of the bus driver in applying his brakes when confronted with the imminent danger of a collision "evidenced complete presence of mind and the exercise of the highest degree of care. If, on being confronted with such danger, he had failed to make extraordinary efforts to" check "his speed, there would perhaps have been ground to charge him with negligence, and the only excuse would have been that, in the sudden peril, he lost his presence of mind. If he had presence of mind (as he manifestly had), it was his plain duty to instantly apply" his braking power to avert a collision. "Even though that might necessarily result in some danger of bruising, or even of more serious personal injury to the passengers, such injury was far preferable to the" more serious injuries that would have undoubtedly resulted from a collision.

We respectfully submit that the trial judge erred in refusing to grant the defendant's motion for a non-suit and/or for direction of verdict in its favor, and that to hold otherwise is to penalize common carriers who employ operators who have presence of mind and use it.

POINT II.

The Trial Judge submitted the case to the jury upon erroneous principles of law and, in his charge, erroneously injected several entirely imaginative theories of ways in which the defendant may have been negligent for which there was no foundation whatever in the evidence, and erroneously instructed the jury that, "all" that they "need to find for the plaintiff" is that the defendant was guilty of any one of them.

Under this heading we will argue Grounds of Appeal Nos. 8, 9, 10, 11 and 12.

The evidence relating to the circumstances of the accident has been completely summed up under Point I. We will not repeat it here but will merely refer to it in so far as it may be necessary.

The portions of the charge excepted to under this heading were the following:

(p. 172, ll. 11-20).

"So the question is whether the jerk or jar that was present in this case was an ordinary jerk or jar that would ordinarily be occasioned by ordinary and proper driving of the vehicle, or whether it was occasioned by an improper operation, by a negligent operation, by an operation that a person ought not to have permitted who was under a duty such as I have indicated, to use a high degree of care in operating it."

(p. 173, l. 35 to p. 174, l. 17).

"The plaintiff here says there was an act of negligence on the part of the bus driver, and that is why she brings this suit. She says he did not have his bus under proper control. She says there was a high degree of care necessary, and under the law he was bound to use a high degree of care to safeguard his passengers. That he did not do

it, that he was travelling on wet pavement, that he was either going too fast or he had not his car under proper control, or was not looking, or he put his brakes on too suddenly, that he did something that he ought not to have done, that a reasonable, prudent person would not have done, who was obliged to use a high degree of care, and it was because of his negligence in that regard that caused this sudden, unusual jerk which precipitated this woman on the floor and caused her injury, and the fact was a proximate cause of the accident. That is the plaintiff's case in a nutshell."

(p. 174, ll. 18-120; ll. 27-28).

"The defendant says that he was not going fast. His bus was not out of control. * * * and that there was no terrific lurching or jerking."

(p. 175, ll. 28-32).

"Some said it was a big jerk, and some said it was a little jerk, I think, or words to that effect. How much was it? Was this an unusual jerk, or was it not?"

Counsel for the plaintiff made a suggestion at the conclusion of the charge, and pursuant thereto the Court further charged, among other things, as follows (p. 178, ll. 32-40):

"I said that counsel's point was that there was an act of negligence, either speed, improper brakes, or something that he did that a reasonable, prudent person would not do who had the charge of passengers, and the duty of using a high degree of care, anything that you might find in the facts that was lacking in a high degree of care rather, and was negligent is all that you need to find for the plaintiff."

Exception was taken to the above parts of the charge as follows (p. 181, l. 20 to p. 182, l. 26):

“Next, I desire also to accept to your Honor’s omission to charge the jury that the jerk must be unusual or abnormal. There was no proof of this, and, therefore, nothing to go to the jury on this question.

“I further desire to except to your Honor’s leaving it to the jury for their consideration, and I desire to except to your Honor’s saying in two places in the charge, that for the plaintiff to recover the jury must find that the driver of the bus was not looking, or that his brakes did not work, or that his bus was out of control, and words to that effect.

“My point is that there was no proof whatever in the case that the brakes were out of order. On the contrary, all of the evidence indicated that they were in excellent order, for the bus, without dispute made a very quick stop. There was no proof whatever that the bus driver was not looking, or that the bus was out of control. On the contrary, the evidence indicates that the bus was proceeding upon a very moderate rate of speed, and was stopped quickly.

“This again, is undisputed and demonstrates conclusively that the bus was not out of control. I respectfully submit that your Honor’s leaving these questions to the jury as you did, points upon which there is no evidence whatever, could not help, but be prejudicial to the defendant, and was without legal justification.

“As a matter of fact these suggestions of possible negligence were first introduced into the case in your Honor’s charge.

“I desire to except to another portion of your Honor’s charge in which your Honor said substantially that the question was whether there was a big jerk or a little jerk. My point here is that there was no testimony

that there was a big jerk, whereas the only direct testimony on the point was directly contra, that is, that the jerk was slight. Therefore, your leaving to the jury to decide whether there was a big jerk was without foundation of the evidence, and without legal justification.”

(p. 182, l. 33 to p. 183, l. 10).

“I desire also to except to that part of your Honor’s charge in which your Honor, after saying all you have defined as lack of control on the part of the bus driver, or that he was not looking, or had bad brakes, stated that all the jury had to do was to find one of these things to bring in a verdict for the plaintiff. This statement was made without qualification. I submit, first, that it was without foundation in the evidence, and even if there had been such evidence it should have been qualified by the further statement that it must have been proved by the preponderance of evidence, and must be shown to have been the proximate cause of the accident. There was no such qualification.”

It will be noted that the Court’s attention was directed to the precise ground of each exception.

Examination of the evidence discloses that these exceptions were well taken.

In the first excerpt of the charge quoted above it will be observed that the trial judge stated the question decisive of defendant’s negligence to be, not the nature of the jerk, but what caused it, and permitted the jury to find the defendant negligent even if the jerk was only ordinary, but its origin negligent operation. The language referred to is so clearly and unqualifiedly to this effect as to require no further comment.

This, manifestly, was an incorrect statement of the legal rule applicable, as, of course, the defendant would not be responsible for the conse-

quences of an ordinary jerk no matter what its cause. The cases are unanimous, as we have argued with citations under the preceding point, that, even under ordinary circumstances where no emergency is presented, a jerk to be actionable must be abnormal, violent or extraordinary. Under this instruction, then, the jury were permitted to find the defendant negligent for an ordinary jerk if it resulted from negligent operation.

Continuing, the trial judge stated that plaintiff said that the bus driver did not exercise the degree of care he owed her in that "he was traveling on wet pavement, that he was either going too fast or he had not his car under proper control, or was not looking, or he put his brakes on too suddenly, that he did something that he ought not to have done * * * that caused this sudden, unusual jerk * * *."

The language just quoted, with the exception of the statement that the bus was traveling on wet pavement, involves a series of sheer assumptions by the trial judge for which there is no support in the evidence. It is so worded as even to permit of an inference that "traveling on wet pavement" may be negligence on the part of one owing a high degree of care. As to the others no one said that the bus was going "too fast." On the contrary all of the authentic evidence was that it was going at a very moderate rate of speed. The only witnesses to estimate it in miles an hour were Leslik and Hastick. The former fixed it at 15 to 20 miles an hour, and the latter at 10 to 15 miles an hour.

Neither did anyone say that defendant's driver did not have his bus under proper control. On the contrary the witnesses are unanimous in saying that it was slowed down nearly to a stop, or

stopped, very promptly. No one said that defendant's driver was "not looking"; nor was there the slightest warrant in the evidence for such a statement, nor for the one following it that the brakes were put on too suddenly.

Finally the jury are left to find "something" or, in other words, *anything* "that caused this sudden, unusual jerk." No witness had described it as such, yet the trial judge in summing up the plaintiff's case and putting it in a "nut shell," as he said, saw fit, not to refer to the evidence as to the jerk or the witnesses' reactions to it, but to unqualifiedly label it as "an unusual jerk." The defendant, at the very least, was entitled to have the jury decide from the evidence what kind of a jerk was made out by the plaintiff's case, remembering that the Court at this time was putting the plaintiff's case in a "nut shell," and not to have this point pre-digested for them by the Court. The trial judge summed up the case made out by the defendant and, perhaps, by innuendo injured it more than he had theretofore when he said (p. 174, ll. 18-20, 27-28):

"The defendant says that he was not going fast. His bus was not out of control. * * * and that there was no terrific lurching or jerking * * *."

There was not a scintilla of evidence of any "terrific lurching or jerking." In stating that the defendant denied any such, the inescapable inference was that it had been accused thereof because, of course, something must be affirmed before it may be denied. In the same way the part of the charge above set out again inferred that the defendant had been accused of excessive speed, and of the bus being out of control, for which, as pointed out above, there was no foundation in the evidence.

The Court continued with the following:

“Some said it was a big jerk, and some said it was a little jerk, I think, or words to that effect. How much was it? Was this an unusual jerk, or was it not?”

In fact no one had mentioned “big jerk” or “little jerk,” or had said anything that by any manner of means could be construed as “words to that effect.” To repeat, no one had described the jerk, the evidence did not justify any such conclusion, and whether it did or not was a question to be decided by the jury and not by the Court. This, then, was not only erroneous quotation, but also erroneous digestment of the evidence by the Court. Further, whether erroneous or not, the Court was again submitting his conclusions of the evidence to the jury instead of leaving them to come to their own.

Finally, the Court charged, at the instance of counsel for the plaintiff, that the latter’s “point was that there was an act of negligence, either speed, improper brakes or something * * *” that defendant’s driver did.

It would seem that the defendant, for all practical purpose, was charged out of court by this language. Although the Court referred to “counsel’s point,” the language was that of the Court and a part of the charge and is unmistakable in its meaning “that there *was* an act of negligence, either speed, improper brakes or *something* * * *.” The Court here does not inquire: Was there an act of negligence? The Court does not simply instruct: It is for you to say whether there was an act of negligence. The Court charges: “there *was* an act of negligence, either speed, improper brakes or *something* * * *.” In short the Court propounds a riddle to the jury: There is negligence in this case; it may

have been speed or improper brakes, but it was "something"; find it. The jury were instructed, not to decide whether there was negligence, but to find it.

Here, again, another possible ground upon which the jury might find defendant negligent was suggested by the Court for the first time, *i. e.*, "improper brakes." There was not an iota of evidence as to this. On the contrary the undisputed testimony indicated that the brakes worked very well.

And to the above was added "*anything* that you might find in the facts that was lacking in a high degree of care rather, and was negligent is *all* that you need to find for the plaintiff."

What could be simpler? "All" the jury must do to solve the riddle is to find "anything"!

When we remember that shortly before this the Court, referring to the plaintiff, said (p. 177, ll. 30-34): "This is her last day in court, and, of course, we try these cases but once, and *this is her day.*" We may well wonder if the jury were concerned with anything in the jury room except, to use the vernacular, "how much" the verdict was to be. Counsel for the defendant had to specially request, at the conclusion of the charge and in open court, that the jury be instructed that this was also the defendant's only day in court.

All of the above must be viewed in the light that the trial judge did not at any time define to the jury the settled law as to jerks, and that all of the propositions above set out were submitted to the jury without any instruction in conjunction with them as to what extent they would be qualified if the jury found that defendant's driver was confronted with an emergency. In other words

the rule applicable to the whole situation was not stated at any of these times, but, on the contrary, one detail, *i. e.*, the jerk, was singled out for special treatment and, although prescribed for over and over again, the fundamental law particularly applicable to it was *never* stated.

To sum up, the trial judge in his charge injected into the case for the first time several theories upon which the defendant might be found negligent and for which there was no warrant whatever in the evidence, and for one of which at least there was no allegation in the complaint, *i. e.*, that there was a "big," "unusual," "terrific" jerk; he permitted the jury to find the defendant negligent if the jerk was "ordinary" but its cause negligence; he failed to state the elementary law applicable to jerk cases and leave the jury to apply it to the facts, but, instead gave the jury his conclusion, or simply assumed, that plaintiff's case was that there was an "unusual jerk," and the defendant's that there "was no terrific lurching or jerking," and put the question to be decided as whether there was a "big" or "little" jerk, and did not leave it to the jury to decide whether there was any evidence of an unusual jerk; finally he charged that there "*was*" an act of negligence, and, after making further suggestions as to what it might be, ending with "or something," for which there again was no foundation in the evidence, he made things as easy as possible for the jury by telling them that "all that you need to find for the plaintiff" is "anything." And all this, may we repeat, without a single reference in connection with them as to how they would be qualified by an emergency situation.

It is well settled that the questions submitted to the jury must be within the issues raised by

the pleadings and must have a foundation in the evidence.

In *Excelsior Electric Co. v. Sweet*, 59 N. J. Law, 441, the rule is well stated as follows:

“It is a cardinal rule for the control of a trial court that the questions submitted to the jury should be within the issues raised by the pleadings.”

The following cases are also directly in point under this heading:

Martinez v. Runkel, 57 N. J. Law 111;

Patridge v. Woodland Steamboat Co., 66 N. J. Law 290;

Merklinger v. Lambert, 76 N. J. Law 806;

Garibaldi v. Rubenstein, 99 N. J. Law 223.

The case of *Murphy v. North Jersey Street Railway Co.*, 71 N. J. Law, p. 5, was an action to recover for injuries received by the plaintiff while attempting to board a car of defendant company. The allegations of the declaration and plaintiff's proofs were that plaintiff attempted to board defendant's car while it was standing, and while he was in the act of doing so said car started, throwing plaintiff to the ground. The case of the defendant was that its car had already started, and was in motion, when plaintiff attempted to board it, missed his hold upon the grip and fell to the ground.

The Court charged the jury that even if they believed that the accident occurred in the way testified to by the defendant's witnesses, they would, nevertheless, have a right to find a verdict for plaintiff if they concluded that the defendant was guilty of negligence.

Held, error. The Court in its opinion said:

“In the first place, there was nothing in the operation of the car, if the testimony

submitted on the part of the defendant was true, upon which the conclusion that it was negligent could be rested."

The case of *Gilmore v. Kane*, 72 N. J. Law 167, was an action for malicious prosecution. The trial court, in charging the jury upon the question of damages, used the following language:

"And the elements there to be taken into account are the fact that the plaintiff was in prison eight days, and whatever injury he may have suffered to his reputation, his feelings, your verdict ought to be for whatever you think would be a fair compensation, and also whatever would reimburse him for any consequent expenses and losses."

After the jury retired the following colloquy took place between the judge and counsel for the defendant:

"Mr. Harris—I desire to except to what your Honor said near the close of the charge as to directing the jury to determine what expenses the plaintiff might have been put to with reference to his defence, and so forth. There was no evidence of any amount.

"The Court—If there is not any evidence, they will not find anything, of course.

"Exception allowed. Let it be sealed, and it is sealed accordingly."

The Supreme Court held:

"The feature of the charge to which the court's attention was directed by this exception was entirely too broad. There is no telling what the jury might not have included in its verdict under this instruction, or from what source it may not have supplied the evidence that was lacking."

The case of *Duel v. Mansfield Plumbing Co.*, 86 N. J. Law 582, was a suit for damages for personal injury by one licensee against another

licensee. The trial court, instead of charging that the duty of one licensee is to use reasonable care not to injure other licensees, charged the jury on the rule applicable when the defendant is an owner or occupier of premises, who has invited plaintiff to come upon the land.

The Court of Errors and Appeals, in its opinion, said:

“The charge therefore submitted to the jury as dispositive of the case an issue not within the pleadings, to which the evidence had not been directed, and as to which there was no evidence.

“It may well be that the mere noting of an exception to the language of the charge would have challenged only the soundness of the legal rule enunciated, and would not have directed the court’s attention to the false issue presented to the jury. In the present case, however, counsel for the defendant expressly directed the court’s attention to the specific ground of his exception—.”

The Court quoted with approval the language of Chief Justice Gummere in *Murphy v. North Jersey Street Railway Co.*, *supra*.

So in the present case, counsel for the defendant, expressly directed the Court’s attention to the specific ground of his exception.

In *Marsella v. Rivetti*, 1 N. J. Miscel. Rep. 522,—

“The plaintiff had testified that, as a result of the accident, he was confined to his bed for about ten or twelve days and to his house for two weeks, and that during that time he could not do any work, although he had work to do. The trial court, in the charge to the jury, after referring to other matters to be considered by that body in determining what would be fair compensation to the plaintiff, added, ‘You have a

right, of course, to compensate the plaintiff for what he lost by being laid up during the time that he was laid up, if you conclude that he was, according to the testimony that has been adduced before you.' We think there was legal error in this instruction, and that it was harmful to the defendant, for the reason that there was nothing in the testimony bearing upon this phase of the case (all of which has been recited) which afforded a measure for determining compensation, even if it be assumed that the plaintiff suffered financial loss by reason of his absence from business. In the case of *Gilmore v. Kane*, 72 N. J. L. 167, it was held that a similar instruction, where there was no evidence upon which the jury's finding might be rested, was harmful error.

"For the reason indicated, the judgment under review will be reversed."

We respectfully submit that the trial judge submitted this case to the jury upon erroneous principles of law, inadequate elucidation of the rules applicable and erroneously injected into the case in his charge, for the first time, several entirely imaginative theories of possible negligence on the part of the defendant for which there was no foundation whatever in the evidence; and in so doing committed reversible error even though the principles were correctly stated elsewhere for it is well settled that an erroneous instruction followed or accompanied by a correct one is not cured by the latter, unless it is also expressly withdrawn. The reason for this is that the jury is left at liberty to adopt either of the contrary instructions.

State v. Tapack, 78 N. J. L. 208;

State v. Erie Railroad, 84 N. J. L. 661;

Collins v. Central R. R. Co., 90 N. J. L. 593;

Cox v. Rosenvinge, 135 Atl. 59 (N. J. Sup. Ct., Nov. 16, 1926; not officially reported; reversed on other grounds in 104 N. J. Law 371).

POINT III.

The Trial Judge erroneously admitted in evidence certain testimony relating to alleged money losses on the part of the plaintiff, and erroneously charged the jury as to the measure of damage they should use in assessing the amount to which the plaintiff was entitled for the hire of someone to care for her.

Under this heading we will discuss Grounds of Appeal Nos. 4 and 5.

The plaintiff had two daughters, Ethel and Grace. Grace worked out as a domestic. The plaintiff sought to show that she had lost Grace's wages for one month for the reason that Grace had remained at home to care for her for that period, and habitually, although an adult daughter twenty-four years of age, turned all of her wages over to the plaintiff. Grace was not produced. Her sister, Ethel, the first witness to testify for the plaintiff, was permitted, over objection, to answer the following question, without any qualification other than her own statement, in the form of a conclusion, that she knew what she was about to testify to (p. 15, l. 35 to p. 16, l. 8):

“Q How much did she turn over to your mother? A \$70.”

An objection was made to the foregoing on the ground that it was not a proper measure of damage (p. 14, l. 39 to p. 15, l. 10; p. 16, l. 9) and exception duly taken (p. 16, ll. 10-14). The Court's submission of this item to the jury was also excepted to for the same reason (p. 180, ll. 10-25).

This item, along with a similar one for the other daughter, Ethel, was submitted to the jury by the trial judge in the following language (p. 166, ll. 7-10; 15-17; 23-36; p. 167, ll. 5-9):

“* * * and she asks that she be compensated for the amount of money that it cost her in the way of expenses * * * for the hiring of someone to do her work * * * the expense that she has been put to as I have noted it, is * * * that one of her daughters, Grace, who was employed at a wage of \$70 a month, was obliged to stay home for a month with her, that she gave her all of her money, and that she therefore lost the daughter's services for that month, *and she is entitled to receive the reasonable value of someone's services to take care of her during that month*, that she had her daughter Grace stay home, and her daughter Ethel says she was obliged to stay home more or less to take care of her mother when Grace could not, and she lost in wages about \$50, and she says that during the times that she stayed home she was not paid, and she says that she also gave all of her wages to her mother. * * * *but the question is how much would it have cost the mother to have hired someone to have taken care of her during these times that the daughters stayed home. That is the measure of damages.*”

The defendant excepted to the foregoing as follows (p. 183, ll. 10-26):

“I desire to except to your Honor's charge that the proper measure of damage to which the plaintiff is entitled for the hire of someone to care for her was the reasonable cost, of what it would cost to hire such a person. My point is that she is not, of course, entitled to anything she did not spend but is only entitled to what she actually did spend, after proof that she required someone to care for her and proof of the period for which she required such attendance. The

language of your Honor's charge leaves the jury the right to award the reasonable cost to hire someone to care for her, irrespective of what she actually spent and, of course, the latter is all that she has a right to recover for."

It will be noted that the specific ground of the exception is called to the attention of the Court.

Our first point is that Ethel's testimony as to what her sister Grace habitually turned over to their mother was not a proper item of damage for the mother in this action. Grace, admittedly, was twenty-four years of age (p. 20, l. 11). As an adult child she was entitled to her own wages, and the mere fact, as pointed out in the exception, that she customarily turned her wages over to her mother did not make this an element of damage for the mother.

In addition, although this ground was not assigned in the objection, Ethel's testimony was rank hearsay, and was not cured by the fact that the plaintiff subsequently testified to the same thing, for, of course, Ethel's testimony tended to strengthen that of her mother. It has long been settled that not only is it error to admit hearsay evidence, but that it is error to let it go to the jury even though they be instructed to disregard it.

In *Demoney v. Walker*, 1 N. J. Law (Coxe) 33, the facts are stated as follows:

"The justice, in this case, permitted hearsay evidence to go to the jury, but directed them to pay no regard to hearsay testimony."

It was held that:

"If hearsay evidence be admitted, though the justice direct the jury to pay no regard to it, it is error."

Furthermore, if the best evidence is available it must be produced.

Hoffman v. Rodman, 39 N. J. Law 252.

The best evidence here would have been the testimony of Grace. She was obviously available but was not produced.

Our second point is that the trial judge in the part of the charge above quoted, submitted the items of loss claimed under this heading to the jury under an entirely erroneous measure of damage. Twice in the excerpt quoted above the Court expressly charged that the measure of damage was how much it would have cost the plaintiff to hire someone to care for her. His language is so definite and unequivocal that we quote his second reference again:

“—but the question is how much would it have cost the mother to have hired someone to have taken care of her during these times that the daughters stayed home. That is the measure of damages.”

In other words, the measure of damages for money lost or spent for the hire of someone to care for the plaintiff is not what was actually lost or spent, but what, in the jury's opinion, it would have cost to hire someone for that purpose. If this be a correct statement of the rule, a plaintiff possessed of Spartan fortitude who foregoes the attendance of a nurse, for example, when he should have one, is entitled, upon proof of that fact, to recover what the jury think it would have cost to hire one. The door is wide open to permit recovery for what the jury think might or should have been spent, regardless of what was actually spent. The language of the Court is so plainly to this effect as to permit of no other interpretation, and it is without any qualifica-

tion or limitation whatever. The jury in this case, therefore, were permitted, as to these items at least, to assess damages for what they thought it would have cost plaintiff to hire someone, regardless of what it did actually cost her. Under these circumstances it is utterly impossible to determine what amount was assessed under this heading.

This, of course, we respectfully submit, was palpable error as it is elementary that, in actions of this kind, the plaintiff may only recover for what he has actually spent or become obligated to spend for the hire of someone to attend or care for him, and this error is not cured even though the correct rule was charged elsewhere.

It is well settled that an erroneous instruction followed or accompanied by a correct one is not cured by the latter, unless it is also expressly withdrawn. The reason for this is that the jury is left at liberty to adopt either of the contrary instructions.

State v. Tapack, supra;
State v. Erie Railroad, supra;
Collins v. Central R. R. Co., supra;
Cox v. Rosenvinge, supra.

POINT IV.

The Trial Judge erroneously submitted to the jury as an element of damage an alleged item of expense for the hire of someone to care for the plaintiff of which there was no competent proof.

Under this heading we will argue Ground of Appeal No. 6.

The Court also submitted another item of alleged expense for the cost to hire someone to care

for the plaintiff to the jury as follows (p. 167, ll. 9-26):

“In addition to those items here is another item. There is a Mrs. Vores who was a friend and a neighbor who was with her at the time she was hurt, and came in. Mrs. Vores is a householder, has at least one child, because I remember her talking about getting home for lunch to get her child’s or children’s lunch. She took care of her, and she says that she was going to charge her a small amount because of their friendship, and the amount that she was charging for her services, which extended for seven or eight months, as I remember it, is \$12 a week. Now those are the actual expenses, the actual outlays as I have recorded them, as they were testified to, and I think you will find them correct.”

The defendant excepted to the foregoing, the precise ground thereof being again called to the attention of the trial judge as follows (p. 180, l. 26 to p. 181, l. 9):

“I desire to except to your Honor’s leaving to the jury as an element of damage the fact that Mrs. Vores had attended the plaintiff for seven or eight months at \$12 a week, for the reason, first, that the time stated by your Honor was incorrect, such time being, according to Mrs. Vores’ testimony, six or seven months, instead of seven or eight.

“Second, this was not a proper element of damage, because it was never shown that said charge was reasonable; and further it was not shown that Mrs. Vores was actually going to make such a charge, or that she had made such a charge. She merely mentioned \$12 a week incidentally with a qualifying remark which left it open to question as to whether she was actually going to charge anything for her services.

“The other proofs being that they were intimate friends. My point is this item should

not have been left to the jury at all as an element of damage."

The only evidence upon this subject was the following:

The plaintiff's testimony was brief on this point and we quote it herewith in its entirety (p. 27, l. 35 to p. 28, l. 11):

"Q How long did Mrs. Vores work for you? A One month, first month.

"Q Then did she work for you again? A Yes, in six months again.

"Q How much did you pay Mrs. Vores? A Me no pay nothing because I had no money.

"Q Has she charged you anything? A Maybe \$12 a week.

"Mr. Dorgeval: I object to that.

"The Court: She will be on the stand.

"Mr. Dorgeval: Is that stricken out?

"Mr. Simon: I will consent to it."

We submit that the effect of the above colloquy is that the testimony "Maybe \$12 a week" was struck out, and, therefore, cannot now be considered as evidence in this case. Whether this be so or not, however, we submit that said testimony has no probative force, first, because the plaintiff was not qualified to testify to this; second, because, even if she were so qualified, her answer "Maybe \$12 a week" is too indefinite and vague to meet the requirements of proper proof, and patently indicates that she did not know if any charge was to be made.

The only other testimony on this subject is that of Mrs. Vores. It is brief and we quote it *in toto* (p. 56, l. 32 to p. 57, l. 4):

"Q How much did you charge Mrs. Seiner for the work that you had? A She is good friend for me and she wants to pay and I said you want to give me something, \$12, that is enough.

“Q \$12 a week? A Yes.

“Q How many weeks were you with Mrs. Seinner? A About six or seven months.

“Q Altogether? A Yes.”

It will be noted that here again the answer is qualified. Mrs. Vores does not say that she has or will make a charge of \$12 a week, and that said charge is reasonable for the services rendered. On the contrary, she says nothing whatever as to the last mentioned, nor does anyone else, but merely says that the plaintiff is a good friend of hers, and that she told plaintiff that if the latter wanted to give her something to give her \$12 a week.

Other portions of Mrs. Vores' testimony are pertinent to this discussion. Mrs. Vores and the plaintiff have been good friends for twenty-one years; they live a distance of about one minute from one another (p. 57, ll. 28-34); Mrs. Vores used to call upon her friend, the plaintiff, prior to this accident. Although Mrs. Vores testified that during the time she attended the plaintiff after the accident she arrived every morning at 8:30 A. M. and remained until 11:30 A. M. and returned again at one P. M. and remained until five P. M., she admitted, on cross examination, that in spite of having been with the plaintiff all day, as above described, she frequently returned in the evening simply to be with and talk with her friend, the plaintiff. To this would be added the plaintiff's testimony that she started to do the shopping for her household three months after the accident (p. 45, ll. 30-40), and her daughter Ethel's statement that plaintiff was around the house three months before she was able to go out (p. 13, ll. 36-37). Finally, it should be noted, that the only evidence that plaintiff could not work during the period of Mrs. Vores'

alleged attendance was her own statement to that effect. No one else, including the plaintiff's physicians, mentions anything about it.

These facts certainly indicate that whether or not Mrs. Vores' services were necessary is open to grave doubt, certainly as to whether they were necessary for any such protracted period as testified to. When to this is added plaintiff's vague statement on the subject, which counsel for the plaintiff consented should be struck out, and Mrs. Vores' qualified testimony, which is only to the effect that she told plaintiff that if the latter wished to give her something she should give her the amount stated, we have a situation where it is certainly fair to say that the evidence does not present positive, legal proof of an expense that will permit the jury to infer with *reasonable certainty*, what, if any, charge was actually to be made. It is obvious that no charge had been made up to the time of the trial, and it is certainly reasonably inferable, at least, that no charge whatever was to be made.

Under these circumstances it would seem that the principle laid down in the case of *Bartow v. Erie Railroad Co.*, 73 N. J. Law, 12, should apply. It is well stated in the syllabus as follows:

"Loss of profits in business are recoverable as damages in actions of tort, when they are capable of being estimated with reasonable certainty. But where the proof furnishes no data from which the jury may find with reasonable certainty the amount of the profits recoverable as damages as the result of the accident, it is error for the court to submit this element of damages to the jury."

It will be noted that the period of Mrs. Vores' alleged service was only for six or seven months instead of for seven or eight months as charged by the Court.

It will also be noted that, while the plaintiff testified that she could not work for said period, there is no testimony that she required attendance for so long a period, or in fact for any period, by either the plaintiff or anyone on her behalf. Regardless, therefore, of whether there was any legal proof of any charge for Mrs. Vores' services, there is no proof that said services were proper or necessary, or that the amount mentioned was reasonable.

In this situation the rule laid down in the recent case of *Ferraro v. Public Service Railway Co.*, 6 Miscel. Rep. 463; 141 Atl. Rep. 590, would seem to be applicable. The facts and findings are well stated in the syllabus as follows:

"In action for damages to automobile caused by collision with trolley car, admitting in evidence bill for repairs of automobile, without proof that charges therein were proper, necessary, and reasonable, held error as hearsay and self-serving, not cured by fact that some evidence was produced as to reasonableness of some of charges contained in bill."

We also wish to call attention to the fact that the part of the charge here complained of, immediately follows that portion of the charge we have discussed in the preceding point. As this is also an item of alleged loss or expense for the hire of someone to care for the plaintiff, we submit that the jury may well have applied the measure of damage referred to above to it, *i. e.*, "How much would it have cost the mother to have hired someone to have taken care of her * * *. That is the measure of damages."

Whether or not the rule respecting this item was correctly charged elsewhere is immaterial for, as pointed out above, it is well settled that an erroneous instruction followed or accompanied

by a correct one is not cured by the latter, unless it is also expressly withdrawn.

State v. Tapack, supra;

State v. Erie Railroad, supra;

Collins v. Central R. R. Co., supra;

Cox v. Rosenvinge, supra.

We respectfully submit that the Court erred in leaving this item to the jury as an element of damage.

POINT V.

The Trial Judge erroneously charged the jury that there was evidence that the plaintiff was permanently disabled.

Under this heading we will discuss Ground of Appeal No. 7.

The portion of the charge here complained of read as follows (p. 167, ll. 30-33):

“She says she is permanently disabled. She says so through her counsel. She says this is a permanent disability. Now, on that question doctors do not agree.”

The defendant excepted thereto in the following language (p. 181, ll. 13-19):

“I desire to except to your Honor’s remark that the doctors, or the plaintiff’s doctors, say that she is permanently disabled. My point is that the most that her doctors said was that she had a permanent condition, but none of them said she was permanently disabled.”

It will be noted that here again the Court’s attention was directed to the precise ground of the exception.

Four doctors testified in the cause: Drs. Cohen and Mageniss for the plaintiff, and Drs. Van Schott, Jr., and Manley for the defendant.

The testimony of all of these doctors may be scoured in vain for any testimony whatever of permanent disability.

The most that Dr. Cohen said was that plaintiff had a nerve injury of the back and a cough which, in his opinion, are permanent (p. 102, l. 4 to p. 103, l. 24). On the other hand he said that plaintiff can bend, he does not know how much; that there is no limited motion of her chest (p. 103, ll. 27-36). As to her pain he said (p. 104, ll. 6-12):

“A She comes in once in a while complaining of pains, if the weather will be damp and rainy, I suppose she will have a little pain, but if it is nice and dry I do not think she will have any pain, that is, from previous experience with other people.”

He said further that there was no limitation of movement, the breath sounds of her lungs were good, there being no rales, no friction rub and normal excursion of the chest on both sides (p. 104, ll. 26-40). He never found a fractured rib (p. 105, ll. 10-30), and when he started to treat her in the middle of November, 1928 (the accident occurred September 27, 1928) the only objective sign of injury was a little lump on one of her ribs. All of her other symptoms were subjective (p. 106, l. 25 to p. 107, l. 13). While he testified that there had been traumatic pleurisy in answer to a hypothetical question, he admitted that this was merely a “presumption” on his part, and that he did not actually find it himself (p. 111, ll. 24-30). He found nothing objective in this connection (p. 112, ll. 17-22).

Dr. Mageniss, who examined the plaintiff once and only for the purpose of testifying (p. 121, ll. 6-8), found only some tenderness on the right side of the chest, and that the breathing was not

as clear on that as on the other side, "but not to any marked extent. Those are the only things that I discovered" (p. 113, ll. 34-40). The plaintiff complained of pain when she bended and exerted herself in all directions like a normal person, but he could not tell from his examination whether she was actually suffering pain or not (p. 114, ll. 22-30). There was a "slight change" in the breathing sounds on the side alleged to have been injured (p. 114, ll. 31-40).

On cross examination he said that the difference in sound in the lungs may have been due to an old pleurisy, or other inflammatory condition; she might have had pneumonia with adhesions there; it might have been there for years. He admitted that all that he had testified to with reference to traumatic pleurisy was based on the history of the case (which, of course, he was not entitled to consider since he was not the attending physician, and only examined plaintiff once for the purpose of testifying, *Consolidated Traction Co. v. Lambertson*, 60 N. J. Law 452) and X-rays, which were not in evidence. The only objective symptom he found was the sound difference. Plaintiff did bend for him. Pleura will heal more quickly than the bone. Nothing in his examination to indicate traumatic pleurisy; only the history of the case (p. 119, l. 20 to p. 120, l. 40).

Dr. Van Schott, who examined plaintiff on October 2nd, 1928, five days after the accident, on behalf of defendant, found no evidence of permanent injury, but, on the contrary, that she would be completely recovered in from four to six weeks. Found no evidence of pleurisy or punctured lung (p. 123, l. 35 to p. 124, l. 28). Listened to chest and found no adventitious sounds (p. 126, ll. 30-34).

Dr. Manley, who examined plaintiff on behalf of defendant on January 28th, September 15th and November 24th, 1929, found no objective symptoms and nothing to interfere with her ability to bend or, in fact, with any of her movements or functions (p. 138, ll. 12-18). In his second examination he had her bend and exercise herself in all directions, and she was able to do so normally (p. 146, l. 39 to p. 147, l. 5). Could not find anything the matter with her on any of his examinations (p. 148, ll. 17-27).

The plaintiff did not at any time state what her injuries consisted of. All she did say in this connection was that her "head, chest, back, inside very sick"; that she had expectorated blood since the accident, and had a cough which she did not have before; that she was injured on the right side (p. 27, ll. 7-25); that it hurts her to bend and she has dizzy spells (p. 30, ll. 10-24). Started to do the shopping three months after the accident (p. 45, ll. 30-40). Attended by Dr. Bleasby for about the first six weeks (p. 47, ll. 16-17). He was not produced.

The foregoing comprises a complete summary of all of the evidence introduced upon the subject of the plaintiff's injuries. We submit that a reading of it disclosed that there is not a scintilla of evidence of any permanent disability. On the contrary, as stated in the defendant's exception to this part of the charge, the very most that any of plaintiff's doctors said was "that she had a permanent condition," but none of them said she was "permanently disabled," nor in fact, did any of them say that she had been *disabled* at any time. Absolutely the only evidence as to this is the plaintiff's own statement that she could not work.

Here again matter was submitted to the jury for which there was no foundation whatever in the evidence. We have argued this subject under Point II and will not repeat here what we have said there. We respectfully submit, however, that under the authorities therein set out it was error on the part of the trial judge, in view of the evidence, to leave to the jury, and therefore permit them to decide affirmatively if they wished, the question whether plaintiff was permanently disabled.

POINT VI.

The Trial Judge erroneously permitted a medical expert called by the plaintiff to testify in answer to a hypothetical question that did not either accurately or sufficiently state the facts.

Under this caption we will argue Ground of Appeal No. 3.

We have summed up the medical testimony and the evidence given by the plaintiff as to her injuries under the preceding point, and will not here repeat it. A proper understanding of the ruling here complained of requires the further statement, however, that at the time this question was asked of Dr. Mageniss the only portion of the evidence summarized under Point V that was in evidence was the testimony of the plaintiff, Dr. Cohen and Dr. Mageniss' statement of what he had found on his examination.

The question was as follows (p. 115, ll. 34-40):

“Q Doctor, assuming a woman of fifty-three sustained a broken rib and had expectorated blood thereafter some time, and had a cough that lasted to the present date, what would you say, in your opinion, doctor, she had suffered from?”

It was objected to on the ground that it did not either accurately or sufficiently state the facts. The objection was overruled and an exception allowed (p. 116, l. 4 to p. 117, l. 15).

The record shows that it was answered as follows (p. 117, ll. 16-25):

“The Witness: From the contusion of the fracture of the ribs, a probable injury to the pleura.

“Q Anything else? A Most always in fractured ribs injury to the pleura, because the pleura is almost attached to the ribs, or the ribs attached to the pleura.”

It will be noted that the second question “Anything else?” was not specifically objected to. We submit, however, that the propriety of the answer to it is as effectively raised as that of the preceding question and answer as the words “Anything else?” are not in themselves a question, but were obviously merely used to urge the witness to complete his answer to the hypothetical question theretofore objected and excepted to.

Examination of the relevant testimony discloses that this objection and exception were well taken.

The facts recited in said question were inaccurate in that the question assumed a broken rib. There was no proof whatever either at the time this question was asked, or subsequently, that the plaintiff sustained a broken rib as a result of this accident, nor, in fact, any competent proof that she had sustained a broken rib from any cause.

The facts recited in said question were patently insufficient. Assuming that there had been a fracture of a rib, nothing was said as to the degree or severity of said fracture, and this was obviously essential to permit the doctor to give an honest and intelligent opinion. The question

recited that the plaintiff expectorated blood for sometime after she sustained a broken rib, but it was silent, as was the evidence, as to whether she had done this prior to the accident. Further, the question merely assumed "a broken rib" and did not designate the particular rib that it was claimed had been fractured. Here again it was obviously essential that the doctor know just what rib was referred to in order to answer the question properly. So much for the facts that were set forth.

The question was amazingly lacking in other facts which were essential to elicit a satisfactory answer. Nothing was said as to how the accident occurred; as to whether the plaintiff was confined to bed and, if so, for how long; as to whether she ran a temperature, and the degree and duration thereof; as to what symptoms she experienced in the region of the alleged broken rib; as to what the condition of her chest was externally and internally, *i. e.*, whether there were any bruises, lacerations or abrasions externally or changes in the breath sounds, any friction rub or rales internally, and the duration thereof; any limitation in excursion on either side of her chest; the time within which the alleged fracture healed and the result obtained; the color of the blood expectorated and a multitude of other things which at once suggest themselves and most of which, at least, were obviously essential to permit such a question to be answered intelligently.

Counsel for the plaintiff may answer that most, if not all, of these were not in evidence. This is so, but does not change the fact that they should have been if such a question was to be asked, and, further, should have been incorporated in the question.

The fact that the doctor's answer to said question was not a proper one and was not based, as it should have been, upon the facts included in the question, is demonstrated by the following question which was asked the doctor on cross examination, and his reply thereto (p. 120, ll. 9-13):

“Q Now, what you have testified to here, doctor, then, all that you have testified to here about pleurisy has been based upon the facts that counsel gave you, isn't that right?

A No, based on the history of the case and X-rays.”

In other words the doctor's answer to said question was based upon the history of the case, which he was expressly instructed by the trial judge to disregard (p. 116, l. 39 to p. 117, l. 11), and upon the X-rays which were not then, nor thereafter, introduced into evidence.

We respectfully submit that when hypothetical questions embodying a meagre statement of the known facts, but, of course, not including the vast field of unknown facts, are asked of a medical witness, and the desired answer obtained, the question should be closely scanned to ascertain if it embodies evidence sufficient to justify the opinion given; further, that the question here objected to was palpably lacking in such evidence and that the trial judge, therefore, erred in allowing it to be answered.

POINT VII.

The Trial Judge, upon the application of the attorney for the defendant to introduce into evidence certain of the interrogatories, and their answers, that had been propounded by the defendant, erroneously ruled that all of the defendant's interrogatories, and their answers, must be introduced if any were to be admitted into evidence.

Under this heading we will argue Ground of Appeal No. 13.

This point arose at the conclusion of the case when the attorney for the defendant attempted to read into the record *certain* of the interrogatories propounded by the defendant, and their answers, and appears in the record in the form of a rather lengthy colloquy between the Court and counsel for both parties (p. 159, l. 20 to p. 164, l. 25).

Objection was made by the attorney for the plaintiff that *all* of the interrogatories propounded by the defendant must go into evidence if any were to be admitted (p. 161, ll. 1-10). The defendant's contention was that the party propounding the interrogatories had the right to introduce those he wished, and that to hold otherwise would render interrogatories valueless at the trial by compelling the party who wished to introduce one or more, but less than all, to put into evidence all sorts of self-serving declarations by the adverse party that might be contained in other answers (p. 161, ll. 10-33). The Court took the view advanced by the plaintiff and refused to let the defendant introduce *any* of said interrogatories unless *all* were offered in evidence (p. 161, ll. 1-39). The defendant then offered all of said interrogatories but excepted to

the Court's ruling for the reason mentioned above (p. 163, l. 15 to p. 164, l. 12).

There were ten interrogatories in all (p. 192, to p. 194). As will be seen from the record (p. 160, ll. 20 to 40) the defendant wished to introduce the interrogatories, and their answers, pertaining to plaintiff's alleged injuries. The purpose was to show that although said interrogatories were answered on October 21, 1929 (the accident occurred September 27th, 1928, and the trial began December 2nd, 1929, or a little over a year after the accident, and something over a month before the trial), no mention was made of certain injuries such as the spitting of blood and the chronic cough which, at the trial, it was testified that plaintiff had suffered from, continuously, from the accident to the trial, and which were two of the most important alleged facts embraced in the hypothetical question to Dr. Mageniss which we have discussed under Point VI. For this purpose the defendant wished to use interrogatories Nos. 3, 4 and 5, which were read into the record before objection was made (p. 160, ll. 20-40) and No. 9, or all of those pertaining to this point.

Their importance under the evidence, since neither they nor any other answer contains any reference to the injuries mentioned above, is too obvious to require comment. Under the Court's ruling, however, the defendant was compelled, under penalty of not being allowed to introduce any of said answers, to put into evidence, in addition, answers which were rankly self-serving and very likely to be prejudicial to the defendant, such as the answers to Nos. 1 and 2 (p. 192, ll. 30-40) which described how the plaintiff was injured. There was no testimony whatever in the cause as to this. The same may be said of No.

10 (p. 194, ll. 1-10) which itemized plaintiff's expenses and included at least two items of which there was no competent proof, and one of which there was no proof at all.

These last, *i. e.*, the answers to Nos. 1, 2 and 10, had no bearing whatever upon the subject for which defendant wished to use the other answers above referred to, did not explain, qualify or limit them and were self-serving in the highest degree. We submit that the Court erred in compelling the defendant to introduce them, along with those it wished to use, under penalty of not being allowed to introduce any of said answers.

In *Cetofonte v. Camden Coke Co.*, 78 N. J. Law 662, the syllabus well states the attitude of this Court upon this subject:

"Under section 140 of the Practice act (Pamph. L. 1903, p. 575), which provides that the written answers to written interrogatories submitted before trial upon any matter material to the issue shall be evidence in the action if offered by the party proposing the interrogatories but not otherwise, the action of the trial judge in permitting the answer to one of several interrogatories to be offered and read in evidence without admitting the answers to the remaining interrogatories cannot be said to be erroneous when there was no showing nor offer to show, either in the trial court or in the reviewing court, that the remaining answers were material to the issue or that they tended to explain, qualify or limit the answer admitted."

Beakly v. Freeholders of Camden, 81 N. J. Law 637, is to the same effect.

In the instant case there was no showing or offer to show "that the remaining answers were material to the issue or that they tended to explain, qualify or limit" the answers which the

defendant wished to offer. On the contrary a mere reading of them demonstrates conclusively that they were entirely unrelated.

While we are unable to find any authority that directly holds that the Court's action in the case at bar was error, we respectfully submit that, reasoning from the authorities above set out, and having in mind the purpose of interrogatories, the Court, in the absence of proof that the remaining answers were immaterial to the issue or tended to explain, qualify or limit the answers originally offered, erred in compelling the defendant to offer the former under penalty of not being allowed to introduce the latter; that to hold otherwise is to nullify almost entirely the value and usefulness of interrogatories under our practice at the trial by compelling the party propounding them either not to use them at all, or, by so doing, to permit the adverse party to get before the jury a multitude of self-serving declarations entirely unrelated to the subject for which the selected answers were offered, and including things such as expenses, loss of profits, et cetera, which he, perhaps, could not prove nor bring to the jury's attention in any other way.

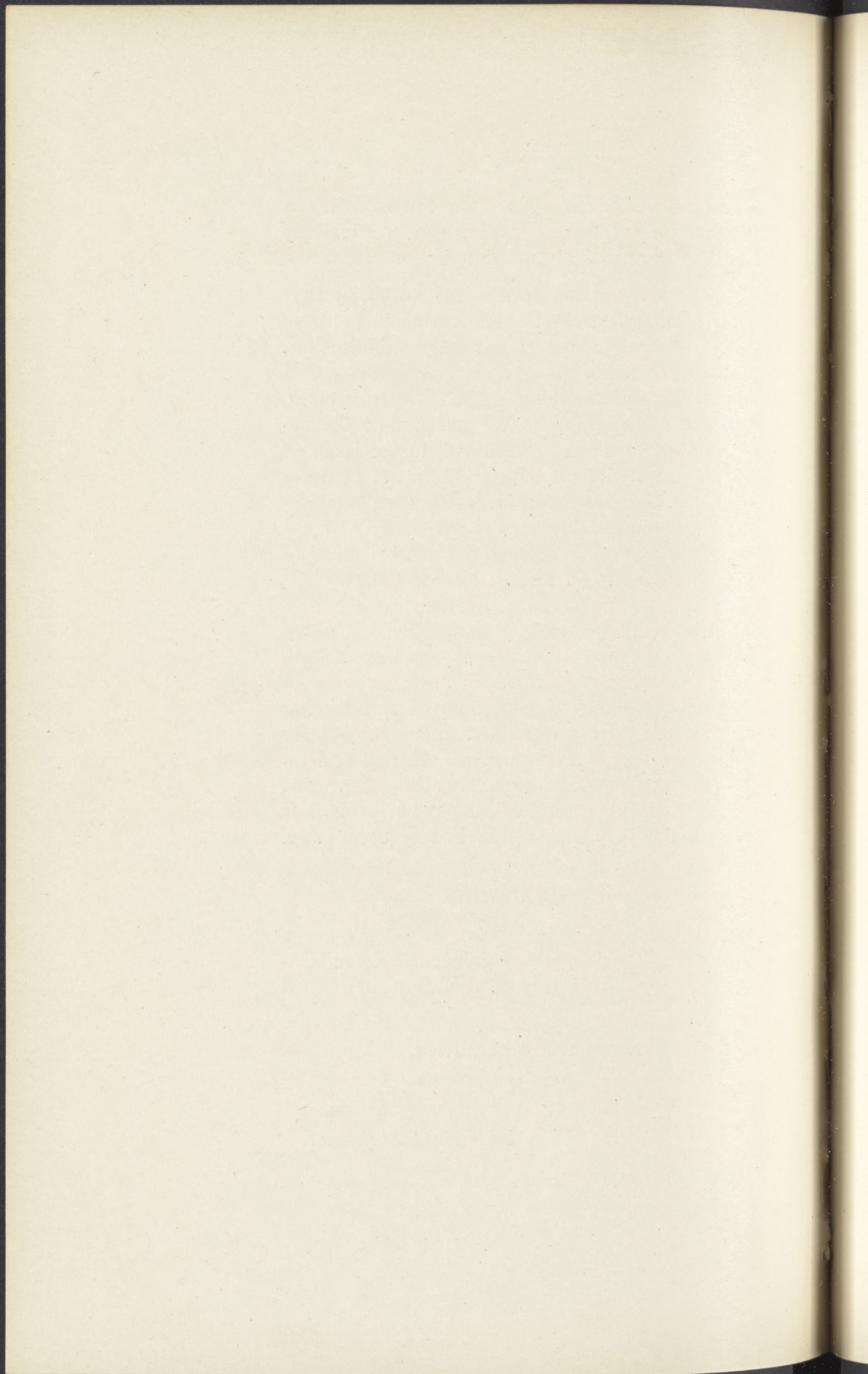
CONCLUSION.

We respectfully submit that, for the reasons enumerated, the judgment against the defendant-appellant should be reversed and a new trial ordered.

Respectfully submitted,

HENRY H. FRYLING,
Attorney for and of Counsel with
Defendant-Appellant.

HAROLD F. DORGEVAL,
Of Counsel.



New Jersey Court of Errors and Appeals

KATHERINE SEINNER, Plaintiff-Appellee,	}	Action at Law.
vs.		On Appeal from the New Jersey Supreme Court.
PUBLIC SERVICE COORDINATED TRANSPORT, Defendant-Appellant.		

ANSWERING BRIEF OF PLAINTIFF.

Opening Statement.

Counsel for defendant has quite fully covered the facts of the case as well as the testimony, and it is not our intention to repeat same at any great length. For the purpose of clarification, we shall very briefly recapitulate what the bare facts are, and over which there seems to be no dispute.

Plaintiff was riding as a fare-paying passenger in the bus of the defendant company, which was proceeding west on Outwater Lane, in the City of Garfield. Running into Outwater Lane from the North, and intersecting the street, only on one side, so as to form what is commonly termed a dead-end intersection is Prospect Street. On Prospect Street a bus operated by some third party, not a party litigant, was being driven in a southerly direction. That bus was coming from the *right* of the defendant's bus, and stopped at the corner. *The driver of the defendant's bus (and he did not testify) stepped on his brakes, as a result of which*

the bus according to the testimony, skidded or slid somewhat to the right and quite a few feet forward. There is no dispute that the bus "jerked" and counsel attempts to argue the nature of the jerk. Nevertheless, as a result of the jerk, the plaintiff was dislodged from her seat, sustaining severe injuries. We say that plaintiff was dislodged from her seat notwithstanding that as defendant contends there is no direct evidence of that, because the circumstantial evidence conclusively proves it to be so, as well as counsel's (defendant) assumption in a great part of cross-examination that plaintiff fell out of her seat. With this question we will deal with more at length in any other part of this brief.

ANSWER TO POINT I.

It was not error to refuse motions for non-suit and directed verdict in favor of defendant and trial court rightfully refused same.

Before going specifically into the evidence on this point, counsel desires to point out a few of the fundamental rules touching on motions of this sort.

For the purposes of this motion, the defendant admits the truth of the evidence presented by the plaintiff, and of every legitimate inference that may be drawn therefrom, but denies its sufficiency in law.

Mumma vs. Easton & A. R. Co., 73 N. J. Law 653;

Martin vs. North Jersey, 81 N. J. Law 562;

Weston Electric vs. Benecke, 82 N. J. Law 445;

Jones vs. Public Service, 86 N. J. Law
646.

In passing upon the motion, the trial court will regard the plaintiff's evidence in the light of the most favorable inferences to which such testimony is legitimately susceptible. If two inferences may reasonably be deduced from the evidence, one favorable to the plaintiff, and one against him, a jury question is presented, and a non-suit is improper.

State Consol. Traction vs. Reeves, 58 N.
J. Law 573;
Railroad Co. vs. Matthews, 36 N. J. Law
531;
Barr vs. Lombard, 53 N. J. Law 233.

In passing upon a motion for a non-suit, the court will not consider discrepancies between testimony of witnesses called by the plaintiff.

Kaufman vs. Bush, 69 N. J. Law 473;
Klie vs. Hollstein, 98 N. J. Law 473.

It is for the trial judge to say whether negligence of the defendant may be drawn, and it is for the jury to say whether negligence ought to be drawn.

Simpson vs. Snellenburg, 96 N. J. Law
518, 24 A. L. R. 503;
Liss vs. P. S., 141 Atl. 1.

Bearing these fundamentals in mind, it is apparent that it is not necessary to raise a sharp factual dispute before a question may be one for the jury. It may well be, that the evidence on part of both sides are in "startling accord", but as long as there are different inferences that may legitimately be drawn therefrom, it is improper for the court to take the case away from the jury. We

know of no better instance for the drawing of inferences than the present case. While as before stated the witnesses seem to agree on the bare facts involved, each has a separate and distinct version as to how the accident happened.

Plaintiff, Katharine Seinner, had quite some difficulty in speaking English, and for that reason was placed on the stand and questioned only as to the injuries and damages that she sustained. She did not testify about the accident until defense counsel, over the strenuous objection of plaintiff's counsel, appealed to the court's discretion, and cross-examined here relative thereto. (State of Case, p. 50, ll. 10-20). She then testified that the other bus (referred to as the one coming from the right) had stopped, (S. of C., p. 51, l. 33).

Q. Did the other bus stop? A. Yes.

and that her bus had not stopped, that it was going too fast, (ll. 39-40).

Q. And your bus stopped too? A. My bus no stop. *Going too fast* and no stop.

It is noticeable that counsel, although he now complains of plaintiff's failure to explain the manner in which she was injured, did not care to question her and find out at the trial, although he later practically assumes that plaintiff fell out of her seat.

Mary Vores was the next witness called for plaintiff and the sum total of her testimony respecting the accident was that she was sitting near the window of the bus and saw another bus coming toward Outwater Lane from Prospect Street (this does not seem to be very clear) (S. of C., p. 55, ll. 30-34) and then asked by the court what she saw, stated (S. of C., p. 56, ll. 1-10):

A. I closed my eye and I afraid right away big accident come and the *driver turn around and the other way* and my jitney bus hit my head in the window and I don't know where I am and I look Mrs. Seinner and I do not see and I see Mrs. Seinner sit in the floor and I want talk.

further cross-examined by defendant's counsel, she testified as follows (S. of C., p. 62, ll. 10-40) :

Q. You said you expected a big accident?

A. That is very big.

Q. You saw a big accident was going to happen? A. Yes.

Q. When you saw this other bus come out— A. *Other bus stay.*

Q. Let me finish my question, please, when you saw other bus come out you thought there would be a big accident? A. Yes.

Q. And that was just before the bus jerked? A. That bus stay over there Prospect Street.

Q. When you thought there was going to be a big accident— A. It stay up there.

Q. When you thought there was going to be a big accident then your bus jerked? A. *What is jerked?*

By the Court:

Q. It was just before Mrs. Seinner *fell* on the floor that you thought there would be a big accident? A. Yes.

Q. Just before you banged your head? A. I saw jitney pass Prospect Street but stay and my jitney run fast.

Q. And you bunched your head? A. Yes.

Q. And she fell on the floor? A. Yes.

Vores corroborated Mrs. Seinner's statement that the bus was traveling at a fast speed. Both contended that the driver crossed the intersection with reckless abandon, and did not exercise proper control over the bus. The inference from the story

of both is that the defendant driver instead of conceding the right of way to the bus coming from his right, attempted to cross first, or else misjudged his distances, so that he had to check his bus, and when the bus on his right stopped, continued to cross, and as Mrs. Vores says "driver turn around and the other way" indicating that the bus had swerved.

It is humorous to note defendant's attempt to capitalize the fact that Mrs. Vores does not even mention a "jerk." Counsel is wrong, the witness did mention jerk, she asked what "jerked" means. It is also noteworthy that while counsel mentions the lack of evidence of plaintiff's fall, the court in its questions, *supra*, assumed that plaintiff fell to the floor.

Q. And you bunked your head? A. Yes.

Q. And she fell on the floor? A. Yes.

Elinore Schmidtroth, the witness to succeed Mrs. Vores, was probably the most damaging witness produced respecting the nature and character of the jerk in question. She testified that she was a passenger in the same bus that Mrs. Seinner was riding, that the bus was traveling on Outwater Lane, that she was looking out of the window, (S. of C., p. 64, ll. 13-20) and as they were 'getting' to the street, Prospect Street, and there was another bus coming up, which did not come out, but was just about to make a turn, (ll. 21-24) that her bus was going down hill, not fast, and "all of a sudden the bus came to a sort of a stop".

Further testimony: (S. of C., p. 64, ll. 30-32)

Q. And what happened to the bus then?

A. It gave a jerk.

Q. Were you jolted at all then, were you moved at all? A. I *felt the jerk*.

(further, page 65, ll. 1-14)

Q. Any way. When it jerked did it stay in the same place? A. It moved.

Q. Where did it move? A. Toward the right.

Q. Sideways? A. Yes, sir.

Q. How far? A. I cannot judge.

and further (lines 28-35) :

Q. And it stopped? A. He did not make a complete stop there. A. He went real slow but then he started up again.

Q. As soon as the skid was over, he went ahead? A. Yes. He did not make a complete stop.

Q. *He came to almost a stop and then went ahead?* A. Yes.

and then towards the conclusion of her testimony, notwithstanding that counsel claims there is no characterization of the jerk in question, the witness emphatically states that the bus gave "a real jerk" (S. of C., p. 69, ll. 26-30).

Q. You were not nearly thrown out? A. All that I knew *the bus gave a real jerk*. I was sitting with my boy friend and I felt his arm tighten around me.

A short resume of Elinor's testimony, reveals the unalterable inference that the bus was traveling along at a moderate rate of speed going down hill, that the bus driver either did not maintain a proper observation for vehicles coming from his right, or if he did, either misjudged his distance, or deliberately continued, and then "all of a sudden" the bus came to a "sort of a stop", skidded to the right, both sideways and forward, and then continued forward, without coming to a complete stop. She testified that *the bus gave a real jerk*, and that

her boy friend tightened his arm around her.

Joseph Leslik, was the only other witness for the plaintiff. Apparently the stenographer did not catch the difference between the word "police" and "peace", as the record indicates plaintiff's counsel represented to the court that he had some police officers in court, that the Chief of Police asked to have given preference, (S. of C., p. 32, ll. 1-10). The fact is (off the record) that Leslik is an officer of the Garfield Police Department. Leslik testified that the accident happened at about 8:30, (S. of C., p. 32, ll. 26-27) that Outwater Lane, at the scene of the accident is about 75 feet wide, (ll. 31-33) that it comes to a slope (l. 34), going down hill (l. 38) that Prospect Street runs dead-end into Outwater Lane (p. 33, ll. 13-15) that it was raining before and the pavement was wet (p. 33, ll. 10-13), further testimony (p. 33, lines 15-31).

Q. As you are out on Outwater Lane, and before you reach Prospect Street, did you observe any vehicles coming out of Prospect Street? A. There was a bus coming out.

Q. How far was your car from the corner where Prospect Street was? A. *About 200 feet.*

Q. And was that bus on Prospect Street on the left or right of your bus? A. He was on the right.

Q. At that time when this bus was coming out what did you observe the driver of the Public Service do? A. *He did not do anything until he came 50 feet away and then he noticed a bus and jammed his emergency brake on.*

Q. Then what happened? A. And then the bus went out into the gutter and *the rear wheel hit the gutter.*

that after the bus hit the curb, the front of the bus was sticking out towards the center of the road

(p. 33, ll. 33-36) and that occurred about ten feet from Prospect Street (ll. 37-40), further testimony indicated that the bus traveled about ten feet after applying his brakes, (p. 34, ll. 15-19).

Q. So that from the time he applied his brakes to the time that the bus stopped, how many feet had he travelled? A. About 10 feet.

Asked how fast he thought the bus was traveling, just before the accident he answered "about fifteen or twenty miles", (p. 36, ll. 37-40). Asked what happened to the occupants of the bus, Leslik, stated that they were all shaken up (p. 37, ll. 18-20) and further asked if he saw any people off their seats, answered, (ll. 26-28)

"They were all shook up off their seats but this woman was knocked out."

We especially note the fact that defense counsel, actually assumes that plaintiff was thrown from her seat during his cross-examination of Leslik (p. 39, ll. 1-6).

Q. Of course, as you say, she was the only one thrown from her seat? A. Thrown out of her seat, yes.

Q. To the floor? A. Yes, she was the only one thrown to the floor.

It is also important to note that in Leslik's opinion, if the Public Service bus had continued ahead, there never would have been an accident. This was not volunteered, as defense counsel would have your honors believe, but was in answer to his own question over the *withdrawn objection* of plaintiff's counsel, (p. 40, ll. 36-40).

Q. If the Public Service bus had continued

ahead there would have been a collision? A. No.

Mr. Simon: I object to that. I will withdraw it if he can answer it.

The Witness: There never could be a collision. The other bus was already out when he applied his brakes.

Other important points brought out by Officer Leslik was that the bus skidded about ten feet (p. 42, ll. 39-40), that he saw the driver apply both the emergency brake and foot brake, (p. 44, ll. 6-8) and that the driver stopped his bus at a point not a regular stopping place, (p. 44, ll. 13-17)

Defense produced three witnesses, who were riding in the bus as passengers. Their testimony with the exception of Joseph Hastick is brief, weak and corroborative.

Josephine DeLotto merely testified that there was a jerk, (p. 74, ll. 24-25), and that she was not thrown from her seat. Asked if she was nearly thrown from her seat, she stated that she did not remember, (p. 74, ll. 27-28).

Lena Pallatina testified that she knew something happened, that she felt a skid or jerk (p. 75, ll. 27-30) that it happened so quick that she did not know what kind of a jerk it was, but that it did not throw her off her feet and "maybe she went forward a little bit." (p. 79, ll. 30-37). She did not remember whether the bus made a half-turn, or skid and did not see the other bus involved, (p. 80, ll. 1-11).

Joseph Hastick stated that the bus was traveling between ten and fifteen miles an hour before the accident (p. 81, ll. 20-22) that when his bus jerked, he just happened to see forward, and saw

the other bus coming to a dead stop, (ll. 26-31), further (ll. 32-34) :

Q. And what did your bus do, did it stop or did it go on? A. After the bus *skidded* to one side—

further describing the action of the bus, (p. 82, li. 10-14)

Q. You say the bus jerked and skidded to one side? A. Yes.

Q. What side did it skid to, right or left? A. To the right.

and further after a colloquy by the court (ll. 38-40) :

Q. Did the bus skid to the side at all? A. Yes.

Q. How much would you say it went to the side? A. About three feet.

Q. Three feet side movement? A. Yes.

Q. Did it slide forward at all? A. Yes, it did slide forward.

Q. How many feet? A. *About ten or twelve.*

By the Court: So that the motion of the bus was ten or twelve feet forward slide and the rear of it went three feet to the right?

A. At the same time it was going forward it was skidding sideways.

This concludes our summary of the different witnesses' testimony. It is apparent that there are slight differences of opinion respecting distances, and speeds. There is also a difference of opinion respecting the characterization of the jerk, together with descriptive testimony relative thereto.

At this stage of the case, the defendant now contends that there was no question for the jury to determine, of course bearing in mind that the most favorable inference of the testimony is to be ad-

duced to plaintiff, and that the credibility of the witnesses, unless incredible as a matter of law, is not to be questioned. It is unfortunate that our Practice Act does not permit a plaintiff in a tort action to move for a direction of the verdict, for we feel that were there such provision, the court would be bound to direct the jury to assess damages, because the undisputed testimony shows the defendant to be guilty of negligence. There of course, was no question of contributory negligence, and the court pursuant to plaintiff's request (S. of C., p. 17, ll. 20-27) rightfully charged the jury, (p. 172, ll. 20-25).

“Of course, there is no testimony here of any contributory negligence. The only question I repeat for you to determine is whether or not there is wrong done by the Public Service to the Plaintiff, whether there was a violation of the law that it owed her.”

We must also bear in mind that the defendant being a common carrier, owed to the plaintiff a high degree of care to see that she was safely transported to her destination. With the legal status we shall deal with more in detail, elsewhere in this brief.

Briefly, the gist of defendant's contention is (1) that he was confronted with a sudden emergency, and (2) that there was not such a violent or unusual “jerk” that would bring it within the line of the “jerk” cases. Off hand, it would seem to us that both grounds are inconsistent with each other. If there was a sudden emergency, and as the evidence shows, the bus driver jammed both his foot-brake and emergency brake, skidded and slid a distance of ten to twelve feet, then it is hard for us to conceive that there was no unusual jerk, and if

there was no unusual jerk and the driver had his bus under proper control, then it is difficult for us to understand what emergency he may have been confronted with, unless it may be construed to mean merely a mental condition.

Just what is an emergency, and just what does "emergency" mean? The Diamond Webster Dictionary, published by the World Syndicate Company defines "emergency" as follows:

"n. a sudden occasion; pressing necessity; crisis"

Incidentally, while we will attempt to prove that the situation was far from an emergency one, we might point out, that there may be two kinds of emergencies particularly respecting accidents. There may be one which we might define as a real emergency, totally unforeseeable, and which would come exactly within the facts of the *Corkhill vs. Camden & Surburban Railway*, 69 N. J. Law 97, and then there may be one which we might define as a negligent emergency, if there is such a thing, one occasioned through carelessness and negligence.

Does counsel intend to convince this court that his driver while in the proper and careful control of his bus, was *suddenly* confronted with an unforeseen crisis? Is there any reason in the world why there should have been an accident (had the busses continued) if his bus was at all times under careful and proper control? And there is one more point troubling us, where was this driver of the other bus referred to? Why was he not produced in court, or accounted for? It is quite hard for us to imagine, that the Public Service, after attempting to place all of the blame on this "other bus" should slip up on such an important part of their investigation. Placing the blame on a third

party not produced in court in our opinion, if the court will pardon us for the vernacular, is a "lame duck" argument. Is there any evidence that the other bus was being driven excessively, or was not under control? This accident did not occur at an alley-way or at some narrow driveway, where a car may suddenly shoot out to the peril of a passing motorist. This accident occurred at a regular, wide, normal street intersection. Why should a bus traveling at a moderate rate of speed have to skid ten to twelve feet forward and some three feet sideward? If a proper observation was maintained, why was it necessary to jam both the foot brake and the emergency brake?

Coming back for a moment to the testimony. Defendant spends a few pages criticizing and characterizing Officer Lesnick's testimony, and we feel that it is only fair on our part to come to his defense. As a rule if testimony of witnesses is to be weighed and discriminated, that of an officer of the law, is to be given the greater weight. An Officer of the law, sworn seven years ago to enforce and uphold the law, produced in court, sworn to tell the whole truth and nothing but the truth, and counsel, although he does not dare claim he perjured himself, claims that his testimony is "so studded with flat contradictions and patent inaccuracies and which is, on so many points, directly contradicted by every other witness—does not meet the high standards for veracity which our courts require—that renders the whole of the testimony of this witness unworthy to be classified under the heading of credible evidence." Let us see if that is so. Is there anything unusual about Lesnick's testimony that the bus was traveling between fifteen to twenty miles an hour? Witness Joseph Haschik testified that the

bus was going ten to fifteen miles an hour. Is there anything unusual about Leslik's opinion that the bus travelled about ten feet before it stopped? Witness Joseph Haschik stated that it skidded between ten to twelve feet. Is there anything unusual about Leslik's opinion of the width of the road at the scene of the accident? Does 75 feet impress this court with being grossly exaggerated? The case took two days to try and counsel had an opportunity to have the road measured to the inch, but he did not do it. He apparently was content to rely on the evidence produced in court, and now he is objecting. What is unusual about seeing the bus driver jam his brakes while the bus was approximately fifty feet away from the other bus? We think that is the exact fact. Nobody testifies otherwise. What is wrong with the opinion that the average road is fifty feet wide? Certainly we feel that all of these questions touching on credibility were for the jury. We somewhat admire counsel's brushing statement that his evidence cannot come under the title of "credible evidence." Notwithstanding this, counsel then tamely saves a statement here, and a statement there, saying that it is in point with what the other witnesses testified to. Nothing unusual about counsel's strategy, it happens in almost every brief he writes.

Counsel continues with a comparison of the testimony, and then draws the excellent postulation that (brief, p. 16, ll. 4-8)

"the recorded actions of both drivers, as well as the other testimony, leaves no doubt but that if both buses had continued a collision would have ensued."

this notwithstanding that on his own cross-examination, Officer Leslik, who was riding in the bus right next to the bus driver, emphatically stated

that if the bus had continued there would have been no accident. This in our opinion was in itself sufficient to permit the jury to determine that the driver was negligent. Just because counsel keeps hammering "emergency", "emergency" does not mean that that is so. If there was an emergency, and we claim there was none, it was certainly for the jury to determine. The facts in the instant case certainly are not analogous to the Corkhill vs. Camden & Surburban Railway, *supra*. A review of the facts there will readily disclose that the motorman did everything that a reasonable prudent person could have done and that while the electric car he was operating was crossing the tracks, "a train *unexpectedly* approached" rounding the curve, "giving no signal, bell or whistle". Certainly he was confronted with an emergency, and we think that the Supreme Court rightfully complimented the motorman for maintaining a complete presence of mind. We submit that not only was it for the jury to determine whether the bus driver exercised a high degree of care, but that the great weight of the evidence showed that he was negligent.

Now as to the other point argued by the defendant that the lurch was not of such a nature, as to permit it to come within the cases cited by the defendant. It is true that with the exception of Miss Schmidroth, who testified that the bus gave a *real* jerk, there was no witness who characterized the jerk. As to whether or not it is proper for counsel to ask a witness whether the jerk was unusual or violent, we cannot say. Off hand, without searching for authority on point, we would assume that it would be calling for such a conclusion that to decide it would oust the jury of its function, and permit the witness to determine

what is the duty of the jury. Were the question of the jerk merely incidental, we would unquestionably say that such a question is proper, but where the gist of the case, and the question of liability depends a great deal upon that one single factor, we think the question is not one of opinion for the witness, but one of fact for the jury. So in this case, we say it is for the jury to determine what sort of a lurch or jerk, this bus gave, and they are to draw their conclusions from all of the facts and circumstances. The fact that no person was thrown from his seat is a fact to be taken into consideration in connection with the severity of the jerk. So also the fact that Mrs. Vores 'banged' her head, or the fact that all of the passengers were shaken up, or the fact that one passenger 'went forward a little' or the fact that one passenger felt a 'real' jerk, are facts to be taken into consideration in coming to a conclusion respecting the severity of the 'jerk'. So also we must consider the skid and slide of the bus, and the fact (if the jury found that to be so) that the rear right wheel struck the curb. This case is different from any cited by the defendant in that involves the dislodging of a passenger while sitting in her seat and not the unbalancing of a passenger while standing or walking in the car. There are several other noteworthy points too. The cases touching the subject of lurches, involve trolley cars running on rails, which as the court explains in the case of *Consolidated Traction vs. Thalheimer*, 59 N. J. Law 474, 37 Atl. 132:

"As street cars run upon rails fixed and leveled in the highway and not permitting lateral motion, and are provided with brakes which when applied quickly or when, after being applied, are released quickly, before the momentum of the car has been over-

come, produce known mechanical effects upon persons on the car, the occurrence of a jerk or lurch of the violence described fairly justifies an inference that either the tracks were improperly laid, or were out of order, *or the brakes were improperly handled.*"

necessarily involve as pointed out by the defendant in *Chester vs. P. S. Ry. Co.*, 94 Atl. 953, that the 'ordinary progress of a *trolley* car from rail to rail is, in a sense, a succession of jolts and lurches' but obviously an autobus does not have the restricted motion (from rail to rail) that a trolley car has. Of course, defendant does not contend that plaintiff was dislodged by one of the ordinary movements of the bus. Is there any proof that a bus in its natural operation, lurches or jerks as does a trolley car?

We refer once more to *Consolidated Traction vs. Thalheimer*, supra. The facts there show that plaintiff had walked to the rear door of the car, which was open, and was just coming out of it when she was thrown into the street by a movement of the car which she described as a "jerk". The defendant moved for a non-suit on the grounds that there was no evidence of a breach of duty owed to the plaintiff, and that the plaintiff was guilty of contributory negligence. The trial court denied the motion and this court in commenting upon it stated:

"Upon an application for a new trial, a serious question would be presented as to the weight of this conflicting testimony; but upon error the weight of testimony cannot be considered. Our review is limited to the consideration of the question whether Mrs. Thalheimer's evidence, if credence were given to it, was sufficient to establish the liability-

ty of the traction company to answer for her injury.

“The contention that the evidence in question was insufficient to show a breach of the duty which the traction company, as a carrier of passengers, owed to Mrs. Thalheimer, cannot in my judgment prevail. That duty has been described in this court as calling for a high degree of care. *Railway Co. vs. Lee*, 50 N. J. L. 438, 14 Atl. 883.”

and further in commenting upon the lurch or jerk in question stated:

“At all events, the fact that such a lurch or jerk occurred as would have been unlikely to occur if proper care had been exercised brings the case within the maxim, “*res ipsa loquitur*,” as expounded in the Court of Errors in *Bahr vs. Lombard*, 53 N. J. Law 233, 21 Atl. 190, etc.”

Counsel goes into a rather lengthy and detailed discussion of *Faul vs. North Jersey St. Ry. Co.*, 70 N. J. Law 795 in an attempt to bring that case within the facts in the case at bar. A careful study of the details will reveal, however, a wide difference in the facts. It may be noted that the plaintiff was the only person who referred to the action of the motorcar as a ‘jolt’ and from the physical facts it is quite evident that plaintiff was not thrown from the platform because of any ‘jolt’ or ‘jerk’. The court in passing upon that question stated:

“No passenger inside of the car, whether standing or sitting, testified that he noticed any jolt of the car. That expression was only used by the plaintiff.”

and it may be noticed that the reason why there was no recovery in the *May vs. North Hudson Ry.*

Co., 49 N. J. Law, 455, is because it would impose an obligation of a "nice adjustment of the exact amount of power necessary" which the court said was very difficult of calculation. The facts there are entirely different from those in the instant case. We think that the true test is laid down in the Whalen vs. Consolidated Traction case, and speaking of that case, the same court says:

"The accepted rule in actions founded upon negligence is that, when the plaintiff shows that he was injured through some act of the carrier's servant which might have been prevented by due care, if the carrier proves that such care was in fact exercised, negligence cannot be inferred by the jury. Whalen vs. Consolidated Traction Co., 61 N. J. Law 609."

The Raeuber vs. P. S. Ry. Co. case, (89 N. J. Law 366) may be very readily distinguished from the instant case. There the evidence showed that plaintiff was in the act of alighting from the steps of the car, and that just at the moment that he was stepping onto the step, the car gave a jerk which threw him into the street. The court refused to sustain the judgment holding:

"There is no proof that the jerk of which plaintiff complains was abnormal, or anything more than was merely incidental to the proper observation of the car."

In other words the court said that every car when coming to a stop for the purpose of permitting passengers to alight, does during the natural course of operation jerk to some extent, and the plaintiff in that case failed to prove that this jerk was anything more than the usual jerk. However, the facts in the case *sub judice* are totally different.

Here we have a plaintiff who is sitting in her seat, and is dislodged because of the action of the bus. We submit that plaintiff has proved that this jerk in question was one caused by negligence and not one which occurs in the normal operation of the car. And here we might also comment, that merely because one of defendant's witnesses may have received "more than one of those jerks" is not indicative of the fact that the jerk was not unusual or that it was not occasioned by negligence. It may well be that Miss De Lotto has had the pleasure of riding with several reckless drivers, upon which occasions she experienced other jerks.

In *Burr vs. Pennsylvania R. R. Co.*, 64 N. J. Law 30, the Supreme Court after deciding that question of an ordinary lurch or violent lurch, under the conflicting evidence was properly submitted to the jury, in commenting upon the trial judge's charge said:

"The charge, in substance, was that, if there were no more violence and lurching than ordinarily attend the starting of a train, the jury could not draw from it an inference that the company was negligent;"

It is a matter of common knowledge that a train propelled by steam, must of necessity, while starting, lurch and jerk to some extent, and it is for that reason, by virtue of the law of physics, that the trial court charged that there must be an extraordinary lurching before there can be an inference of negligence. And in connection herewith, we call the court's attention to the fact that all of these abnormal or extra-ordinary jerk" cases involve the theory of inferred negligence or the maxim of *Res Ipsa Loquitur*, whereas in the instant case plaintiff has exceeded that requirement and has actually proved negligence on the part of

the driver. We have no quarrel with Haile vs. Clayton & Hoff Co., 61 N. J. Law 197, and agree *in toto* with everything therein stated. Here we again call attention to the fact that the driver acted as a prudent person and at all times had his vehicle under proper control. This is not true in the instant case.

Nirk vs. Jersey City, 75 N. J. Law 646, involves a different set of facts and is therefore inapplicable to the present situation. In Budner vs. P. S. Corporation, 74 N. J. Law 298, the court found the verdict to be against the weight of the evidence stating:

“The question of the negligence of the defendant was properly submitted to the jury, but more than a dozen witnesses upon the car that the deceased fell off testified that they felt no jar or jerk of the car, and seven witnesses testified that, when the deceased was on the run board after the car started his hat blew off, and he reached or jumped for it, and thus fell off the car and down upon the pavement and was injured.”

That case too, embraces an entirely different set of facts. So also, is Agry vs. Pennsylvania R. Co., 146 Atl. 587. That covers the last of defendant's citations.

It will be noted that with the exception of the Corkhill vs. Camden & Surburban case, *supra*, there is no reported case involving the lurching or jerking of a car injuring a passenger who is seated, and that case turned upon the question of liability while acting in an emergency.

We have one more citation which may or may not be of assistance. In Scott vs. Bergen County Traction Company, 63 N. J. Law 407, 43 Atl. 1060 the syllabus of the court recites:

The occurrence of a sudden lurch or jerk of a street railway car, of sufficient violence to throw a passenger off the platform who was there preparing to alight and awaiting the stoppage of the car for that purpose, justifies an inference of a breach of duty upon the part of those operating the car within the maxim, "Res ipsa loquitur." *Traction Co. vs. Thalheimer, supra.* That the car was following another closely, which was stopping and starting suddenly, is a fact for the consideration of the jury in determining the cause of the sudden lurch or jerk, and as bearing upon the question of negligence arising in the cause.

The railway company operating such a car is bound to exercise a high degree of care to carry its passengers safely in or upon whatever part of the car they are permitted to ride.

So also in the instant case, it was properly left for the jury's determination as to the negligence of the other bus, if any, in relation to the swerving and jerking of the defendant's bus.

Without again recapitulating the testimony, and with permission to repeat once more our theory that the argument propounded by the defendant on the point of sudden emergency and on the point of abnormal jerking, are inconsistent, we respectfully submit that the entire question was rightfully and properly submitted to the jury, and that there was ample evidence as a matter of law, for the jury to have returned a verdict.

ANSWER TO POINT II.

The trial judge did not submit the case to the jury upon erroneous principles of law, did not inject any imaginative issues, and did not erroneously instruct the jury on the question of negligence.

It was with a good deal of interest that we read counsel's elaborate treatise on this subject. It very strongly reminds us of early historic Greek times, when Sophistry was the vogue. Counsel certainly makes a strong attempt to prove that almost everything that the trial court stated was either erroneous or unwarranted. We wonder what counsel would say if the tables were reversed, and he were "sitting on the other side of the fence."

We suppose that a trial court should be restricted in his charge to some four or five lines. We suppose that a trial judge should merely say "Gentlemen of the Jury, you have heard the evidence, and it is for you to say whether or not the defendant was negligent and the plaintiff contributorily negligent" and continue with a definition of negligence and contributory negligence and then conclude with "the case is in your hands." It is fundamental that a party cannot complain of the court's failure to charge certain propositions of law unless specifically requested to do so by counsel. An examination of the record also discloses that each of counsel's requested instructions were charged and defendant makes no complaint of failure to so charge. Defendant therefore cannot as he claims in his brief, charge the court with failing to charge adequately and to suit his convenience. Has counsel the right to limit the language of trial judge?

Has he a right to choose his words? We submit that it is within the proper discretion and conduct of the trial judge to comment on the testimony, limited of course to the rule of "fair comment."

That a trial judge has the undoubted right to comment on the testimony, is now well settled law. As was held in *Merklinger vs. Lambert*, 76 N. J. Law 806, 72 Atl. 119:

"What the trial judge said upon the facts was not subject to criticism. The language used was by way of illustration merely, and had been preceded by a clear and distinct charge that it was for the jury to determine, under the circumstances of the case, whether the deceased was guilty of contributory negligence. *It cannot be disputed that the trial judge has an undoubted right to make such comments and expressions upon the testimony as he thinks necessary for the direction of the jury, so long as he leaves the jury to determine the facts and draw their own conclusion therefrom.*" *Foley vs. Laughran*, 60 N. J. Law 464, 38 Atl. 960; *Camden & Atlantic R. R. Co. vs. Williams*, 61 N. J. Law 646, 40 Atl. 634. (italics ours)

See also *Kneip vs. N. Y. & L. R. R.*, 131 Atl. 886.

Coming directly within the foregoing rule, we quote the cold, simple and unequivocal language of the trial judge:

"You decide this case from your recollection of what the testimony was, not from mine, because I may have misstated it, and if I have in any particular, you will disregard any misstatements that I have made. There is no significance in the fact that I have not covered all of the testimony. You must decide it from all the testimony, and you must decide it from all the testimony,

as you remember it, and if I have stated it incorrectly, or if counsel has in any particular, of course, you will disregard such misstatement, but depend rather on your own recollection of what the testimony is."

We think that the criticism of the trial judge is not only absolutely unwarranted, but is totally unfair. A complete reading of the charge, not the distangled separation and isolation of certain statements, will readily reveal to an unbiased mind that it was fair, impartial, clear, distinct and legal. It will reveal that the defendant was given every possible benefit. It will reveal that the court charged a "high degree of care" denotes nothing more than a degree "commensurate with the risk or danger", (S. of C., p. 172, ll. 36-39), that if they found the driver was confronted with a sudden emergency (bearing in mind that we claim there was no proof of sudden emergency), they "must test his conduct by what you think a reasonable, prudent person would have done if confronted with a similar emergency," and to continue in the exact language of the trial court, (p. 173, 10-34) :

He is not required to exercise the best possible judgment. He is only required to exercise that degree of skill and care which a reasonable, prudent man would be expected to exercise under similar circumstances.

If you find, for instance, that this occurrence was an unavoidable accident (which we again say is contra to the proof, and should not have been submitted to the jury) and not due to any lack of care or negligence on his part then, of course, your verdict must be no cause for action.

By proximate cause is meant the directly producing cause without which the accident would not have happened.

The term "proximate" indicates that there

must be no other culpable and efficient agency intervening between the defendant's dereliction and the injury.

If therefore, you find that the proximate cause of the accident was a third party, the other bus in this case, then your verdict must be no cause for action.

In addition to everything that we have previously said, we must also bear in mind the general rule as stated in *Carey vs. Deems*, 129 Atl. 191:

"But, in considering the judicial action complained of the court will not set aside
 (2) such error has produced manifest wrong
 (1) the verdict, even where error appears, unless and injury to the party against whom the verdict has been rendered." *Butler vs. Hoboken Printing, etc. Co.*, 73 N. J. Law 45, 62 Atl. 272.

*lines (1) and (2)
 should be reversed*

This rule is merely affirmative of the provision in our Practice Act, and was obviously adopted for the purpose of administering justice. The Act prohibits a cause from being reversed merely because of some technical error, unless as stated, it can be shown that such error was prejudicial and injurious. The Act specifically provides:

Section 163—sub-section 303. 27. REVERSAL OR NEW TRIAL ON MERITS.

No judgment shall be reversed, or new trial granted on the ground of misdirection, or the improper admission or exclusion of evidence, or for error as to matter of pleading or procedure, unless, after examination of the whole case, it shall appear that the error injuriously affected the substantial rights of a party. (Laws of 1912, c. 231, p. 382, supplementing L. 1903, p. 537).

Thus, in order for this court to reverse the judgment on the grounds urged by the defendant, it

must appear, after the entire reading of the record that prejudicial and injurious error was committed.

With these rules in mind, and without undertaking to specifically answer each argument urged by the defendant under this point, we respectfully submit that the contention of the defendant is totally devoid of merit.

ANSWER TO POINT III.

The trial judge did not admit erroneous testimony, and did not erroneously charge the jury as to the measure of damages plaintiff was entitled to recover.

Briefly, the defendant complains of the trial court's action in permitting as an item of recovery the amount of \$70 which represented the loss of wages for one month on the part of a daughter Grace. The evidence is uncontradicted that the daughters turned over their entire earnings to the mother, it appearing that the mother was a widow, and that they supported her, (S. of C., p. 20, ll. 1-4). This is objected to, both as to admission in evidence, and as to an instruction of damage. Aside from being very trivial, and of course, not harmful (amounting only to \$70) we feel that facts are brought squarely within the ruling of the court in *Corum vs. Davis*, 3 Misc. 981, 130 Atl. 448, wherein the court, to be quoted at length, stated:

“The sixth point is that it was erroneous to instruct the jury that the husband could recover for a loss of his own wages while he was attending his wife. The testimony showed that she needed care and nursing,

and that, instead of hiring a nurse, he had stayed away from his work and attended her himself. It appeared that he earned ordinarily from \$3 to \$3.75 a day, and that he stayed away from work for two weeks. The total amount claimed on this item would therefore be something like \$40. It is common knowledge that a trained nurse at the present time costs about \$40 a week, and it is very doubtful whether even a practical nurse could be had for less than \$20 a week. The argument made is that, if the husband earned \$1000 a week, he could recover that amount under this charge; but the simple answer is that, if he had earned \$1000 a week, such an instruction would probably never have been given to the jury. In testing the propriety of an instruction, the court necessarily must consider the instruction with reference to the particular case before it. *State vs. Egan*, 84 N. J. Law 701-706, 87 Atl. 455."

That case should satisfactorily dispose of any doubt on the ruling of the trial judge respecting the item of \$70 for loss of one month's wages.

ANSWER TO POINT IV.

The trial judge did not erroneously submit to the jury an item of expense for which there was no competent proof and plaintiff claims defendant is estopped from attacking the charge respecting a disputed point of damage, because same is peculiarly a subject matter for a rule to show cause.

Without repeating the testimony of Mrs. Seinner and Mrs. Vores on the subject of working for plaintiff, and the charge therefor, plaintiff contends that

all the record must show is that there was some evidence from which the court had a right to submit to the jury the question of compensation for such services.

As pointed out in defendant's brief (p. 59), the evidence shows that Mrs. Vores worked for Mrs. Seinner for a period of six or seven months, that Mrs. Seinner did not pay anything to Mrs. Vores because she had no money to pay and Mrs. Vores testified that Mrs. Seinner was a good friend of hers and wanted to pay her and she said "you want to give me something \$12 a week is enough" (brief, of def., p. 59, ll. 1-4). Obviously it appears that Mrs. Seinner was financially in a position that would not enable her to make payment, and because of that position, Mrs. Vores was very reluctant to enforce payment, leaving it entirely up to the volition of the plaintiff. This does not necessarily mean that because of such situation Mrs. Vores had no right to be compensated. After all, the test for measuring Mrs. Seinner's damages is "what has she become and what will she become obligated for" and there is no rule of law that could prevent Mrs. Vores from suing Mrs. Seinner tomorrow. There is no proof that these services were unnecessary or voluntary, and the presumption is to the contrary. The rule is well settled that one can recover for the performance of household duties, except in the case of a member of the immediate household, in which case there is a presumption that such duties are performed gratuitously. We are not interested in the weight or credibility of the witnesses' testimony, for that too has been held to be immaterial, on an appeal. The only question then to be considered is was there any legal evidence from which the court might charge the jury on that subject. We submit there was.

Then there is another question which is seriously disturbing our minds. Can an appellate court reverse a case on an instruction of the trial judge, covering one of several elements of unliquidated damages, particularly when that claim, as is apparent from the record is a minor element of damage? We contend not.

See *Karnhuff vs. Kelch*, 69 N. J. Law 499, 55 Atl. 163. There the syllabus of the court recites:

5. In an action of tort brought by husband and wife, the declaration, which contained but a single count, set forth some grounds of special damage for which the plaintiffs were entitled to sue jointly, and another ground of special damage for which the husband in his own right, was alone entitled to recover; the *ad damnum* clause claimed simply the "damages of the said plaintiffs" and the judgment was that the plaintiffs recover "their said damages."

HELD (following *Consolidated Traction Co. vs. Whelan*, 37 Atl. 1106, 60 N. J. Law 154), that the effect of the verdict and judgment was to give only those damages to which the plaintiffs were jointly entitled.

So, we likewise feel in the instant case, that the "effect of the verdict and judgment was to give only those damages to which plaintiff was justly entitled." At least the presumption should be to that effect. To begin with the total amount involved approximated three to four hundred dollars, (six or seven months at \$12 per week). Thus, if error was committed, and we deny that it was, it constituted so minute an element of damage, that as a matter of law the jury could not have been prejudiced thereby. The defendant did not object to its introduction as evidence, and we feel that had the judge not charged that as an ele-

ment of recovery, the jury would have returned the same verdict.

As an indication that the court will not pass upon an instruction relating to damages on an appeal, unless that point is material, see *Livesey vs. Helbig*, 87 N. J. Law 303, 94 Atl. 47. In that case it appeared that the court charged the jury "manifestly large damages, so far as the evidence in the case indicates, would be entirely out of the question and entirely improper." The jury however returned a verdict in favor of the defendant. The court in deciding that the error complained of was immaterial stated:

"By no process of reasoning could the judge's limiting the jury to find a small amount of damages induce their finding no damages at all. What was said as to the measure of damages was immaterial unless the jury first found in favor of the plaintiff."

And in the case of *Conveyor and Equipment Company, Inc. vs. Shapiro*, 7 Adv. Rep. 1095, decided by this court in October last, although there was no legal evidence which would justify a verdict of "no cause of action" (which was returned by the jury), the defendant admitting in court that a sum of \$36.43 was due to plaintiff, and the court charging the jury to that effect, this court affirmed the verdict of the jury on the theory that the plaintiff should have obtained and prosecuted a rule to show cause, in which instance a new trial would undoubtedly have been granted.

The rule has been adequately demonstrated in *Johnston vs. N. Y. & L. B. R. Co.*, 65 N. J. Law 421, 47 Atl. 586. The facts are quite fully summed up in the syllabus of the court which holds:

2. The charges of the court that the jury

might, in fixing the damages of the wife, consider the remote possibility of her husband's death, and, in event thereof, the possible loss to her in her earning power thereafter, was error; but in view of the reasonableness of the damages awarded in the case considering the character of the injuries to the wife and the evident lack of harm to the defendant arising from the erroneous instruction the verdict should not be set aside. Harmless error is not ground for reversal.

and the court in commenting thereon, specifically stated:

“The verdict was a very reasonable one under the evidence. There is nothing in the case, therefore, to show that the element of damages suggested by the court as a possible one for the jury to consider was given by them any importance in fixing the damages, and it does not appear to have been other than harmless error, for which the verdict should not be set aside. *Whitaker vs. Miller*, 63 N. J. Law, 587, 44 Atl. 643.”

We call attention to the fact that this case was brought up on a rule to show cause, where obviously, it was within the discretion of the court to reduce the damages, if found to be erroneous. Cases of foreign jurisdictions are quite lacking. The rule was, nevertheless adopted in a Pennsylvania court, wherein it was held that the court's instructing covering the measure of damages was harmless error. *Walsh vs. Altoona & Electric Ry. Co.*, 232 Pa. 479, 81 Atl. 551. In that case, to our way of reasoning, (and as the court characterized the charge) the learned trial judge in illustrating the measure of damages by far exceeded his realm. Even a casual reading discloses that it was erroneous. In spite of it all, the court held:

"We are not convinced that the errors complained of in the second and tenth assignments did the defendant any harm. The amount of the verdict shows that the appellant was not injured by the illustration given by the learned judge in his charge as to the proper manner of estimating the damages. We do not approve of the language used by him in submitting the case on the question of damages, and complained of in the second assignment; but it is apparent that it worked no injury to the appellant in this case, and therefore the assignment is not sustained."

The case of *Bartow vs. Erie R. Co.*, 73 N. J. Law 12, 62 Atl. 489, cited by the defendant, is we think, distinguished from the facts outlined in the instant case. While apparently, the action there, is styled in tort, there is no indication that the suit was one for personal injuries. Nor is there any indication respecting the amount of profits as compared with the size of the verdict. On the contrary we feel that that portion of the charge controlled the entire case respecting the damages, and it was for that reason that the verdict was reversed. It may be noted that the case there relied upon, *East Jersey Water Co. vs. Beiglow*, 60 N. J. Law 201, 38 Atl. 631, involves a property damage claim and is based on a charge of unusual diversion of water resulting in damage.

Before concluding this point, we desire to note two things. One is in answer to defendant's contention that the trial court charged the jury that Mrs. Vores was employed for a period of seven or eight months, when as a matter of fact, it was only six or seven months, which we feel was corrected when the court adequately instructed the jury, as previously pointed out in our brief, to disregard anything told them which was inconsistent

with their recollection of the evidence, and to rely solely on their judgment of the facts. The other point is that we desire to here incorporate everything that already has been said relative to the necessity of error being both prejudicial and injurious.

We respectfully submit that there was no error by which the defendant was prejudiced or damaged.

ANSWER TO POINT V.

The trial judge did not charge that there was evidence of plaintiff being permanently disabled, and what the court did say was not error.

The defendant alleges that the verdict is erroneous because the trial court charged the jury:

“She says she is permanently disabled. She says so through her counsel. She says this is a permanent disability. Now, on that question doctors do not agree.”

Bearing in mind that this is the court's interpretation of fact, and repeating as we have said on two other occasions, that the court adequately and emphatically charged the jury to disregard his version of the facts and to accept their own, and the fact that before a cause may be reversed it must appear that the error charged was both prejudicial and injurious, we feel that the argument of the defendant is so frivolous as not to warrant any further consideration. We will therefore proceed to the next ground of appeal.

ANSWER TO POINT VI.

The trial judge did not commit error in permitting an expert witness to answer a hypothetical question that accurately embodied the facts in evidence.

A careful perusal of the allegations charged under this ground of appeal, is in our opinion untrue in fact, as well as unsupported in law.

Mrs. Seinner testified (P. 26, ll. 21-24) that before the accident she felt all right, but after the accident she felt very sick, that before the accident she weighed 160 and after the accident, 128, that (P. 27, ll. 3-21) before the accident she never coughed, but since the accident she coughed very much, expectorating blood almost every morning. Plaintiff's daughter Ethel testified that her mother was never under a doctor's care before the accident, and Mrs. Vores that before the accident Mrs. Seinner looked "fat and red face." (P. 63, ll. 1-3) It is untrue that there was no evidence of a broken rib, unless the defendant means to contend that a fractured rib is different from a broken rib. Nor is it true that Dr. Magennis did not mention which rib was fractured, nor in our opinion should it make any difference. A fractured rib would give the same problematical results whether it were the second or the fifth.

We can hardly assume that any expert testimony on the part of Dr. Magennis is damaging to the defendant, because at the most it was merely corroborative. The record discloses that Dr. Cohen, who was the attending physician, quite fully covered the question of traumatic pleurisy,

as well as undergoing a healthy cross-examination on that subject.

The contention that the question should have included a multitude of elements mentioned by the defendant, is equally without merit. An injury to the pleura is a very simple matter, and as the doctor testified is a good probability in every fractured rib case.

Hypothetical questions asked of experts, are always within the discretion of the trial judge, and unless the permission of such question is damaging, error cannot be complained of. We think the facts come properly within the ruling laid down in *Kaltman vs. Bocino*, 126 Atl. 654.

We therefore submit that the lower court committed no error in permitting the witness to answer the question discussed.

ANSWER TO POINT VII.

The trial court did not commit error in permitting all of the interrogatories to go in evidence, since they were offered for the purpose of attacking the credibility of the plaintiff, and they therefore became competent as touching upon the question of credibility.

The defendant was not harmed by the introduction of the remaining interrogatories as they were merely corroborative, having already been testified to in detail, in addition to which they were harmless since they touched mostly on the question of damages.

Defendant offered to introduce interrogatories 3, 4, 5, and 9. These were introduced together with the remaining interrogatories 1, 2, 6, 7, 8 and

10. The defendant had the use and benefit of the interrogatories that he offered to introduce, and he therefore is precluded from complaining on that score. A perusal of the remaining interrogatories readily discloses that they were already in evidence, having been testified to by different witnesses. Certainly if the questions were proper as interrogatories, they were proper for trial examination, and we know of no case where interrogatories were asked before trial, that were not subsequently, during the course of the testimony, repeated. This is not a case where new evidence was brought in by means of self-serving declarations. This is not a case where the plaintiff did not take the stand, and through the medium of interrogatories, foreign evidence was introduced.

Notwithstanding, we think that the interrogatories properly limited and qualified each other. This is particularly true, because the defendant introduced them, merely for the purpose of attacking the witness's credibility. It certainly seems unfair, and we think, is not within the spirit of the Practice Act, to permit a party to select those interrogatories which are favorable to him, to the exclusion of all others.

Harris's Pleading and Practice, (page 423) commenting on Answers to Interrogatories as evidence recites:

The party serving the interrogatories should not offer in evidence only those answers which are favorable to him, omitting others tending to qualify the answers offered in evidence.

So also, the syllabus of this court in the case of *Beakly vs. Board of Chosen Freeholders*, 81 N. J. Law 637, 80 Atl. 457, recites:

Under section 140 of the practice act (P.

L. 1903, p. 575), which provides that the written answers to written interrogatories submitted before trial upon any matter material to issue shall be evidence in the action if offered by the party proposing the interrogatories, but not otherwise, the action of the trial judge in permitting the answers to several interrogatories offered and read in evidence without admitting the answers to the remaining interrogatories cannot be said to be erroneous when there was no showing nor offer to show, either in the trial court or in the reviewing court, that the remaining answers were *material* to the issue, or that they tended to the issue, or that they tended to explain, qualify, or limit the answers admitted.

Thus, we submit, that under the Beakly case, all that is necessary to show for the remaining interrogatories to become admissible, is that they are material to the issue. And the answers in our opinion being very material, it does not now make any difference whether counsel so stated at the time that the interrogatories were offered. The Practice Act (section 140) providing either party may propound written interrogatories "upon any matter material to the issue" we cannot quite understand the court's ruling that the remaining interrogatories must be material to the issue, unless it was the intention of the act to prevent a party from introducing separated interrogatories which are obviously favorable to him. And we are more inclined to the view that the party proposing the interrogatories should prove that the remaining interrogatories which he intends to exclude, do not explain, qualify or limit those answers that he attempts to introduce. This to us seems to be the fairer rule. Nevertheless, we submit, that it should

really make no difference, whether it be because the other answers are material, or limit or qualify those which are offered in evidence, or whether it be because the answers admitted were harmless, having already been testified to as part of the evidence. We ask the court to also bear in mind that there is no decided case holding it to be error to permit an entire set of interrogatories to be introduced in evidence.

For the reasons herein urged, we respectfully submit, that each of the defendant's grounds of appeal is without merit, and if at all the trial court committed error, such error was harmless.

We respectfully pray that Defendant's appeal be dismissed.

Respectfully submitted,

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with Plaintiff-Appellee.

