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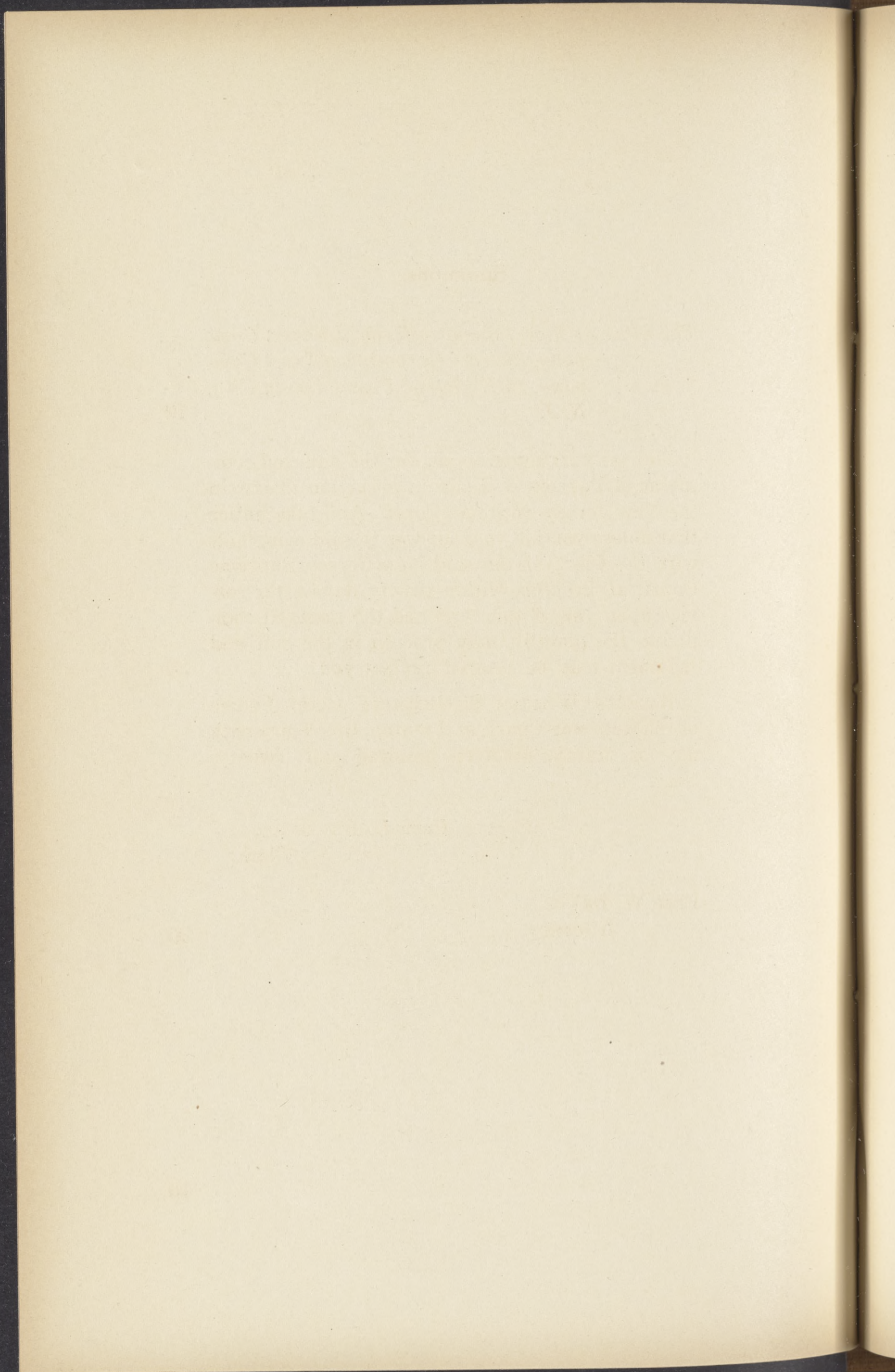

Summons.

The State of New Jersey to Sheffield Farms Company, Inc., c/o Corporation Trust Company, 15 Exchange Place, Jersey City, N. J.

[L. S.]

10

You are summoned to answer the annexed complaint of Patrick J. Egan in an action at law in the New Jersey Supreme Court. And take notice that unless you file your answer to said complaint with the Clerk of the said New Jersey Supreme Court, at Trenton, within twenty days after service upon you of this writ and the annexed complaint, the plaintiff may proceed in the suit and judgment may be entered against you. 20

Witness, William S. Gummere, Chief Justice of the Supreme Court, at Trenton, this Thirteenth day of March, nineteen hundred and Twenty-Nine.

Fred L. Bloodgood,
Clerk.

Fred W. DeVoe,
Attorney. 30

40

Complaint.

NEW JERSEY SUPREME COURT,

MLDDLESEX COUNTY.

PATRICK J. EGAN, Plaintiff, *vs.* SHEFFIELD FARMS COMPANY, INC., Defendant.		Action at Law. Complaint.

10

Plaintiff, Patrick J. Egan, residing in the Borough of Middlesex, in the County of Middlesex and State of New Jersey, says that:

20

1. On August 16, 1928, the defendant, Sheffield Farms Company, Inc., a corporation of the State of New York, licensed to transact business in the State of New Jersey, was the owner and operator, through its agent or servant, of a certain truck in and about the Terminal Yard of the West Shore Railroad Company at Weehawken, New Jersey, and while operating the said truck it became and was the duty of the said Sheffield Farms Company, Inc., through its agent or servant, to move and operate the said truck with reasonable and proper care and caution and in such manner as to avoid running into and damaging other vehicles, and injuring persons working in, about or upon such other vehicles, without negligence on their part, in said Terminal Yard.

30

2. Defendant, through its agent or servant, disregarding its duty as aforesaid, did on August 16, 1928, so carelessly and negligently run and operate the said truck in and about the said Terminal Yard, that as a result thereof the said truck, owned and operated by defendant as aforesaid,

40

was with great violence and force run into and driven against the truck which plaintiff, Patrick J. Egan, was then and there operating with reasonable and proper care and caution, and without negligence on his part, and that as a result thereof the said truck, owned and operated by defendant as aforesaid, was with great violence and force run into and driven against the person of the plaintiff, Patrick J. Egan, who was then and there working in, about or upon his said truck, and without negligence on his part.

10

3. By reason of defendant's carelessness and negligence as aforesaid, the said plaintiff, Patrick J. Egan, suffered great and serious personal and physical injuries and has been permanently disabled thereby.

20

4. By reason of defendant's carelessness and negligence as aforesaid, the said plaintiff, Patrick J. Egan, has suffered great and serious pain and suffering, and has suffered great and serious mental distresses, and continues to suffer great and serious pain and suffering, and great and serious mental distresses.

5. By reason of defendant's carelessness and negligence as aforesaid, the said plaintiff, Patrick J. Egan, has been forced to expend large sums of money in payment of medical and hospital bills.

30

Plaintiff, Patrick J. Egan, demands as damages the sum of Fifty Thousand Dollars ($50,000.00).

Fred W. DeVoe,
Attorney for Plaintiff.

Dated: March 9, 1929.
Filed March 16, 1929.

Fred L. Bloodgood,
Clerk.

40

Answer.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

10

PATRICK J. EGAN, Plaintiff, *vs.* SHEFFIELD FARMS COMPANY, INC., Defendant.	Action at Law. Answer.

Defendant, a body corporate, organized and ex-
20 isting under the laws of the State of New York and duly licensed to transact business in the State of New Jersey, answering the complaint herein, says that:

1. Excepting that defendant admits that on August 16, 1928, it was the owner and operator of a truck in the West Shore Railroad Yard at Weehawken, New Jersey, defendant denies each and every of the allegations set forth in the complaint.

30

SEPARATE DEFENSES.

1. Defendant further says that at the time and place mentioned and referred to in the complaint, plaintiff was in divers respects negligent, and that plaintiff's said negligence contributed, as an efficient cause, to the bringing about of any injuries and/or damage, immediate or consequent, which he may have sustained.

40

2. Defendant further says that the negligent manner in which plaintiff conducted himself and operated, placed and maintained the vehicle of which he was in charge, at the time and place mentioned and referred to in the complaint, was the sole proximate cause of any injuries and/or damage which he may have sustained, and created a situation of sudden emergency impossible of anticipation or avoidance, even in the exercise of reasonable care.

10

3. Defendant further says that any injuries and/or damage which plaintiff may have sustained at the time and place mentioned and referred to in the complaint resulted solely from an unavoidable accident and not from any negligence on the part of defendant, direct or imputed.

20

Autenrieth, Gannon & Wortendyke,
Attorneys for Defendant.

Filed, August 22, 1929.

Fred L. Bloodgood,
Clerk.

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Reply to Answer.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

10

PATRICK J. EGAN, Plaintiff, *vs.* SHEFFIELD FARMS COMPANY, INC., Defendant.	Action at Law. Reply to Answer.

Plaintiff, Patrick J. Egan, replies to the An-
20 swer filed in this matter in manner following:

1. Plaintiff denies each and every of the allegations set forth in the Separate Defenses set out in the Answer and joins issue on the Complaint, Answer and Reply filed in this matter.

FRED W. DEVOE,
Attorney for Plaintiff.

Dated: August 27, 1929.
30 Filed August 28, 1929.

FRED L. BLOODGOOD,
Clerk.

40

Testimony.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT.

December Term, 1929.
PATRICK J. EGAN,
Plaintiff,

vs.

SHEFFIELD FARMS COMPANY,
INCORPORATED,
Defendant.

10

Transcript of stenographer's notes of evidence in the above entitled cause, taken before Hon. John P. Kirkpatrick, Judge, and a Jury, at the Middlesex County Courthouse, in the city of New Brunswick, New Jersey, on the twentieth day of December, A. D. 1929.

20

Appearances:

FRED W. DEVOE, Esq., Attorney for the Plaintiff.

Messrs. AUTENRIETH, GANNON & WORTENDYKE, REYNIER J. WORTENDYKE, JR., (Present), Attorneys for the Defendant.

30

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

(Mr. DeVoe made an opening statement to the jury on behalf of the plaintiff.)

(Mr. Wortendyke made an opening statement to the jury on behalf of the defendant.)

40

PATRICK J. EGAN, the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. DeVoe:

Q. Mr. Egan, where do you live? A. Middlesex
10 Borough.

Q. How long have you lived there? A. About six years.

Q. Are you married? A. Yes, sir.

Q. Do you live with your wife? A. Yes.

Q. Have you any children? A. Six.

Q. How old is the oldest child? A. Seventeen.

Q. What is her name? A. Mary Egan.

Q. Does she work? A. Yes.

Q. What does she do? A. She is a saleslady
20 in Draper Brothers in Plainfield.

Q. How much does she get a week?

Mr. Wortendyke: I object, if the Court please.

The Witness: Twelve dollars.

The Court: Objection sustained.

By Mr. DeVoe:

Q. Do any of the other five children work? A. No.

30 Q. How young is the youngest? A. Four years.

The Court: What has this got to do with it?

Mr. DeVoe: If your Honor please, I think it goes on the question of his necessity of support of these children.

Mr. Wortendyke: This is not a death action, if your Honor please.

40

By Mr. DeVoe:

Q. Mr. Egan, for whom did you work on August 16, 1928? A. Local Milk Products.

Q. That is a company, is it not? A. Yes.

Q. Is it located in New York? A. In New York.

Q. And did you have an accident on August 16, 1928? A. Yes. 10

Q. Speak up so the jury can hear you. A. Yes.

Q. Where was the accident? A. In Weehawken milk yard, New York Central yards at Weehawken.

Q. Over in New Jersey? A. In Jersey, yes.

Q. What were you doing there that night? A. I was loading cheese on the truck at the time.

Q. How did you get there that night? A. By motor truck. 20

Q. Did you drive it yourself? A. Drove it myself.

Q. Anybody with you? A. No.

Q. What time of night was it? A. One a. m.

Q. In the morning? A. In the morning.

Q. Where was your truck when the accident occurred? A. Parallel with the platform.

Q. And where were you when the accident occurred? A. Standing with my feet braced on the platform; my right foot on the platform and my left foot in the truck. 30

Q. How long had your truck been at that platform before the accident occurred? A. I cannot determine the number of minutes, but it had been there long enough to have two or three cans of stuff on.

Q. Was anyone helping you load the truck? A. Why, Louis Rothman was rolling the cans over to me.

Q. Louis Rothman? A. Yes. 40

Q. Who was he employed by? A. He was employed at that time by the Phoenix Cheese Company.

Q. Where was the cheese coming from? A. Coming from the country somewhere. I don't know the exact place.

10 Q. Just before you get them on the platform? A. Out of the car.

Q. The freight car? A. The freight car.

Q. What were they in? A. Cans, large cans.

Q. How large were the cans? A. About 120—110 to 120 pounds.

Q. Just give a measurement, will you, of the size of those cans, show the jury how tall they were. A. Why, these cans stand about that high (indicating). Large, iron, flat cans, a handle on 20 each side.

Q. How big and round? A. About that wide (indicating); about as wide as a milk can; ordinary forty-quart milk can.

Q. You say at the time of the accident you had your right foot on the platform? A. Yes.

Q. That is the loading platform? A. Yes.

Q. Where was your left foot? A. It was over in the truck, or on the side of the truck; on the extension on the side of the truck.

30 Q. Did the truck have a top on it? A. No.

Q. Was it an open truck? A. An open truck with a retaining sideboard, an iron bound sideboard.

Q. The sideboard lets down about ten inches? A. Yes.

Q. Was there any extension on the outside? A. There is a six-inch extension on the outside of the truck, outside of the back, for the purpose of hanging empty milk cans on.

40

Q. Where was your left foot at the time of the accident? A. My left foot was in the truck.

Q. Now, will you please show the jury just your position at the time this accident occurred? A. I will, sir. I can't show them the exact position.

Mr. Wortendyke: If your Honor please, I object, in view of the fact that the circumstances are very different. 10

By the Court:

Q. The truck was backed up to the platform? A. Your Honor?

Q. Was the truck backed up to the platform or standing sideways to the platform? A. Standing on the side of the platform, with one foot on the truck. 20

Q. Was the truck— A. No, sideways. I was loading from the side.

Q. And your left foot was over the sideboard in the truck? You straddled the sideboard? A. No, my left foot was in the truck, and my——

Q. Then you were straddled with the sideboard, weren't you? A. Yes.

By Mr. DeVoe: 30

Q. And now, did you have any cheese in your hand when the accident occurred? A. I had cheese in my hand, and I had it about halfway across.

Q. And then what happened? A. I felt a jerk, which throwed me forward, and the weight of the cheese caused me to sling to the left. I dropped into the crevice between the truck and platform.

Q. You were thrown forward and twisted to the left? A. Into the crevice. And I fell in the crevice between the truck and the platform. 40

Q. How wide was the space between the truck, the overhang of the truck, and the platform, would you say? A. Two inches.

Q. Two inches? A. Yes.

Q. How wide was the overhang? A. The overhang was six inches.

10 Q. So there were eight inches from the sideboard to the platform? A. Yes.

Q. You were thrown into this crack? A. Thrown into the crevice between the truck and platform.

Q. What happened after that? A. I felt the truck moving.

Q. Your truck? A. Yes, forward.

Q. While you were still in this hole? A. While I was still in there. My head happened to strike the iron. I could not say how far it
20 moved, but I know it moved forward.

Q. And you were in there at the time? A. At the time.

Q. Now, what happened after that? A. Louis Rothman grabbed me and pulled me to my feet.

Q. He was the man who was rolling the cheese cans over to you? A. Yes, and when I got to my feet, I crippled around. I was in agony, and I crippled around. I legged all around, and I felt a little better. When I felt a little better, they
30 had already loaded the material on the truck. The men around there, with sympathy toward me, all chipped in and put the stuff on. I know Rothman was one man. I don't know who the other man was.

Q. Is Rothman here in court? A. I expect him here.

Q. He is not here now? A. I haven't seen him here yet though.

Q. You don't know the other man? A. No.

40

Q. What did you do after you crippled around a bit, as you call it? A. After awhile I got to the seat and drove up to the other car.

Q. When you came out of the hole did you see any other truck there near you? A. I looked up and I seen on the floor—saw him hooked with the right front wheel in the left rear wheel of my truck. He was locked under my left rear wheel, and it had the body on the truck raised up. The man was fast there and could not get away.

10

Q. The right front wheel of the Sheffield truck was in your left— A. Was locked in my left front wheel.

Q. Was locked in your left front wheel? A. Left rear wheel of my truck.

Q. In the left front wheel? A. Not the left front wheel; the left rear wheel, and it had the body raised up.

20

Q. The body of your truck raised up? A. The body of my truck was raised up on an angle. The body was set right on the Sheffield wheel. I could see that.

Q. What kind of wagon or truck was the Sheffield truck? A. Four-horse truck.

Q. Were there four horses attached to it at that time? A. Four horses attached to it at that time.

Q. What was the driver doing, if you know? A. Why, he was backing up and trying to get out; get away. He backed up and got out, and he seemed to have no trouble to pass my truck afterwards.

30

> Mr. Wortendyke: I ask that it be stricken out, if the Court please, as a conclusion and as not responsive.
>
> The Court: I don't think that is a conclusion. He says he seemed to have no trouble to pass him afterwards.

40

Mr. DeVoe: Mr. Wortendyke said, in the opening, he cut his wheels to enable him to make a free passage.

Mr. Wortendyke: I was only directing my remark to the competency of the fact, if the Court please, that is all. May I have
10 an exception?

The Court: Yes.

By Mr. DeVoe:

Q. Mr. Egan, did you go around and look at that truck where this interlocking occurred? A. After I had been there for some time and felt a little better, I got down to determine the damage that was done to my truck.

Q. Was there any damage done to your truck?
20 A. I could not really see much damage then, but I understand——

Q. No, no, no.

Mr. Wortendyke: I object.

By Mr. DeVoe:

Q. It was not your truck. It was the Local Company's truck? A. Yes.

Q. Mr. Egan, what was the condition of the rear
30 of your truck with reference to lighting, when you went around to examine the damage? A. Why, the lights were in perfect condition. It was burning and lighting. I had electric lights on the truck, and they were all burning.

Q. When you went around to examine the damage was your rear light lighted? A. I certainly looked at the rear light, the first thing, because the policemen don't allow you to run without lights.

40

Q. Mr. Egan, what did you do after the fellows had chipped in and helped you load this truck? A. I pulled up to another car where I had some more stuff coming in, and I told the car man I got hurted and was not able to load the truck.

Q. What happened then? A. He loaded the truck for me. A couple of people was there, whether they belonged to that car or not I don't know. 10

Q. Did they load the truck? A. They loaded the truck.

Q. What happened then? A. I run to New York.

Q. Just a minute before you returned to New York, did you see the driver of the Sheffield Company's wagon? A. Yes.

Q. Where did you see him? A. Right ahead at the platform, a couple of cars above where I was. 20

Q. Did you speak to him about the accident? A. I spoke to him, and I asked him his name.

Q. Did he give it to you? A. He asked me then if I was hurt.

Q. Did you tell him you were hurt? A. I told him, "Yes, I am hurt."

Q. Is he in court here this morning? A. I would not know the man if I seen him. I only seen him once to my knowledge, that night.

Q. What name did he give you? A. Sir? 30

Q. What name did he give you? A. I think it was F. Miller.

Q. How do you know it was a Sheffield truck, Mr. Egan? A. The name was printed on the side of it.

Q. Had you ever seen the truck before? A. Often. We were accustomed to those trucks coming over there continually. There is only two companies that send over have horse trucks, Sheffield and .... The drivers may have 40

been different, but we know the horses and the trucks.

Q. Did I understand you to say that the name was on the wagon? A. Yes. There was also a number on that wagon which I don't remember.

Q. Mr. Egan, how wide is the yard between the
10 platform where the accident occurred across the yard to the platform on the other side? A. I believe it is about thirty-five to forty feet.

Q. Have you made any effort to determine how wide that yard is? A. I have often walked across it.

Q. Have you walked across it recently? A. About a month ago.

Q. Did you count your paces? A. Yes.

Q. How many paces? A. About fifteen.
20

Mr. Wortendyke: Objected to, if the Court please, as not competent, unless it is shown it was in the same condition now as at the time of the accident.

Mr. DeVoe: I will ask him.

By Mr. DeVoe:

Q. When you paced across that yard a month ago were the platforms in the same position they
30 were when the accident occurred? A. Yes.

Q. How many paces did it take for you to cross? A. About fifteen paces.

Q. Of your paces? A. Yes.

Q. How many times had you loaded in that yard, Mr. Egan? A. Why, I have been loading in that yard back and forth for over fifteen—fourteen years. I really could not tell you how many hundred times I have loaded in that yard.

Q. Had you been in this milk business for that
40 length of time? A. Off and on. I had been out of it and at it again.

Q. Was it your custom to load your truck by driving your truck parallel to the platform or backing up?

Mr. Wortendyke: I object to it as immaterial, what his custom was.

The Court: Objection sustained. 10

By Mr. DeVoe:

Q. Mr. Egan, you say you drove back to New York that night with your load? A. Yes.

Q. What did you do when you got to your company's place in New York? A. I reported the accident to the foreman.

Q. What did he do, if anything, as a result of that report? A. He——

20

Mr. Wortendyke: I object to that unless it is of his own personal knowledge.

A. He got help to unload the truck.

By Mr. DeVoe:

Q. Unload your truck? A. Yes.

Q. What happened after that? A. He begged me——

Mr. Wortendyke: I object to it as hearsay, immaterial, and irrelevant. 30

Mr. DeVoe: I am not testifying, if your Honor please. I can't coach him.

By Mr. DeVoe:

Q. What did you do after your truck was unloaded, if anything? A. I was asked to go out with the man——

Mr. Wortendyke: I object to it, if the Court please. 40

By Mr. DeVoe:

Q. I don't want you to tell us what somebody said to you.

By the Court:

10 Q. What did you do? A. I went out with the man and showed him the route.

By Mr. DeVoe:

Q. That morning? A. That morning.

Q. After you got through going around on your route what did you do? A. When I returned, I went to see a doctor.

Q. What was the name of the doctor? Do you 20 remember it? A. I don't remember his name. I was sent there.

Q. Where was he located? A. Somewhere on the west—east of Fifth Avenue, I think.

Q. In New York City? A. In New York City, yes.

Q. What time of day was it when you went there? A. About mid-day.

Q. On August 16? A. On August 16.

Q. And did you see the doctor? A. I did.

Q. What did you do after you saw the doctor? 30 A. I telephoned the Local Milk & Cream Company and told them the doctor told me to return the next day.

Q. What did you do after that? A. I went home.

Q. Where did you live then? A. Bound Brook, Middlesex Borough, where I live now.

Q. How did you go home? A. By train.

Q. Up to this time were you suffering any pain? A. I was suffering after the accident, you 40 mean, or before?

Q. Yes. A. After the accident I was continually in agony.

Q. What part of your body pained you? A. My back was terribly sore and my stomach also pained me everywhere it was crushed, and the left side. I also had a terrible pain in my head.

Q. What time did you get home? A. About three o'clock. 10

Q. In the afternoon of the sixteenth? A. On the afternoon of the sixteenth.

Q. What did you do when you got home? A. Told my wife what happened.

Q. What did you do then? A. Went to bed.

Q. Did you get up the next morning and go to work? A. I tried to get up but I was unable.

Q. What happened then? A. My wife called in a doctor. Dr. Grant responded to the call. 20

Q. Where was Dr. Grant located? A. He was in Dr. Wills' office in Bound Brook.

Q. Did Dr. Grant come to see you? A. Yes.

Q. What time of day was that? A. Well, he got there, I guess, after eight o'clock.

Q. On the morning of the seventeenth? A. On the morning of the seventeenth.

Q. Yes.

Mr. DeVoe: If your Honor please, with counsel's permission, I would like to state that this is the stipulation I spoke to you about with reference to Dr. Grant. 30

Mr. Wortendyke: That he is sick?

Mr. DeVoe: That Dr. Grant is now in White Plains Sanatorium in New York and is not available.

Mr. Wortendyke: I am willing to take Mr. DeVoe's word on that.

40

By Mr. DeVoe:

Q. Did Dr. Grant treat you that morning? A. Yes.

Q. How long did you stay in bed? A. On the third—on his third visit I begged him to be al-
10 lowed to sit up.

Q. Now, Pat, I asked you how many— A. Three days.

Q. You stayed in bed three days. Did Dr. Grant come to see you every day? A. Yes.

Q. Were you suffering any pain during those three days? A. Terrible pain in the back.

Q. Any other pains? A. In the stomach. It was still sore.

Q. Is that all? A. That is all.

20 Q. How long did you continue under Dr. Grant's supervision? A. About seven weeks.

Q. You stayed home during those seven weeks? A. Yes.

Q. You didn't go to work? A. No.

Q. You didn't go to a hospital? A. No.

Q. How many times did Dr. Grant treat you during those seven weeks? A. I went to his office about twice a week, after I got up.

Q. Well, will you say that he treated you sixteen or eighteen times during the seven weeks?
30 A. About fourteen times.

Q. About fourteen times? A. Yes.

Q. Did you do anything to your back as a result of what Dr. Grant told you? A. I got a brace.

Q. Did you put it on? A. I got a brace—two braces. The first one seemed to be of no use to me, and I got a second one, and he also had me in adhesive tape.

40 Q. In adhesive tape? A. Yes.

Q. Have you continued to wear that brace? A. Yes.

Q. How long did you wear it from the time you put it on, under his direction, up to the present time? A. I am still wearing it.

Q. You have worn it ever since? A. Ever since. Occasionally it hurts me. I got to remove it for a day, but when I remove it, I tape my back with adhesive tape.

Q. You tape your back with adhesive tape? A. Yes.

Q. Do you have your brace on now? A. Yes.

Q. How many braces have you bought in the last year and a half? A. I have really worn them out. When they get in bad shape, I change them. I have about six braces.

Q. What did you do, if anything, after the seven weeks at home? A. I returned to the Local Milk & Cream Company and went to work.

Q. How long did you work for them? A. About four weeks.

Q. And during those four weeks, did you have these pains that you referred to? A. Continual pain.

Q. Did you go back to your same employment as you had before the accident? A. Yes. I asked them to change me, and they did so. They changed me to another lighter job.

Q. Another what? A. Lighter, where I would have less work.

Q. Why did you stop working for them at the end of four weeks? A. I was unable to continue my work.

Q. What did your work, at that time, consist of? A. Route work. Route work only, I was doing then.

10

20

30

40

Q. What does route work consist of? A. Delivering milk to drug stone fountains and restaurants and such as that.

Q. Did you have anyone on the truck with you? A. No.

Q. While doing route work, what are you
10 obliged to do with reference to these cans? A. You are obliged to take them off the truck and deliver them in the basement or on the elevators of the building where you put the stuff in.

Q. How much did they weigh per can? A. About 110 pounds.

Q. Full of milk or cream? A. Milk.

Q. During the time, Mr. Egan, that you worked there, those four weeks, you say you continued with your pain and suffering? A. Yes.

20 Q. What have you to say as to the loss of weight, if any, during those four weeks? A. I lost weight terribly during those four weeks. I lost some weight the first seven weeks that I was laid up. When I returned to work, actually you could see me lose weight. I lost around thirty pounds.

Q. During those four weeks? A. Yes.

Q. After you stopped working for them at the end of four weeks what did you do? A. I came
30 home and stayed home until the seventeenth of January. I had gotten a job with the Public Service, driving a bus, which I thought was lighter and easier work, owing to the fact that I had a bunch of little children to feed. I was very glad to take it, even though it was less money.

Q. How many weeks were you home from the time you stopped at the end of four weeks until you started with the Public Service? About? A. I must have been over eight weeks home.

40

Q. Well, did your weight come back during that time? A. I gained some. I will never regain my normal weight, even today.

Q. What did you do during those eight weeks? A. Lay around and rested. Of course I went out at times trying to find some easy employment, to make a dollar. I needed money. 10

Q. Mr. Egan, during those eight weeks did you consult another doctor in addition to Dr. Grant? A. Yes, I consulted Dr. Forman.

Q. He is here in Court? A. Yes, he is here in Court.

Q. Mr. Egan, during those eight weeks did Dr. Forman prescribe any treatment for you? A. He told me it was wise to wear the brace, and I asked him if it would be possible to go back and do the work I had been, and he told me—— 20

Mr. Wortendyke: I object to it, if the Court please. The doctor can testify.

The Court: Objection sustained.

Mr. DeVoe: Yes.

By Mr. DeVoe:

Q. Did you go to any hospital as a result of your visit to Dr. Forman? A. Middlesex Hospital for X-rays. 30

Q. How many times were you X-rayed at the hospital? A. In Middlesex Hospital twice.

Q. When was the first time? I will withdraw that. When was it? A. In the summer sometime.

Q. Mr. Egan, you went to work, you say, for the Public Service in January, 1929? A. 1929.

Q. Driving a bus? A. Driving a bus.

Q. And you have continued to drive a bus for them down to the present time? A. Down to the present time. The only thing is that I often have to take time off. 40

Mr. Wortendyke: I ask that it be stricken out as not responsive.

The Court: It may stand.

By Mr. DeVoe:

10 Q. You are now working for them? A. Yes.

Q. Mr. Egan, what have you to say as to your general health before this accident occurred? A. Before this accident occurred I was able to work all kinds of hours. Work never bothered me.

Q. Work never bothered you? A. I liked to work. I was trying to save a little money to start a little business, and since the accident——

Q. Now, wait a minute, Mr. Egan. You say that for years before this accident you were en-
20 gaged in the same business as you call route work? A. In the same line of business. In fact, I was brought up in the business.

Q. And this route work, as you term it, is the kind of work that you did during those four weeks that you referred to? A. Yes, but lighter. I didn't have as heavy work, because I asked for easier work.

Q. In what way was your work prior to August 16 harder than the work which you did during those four weeks? A. Excuse me?

30 Q. In what way was your work which you did before August 16, 1928, harder than the work you did during those four weeks when you went back? A. I used to get up at eleven o'clock here at night and make an extra load before I went on the route, and after when I returned, I was hardly able to serve the route.

Q. Were the cans of milk and cream, before the accident, which you handled any heavier? A. God knows they felt a whole lot heavier when I
40 returned.

Q. Were they any heavier? A. No, they didn't, but they felt a whole——

Q. So during those years before this accident, you tossed those milk cans around——

Mr. Wortendyke: I object to that question.

The Court: Objection sustained. 10

By Mr. DeVoe:

Q. Did you ever have an accident before this accident, Mr. Egan? A. Never.

Q. Have you had an accident since this accident? A. No.

Q. What was your pay before August 16, 1928? A. My pay averaged about $62 a week.

Q. Was it different in different weeks? A. Well, yes, it was different because according to the time I worked. My steady salary for a seven-hour period, which covered a route was about, for that seven hours, was $42 a week. That was my steady check. If I worked overtime, I got paid for it. If I worked for my day off for the Local, I got time and a half. When I didn't work for the Local on my day off I went down and worked for Harry 20

Q. What business is Harry .... in? A. The milk business, and also for the Malone Dairy Company on my day off. 30

Q. How much did you get paid for overtime? A. With the Local, it figured a dollar and a half an hour for the day off.

Q. Did they pay you anything besides your regular check and your overtime work? A. They paid me for my overtime, but they paid me for increased business, of course.

Q. Any new business you brought in? A. Any new business I brought in I got paid for. 40

Q. You have already testified that your weekly pay was $42 a week? A. Yes.

Q. Now, how much did your overtime average per week? A. About eighteen dollars.

Q. How much did you new business average per week? A. I average new business had been about two dollars a week.

10

Q. How much are you getting now from the Public Service? A. $35 if I work six days. My health keeps me from working six days. Of course, if I lose a day's pay it means from five to six dollars, according to the number of hours I work.

Q. How much do you get per hour from them? A. Sixty-three cents.

20

Q. How many hours a day do you work for them? A. Some runs have eight hours and twenty-four minutes; some runs have ten hours twenty-eight minutes; some is seven hours; some is only a few hours.

Q. Have they any rule with reference to time off? A. They make you—the Union makes you take a day off in every eight.

Q. Now, Mr. Egan, under those conditions that you have just referred to, you say you average $35 a week? A. $35.

30

Q. Mr. Egan, are you obliged, at any time, to take off any time because of your pains? A. Certainly. Very seldom a week passes or at least once in two weeks that I don't have to stay home, rest up, and bandage my back; also on account of the brace hurting me under the arm. I put that on and that adhesive tape don't seem to give me the same support the brace gives me.

Q. When you take a day off to rest up, as you call it, is that deducted from your thirty-five dollars a week? A. Certainly. The Public Service pays for no man that don't work.

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Q. Do you still suffer from these pains, Mr. Egan? A. Subject to the pains?

Q. Are you still suffering from these pains, Mr. Egan? A. Why, certainly, I am still suffering.

Q. Mr. Egan, these platforms referred to in this freight yard, are they fixed platforms in the ground or movable platforms? A. They certainly must be fixed platforms. That I ain't sure of, but trucks bunk against them and never moves them. 10

Q. Well, how thick are the planks on the platform? A. They are generally about two-by-ten planks; something about that size.

Q. Are they the type of platforms which are usually found in freight yards? A. Yes, they are regular milk platforms.

Mr. DeVoe: That is all that I have, if your Honor please, excepting—I don't know that it is material—but Mr.—— says that Dr. Grant is in White Plains, Pennsylvania, and not in White Plains, New York. 20

Mr. Wortendyke: It doesn't make any difference. If Mr. DeVoe says he is not available, I will take his word for it.

Mr. DeVoe: I don't want to have the record wrong. That is all.

Cross-examination by Mr. Wortendyke: 30

Q. You say, Mr. Egan, that on August 16, 1928, you were employed by this Local Milk & Cream Company in New York City? A. You will have to speak a little louder, please.

Q. You say that on August 16, 1928, you were employed by this milk company in New York City? A. Yes, sir.

Q. And for how long previous to that time had you been employed by that concern doing that 40

particular kind of work? A. I have got no dates, sir, when I went there, but I must have been five or six months there.

Q. For whom did you work before you came with them? A. Sir?

Q. For whom did you work before you came with the Local Milk Products? A. Beaks Dairy Company.

10

Q. Is that New York? A. Yes.

Q. Did you work very long with them? A. About a year and a half.

Q. What kind of work did you do for the Bates Dairy Company? A. Route work.

Q. The same as you did for the Local Milk Products? A. Yes.

20

Q. You were with that preceding employer about a year and a half, you say? A. Yes.

Q. Now, on this particular evening what kind of truck did you have? A. A Garford ton and a half.

Q. What kind of body was it? A. A regular route body.

Q. Open? A. Open excepting there is a deck in the front.

Q. What do you mean by deck? A. A second deck for cans in the front.

30

Q. But the back is the ordinary type of open single wagon body? A. No, it is a truck. Regular truck. Motor truck, four cans wide.

Q. It has ten-inch sides, hasn't it? A. Yes.

Q. But except for its width and size, it is the same shape as a single wagon body, isn't it? A. Open body, yes.

Q. It has a tail gate? A. Small tail gate, ten-inch tail gate.

Q. What? A. Ten-inch tail gate.

40

Q. Now, on this particular night there was another truck across the way from yours at the opposite platform, was there not? A. Not to my knowledge.

Q. Would you say that there was not? A. I can't say that.

Q. How long had you been loading or unloading when you had this accident? A. How long had I been loading? 10

Q. At that point? A. You mean that night or——

Q. That night? A. Well, I had pulled in there and started to put the stuff on. The exact time I can't tell—ordinary regular time a man gets to get off his feet, get up there, and get ready.

Q. So that not knowing whether there was any truck on the opposite platform, you can't tell in what position it was on that platform? A. Sheffield's man backed up and turned his four horses there and drove away. If there was a truck there, I don't see how he could do that. 20

Q. You saw the Sheffield wagon turn around and back away? A. I seen him back up and drive away.

Q. Where did he drive? A. Up the yard, I don't know where.

Q. Which direction? A. West. 30

Q. That was the same direction in which he was going? A. Yes.

Q. So he backed up— A. Backed up and turned his horses around. Four horses requires quite a little space to turn out from that yard.

Q. And he turned out to what extent? How far out? A. Probably two or three feet. Probably far enough to clear my truck.

Q. He didn't turn around and go in the opposite direction? A. No, he didn't turn around and go in the opposite direction. 40

Q. Now, you were loading cheese of the Phoenix Cheese Company? A. Well, the cheese was belonged to either the Local or the Phoenix. I don't know who the cheese belonged to, but it came in our car and I loaded it.

10 Q. What other stuff, if any, were you loading at the time? A. I generally load cream and butter, milk. They are also——

Q. Were you loading any of those products that night? A. Not at that platform.

Q. Before had you loaded some? A. No.

Q. You were to pick those up later? A. I got those picked up for me later.

Q. Now, at this particular time how did the level of the floor of your truck compare with the level of the platform from which you were loading?

20 Was it higher or was it lower? A. The level of the floor of the platform is about two inches lower—the level of the floor of the truck is about two inches lower than the floor of the platform.

Q. You had a ten-inch tail gate on your truck? A. Yes.

Q. That tail gate is hinged at the rear end of the floor of the truck? A. Yes.

Q. And it bends out level with the truck? A. Yes.

30 Q. Or lower, as you may choose? A. Yes.

Q. And it is supported by chains, isn't it? A. Yes.

Q. And in backing your truck up to that platform, in view of the relative heights of the two levels, that is, the floor of the truck and the level of the platform— A. I didn't——

Q. Just a minute. I am asking you about your truck. (Continuing) In lowering the tail gate, you would have a platform or continuation of your

40 wagon or truck floor to the platform, wouldn't you?

Mr. DeVoe: I object.

The Court: Objection sustained.

A. In loading from the rear, yes, but I was not backed from the rear. I was loading from the side.

The Court: You don't have to answer it. 10

Mr. Wortendyke: I will withdraw the question.

By Mr. Wortendyke:

Q. The tail gate, however, was supposed to be up there? A. Yes, it was closed at that particular time.

Q. Exactly. That is what I want to find out. Your truck, you say, was parallel with the platform from which you were loading? A. My truck was parallel with the milk platform. 20

Q. Beyond the—as you call it—the side of your truck there extended a continuation of the floor? A. The floor.

Q. About how far was that, would you say? A. Six or seven—six inches.

Q. Did any portion of your truck extend beyond the line thereof, from the side of that continuation of the floor? Do you understand what I mean? A. I don't quite get you. 30

Q. All right, I will withdraw the question and re-frame it. You say there was a continuation of the floor out beyond the side for six inches? A. Yes.

Q. Suppose you draw a line out beyond—— A. Yes.

Q. Was any part of your truck extended? A. You mean at a line from the front of the truck to the rear? A. No. From the outside edge of this continuation, this six-inch extension of the plat- 40

form, was any other part of your truck beyond that? A. The wheels, of course, extend beyond the——

Q. How far did they extend? A. They probably extend a couple of inches.

10 Q. A couple of inches? A. A couple of inches past the side.

Q. Did you ever measure it? A. No.

Q. This was a Garford truck? A. A Garford truck. Just a view of it would make me think they extended a couple of inches.

Q. Then how much space, at the time you were loading, was there between the edge of this extension of your truck floor to the edge of the platform from which you were loading? A. About

20 two inches.

Q. Now, your cans that you were loading, about what diameter are they? How wide? A. A milk can is about, I should say, about twelve inches across the bottom.

Q. Right. Now, you had your left foot over the side of your truck onto the floor of your truck, and your right foot, if I understand you correctly, on the platform, and you were loading these—— A. Just a minute. I would like to hear that again.

Q. You had your left foot—check me and cor-

30 rect me if I am wrong—— A. A little louder.

Q. Your left foot on the truck floor inside the truck and your right foot on the platform from which you were loading? You were straddling the gap? A. Yes.

Q. Now, you say that you fell forward or rather the weight of the can in your hand pulled you forward and that you were pulled into this gap?

Mr. DeVoe: If your Honor please, I ob-

40 ject. That is misstated. He did not say that.

Mr. Wortendyke: I withdraw the question. It was my understanding.

Mr. DeVoe: I don't want to——

The Witness: I was thrown forward.

Mr. DeVoe: I understood him to say the truck threw him forward. 10

By Mr. Wortendyke:

Q. As a result of this accident, did you fall forward and into this gap? A. I was thrown forward.

Q. Were you thrown forward into this gap between the truck? A. Into this gap.

Q. How far down did you go? A. How far? I fell on the extension, and the extension kept me from being killed with the weight between the 20 side of the truck and the platform. If the extension had not been there, I would have been killed between the truck and the platform and crushed to death.

Q. You didn't fall any lower than the extension, did you? A. Just to the extension.

Q. Yes, and the extension was on the level of the floor of the truck, wasn't it? A. The level is a little below the platform.

Q. I am talking about the floor of the truck? A. 30 Level with the floor of the truck.

Q. That was the point at which you had your left foot? A. On the floor of the truck, yes.

Q. So that you did not fall below the extension? A. I didn't fall below the extension.

Q. Where did the can go? A. That is a pretty hard question to answer, because when I was thrown, I didn't look where the can went. It most likely went in the truck. It went out of my hands.

Q. But weren't you able to observe where that 40

large can went? A. I was able to observe very little. With your head hurting and with a pain, and you have to be pulled out, a man with a broken neck can't observe a whole lot.

Q. Just let me ask you this: How large a space is there between this side which you say set out ten inches on the truck and the platform, the very platform from which you were loading? A. There was no space except the extension of the truck and about two inches.

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Q. That made eight inches? A. That made eight inches.

Q. And the can is a foot in diameter? A. About a foot.

Q. And you say you don't know where the can went? You don't know where the can went? A. It may have dropped back to the platform or fell in the truck. Most likely it fell in the truck.

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Q. It didn't fall in between there? A. I couldn't swear where it fell.

Q. How long was it after you were thrown forward, as you say, that you made this inspection of that rear light? A. It felt about a year from the way I felt at the time, but I will say it was a half hour.

Q. So that you cannot tell us from your own observation whether the light was lighted during that half hour interval that elapsed? A. Well, if the light was lighted when the truck was there after the accident, it certainly was lighted before. There was nobody touched my truck only myself.

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Q. But you were in pain, were you not? A. I was in pain, yes.

Q. And you could not tell where this large can of cheese went to when you fell, could you? A. Yes.

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Q. Could you? A. No.

Q. So that you could not tell whether anybody else was around your truck or not, could you? A. Most likely nobody is going to bother with the truck.

Q. Most likely, but you don't know, do you? A. No.

Q. Now, where is this light on your truck located? A. On the license plate rack.

Q. Where is that? A. Right in the rear underneath, about two and a half—about two feet from the ground.

Q. Underneath the body? A. Underneath the body.

Q. On the left side or right side? A. It is—the light sits on the left side. The plate sits around in the center.

Q. You found that light lighted after the collision? A. After the collision? That is—that light is toward the left side. It ain't over on the left side. The center of the truck—there is two large beams come down, and on that beam is a license bracket. The license bracket sits to the center of that, and the light sits there. It is a good foot to the left of the wheel.

Q. Was it a half hour afterwards that you made this observation, that you had no damage to your truck? A. I made the observation before I pulled from the platform. Most likely a half hour elapsed before I was able to do anything.

Q. Where were you and what were you doing during that half hour? A. Sitting around the platform.

Q. Talking to anybody? A. What?

Q. Talking to anybody? A. Well, in a place of that kind, there is nobody much to talk to. Everybody seems to be busy.

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Q. You were not talking to anybody then, were you? A. I may have spoke to some of the boys who asked me how I felt.

Q. After you had made this inspection, did you go to the man that had this Sheffield wagon up the line, up the platform? A. Yes.

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Q. About how far up the platform was it? A. The exact distance in feet, I can't tell you. But it must have been two or three cars.

Q. Two or three freight cars? A. Freight cars.

Q. There was a train of cars on the opposite side, I suppose? A. Yes, on the opposite side.

Q. Now, you say that it had been your custom and even your employment prior to this accident to serve milk and dairy products to various customers? A. Yes.

20

Q. Were they retail or wholesale customers? A. They retail it.

Q. They retail it? A. Yes, they were, as a rule, fountains, restaurants, and such stuff as that.

Q. You delivered it in bulk to them? A. In bulk, in cans.

Q. How many hours a day did you work when you were employed just prior to this accident? A. The route service included seven hours, but if I got down there a couple of hours ahead and went over for a load of cream or milk to the station, or I worked delivering a few specials after I came back, I generally put in ten hours.

30

Q. You did that every day? A. Well, if I didn't, there was days that I would put in more than ten hours. There was days that I would put in fifteen hours.

Q. Where were you living at the time? A. Bound Brook. You got to leave here eleven at night.

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Q. Now, after you had gone over your route with this other man on that particular day, you then went home, didn't you? A. I went home, yes.

Q. By the way, during that time did you help with the deliveries? A. No.

Q. You went to bed, did you not? A. I went to bed when I got home.

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Q. And stayed in your bed how long? A. The third day I got up.

Q. But you remained at home seven weeks, did you not? A. The exact amount of weeks I can't state.

Q. Well, the date, give that. About what time? A. Well, Sheffield Farms saw me in New York about the time that I went back to work. The dates I ain't sure about.

20

Q. You went to see the Sheffield Farms in New York when? A. I don't know. They know the dates. I don't.

Q. Would it refresh your recollection if I told you it was the tenth of September? A. Sir?

Q. Would it help you to remember if I told you it was the tenth of September? A. Tenth of September it was? Well, I can't—under oath I can't say.

Q. That is— A. They have got the dates there.

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Q. You remember, though, having been up there? A. Yes.

Q. Would you say that you were not up there on the tenth of September? A. I could not say.

Q. You could not say? A. No, under oath I can't say a lie.

Q. So that when you say seven weeks, that is as near as you can, approximately? A. Approximately as close as I can get it.

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Q. Then you went back to the Local Milk Products Company. What kind of work did you do for

New Jersey State Library

them? A. Remember, I didn't go back to the Local Milk Products Company the day I was in Sheffield. I still remained a week around and was afraid to go back to work.

Q. I understand — A. But necessity drove me back.

10 Q. When you did go back to Local Milk Products, you worked for them for a period of four weeks, did you not? A. Approximately about four weeks.

Q. As a route salesman, didn't you? A. Yes, but I was at that before.

Q. You had your same route again? A. For a week I took the same route, just the route alone, without the extra work.

20 Q. What do you mean by the extra work? A. The extra work of going after stuff, working overtime.

Q. In other words, you didn't do over time, during that— A. No.

Q. But you did your regular time? A. No, I have been taken off the route, and went on another route which was lighter.

Q. Now, did I correctly understand you to say, on your direct examination, that you handled the same kind of cans of wilk? A. The same cans.

30 Q. Weighing the same weight? A. Weighing the same weight. The only thing is when I used to lift them—I dragged them when I returned and rolled them.

Q. And did you always lift them before this accident? A. Why, before this accident I used to put them three high on top of one another, and there is men in the Sheffield Farms knows it.

Q. How much did you weigh before the accident? A. I weighed about 165 pounds.

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Q. How tall are you? A. About five foot, five, I guess. I haven't measured myself in a long while.

Q. By the way, when did you weigh yourself last? A. Last? About two weeks ago.

Q. How much did you weigh then? A. About 161, 162. 10

Q. Now, do you recall what day in January, 1929, you got this job as a bus driver with the Public Service? A. I was appointed on January 17. I didn't work for two or three weeks, because I had to break in.

Q. You had to go through your training period, didn't you? A. Training.

Q. Yes, then you are put in charge of a bus? A. Yes. 20

Q. About how large a bus was this that you were in charge of? A. These buses are not always the same bus. There is different sizes.

Q. What line are you working? A. I work every line. Here in Plainfield they have seven or eight lines. I work on practically every line they have. The bus will seat—I am not sure how many people—but to be safe I will say thirty-five people.

Q. Is it the usual type of Public Service bus that is in use in this state? A. I can handle the usual type of Public Service bus with agony. 30

Q. And you have been working with them in that capacity since January of this year? A. Since January, 1929.

Q. I understood you to say in your employment with the Public Service that you are paid $35 for six days' work? A. For six days' work the salary in Public Service varies, according to the hours you work.

Q. In other words, you are paid how many cents an hour? A. Sixty-three cents an hour. 40

Q. And you usually work about ten hours, do you not? A. Well, no. Eight or ten, whatever I am able to work. I have been taken off the bus a week ago last Sunday I asked to be taken off the bus in terrible condition, and the following Monday I had to stay home.

10

Q. You asked to be taken off? A. Yes, I called up and asked to be taken off, and they sent a man to relieve me.

Q. Just a moment. I will come to that, Mr. Egan. Now, at the time that this accident occurred you were actually working on your job within your scope of employment for the milk products company, were you not? That was your usual work for that company that you were doing, was it not? A. Yes.

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Q. Have you received any compensation by way of reimbursement for your wages since you have been incapacitated?

The Court: What difference does that make?

A. No.

Mr. Wortendyke: I understand they would be entitled to such of it if they did get any.

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The Court: No, they would not be entitled to such of it, but the people who paid it would be entitled to be reimbursed if there were a judgment.

Mr. DeVoe: That is what I understand, if there was proper notice——

The Court: It hasn't anything to do with this case.

By Mr. Wortendyke:

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Q. Do you remember what date you first went to Dr. Forman? A. No.

Q. Do you remember what month it was? What time of the year? A. It must have been December.

Q. Of 1928? A. Of 1928.

Mr. Wortendyke: That is all.

10

Re-direct examination by Mr. DeVoe:

Q. Mr. Egan, was this freight yard lighted on the night of the accident? A. That yard is always as bright as day. There is hundreds of men working there. They can't do it if you have no light. It was lighted on the night of the accident.

Q. What was it lighted with? A. Electric light. Large arc lights.

20

Q. Do you have trouble with your hearing? A. I have head noises.

Q. Did you ever have any before the accident? A. Never.

Mr. DeVoe: That is all.

Re-cross-examination by Mr. Wortendyke:

Q. When did you first notice these head noises? A. What?

Q. When did you first notice these head noises? A. The day before I got up. The following morning I went to get up my head was dizzy and sore.

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Q. How long did your head noises continue? A. They still continue.

Q. They do? A. Yes.

Q. Were you examined by a physician before you were accepted as a bus driver for the Public Service? A. Yes.

Mr. Wortendyke: That is all.

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Mr. DeVoe: If your Honor please, I would like to offer in evidence at this time the Murray (?) experience table of mortality, showing the years of expectancy of this witness. I don't know that I asked him the date of his birth. May I ask him now, please?

10

The Court: Yes.

By Mr. DeVoe:

Q. When were you born, Mr. Egan? A. October 13, 1892.

Mr. Wortendyke: If the Court please, I agreed with Mr. DeVoe that I would not put him to the necessity of formal proof of the mortality tables, but I am willing now to stipulate that what he has in his hand is a table furnished agents of the life insurance company, for the purpose of guiding them in making up life insurance policies, but I object to the use of any mortality tables as incompetent. irrelevant, and immaterial in this case.

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Mr. DeVoe: Best answering the objection, your Honor, if it is necessary I would like to say that I have more than that. I have in my hand the American Experience Table of Mortality. I understand it is used by all the insurance companies.

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The Court: How it is competent in this case? It is not a death case.

(Argument off the record.)

The Court: Possibly it might be used where there was a total disability, which would be tantamount to a death case. Under

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any circumstances it is not competent at this time. If it should subsequently develop that it is competent, I will continue the offer. That does not preclude you from offering it later if the situation changes.

(A recess was taken until 1.55 p. m.) 10

AFTERNOON SESSION.

WILLIAM G. HERMAN, a witness produced on behalf of the plaintiff, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. DeVoe:

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Q. Dr. Herman, are you a licensed physician and surgeon of this state? A. I am.

Q. And where are your offices? A. In Asbury Park.

Q. Are you connected with any hospitals? A. Yes, with the——

Mr. Wortendyke: We admit the doctor's qualifications as a physician and surgeon.

Mr. DeVoe: Thank you.

30

By Mr. DeVoe:

Q. What hospitals, Doctor? A. The Middlesex General Hospital in New Brunswick, the Monmouth Memorial in Long Branch, and the Ann May Memorial in Spring Lake, and with the Allenwood Tuberculosis Sanatorium in Allenwood, New Jersey.

Q. Of what college are you a graduate? A. New York Homeopathic and Flower Hospitals.

40

Q. You are a graduate of Rutgers too, of this city? A. That is right.

Q. Do you specialize in any particular branch of the medical profession? A. Yes, I specialize in the use of X-ray for diagnosis, treatment, and radium.

10 Q. As a matter of fact, Doctor, do you practice generally or just confine yourself to your specialty? A. No, I limit my practice to the specialty.

Q. How long have you specialized in the use of the X-ray? A. For ten years.

Q. Are you connected with any national societies with reference to your specialty? A. Yes, with the American Roentgen Ray and the Horticulture Society of New York, and the New York

20 Roentgen Ray.

Q. Did you examine the plaintiff in this case? A. I did.

Q. Do you recall when you examined him? A. Well, it was the early part of December last year. The exact date I think was the fourth, I am not positive.

Q. Have you examined him since that time? A. Yes.

Q. When did you examine him the second time? A. Yesterday.

30 Q. Did you take any X-ray pictures in December, 1928? A. Yes.

Q. Did you take any X-ray pictures after that? A. Yes, in October of this year.

Q. Where did you take the X-ray pictures on both occasions? A. At the Middlesex Hospital in this city.

Q. In New Brunswick? A. That is right.

Q. Now I show you some X-rays and ask you

40 if these were taken by you of the plaintiff in this case? A. They were.

Q. Now, when were those five X-rays taken? A. On the fourth of December, 1928.

Q. And they are of the plaintiff? A. They are.

Q. I only want to offer, Doctor, those that are important. Will you just show me which ones are? A. May I have that view box a minute?

Q. Yes. 10

(The light machine was placed before the witness.)

Q. Does that one have any bearing? A. I don't believe so.

Mr. DeVoe: If your Honor please, we would like to offer these four X-rays.

Mr. Wortendyke: No objection.

The Court: They may be admitted. 20

(The four photographs referred to were received in evidence and marked "Exhibits P-1, P-2, P-3, and P-4", respectively.)

By Mr. DeVoe :

Q. When were these Exhibits P-1, P-2, P-3, and P-4 taken? A. On the fourth of December, 1928.

Q. Now, I show you three other X-rays and ask you when they were taken? A. They were taken on October 9, 1929. 30

Q. Of the plaintiff, in the Middlesex Hospital, this city? A. That is right.

Mr. DeVoe: I offer these.

Mr. Wortendyke: Three, Mr. DeVoe?

Mr. DeVoe: Yes.

Mr. Wortendyke: No objection.

By Mr. Wortendyke:

Q. Taken by you, Doctor? A. Yes. 40

Mr. Wortendyke: No objection.

Mr. DeVoe: I ask that they be marked.

The Court: They may be admitted.

(The photographs referred to were received in evidence and marked "Exhibits P-5, P-6, and P-7," respectively.)

10

By Mr. DeVoe:

Q. Doctor, do you want to come down to the box and read them? Now, tell me, Doctor, please, what P-1 shows. A. P-1 is an X-ray taken of the thorax, that is the upper part of the body, the chest, with the idea of showing the dorsal spine, the part of the spine that composes the upper back in the anterior-posterior direction. It shows the last two cervical or neck vertebrae and the twelfth. That comprises the bones of the back from which the ribs spring, only in the direction from front to back.

20

Q. This, Doctor, was taken with the plaintiff facing you? A. The patient lying on his back, face up.

Q. Does P-1 show any injuries to the spine? A. Well, P-1 includes the twelfth dorsal vertebra, which has suffered injury, but this does not show particularly well since it is almost out of the X-ray.

30

Q. Does the picture show the backbone itself straight or out of line? A. It shows a portion of the backbone with some rather insignificant small curvatures up here (indicating). Nothing important.

Q. Let us see what the next one shows. Will you now read, please, P-2? A. P-2 is an X-ray taken of this same patient, but instead of from front to back, it is taken through the sides, from

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one side to the other, with the patient lying on his side, and this shows a portion of the lumbar spine, that is the part below the ribs, and a portion of the spine in the lower chest above the ribs. It shows five lower dorsal, and it shows four of the five lumbar in the lateral portion.

Q. Does it show the twelfth dorsal vertebra? A. It does. 10

Q. Will you tell the jury, please, what is the twelfth dorsal vertebra? A. This one here (indicating).

Q. What is it, with reference to the backbone? A. Well, it is the last of the vertebra or bones in the back from which the ribs articulate. It is the extension of the dorsal and the lumbar vertebrae.

Q. And is that the last vertebra with ribs coming out of it, as I, a layman, would put it? A. That is the idea. 20

Q. Which one is it? A. This here (indicating).

Q. Does that show anything the matter with it? A. It shows a difference in the shape of the body of this bone. It is different than the shape of those above or below it.

Q. Will you explain the difference in shape and the difference between the two? A. The width of this bone from above downwards in the anterior front portion is narrower than the width on the posterior surface from above downward, and these others are equal to the distance from above downward on the posterior or back side of that bone. 30

Q. The first one you described was the twelfth dorsal? A. Yes.

Q. And you say that is narrower on one end or side? A. That is narrower to the front than it is to the back.

Q. What does that indicate? A. That indicates a compression of the body of this vertebra. 40

Q. And when you say a compression, will you explain that? A. Well, only that the upper and lower surfaces have been brought closer together in the front half of this bone than they are in the back, whereas the front on the upper and lower surfaces should be practically parallel to each other.

10

Q. Does that picture show the twelfth dorsal as fractured? A. It shows a compression at the body of this vertebra which is the result of a fracture.

Q. Is there any medical term for such a compression? A. A compression or crushed fracture.

Q. A compression fracture? A. Or crushed fracture.

Q. Will you please put a mark on that, with the Court's permission, and show which is the twelfth? Draw a line near it. A. (The witness marked the photograph.)

20

Q. The twelfth dorsal vertebra, then, is the one beside the figure 12 that you put upon the picture, is that right? A. That is right.

Q. Will you read P-3 to us? A. This raygraph is taken with the patient laying on his back, taken from anterior to posterior, as we say, or from front to back, and shows the lumbar vertebrae, those in the lower portion of the spine, in the anterior or posterior, front to back, portion, and it shows the twelfth dorsal vertebra, and the five lumbar vertebrae below it.

30

Q. Does it show any unnatural condition? A. Why, it shows, I believe, two. It shows the anterior aspect, and this twelfth dorsal vertebra with the narrowing of the anterior portion again on the body of this twelfth, and it also shows rotation of the fourth lumbar on the fifth.

40

Q. Did you take another X-ray of that portion of the spine in October, which was introduced here? A. Yes.

Q. Does the later picture show the condition with reference to the lumbar? A. Yes.

Q. Now, will you turn to P-4? Will you read that one, please? A. P-4 is a ray-graph or X-ray taken of the lumbar spine, the lower half of this back, from side to side, instead of from front to back. This only demonstrates again what I have shown you heretofore, that is the narrowing of this twelfth dorsal vertebra. 10

Q. Will you please mark on this one, P-4, the figure 12 beside the twelfth dorsal vertebra? You have so marked it, haven't you? A. I have.

Q. Those were the four, were they not, that were taken on December 4, 1928? Now, you examined Egan again, didn't you, in October? A. Yes. 20

Q. And you took these X-rays at that time, did you not? A. That is right.

Q. Now, I will ask you to read P-5. You can put it up there better than I can. You are more accustomed to it. A. (The witness placed Exhibit P-5 on the light machine.) This X-ray is taken of the lower or lumbar spine from front to back, with the patient lying on his back, and it shows again the fifth lumbar and the twelfth dorsal. 30

Q. Just look at this one, please, for a second. Wasn't P-5 taken from the same position as P-3? A. That is right.

Q. What does P-5 show with reference to the twelfth dorsal? A. Practically the same.

Q. What does it show with reference to the fourth and fifth lumbar, as you refer to, when you read P-3? A. The alignment or position of the 40

fourth and fifth lumbar now appear practically normal.

Q. Although they were not normal in P-3? A. They were rotating in the previous examination.

Q. What would that indicate to you? A. Well, the proper position and alignment of these two bones has now been restored, the mechanics causing the previous condition noted have apparently been corrected or have alleviated themselves, and the position between them has now been restored. The compression of the muscle or muscle spasm of this bone at the time the first X-ray was taken, that has been removed or alleviated, and now we find a normal position between those two bones.

Q. Now read P-6, please. A. This ray-graph is again one taken of the lower lumbar vertebrae from one side to the other, which again shows the twelfth dorsal and the fifth lumbar in the lateral direction.

Q. It was taken from the same position, was it not, as— A. The same direction as P-4.

Q. Yes, what does that show with reference to the twelfth dorsal? A. They are the same thing, so far as the shape of this vertebra is concerned.

Q. It showed no difference than in P-4? A. Practically no difference.

Q. Will you read the other, please? A. This ray-graph, P-7?

Q. Yes. A. P-7 is taken with the patient lying on his back. It shows the upper or dorsal vertebrae—all twelve of them—and the first lumbar vertebrae.

Q. Now, will you mark the twelfth dorsal on that picture? A. (The witness marked the picture.)

Q. It is the one marked with the figure 12, is it not? A. That is right.

Q. And will you please show the jury the compression fracture that you referred to before in this picture? A. There is a general narrowing of the width of this vertebra or bone and also a longitudinal or striated disturbance in the texture of the bone itself on the left side, lower portion of this body, and which, if it is compared in size with the same portion of bones above or below, will very clearly be seen to be different. 10

Q. That picture is taken in the same position as P-1, was it not? A. Correct.

Q. Does the last picture, P-7, show the same curvature of the spine as P-1? A. The small curvatures, is that what you mean?

Q. Yes. A. Yes.

Q. Doctor, the first time you saw Egan did you make any examination? A. Why, he was referred to us to make an X-ray examination of his back, for a portion of his back bone and so forth, so I went over him to see where he might feel any tenderness, or in other words, to try to limit my examination to the part necessary, and before we took the X-rays I went over his back and felt it for any deformities or tender places. 20

Q. What did you find? A. I found, in about the mid portion, that is, midway between the crest of his ilium, his hip bone, it would ordinarily be called, and the upper portion of his back, a definitely tender area, which, on slight pressure, made him rather wince, about the location of the eleventh or twelfth dorsal vertebra in that region. 30

Q. Doctor, from your examination and from these X-rays, can you state whether or not there is anything the matter or any injury existing in this man's spine? A. In my judgment, this man, at some time had sustained a compression fracture of the twelfth dorsal vertebra. 40

Q. Did he have it, in your opinion, when you first examined him and took the first pictures on December 4, 1928? A. He did.

Q. And did he have it, a like effect, when you took the second picture on October 9, 1929? A. He did.

10 Q. You say you examined him yesterday here? A. Yes.

Q. Did he have it then, in your opinion? A. In my opinion he did.

Q. You spoke of a compression fracture. Will you please tell the Court and jury the mechanics which go to make a contraction fracture? A. The spine is a series of bones, placed together, proximately together, with a layer of cartilege in between so as to be flexible. It has a series of 20 hinges. These bones which we call vertebrae are placed one above the other with a cushion of cartilage in between. There is a certain normal limitation to the bending or flexion of the bone of this spine. The curves in the spine go in opposite directions, that is, the lower half of the spine has a curve forward; the upper half of the spine has a curve backward; and these two curves meet at the junction of the dorsal or upper vertebrae and the lower or lumbar vertebrae. As I say, 30 there is a normal amount of play in this back, allowing us to bend forward and backward and side to side. If the amount of bending or flexion of the back in any direction is over or beyond the normal, then definte pressure is brought to bear upon some portion of the spine. That is a compression. That is the name of the fracture of the different tips. We call it a compression because we have a small bone of which the two surfaces, upper and lower surfaces, are parallel to each 40 other. It is made of bone and therefore it is not

elastic. The cartilage pads between are only flexible within a certain limit, and if this arc of the back is extended beyond its normal limit, it exerts undue pressure in that key bone in the arch, and something has to give way, and it is practically always the body, which is a spongy material, with a little hard bone on the outside, above and below, and so the extreme pressure above and below the one bone, whichever happens to be the key of the arch, this bone gives way, and the bones then merely become depressed, and that is the mechanics of a compression fracture. 10

Q. In what way, Doctor, in your opinion, could the mechanics you describe begin to operate? A. Well, in any—at any time, in any way, through external force or any other way strong muscular action, this back, whatever portion may be involved, is bent out of the normal amount of curvature which nature has intended. In other words, if the patient is forcibly bent forward, downward, or if the patient is forcibly bent backward or forcibly bent to one side or the other. 20

Q. Do I understand you to say, Doctor, that this vertebra is a spongy substance covered by a bone? A. Well, it is a bony network. I can best illustrate it by saying it is something like a honeycomb inside, with a layer of backbone on the outer surfaces, both on the upper surface and the lower surface, and around, because it is eliptical. 30

Q. Would you say, in your opinion, that the inside of this vertebra, the spongy part, has become depressed? A. Yes, it is telescoped. Just like you would take a honeycomb and crush it together: The little compartments will telescope into each other.

Q. Would you say that that condition would cause the pain and suffering that Egan complained to you today? A. I would. 40

Q. Would you say that the accident described here this morning could have been the proximate cause of this injury?

Mr. Wortendyke: Now, if the Court please, I object to that on the ground it is too speculative. The form of the question is worded as to whether it "could have been".

10

The Court: I think "might have been" would have been a better word.

Mr. DeVoe: I was going to ask him the next time, "if it were". I will ask him that now.

By Mr. DeVoe:

20

Q. Would you say, Doctor, in your opinion, that the accident described here this morning was the proximate cause of this injury which you now describe? A. As I understood the description of the accident, it could.

Q. Would you say that it was the— . Yes.

Mr. Wortendyke: I ask that that answer be stricken out.

The Court: I think that is proper. He says it could have caused it. That is as far as——

30

Mr. Wortendyke: The objection is only based as to the degree of speculation the question elicits.

The Court: I think I shall let that answer stand.

Mr. Wortendyke: May I have an exception?

The Court: Yes.

40

By Mr. DeVoe:

Q. Would you say, Doctor, that the accident described this morning was the proximate cause of this injury? A. Yes.

Q. Doctor, will this injury continue indefinitely, in your opinion? A. That depends entirely on the treatment and his response to it. 10

Q. Have you treated any such cases yourself? A. I have.

Q. Have you seen fractures of the spine? A. Plenty of them.

Q. And fractures of the vertebrae? A. Yes, sir.

Mr. DeVoe: That is all.

Cross-examination by Mr. Wortendyke: 20

Q. If I understand you correctly, Doctor, the formation of the spine, roughly, is in the nature of the letter "S"? A. Yes.

Q. The elongated letter "S"? A. That is right.

Q. And the lumbar section of the spinal column is convex anterior, is it not? A. That is right.

Q. And concave posterior, is it not? A. That is right.

Q. And the dorsal section of the spine is convex posterior? A. That is right.

Q. How are the respective vertebrae, Doctor, maintained in relative position, one with the other? A. As I have already mentioned, they have this cartilage disc between them, and then they are plentifully joined one to the other by fibrous ligaments in front, back, and both sides. 30

Q. From the arc out, of which the column is convex, be it anteriorly or posteriorly, depending upon the section of the spine, are the fronts of the segments or sections the same distance apart in an erect position of the patient as the rear? A. I don't believe I quite understand. 40

Q. Possibly I am a little bit obscure. You have mentioned the convexity in reverse position of the two sections of the spine? A. Yes.

Q. And you have also described the fact that the spine is made of sections or vertebrae separated by the cartilagious discs, making a cushion, I presume? A. That is right.

Q. Now, what I am trying to get at is this: Confine your attention for a moment to the lumbar section, which is convex to anterior; are the gaps between the vertebrae along the anterior edge of that convex part the same distance apart, one from the other, as on the posterior edge of that same arc? Do you understand what I mean? A. Now, are you referring to the cartilagious disc, or are you referring to the bone itself?

Q. The distance apart from the bone itself. A. That is the perfectly normal spine—I guess nature is never one hundred per cent. Within reasonable limits a perfectly normal spine, these vertebrae are the same width along the anterior margin as they are along the posterior.

Q. Possibly I didn't make myself clear. Referring to the gap or space between any human vertebrae in that lumbar section of the spine——

The Court: In two vertebrae there can't be a space between one.

Q. Vertebrae I should have said. Is that the same distance anteriorly, that is, on the anterior edge of the arc as it is on the posterior edge of the same arc? A. I asked you if you are referring to the bone?

Q. The space between the bone. A. Between the bone, that refers to the cartilagious disc that is in between.

Q. All right, whether it is the cartilagious disc that is in between or whether there isn't anything in there——

By the Court:

Q. What he wants to know is whether the bones are the same distance apart in the front as they are in the back? A. That space between the bone is occupied by cartilage. 10

Q. Is it just as wide? A. That depends upon the position of the patient, because when you bend it, the bone can't give, the cartilage lays there and it thickens.

By Mr. Wortendyke:

Q. Now, upon forward flexion, what takes place between any two adjacent vertebrae in the lumbar region? A. The first thing that takes place is the dminution of the space in the thickness of the cartilage to allow that bending of the bones. 20

Q. Is the diminution greater on the anterior arc or on the posterior arc? A. It would have to be greater on the anterior arc if there were a forward bending—I mean a dminution forward.

Q. You mentioned, Doctor, in the course of your description, that no spine is one hundred per cent. perfect. A. That is right. 30

Q. You have had rather broad experience with spinal pathology, have you? A. I have seen quite a few.

Q. And injuries? A. Yes.

Q. Is it or is it not a fact, Doctor, that in a very large number of cases the effect of posture, habitual and customary posture, on the shape and relative position of the vertebrae, the spinal column is affected, and rendered to a greater or less 40

degree abnormal? A. I have never seen it affect one bone alone.

Q. You have not? A. No.

Q. And you mentioned, with reference to the twelfth dorsal vertebra, particularly in connection with P-7, which was the last plate, I think, that you testified from, that there was what you have described as a striated disturbance. Can you explain a little bit more in detail what you mean by that, and how it is located, and what it is the result of? A. If you give me rein, if you give me free latitude, I think I can.

Q. I will be very glad to.

By Mr. DeVoe:

Q. Do you want the pictures, Doctor, to show it? A. Only if the gentleman would like it.

By Mr. Wortendyke:

Q. If it would be more helpful to you to describe it with the pictures, why, do so. A. All right. The twelfth dorsal vertebra is the key bone between these two arcs, the lower one and the upper one. Probably this bone is under particular stress, since there is over extension or over flexion of the spine as a whole. Now, it is my opinion that I am giving you. That is all. That when there was an over extension or over flexion of this bone forward and not straight forward but to the left, pressure was brought to bear upon this bone, and particularly upon this side, and particularly in the lower half of this side, of this bone, and that bone trying to allow that curve, these two cartilagious pads which allow elasticity of the spine yielded as much as they go. There was material there that could not be compressed

beyond a certain point. After that point was reached, then the weakest bone in this area gave way, which was the spongy material. These ashen taints on the X-ray mean there is some bone salt or lime other than in the center of the bone. The pressure which was greater at this point here crumpled in the layers, one layer on another, like you would telescope an opera hat. This, you will note, was in October of this year. It was at least a year following—not quite a year, about ten months and subsequent to the first examination we made, and then it was some time after any alleged injury, so that we have, along the line of this telescoping, a compression of this bone. We have had some attempted healing by nature. She has thrown down little layers of lime and salt, and so, where this fracture occurred in the bigger half of this bone, we now have lime thrown in there in nature's attempt to heal it. 10 20

Q. Do you find, Doctor, any similar appearance with reference to what you indicated as an over supply or over concentration of lime salts in any of the other vertebrae in the spinal column, shown on that picture? A. Well, there may be a little on this bone here (indicating), right below it, because pressure certainly was exerted on that portion of the first lumbar as well as the twelfth dorsal. The rest of the bones look about normal to me with the exception of these variations. We have had—— 30

Q. Which you would say are not so pronounced as to indicate they were exceptions to the general run of the average? A. That is right.

Q. Now, in your opinion, Doctor, what was the immediate mechanical cause of the condition which you feel is shown to exist by that X-ray picture 40

and the others in that dorsal vertebrae? A. I think there was some force exerted which caused this spine to overflex, overbend forward, or as the books describe it, called a jack-knife injury, in which the patient was bent forward beyond the normal amount of give that he has.

10 Q. Over forward bending of the spine? A. Forward, and in this case to the left, as this bone shows more damage on the left side than it does on the right.

Q. Do you know whether or not this man is right-handed or left-handed? A. I don't know.

Q. You didn't have occasion to find out or test that? A. No.

Q. Assuming, Doctor, that for a period of several years prior to the date upon which you took

20 your first set of plates—I think you said that was in December, 1928? A. Yes, sir, that is right.

Q. (Continuing)—and taking into consideration the height and weight and muscular development which you found this man to possess, that in the carrying on of his employment and his occupation he had been in the habit of lifting and swinging cans full of milk, weighing from 110 to 120 pounds, what have you to say as to the probability, if there is such, that that habitual employment, particu-

30 larly in view of the weight of the objects handled and the method of handling—this man, in the light of all his physical make-up—had on the condition which you find here as a producing cause? A. Do you mean the normal every-day handling of them without any accident of any kind?

Q. Yes. A. I would not think it would have any bearing on it.

Q. You wouldn't? A. No.

Q. The lifting and swinging of such weights

40 would involve a pronounced forward flexion of the

back, would it not, in picking them up, swinging them, and sitting them down? A. Yes.

Q. With an accompanying partial twisting motion, similar to that which you described in connection with it? A. Yes.

Q. But you say, Doctor, in your opinion, that operation over a long period of time could not have caused this? A. Not unless he had an accident, no, and by an accident I mean something that would cause the sudden and acute overflexion that we have been speaking about.

Q. Did you find, either as a result of your physical examination of this man or as a result of the examination of the X-ray pictures, that there was any involvment of muscle or ligament in the condition which you have been describing? A. Well, at both times there was a muscle spasm. The first X-rays that we took of the lower lumbar region showed this rotation on the fourth and fifth. That might have been a condition pre-existing at the time of his injury, or it might have taken place as a result of the muscle spasm following his injury. I believe that the second X-rays we took proved that it was not a long standing condition, because it had disappeared ten months after our first X-rays, and the lower part of his spine is now in alignment, and if it had been a long standing affair, that would not have happened.

Q. Wherever there has been a temporary stretching or other taxing of the muscle, a spasm of the muscle results? A. Yes.

Q. That, of course, is an accompaniment of it? A. It always takes place in fractures as the result of hyper-sensitiveness of the bone.

Q. That is because of the nerves involved? A. Yes.

10 20 30 40

Q. At the conclusion of a period of approximately seven weeks following the accident, to which we have been referring, this man returns to the occupation in which he had been engaged immediately before the accident. Taking that in conjunction with your findings, what have you to
10 say as to his capacity to work? A. Why, that is rather consistent with this type of injury, where the deformity is not very marked, in that they have acute symptoms to start with, which are comparatively transitory, and the mere fact that they go back to work does not gainsay the fact that they sustained damage to the spine, but the fact that they do go back tends to aggravate it. Sometimes cases have not been recognized for a month or even a year following the injury, and then it has
20 only been recognized when X-rays are taken, in many cases after severe development, and in other cases more and more retrogression, and decomposition, and deformity.

Q. You mentioned, I think, Doctor, in response to Mr. DeVoe's question, that the complete recovery of this patient would depend upon the nature of his treatment and his response to it? A. Yes.

Q. I think you also said, in the course of your direct examination, that internal strong muscular
30 action would result in the over extension and contraction that you were describing. To what, in particular, here, for example, do you refer? A. Well, suppose a man is trying to save himself from falling, and he suddenly contracts his muscles. I have seen far more bones broken that way: A man stepping off the curb, and he trips and he tries to save himself, and his muscles suddenly go in involuntary to a certain extent, the sub-conscious mind of the man, they go into a sudden spasm,
40 and they tear that bone, causing this over flexion

or extension on it. Now, in the same way, if he falls backwards, we will say, in a sitting position, and he is thrown this way (indicating), and he tries to catch himself, the sudden spasmodic contraction of those muscles there very forcibly, may cause a bone to give way.

10

Q. Reflex— A. I do mean that he can do it voluntarily.

Mr. Wortendyke: I think that is all, Doctor.

NORMAN N. FORNEY, a witness produced on behalf of the Plaintiff, being duly sworn according to law, on his oath, saith:

20

Direct examination by Mr. DeVoe:

Q. Dr. Forney, you are a licensed physician and surgeon of this state? A. I am.

Q. How long have you been such? A. Twenty-three years.

Q. Where are you located? A. Milltown.

Q. Are you connected with any hospitals? A. I am connected with Middlesex and St. Peter's.

Q. Here in the city? A. Yes.

30

Q. Do you know Patrick J. Egan? A. I do.

Q. Have you examined Egan? A. I did.

Q. When? A. Well, I examined him in December of last year, or the last of November of last year.

Q. For the first time? A. Yes, that was the first time.

Q. You have examined him several times since? A. Yes, I have seen him several times since. I seen him in October of this year, and then I saw him again in the past few days.

40

Q. At the time of the first examination where did that take place? A. In my office.

Q. In Milltown? A. Yes.

Q. What examination did you give him? A. Well, I inquired carefully into his history, and he gave me the history of having had an accident, and following the accident he was not able to work for a period of time, and he said that he had the sudden pains in his back. He complained of some other minor symptoms, to which I did not pay much attention. I had him remove his clothing, and immediately I noted upon looking at him, what a shape other than normal his back had, and then I tested him out for sensation and also for tenderness, and found that he was exceedingly tender about the end of the ribs and over his spinal column, and I suggested—I noticed also that he had a great deal of difference from one side of the chest to the other and his spine was curved in two different directions, and I suggested that he go into the hospital and have an X-ray, since I suspected he had a fracture of some portion of his vertebræ.

Q. And he did go in, and the X-rays were taken, and they are the ones that have just been offered in evidence? A. Yes.

Q. Doctor, did he complain to you of any pain or suffering? A. He did.

Q. Did he tell you where the pains were? A. He said that his pain was principally in his back. Upon careful questioning, I found that it was just at the end of the rib.

Q. Doctor, did he give you a history of the accident? A. Yes, he gave me a history of the accident.

Q. Did he give you a history from the time of the accident down to the time he testified? A. Yes, he did.

Q. Doctor, what is the trouble with Egan? A. Well, he has had a fractured vertebra.

Q. Which one? A. The twelfth dorsal, according to the X-ray.

Q. Have you any other way that you can prove that besides the X-ray? A. Well, he is exceedingly tender over the twelfth dorsal and the first lumbar vertebra upon pressure, and he is also very sensitive—hyper-sensitive in that area, and particularly on the left side, that is, hyper-sensitive as far anterior—as far front, as his armpit, that is, his axilia. 10

Q. What have you to say as to whether or not his backbone is out of line? A. Well, it is out of line according to the X-ray.

Q. Is there any other way that you can prove that besides the X-ray? A. Why, from his general condition, you can see when you take off his clothing and look at his back that it is distorted. 20

Mr. DeVoe: Mr. Egan—with the Court's permission, I would like to have the doctor show the damage to the jury.

The Witness: I can't show it very well with his clothing on. He will have to take off his clothing.

By the Court: 30

Q. You don't have to take off all his clothing, do you? A. Only just down to his waist line.

(The plaintiff disrobed to the waist line.)

The Witness: (Continuing) Now, the condition that he shows today is practically the same condition that I saw the minute I looked at him. I think you can easily notice it. It is just over on the other 40

side of his chest. As you look at him, his one shoulder is higher than the other. The left shoulder is higher than the right. You also notice that his body curves this way (indicating), and in turning around you can see the same thing in his spine, and you also notice that the shoulders—(to the plaintiff) Now straighten up. Put your feet together. Put them both together. Now straighten—get this shoulder up.

You see, it is impossible for him to straighten out his back at any time. (To the plaintiff) Stand still, please. Now, he is very sensitive. Now, just a minute, you stand still a minute. Wait a minute. Now tell me which side hurts you the most.

(The doctor touched the body of the plaintiff.)

The Plaintiff: Oh!

The Witness: That is where it hurts you. Now, stand still, I won't hurt you. That is where most of his tenderness is. He is very sensitive, particularly in this area where he has had the injury. It is probably due to a nerve condition.

By Mr. DeVoe:

Q. Doctor, will you just show the jury, on his back, the twelfth dorsal? A. The twelfth dorsal is just—wait a minute. I will take this side. He is not so sensitive. It is right here at the edge of this rib. That is the twelfth dorsal. Right here (indicating).

Q. What have you to say, Doctor, as to the falling of the right shoulder or the left shoulder? A. It is the left shoulder.

Q. It falls? A. It droops.

Q. What have you to say as to that? A. I think it is due to this fracture that he has. The fracture of the vertebra is mostly on the left side, and of course there is soreness there when he carries himself to the left side. Naturally he assumes that position, or nature assumes it for him. In other words, that is due to nature taking care of the soreness that he had where the fracture is on the left side. The fracture is mostly on the left side of his spine, and he stands this way (indicating), just the same as a man does who has a fracture of his thigh. He conserves that by standing on his other foot, and that is the way nature does by putting the weight on the other side.

Q. Doctor, what have you to say as to the proximate cause of this condition? A. It was due to an injury.

Q. Would you say that the accident referred to this morning was the proximate cause of this condition? A. I would.

Q. Will he recover from this injury, Doctor? A. Well, it is doubtful, in my opinion now, because it is a year and three months since the accident.

Q. Do the X-rays show any improvement in the condition? A. There does not seem to be very much improvement in it as far as my knowledge of X-rays goes.

Q. Would you say that this man, the plaintiff, will ever be able to do any hard work again? A. I don't think he will ever be able to do any hard work again, and he should not do it.

Q. Will he ever be able to do the lifting that he was doing at the time of the accident, that is, carrying, his daily occupation—these cans of cream at 110 pounds? A. No, he will never be able to do that.

Q. He wears a brace, does he not, Doctor? A. He does.

Q. Did you suggest any treatment to him when he came to see you? A. Well, I suggested that he should be put in a plaster-of-Paris jacket for a period of time, and it should be changed from time
10 to time.

Q. You say for a period of time. How long would that be? A. It may take a year, until he gets fixation in that joint.

Q. If he gets fixation, what happens then? A. Well, he is limited in his motion of his back, but the soreness gets better.

Q. His back bone is fixed, as I recall it? A. Not that particular location.

20 Q. And if that occurred could he go back to his former occupation? A. No, because the first time that he had a jar, he might fracture it over again, because his back would be rigid at the point where it should break the most.

Q. Is that the vertebra which is the key of the bones? A. That is really the key of the bone, that and the first lumbar.

Q. That is the keystone of the arch or the ridge? A. It is.

30 Mr. DeVoe: That is all.

Cross-examination by Mr. Wortendyke:

Q. Dr. Forney, have you specialized in any particular branch of medicine or surgery or osteology? A. Well, I am doing only this work and surgery now.

Q. Have you specialized in any bone cases? A. No, I have not done any specializing only just as general surgeon.

40 Q. Have you had occasion to treat, to diagnose a very many spine injuries? A. I have had occa-

sion to treat a good many of them and see a great many more.

Q. Many of them were non-traumatic? A. Yes, there was a great many cases of spine injury, but spine injuries which were not traumatic as much as tubercular.

10

Q. Curvature? A. Yes.

Q. That is due frequently to posture, is it not? A. Well, not—not a fixed curvature of the back is not.

Q. It is not? A. No.

Q. Would you say this is a fixed curvature of the back? A. Well, I would say it is going to be, if it is not, if it is not fixed now, it is going to be shortly.

Q. You, of course, got his history of the accident before you proceeded to examine him, did you not? A. Yes, I had a history of his accident first.

20

Q. Do you specialize in X-ray work or the taking or reading of X-rays? A. I don't specialize in it. I have an X-ray machine, and I have a man who does that work for me, and I very often ask Dr. Herman's help, or if there is something——

Q. Now, I understood you to say, Doctor, that in your opinion, Mr. Egan will never be able to carry milk or cans of cream weighing from 110 to 120 pounds. Do I correctly understand you in that regard? A. Yes. I don't think he will.

30

Q. Now, assuming, Doctor, at a point approximately seven weeks after his alleged injury, he resumed his employment, which involved the carrying and lifting and swinging of large cans of milk, and continued in that occupation for a period of four weeks, is that your opinion, as to his probability to resume such work or work of a similar nature? A. No, because I heard his

40

testimony on the stand this morning that he could not do it.

Q. Did you hear him say that he did it for a period of— A. I heard him say he did it for a period of a week. He dragged the cans. He could not swing them.

10 Q. For a week? A. Well, he had the same job for a week. That is his testimony.

Q. You didn't hear him say for four weeks? A. I don't remember whether it was four weeks or what it was, but I do remember he tried to do it and stopped, because he could not.

Q. You mentioned something with reference to the possibility of danger in resuming the work which we have been discussing, that a slight jar might break the member that you have been de-
20 scribing? A. Well, only after he has had a fixation there.

Q. And by a fixation, just what do you mean? A. I mean, putting him in a plaster-of-Paris cast and getting solid union of that bone, and fixation of the vertebrae in front of it and fixation of the vertebrae below it.

Q. Now, Doctor, there is no union between the individual vertebrae of the spinal column, is there? A. No, but you will get fixation there if you fix
30 it long enough so he gets no motion between them.

Q. Those X-rays show no fragments of fracture? A. I am not sure of that, because I have not looked at them lately.

Q. You heard Dr. Herman say there was a fracture? A. Yes, compression.

Q. A telescoping of the member? A. Yes.

Q. Is that your opinion as to the necessity for the fixation? A. No, because that is what we always do in those cases—this fixation. There are
40 two cases in the hospital at the present time. Both of them are being fixed.

Q. Will you explain in what respect fixation is the only course that would be worked in a situation of that kind? A. Because it is the only course that would be worked in any fractured bone. If you have a fracture of the humerus, you fix it. If you have a fracture of the collar bone, you fix it, so you get good union. 10

Q. But in the bones you have just mentioned, you have two fragments, and you bring them in a position for the purposes of getting union, do you not, and making them one bone? A. Well, you fix the spine so you get union of those bones.

Q. But those bones are not normally united, are they, Doctor? A. Why, that one bone is united.

Q. As a union, one section? A. Yes.

Q. Did I correctly understand you to say that your contemplated plan would be to fix each independent section or segment from its neighbor? A. You can't fix it to its neighbors, but in the fixation you necessarily would limit the motion of that spine by fixing the joints. The idea is the same thing as if you have a fracture of the head of the humerus. You can't fix it any other way than that you fix the shoulder joint itself, so consequently you put on some apparatus whereby you fix that, and naturally it takes a good deal longer time to get fixation in the back than in the shoulder, and consequently you would—— 20 30

Q. Would that fixation necessarily be permanent—a fixation as between that vertebra—using the single number—and its adjoining vertebrae? A. You couldn't do it in——

By the Court:

Q. No. Would that condition be permanent? A. No, it would be permanent. 40

By Mr. Wortendyke:

Q. There are no separate fragments of this particular union or section of the spine? A. No.

Q. In other words, it is just a union? It is self-contained, is it not? A. Yes, it is self-contained,
10 of course, because if you have a fracture of the bone, in spite—pardon me, it is self-contained also.

Q. In what respects will the rendering of that self-contained union ameliorate the condition which you have mentioned? A. Because it will give him solid union there, anticipating it will alleviate his soreness there.

Q. Did you also get from this man, at the time you examined him, a history of his employment prior to this accident that he spoke of? A. Yes,
20 I got his history of employment before this time.

Q. Did you ascertain from that history that over a period of several years, he had been in the habit of lifting and swinging cans of milk or cream or cheese, weighing from 110 to 120 pounds? A. I did.

Q. By the way, did you have occasion to find out whether he is right-handed or left-handed? A. He is right-handed.

Q. So that in lifting and swinging these cans, he would reach to the right and carry across to
30 the left, instead of in the opposite direction, would he not? A. I don't know. That is sort of an intelligence test. I don't just know how he would do it. I imagine that would be the natural assumption.

Q. The tendency to favor one side or the other is toward the right, is it not, as you exhibited him to the members of the jury? A. Yes, I had forgotten which side it is on. It is on the right.
40 No, he favors his left.

Q. But the holding is of the right? A. Yes, he holds the right.

Q. What day, Mr. Forney, did you first treat this patient? A. Well, I am not sure what day it was. It was around the first of December. It was just a day or two before I had the X-rays taken. 10

Q. Do you know whether he had been receiving any treatment prior to his coming to you? A. Why, I went into that carefully, and he told me that the doctor who had taken care of him had suggested that he have a brace for his spine.

Q. But I mean you don't know what the nature of the treatment was? A. Only what he told me.

Mr. Wortendyke: Thank you, that is all. 20

By Mr. DeVoe:

Q. What did he tell you in regard to the treatment?

Mr. Wortendyke: Objected to, if the Court please.

Mr. DeVoe: Well, he brings it out on cross-examination, if your Honor please.

The Court: He has not brought out anything about the nature of the treatment though. I don't think that makes hearsay testimony any more competent. 30

Mr. DeVoe: That is all, Doctor. If your Honor please, I would now like to offer this American Experience Table of Mortality, contained in the book of the Prudential Insurance Company of America.

Mr. Wortendyke: I renew my objection, if the Court please.

The Court: That is the Carlisle table? 40

Mr. DeVoe: It is not the Carlisle table, if your Honor please, but it is a subsequent case to that, which treats of the insurance company mortality tables.

The Court: I understand your objection to it is not a technical objection—no objection to that particular table.

10

Mr. Wortendyke: No, your Honor, simply as to its competency in a case of this kind.

The Court: This case of Dickinson *vs.* The Mutual Grocery Company, in the opinion of the Court of Appeals may be admitted as to its scope and so forth. If Mr. DeVoe wants it in, I will permit it to be introduced.

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Mr. Wortendyke: May I have an exception, if your Honor please?

The Court: Yes.

(The paper referred to was received in evidence and marked "Plaintiff's Exhibit 8".)

Mr. DeVoe: If your Honor please, we had expected that Mr. Rothman, who has been referred to, would be here. He is not here. He is from Brooklyn, and I had assurance this morning that he would be here.

30

He is not here yet. Our case is in excepting for that testimony. If we don't finish today, I am asking leave to put him on should he turn up. Otherwise our case is in.

The Court: Have you any objection to that, Mr. Wortendyke:

Mr. Wortendyke: If I may be afforded a similar opportunity on the defense, if necessary, of course, I have no objection.

40

The Court: Have you an absent witness also?

Mr. Wortendyke: No.

The Court: You mean if you find you have one?

Mr. Wortendyke: Yes, I am willing to trust to your Honor's sense of fair play in that regard. 10

Lawrence A. Cahill, a witness produced on behalf of the defendant, being duly sworn according to law, on his oath, saith:

Direct examination by Mr. Wortendyke:

Q. Doctor, you are a licensed practicing physician and surgeon of the State of New Jersey? A. Yes, practicing in Newark since 1911. 20

Q. Are you connected with any hospitals? A. Yes, for the past twelve years I have owned and conducted my own hospital. Prior to that I was in St. James Hospital in Newark.

Q. Are you a graduate of any institutions of learning, academical and professional? A. Yes, graduate of the University of Maryland, 1911.

Q. In the course of your practice, Doctor, have you had occasion to specialize in any particular branch of medicine? A. Yes, I am practicing—specializing in industrial surgery and medicine for the past ten years about. 30

Q. Have you, in conjunction with that practice and specialty specialized also in X-ray? A. Yes, I have owned an X-ray machine now for about, oh, fourteen years.

Q. In connection with your— A. In connection with my work—accident work.

Q. In connection with the diagnosis and treatment of your cases, do you take and read these X-rays? A. I do. 40

Q. Did you have occasion, Doctor, to examine the plaintiff, Patrick Egan, in this case? A. Yes, sir.

Q. When and where did you examine him? A. I examined him in September, 1929, in my office, in Newark, and I took an X-ray picture at the
10 time to check up on his statements.

Q. Did you examine him prior to that day as well? A. I did not.

Q. And of what portion of his anatomy did you take an X-ray picture, on the occasion that you mentioned? A. A picture of his head and of his spine, particularly the lower part of his spine, where he complained of pain.

Q. I show you what purports to be an X-ray film, and ask you if you will examine it and tell us
20 if it is the picture of the lower part of the spine that you took of the plaintiff? A. It is.

Q. Now, Doctor, from what position is that X-ray picture taken? A. Anterior-posterior view, man lying on his back, face up.

Q. That is from front to rear? A. Yes.

Q. Does that show the twelfth dorsal vertebra? A. It does.

Q. And directing your attention to that particular unit of the spine, will you tell us what that
30 shows as to its condition? A. It does not show any pathology. It looks the same to me as the other vertebrae.

Q. And as a result of the reading and examination of that X-ray plate, taken by you on the occasion that you have mentioned, what is your opinion as to whether or not this plaintiff is suffering from a compression fracture of the twelfth dorsal vertebra of the spine? A. He is not.

40 Mr. Wortendyke: If the Court please, I offer in evidence this photograph.

Mr. DeVoe: No objection.

(The photograph referred to was received in evidence and marked "Defendant's Exhibit 1.")

By Mr. Wortendyke: 10

Q. Now, I call your attention, Doctor, to Exhibit P-7 offered in evidence by the plaintiff in this case and ask you to direct your attention on that exhibit to the twelfth dorsal vertebra, and tell us what, if anything, that shows? A. I am looking for the marker, to show which is the left or right side.

A Voice: The sticker is on the right side.

A. (Continuing) The twelfth dorsal vertebra appears normal to me. 20

Q. Now, Doctor, did you have occasion, at the time of making your examination at which you took the photograph marked Exhibit D-1, to examine this man physically as well? A. I did.

Q. Did you direct your attention and examination to his back? A. I did.

Q. With reference to the appearance, position, and degree of sensitiveness in various portions of his back, can you give us any opinion as to the probable cause of the condition which you found? 30

Mr. DeVoe: If your Honor please, I object. I understood the Doctor to say that he found no condition existing.

The Witness: Exhibited in the X-ray picture.

By Mr. Wortendyke:

Q. I am talking now about the clinical examination. A. Clinically the man stood as you see him 40

before you. His right shoulder droops. He is a right-handed man. His right arm is larger, slightly larger than his left—better developed. His left chest sticks out. He gives a past history of carrying heavy cans of milk, naturally pulling him down, which is a common thing in men work-
10 ing, that the one side or the other becomes drooped, whether you are right-handed or left-handed. That is nothing unusual. It is so here, and this man, when he stands, he has a curvature of the spine in the lumbar region. This region here (indicating) just below the ribs, but that curvature is simply due to his posture. He stands drooped on the right side, and his spine turns the other direction. I examined him for muscle spasm, and he had none. Now, muscle spasm is
20 present in sprains. We find it frequently in men handling this kind of work. And an ordinary back sprain in that region, known as the sacro-iliac region, which is very common, men who receive a sacro-iliac sprain are laid up for months and months. If you see them early enough, the muscles will be contracted there and hard. That is due to the inflammatory conditions and the pain caused by it. Now, when I examined this man, he had no spasm. He bent forward, backward and regu-
30 larly, touched his toes, got up, walked, assumed a regular posture without any apparent discomfort. I tested him for pain. We have a very definite test for pain, and this man showed no evidence of pain. He complained to me that it pained him, but he did not show any evidence of it.

Q. Doctor, what is the definite test that you apply to it? A. Well, we observe a man's eyes—pupils. If a man has pain his pupils contract, and his pulse becomes fast immediately, the result
40 of pain. Now, that is a very definite symptom,

and we always do that in testing a man, especially when they say the back hurts him.

Q. Did you apply that test to him? A. I did.

Q. Did it indicate positively or negatively? A. Negatively.

Q. Now, Doctor, assuming that this man, for the period of—I think he said fifteen years past, has been engaged in the business of a route milk man, in connection with which it has been part of his duty, or he is engaged in the lifting of large cans of milk or cream or other dairy products, and the swinging or carrying of them from one point to another or the piling of them, that he is right-handed, as you found, and that on August 16, 1928, while he was straddling a space of a few inches between a truck, a side of a truck and the milk loading platform, that with one foot in the truck and one foot on the platform, the vehicle in which he was standing, or had one foot, was jarred or moved, and he was thrown forward, but did not fall to a position lower than the level upon which his feet were placed, and that at that time he had in his hand and was in the act of lifting and carrying from the right of the platform to the truck a can of milk, whose weight has been described as varying between 110 and 120 pounds, in your opinion is the fact of his having been jarred or thrown in the manner that I have described, the probable cause of the condition which you have found in your clinical examination or is it the probable result, I should say, of his employment and his posture? A. It is the result of his, I should think—I should say it is the result of his posture over a great many years and the kind of work he followed, which was carrying those heavy cans.

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Q. Now, assuming further, Doctor, that this man has a compression of the twelfth dorsal vertebra, resulting in a narrowing of the member to a greater extent in its anterior end over that in its posterior end, and assuming further the circumstances of this accident as I have incorporated in my last question, and further the nature and extent of his previous employment, would you say, in the first place, that that condition resulted from the jar or movement of the vehicle, that is, the throwing forward, or not? A. Do you refer to the shape of the man? That is all I found wrong with him.

10

Q. I am referring now to the compression at the anterior end of the— A. I have not seen any yet.

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Q. Assuming, for the purposes of the question only— A. Yes.

Q. (Continuing) —that you did have a picture which showed that the twelfth dorsal vertebra was narrower at its anterior end than at its posterior end, and assuming the other facts, with this man's employment, customs, and habits, and the facts of this accident, would you say that that condition had resulted from that accident or from the other circumstances that I have incorporated in my question? A. I would not say it was due to either circumstances.

30

Q. With reference to the condition you found on your clinical examination of this man, what is your prognosis? What would be the future development, if any, of it? A. According to whether or not he will ever straighten out?

Q. Yes. A. That is simply a condition brought around by posture which he has assumed. He has assumed that shape—resulting from his shape and his employment. The chances are that it will stay

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with him. He has simply got a drooping of the right shoulder. There is nothing dangerous about a thing like that. I should think that probably all of us are that way.

Q. Assuming, Doctor, that there was a compression fracture of the twelfth dorsal vertebra on August 12, 1928; that after remaining away from work for a period of, as he says, seven weeks, he resumed his employment; he carried on the same work for a period of four weeks thereafter, assuming he did carry his work on for four weeks thereafter, would you say that would confirm or— A. There is no question that if the man had a fracture of the back, he would never go back to work in ten weeks. That is absolutely a physical impossibility. He would have his back up in a cast or brace for at least a year. It is ridiculous to think that a man could get up and work after eight weeks and go back to work for four more weeks. He can't do it. An ordinary sprain of the back lays a man up for a certain number of days.

Q. Have you, in the course of your practice, Doctor, had occasion to treat broken backs? A. I am treating two cases now. One man is totally paralyzed from his waist down, and the other fellow is all right, he is wearing a brace. It is ridiculous to think that a man can have a broken back and go back to work in two months. I never heard of it.

Mr. Wortendyke: Cross-examine.

Cross-examination by Mr. DeVoe:

Q. Dr. Cahill, how many X-rays did you take? A. Of this man?

Q. Yes. A. I took several pictures. I took a couple of his head. I have them here, and the pictures of his spine, I have them here.

Q. Did you take other pictures of his spine? A. That I haven't here?

Q. Yes. A. They were no good.

Q. What was the matter with them? A. They didn't come out. That is all.

10 Q. They didn't come out very good? A. They didn't come out right.

Q. This picture that you took, D-1, is not as clear as P-7, is it? A. No.

Q. This is the one that Dr. Herman took. A. Yes, a very good picture.

Q. And this is the one that you took? A. It is.

Q. Which is the twelfth dorsal vertebra in this picture, D-1? A. The twelfth dorsal (indicating).

20 Q. You point to that one here on which my pencil is located. That is the twelfth dorsal? A. Wait a minute. Yes, this is the twelfth here. This is the twelfth dorsal with the twelve on it.

Q. I will put a twelve there? A. Yes.

Q. There is an arrow pointing to the twelfth dorsal vertebra? A. That is right.

Q. And the X-ray, at that point, purporting to show the twelfth dorsal, does not show the edges as clear as Exhibit P-7, does it? A. No, the detail of this picture is much better.

30 Q. The detail of P-7 is much better than the one you had? A. Yes.

Q. And a fracture may exist, or compression fracture may exist in the vertebrae and not be shown on D-1, is that right? A. No, sir.

Q. You think that D-1 is clear enough to show that? A. Exactly.

Q. And yet you say that D-1 does not show the—— A. It is not——

Q. (Continuing)—the points and edges of the
40 twelfth dorsal, does it? A. I didn't say that. I said it didn't show it as pretty as this one.

Q. It does not show it, as a matter of fact, does it? A. Yes, it does.

Q. Show me where the eleventh dorsal stops and the twelfth dorsal starts on Exhibit D-1. A. Eleventh dorsal stops right here. This is the lower edge, and here is the twelfth (indicating). 10

Q. And show me the stopping point of the twelfth and the first lumbar. A. Here is the lower edge of the twelfth (indicating).

Q. And you see nothing the matter with the twelfth dorsal on the left side? A. I do not.

Q. In either picture? A. No, sir.

Q. What is this condition here on Exhibit P-7, shown on Exhibit P-7, the left side of the twelfth dorsal, that callus here. What do you call it? A. You have the same thing over here, only it is a 20 little different shape.

Q. They are both on the twelfth? A. I can make it so—if you want to call that a fracture, you can call 3, 4, and 5 up here fractures.

Q. I asked you what it is? A. It is the lower end of the body of the vertebrae.

Q. What is this dark condition shown there in that lower left side of the twelfth dorsal? A. Which do you refer to?

Q. This part here, where I have my pencil. A. That is not dark. Solid piece there. That is the 30 edge. It is more dense than the other bone.

Q. It does not show in the eleventh like that, or the tenth? A. Oh, yes, it does.

Q. Or the ninth? A. All the way up it does.

Q. All the way up? A. Yes.

Q. Now, then, according to your opinion, the plaintiff Egan has no pain and suffering at all? A. The day I examined him he did not exhibit any evidence of it.

Q. Are you prepared to say now that, in your 40 opinion, he has no pain and suffering at all? A.

The day I examined him he didn't. I don't know about today.

Q. You say that his right side is more developed than his left side? A. I said his right arm is slightly larger than his left.

Q. Did you notice that his left chest is thicker
10 —through than his right? A. That is due to posture. The man stands this way (indicating). Carrying those cans—that is the natural result of his posture, carrying those cans.

Q. That is caused by the fact that he carried these milk cans in his right hand? A. Yes, carrying those cans.

Q. Don't you know, Doctor, that those cans weighed 110 pounds? A. Yes.

Q. And that he carried them in his right hand?
20 A. That is what I was told.

Q. Who told you? A. Himself.

Q. Did you take a lateral view of this man's spine? A. I did.

Q. What happened to that? A. It didn't come out all right. I didn't bring it.

Q. Did you bring another one? A. I took about three pictures altogether of the spine, and the other was about the same as this, so I didn't bring it, and one didn't come out right. I don't know
30 which one it was.

Q. So, out of your three pictures of his spine only one came out right? A. No. Two of them came out, but this was the better one so I brought it.

Q. You brought the better one with you, and that picture is not as good as P-7? A. Not as good?

Q. Not as clear. A. Not as clear?

Q. Why didn't you take another lateral view?
40 A. Why didn't I?

Q. Yes, sir. A. I thought the one I had was all right.

Q. You found out it wasn't all right, why didn't you send for him to come back and take another? A. That picture was developed after he had gone from the house.

Q. Why didn't you send for him again and have another taken? A. I didn't think it was necessary. There was no indication of the anterior-posterior view that there was any need of it.

Q. Don't you know that this condition will show more readily in the lateral view? A. What condition?

Q. This compression fracture, if any exists. A. Of course, a wedge-shaped vertebra would show in the lateral view.

Q. More quickly? A. It is the only way it shows, to my knowledge.

Q. Why didn't you take it that way? A. I had no reason to suspect any wedge-shaped vertebrae.

Q. You had no reason to suspect— A. No, sir.

Q. What was he down there for? A. For physical examination and for X-ray.

Q. Who sent him to you? A. The counsellor.

Q. Your counsellor for the Sheffield Farms, did he not? A. He arranged it through your office, I imagine.

Q. And you knew that he complained of this condition, didn't you, before you took the pictures? A. Yes, I knew he complained of pain, but I had sufficient—I had a picture here that did not indicate anything wrong to me. I am taking pictures for years.

Q. Didn't you just tell me that the lateral view was the— A. To show a wedge-shaped vertebra?

Q. Yes. A. But I had no reason to think that man had a wedge-shaped vertebra.

Q. You didn't? A. No.

Q. What was he there for? A. Not for a wedge-shaped vertebra. He was there for an X-ray, and I X-rayed him. I might tell you, as a matter of information, that we often come across a wedge-shaped vertebra, and that does not always mean that the vertebra has been fractured. Any man who has experience will tell you that.

Q. Why didn't you X-ray his feet? A. No complaint about his feet.

Q. He complained about his spine, didn't he? A. The lower part of his back, yes.

Q. And despite the fact that you took three pictures, one of which was not any good, the second of which was not so very good— A. It was all right, but I had one.

Q. It was all right but not good enough to use in court? A. Yes.

Q. Why didn't you bring it? A. One was sufficient.

Q. It is not as clear as the one that is introduced here? A. That doesn't mean anything. I might take another one and get a very pretty picture.

Q. Why didn't you take another one? That is what I want to know? A. It was not necessary.

Q. Of course you knew you would testify in this case, didn't you? A. Yes, sir.

Q. And you knew that in the answer to the bill of particulars, filed by the plaintiff and served upon the defendant, that the plaintiff claims in that bill of particulars that he had a fracture of the twelfth dorsal vertebra? A. Yes, sir.

Q. Pardon? A. Yes.

Q. You knew that before you took the picture? A. I knew he had an injury to his back.

Q. Yes. You know Dr. Scudder, don't you? A. Yes, sir.

Q. You know more about it than I do? A. No. I don't know how much you know.

Q. Now, you say that if this man had a compression fracture of the twelfth dorsal vertebra and stayed home for seven weeks—seven or eight weeks—unable to work, that it would be impossible for him to go back to his former occupation and go to work? A. Yes, sir. 10

Q. Do you recognize Scudder as an authority? A. Oh, sure, yes.

Q. He disagrees with you, doesn't he? A. I don't know.

Q. You don't know? A. No. I have his latest book.

Q. Well, is 1927 his latest book? A. I don't know whether he has one later than that or not.

Q. That is quite late? A. Yes, that is quite late. 20

Q. Just read out loud, will you please, Doctor, from that book, beginning at that paragraph (handing book to witness)? A. One forty-one?

Q. And tell me how much you agree with that authority? A. (Reading) "A compression fracture of the vertebral bodies may result without permanent damage to the spinal cord". I didn't say a word about the spinal cord.

Q. Go ahead. Keep on reading. A. (Reading) 30 "The general story is somewhat as follows: A spinal injury is received. There is some shock. There are a few signs of painful back, possibly tenderness, all temporary, however, clearing up, following lying in bed a few days. The short duration of these suddenly appearing symptoms following injury to the back without any local lesion discernible is quite characteristic. After a varying time of several weeks or months or even years perhaps, a group of delayed symptoms will 40

appear. These delayed symptoms are of very great importance and incapacitate the individual absolutely. These symptoms are those of pain, disability in using the back, roentgen ray evidence of damaged vertebral body or bodies, and the appearance in the damaged vertebral region of a distinct hyphose. At the very outset following the injury, the roentgen ray findings will often be absolutely negative and subsequently, when the delayed symptoms appear, the roentgen ray findings will be clear and definite and positive. Such may be the course of these cases of injured back. They form a small, very important group of cases from all angles." Any more, do you want me to read?

Q. Turn it over and read a few more lines. A. (Reading) "Such a compression fracture or crushed fracture may be unrecognized and therefore go essentially untreated. Many physicians think wrongly that if a man can walk he has not fractured his spine. A fracture to the spine results from either direct violence or from indirect violence. The most common cause is from indirect violence, is seen in the hyper-flexion or hyper-extension of the vertebral part of the spine."

Q. Now, you disagree with that authority, don't you? A. In what respect?

Q. Now, you disagree with that authority, don't you? A. In what respect?

Q. In the respect that he could not go back to work with this damaged vertebra? A. I didn't say anything of the kind. That whole thing was talking about pressure on the cord. There is nothing said in this case about pressure or injury to this man's spinal cord. That whole thing refers to the spinal cord.

Q. It does? A. Yes, read it.

Q. You just read it. You didn't say anything about spinal cord. A. I didn't? Read it. (Reading): "A compression fracture of the vertebral bodies may result without permanent damage to the spinal cord."

Q. That is this condition, isn't it? A. This refers to pressure on the spinal cord. We have not had a word said about pressure on the spinal cord. 10

Q. And in that doesn't the first line say: "A compression fracture may result without permanent damage to the spinal cord", is that right? A. Yes.

Q. That may be such in this case? It is such in this case? A. No.

Q. Why not? A. No compression fracture here. 20

Q. If there were a compression fracture in this case, it may exist without damage to the spinal cord? A. So this doctor says.

Q. And with no damage to the spinal cord, would you say that he would be able to go back to his work at the end of eight weeks? A. No, sir.

Q. And Dr. Scudder disagrees with you? A. He does not. He does not specify any number of weeks. He does not disagree with me. I treat these men every day in my office, understand. I do this work extensively. It is not an odd case—— 30

Q. No, that is right. A. I am treating them all the time.

Q. What is Kemmer's test, Dr. Kemmer's (?)? A. Oh, some name—I will say now if I recall it—of academic interest.

Q. You heard of it? A. Yes, yes; I am just trying to clear it up in my mind. 40

Q. Well, I don't want to burden you unnecessarily. What is spondylites? A. You are talking of spine tuberculosis.

Mr. Wortendyke: I object. I don't think that is cross-examination.

10 The Court: I can't see the materiality of it, now.

Mr. DeVoe: Well, he put Dr. Forney through an intelligence test, as Dr. Forney called it.

By Mr. DeVoe:

Q. You read this part, Doctor, where Dr. Scudder said: "Many physicians think wrongly that if a man can walk he has not fractured his spine."

20 You remember reading that? A. Yes, I agree with him.

Q. Did you notice that his left chest was more developed than his right chest? A. Yes.

Q. And you said that is because he carries himself that way? A. That is due to the man's posture and work.

Q. You say that he has no pain and suffering? A. I couldn't find any.

Q. You couldn't find any? A. No.

30 Q. And you tried as hard as you did in taking these pictures? A. Well, now, I am examining men every day in the week, counsellor; I am not taking an odd one.

Q. And you are taking X-rays every day in the week? A. I guess I do, all right, several of them.

Q. Doctor, when you took this X-ray that you have shown here, Exhibit D-1, you had a nurse pulling his shoulders? I withdraw that. When you took this X-ray, marked Exhibit D-1, Egan

40 was flat on his back, was he not? A. Yes.

Q. You had a doctor or nurse pulling his shoulders, and you had a doctor or nurse pulling his feet, did you not? A. Yes, to straighten him out.

Q. To keep him straight? A. To straighten him out, yes.

Mr. DeVoe: That is all. 10

Joseph L. Diaz, a witness produced on behalf of the Defendant, being duly sworn according to law, on his oath, saith:

> Mr. DeVoe: I will be glad to admit Dr. Diaz's qualifications, inasmuch as I have been examined by him for glasses.
>
> Mr. Wortendyke: The offering of this witness is for the purpose of refuting the Plaintiff's contention that he has had head noises or that the head noises result from this accident. 20

Direct examination by Mr. Wortendyke:

Q. Doctor, did you have occasion, at my request, to examine the eye, ear, nose, and throat of this plaintiff, Patrick Egan? A. I did.

Q. You are a specialist in that particular branch? A. Yes, I am an eye, ear, nose, and throat surgeon. 30

Q. What did you find, if anything, with reference to his ears? A. He has a chronic catarrhal process in both ears, that has existed for many years, which, as yet, has affected his hearing only slightly. It is a process that originated in the nose. He has a thickened crooked bone forming the upper portion of the nose, that has produced

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a thickened condition of the lining of the membrane of the nose. Each eye has a tube in the back part of the nose to the upper part of the throat that extends from the nose into the ear, and the purpose of that tube is to allow air to enter. The catarrhal process has extended from the nose
10 through the lining membrane of this tube into the membrane of the middle ear.

Q. Doctor, assuming on August 16, 1928, that this man, being employed by a milk company and in the course of his employment handling and carrying large cans of milk, weighing 110 to 120 pounds, was, while straddling a space a few inches between a truck and a loading platform, with one foot in the truck and the other on the loading
20 platform, and in the act of transferring one of those cans, jarred or thrown through a movement of his vehicle forward, falling or bending to a point not lower than the level of his feet, and also that since the accident that I have mentioned, he has had what he characterizes as head noises. Can you give us your opinion, with any degree of definitenes, in the light of those things and the physical examination that you made of him, as to the cause of those head noises? A. The cause of the head noises——

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The Court: Wait a minute. You have not got it all in—and that he struck his head when he fell forward, against an iron band on the truck.

By Mr. Wortendyke:

Q. And that he struck his head when he fell forward against an iron band on the truck? A. The cause of those head noises is the chronic
40 catarrhal process that he has in each ear. The head noise is an ordinary symptom of the chronic

catarrhal process of the ears. It is a very common symptom.

Cross-examination by Mr. DeVoe:

Q. He has head noises? A. He says he has, and I have no way of determining whether he has or not, but the patient who comes in for treatment of chronic catarrhal process, complains of it—ninety per cent. of the cases. 10

Q. How long has he had this condition? A. He has had that condition for many years.

Mr. DeVoe: That is all.

Mr. Wortendyke: I understand, of course, that there is no claim made with reference to the eyes. 20

Mr. DeVoe: That is right.

Mr. Wortendyke: The defendant rests, if the Court please.

Mr. DeVoe: If your Honor please, I would like to put on Dr. Herman just for a minute, then we will rest too—with the Court's permission.

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William G. Herman, recalled.

Direct examination by Mr. DeVoe:

Q. Doctor, I show you Exhibit D-1. I want you to examine that X-ray, turn to the twelfth dorsal vertebra, and ask you if you see anything the matter with it, according to this exhibit? A. Dr. Cahill has already testified as to how this has been taken. I would like to ask him—there is a 40

marker on it that says, "left". I take it that that is the left side.

Dr. Cahill: Yes, sir.

A. (Continuing) Well, in my opinion, this vertebra—it is labelled the twelfth dorsal—shows the
10 base of the body of that twelfth dorsal an irregularity, and a deformity, which I think, within reasonable distance agrees quite definitely with the same thing that I illustrated in the ones that I produced.

Q. Of course the condition which exists in this vertebra does not show as clearly in Exhibit D-1 as it does in Exhibit P-7? A. No, the lateral view is the correct view to show that, and after you have seen it in the lateral view, a close-up will
20 often bring out these deformities. If you don't have a lateral view, you may miss it.

Q. Just turn to the better of these two lateral views. A. Either one will do. That is P-2, I believe.

Q. And the lateral views you referred to are marked "Exhibit P-2 and P-6", and it shows, you say, better or plainer in the lateral view? A. I put it this way, that the greater deformity is seen in the lateral view.

30 Mr. Wortendyke: How many pictures did he take of this man?

Mr. DeVoe: There are seven there.

The Witness: I think there were five at the first examination and three or four at the second.

By Mr. DeVoe:

Q. And you have the seven there in evidence?
40 A. There are some there.

Q. And these were the other two? A. That is right.

Q. Did they all turn out as plainly as Exhibit P-7? A. That varies. They are all satisfactory, I believe.

Mr. DeVoe: That is all. 10

Mr. Wortendyke: No questions, Doctor.

Now, if the Court please, I respectfully move the direction of a verdict in this case upon the following grounds: That in the first place the evidence shows that as a matter of law, or rather, as the cases have it so clearly as not to admit of any difference of opinion that this plaintiff in assuming the position that he did, and under the circumstances that he related, was guilty of contributory negligence; and upon the second ground that there has been no proof—no scintilla whatsoever of evidence—produced before this Court and jury in this case indicating any negligence whatsoever upon this defendant, either directly or imputed; and further upon the ground that the evidence so clearly indicates as not to admit of any difference of opinion that the accident and the resultant injuries complained of was an unavoidable accident.

The Court: Motion denied.

Mr. Wortendyke: May I have an exception, if the Court please?

The Court: Yes.

Members of the Jury, we can probably complete this case this afternoon with the summation by counsel and the charge to the jury, so that you will receive it at about five o'clock or thereabouts. That means

that you may or may not get through with it sometime early in the evening. I don't know. Now this is a matter of indifference to the Court, whether you finish it this afternoon or whether you come back on Monday morning. It doesn't make any difference to me, and I am only consulting your own convenience. Some of you may have journeys to go, and if you go out at five o'clock, it may be very late before you complete your deliberations. It is just a matter of your own choice, whether you want to finish it this afternoon or whether you want to come back Monday morning.

The Jury: We will finish it up today, Judge.

The Court: The Court is entirely in harmony with your desires.

(Mr. Wortendyke sums up the case for the defendant.)

(Mr. DeVoe sums up the case for the plaintiff.)

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Court's Charge.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY CIRCUIT.

December Term, 1929.

10

PATRICK J. EGAN,
Plaintiff,
vs.
SHEFFIELD FARMS COMPANY,
INCORPORATED,
Defendant.

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Court's charge to the jury by Hon. JOHN P. KIRKPATRICK, Judge, as follows:

Members of the Jury: This is an action brought for an injury sustained by the plaintiff in what he alleges was a collision between his automobile truck and the horse drawn truck of the defendant due to the defendant's negligence.

The law imposes upon the plaintiff who comes into court and seeks to be compensated for injuries which he says were the fault of another the burden of proving by a fair preponderance of the evidence that those injuries were, in fact, due to the defendant's fault.

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The fair preponderance of evidence does not mean that the plaintiff is required to produce here a greater number of witnesses than those produced by the defendant, but he is required where there is an issue of fact, that is, where there is a contradiction—two different stories told, one by the plaintiff and his witnesses and one by the defendant and his witnesses—the plaintiff is re-

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quired to more than exactly meet the story told by the defendant; that is, he must bring testimony that is a little bit more weighty, a little bit more credible, and a little bit more convincing than that which the defendant brings; and so if there is in this case a contradiction in the testimony pro- 10 duced by the plaintiff and that produced by the defendant in any essential fact, you will analyze the two stories and determine the question of the truth, always with the thought in mind that the law imposes upon the plaintiff the burden of establishing the truth of any essential fact by a fair preponderance of the evidence.

As to the question of liability, the facts testified to by the plaintiff have not been contradicted as 20 to the manner in which he received the injury that he now complains of. His story is that he was engaged in loading cans of cheese on a motor truck in a freight yard at Weehawken and that a horse-drawn truck owned by the defendant collided with the truck in which the plaintiff was loading these cans of cheese and caused the truck on which he had one foot placed to move, and as the result of that sudden movement of the truck in which he was partly standing at that time, he was thrown forward and to the side, and received the injury 30 that he now complains of. That is his story. It is the story upon which he asks you to find that the defendant was responsible legally to him.

That story has not been contradicted. No testimony has been brought here in contradiction of it by the defendant.

All of us, in our contacts with our neighbors, are required to use reasonable care so that they do not receive injuries from our actions. The driver of a horse-drawn truck or motor vehicle, is re- 40 quired by law to use reasonable care in the op-

eration of that horse-drawn truck or motor vehicle, so that others in the lawful pursuit of their activities may not be injured, and that duty rested upon the driver of this horse-drawn truck: the duty of using reasonable care as to other persons who were in the yard on their lawful businesses that night. 10

Reasonable care is the care which is a reasonable, prudent man would use at that particular time and under the particular circumstances that surrounded that particular occasion, or the doing of that which a reasonable, prudent man would not have done or failing to do that which a reasonable prudent man would have done, either constitutes negligence.

Now, if you find that this defendant's driver, 20 upon that occasion, failed to use reasonable care in the operation of his horse-drawn truck, and that the plaintiff received his injuries as the direct and proximate result of the failure of the defendant to use due care, then he may recover from the defendant such an amount as will compensate him for his injuries, under the rules which I shall hereafter give you, provided that he was, at the same time, using the care which the law imposes upon him for his own safety.

We are, all of us, charged not only with the duty 30 of using reasonable care so far as the safety of others is concerned, but we are likewise charged with the duty of using reasonable care for our own safety; and if our failure to use reasonable care for our own safety combined with our neighbor's failure to use reasonable care toward us brings about an injury, we cannot recover; because in order to recover from a defendant, it must appear that our own actions did not in any degree contribute to the injury that we sustained. 40 In other words, to put it a little bit more plainly:

In order for Patrick Egan to recover from the Sheffield Farms, it must appear from the testimony that his injuries resulted solely from the negligent operation of the defendant's horse-drawn truck on the morning of August 16.

10 If, after you have considered all of the various facts in this case, you come to the conclusion that Mr. Egan sustained his injuries without fault on his own part, and due to the negligent operation of the defendant's truck, then you will come to the question of damages.

He received what appeared to be a slight injury and about which there seems to be some dispute in the medical testimony in this case. Dr. Herman and Dr. Forney, witnesses produced on
20 behalf of the plaintiff, testified that he received a compressed fracture of the twelfth dorsal vertebra. Dr. Cahill, a witness produced on behalf of the defendant, testified that there is no evidence of a fracture and that the condition is due to other causes in nowise connected with the injury that he sustained as a result of the fall.

Now, there is a sharply defined issue of fact for you to consider, and there is the place where the burden of proof that the law requires rests
30 upon the plaintiff, and the plaintiff must show you by a fair preponderance of the evidence that he did, in fact, in this fall that he received, sustain the injury that he now complains of.

If you find that he has the injury that he complains of—that he has sustained the burden that the law imposes upon him—you will award him such an amount as will represent, in your judgment, fair compensation for the pain that he has sustained up to this time, and for such pain as he
40 may sustain in the future. You will award him such an amount as represents his loss of wages up to this time. If you find that his injury is of

such a nature that there will be a continued loss of wages, that is, that his earning capacity has been affected by his injury, then you will award him such an amount as represents the present cash value of such loss of wages as he may sustain in the future by reason of his limited capacity to work. 10

There is one other thing. Since we, all of us, are supposed to be entitled to a reasonable enjoyment of life, he is entitled to such a sum as will, in your opinion, in addition to the things that I have already mentioned, represent pecuniary compensation for his inability—if you find such inability exists—to enjoy life in the future as he had before the time of this injury. He is a young man, thirty-seven years of age. Counsel for the plaintiff has produced here the American Experience Table of Mortality, which has been introduced in evidence, and which you will take to your jury room. You will find when you read it that the expectation of future life of a man thirty-seven years of age is thirty years and four months, or thereabouts. 20

The testimony as to his earning capacity is that prior to the injury that he sustained, he was earning sixty or sixty-two dollars a week; that he is at present earning thirty-five dollars a week or thereabouts, making an apparent loss of earning capacity of about twenty-five dollars a week. 30

It is obvious that you will not take thirty years and multiply it by fifty-two and multiply that by twenty-five, because he may die tomorrow, or his earning capacity may increase, or a number of things may happen; and so this table may only be a guide for you to consider in arriving at what is the fair cash value of any loss of earning capacity directly resulting from this young man's injuries and must not be taken as conclusive in any way, but it is a guide for so much as it is worth. 40

If you come to the conclusion that the plaintiff is entitled to recover a verdict in this case, you will render a verdict for such an amount as will, in your opinion, be proper under the rules which I have already given you; if on the other hand you come to the conclusion that the plaintiff is
10 not entitled to recover from the defendant, you will return a verdict of no cause for action.

If you do come to the conclusion that the plaintiff is entitled to recover, you will just render a lump verdict for the amount, not attempting to divide it up into so much for this item and so much for that item, but just a lump sum which will represent the total sum of what you come to the conclusion he is entitled to recover.

The Court: Now, is there anything you want
20 me to say?

Mr. DeVoe: Not in addition.

Mr. Wortendyke: I would very respectfully like to except to that portion of your Honor's charge which begins, "These tables, etcetera," upon the ground that the duration is speculative as to his earnings.

The Court: Well, I might amplify that a little bit, if you have any worry about it.

Members of the Jury: Of course, you under-
30 stand that this is only an average. This man may not live thirty years or thirty months, and you are not to take these tables as being binding upon you or a conclusive test, but they are merely that you may have some idea as to what the experience of mankind has been, as to what future life an average man may expect to have otherwise in good health.

You may now retire, and when you have completed your deliberations in this case, you will be
40 excused until January 6, 1930.

Postea.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

PATRICK J. EGAN, Plaintiff, *vs.* SHEFFIELD FARMS COMPANY, INC., Defendant.	Action at Law. Postea.

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This case was tried before the Honorable John P. Kirkpatrick, Judge of the Middlesex Circuit Court, with jury, at the Middlesex County Circuit, on December 20, 1929.

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The jury rendered a general verdict against the defendant and in favor of the plaintiff for the sum of Eight Thousand Dollars ($8,000.00).

JOHN P. KIRKPATRICK,
Judge.

Dated: December 28, 1929.

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On Postea.

NEW JERSEY SUPREME COURT.

PATRICK J. EGAN, Plaintiff, *vs.* SHEFFIELD FARMS COMPANY, INC., Defendant.	Action at Law. On Postea.

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$8,000.00
67.28

$8,067.28

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It is ordered that judgment be and hereby is entered in favor of plaintiff and against the defendant for the sum of eight thousand dollars, besides costs to be taxed *nisi.*

Entered January 2, 1930.

On motion of

FRED W. DEVOE,
Attorney.

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Notice of Appeal.

NEW JERSEY SUPREME COURT,

MIDDLESEX COUNTY.

PATRICK J. EGAN, Plaintiff-Appellee, *vs.* SHEFFIELD FARMS CO., INC., Defendant-Appellant.	Action at Law. Notice of Appeal.

10

To the above named plaintiff, and Fred W. DeVoe, Esq., his attorney:

20

Sirs:

PLEASE TAKE NOTICE that the defendant in the above entitled cause, Sheffield Farms Co., Inc., appeals from the whole of the judgment entered in favor of the plaintiff upon the verdict in this cause, to the New Jersey Court of Errors and Appeals; and

PLEASE TAKE NOTICE further that the following are the reasons or grounds upon which said appeal will be based, and which will be urged to the appellate court for a reversal of said judgment, viz.:

30

1. In that the trial court committed harmful error in denying defendant's motion for a direction of a verdict in favor of the defendant and against the plaintiff.

2. In that the trial court committed harmful error in admitting in evidence on behalf of the plaintiff the handbook and page therein issued

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and published by the Prudential Insurance Company of America to and used by its life insurance agents.

3. In that the trial court committed harmful error in charging the jury that in arriving at its
10 verdict it might take into consideration the alleged expectancy of life of the plaintiff, as set forth and contained in said life insurance handbook and page thereof.

Respectfully, etc.,

AUTENRIETH, GANNON & WORTENDYKE,
Attorneys for Defendant.

Service of within Notice of Appeal
20 is hereby acknowledged this 2nd
day of January, 1930.

FRED W. DEVOE,
Attorney for Plaintiff.

Filed January 4th, 1930.

FRED L. BLOODGOOD,
Clerk.

30

40

35 MAY.T.1930

New Jersey Court of Errors and Appeals

PATRICK J. EGAN, Plaintiff-Appellee, *vs.* SHEFFIELD FARMS CO., INC., a corporation, Defendant-Appellant.	On Appeal.

BRIEF OF APPELLANT.

Facts.

On August 16, 1928, at about one o'clock in the morning, the plaintiff, in the course of his employment by a corporation other than the defendant (Case, p. 9) was in charge of a Garford ton and a half motor truck, belonging to his employer, which was parked alongside of and parallel with a railroad loading platform in the New York Central yards at Weehawken, New Jersey (Case, pp. 28 & 9). At said time and place the plaintiff was standing with his right foot on the loading platform and his left foot in the truck (Case, p. 9) and was in the act of lifting and/or carrying from the loading platform to his truck a large iron can of cheese, weighing about 120 pounds (Case, p. 10). In this position, his left foot was over a sideboard of the truck which he was straddling (Case, p. 11). There was a gap of about 8 inches from the sideboard of his truck to the loading platform (Case, p. 12). While in the act aforesaid, he felt a jerk which threw him forward and he fell into the crevice between the truck side and the platform

(Case, p. 11), and when he recovered himself he saw the right front wheel of the defendant's horse-drawn wagon locked in his (the plaintiff's) left rear wheel (Case, p. 13).

There was evidence tending to show that as a result of his fall above described, plaintiff sustained injuries to his back.

At the close of the case, the defendant moved for the direction of a verdict upon the ground that the evidence unquestionably showed that the plaintiff was guilty of contributory negligence, and upon the further ground that the case was devoid of any evidence indicating negligence on the part of the defendant (Case, p. 95).

The plaintiff offered in evidence what purported to be an "American Experience Table of Mortality" forming a part of a hand-book published and issued by the Prudential Insurance Company of America, for the use of its agents, for the purpose of proving the expectancy of life of the plaintiff, upon the issue of damages. This was admitted by the Court over the defendant's objection, and an exception allowed (Case, pp. 73-74).

ARGUMENT.

The Trial Court erred in denying defendant's motion for the direction of a verdict in favor of the defendant.

The plaintiff in this case sought relief in the Court below by way of compensation for personal injuries alleged to have been sustained by said plaintiff, and resulting by reason of the defendant's negligence (Complaint, Case, pp. 2-3). It is almost too fundamental to merit reiteration that in cases similar to the instant one, the law casts

upon the plaintiff the burden of satisfying the jury by the greater weight of the evidence (1) that the defendant was guilty of negligence, direct or imputed, and (2) that such negligence was the proximate cause of the injuries of which the plaintiff complains. Our courts have, without exception, as was stated by the Court in *Bien* vs. *Unger,* 64 N. J. L., 597, citing *McGilvery* vs. *Newark Electric L. & P. Co.,* 34 Vroom, 591, held that this right of defendant to have his plaintiff bear the burden of the affirmative is a substantial one, and not a mere matter of form. Even in a case wherein the maxim *res ipsa loquitur* is considered to apply, the foregoing fundamental rule is still recognized as applicable, as was stated by this Court in the case of *Hughes* vs. *Atlantic City & Shore R. R. Co.,* 85 N. J. L., 212, holding that this, the burden of proof, never shifts even though the duty of going forward in argument or presenting evidence may.

In the instant issue, it does, of course, appear that the defendant offered no evidence as to how the accident complained of occurred. This circumstance, however, we respectfully submit, could not affect the situation presented to the Court upon the motion for a direction, unless the facts shown are to be taken to have brought the case within the application of the doctrine of *res ipsa loquitur.* The definition of this doctrine or maxim became an important element in enabling the Court to arrive at its conclusion in the case of *Bien* vs. *Unger, supra,* and, in doing so, Justice Garrison adopted the language of the Court in *Newark Electric Co.* vs. *Ruddy,* 33 Vroom, 509, to the effect that:

> "The doctrine of *res ipsa loquitur* simply calls upon the defendant, after proof of the accident, to give such evidence as will exonerate him, if any there be, and relieves the

> plaintiff from the burden of proving the non-existence of an adequate explanation or excuse."

It would seem, therefore, that the Court below was confronted with the very situation which was in the Court's mind in *Hughes* vs. *Atlantic City & Shore R. R. Co., supra,* as is indicated in the Court's language, at page 216, as follows:

> "In applying the law to a case like the present, we think it clear that the plaintiff was bound to satisfy the jury by the preponderance of evidence that the defendant was guilty of negligence that caused the accident; if he introduced no evidence or no evidence from which an inference of negligence could be drawn, it would be the duty of the judge to direct a verdict for the defendant."

The principle with which we are now dealing was also further affirmed by this Court in the case of *Niebel* vs. *Winslow,* 88 N. J. L. 191, wherein the same Justice (Garrison), at page 193, specifically referred to the *Hughes* case, as well as to that of *Sweeney* vs. *Urban,* 228 U. S. 233, where the question was also discussed by Mr. Justice Pitney, in the United States Supreme Court.

It would seem that the collateral issue in the instant case, namely, the question as to whether or not the evidence produced upon the trial disclosed a situation properly to be considered within the scope of the application of the doctrine of *res ipsa loquitur,* can best be determined by comparison with what appears to be rather a parallel situation in the case of *Adriance* vs. *Schenck Bros., et als.,* decided by this Court and reported in 95 N. J. L., commencing with page 185. In the cited case, the plaintiff paid for a ride on a contraption or contrivance known as a "racer". Toward the end of the particular ride upon the machine dur-

ing which the injuries complained of were sustained, something happened and the plaintiff was found to be doubled up and bleeding. In dealing with the issue as to whether the trial Judge erred in non-suiting the plaintiff, this Court, through Mr. Justice Black, at page 186, said:

> "The facts disclose an injury which is admitted, but do not disclose how it happened and no one gave any testimony on the point. It is urged as a ground of reversal that the plaintiff made out a *prima facie* case of negligence by proof of the injury and that the doctrine or maxim *res ipsa loquitur* is applicable, thus making a jury question. Suffice it to say, we cannot accept this view."

and proceeded to refer with approval and to follow the view of the Court in *Bahr* vs. *Lombard, Ayres & Co.,* 53 N. J. L. 233, in enunciating the rule that if there is no proof of any fact by which the conduct of the defendant can be ascertained, there is nothing for the jury to pass upon, and that the only presumptions of fact which the law recognizes are *immediate* (italics ours) inferences from the facts proved, citing *Price* vs. *New York Central R. R. Co.,* 92 N. J. L. 429.

The appellant in the matter now before this Court respectfully submits that the only evidence to be found anywhere in the entire case in the Court below dealing with the acts or omissions of the defendant, from the standpoint of said defendant's liability or lack of it, is to be found in the following portion of the testimony, from which we beg to quote at this point:

> "Q. And now, did you have any cheese in your hand when the accident occurred? A. I had cheese in my hand, and I had it about halfway across.
>
> Q. And then what happened? A. I felt a jerk, which throwed me forward, and the

weight of the cheese caused me to sling to the left. I dropped into the crevice between the truck and the platform'' (Case, p. 11).

* * * * * *

''Q. How wide was the space between the truck, the overhang of the truck, and the platform, would you say? A. Two inches.

Q. Two inches? A. Yes.

Q. How wide was the overhang? A. The overhang was six inches.

Q. So there were eight inches from the sideboard to the platform? A. Yes.

Q. You were thrown into this crack? A. Thrown into the crevice between the truck and the platform'' (Case, p. 12).

* * * * * *

''Q. When you came out of the hole did you see any other truck there near you? A. I looked up and I seen on the floor—saw him hooked with the right front wheel in the left rear wheel of my truck. He was locked under my left rear wheel, and it had the body on the truck raised up. The man was fast there and could not get away.

Q. The right front wheel of the Sheffield truck was in your left— A. Was locked in my left front wheel.

Q. Was locked in your left front wheel? A. Left rear wheel of my truck.

* * * * * *

Q. What kind of wagon or truck was the Sheffield truck? A. Four-horse truck.

Q. What was the driver doing, if you know? A. Why, he was backing up and trying to get out; get away. He backed up and got out, and he seemed to have no trouble to pass my truck afterwards'' (Case, p. 13).

It will thus be seen that the evidence on the particular question with which we are now dealing, as summarized, indicated that while the plaintiff was straddling the gap between his truck parked alongside of the freight loading platform, with his back in the direction from which, apparently, the

defendant's horse-drawn vehicle was approaching, and while the plaintiff in this position, with one foot over the sideboard and on the floor of his truck and the other on the loading platform was endeavoring to transfer a can of cheese, weighing about a hundred and twenty pounds from the freight platform to the floor of his truck, he was jerked forward and fell into the space between the sideboard of his truck and the loading platform, and that after he had recovered himself, he noticed that the right front wheel of the defendant's horse-drawn vehicle was in contact with some point on the left side of his motor truck.

The complaint, as will be noted from an inspection thereof, charged, as we have hereinbefore stated, that the injuries sustained by the plaintiff resulted from negligence on the part of the defendant through its agent or servant, the driver of defendant's horse-drawn vehicle, charging particularly also that defendant operated its said horse-drawn vehicle negligently and carelessly in and about the railroad terminal yard therein referred to. That, as we have before respectfully submitted, cast upon the plaintiff on the trial, the burden of establishing by the greater weight of the evidence that the defendant actually was negligent, not that it might have been negligent, but that it actually was, in view of the well-established rule that we have heretofore been discussing fixing the burden of proof in cases of this kind.

As a corollary of this principle, the rule further is, and naturally should be, that negligence is not only not presumed but that there is a presumption against negligence, and that testimony and other evidence must be adduced of such definiteness and certainty that negligence must at least be reasonably inferable therefrom. Our courts have uniformly recognized that in accident cases the happening of the accident, or the occurrence of the

collision itself, does not prove negligence, or, as the rule is stated in a recent case not yet officially reported, but to be found in 147 Atl. at page 779, *Garino* vs. *Walker,* the mere happening of the accident is no evidence of negligence.

In dealing with this rule, this Court, in *McCombe, Administrator* vs. *Public Service Railway Co.,* reported in 95 N. J. L. 187, reviewing the action of the trial court below in non-suiting the plaintiff, used the following language through the mouth of Mr. Justice Black, at page 189 of the opinion:

> "In this situation, the trial judge was called upon to say whether any facts had been established from which negligence may be reasonably inferred. Metropolitan Railway Co. *vs.* Jackson, L. R. 3 App. Cas. 193; Newark Passenger Railway Co. *vs.* Block, 55 N. J. L. 605. A motion for a non-suit admits the truth of the plaintiff's evidence and every inference of fact which can be legitimately drawn therefrom. Jones *vs.* Public Service Railway Co., 86 *id.* 646. But the only presumptions of fact which the law recognizes are immediate inferences from the facts proved. Price *vs.* New York Central R. R. Co., 92 *id.* 429. So, it has been said, mere theories and inferences do not authorize a verdict in a case of this nature, unless they are the *only* (italics ours) conclusions which can reasonably be drawn from the facts proven. Negligence is a fact which must be shown. It will not be presumed. There is always a presumption against negligence. 29 Cyc. 589; Bien *vs.* Unger, 64 N. J. L. 596.
>
> For the plaintiff to succeed it was incumbent upon him, in the absence of direct evidence, to show not only the existence of such *possible* (italics ours) responsibility, but the existence of such circumstances as would justify the inference that Saunder's death was caused by the wrongful act of the defendant, and which would exclude the idea that it was

> a cause with which the defendant was unconnected. Suburban Electric Co. *vs.* Nugent, 58 N. J. L. 658; Austin *vs.* Penna. R. R. Co., 82 *id.* 416."

The passage just quoted indicates, of course, that the Court was dealing with a motion for a non-suit. We respectfully submit that in the instant matter, upon the motion for a direction, the same situation was presented, in view of the fact that no evidence bearing upon the question of the defendant's liability was presented other than that adduced on the plaintiff's case.

It is interesting, also, to note that this same Court, through the mouth of the same Justice, in the case of *Alvino, Admx.* vs. *Public Service R'way Co.,* 97 N. J. L. 526, decided not long after the one just quoted from, and in which the rule enunciated in the latter was followed and approved, held that to establish a case of negligence and fix liability of the defendant, it is incumbent on the plaintiff to prove some fact which is more consistent with negligence on the part of the defendant than with the absence of it, and that when the plaintiff's evidence is equally consistent with the absence as with the existence of negligence on the part of the defendant, the plaintiff must fail. In applying this rule to the case then before it, which involved a collision between a motorcycle and a trolley car, resulting in the death of the plaintiff's intestate, who was riding in the side-car of the motorcycle, this Court very definitely stated that facts indicating the *probability* (italics ours) of negligence are not sufficient to justify the submission of the case to the jury, holding that more definite evidence on the question of liability must first be produced and appear from the evidence. This Court further, in dealing with the situation involved in that case, pointed out in further substantiation of the prior decisions on

the subject, that in cases of a similar nature, that is to say, involving collision, the doctrine or maxim *res ipsa loquitur* is not applicable; in that respect, following the rule of *Conover* vs. *Delaware L. & W. R. R. Co.,* 92 N. J. L., 602.

Deeming it not only unnecessary but presumptuous to burden this Court with any further discussion of authorities in support of this phase of our contention, we merely refer to a few other decisions applying the rule in question to somewhat varying states of facts, *e. g., Maphet* vs. *Hudson & Manhattan R. R. Co.,* 98 N. J. L., 369; *Cook, Admx.* vs. *American Smelting & Refining Co.,* 99 N. J. L. 81; *Maher, Admx.* vs. *Magnus Co., Inc.,* 99 N. J. L. 514; *Ryan, Admx.* vs. *Public Service R'way Co.,* 101 N. J. L. 361.

In the light of the rules enunciated in the decisions hereinbefore cited and discussed, may we not examine in detail the situation which confronted the trial court in the instant case, upon the motion for the direction. Both of the parties to the suit, apparently, had equal rights upon the roadway at the scene of the collision complained of, but each was charged with a certain duty or certain duties to other users of the same. The defendant, through its agent and servant, was charged with the duty of exercising reasonable care in the operation of its horse-drawn vehicle to avoid injury to other vehicles and persons. That duty could only be properly deemed to be co-extensive with the defendant's ability reasonably to expect or anticipate the probable results of any diversion from the course dictated by the duty; that is to say, if another user of the highway places himself or his vehicle in such a position as to render it impossible, even in the exercise of reasonable care, for the driver of the defendant's truck to anticipate said party's presence and position, certainly, we respectfully submit,

the defendant cannot be charged with the additional burden of so stretching its imagination, or, to be more exact, require a stretch of the imagination on the part of its driver, to anticipate all possibilities for the purpose of avoiding them.

The motion addressed to the Court upon the application for a direction, presented for the Court's scrutiny the acts of the plaintiff in this case as well, such as the placing of his vehicle, the maintenance thereon of adequate means of giving notice of its position, and particularly the, we respectfully submit, most precarious posture in which the plaintiff had placed himself at the moment that he fell or was caused to fall. In other words, the question occurs, we submit, to any reasonable mind, would the driver of a horse-drawn truck be bound to anticipate that the contact of one of his wheels with that of another vehicle, with the resultant jar to the latter, if any, would result in injury to an individual whose position upon or in connection with his vehicle was not disclosed to the driver of the horse-drawn truck? The conclusion would seem to be undeniable that had the plaintiff not placed himself in such a precarious position, the contact between the defendant's truck and that of the plaintiff would not have resulted in his injury.

Looking further, however, for the purpose of applying the alternative basis recognized by the rules hereinbefore stated, would a jury have been justified in inferring from the mere fact of contact between a wheel of the defendant's vehicle and a wheel of the plaintiff's truck that such contact resulted from negligence on the part of the defendant, even though the plaintiff's truck was at a standstill? We respectfully submit that the question can only properly be answered in the negative, and if such an answer is the only proper one which the question suggests, then, under the

rules above stated, the presumption against negligence which surrounded the defendant in this case, until the plaintiff had overcome it in carrying his burden of proof, continues to operate, and there were no facts from which a jury might properly find or infer negligence.

This being the situation, therefore, and for the reasons herein set forth, we respectfully submit and urge that the Court below committed harmful error in denying the defendant's motion for the direction of a verdict, and that, therefore, the judgment of the Supreme Court, in favor of the plaintiff and against the defendant herein should be reversed and a new trial awarded.

Respectfully submitted,

Autenrieth, Gannon & Wortendyke,
Attorneys for Defendant-Appellant.

Reynier J. Wortendyke, Jr.,
Of Counsel.

New Jersey Court of Errors and Appeals

May Term, 1930

PATRICK J. EGAN, Plaintiff-Appellee, vs. SHEFFIELD FARMS CO., INC., Defendant-Appellant.	On Appeal from Supreme Court, Middlesex County. Brief on Behalf of Plaintiff-Appellee.

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STATEMENT OF FACTS

The facts in this case are not disputed. The plaintiff-appellee had driven into the railroad yard of the New York Central Railroad Company at Weehawken, New Jersey, at about midnight on August 16, 1928, and had driven his motor truck along side of and parallel to the loading platform. His truck was typical of those used for carting merchandise, without any enclosed top, excepting the cab in front for the driver. It had side-boards, with the floor extending 6 inches outside of the sideboard. This six inch over-hang, together with the fact that the truck could not stand flush with the loading platform because the wheels of the truck protruded two inches farther than the over-hang, left a space of eight inches from the sideboard of the truck to the loading platform. (Case, page 12). The plaintiff was standing with his right foot on the loading platform and his left foot in the truck, and not on the over-hang,

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with his back to the entrance of the freight yard, swinging heavy cans of cheese from the loading platform to the floor of his truck, when he felt a jerk which threw him forward and into the eight inch crevice (Case, page 11, line 34). It is admitted that the accident was caused by the truck of the defendant-appellant driving into the said railroad yard, and locking the right front wheel of the Sheffield four horse drawn truck with the left rear wheel of the motor truck of the plaintiff. (Case, page 13, line 10). The case was tried in the Supreme Court, Middlesex County. The jury brought in a verdict in favor of the plaintiff for Eight Thousand Dollars ($8,000.00). (Case, page 104).

The only witness called by either side, as to the facts of the accident, was the plaintiff. The other witnesses were doctors. Despite the fact that the attorney for the defendant said, in his opening to the jury, that he would present evidence showing how and why the accident happened, it is noteworthy that no witnesses were called by the defendant for that purpose. The only reference to said opening is found in an argument on an objection, inasmuch as the court stenographer did not take the opening of either counsel. (Case, page 14, line 3).

GROUNDS FOR APPEAL

This appeal is taken on three grounds, the first thereof being the ground that the trial court committed error in denying defendant's motion for the direction of a verdict in favor of the defendant. This point is the only one argued in the brief of the defendant. The other two points concern the admission in evidence of the mortality tables, and the judge's charge thereon. The latter two grounds of appeal are not argued in the brief of the defendant, and, therefore, it is presumed that they are abandoned.

Of course, this brief will discuss only the first ground of appeal.

ARGUMENT

This court is asked to set aside the verdict on the ground that either the plaintiff was guilty of contributory negligence; or the defendant was free of negligence; or the accident was an unavoidable one. The last factor is not argued in the brief of defendant.

If there was any evidence at all from which negligence on the part of the defendant may have been imputed, it was a proper question for the jury. Was there such evidence? As hereinbefore stated, the only evidence before the court, concerning the accident, is the testimony of the plaintiff. His testimony is found on pages 8 to 42, both inclusive, of the State of Case. 10

The pertinent parts of his testimony are quoted verbatim:

"Q. Where was your truck when the accident occurred? A. Parallel with the platform.

Q. And where were you when the accident occurred? A. Standing with my feet braced on the platform; my right foot on the platform and my left foot in the truck. 20

Q. How long had your truck been at that platform before the accident occurred? A. I cannot determine the number of minutes, but it had been there long enough to have two or three cans of stuff on." (Case, page 9).

"By the Court: 30

Q. The truck was backed up to the platform? A. Your Honor?

Q. Was the truck backed up to the platform or standing sideways to the platform? A. Standing on the side of the platform, with one foot on the truck.

Q. Was the truck—A. No, sideways. I was loading from the side.

Q. And your left foot was over the sideboard of the truck? You straddled the sideboard? A. No, my left foot was in the truck, and my— 40

Q. Then you were straddled with the sideboard, weren't you? A. Yes.

By Mr. DeVoe:

Q. And now, did you have any cheese in your hand when the accident occurred? A. I had cheese in my hand, and I had it about halfway across.

Q. And then what happened? A. I felt a jerk, which throwed me forward, and the weight of the cheese caused me to sling to the left. I dropped into the crev-
10 ice between the truck and the platform.

Q. You were thrown forward and twisted to the left? A. Into the crevice. And I fell in the crevice between the truck and the platform." (Case, page 11).

"Q. How wide was the space between the truck, the overhang of the truck, and the platform, would you say? A. Two inches.

Q. How wide was the overhang? A. The overhang was six inches.

20 Q. So there were eight inches from the sideboard to the platform? A. Yes.

Q. You were thrown into this crack? A. Thrown into the crevice between the truck and platform.

Q. What happened after that? A. I felt the truck moving.

Q. Your truck? A. Yes, forward.

Q. While you were still in this hole? A. While I was still in there. My head happened to strike the iron.
30 I could not say how far it moved, but I know it moved forward.

Q. And you were in there at the time? A. At the time.

Q. Now, what happened after that? A. Louis Rothman grabbed me and pulled me to my feet." (Case, page 12).

"Q. When you came out of the hole did you see any other truck there near you? A. I looked up and I
40 seen on the floor—saw him hooked with the right

front wheel in the left rear wheel of my truck. He was locked under my left rear wheel, and it had the body on the truck raised up. The man was fast there and could not get away.

Q. The right front wheel of the Sheffield truck was in your left—A. Was locked in my left front wheel.

Q. Was locked in your left front wheel? A. Left rear wheel of my truck.

Q. In the left front wheel? A. Not the left front wheel; the left rear wheel, and it had the body raised up. 10

Q. The body of your truck raised up? A. The body of my truck was raised up on an angle. The body was set right on the Sheffield wheel. I could see that.

Q. What kind of wagon or truck was the Sheffield truck? A. Four-horse truck.

Q. Were there four horses attached to it at that time? A. Four horses attached to it at that time.

Q. What was the driver doing, if you know? A. Why, he was backing up and trying to get out; get away. He backed up and got out, and he seemed to have no trouble to pass my truck afterwards." (Case, page 13). 20

"Q. Mr. Egan, what was the condition of the rear of your truck with reference to lighting, when you went around to examine the damage? A. Why, the lights were in perfect condition. It was burning and lighting. I had electric lights on the truck, and they were all burning.

Q. When you went around to examine the damage was your rear light lighted? A. I certainly looked at the rear light, the first thing, because the policemen don't allow you to run without lights." (Case, page 14). 30

"Q. Mr. Egan, how wide is the yard between the platform where the accident occurred across the yard to the platform on the other side? A. I believe it is about thirty-five to forty feet.

Q. Have you made any effort to determine how wide that yard is? A. I have often walked across it. 40

Q. Have you walked across it recently? A. About a month ago.

Q. Did you count your paces? A. Yes.

Q. How many paces? A. About fifteen.

Mr. Wortendyke: Objected to, if the Court please, as not competent, unless it is shown it was in the same condition now as at the time of the accident.

Mr. DeVoe: I will ask him.

By Mr. DeVoe:

10 Q. When you paced across that yard a month ago were the platforms in the same position they were when the accident occurred? A. Yes.

Q. How many paces did it take for you to cross? A. About fifteen paces.

Q. Of your paces? A. Yes.

Q. How many times had you loaded in that yard, Mr. Egan? A. Why, I have been loading in that yard back and forth for over fifteen—fourteen years. I really

20 could not tell you how many hundred times I have loaded in that yard." (Case, page 16).

It cannot possibly be deduced from this testimony that it was an unavoidable accident, or that the plaintiff-appellee was guilty of contributory negligence. Therefore, the only remaining question before this court is whether or not sufficient evidence was produced to warrant the trial court in allowing the jury to determine whether or not the defendant was free of negligence.

30 The present case comes within, and is controlled by, the rule of res ipsa loquitur. This legal maxim, or doctrine, has been frequently defined and applied in this State.

See the recent case of Taylor vs Berner, Supreme Court, July 3, 1929—146 Atl. 674.

See the leading cases of Hughes vs. Atlantic City R. R. Co., Court of Errors and Appeals, January 29, 1914—85 N. J. L., 212 (89 Atl. 769); Conover vs D. L. & W. R. Rd. Co., Court of Errors & Appeals, March

40 3, 1919; 92 N. J. L. 602 (106 A. 384).

See also Bouvier's Law Dictionary (Rawle's Third Revision), Vol. 3, page 2908.

Justice Swayze, in the Hughes case, supra, cites with approval, and also distinguishes and explains, a number of other leading cases which have applied the maxim of res ipsa loquitur. He cites and follows the leading case in the United States Supreme Court of Sweeney vs Erving 228 U. S. 233.

As Bouvier says, res ipsa loquitur is "a phrase often used in actions for injury by negligence where no proof of negligence is required beyond the accident itself." Literally translated, "the transaction speaks for itself."

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Bouvier adds that the following definition of res ipsa loquitur, as contained in a leading English case, is a legal classic:

> "When the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care."

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Wigmore says, as quoted by Bouvier, that the rule operates when the apparatus is such that in the ordinary instance no injurious effect is to be expected unless from careless user, and the user must have been in the control of the party charged. That is the situation in the case now before the court. Defendant was operating a four horse drawn truck, the operation of which ordinarily is not injurious. A reasonable prudent man could not have expected, in the ordinary course of things, that this horse drawn truck was to be driven into and collide with his motor truck, which was standing in a proper manner, in a proper place.

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Further, the United States Supreme Court defines the rule as follows:

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"The doctrine is that when a thing which causes injury without fault of the person injured, is shown to be under the exclusive control of defendant and would not cause the damage in ordinary course if the party in control used proper care; it affords reasonable evidence, in the absence of an explanation, that the injury arose from defendant's want of care." San Juan Light & Transit Co. v. Requena. 224 U. S. 89, 32 Sup. Ct. 399, 56 L. Ed. 680.

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No one can argue that the plaintiff-appellee was at fault; the horse drawn truck was under the exclusive control of the defendant, the operation of a four horse drawn truck would not cause damage in the ordinary course, if controlled with proper care; the operation of the four horse drawn truck was not with proper care, inasmuch as it is admitted that the freight yard was thirty-five to forty feet wide, at the point where the accident occured (Case, page 16, line 13); that the four horse drawn truck had no difficulty in passing the motor truck of the plaintiff-appellee, after the accident, after he had backed up and turned only two or three feet, or enough to clear the motor truck (Case, page 13, line 30; also, page 29, line 33).

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One of the tests, in the application of the doctrine, is whether or not the facts as proved would have legally warranted a verdict against the defendant; that is, was there sufficient evidence produced by the plaintiff to justify a jury in drawing an inference of negligence. If such occurred, the case was a proper one for the jury.

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As quoted with approval by Justice Swayze in the Walsh case, "the occurrence itself in the absence of explanation by the defendant, affords prima facia evidence that it was want of due care"; as Justice Swayze further says, "it is evidence; whether it amounts to proof is for the jury to say."

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The Walsh case also considered the question of

whether or not the burden of proof shifts, which is not involved in the case now before the court.

The Taylor case, supra., held that the explosion of a vichy bottle does not ordinarily result, and that the rule of res ipsa loquitur applied. In that case the court said:

> "The defendant as a bottler was obliged to use reasonable care in the filling of the bottle of vichy. With the exercise of reasonable care it is obvious that an explosion such as here occurred does not ordinarily result. This being true, we think the rule of res ipsa loquitur applied, and that it was permissible for the jury to infer from the occurrence of the explosion want of such reasonable care." Taylor v. Berner, 146 Atl. 674. (Not cited).

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The testimony in this case clearly shows that with the exercise of reasonable care the four horse drawn truck of the Sheffield Farms Company would have passed the motor truck of the plaintiff, without the locking of wheels.

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Such is obvious, in view of the fact that the motor truck was of standard size, drawn parallel to the loading platform, and the horse drawn truck had the remainder of the freight yard, of a width of thirty-five or forty feet, in which to pass.

Aside from the doctrine of res ipsa loquitur hereinbefore stressed, the question in the instant case was a factual one and proper for the jury. Such law is well settled.

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> "A jury question is presented, where proof present facts and circumstances from which defendants' negligence causing injuries could be found." Fitzgerald vs. Gare—147 Atl. 469.
>
> "Contradictory evidence on the issue of negligence and contributory negligence makes the issues for the jury to determine." Barwick vs. Blauvelt —146 Atl. 430.

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> "Where fair minded men might honestly differ as to the conclusions to be drawn from facts, whether controverted or uncontroverted, the question at issue should go to the jury." Bennett vs. Busch—75 N. J. L. 240 (67 Atl. 188). Cited and followed by Chancellor Walker, Court of Errors and Appeals, October 14, 1929, in Finnegan vs. Goerke Co.—147 Atl. 42.

10 Under the circumstances which confronted the plaintiff at the time of the accident, the question whether or not he exercised reasonable care for his own safety was a jury question. He was not engaged in a dangerous or hazardous undertaking. He was doing what a reasonable prudent man would have done under the same circumstances, and there is no testimony to the contrary.

Be that as it may, if the defendant contends that there was contributory negligence on the part of the plaintiff
20 in this case, it also was a jury question. See Kaas vs. Glatzel, Sup. Ct., November 9, 1929—147 Atl. 652.

REPLY TO ARGUMENT IN BRIEF OF DEFENDANT-APPELLANT

The brief of the defendant contains a number of arguments, and citations, which are taken up seriatim
30 and answered, and/or distinguished from the present case as follows:

Brief of defendant, top of page 3, contends that the burden of proof is on the plaintiff, and cites Bien vs. Unger. (64 N. J. L. 597) and Hughes vs. Atlantic City Railroad Company, (85 N. J. L. 212). That proposition is not involved in this appeal. The plaintiff carried the burden of proof, as proved by the evidence submitted and the jury's verdict thereon.

The question involved in the present case is whether
40 or not there was sufficient evidence presented by the

plaintiff, from which the jury may have drawn the inference that the defendant was guilty of negligence.

Brief of defendant, at the bottom of page 3, discusses the doctrine of res ipsa loquitur. This doctrine already has been discussed in this brief. Although the brief of defendant, at this point, stresses the fact that, under the doctrine of res ipsa loquitur, the burden of explaining is upon the defendant, it is noteworthy that the defendant in the present case made no effort in any way whatsoever to explain the accident. 10

The jury had the right to draw the inference, from such lack of explanation, and from the failure of the defendant to present any witnesses, especially the driver of the horse drawn truck, that any evidence that they could have presented would have been damaging to the defendant.

The brief of defendent, on page 4, cites the Hughes case and also that of Niebel vs. Winslow, Court of Errors and Appeals, November 15, 1915, 88 N. J. L. 191 (95 Atl. 995). The Neibel case also 20 cites the Sweeney case in the United States Supreme Court, supra. All these cases deal with the question of the burden of proof, and whether or not it shifts. It is not contended, in the present case, that the burden of proof shifted or should have shifted, from the plaintiff to the defendant.

As the court said in the Hughes case, as quoted in the brief of defendant, "If the plaintiff introduces no evidence or no evidence from which an inference of negligence could be drawn, it would be the duty of the 30 judge to direct a verdict for the defendant."

That sufficient evidence was produced in the instant case from which an inference of negligence, on the part of the defendant, could have been drawn, cannot be disputed.

The brief of defendant, on page 4, also cites the case of Adriance vs Schenck Bros. Court of Errors and Appeals, November 15, 1921, 95 N. J. L. 185, (112 Atl. 408). In that case the plaintiff could not 40

connect the defendant with the happening and the court held that "if there is no proof of any fact by which the conduct of the defendant can be ascertained, there is nothing for a jury to pass upon." Of course, the Adriance case is easily distinguished from the present case.

The brief of defendant, in the middle of page 5. argues that there must be some proof of the conduct of the defendant, or it is not a jury question. A portion of the testimony of the plaintiff is then quoted. The quotations are correct, and the evidence thereby produced most certainly is sufficient to place this case within the rule of res ipsa loquitur, and most certainly is sufficient to justify the jury in imputing negligence to the defendant.

The brief of defendant, middle of page 7, deals with the question of whether or not the verdict was contrary to the weight of evidence. That is not the proposition before this court on this appeal. Assuming that it is before this court, the plaintiff's testimony was uncontradicted and the jury did not have any counter testimony to weigh.

The brief of defendant, on the bottom of page 7, discusses the principal of law that the mere happening of an accident is no evidence of negligence. That is not the proposition before this court on this appeal. Assuming that it is before this court, the plaintiff did not rest his case upon the mere happening of an accident, with the inference of negligence, but gave uncontradicted testimony as to how the accident happened, and the clearly implied negligence of the defendant in failing to use reasonable care in the operation of the horse drawn truck.

The brief of defendant, pages 8, 9 and 10, discusses the questions arising out of "presumption against negligence;" "facts from which negligence may be reasonably inferred," and "proving the

proximate cause of the accident." The cases cited are easily distinguishable from the present case.

There is no contention, or any evidence whatsoever, that the plaintiff was guilty of any negligence. As repeatedly stated, the only question before the court is whether or not there was sufficient evidence, whether direct or implied, to warrant the jury in imputing negligence to the defendant.

The brief of defendant, at the bottom of page 10, discusses the rights of the plaintiff and the defendant in the use of the freight yard in question. It must be borne in mind, in considering such discussion or argument, that the plaintiff's truck was alongside of the loading platform, faced away from the entrance; the plaintiff was standing with his right foot on the loading platform and his left foot in his truck, with his back to the entrance, swinging heavy cans of cheese from the freight platform to his truck, when the accident happened. That was the picture which presented itself to the eyes of the driver of the four horse drawn truck when he drove into the freight yard. The freight yard was thirty-five or forty feet wide, at the place of the accident. The plaintiff was going about his work in a reasonable prudent manner. The driver of the four horse drawn truck, if he had used due care, would have been able to have passed the plaintiff's truck without a collision, especially in view of the fact that he had the remainder of a freight yard of thirty-five or forty feet in width in which to make such passage. Although the accident occurred at midnight, the freight yard was lighted like day, (Case page 41, line 15). The horse drawn truck subsequently passed without difficulty, (Case, pg. 13, line 30).

The posture of the plaintiff, at the time of the accident, as discussed on page 11 of the brief of the defendant, has no bearing upon the proposition before this court.

The brief of the defendant, at the bottom of page

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11, discusses the inferences which a jury might have drawn from the fact of the locking of the wheels, or collision. That is the very point in this case. If the evidence produced was such that inferences may have been or may not have been drawn by the jury, it was properly a jury question.

Such being so, it is urged that the appeal of the defendant-appellant be dismissed, with costs to be taxed.

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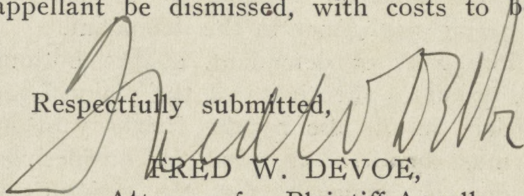

Respectfully submitted,

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Dated: May 13, 1930.

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